

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

Injury No.: 13-020058

Employee: Jerry E. Thomas
Employer: EmployBridge d/b/a Pro Logistix
Insurer: American Casualty Company of Reading, PA

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, 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.

Discussion

Costs under § 287.560 RSMo

The administrative law judge determined that employer defended this claim without reasonable ground and awarded attorney's fees to employee under § 287.560 RSMo, which provides, in pertinent part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

We exercise our discretion to award costs under the foregoing provision with caution and only where the case is clear and the offense egregious. *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. 2009). As noted by the administrative law judge, the initial treatment records generated in connection with employee's medical care following the work injury suggest that he injured his left hand in a car door and not, as employee testified, in a machine while working at the premises of employer's client. This evidence, combined with the testimony from employer's witness Rick Cavallaro, raised legitimate questions with regard to the issue of accident. It was employee's burden to convince the fact finder that he sustained an accident at work; employer did not lack reasonable ground for challenging his ability to do so.

We find insufficient evidence on this record to support a finding that employer acted with the type of "egregious and outrageous conduct" exemplified in cases such as *Monroe v. Wal-Mart Assocs.*, 163 S.W.3d 501, 506 (Mo. App. 2005) and *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). For this reason, we modify the administrative law judge's award on this point. We conclude that employer did not

Employee: Jerry E. Thomas

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defend this claim without reasonable ground, and that employer is not liable for costs under § 287.560.

Rate of compensation

We note that in employer's brief, it challenges the administrative law judge's conclusion that employee's average weekly wage with employer entitles him to a compensation rate of \$240.00. But employer did not, in its Application for Review, identify any error on the part of the administrative law judge with respect to this issue. As a result, the issue is not properly before us. See 8 CSR 20-3.030(3)(A), requiring an applicant for review to "state specifically in the application the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported." See also *Stonecipher v. Poplar Bluff R1 Sch. Dist.*, 205 S.W.3d 326, 332 (Mo. App. 2006). For this reason, we will not disturb the administrative law judge's findings, analysis, or conclusions with respect to the issue of the appropriate rate of compensation herein.

Conclusion

We modify the award of the administrative law judge as to the issue whether employer is liable for costs under § 287.560 RSMo. Employer is not liable for employee's attorney's fees, because employer did not defend this claim without reasonable ground.

The award and decision of Administrative Law Judge Emily S. Fowler, issued November 19, 2013, is attached and incorporated by this reference to the extent not inconsistent with our award and decision herein.

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

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

Given at Jefferson City, State of Missouri, this 6th day of May 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Jerry E. Thomas

DISSENTING IN PART

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 awarding costs under § 287.560 RSMo against this employer should be affirmed.

As its rationale for reversing the award of costs, the majority cites the fact that contemporaneous medical records report employee having shut his hand in a car door, rather than having injured himself while working for employer. The majority posits that this circumstance provided employer with a reasonable ground for its denial of this claim. I find a number of problems with this.

First, the majority ignores the case law which holds that “[t]here is no requirement that the medical records report employment as the source of injury.” *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010). There are many good reasons for this rule, the most compelling of which is that the unsworn statements of the oftentimes unidentified individuals within the healthcare system who create these records simply are not entitled to more weight than the sworn and cross-examined testimony of an employee before an administrative law judge. Especially here, where we are dealing with records generated in the course of employee's treatment in the emergency department of a large hospital, the reliability of these hearsay statements strikes me as highly suspect.

The majority also ignores employee's testimony that he was in shock when he arrived at the hospital. As the administrative law judge noted, contemporaneous photographs of the violent mutilation of the middle finger on employee's left hand are included in evidence. Especially in light of this evidence, I find eminently credible employee's testimony that he was in shock and that he wasn't really aware of what he initially said or did once he arrived at the hospital. If indeed employee did tell the emergency personnel and treating physicians that he injured his hand in a car door, he did so because he was in shock and was not fully aware of what was taking place. I also agree with the administrative law judge's assessment that there is no possible way that employee could have suffered the injury seen in these photographs by shutting his hand in a car door. For these reasons, along with the fact that the medical records reveal employee still had his work glove on his left hand when he arrived at the hospital, and the admissions on the part of employer's sole witness that he discovered blood on the floor where employee was working, I conclude that the issue is clear, and that employer had no reasonable ground whatsoever for disputing the issue of accident.

Second, the majority ignores that employer waited until the day of the hearing to dispute the issue of notice, and thereafter failed to present any evidence that would support a finding that employee failed to provide written notice or that employer was prejudiced as a result. As the administrative law judge points out, employer had absolutely no ground for disputing this issue where the records of the Division of Workers' Compensation reveal that it received a copy of employee's claim for compensation within thirty days of the injury, because that document unquestionably amounted to written notice of

Employee: Jerry E. Thomas

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employee's injury meeting each of the criteria required under § 287.420 RSMo. At minimum, employer has unreasonably defended this claim with respect to the issue of notice, and thus an award of costs is proper.

Third, the majority ignores that in its brief to this Commission, employer acts egregiously in misstating the record. For example, on page 7 of its brief, employer asserts that its witness, the supervisor Rick Cavallaro, testified that there was no blood on the machine where employee was working, but fails to note that this witness also specifically testified that he *didn't even check the machine*. See *Transcript*, page 112. Employer's lack of candor toward this tribunal reveals an absence of good faith and is emblematic of the type of behavior that an award of costs under § 287.560 is designed to prevent.

I would affirm the award of the administrative law judge ordering employer to pay attorney's fees for its unreasonable and egregious behavior in defending this claim. Because the majority has determined otherwise, I respectfully dissent from that part of the Commission's decision.

Curtis E. Chick, Jr., Member

TEMPORARY AWARD

Employee: Jerry E. Thomas

Injury No: 13-020058

Dependents: N/A

Employer: EmployBridge d/b/a Pro Logistix

Insurer: American Casualty Company of Reading, PA/Gallagher Bassett Services, Inc.

Additional Party: N/A

Hearing Date: October 7, 2013

Checked by: ESF/pd

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: March 14, 2013
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: Employee was operating a milling machine when it jammed. While attempting to free the jam, his left hand was injured by the milling head.
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: Amputation of middle finger on left hand
14. Nature and extent of any permanent disability: Not determined at this time
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$24,395.94
18. Employee's average weekly wages: \$360.00
19. Weekly compensation rate \$ \$240.00/\$240.00
20. Method wages computation: by evidence

COMPENSATION PAYABLE

21. Amount of compensation payable: Temporary benefits for 3 weeks at \$240.00 per week for a total of \$720.00. Medical aid in the amount of \$24,395.94
22. Future requirements awarded: future medical which shall cure and relieve the effects of Employee's injury to his left middle finger and shall include but not limited to prosthesis.

Costs shall be assessed against Employer for defending this claim on unreasonable grounds and shall be paid as attorney fees of 25% of all benefits awarded herein for a total of \$6,278.99 to be paid above and beyond the medical costs and temporary total disability to be paid to Employee.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerry E. Thomas

Injury No: 13-020058

Dependents: N/A

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Hearing Date: October 7, 2013

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On October 7, 2013 the Employee and the Employer/Insurer appeared for a hardship hearing. The Division has jurisdiction to hear this case pursuant to §287.110. The Employee, Jerry Thomas, appeared in person and with Counsel Scott W. Mach. The Employer/Insurer appeared through Counsel, Jeffrey A. Mullins.

STIPULATIONS

At the hearing the parties stipulated to the following:

- 1) That the Employer Pro Logistix, was an employer operating under and subject to the provisions of Missouri Worker's Compensation Law on March 14, 2013 and was fully insured by American Casualty Company of Reading, PA c/o Gallagher Bassett Services;
- 2) That Jerry Thomas was its Employee and working subject to the law in Kansas City, Jackson County, Missouri; and
- 3) Missouri Department of Labor, Division of Worker's Compensation has jurisdiction over the claim.

ISSUES

The parties request the Division to determine the following issues:

- 1) Whether the Claimant suffered a compensable accident and injury arising out of and in the course and scope of his employment;
- 2) What Employee's average weekly wage and compensation rate were at the time of the alleged injury;
- 3) Whether Employee gave Employer notice as required by law;
- 4) Whether employer owes employee any sums as and for temporary total disability;

- 5) Whether Employer is liable to Employee for payment of past medical expenses in the sum of \$24,395.94;
- 6) Whether employer is must provide employee with additional medical care; and
- 7) Whether employer must reimburse Employee the cost of this proceeding for defending the claim without reasonable ground pursuant to Section 287.560. Payment of Cost and Fees under 287.560.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Jerry Thomas, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

Claimant's Exhibit A - Photographs of Employee's left hand

Claimant's Exhibit B - Medical Records, Truman Medical Center

Claimant's Exhibit C - Medical Records, Richard Hutchison, MD/Orthopedic Clinic

Claimant's Exhibit D - Medical Bills

Claimant's Exhibit E - Deposition of Jerry Thomas

Claimant's Exhibit F - Report of Injury

The employer and insurer offered the testimony of Mr. Rick Cavallaro, Safety and Facility Manager for Blount International, Inc., as well as the following evidence without objection:

Employer/Insurer's Exhibit 1 - Rubber work gloves

Employer/Insurer's Exhibit 2 - Two blades

Employer/Insurer's Exhibit 3 - Seven photographs of milling machine

Employer/Insurer's Exhibit 4 - DVD with two short clips of milling machine

The following exhibit was offered but not admitted by the Court after objection from Employee:

Employer/Insurer's Exhibit 5 – Employee Check Detail Report- Offered by Employer over objection of Employee- objection sustained-exhibit but not admitted.

Based on the above exhibits and the testimony of the witnesses, this Court makes the following findings:

“ACCIDENT”

The first issue to be determined by this Court is whether the Employee suffered an accident arising out of and in the course of his employment. I find that the Employee did suffer an on-the-job injury by accident to his left hand arising out of and in the course of his employment with Pro Logistix on March 14, 2013 at the Blount International plant at 12th and Van Brunt in Kansas City, Jackson County, Missouri.

There is no issue that the Employee sustained an injury to his left hand, particularly the

left middle finger, on March 14, 2013 between 9:00 and 9:30 a.m. The medical records from Truman Medical Center show a very fresh wound to the left hand of Employee. He was admitted to Truman Medical Center at 9:47 a.m. according to Dr. Deborah Corder who took his vitals that morning upon entry to the emergency room. It is also important to note that Employee was still at his place of employment as late as 9:30 a.m., according to the testimony of Employee himself, and the employer's witness, Rick Cavallaro. At 9:59 a.m. on that same morning, Employee was administered Hydrocodone, 5 mg. At 10:29 a.m., he was taken to orthopedic surgery; and at 10:30 a.m., he was in surgery. He continued on pain medication throughout his three-day stay in the hospital (See Exhibit B, Truman Medical Center records, and Exhibit A, photographs of the injured hand). All evidence supports that he had a very severe mangling injury to his left hand, specifically to the middle finger, on March 14, 2014 at approximately 9:00 a.m.

The Employee has the burden of proof to prove that the accident happened while at work. See Hawkins v. Emerson Electric, 676 S.W.2d 872 (Mo App 1984). At the hearing, credibility determinations are made by the Administrative Law Judge. Davis v. Research Medical Center, 903 S.W.2d 557 (Mo App 1995).

Employee was a 26-year-old high school graduate who had recently been working for \$8 per hour for the City of Kansas City's Downtown Counsel (See Exhibit E, Employee's Deposition, page 16). Employee quit his job with the Downtown Counsel for a job at Pro Logistix for \$9 per hour for 40 hours per week (See Exhibit E, Employee's Deposition, page 16). Employee was assigned to Blount International which makes lawnmower blades using milling machines. He had worked for Pro Logistix and Blount International for approximately four weeks before the accident. By the date of the accident, Employee did not know his supervisor's name at Blount International because his normal supervisor, Scotty Goldstein, was not present on the date of the accident. He was told to use a different milling machine, number 413, a machine he had never operated before (See Exhibit E, Employee's Deposition, page 22). Milling Machine 413 was different from the milling machine he previously used at Blount. On page 28 of his deposition, Employee testified that he was unfamiliar with Machine 413 and that the heads were open. He further testified that he did not know the names of either of the two supervisors on the date of the accident and did not know even where the first-aid room was at Blount. The safety manager for Blount testified that he had never seen Employee before the date of the accident and that the milling machines and lawn mower blades would cause injuries sufficient enough to cause bleeding at least once or twice a month at the plant. Employee also testified regarding the high speed of the moving heads on the milling machine and the ability of those heads to mill the hardened steel of blank mower blades into blades with sharp edges. Both Employee and the safety manager testified about the shield on the milling machine that was in place to help keep the operator from being hit with flying pieces of steel debris.

Pro Logistix, the company from which Employee received his paychecks, had no personnel at the Blount location. He received no training from Pro Logistix. After his injury, Employee repeatedly called Pro Logistix without response. His prior supervisor at Pro Logistix had been let go during the same four weeks that Employee worked for Pro Logistix, and a new person named Katie became his supervisor. No one from Pro Logistix testified.

On the morning of the injury, March 14, 2013, Employee testified that he began work at 7:00 a.m. He signed a time sheet while the regular employees of Blount International punched a

time clock. He attended a meeting which lasted approximately one-half hour in which the day's assignments were discussed. Any problems during prior shifts were also discussed. He went to work on Milling Machine 411, the machine he had previously worked on at Blount, but someone was already operating that machine. Employee was then told to work on Machine 413, a machine he had never operated before. At this point, Employee did not know the name of the safety manager, nor did he know the name of the manager or lead man who was working with him for the first time that morning.

Both Employee and the safety manager testified that the Blount plant located at 12th and Van Brunt, in Kansas City, Missouri had a very noisy environment and that hearing protection, eye protection, gloves, and steel-toed shoes were mandatory because of the dangers found in the workplace.

After beginning work on Machine 413, Employee was processing orders placing blank lawnmower blades in the milling machine which had two heads that would shape and grind the hardened steel to form the edges of the lawnmower blades. (Examples of these blades are in evidence as Exhibit 2.)

Employee testified that some time near 9:00 a.m. the machine he was working on jammed. The blank mower blade was not completely milled. When he reached with his left hand to attempt to unjam the machine, as he had been instructed, it grabbed his finger and hand, causing injury to the middle finger on the left hand. His hand was gloved in a rubber glove, for which Defendant's Exhibit 1 is an exemplary. It has a cloth backing with rubber-like material surrounding the palm and fingers for grip. This glove would remain on Employee's hand until he arrived at Truman Medical Center and began treatment.

After Employee was injured, he did not realize how badly he was hurt and was likely in shock. He saw that there was blood on the machine and then went to the restroom. He testified that he washed his hand in the sink but could not get the glove off because it was stuck to his hand. He then wrapped his hand in paper towels and returned toward his work station. Employee testified that he could see blood on the floor in the bathroom and the floor returning to his work station. Employee testified that he did not know how badly he was hurt. He was clearly bleeding from his left hand but did not have injury to any other part of his body. There were only three people working in the milling department, and it was loud (See Exhibit E, Deposition, page 32). He testified that he had on a long-sleeved shirt on the date of the accident. He went back toward his machine when he encountered two supervisors cleaning up blood (See Exhibit E, Deposition, page 31). After Employee spoke briefly with supervisors, he was told to sit down and take it easy for a few minutes. His pain worsened. He went to the break room and called Pro Logistix asking for his supervisor, Katie. He was not able to reach her and the pain worsened. He told his supervisors at Blount that he needed to see a doctor and left. At that time, Employee left and went directly to Truman Medical Center. Employee testified that he did not hurt himself in any manner by slamming his hand in a car door on his way to Truman. He arrived at Truman according to the Truman Medical Center records at 9:47 a.m. on Thursday, March 14, 2013.

Employee testified that he believed he was in shock and was experiencing tremendous pain. His glove remained on his hand the entire time, keeping the injured finger in place and

limiting the bleeding. The nurses at Truman called his mother, his sister, and the mother of his children. He knows that some of his family came to Truman and took photographs prior to surgery. Employee was taken to surgery at 10:30 a.m. The photographs, therefore, had to have been taken within the hour following the accident (See 8 photographs in Exhibit A). The photographs show the middle finger extremely swollen with the top portion detached except for a piece of skin flap which kept the top two joints of the finger attached. The bone is obvious in the photographs and the tearing of the flesh and the cutting of the bone is at a very wide angle. It was not what one would expect from someone shutting his hand in a car door. In fact, it would be nearly impossible to slam a hand in a car door and cause such tremendous damage to the middle finger without crushing both the index and ring fingers of the left hand in the process. The injury illustrated in the photographs was completely consistent with a cutting/ripping injury by the milling machine.

Employee testified that he did not know when the glove was removed. However, the glove is not on his hand in the photographs, Exhibit A, although he indicated on cross-examination that he believes portions of the glove he was wearing are visible in some of the photographs. However, there is indication in the medical records that there was a glove present at the time he was examined. In Employee's Exhibit B in a report titled HH Radiology Report dated March 14, 2013 and showing a time 9:59:01, it states "Glove- not removed". In another record also dated March 14, 2013 entitled Medical Specialty Documentation and subtitled Pre-op History and Physical, it indicated that "Was wearing glove at time of injury. Presented to TMC ED where glove was removed and radiographs obtained." It appears that they did not remove the glove until they took X-rays, but apparently a glove was present on his hand until that time.

The doctors took him to surgery and attempted to reattach the finger, but later it was determined that it would not be successful. Therefore, the following day on Friday, March 15, 2013, Employee was taken back to surgery and the finger was amputated below the second joint.

Employee next testified that he became aware that the records at Truman Medical Center indicated that he hurt his hand in a car door. He also noted that by the time he left the hospital, he learned of this history and ultimately attempted to correct it. Specifically, a portion of Dr. Hutchison's records from the Orthopedic Clinic notes dated March 22, 2013 at 3:24 a.m. state:

"Interval History: Mr. Thomas is a 26-year-old man who is now one week out after having a revision amputation of his left long finger. Initially, we thought that he had slammed his finger in a car door, but he says that actually he was hurt at work, not sure why he did not mention this before. He said he was little shocked by the whole experience, and he does not really remember talking about the car door. Says that he works in a factory that makes lawnmower blades. He reached up to get something as it was coming out of a fast moving machine, and a part of the machine must have grabbed his finger. I did not get cut by lawnmower blade, but rather it was the machine that was spinning them out."

It is important to note that despite this clear statement from Dr. Hutchison as to the history of the accident, later, Truman Medical Center records continue to indicate that Employee hurt himself with a car door. It appears that once it was in the records, the records kept repeating themselves from the initial entry.

It is clear, however, that Employee suffered an injury sometime between 9:00 a.m. and 9:30 a.m. on Thursday, March 14, 2013 that more probably than not occurred at his place of work involving a milling machine. Having viewed the photographs in Employee's Exhibit A, it is clear that Employee suffered an extremely traumatic injury to his left hand. It is quite doubtful even to the layman's eye that the injury was caused by being slammed in a car door.

The Employer had one witness, Rick Cavallaro. He was the safety manager at Blount and had been the safety manager for six years. He testified that on the morning of March 14, 2013 sometime after 9:00 a.m. an employee came to his office and indicated that there was blood on the floor in the mill room and the bathroom area. Mr. Cavallaro immediately went to the room where the blood cleanup material is kept. He grabbed the red bag to clean up blood and began cleaning. He testified that while cleaning up the blood he had a very brief encounter with the Employee. He said he had a 10-15 second conversation with Employee and asked if he needed a band-aid because he said there was a very slight cut on Employee's forearm near his elbow. Mr. Cavallaro said that Employee told him that he did not need treatment. No other follow-up was done by Mr. Cavallaro. He did not inspect the machine that Employee was operating. He said he knew nothing of the accident until he was informed by his attorney months later. He never asked or learned how Employee was injured or why there was a blood trail and a bloody paper towel in the bathroom.

Employee testified that there were no other cuts on his body. The records from Truman Medical Center indicate no cuts. To believe Mr. Cavallaro, one would have to believe there was a severe enough cut to cause dripping blood in a path from the area around the milling machine into the restroom, but that when he arrived shortly after the accident, the cut did not even require a band-aid. Further Employee testified he had on a long sleeve shirt that day which would make it impossible for Mr. Cavallaro to have seen Employee's forearm near his elbow. Employee's testimony regarding wearing this long sleeve shirt is credible as it was the middle part of March, a typically cooler time of the year in this part of the country. Further he testified that long sleeve shirts were preferable as they helped protect the employee's from flying debris and metal shards thrown off by the milling process. Mr. Cavallaro's testimony was also instructive in that he testified that there are many "nicks" involved in this type of work. Once or twice a month, someone gets nicked by the blades or the shards of metal coming off the milling machine.

Under cross-examination, Mr. Cavallaro testified that he had never seen the amount of blood that he saw in this case except in one very severe injury case where a buffer tore into the knee of an employee causing a large wound. Despite that, Mr. Cavallaro made no further investigation and only talked with the Employee for 10-15 seconds. He testified that he did not know if the Employee returned to work or if he left the area with his supervisor and did not return to the milling room when he was present. He made no written report of this blood incident. It is important to note that no investigation or report was made after there was blood in the mill room, blood in the bathroom, and a new employee left abruptly at 9:30 a.m. after saying he was going to the doctor.

After this brief encounter, Employee went to the break room, called his employer at Pro Logistix, received no response, and decided he had better get himself to the hospital. Employee

testified that he was in great pain and nearly passed out several times before he received treatment at the hospital.

Also of importance is the fact that the safety manager for Blount did not ever look at Employee's hand, nor did he ever look at the machine to confirm that there was blood on the machine or pieces of the glove. The only testimony regarding blood on the machine came from the Employee. Mr. Cavallaro's testimony was that he would have checked the machine if Employee had told him he had hurt his hand on the milling machine, but since Employee did not tell him, the safety manager did not even check the machine.

Besides the fact that the safety manager did not investigate the blood spots that he found on the floor and on a paper towel in the restroom, there were other witnesses present who were not available to Employee who were available to the Employer who did not testify. Employee repeatedly testified that he did not know the names of the people who were in a supervisory position who he told about the injury and who he told that he was going to the doctor that morning. The Employer did not call either of the two other supervisors who were present that day and who had direct contact with Employee.

In Exhibit F, The Report of Injury filed by Blount International with the Missouri Department of Labor and Industrial Relations Division of Worker's Compensation states, "While in the course and scope of employment temp was operating a milling machine when it jammed." The box labeled "Part of the Body Affected" states "hand(s)." It also states that the injury took place on the employer's premises. Statements in a Report of Injury are admissions. See Section 287.380.1 RSMo, Supp 2008.

This Court finds that Employee's testimony is credible despite the conflicting information in the medical records stating he had injured his finger in a car door. Employee's version of what happened makes sense and is consistent with the clearly devastating injury he received to his left hand. The employer's witness is found not to be credible. It is difficult to believe that an experienced safety manager who is made aware of blood drops on the floor from a milling area to a bathroom would not have done a more thorough investigation. Instead, he simply cleaned up the blood. Clearly, there was an injury at the work place, one which produced enough blood to require a clean-up effort. Yet, the safety manager did not investigate or write a report.

For all of these reasons, I find there was an accident arising out of and in the course of employment where Employee was injured by the milling machine on March 14, 2013 at approximately 9:00 a.m. while Employee was an employee of Pro Logistix, working at a milling job at Blount International.

"RATE"

Finding that there was an accident arising out of and in the course of employment, the next issue is the rate of compensation. The compensation rate statute is Section 287.250, RSMo which indicates in descending order. 1. If the wages are fixed by the week, the amount so fixed shall be the average weekly wage. According to the Report of Injury filed by Blount International and the testimony of Employee, he was to be a full time employee. The amount fixed by the week, according to the Report of Injury, Exhibit F, was \$360 per week. See

Stageman v. St. Francis Xavier Parish 611 S.W.2d 204 Mo Banc 1981, for the rule that it is necessary to look at the methods of calculation of wages from descending order beginning with number one.

The Employer argues that Employee was an hourly employee and was part-time, but offered no evidence to contradict the fact that Employee was earning \$360 per week, at least for the week before the accident. Employee testified that he believed he was a full-time employee and did not dispute the fact that in several weeks before the injury he did not get paid for a full 40-hour week. The statute is very clear and the Report of Injury confirms that “if the wages are fixed by the week, the amount so fixed shall be the average weekly wage.” See Section 287.250(1). The statute is to be strictly construed and the rate would yield a worker’s compensation rate of two-thirds of that amount or \$240 per week for both permanent partial disability and temporary total disability.

Again in Exhibit F, The Report of Injury filed by Blount International with the Missouri Department of Labor and Industrial Relations Division of Worker’s Compensation states, The Report of Injury indicates that Employee was a full time regular employee earning \$360 per week, working 5 days per week. Statements in a Report of Injury are admissions. See Section 287.380.1 RSMo, Supp 2008

“NOTICE”

This Court can take judicial notice of its own documents. The Court notes that the original claim for compensation was received by The Division of Workers’ Compensation on April 1, 2013, 18 days after the accident. The letter from the Division directed to Pro Logistix is dated April 2, 2013, just 19 days after the accident, which indicates, “Copies of the claim are being sent to each employer and insurer, or third-party administrator if applicable.”

Supreme Court Rule 44.01 regarding time computation provides at subsection (e) that three days is the time that is added if a pleading is mailed. Therefore, the Division’s notice of the claim with the claim itself was mailed on April 2, 2013. It is presumed that the time to file an answer would start upon receipt within 3 days or April 5, 2013. This accident happened on March 14, 2013. Therefore, notice of the claim with a copy of the claim would have reached Employer in writing by Friday, April 5, 2013, just 22 days after the accident, well within the 30 day notice as set out in Section 287.420.

Pro Logistix filed its answer just 32 days after the accident on April 16, 2013. It makes no reference to a notice defense. Likewise, the answer filed to the first amended claim by Pro Logistix does not raise a notice defense. Notice is an affirmative defense and must be raised in the pleadings. Claimant was not made aware of the notice defense until the morning of the hearing.

Further, Blount International and Pro Logistix are both employers in the case. The Report of Injury and the testimony of the safety director confirm that Blount had actual notice of the blood and of an accident that happened on its premises on the date of the accident.

Employee testified that he also called and attempted to give notice to Pro Logistix even before he left for the hospital by calling his supervisor, Katie. He also indicated that he called her again from Truman Medical Center the second day he was hospitalized and left a message that he had been injured at work, but he never received a return call from Katie or any other person at Pro Logistix. Pro Logistix is an agency that attempts to insulate employers from worker's compensation liability by providing workers to plants such as Blount International. It assumes the worker's compensation liability. It had both constructive and actual notice in a timely manner.

Pro Logistix had no employees on site at Blount International. I find that Employee gave notice to his supervisors of the injury, which was uncontradicted since the supervisors did not testify. Further, Pro Logistix had the written Claim for Compensation within the thirty-day requirement allowed under Section 287.420, and there was sufficient notice under the law to allow for benefits under the law.

For these reasons, I find that the notice defense is totally without merit.

“TEMPORARY TOTAL DISABILITY BENEFITS OWED”

The Employee was injured on March 14, 2013. The Employee testified that Dr. Hutchison released him to return to work at his second job, which was working for Mosaic as a Samsung salesperson at Best Buy, approximately three weeks after the accident. He testified that he was never released by Dr. Hutchison up to the time of hearing to return to heavy labor in milling because he still had numbness and pain in the stump of the finger. Temporary total disability is available when an injured employee is unable to return to any gainful employment on the open labor market. In this case, Employee was released to return to work with the only restriction being he was not released to return to heavy labor in milling because he still had numbness and pain in the stump of his finger. There was no evidence from either side as to whether the Employer offered other work to accommodate Employee nor was there evidence that he asked. It appears to this Court that Employee was released to return to work at his other job and in fact did return to that job and that he therefore was capable of obtaining work on the open labor market. For that reason, I find that 3 weeks of temporary benefits are owed at a rate of \$240 per week for a total of \$720.00.

“PAST MEDICAL”

The evidence is undisputed that there is \$24,395.94 in past medical provided on behalf of Employee. In the case at hand, Employee was clearly injured while working at Blount under the employment of Pro Logistix. Although it is alleged that the safety manager asked him if he was okay and he said he was fine, it appears he attempted to contact the person he believed to be his supervisor with Pro Logistix, Katie. He was unable to do so despite repeated attempts. The situation called for immediate and emergent care. Employee got himself to the hospital where he was given immediate care which was directly related to the injury he suffered. Even after the first surgery, Employee attempted to contact this supervisor at Pro Logistix without success. His supervisor never returned his calls, nor did anyone on her behalf. Employee's injury has been deemed to be work related. Employee gave his employer proper notice. The employer is

responsible for the costs of Employee's medical care herein. I find that figure of \$24,395.94 not to be in dispute by the Employer and award that amount to Employee for past medical benefits.

“FUTURE MEDICAL”

Employee testified that he is still under the care of Dr. Hutchison and that he last saw Dr. Hutchison on September 22, 2013. He has a return appointment on February 22, 2014. Employee also testified that Dr. Hutchison has prescribed a finger prosthesis and that he went to Hanger Orthotics to be fitted. Hanger would not provide the prosthesis until there is a determination of compensability under the worker's compensation case. Further medical treatment which shall cure and relieve Employee of his injury is so ordered for Employee.

“COSTS”

The cost of prosecuting a worker's compensation claim when it is defended without reasonable grounds is allowed under Section 287.560 RSMo. Here, I find that the defense of this matter was done without reasonable grounds and award costs to the Claimant.

First, the Claimant testified that after the injury he called the Employer, Pro Logistix, because Pro Logistix being an outsourcing of personnel type company, had no one available at the Blount International plant where he was assigned to work. Despite Claimant's testimony that he called the morning of the accident and several additional times from the hospital, he was not ever provided a response by his employer, Pro Logistix. Pro Logistix brought no one to the hearing to testify or rebut this information, nor did it provide reasonable rebuttal for the propositions put forward by Claimant's testimony and exhibits that he was injured while attempting to free a jam on the milling machine that he was assigned to. There apparently was no communication between Pro Logistix and the employer where Claimant actually worked, Blount International. The only defense appears to be medical records which indicated Employee told his doctors in the emergency room that his injury was caused by slamming his finger in a car door. This information was later corrected by Employee. However, one look at the photographs in Employee's Exhibit A of Employee's horribly mangled finger would clearly indicate that his injury was far more traumatic than any car door could cause. Defense of this claim was egregious at best.

Claimant's testimony that he was injured on the milling machine, that there was blood on the milling machine, and that there was a trail of blood from the mill room floor into the bathroom is not rebutted. The Employer only brought the testimony of Blount's safety director, which confirmed the trail of blood on the mill room floor and in the bathroom along with confirmation that there was blood on a paper towel in the trash in the bathroom; yet, no investigation was done by either Pro Logistix or Blount International.

The Employer and insurance carrier's conduct is further questioned for reasonableness when it raised for the first time at hearing a notice defense, when in fact it had to have received a written copy of the claim itself within the 30 days provided in Section 287.420.

The problem herein is that Employee failed to offer evidence as to his costs incurred in preparing for this trial. This Court cannot assess such costs without that evidence. However Employee did request attorney's fees of 25% of all benefits awarded herein. This Court shall therefore assess such fees as costs above and beyond the payment of such benefits. The benefits awarded herein include medical costs of \$24,395.94 as well as temporary total disability in the amount of \$720.00 for a total of \$25,115.94. Twenty-five percent of these benefits awarded herein is \$6,278.99. This amount shall be paid by Employer to Employee above and beyond the \$25,115.94 of benefits awarded. Any other costs incurred in preparation of this trial have not been considered herein and such costs and expenses may be submitted and considered at a final hearing if such occurs.

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation