

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge)

Injury No. 11-036384

Employee: Alejandro Romero  
Employer: Nelson Flooring  
Insurer: Hartford Accident & Indemnity Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Introduction**

The parties asked the administrative law judge to resolve the following issues: (1) average weekly wage and rate of compensation; (2) past medical expenses; (3) whether employee is entitled to reimbursement of \$95 for the cost of service on Nelson Davilla; and (4) underpayment of temporary total disability benefits.

The administrative law judge rendered the following findings and conclusions:

(1) employee's average weekly wage is \$300 per week resulting in a rate of compensation for temporary total and permanent partial disability benefits of \$200 per week; (2) employee is entitled to \$350 in past medical expenses; (3) employee is entitled to future medical care and treatment to cure and relieve employee from the effects of his work-related injury, including, but not limited to, doctor's visits, replacement contact lenses, reimbursement for the cost of eye drops, and lens cleaner as needed in the future by employee; (4) employer is liable for the \$95.00 cost of personal service on employer Nelson Davilla because of his refusal to voluntarily and cooperatively attend his deposition as a party to the case; (5) employer is liable for additional temporary total disability benefits in the amount of \$3,789.53; and (6) employer is liable for \$28,000.00 in permanent partial disability benefits for 100% loss of visual acuity.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in awarding only 140 weeks of compensation for employee's complete loss of use of his left eye; and (2) in calculating employee's average weekly wage.

**Discussion**

"Complete loss of use" under § 287.190.2 RSMo

Employee argues that the administrative law judge erred in awarding 140 weeks of permanent partial disability benefits, citing § 287.190 RSMo, which provides, in relevant part, as follows:

Employee: Alejandro Romero

1. For permanent partial disability ... the employer shall pay to the employee compensation computed at the weekly rate of compensation ... which compensation shall be allowed for loss by severance, total loss of use, or proportionate loss of use of one or more of the members mentioned in the schedule of losses.

SCHEDULE OF LOSSES

Weeks

...

(29) Complete loss of the sight of one eye.....140

2. If the disability suffered in any of items (1) through (29) of the schedule of losses is total by reason of severance or complete loss of use thereof the number of weeks of compensation allowed in the schedule for such disability shall be increased by ten percent.

Pursuant to the foregoing, "complete loss of sight of one eye" is equal to 140 weeks of permanent partial disability, with an additional 10% increase for "complete loss of use thereof." Employee suggests, in his brief, that the parties stipulated employee suffered a complete loss of use of the left eye, such that the 10% increase is applicable. But the record is not entirely clear on this point, as the administrative law judge recited the parties' stipulation, as follows:

The parties have also stipulated that as a result of this injury the [employee] sustained PPD of 100 percent of the left eye, which is a 140 weeks of compensation.

*Transcript, page 2.*

It is unclear from the foregoing terminology whether the parties intended to stipulate that employee suffered a "complete loss of sight" in the left eye, or a "complete loss of use thereof." It is also unclear whether the administrative law judge's reference to 140 weeks of compensation represents the stipulated extent of employer's liability for permanent partial disability benefits, or a mere recital by the administrative law judge of the statute's provision that complete loss of sight of one eye is equal to 140 weeks of compensation.

Turning to the report from employee's medical expert, Dr. Joan Pernoud, we find the doctor's opinion that employee's "primary visual efficiency" is 0% based on findings that his "visual acuity efficiency" is 0%, his "visual field efficiency" is 82%, and his "visual binocular efficiency" is 100%. *Transcript, page 163.* It appears from Dr. Pernoud's calculations that employee suffered a complete loss of visual acuity efficiency in the left eye, and we feel confident in so finding, as his report is the only expert medical evidence on the record. Yet, nowhere in Dr. Pernoud's report does he state that employee suffered a complete loss of use of the left eye.

Employee: Alejandro Romero

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Based solely on the record before us, we would be inclined to leave the administrative law judge's award of 140 weeks of permanent partial disability benefits undisturbed. At oral arguments in this matter, however, counsel for employer acknowledged, in an admirable show of candor, that employee suffered a total loss of use of his left eye, and that a 10% increase may be appropriate in this case. Based on this concession, we feel confident in interpreting the administrative law judge's recitation of the parties' stipulation regarding permanent partial disability to mean that the parties intended to stipulate that employee suffered a complete loss of use of the left eye. "A stipulation should be interpreted in view of the result which the parties were attempting to accomplish." *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001).

Accordingly, we hereby modify the administrative law judge's award to apply the 10% increase under § 287.190.2. Employer's liability for permanent partial disability benefits is equal to 154 weeks at the rate of \$200 per week, for a total of \$30,800.00.

**Conclusion**

We modify the award of the administrative law judge as to the issue of employer's liability for permanent partial disability benefits.

Employer's liability for permanent partial disability benefits is \$30,800.00.

The award and decision of administrative law judge Margaret D. Landolt, issued September 23, 2014, is attached hereto and incorporated by this reference to the extent not inconsistent with our findings, conclusions, decision, and modifications herein.

This award is subject to a lien in favor of Elizabeth Ituarte, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Alejandro Romero

Injury No.: 11-036384

Dependents: N/A

Employer: Nelson Flooring

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: N/A

Insurer: Hartford Accident & Indemnity Co.

Hearing Date: July 1, 2014

Checked by: MDL

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: May 13, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee was using a nail gun that misfired and shot a nail in his eye.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left eye
14. Nature and extent of any permanent disability: 100% of the left eye
15. Compensation paid to-date for temporary disability: \$1,894.48
16. Value necessary medical aid paid to date by employer/insurer? \$48,834.27

Employee: Alejandro Romero

Injury No.: 11-036384

- 17. Value necessary medical aid not furnished by employer/insurer? \$350.00
- 18. Employee's average weekly wages: \$300.00
- 19. Weekly compensation rate: \$200.00/\$200.00
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$350.00
Underpayment of temporary total disability benefits	\$3,789.53
140 weeks of permanent partial disability from Employer	\$28,000.00
Cost of Personal Service on Nelson Davilla	\$95.00

- 22. Second Injury Fund liability: No

TOTAL: \$32,234.53

- 23. Future requirements awarded: Future medical treatment pursuant to award

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ms. Elizabeth Ituarte

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Alejandro Romero

Injury No.: 11-036384

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Nelson Flooring

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: N/A

Insurer: Hartford Accident & Indemnity Co.

Checked by: MDL

### **PRELIMINARIES**

A hearing was held on July 1, 2014 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Alejandro Romero ("Claimant") was represented by Ms. Elizabeth Ituarte. Nelson Flooring ("Employer") and its insurer Hartford Accident and Indemnity Company were represented by Mr. William Paasch. Ms. Ituarte requested a fee of 25% of Claimant's award.

The parties stipulated that on or about May 13, 2011 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant was paid Temporary Total Disability ("TTD") benefits of \$1,894.48 for the period from May 14, 2011 to November 28, 2011 at the rate of \$66.66 a week; Employer paid medical benefits of \$48,834.27; Claimant sustained Permanent Partial Disability ("PPD") of 100% of the left eye at the 140 week level as a result of the work injury of May 13, 2011; and the medical benefits shall remain open, and Employer shall provide future medical benefits including all care necessary to cure and relieve the effects of the work injury of May 13, 2011 including but not limited to any replacement contact lenses and solutions necessary to maintain the contact lenses.

The issues to be determined are what was Claimant's average weekly wage at the time of his work accident, and what are the appropriate rates of compensation to be used to calculate weekly benefits; liability of Employer for past medical expenses of \$10 per month retroactive to May 13, 2011 to cover Claimant's out of pocket medical expenses; whether Employer underpaid TTD benefits; and whether Claimant is entitled to reimbursement for \$95 Claimant incurred obtaining service on Nelson Davilla, the owner of Employer.

### **SUMMARY OF EVIDENCE**

Claimant is a 43 year old man who was injured on his first day on the job working for Employer. Employer's company is owned by Mr. Nelson Davilla, who also happens to be Claimant's neighbor. Employer is in the business of residential floor installation, and Claimant was hired to install hardwood floors in residences.

At the time he was hired by Employer Claimant had another job working 35 to 40 hours a week for Home Town Buffet. Claimant worked Saturday through Tuesday for Home Town Buffet. Claimant was hired by Employer to work on Thursdays and Fridays, with the understanding that if there was enough work, he would eventually work Wednesdays as well. Mr. Davilla told Claimant from May to December there would be a lot of work available. It was Claimant's intention to eventually quit his job at Home Town Buffet and work full time for Employer when Employer was able to offer him more work. Claimant and Mr. Davilla agreed Claimant would be paid at the rate of \$100 a day.

Claimant's first day of work for Employer was on May 13, 2011. Claimant was working at a job site installing flooring. As he was putting the finishing touches on trim around the door, Claimant was using a nail gun that misfired, and a nail lodged in his left eye. The nail penetrated Claimant's cornea, iris, lens, and retina and produced a ruptured globe. He was diagnosed with iridodialysis, choroidal detachment, and two retinal breaks. Claimant underwent two different eye surgeries. Claimant was eventually provided with a contact lens.

After he was injured, Claimant was paid by Mr. Davilla, who left \$100 with Claimant's mother. Claimant underwent medical treatment which was authorized by Employer. Since the injury, Claimant has incurred out of pocket medical expenses. Claimant wears a contact lens, and he has paid for cleaning solutions for his lenses out of his own pocket at the rate of \$10 per month. Claimant also must replace his contact lenses monthly.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant sustained 100% loss of use of the left eye resulting in PPD of 140 weeks. The parties stipulated that Claimant sustained 100% loss of the left eye or 140 weeks of compensation.

In determining the applicable weekly wage rate under section 287.250 “**[i]t is necessary to commence with the first subsection and then to descend in numerical order under the other subsections until the wage rate provision is found that applies to the particular facts of the case.’**” *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204, 210 (Mo. banc1981) (citation omitted).

Section 287.250 sets out in pertinent part:

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:
  - (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
  - (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;

(3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured.... For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week.

\* \* \*

(6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;

\* \* \*

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the [C]ommission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage

*Adamson v. DTC Calhoun Trucking, Inc.*, 212 S.W.3d 207, 213-14 (Mo. Ct. App. 2007)

Subsection 1 (1 – 6) does not apply because the wages were not set by the week, month, or year, and the facts of this case do not allow for the calculation of an average weekly wage based on prior weeks worked, and there is no evidence of similarly situated employees within the same or similar employment. Therefore in rendering a conclusion as to the correct calculation of the average weekly wage, I refer to Subsection 4 which requires a fair determination based on all of the exceptional facts in the case.

It is clear that Claimant was to be paid \$100 for each day of work. Employer and Claimant agreed Claimant would be working two days a week full time, on Thursdays and Fridays, at the rate of \$100 per day regardless of the number of hours worked. There was a possibility Claimant would be working three days a week if work was available. Claimant began working in May, and there is evidence Employer was entering his busy season where a lot of work would be available. It is clear that at the time of the accident the agreement of the parties was that Claimant would work 2 – 3 days per week at \$100 per day. Claimant’s testimony regarding what might happen in the future is speculative. I find Claimant’s average weekly wage is \$300 a week resulting in a rate for TTD/PPD of \$200 per week. This results in a PPD award of \$28,000 and an additional amount owed for underpayment of TTD of \$3,789.53 for a total of \$31,789.53.

I further find Claimant is entitled to unpaid, past medical expense for his eye drops and lens cleaner at a rate of \$10 per month since August of 2011 for a total owed of \$350 as of the date of the hearing in this matter.

Claimant is entitled to future medical care and treatment to cure and relieve employee from the effects of his work-related injury, pursuant to the provisions of Section 287.140 RSMO. Employer shall provide such care and treatment including, but not limited to, doctor's office visits, replacement contact lenses, reimbursement for the cost of eye drops, and lens cleaner as needed in the future by Claimant.

Employer is liable for the \$95.00 cost of personal service on Employer Nelson Davilla because of his refusal to voluntarily and cooperatively attend his deposition as a party to this case.

I find Employer is liable to Claimant, for past due benefits and costs of \$32,234.53. This figure results from PPD expenses of \$28,000 for 100% loss of visual acuity, differential in TTD owed of \$3,789.53, past medical expenses of \$350.00, and taxable cost for service of Subpoena Duces Tecum on Nelson Davilla for \$95.00.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney Ms. Elizabeth Ituarte.

Made by: \_\_\_\_\_

MARGARET D. LANDOLT  
*Administrative Law Judge*  
*Division of Workers' Compensation*