

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

Injury No.: 06-004874

Employee: Robert M. Thornsberry
Employer: Thornsberry Investments, Inc./Lebanon
Livestock Auctions, LLC
Insurer: Grinnell Mutual Reinsurance/AIG Claim Services
Date of Accident: January 14, 2006
Place and County of Accident: Laclede County, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs of the parties heard oral arguments and considered the entire record. Pursuant to §286.090 RSMo, we issue this final award and decision modifying the October 17, 2007, 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.

Preliminaries

The parties stipulated to certain facts during the hearing before the administrative law judge. Among other things, the parties stipulated that employee had not received any temporary benefits as of the date of the hearing and that his compensation rate for temporary total disability benefits was \$340.46. The administrative law judge awarded employee temporary total disability benefits from January 14, 2006 to June 2, 2006, totaling \$7,003.74.

Thornsberry Investments appealed to the Commission alleging the administrative law judge erred in several respects, including an allegation that there was no evidence to support an award of temporary total disability benefits to employee.

Legal Principles

An employee is entitled to temporary total disability benefits to cover healing periods to be paid until the time when the employee can return to work, his condition stabilizes, or his condition has reached a point of maximum medical progress. *Schuster v. Division of Employment Security*, 972 S.W.2d 377, 381 (Mo.App. E.D. 1998).

[T]he 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." *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); § 287.020.7. "It does not require that the claimant be completely inactive or inert." *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo.App. 1995); see also *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996); *Reiner v. Treasurer, State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo.App. 2003).

Discussion

The administrative law judge found that employee was entitled to temporary total disability benefits between January 14, 2006, the date of employee's accident, and June 2, 2006, when employee was released from physical therapy.

The Commission majority disagrees with this determination. The medical records in evidence only show that employee was released from physical therapy on June 2, 2006, because he had not been seen for treatment since May 1, 2006. There is no indication that this date coincided with employee's maximum medical improvement, ability to return to work or the stabilization of his condition.

Additionally, there is no testimony in the record regarding employee's entitlement to temporary total disability benefits. There is no evidence that employee was totally disabled for any period of time after his work accident. Therefore, employee has failed to sustain his burden to show by competent and substantial evidence that he is entitled to temporary total disability benefits.

Award

We reverse the administrative law judge's award of temporary total disability benefits. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge David L. Zerrer, issued October 17, 2007, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 21st day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING IN PART, DISSENTING IN PART

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 disagree with the majority's decision to deny employee temporary total disability benefits, and believe the decision of the administrative law judge should be affirmed in its entirety.

"[T]emporary total disability" is a judicial creation that is defined by case law and not by statute. *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. W.D. 1997). The purpose of temporary total disability benefits is to cover the employee's healing period, so the award should cover only the time before the employee can return to work. *Id.* at 575; *Seeley v Anchor Fence Co.*, 96 S.W.3d 809, 821 (Mo.App. S.D. 2002). Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress." *Id.* Thus, temporary total disability benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected. *Id.*; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo.App. E.D. 2002).

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 909 (Mo.App. E.D. 2008).

[T]he Commission does not have to make its decision only upon testimony from physicians; it can make its findings based on the entire evidence. *Smith*, 32 S.W.3d at 573; see *Eimer*, 895 S.W.2d at 120.

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo.App. 2003). (citing *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568 (Mo.App. 2000)).

The evidence in the record shows that as a result of his work accident on January 14, 2006, employee's left hand suffered full amputation of the second digit, partial amputation of the left thumb, ruptured flexor tendon of the third digit, and significant trauma to the fourth and fifth digits. Clearly, even to a lay person, this was a devastating and debilitating injury.

The medical records of Dr. Perez, dated February 17, 2006, set forth that employee is "significantly limited in his activities and has had to place his veterinary practice on hold." Additionally, the discharge records from the University of Kansas Hospital show that employee was not to return to work, resume normal activity, resume strenuous activity or lift any weight. I believe this evidence is sufficient to show that after employee's accident, he was unable to return not only to his employment, but to any employment, and therefore, was totally disabled.

The next issue then is to determine when employee's healing period ended. As the administrative law judge correctly pointed out in his award, employee was released from care on June 2, 2006. There is no evidence that any further care was given to employee after June 2, 2006. It is reasonable to infer that employee did not feel he needed further treatment at that time because his condition had stabilized or reached maximum medical improvement. Therefore, I believe employee's total disability ended on June 2, 2006, when he was discharged from further care.

Based on the above, I believe there is competent and substantial evidence in the record to demonstrate that employee was temporarily and totally disabled from January 14, 2006 to June 2, 2006. Therefore, employee is entitled to temporary total disability benefits for that period, totaling \$7,003.74. For this reason, I would affirm the award of the administrative law judge in its entirety.

John J. Hickey, Member

AWARD

Employee: Robert M. Thornsberry

Injury No. 06-004874

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Thornsberry Investments, Inc/ Lebanon Livestock Auction, LLC

Additional Party:

Insurer: Grinnell Mutual Reinsurance/AIG Claim Service

Hearing Date: August 21, 2007

Checked by: DLZ

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 14, 2006
5. State location where accident occurred or occupational disease was contracted: Laclede 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:
Claimant's hand was crushed by animal
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: left upper extremity at the fingers and hand
 - Nature and extent of any permanent disability: 50% of the upper extremity at the 175 week level
15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages: \$510.69
19. Weekly compensation rate: \$340.46

- Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$64,733.71 - \$13,525.16 = 57,208.35

20-4/7 weeks of temporary total disability (or temporary partial disability): \$7,003.74

87.5 weeks of permanent partial disability from Employer: \$29,790.25

20 weeks of disfigurement from Employer: \$6,809.20

22. Second Injury Fund liability: Yes No X Open

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:
weekly differential () payable by SIF for weeks beginning
and, thereafter, for Claimant's lifetime

Total: \$94,002.34

23. Future requirements awarded: None

Said payments to begin immediately 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: Steven Rives

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert M. Thornsberry

Injury No: 06-004874

Before the
DIVISION OF WORKERS'

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

Dependents:

Employer: Thornsberry Investments, Inc./ Lebanon Livestock Auction, LLC

Additional Party

Insurer: Grinnell Mutual Reinsurance/AIG Claim Service

Checked by: DLZ

On the 21st day of August, 2007, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Steven Rives. Alleged Employer, Thornsberry Investments, Inc. appeared by its corporate representative, Brenda Thornsberry and by attorney Patrick J. Platter. Alleged Employer, Lebanon Livestock Auction, LLC, appeared by its corporate representative, Robert Haynes, and by attorney, Karen Johnson. Healthcare provider, L.E. Cox Medical Center appears by its attorney, Jason Shafer. Healthcare provider, Kelly Holtkamp M.D. and/or Orthopedic Specialists of Springfield, although served with notice of this hearing, comes not and fails to appear. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is not a party to this claim.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 14th day of January, 2006, Thornsberry Investments, Inc. and Lebanon Livestock Auction, LLC, were employers operating subject to the Missouri Workers' Compensation Law; employer, Thornsberry Investments, Inc., was fully insured by Grinnell Mutual Reinsurance and employer, Lebanon Livestock Auction, LLC, was fully insured by AIG Claims Service; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about January 14, 2006, Claimant sustained an accident which arose out of the course of and scope of employment; the employment occurred in Laclede County, Missouri, and the parties agree that Laclede County, Missouri, is the proper venue for this hearing; The Claimant notified the employers of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; neither employer contests the nature and extent of disability claimed by the Claimant; at the time of the claimed accident, Claimant's average weekly wage was \$510.69, sufficient to allow a compensation rate of \$340.46 for temporary total disability and permanent partial disability; no temporary disability benefits have been paid up to the date of this hearing; no medical benefits have been paid up to the date of this hearing; the Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award; the parties further stipulate that the charges set out in the Application for Direct Payment filed by L.E. Cox Medical Center were related to this injury.

ISSUES

Whether the accident arose out of the course of and scope of employment.

Whether the Employer is obligated to pay for past medical expenses.

Any temporary total benefits owed to the Claimant.

Whether the Claimant was an employee of Thornsberry Investments, Inc., acting as such, at the time of the accident.

Whether the Claimant was an employee of Lebanon Livestock Auction, LLC, acting as such, at the time of the accident.

Any right of indemnification and/or contribution from either Thornsberry Investments, Inc., or Lebanon Livestock Auction, LLC.

Whether Healthcare Provider, L. E. Cox Medical Center, is entitled to payment pursuant to Application for Direct Payment.

Whether Healthcare Provider, Kelly Holtkamp, M.D. and/or Orthopedic Specialists of Springfield is entitled to payment pursuant to Application for Direct Payment.

DISCUSSION

A legal file was established which consisted of the following documents, to wit: Report of Injury; Claim for Compensation; Answer filed by Employer, Thornsberry Investments, Inc.; Amended Claim for Compensation; Answer to Amended Claim for Compensation filed by Employer, Lebanon Livestock Auction, LLC; Answer to Amended Claim for Compensation filed by Employer, Thornsberry Investments, Inc.; Application for Direct Payment filed by L.E. Cox Medical Center; Application for Direct Payment filed by Kelly Holtkamp, M.D. and/or Orthopedic Specialists of Springfield; Response of Thornsberry Investments, Inc. to Application for Direct Payment; Motion for Indemnification and /or Contribution filed by Thornsberry Investments, Inc.; Response of Lebanon Livestock Auction, LLC to Motion for Indemnification and/or Contribution filed by Thornsberry Investments, Inc.; Reply filed by Thornsberry Investments, Inc. to Response of Lebanon Livestock Auction, LLC with regard to Motion for Indemnification and/or Contribution.

Robert M. Thornsberry, D.V.M., claimant herein, testified on his own behalf. Claimant testified that he is a duly licensed veterinarian in the State of Missouri, having practiced veterinary medicine since 1977. Claimant has lived and worked in the Richland, Missouri, area his entire professional career. Claimant testified that he and his wife are the sole owners of a corporation known as Thornsberry Investments, Inc., (hereinafter sometimes referred to as "Thornsberry") and that Thornsberry was a personal investment company through which Claimant operated various businesses including, but not limited to veterinary services. Claimant testified that all his veterinary service fees are eventually deposited in the accounts of Thornsberry and Claimant receives his compensation from time to time from Thornsberry.

Claimant testified that in 1994, on the advice of his accountant, he set up a separate entity known as Avanco, LLC, for the purpose of billing and receiving payments on invoices.

Claimant testified that during the period from 1977 through 1990, he performed services as an independent veterinarian. After 1990, Claimant performed whatever veterinarian services he performed through Thornsberry Investments, Inc., which continued until his injury, after which he was no longer able to perform veterinary services.

Claimant testified that in the summer of 2005 he was contacted by Mr. Haynes, owner of Lebanon Livestock Auction (hereinafter sometimes referred to as the auction company) and requested to perform veterinary services for the auction company during livestock sales. Livestock sales were held each Saturday and began in October 2005. Claimant further testified that he brought several employees with him to the auction, depending on how many cattle were consigned for the day, and that these employees were employees of and paid by Thornsberry Investments, Inc.

Claimant testified that a billing statement was issued one week in arrears for the veterinary service performed and that AVANCO, LLC issued the billings and that the money, when paid, was deposited into Thornsberry Investments, Inc. accounts. Claimant started performing veterinary services for Lebanon Livestock Auction in October 2005 and continued, uninterrupted until the date of his injury on January 14, 2006.

Claimant testified concerning the events of January 14, 2006. Claimant was in the process of performing veterinary services on cattle to be sold at the auction. A particular animal was acting unruly when brought into the shoot for testing. The animal charged at the area where Claimant was located. The Claimant attempted to get out of the animal's way, but the animal butted a post upon which Claimant's hand was placed. The animal struck the post with such force that the animal was rendered unconscious. Claimant's hand was crushed between the animal's head and the post with enough force to smash his thumb and index finger completely.

Claimant was airlifted to St. John's Medical Center in Springfield, Missouri, where he was treated in the emergency room. After a period of time, it was determined that Claimant's injury was so serious that the

decision was made to transfer Claimant to the Kansas University Medical Center in Kansas City, Missouri, for further treatment by upper extremity specialist surgeons. Claimant was again airlifted, this time from Springfield to the Kansas University Medical Center in Kansas City, Missouri.

Claimant was taken to surgery the same day to repair the damage to his hand, which resulted in a complete amputation of Claimant's index finger and a partial amputation of his thumb.

Exhibit A, purporting to be medical records supporting Claimant's treatment, was admitted into evidence without objection. Healthcare Provider Exhibits aa and bb, purporting to be medical records to support Healthcare Provider, L.E.Cox Medical Center's claim for payment of \$13,525.16 in expenses for treatment administered to Claimant were admitted into evidence without objection.

On cross-examination, Claimant admitted that he signed an agreement delineated as Agreement For Performance of Livestock Market/Sale Veterinary Responsibilities, marked and later admitted as part of Employer-Insurer's Exhibit 31. Claimant admitted an explanation of the agreement and the fact that any livestock auction was required by state and federal regulations to have a state approved veterinarian on premises during any livestock sale. Claimant further admitted that he signed the agreement as Robert Max Thornsberry D.V.M., (Doctor of Veterinary Medicine). Claimant further admitted that he always signed his signature with his professional designation when the signature was in any way connected with his professional license as a veterinarian.

Claimant admitted that Thornsberry Investments Inc. was not a party to the agreement and that the agreement used the words "in our employ" in the auction company's portion of the signature to the agreement.

Claimant admitted that one of the veterinarian duties at the auction was to inspect the premises for cleanliness but that duty did not involve seeing to the maintenance of the facility. Claimant further admitted that the auction company was required by state regulations to provide adequate office space for the veterinarian to carry out his duties of testing and inspecting livestock to be sold. Claimant further admitted that he had previously performed the same services for the prior owner of the auction company under a different license until the facility burned in 2003, after which the livestock auction was closed until October 2005 when Mr. Haynes reopened the facility and requested Claimant to again perform veterinary services to the auction company, as required by law.

Claimant admitted that he usually brought two or three people to the auction to assist in the inspection and testing process. One person would bring cattle to the holding pen; one person would operate the chute which held the animal until the testing was completed, and one person to keep the records on the tested animals which were cleared for the sale. Claimant further admitted that the auction company had no control over how or in what order the livestock were tested with the exception that from time to time the auction company may ask that cattle be tested out of order in order to get the animals into the sale ring more expeditiously.

Claimant admitted that his services were charged on a per animal basis: \$.25 per animal for inspection; \$4.00 per head for blood testing; and \$4.00 per head for pregnancy testing. Claimant further admitted that he would take the records generated for a day at the sale to his wife, who would produce a billing statement which would be forwarded onto the auction company. Claimant admitted that the amount paid for veterinary services for ten weeks preceding the injury, less the amounts paid for other expenses, averaged \$510.00 per week, and that Claimant agreed that his average weekly wage, for purposes of this claim, was \$510.00 per week.

Claimant admitted that Thornsberry Investments, Inc. was incorporated in 1983 and has remained an operating corporation from its inception through the date of Claimant's injury.

Claimant admitted that AVANCO Feeds, LLC was formed with Claimant and his spouse as the sole and only members. Claimant further admitted that AVANCO Feeds, LLC manufactures and sells feed for animals but that its primary purpose is to act as a billing machine for Thornsberry Investments, Inc. Claimant further admitted that the persons who perform labor at or within the activities of AVANCO are paid by Thornsberry Investments, Inc. Claimant admitted that he has a background in animal feed manufacturing and that the State of Missouri requires a license to manufacture animal feed in the state.

Claimant admitted that when he received checks from the auction company he turned them over to

his wife who acted as book keeper for Thornsberry Investments, Inc., AVANCO LLC, as well as for Claimant and Claimant's spouse's personal funds.

Claimant admitted that he used to operate a veterinary consulting business known as Mid America Veterinary Consulting, but that business has not functioned since AVANCO, LLC was formed in 1994. Claimant further admitted that he works about 80 hours each week and that he divides his time between the feed manufacturing mill, developing new feed formulas, veterinary services, conducting post mortem exams on dead animals, and the auction service.

On cross-examination by the auction company, Claimant admitted that he does not consider himself as self-employed, but rather Claimant considers himself an employee of Thornsberry Investments, Inc. Claimant further admitted that he was licensed as a veterinarian in five states and that Claimant provided consulting services outside the state of Missouri from time to time. Claimant also admitted that the emergency veterinary services provided by the Claimant were through Thornsberry Investments, Inc.

Claimant admitted that he was an approved livestock auction facility veterinarian and that such approval required special training and that an approved veterinarian had to be accredited and certified by the USDA. Claimant further admitted that after state approval as a livestock auction veterinarian that the veterinarian is known as a "Deputy State Veterinarian."

Claimant admitted that as a deputy state veterinarian Claimant has authority over the auction premises for the purpose of determining animal diseases, including isolating diseased animals and identifying various diseases. Claimant further admitted that he has authority to stop a sale from continuing if he finds certain diseased animals or to notify the state veterinarian to stop a sale until the disease control measures are taken to insure that the spread of a disease does not occur. Claimant further admitted that he has authority over certification for animals to be shipped across state lines.

Claimant admitted that the state veterinarian oversees the operations of an approved veterinarian and that the state veterinarian can remove an approved veterinarian from his duties and authority over the sale of animals on his own initiative or after a request for removal from an auction operator. Claimant further admitted that the auction company had no authority to direct the work performed by the veterinarian at the sale.

Claimant admitted that the veterinarian sets the fees paid for the services and that those fees are then passed through to each vendor of animals sold. Claimant admitted that the auction company was billed each week for the services performed at the previous sale.

Claimant admitted that he was paid a salary by Thornsberry Investments, Inc. and that his salary had no direct relationship with the amount billed to the auction company for services provided by the veterinarian. Claimant further admitted that if he was not going to be on the premises on the date of a sale, that it was the responsibility of the veterinarian to locate a substitute to perform the necessary duties and that the auction company had no authority in choosing who the substitute would be.

Claimant admitted that Thornsberry Investments, Inc. provided helpers to assist Claimant at the auction company, however, the auction company could not control or terminate any employee of Thornsberry Investments, Inc. who was working at the livestock auction site with the Claimant. Claimant further admitted that some of the supplies used at the auction were provided by the state of Missouri and the remaining supplies were provided by Thornsberry Investments, Inc.

The Claimant admitted that he worked approximately 4 days each month at the Lebanon Livestock Auction which comprised part of an 80 hour work week. Claimant further admitted that he always considered himself an employee of Thornsberry Investments, Inc.

Brenda Thornsberry testified on behalf of Claimant. Brenda Thornsberry testified that she is the spouse of Claimant and the president of Thornsberry Investments, Inc. Mrs. Thornsberry has been the president of Thornsberry Investments, Inc. since its inception in the 1980's. Mrs. Thornsberry testified that she is in charge of bookkeeping for the company and administering the day to day operations of the company. Mrs. Thornsberry further testified that she was the contact person for the workers' compensation insurance carrier for Thornsberry Investments, Inc. Mrs. Thornsberry further testified that all employees of Thornsberry Investments, Inc., including the Claimant, were covered for workers' compensation injuries. Mrs. Thornsberry identified Claimant's Exhibit B as a copy of Missouri Division of Employment Security filings

showing all the employees of Thornsberry Investments, Inc., including the Claimant. Mrs. Thornsberry further testified that the premium for workers' compensation insurance coverage was calculated based on the total payroll of the company and audited once each year in arrears to determine the exact payroll which is used to calculate the premium with adjustments up or down depending on the gross total payroll.

On cross-examination by Insurer of Thornsberry, Mrs. Thornsberry admitted that all employees were paid through Thornsberry Investments, Inc. and not through AVANCO. She further admitted that all receipts were deposited immediately from the AVANCO account into the Thornsberry Investments, Inc. bank account.

Employer, Thornsberry introduced, and there was admitted without objection, Exhibits 1 through 32. Employer, Thornsberry also introduced and there was admitted without objection Exhibit 33 which contains part of the Claimant's deposition taken prior to trial.

Robert Gene Haynes, owner of Lebanon Livestock Auction, testified on behalf of Employer, Lebanon Livestock Auction, LLC. Mr. Haynes testified that he is the owner of Lebanon Livestock Auction, referred to herein as the auction company, and that he has been the owner since October 22, 2005, the date of the first sale of livestock under his ownership.

Mr. Haynes testified that he knew Claimant for several years prior to the date of Claimant's injury and that he was aware that the owner of a livestock sale facility had to have a state approved veterinarian on premises whenever a sale of animals was to occur. Mr. Haynes further testified that he was aware that he could not obtain a state license to operate a livestock sale barn without having an arrangement for an approved veterinarian available.

Mr. Haynes testified that prior to licensing the livestock auction Dr. Good, State Veterinarian, inspected the facility and that Dr. Good gave Mr. Haynes a state form concerning veterinary services at the facility and that the form Mr. Haynes was given by Dr. Good already had Claimant's signature affixed. The agreement is admitted as Exhibit 31.

Mr. Haynes testified that the fees paid to Claimant were set by the Claimant without any negotiations on the part of Mr. Haynes and that no withholding was ever deducted from any check issued to Claimant for veterinary services. Mr. Haynes testified that veterinary fees were always paid by the vendor of an animal that went through the sale. The amount of the fees was deducted from the proceeds check for sale amount of the animals and held for payment to the Claimant.

Mr. Haynes testified that the auction company was obligated to provide some office space for the veterinarian but that the office was not furnished by the auction company. Mr. Haynes further testified that when animals are received at the sale barn they are sent to the veterinary building first for testing and identification of any disease. Thereafter, the animals are sorted into pens in preparation for the sale.

Mr. Haynes testified that he had several employees at the sale barn and that the veterinarian had no control over the hiring, termination, or duties of those employees.

On cross-examination by Employer, Thornsberry, Mr. Haynes admitted that no Form 1099 was issued to Claimant for 2005 or 2006. Mr. Haynes further admitted that, notwithstanding the agreement set out in Exhibit 31, Claimant was never considered an employee of the auction company and that Exhibit 31 was a form printed and distributed by the state of Missouri, as a requirement to obtain a livestock sale facility license. Mr. Haynes admitted that after the Claimant's injury, Dr. Good, state veterinarian, selected Claimant's replacement that now performs veterinary services under a similar agreement as Exhibit 31.

Employer, Lebanon Auction Company, LLC, admitted Exhibit I into evidence without objection.

FINDINGS OF FACT AND RULINGS OF LAW

Whether the Claimant was an employee of Thornsberry Investments, Inc., acting as such, at the time of the accident.

Whether the Claimant was an employee of Lebanon Livestock Auction, LLC, acting as such, at the time of the accident.

Whether the accident arose out of the course of and scope of employment.

Claimant testified that he always considered himself an employee of Thornsberry Investments, Inc. Brenda Thornsberry, spouse of the Claimant, one of two owners of Thornsberry Investments, Inc., and President of Thornsberry Investments, Inc., and as such the corporate representative of Thornsberry

Investments, Inc. testified that Claimant was an employee of Thornsberry Investments, Inc. The evidence is clear that Claimant was an employee of Thornsberry Investments, Inc. Exhibit B indicates that the corporation paid unemployment tax on Claimant as an employee, along with other employees.

The issue herein is whether Claimant was acting as an employee of Thornsberry Investments, Inc. at the time of his injury. Claimant testified that he is a licensed professional veterinarian. Claimant also testified concerning his other business ventures which are related to the veterinary practice but not actually part of the profession, such as his animal feed manufacturing business and his research and development for new animal feeds. Claimant and Brenda Thornsberry each testified that all of Claimant's income derived from the practice of veterinary medicine was part of the operation of Thornsberry Investments, Inc. There was no evidence to the contrary introduced at the hearing. Claimant testified in his deposition that he was paid through AVANCO but Claimant also stated in his deposition that his wife handled all the book work and that she handled all the money transactions for all the businesses and that Claimant was not totally familiar with the details of the book keeping for the businesses. The deposition testimony with regard to Claimant's spouse handling all the money transactions was confirmed at the hearing.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant was acting as an employee of Thornsberry Investments, Inc. at the time of his injury on January 14, 2006. In light of this finding, I further find that Claimant was not an employee of Lebanon Livestock Auction, LLC at the time of his injury on January 14, 2006.

There was evidence adduced at the hearing that Claimant could not act as a veterinarian and be employed by a corporation or employer other than pursuant to certain entities set out in the statutes of the state of Missouri. Whether Claimant was practicing veterinary medicine within an appropriate business or corporate structure is not determinative in this claim. Therefore, I find that Claimant's testimony and the testimony of Brenda Thornsberry is credible as to how they operated their business including the veterinary service performed by the Claimant.

Having found that Claimant performed veterinary services as an employee of Thornsberry Investments, Inc., the remaining question of fact is whether Claimant was performing those tasks on January 14, 2006. I find there is substantial and competent evidence that Claimant was performing the duties of a licensed veterinarian at the time of his injury and that those duties were pursuant to his employment with Thornsberry Investments, Inc.

I find that Claimant's accident arose out of the course of and scope of his employment with Thornsberry Investments, Inc.

If Claimant were found not to be an employee of Thornsberry Investments, Inc., and not a regular employee of Lebanon Livestock Auction, LLC, the issue of whether Claimant was acting as an independent professional veterinarian could be raised, and thus perhaps Claimant held the status of a statutory employee. In order for Claimant to be a statutory employee of Lebanon Livestock Auction, LLC, Claimant would have to be shown to meet the tests for statutory employment. Most notably, Claimant would have to be shown to be performing a task which is part of the ordinary course of business of the statutory employer. Claimant's presence and relationship with the auction company grows out of licensing requirements of the state of Missouri. But for the state mandated requirement that a state approved veterinarian must be present at the time of sale of animals, Claimant's services would not be required to carry on the business of a livestock auction.

Employer urges that the agreement for veterinary services signed by the Claimant and the auction company is, in some way, an employment agreement or an agreement which would fulfill the tests of statutory employment. The agreement, which is Exhibit 31, has a preamble which establishes a relationship between the veterinarian and the Department of Agriculture, Division of Animal Health, wherein the veterinarian agrees to perform certain responsibilities set out in the agreement by the state of Missouri. The agreement provides for no consideration as between Claimant and the auction company, and although the auction company has signed the agreement, the attestation clause references that the auction company understands the conditions that the veterinarian has agreed to and that the auction company will consent to the conditions, stipulations and penalties which the veterinarian has agreed to. I find that the agreement set out in Exhibit 31 is not sufficient to establish an employment relationship between Claimant and the Lebanon

Livestock Auction, LLC. I further find that the agreement is sufficient evidence to support the testimony of Claimant that his professional duties are a function of Claimant's duties as a deputy state veterinarian and not as part of the regular course of business in operating a livestock auction. I find that Claimant was not a statutory employee of Lebanon Livestock Auction, LLC at the time of his injury.

Based on the proceeding findings of fact, Claimant is found to be an employee of Thornsberry Investments, Inc. acting as such at the time of his injury, and further that Claimant was operating in the course of scope of such employment at the time of his injury.

Whether either employer is obligated to pay of past medical expenses.

Based on the previous findings of facts and rulings, I find the Employer, Thornsberry Investments, Inc, is obligated to pay the medical expenses set out in Exhibit A in the total sum of \$64,733.51. Employer Thornsberry Investments, Inc. is hereby ordered, subject to other rulings contained elsewhere in this award with regard to an Application for Direct Payment, to reimburse Claimant for all such medical expenses set out in Exhibit A, in the total sum of \$64,733.51, \$13,525.16 of which is for medical expenses due to L.E. Cox Medical Center and the subject of an Application for Direct Payment.

Any temporary total benefits owed to the Claimant.

Claimant was injured on January 14, 2006. Exhibit A shows that Claimant was released from treatment on June 2, 2006. After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant is entitled to temporary total disability benefits from the date of his injury until the date he was released from treatment on June 2, 2006.

Claimant's stipulated compensation rate is \$340.46 for temporary total disability as well as permanent partial disability. Based on the previous rulings as to employment, I find that Claimant is entitled to 20-4/7 weeks of temporary total disability benefits. Thornsberry Investments, Inc, is obligated and it is hereby ordered to pay to Claimant the sum of \$7,003.74 as and for temporary total disability benefits (20-4/7 x \$340.46 = \$7,003.74).

I find this issue in favor of Claimant.

Any right of indemnification and/or contribution from either Thornsberry Investments, Inc. or Lebanon Livestock Auction, LLC.

The right of contribution is set out in Section 287.040. Such a right of contribution is conditioned upon a finding that Claimant was a statutory employee and the party seeking contribution is an up line employer from a primary employer. Based on the findings and rulings set out previously in this award I find this issue to be moot. Therefore, no contribution and/or indemnification is ordered to be paid by any party to this claim.

Whether healthcare provider, L.E. Cox Medical Center, is entitled to payment pursuant to Application for Direct Payment.

L.E. Cox Medial Center previously filed an Application for Direct Payment with the Division of Workers' Compensation. Exhibit aa and Exhibit bb setting out medical records for treatment of Claimant which include transportation to the hospital and transportation from the hospital to the Kansas University Medical Center in Kansas City, Missouri, were admitted into evidence without objection from any party. Exhibit aa contained billing information showing the total charges for services rendered to be \$13,525.16. I find that L.E. Cox Medical Center provided necessary treatment services to the Claimant in an emergency situation and that the charges for such services in the amount of \$13,525.16, were reasonable. Employer, Thornsberry Investments, Inc. is hereby ordered to pay the sum of \$13,525.16 directly to L.E. Cox Medical Center. Employer is hereby given a credit against the medical expenses ordered to be paid as reimbursement to the Claimant as previously ordered in this award.

Whether Kelly Holtkamp M.D. and/or Orthopedic Specialists of Springfield is entitled to payment pursuant to Application for Direct Payment.

Neither Kelly Holtkamp M.D. nor Orthopedic Specialists of Springfield appeared in person, by representative, or by counsel at the hearing. The Application for Direct Payment filed by Kelly Holtkamp M.D. was made part

of the legal file. Other than treatment records for service rendered to the Claimant, no evidence was adduced at the hearing as to the amount of charges billed by Dr. Holtkamp for medical treatment services. There was no evidence adduced at the hearing as to the reasonableness of any charges claimed on the application for Direct Payment. I find that there is insufficient evidence to establish that Kelly Holtkamp M.D. and/or Orthopedic

Specialists of Springfield is entitled to an order from the Division of Workers' Compensation ordering the Employer to pay the amount set out on the Application for Direct Payment directly to the applicant. Application for Direct Payment filed herein by Kelly Holtkamp M.D. and/or Orthopedic Specialists of Springfield is denied.

The parties stipulated and agreed prior to the hearing that Claimant's permanent partial disability is 50% to the upper extremity and the 175 week level. The parties stipulated that Claimant's weekly compensation rate is \$340.46. Based on the findings and rulings previously set out in this award, Thornsberry Investments, Inc. is hereby ordered to pay to Claimant the sum of \$29,790.25 as and for a permanent partial disability benefit ($175 \times 50\% = 87.5 \text{ weeks} \times \$340.46 = \$29,790.25$).

The parties stipulated and agreed that Claimant was entitled to 20 weeks of disfigurement. The Claimant's hand was observed during the hearing. Based on the condition of Claimant's injured hand, as observed at the hearing, and further based on the agreement of the parties, I find that Claimant is entitled to 20 weeks of disfigurement benefits as a result of this injury. Employer, Thornsberry Investments, Inc., is hereby ordered to pay to the Claimant the sum of \$6,809.20, as and for a disfigurement benefit ($20 \times \$340.46 = \$6,809.20$).

Claimant's attorney has requested approval of an attorney fee of 25% of the amount of this award. Claimant's request for attorney fee is hereby approved. Claimant's attorney is granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Date: October 17, 2007

Made by: /s/ David L. Zerrer
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation

The following cases were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003): *Sullivan, Sifferman, and Reiner*.

The following cases were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003): *Cooper, Eimer and Smith*.