Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 06-002402

Employee: Ross Stillwell

Employer: Knapheide Truck Equipment Company

Insurer: Travelers Commercial Casualty

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard the oral arguments of the parties. We have reviewed the evidence and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the July 23, 2009, 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.

We disagree with the administrative law judge's conclusion that medical expenses are not "compensation" under the Workers' Compensation Law (Law). We conclude medical expenses are "compensation" under the Law and, as such, are subject to reduction by operation of § 287.120(5) RSMo where an employee is injured due to his violation of employer's safety rules or due to his failure to use safety devices provided by an employer. We reach our conclusion through a plain reading of the Law. Put simply, the Law *says* medical expenses are compensation.

The language of § 287.140.1 RSMo, implies that medical treatment and expenses constitute "compensation." Section 287.140.1 RSMo, provides, in part:

> In addition to all **other** compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. (Emphasis added).

If medical expenses are not an element of compensation under the Law, then the word "other" is superfluous. "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513 (Mo. 2009) (citation omitted).

If there were any doubt about whether medical expenses are compensation, the legislature eliminated it in 1986 when it enacted § 287.260.2 RSMo.[1] Section 287.260.2 specifically states that the Workers' Compensation Law provides "compensation for medical expenses."

> Notwithstanding subsection 1 of this section, the compensation payable under this chapter **other than compensation for medical expenses** and therapy under section 287.141, shall be assignable for the purpose of satisfying child support obligations, shall be subject to attachment, garnishment and execution for the purpose of collecting and satisfying unpaid and delinquent child support obligations, and shall be subject to the lien provided for in section 454.517, RSMo. (Emphasis added).

We think the administrative law judge discounts the value of *Martin v. Star Cooler Corp.*, 484 S.W.2d 32 (Mo. App. 1972) in her analysis. The legislature added § 287.260.2 well after the decision in *Martin* was issued. "The legislature is presumed to know the existing case law when it enacts a statute." *Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222-223 (Mo. App. 2007) (citation omitted). We must presume the legislature was aware of the *Martin* holding when it enacted language in § 287.260.2 consistent with the holding.

We reverse the administrative law judge's conclusion that the penalty of § 287.120(5) does not operate to reduce employee's medical expenses.

Employee argues that we must reconsider the penalty percentage to apply because we expanded the compensation to which the penalty is being applied beyond the compensation used by the administrative law judge. We disagree. The administrative law judge determined the appropriate penalty percentage *before* she considered whether or not the penalty applied to medical expenses. We find that the 30% penalty used by the administrative law judge is appropriate and we find no reason to disturb the administrative law judge’s finding regarding the penalty percentage.

For the foregoing reason, in addition to the 30% reduction in temporary total disability benefits, permanent partial disability benefits, and disfigurement benefits ordered by the administrative law judge, employee's medical benefit award is also reduced by 30% due to employee's violation of employer's safety rules and his failure to use safety devices provided by employer. In all other respects, we affirm the award of the administrative law judge.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

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[1] A.L. 1986 H.B. 1479.

The award and decision of Administrative Law Judge Lisa Meiners, issued July 23, 2009, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 23rd day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed. I respectfully dissent from the decision of the majority of the Commission to modify the award of the administrative law judge in this case.

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John J. Hickey, Member

AWARD

Employee: Ross Stillwell Injury No. 06-002402

Employer: Knapheide Truck Equipment Company

Insurer: Travelers Commercial Casualty

Hearing Date: June 22, 2009 Checked by: LM/cg

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: January 5, 2006
5. State location where accident occurred or occupational disease was contracted: Clay County, 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: While in the course and scope of Employee's work, a truck body fell on Claimant's upper extremities causing severe crush injuries.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Upper extremities.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: $51,345.58
16. Value necessary medical aid paid to date by employer/insurer? $168,967.89
17. Value necessary medical aid not furnished by employer/insurer? $0

18. Employee's average weekly wages: $829.36

19. Weekly compensation rate: $552.92/$365.08

20. Method wages computation: By stipulation

21. Amount of compensation payable: Unknown
The Employer is liable to Employee for permanent total benefits in the amount of $552.92 per week, as well as 21 weeks of disfigurement. The Employer is entitled to a 30% reduction of compensation pursuant to §287.120(5).

22. Second Injury Fund Liability: No

23. Employer is to provide Employee with additional medical care as required to cure and relieve the symptoms related to the injury of January 5th, 2006.

The compensation awarded to the Claimant shall be subjected to a lien in the amount of 24% by Employee's attorney, Steffanie Stracke, for services rendered.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ross Stillwell Injury No. 06-002402

Employer: Knapheide Truck Equipment Company

Insurer: Travelers Commercial Casualty

Hearing Date: June 22, 2009 Checked by: LM/cg

The parties appeared for hearing on June 22, 2009. Ross Stillwell, the Employee, appeared in person and with counsel Steffanie Stracke. The employer, Knapheide Truck Equipment Company, through its insurer, Travelers Commercial Casualty, was represented by Shelly Naughtin. The Second Injury Fund was also present and represented by Benita Seliga.

STIPULATIONS

The parties stipulated to the following:

1) that Claimant was an employee working subject to Missouri Workers' Compensation Law;
2) that the employer was operating subject to the Workers' Compensation Act;
3) that Claimant sustained an injury by accident that arose out of and in the course of his employment on January 5th, 2006;
4) that notice was given and a claim filed within the time allowed by law;
5) that the average weekly wage was $829.36, which makes the compensation rate $552.92/$365.08;
6) that the injury by accident occurred in Clay County, Missouri;
7) that the employer has paid $168,967.89 in medical expenses and $51,345.58 in temporary total disability benefits that were paid until October 18th, 2007.

ISSUES

The parties requested the Division to determine the following issues:

1) whether the Claimant sustained any disability and, if so, the nature and extent of that disability as a result of the January 5th, 2006 accident;
2) the liability of the Second Injury Fund;
3) whether the Claimant sustained any disfigurement under §287.190 (4);

4) whether the employer is liable to the employee for future medical care as a result of the January 2006 accident;
5) whether the employer is liable to the employee for past temporary total disability benefits between October 19th, 2007 through December 31st, 2007 in the amount of $4,933.30 and;
6) whether a safety penalty should be assessed against the employee pursuant to 287.120 (5).

EVIDENCE

Claimant, a 58-year-old high school graduate, has worked as a heavy mechanic for 25 years, with the last 13 years at Knapheide Trucking. On January 5th, 2006, Claimant lifted a heavy truck body using a chain hooked to the tailgate of a truck. Claimant lifted the truck body 18 inches off the ground in order to work under it. Additionally, Claimant did not place supports under the dump body even though there is a safety rule to use them when a truck body is elevated.

At some point, the tailgate opened and the truck body, without a support device, hit the floor. As a result, Claimant's forearms were crushed under the truck body. (See Employer's Exhibits 7 through 9.) Claimant was rushed to the hospital where he remained until mid-January. Ultimately, Claimant underwent approximately three to four surgeries of the left hand and forearm as a result of the traumatic accident of January of 2006. Claimant also underwent approximately four to five surgeries of the right hand and forearm due to the January 2006 accident. Claimant was found to be at maximum medical improvement on October 19th, 2007, after the employer had paid $168,967.89 in medical expenses.

For a time, Claimant performed light-duty work, but the work was sporadic. Claimant worked approximately one to two times a week, sometimes lasting one to two hours for Knapheide Trucking. In this capacity, Claimant drove trucks when the need arose. Presently, Claimant is not working.

As a result of the work accident, a functional capacity evaluation performed on October 16th, 2007 found Claimant's grip techniques do not allow safe control of objects. I also find based on the functional exam capacity evaluation that Claimant cannot handle heavy tools or objects as a result of his loss of grip strength due to the last accident. Claimant is unable to lift as he did prior to the January 2006 accident. Indeed, Claimant has limited fine motor skills of both hands and he has to use a button hook for buttoning and fastening shirts and pants. He has difficulty writing, opening jars and gripping objects such as kitchen utensils and screw drivers. Additionally, Claimant, due to the loss of strength, fine motor abilities and grip, has difficulty gripping handles to open doors and lifting a gallon of milk.

The parties request that this Award address whether the Claimant sustained any disability and, if so, the nature and extent of that disability. More specifically, Claimant requests that this Award address whether or not he is rendered permanently and totally disabled as a result of the January 5th, 2006 accident, or is he disabled as a result of the combination of his pre-existing disabilities combined with that last accident.

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Total disability means the inability to return to any reasonable or normal employment. The term "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. It does not require that the Claimant be completely inactive or inert.

Two doctors' opinions were admitted into evidence regarding this issue. Dr. Bruce Toby, an orthopedic surgeon, recommended Claimant could pursue truck driving since Claimant drove trucks for Knapheide one day a week during light-duty status. Dr. Toby also restricted Claimant to jobs within the medium physical demand requirements. His restrictions are outlined in Employer's Exhibit 1.

On the other hand, Dr. Koprivica found the January 2006 accident to be the prevailing factor of Claimant's loss of capabilities of both upper extremities that render him permanently totally disabled. Dr. Koprivica assigned a 50 percent permanent partial disability body as a whole as a result of the last accident of January 2006. I agree with Dr. Koprivica.

Based on the facts noted above regarding Claimant's limitations of his upper extremities, I find Claimant sustained a 50 percent permanent partial disability body as a whole as a result of the January 2006 accident. I also find that the Claimant is unemployable in the open labor market as a result of the January 2006 accident.

Further indication that Claimant is permanently totally disabled is the opinion of Mike Dreiling, a vocational expert. Dreiling found the best, if not only, scenario for employability is if his employer of 13 years accommodates him. If not, Dreiling opined Claimant to be unemployable in the open labor market based on his age, lack of transferable skills, and severe limitations of his upper extremities.

I find the employer discussed giving Claimant a fleet position with Knapheide in March of 2008. I also find that Claimant accepted that position on April 1st, 2008 when his attorney sent a letter stating Claimant was interested in attempting employment with the employer. The employer never responded to this letter and presently there are no employment opportunities with Knapheide.

Regardless, I find Claimant would not be able to perform the fleet position on a sustained basis or perform those job requirements in the ordinary course of a 40-hour workweek. This finding is based on the limitations and restrictions of his upper extremities, as noted earlier. Therefore, I find Claimant to be unemployable in the open labor market as a result of the January 2006 injury by accident.

Since I find the January 2006 injury by accident to be the prevailing factor rendering Claimant permanently totally disabled, there is no Second Injury Fund liability. The employer is liable to Employee for permanent total disability benefits in the amount of $552.92, beginning on October 19th, 2007 and continuing for Claimant's lifetime.

The next issue is whether Claimant is entitled to additional compensation pursuant to §287.190 (4). §287.190 (4) states "if an employee is seriously and permanently disfigured about the head, neck, arms or hands, the Division or Commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed 40 weeks of compensation."

I find Claimant underwent numerous surgeries of each upper extremity that resulted in serious permanent scaring. Indeed, Claimant, on the left upper extremity, sustained a straight scar approximately four inches and another two-inch scar of the left elbow. As such, I find Claimant is entitled to six additional weeks of compensation regarding the disfigurement of the left arm.

Claimant also has a six-inch scar that runs from the middle of his palm to his right forearm, a three-inch scar on the side of his right wrist, a two-inch scar near his right elbow, and a five-inch indentation of the top portion of his right forearm. Thus, Claimant is entitled to 15 weeks of additional compensation pursuant to §287.190 (4) regarding the right upper extremity. In total, the employer is liable to the Employee for 21 weeks of additional compensation pursuant to §287.190 (4).

Claimant also requests the employer to pay for past temporary total disability benefits from October 19th, 2007 to December 31st, 2007. It is the Claimant's burden to show he is unemployable in the open labor market. The Claimant's expert, Dr. Koprivica, as well as employer's expert, Dr. Toby, find Claimant reached maximum medical improvement on October 19th, 2007. As such, based on Dr. Toby and Dr. Koprivica, I find Claimant reached maximum medical improvement on October 19th, 2007. The employer is not liable to Claimant for past temporary total disability benefits.

The parties request the next issue to be determined is whether the employer is liable to Employee for future medical care as a result of the January 2006 accident by injury. Once again, it is the burden of the Claimant to show the need for medical treatment as a result of the January 2006 accident. Several experts' opinions were admitted into evidence addressing this issue.

Claimant's expert, Dr. Koprivica, found Claimant will require an arthroplasty of his left middle finger. The employer had several doctors who issued opinions. Dr. Scott Frankel and Dr. Richard Benet recommended in September 2006 a right long finger MCP joint arthroplasty.

On the other hand, Dr. Bruce Toby, an orthopedic surgeon, opined that future medical care of Claimant's upper extremities was unwarranted. I find based on the three doctors' opinions expressing the need for future medical care that Claimant's burden has been met. The employer is liable to Employee for future medical care of his upper extremities in order to cure and relieve the symptoms relating the January 2006 accident.

The next issue to address is whether a penalty of 25 to 50 percent should be applied to Claimant's compensation as a result of violation of a safety penalty pursuant to §287.120 (5). Employer argues that Claimant committed safety violations by not using supports under a raised

truck body and by failing to lift the truck body properly with spreader chains attached to the four corners of the truck body.

> §287.120 (5) states "where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least 25 but not more than 50 percent, provided that it is shown that the employee had actual knowledge of the rules so adopted by the employer and provided, further, that the employer had prior to the injury made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rules so adopted for the safety of the employees."

Based on the testimony and evidence admitted, I find the employer provided safety devices such as spreader chains to lift the truck body by its corners and blocks to place under suspended truck bodies. It is uncontradicted that Claimant lifted the truck using a chain hooked on the tailgate rather than four corners. Likewise, it is uncontradicted Claimant did not use support blocks under the suspended truck body.

I find that Claimant had actual knowledge of the safety rule requiring support devices be used under elevated truck bodies. Employer's Exhibit 2 revealed the employer held a safety meeting on January 5th, 2005 which covered "again stressing the support of dump body." I interpret the word "again" to be the employer had on more than one occasion stressed the importance of the safety rule. Additionally, Employer's Exhibit 2 shows all mechanics attended. I interpret "all" to include Claimant since he was a mechanic for Knapheide. Therefore, I find Claimant had actual knowledge of this particular safety rule.

I also find the employer made reasonable efforts to enforce this rule. The employer, as noted above, conducted meetings, as well as gave verbal reprimands to employees not using supports under raised trucks. Steve Bowles, whose duties included overseeing employer safety meetings, personally walked through the shop several times a day to ensure employees placed supports under raised truck bodies. Additionally, the employer provided support devices in each work bay. As such, the employer made reasonable efforts to enforce the use of support devices.

Based on the evidence presented, I find Claimant sustained an injury of his upper extremities by failure to use support blocks under the elevated truck body. I assess a 30 percent penalty against the "compensation" provided under the Workers' Compensation Statute.

Regarding the other safety rule of using spreader chains, I do not find the employer proved Claimant had actual knowledge of using four corners when lifting a truck body. Indeed, several witnesses testified that it is common sense to lift a truck body by four corners. I find this testimony does not meet the requirement that Claimant had actual knowledge of the rule, regardless that rule enforced "common sense." Regardless, I find a safety rule was violated and

a 30 percent penalty is assessed against the compensation provided under the Missouri Workers' Compensation Act.

The next issue is how is compensation defined under the 2005 statute when strictly construing §287.120 (5).

It should be noted every published decision that references §287.120 (5) interprets the statute as it was written prior to the 2005 changes. Before 2005, the law provided that the entire Workers' Compensation Act should be liberally construed and as such, medical benefits was considered compensation. However, a recent case, Allcorn v. TAP Enterprises, Inc., (SD 29311 February 26, 2009) laid out its interpretation of strict statutory construction of the Workers' Compensation Act by providing:

> (o)ur guidance on the construction of this section is found within Chapter 287. Specifically, section 287.800, also amended in 2005, requires that the 'courts shall construe the provisions of this chapter strictly.' This requirement is also a significant departure from the prior law which called for the provisions of Chapter 287 to be 'liberally construed.' 'A strict construction of a statute presumes nothing that is not expressed.' 3 Sutherland Statutory Construction Section 58:2 (6th ed. 2008). The rule of strict construction does not mean that this statute shall be construed in a narrow or stingy manner but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. §376(1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 Sutherland Statutory Construction §58:2 (6th ed. 2008) The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 Sutherland Statutory Construction §58:2 (6th ed. 2008)

Consequently, this court must strictly construe the provisions of §287.120(5).

Contained within the provisions of §287.120 is the language that indicates that the penalty shall be applied to "the compensation and death benefit provided for herein." Section 287.020 provides definitions of many of the words included in the Act including "employee," "accident," and "injury." However, nowhere in the Act is the term "compensation" defined. Consequently, the rules of strict statutory construction dictate that the term be given its natural or plain meaning. The term "compensation" has been defined as "payment for work performed, by salary, wages, commission or otherwise." The Free Dictionary. The West Encyclopedia of American Law Ed. 2 Copyright 2008 defines the term "compensation" as "a pecuniary remedy that is awarded to an individual who has sustained an injury in order to replace the loss caused by said injury such as workers compensation. Wages paid to an employee or, generally, fees, salaries, or allowances."

Knapheide asserts that the term "compensation" includes the amount of money that the Employer paid the medical providers who provided treatment to Mr. Stillwell to cure and relieve the effects of his injury. I find that medical treatment is not wages paid to Mr. Stillwell. Mr. Stillwell did not receive payment for the medical charges incurred; rather, the medical providers were paid directly for those services. If the Legislature had intended to include medical benefits in this provision, they certainly could have used the term "all benefits" as opposed to simply limiting it to "compensation." By choosing instead to use the term compensation in that fashion, I assume that the Legislature did not intend for medical expenses to be included within the penalty provision.

I also assume the statute is intended to be a penalty directed at an employee for his failure to use a safety device or follow a safety procedure which in turn results in him losing a percentage of his compensation. Consequently, the employee is penalized directly by the reduction in temporary total and permanent partial disability. Those are the benefits that "compensate" the employee. Whereas, reducing the cost of the medical charges by twenty-five or even fifty percent penalized the medical providers rather than the Employee.

To further support this contention that medical benefits are separate and distinct from the other "compensatory" benefits of temporary and permanent partial or total disability is that these benefits are addressed in completely separate statutes. Section 287.140 deals with medical benefits, as opposed to §287.160 which outlines the "compensation" to be paid by the employer. Section 287.160 refers to the wage benefit. Medical benefits, on the other hand, are addressed in a completely different statute than any other type of benefit which are separately outlined in §287.160.

When referring to the wages to be paid by the employer, the term "compensation" is used. However, in Section 287.140 the statute provides that "in addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment… as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Consequently, the statute specifies that medical benefits are separate and distinct from all other forms of "compensation" provided to the employee under the chapter. Nowhere in the statute is medical treatment or benefits referred to as "compensation."

One of the often cited older cases which refers to the interpretation of the safety statute prior to 2005 is Martin v. Star Cooler corp., 484 S.W.2d 32 (Mo.App. 1972) wherein the court stated that in determining whether or not medical treatment should be included in the term compensation it looked to Pruitt v. Harker, 328 Mo. 1200, 43 S.W. 2d 769 where the court ruled "this act should be liberally construed as to the persons to be benefitted… And a doubt as to the right of compensation should be resolved in favor of the employee." It was entirely due to the application of the principle of liberal construction previously provided for under the Act that led the liberal construction requirement has been removed from the Workers' Compensation Act and been placed with the principle of strict statutory construction, that analysis is no longer appropriate.

As such, the employer is entitled to a 30 percent reduction of Claimant's temporary total disability benefits, permanent total disability benefits, as well as disfigurement as they are deemed compensation under the Workers' Compensation Act.

In sum, the employer is liable to Employee for permanent total disability benefits beginning on October 19, 2007, the date of maximum medical improvement, and continuing for Claimant's lifetime at a rate of $552.92. The employer is liable to Employee for 21 weeks of additional compensation pursuant to §287.190 (4), as well as liable to Claimant for future medical care as a result of the January 2006 accident. However, the employer is also entitled to a 30 percent reduction of compensation of these benefits based on violation of a safety penalty pursuant to §287.120 (5). Lastly, the employer is liable to Employee for future medical care in order to cure and relieve the symptoms of the January 5, 2006 accident.

Date: _____ Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Naomi Pearson
Division of Workers' Compensation