

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-146629

Employee: David Ullum
Employer: George Carden Circus International, Inc. (Alleged)
Insurer: St. Paul Travelers
Date of Accident: Alleged May 30, 2003
Place and County of Accident: Alleged Hickory County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 14, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued February 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A
Employer: George Carden Circus, International, Inc. (alleged)
Additional Party: N/A
Insurer: St. Paul Travelers
Hearing Date: November 28, 2005

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: RJD/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged to be May 30, 2003.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Hickory County.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Not as a covered employee.
7. Did employer receive proper notice? N/A.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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 injured while engaged in the exempt occupation of farm labor.
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: N/A.
14. Nature and extent of any permanent disability: N/A.
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? N/A.
18. Employee's average weekly wages: Not ascertained.
19. Weekly compensation rate: Not ascertained.
20. Method wages computation: N/A.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Ullum

Injury No: 03-146629

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

Dependents: N/A

Employer: George Carden Circus, International, Inc. (alleged)

Additional Party: N/A

Insurer: St. Paul Travelers

Checked by: RJD/tmh

ISSUES DECIDED

The evidentiary hearing in these cases (Injury No. 03-146629 and Injury No. 04-144518) was held on November 28, 2005, in Camdenton. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on January 20, 2006. The hearing was held to determine the following:

1. Whether Claimant sustained an accident on May 30, 2003, with alleged employer George Carden Circus International, Inc.;
2. Whether Claimant sustained an occupational disease on or about May 20, 2004, with alleged employer George Carden Circus International, Inc.;
3. Whether the notice requirement of Section 287.420 serves as a bar to compensation in either case;
4. Claimant's average weekly wage and resultant compensation rates;
5. Whether Employer and Insurer shall be ordered to provide Claimant with medical care pursuant to Section 287.140, RSMo in either or both cases;
6. Claimant's entitlement to temporary total disability ("TTD") benefits in either or both cases;
7. Whether either or both of Claimant's alleged injuries are the result of an employment (i.e., "farm labor") exempt from Chapter 287, RSMo, as set forth in Section 287.090, RSMo; and
8. If Claimant was engaged in exempt employment at the time of either or both injuries, whether George Carden Circus International, Inc., elected coverage for Claimant under Chapter 287, RSMo.

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STIPULATIONS

The parties stipulated as follows:

1. That venue for the evidentiary hearing is proper in Hickory and adjoining counties, including Camden County;
2. That, for both cases, the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo; and
3. That St. Paul Travelers fully insured the Missouri Workers' Compensation liability, if any, of George Carden Circus International, Inc., at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, David Ullum; the testimony of Loretta Clay, Employer's office manager; payroll records; W-2 forms; photocopies of checks; medical records and medical bills, and Claimant's journals for the years 2003 and 2004.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, David Ullum, was born on December 8, 1956, and has a 12th grade education. I find that in approximately 1990, Claimant began working for George Carden and Carden's uncle. Carden asked Claimant to work on a farm or ranch that Carden and his uncle had purchased. For the first year or so, Claimant was paid by George Carden in cash. Beginning sometime in 1991, Claimant was paid, by check, by "George Carden Circus International". For the years 1992 and 1994, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$7,500.00. For the year 1995, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$5,250.00.

For the years 1996-1999, Claimant received Forms W-2 from "George Carden Circus International, Inc.", showing annual earnings, respectively, of \$8,425.00, \$9,275.00, \$9,650.00 and \$11,000.00. For the year 2000, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$11,600.00. For the year 2001, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$11,700.00. For the year 2003, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$12,300.00.

For the year 2003, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$5,775.00; these wages were paid from January 3, 2003, through June 13, 2003. On June 13, 2003, Claimant received a personal check from "George Carden" for \$150.00. Beginning September 12, 2003, and ending December 12, 2003, Claimant received 11 checks from "GC Ranch", totaling \$3,303.77. These checks were all signed by "Loretta Clay". Ms. Clay testified on behalf of the alleged employer and its insurer, St. Paul/Travelers; Ms. Clay testified that she was "office manager of the circus" for more than 20 years and that she also "pays the farm bills". It is unclear from the evidence if Claimant received any pay between June 13, 2003, and September 12, 2003, and if so, from what source.

In 2004, Claimant received 16 checks from "GC Ranch", also signed by Loretta Clay. These checks total \$3,779.92.

Claimant last worked on May 20, 2004.

Loretta Clay testified that (at least until mid-2003), Claimant was paid for the first 25 hours of each week by “the circus”, and the remaining hours each week were paid by a ranch check or by a personal check from George Carden. For 2002 and early 2003, Clay’s testimony in this regard is corroborated by photocopies of checks in evidence. In 2002, there is one check from “George Carden” for \$1,184.53, with the memo: “bills and cash”. Also in 2002, there are 22 checks to Claimant from “GC Ranch”, all signed by George Carden, totaling \$7,280.82. A portion of that amount was reimbursement for out-of-pocket expenses. For the first six months of 2003, there are three checks to Claimant from “GC Ranch”, all signed by George Carden, totaling \$1,388.30.

There were no W-2 Forms in evidence from “GC Ranch” or from “George Carden”.

Most of Claimant’s work, over the years was done at the “ranch”. According to Claimant’s testimony, his work on the ranch was “cutting wood, building fence, taking care of the buffalo”. According to Claimant’s 2003 journal, his work included taking care of barn stock, taking care of pen stock, feeding hay bales and food cubes to cows, pushing and piling brush, checking on calves, finding and retrieving cattle that had gotten loose, feeding bulls, horses and buffalo, setting fence posts, and cleaning fence rows.

A portion of Claimant’s work was done at the “circus winter quarters” near Springfield, where the circus kept its equipment and elephants during the winter months. Claimant estimated that he spent “100 days in 13 years” working at the circus winter quarters, or an average of eight days per year.

On May 30, 2003, Claimant sustained an accident on the ranch when his left hand was caught in a John Deere “round” baler (i.e., this machine made the large round bales as opposed to the smaller “square” bales). He sustained multiple lacerations of the hand, including a severe laceration of the palm with partial degloving. Claimant’s foreman, Mike McCroskey was made aware of the injury immediately. George Carden also was made aware of Claimant’s injury and told Claimant that he (Carden) would take care of Claimant’s medical treatment “just like work comp would do”. According to Claimant’s testimony, Carden also told Claimant: “Work comp won’t cover it, because they know the elephants don’t use big bales.”

Shortly after this injury, Claimant’s method of compensation was changed as detailed above. Claimant testified that he only worked part-time after the left hand injury.

Claimant testified that he began having problems with his right hand when the weather got cold in late 2003. Claimant testified that he told Mike McCroskey about his right hand problem on November 18, 2003. Claimant’s journal (as well as the pay records) indicates that Claimant’s work hours diminished in 2004. Claimant’s journal for 2004 also indicates that he was no longer working with the cattle in 2004, which was a substantial part of his job prior to May 30, 2003. Claimant’s last day of work was May 20, 2004.

On May 31, 2005, Claimant filed a claim for compensation in Injury No. 03-146629 against “George Carden Circus International, Inc.” regarding the May 30, 2003, left hand injury. Also on May 31, 2005, Claimant filed a claim for compensation in Injury No. 04-144518 against “George Carden Circus International, Inc.” for “right fingers, hand, wrist, arm” alleging that he “developed carpal tunnel syndrome culminating on or about 5/20/04 when he was replacing old fence posts”.

On June 29, 2005, Answers were filed in each case by attorneys Katharine Collins and Christina Madrigal on behalf of “George Carden Circus” and “St. Paul Travelers”. The body of each Answer is identical and reads as follows:

Employer and Insurer admit that on the date of the alleged accident or work-related injury, the Employer was operating under the terms of the Missouri Workers’ Compensation Act and that all liability thereunder was fully insured by Insurer.

Employer and Insurer deny that Employee sustained an accident or work-related injury arising out of and in the course of the employment for the said Employer.

Employer and Insurer deny that the Employee sustained any disability related to or as the result of any accidental or work-related injury as contemplated under the law.

Employer and Insurer deny each and every allegation contained in the Employees (sic) Claim for Compensation contained herein and not specifically admitted.

Employee failed to give due notice to the Employer and Insurer of his/her alleged accidental or work-related injury, as claimed, and as required in §287.420, R.S.Mo 1969.

Employment. Both claims were filed against “George Carden Circus International, Inc.” (hereinafter sometimes referred to as “Employer”). Employer denies that Claimant was in its employ at the time of either injury. Employer states in its brief:

Both of these claims are lodged against a corporate entity by the name of George Carden Circus International, Inc. No evidence has been introduced that Mr. Carden’s farm where the Claimant worked and allegedly was injured is owned or operated, in whole or in part, by the named employer. The fact that Mr. Ullum was paid, in part, from of (sic) the circus account, is an acknowledgment that part of his employment at the farm, clearing away and harvesting timber, did have a benefit to the circus and payment was made as an accounting recognition of same.

For the first five months of 2003, Claimant was paid in excess of \$5,000 by George Carden Circus International, Inc., and less than \$1400 by all other entities combined. Payment of wages by George Carden Circus International, Inc., was more than an “accounting recognition”; George Carden Circus International, Inc., was Claimant’s primary employer. Employer is a corporation; it may

operate circuses or theme parks or restaurants or nightclubs or trash hauling services or farms. It can send its employees to do work at any location it sees fit. **On May 30, 2003, Claimant was clearly an employee of George Carden Circus International, Inc.**

As far as Claimant's employment status on May 20, 2004, the conclusion cannot be the same. As of May 20, 2004, Claimant had been paid exclusively by "GC Ranch" for eight months. While his duties may not have changed materially since his last paycheck from George Carden Circus International, Inc. (although there is evidence to suggest otherwise), Claimant simply was not an employee of the corporate entity named in the claim for compensation: "George Carden Circus International, Inc." on May 20, 2004, nor for at least eight months prior to May 20, 2004. Claimant may have been an employee of George Carden during that time, but there is no proof that Claimant was an employee of the corporate entity at that time.^[1] Claimant argues in his brief that "payment of wages is not conclusive on who is the employer. It is necessary to look at all the circumstances of the relationship." For that proposition, Claimant cites two cases, *Hill v. 24th Judicial Circuit*, 765 S.W.2d 329 (Mo.App.E.D. 1989) and *Stone v. Heisen*, 777 S.W.2d 664 (Mo.App.S.D. 1989). As stated in *Hill* at p. 331:

(P)ayment alone does not create an employer-employee relationship (although payment of wages is a circumstance to look at in determining who the employer is, it is insufficient in itself to establish that fact). ... The factors to consider in determining whether an employer-employee relationship exists are whether the claimant was performing services for the alleged employer and whether the services were controllable by the alleged employer.

Regarding the May 20, 2004 claim, Claimant has not proven that George Carden Circus International, Inc., controlled Claimant's services, nor has Claimant proven that he was performing services for George Carden Circus International, Inc. **I find that Claimant was not an employee of Employer as regards to the Claim for Compensation in Injury No. 04-144518.**

"Farm Labor" and Election of Coverage. Employer and Insurer contend that Claimant was engaged in "farm labor" at the time of both alleged injuries. "Farm labor" is an "exempt occupation" under the Missouri Workers' Compensation Law.^[2] Claimant contends that he was not engaged in "farm labor", or, alternatively, that Employer had elected coverage for "farm labor".^[3]

A good synopsis of this area of the law is found in Missouri Practice Volume 29, Workers' Compensation Law and Practice (Korte, 1997) at pages 37-40 (citations omitted):

The Workers' Compensation Law does not apply to the employment of farm labor. The term "farm labor" is interpreted according to its ordinary and customary usage, so as to not exclude from the jurisdiction of The Workers' Compensation Law all workers who could be included in the broadest definition of the term "agriculture".

Agriculture is not synonymous with farming; it is more comprehensive and refers to activities consisting of or directly related to the cultivation of the ground in the sense of husbandry. In addition to cultivation of the soil, it also includes the raising and gathering of crops and the raising of livestock.

Whether or not a worker is engaged in farm labor at the time the claim for workers' compensation benefits arises is to be determined from the character of the work that the worker is required to perform, and not from the general occupation or business of the worker's employer, the particular work the worker was performing at the time the claim arose, or the place where such work was being performed. A worker's status cannot be classified according to the uses for which the products of the farm are possible or are designed, or by the kind and nature of the products.

At the time the claim arises, the worker must be engaged in an act that is usually performed in the operation of a farm, although that alone is not determinative of the claim. The worker may be a farm laborer if the work in which the worker is engaged was performed for the sole purpose of carrying on farm operations, or if the worker was employed to perform ordinary farm work on a farm.

A worker is not a farm laborer, however, simply because the task being performed at the time the workers' compensation claim arises is sometimes performed by a farm laborer, is an incident of farm labor, or is labor being performed on a farm, if the task is being performed within the scope of the worker's principal employment, and that principal employment is not agricultural in nature. A worker who is hired for one project only does not become a farm laborer simply because the worker's services are rendered on a farm, even if the services the worker renders would be considered farm labor if performed by a farm laborer.

If, on the other hand, the task in question has not been imposed upon the worker by the employer in the scope of the business in which the worker is employed by the employer, the worker may be held to be a farm laborer if otherwise appropriate. As in other areas of The Workers' Compensation Law, a worker may render services to an employer in dual or multiple capacities, and may be subject to the jurisdiction of The Law when engaged in one capacity, but exempt from its application while engaged in another. Many disputes have arisen precisely under such circumstances.

The employment of an employer's farm laborer in an employment subject to The Workers' Compensation Law subsequent to an injury or death arising out of the farm labor is irrelevant, as is the worker's intention render non-farm labor services to the employer subsequent to the worker's injury or death arising out of farm labor. It is also irrelevant that the farming operation out of which the farm labor that is the basis of the workers' compensation claim arose is not as significant as the employer's other, non-farming businesses.

A previous election by the employer to accept the jurisdiction of The Workers' Compensation Law that mentions other businesses of the employer but not the employer's farming operation does not subject the employer to the jurisdiction of The Workers' Compensation Law as to the employer's farm laborers, especially when the employer's farming operations commence after the filing of the election, and the employer's insurance policy in effect at the time of the election contains a denial by the employer that it conducts any businesses other than those listed in the policy.

Activities which have been held by Missouri courts to constitute farm labor include the care of livestock, the milking of cows, and the care and breeding of cows on a farm. Activities which have been held by Missouri courts to not constitute farm labor include operation of a greenhouse and the operation of a bulldozer to prepare land for agricultural uses. Whether or not a farm manager is a farm laborer is a question upon which Missouri courts either disagree, or which they have left to the Labor and Industrial Relations Commission of Missouri to decide on a case-by-case basis.

Other activities from authorities outside Missouri have been noted with approval as constituting farm labor. These include:

- (1) care of horses:
- (2) plowing the fields of a dairy farm:
- (3) cutting and raking hay;
- (4) care and/or marketing of crops, livestock, or products yielded by stock, including:
 - (a) wool and sheep;
 - (b) dairy products;
 - (c) swine;
 - (d) manure;
 - (e) cordwood;
 - (f) hay;
 - (g) vegetables;
 - (h) fruit;
 - (i) eggs;
 - (j) lard;
 - (k) tobacco;
 - (l) cotton; and
 - (m) other provisions for the mouth.

Applying these principles to Claimant's employment, I find that Claimant was clearly engaged in "farm labor". Claimant's principal duties were care of livestock and cutting of wood, both of which are recognized as "farm labor". Claimant's 5/30/03 injury was sustained while engaged in baling hay, which also comes under the purview of "farm labor". Claimant's alleged 5/20/04 injury was from "replacing old fence posts", which (although not specifically mentioned in the listing above) is part of any livestock farmer's duties. I find that Claimant's principal occupation was the exempt occupation of "farm labor". Claimant was engaged in "farm labor" at the time of each claimed injury. As noted above, even though the general business of Employer may have been "circus" (not "farming"), it is the character of Claimant's work that determines whether that work constitutes the exempt occupation of "farm labor". I find that, without question, Claimant's work was "farm labor". The fact that Claimant worked an average of eight days per year at the circus's winter headquarters performing (presumably) work other than exempt "farm labor", has no legal significance in this case, because, as *Korte* states: "... a worker may render services to an employer in dual or multiple capacities, and may be subject to the jurisdiction of the (Workers' Compensation) Law when engaged in one capacity, but exempt from its application while engaged in another." Therefore, if Claimant had injured himself while working in a non-exempt occupation at the circus's winter headquarters, the result might be different. Based on the facts of this case, there is no question that Claimant was engaged in the exempt occupation of "farm labor" at all times relevant to both claims herein.

The next issue that must be addressed is whether Employer elected that its farm labor be covered under the Missouri Workers' Compensation Law. Claimant argues that George Carden Circus International, Inc., elected to have its exempt farm labor employees covered under the Missouri Workers' Compensation Law by purchasing a policy of workers' compensation insurance. The pertinent portion of Section 287.090.2 states as follows:

Any employer exempted from this chapter as to the employer or as to any class of employees of the employer pursuant to the provisions of subdivision (3) of subsection 1 of section 287.030 or pursuant to subsection 1 of this section may elect coverage as to the employer or as to the class of employees of that employer pursuant to this chapter by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member.

An analysis of the clear language of this section yields the conclusion that an election may be made by an employer which would otherwise be totally exempt from the Workers' Compensation Law (e.g., a non-construction industry employer with less than five employees) **or** by an employer (such as George Carden Circus International, Inc.) which has a "class of employees" exempt from the act (which presumes that that employer also has one or more classes of employees which are not exempt). The clear language of the statute also states that there are three methods to make the election: (1) by purchasing and accepting a workers' compensation insurance *policy*; (2) by purchasing and accepting a workers' compensation insurance *endorsement*; or (3) by written notice to the group self-insurer of which the employer is a member. An employer who make an election by utilizing method 2 or 3 *already has workers' compensation coverage*; utilizing method 2, the employer would purchase and accept an endorsement to its already existing workers' compensation policy to cover an exempt class of employees; utilizing method 3, the employer would notify its group workers' compensation self-insurer, of which it is already a member (i.e., already covering its covered employees).

Thus, if George Carden Circus International, Inc., had less than five employees, the purchasing and acceptance of a workers' compensation insurance policy would, *ipso facto*, constitute an election. But George Carden Circus International, Inc., had approximately 30 employees, and was required to maintain a policy of workers' compensation on its non-exempt employees. By complying with the law and purchasing a policy for those employees, George Carden Circus International, Inc., did not automatically elect coverage for Claimant, an employee engaged in exempt "farm labor". It would be necessary to examine the contents of that policy, or any endorsements thereto, to determine if an election was made to cover Claimant. Unfortunately, the policy was not in evidence (nor were endorsements, if any). Claimant argues in his brief: "Although the lawyer appearing on behalf of the employer/insurer did not have a copy of the policy at the hearing as required by law, the fact that the insurer for the circus entered its appearance on both claims conclusively proves that workers' compensation insurance exists. §287.300." It is debatable whether §287.300 provides for such "conclusive proof", nevertheless, it would only be proof that St. Paul Travelers provided a valid workers' compensation policy to George Carden Circus International, Inc., covering the dates of Claimant's injuries (to which fact counsel for St. Paul Travelers stipulated), and would **not** constitute proof that such policy constituted an election under §287.090.2. As I find that Claimant has the burden of proof on the issue of election (as opposed to Employer having the burden of proving a *non-election*), I find that George Carden Circus International, Inc., did **not** elect to have Claimant, an employee engaged in exempt "farm labor", covered under the Missouri Workers' Compensation Law. [\[4\]](#)

As both of Claimant's alleged injuries occurred while in the exempt occupation of "farm labor", and as Employer did not make an election to cover "farm labor", **Claimant's Claim for Compensation against George Carden Circus International, Inc., in Injury No. 03-146629 is denied, Claimant's Claim for Compensation against George Carden Circus International, Inc., in Injury No. 04-144518 is denied, and Claimant's Claim for Compensation against the Second Injury Fund in Injury No. 04-144518 is denied.**

All other issues are moot.

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-144518

Employee: David Ullum

Employer: George Carden Circus International, Inc. (Alleged)

Insurer: St. Paul Travelers

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

Date of Accident: Alleged May 20, 2004

Place and County of Accident: Alleged Hickory County

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 14, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued February 14, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of July 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David Ullum

Injury No. 04-144518

Dependents: N/A

Employer: George Carden Circus International, Inc. (alleged)

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

Additional Party: Second Injury Fund

Insurer: St. Paul Travelers

Hearing Date: November 28, 2005

Checked by: RJD/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged to be May 20, 2004.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Hickory County.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No.
7. Did employer receive proper notice? N/A.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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: N/A.
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: N/A.
15. Nature and extent of any permanent disability: N/A.
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? N/A.
18. Employee's average weekly wages: Not ascertained.
19. Weekly compensation rate: Not ascertained.
21. Method wages computation: N/A.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: No

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Ullum

Injury No: 04-144518

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: George Carden Circus International, Inc. (alleged)

Additional Party: Second Injury Fund

Insurer: St. Paul Travelers

Checked by: RJD/tmh

ISSUES DECIDED

The evidentiary hearing in these cases (Injury No. 03-146629 and Injury No. 04-144518) was held on November 28, 2005, in Camdenton. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on January 20, 2006. The hearing was held to determine the following:

9. Whether Claimant sustained an accident on May 30, 2003, with alleged employer George Carden Circus International, Inc.;
10. Whether Claimant sustained an occupational disease on or about May 20, 2004, with alleged employer George Carden Circus International, Inc.;
11. Whether the notice requirement of Section 287.420 serves as a bar to compensation in either case;
12. Claimant's average weekly wage and resultant compensation rates;
13. Whether Employer and Insurer shall be ordered to provide Claimant with medical care pursuant to Section 287.140, RSMo in either or both cases;
14. Claimant's entitlement to temporary total disability ("TTD") benefits in either or both cases;
15. Whether either or both of Claimant's alleged injuries are the result of an employment (i.e., "farm labor") exempt from Chapter 287, RSMo, as set forth in Section 287.090, RSMo; and
16. If Claimant was engaged in exempt employment at the time of either or both injuries, whether George Carden Circus International, Inc., elected coverage for Claimant under Chapter 287, RSMo.

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STIPULATIONS

The parties stipulated as follows:

4. That venue for the evidentiary hearing is proper in Hickory and adjoining counties, including Camden County;
5. That, for both cases, the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo; and
6. That St. Paul Travelers fully insured the Missouri Workers' Compensation liability, if any, of George Carden Circus International, Inc., at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, David Ullum; the testimony of Loretta Clay, Employer's office manager; payroll records; W-2 forms; photocopies of checks; medical records and medical bills, and Claimant's journals for the years 2003 and 2004.

FINDINGS OF FACT AND RULINGS OF LAW

I find that Claimant, David Ullum, was born on December 8, 1956, and has a 12th grade education. I find that in approximately 1990, Claimant began working for George Carden and Carden's uncle. Carden asked Claimant to work on a farm or ranch that Carden and his uncle had purchased. For the first year or so, Claimant was paid by George Carden in cash. Beginning sometime in 1991, Claimant was paid, by check, by "George Carden Circus International". For the years 1992 and 1994, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$7,500.00. For the year 1995, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$5,250.00.

For the years 1996-1999, Claimant received Forms W-2 from "George Carden Circus International, Inc.", showing annual earnings, respectively, of \$8,425.00, \$9,275.00, \$9,650.00 and \$11,000.00. For the year 2000, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$11,600.00. For the year 2001, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$11,700.00. For the year 2003, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$12,300.00.

For the year 2003, Claimant received a Form W-2 from "George Carden Circus International" showing wages of \$5,775.00; these wages were paid from January 3, 2003, through June 13, 2003. On June 13, 2003, Claimant received a personal check from "George Carden" for \$150.00. Beginning September 12, 2003, and ending December 12, 2003, Claimant received 11 checks from "GC Ranch", totaling \$3,303.77. These checks were all signed by "Loretta Clay". Ms. Clay testified on behalf of the alleged employer and its insurer, St. Paul/Travelers; Ms. Clay testified that she was "office manager of the circus" for more than 20 years and that she also "pays the farm bills". It is unclear from the evidence if Claimant received any pay between June 13, 2003, and September 12, 2003, and if so, from what source.

In 2004, Claimant received 16 checks from "GC Ranch", also signed by Loretta Clay. These checks total \$3,779.92. Claimant last worked on May 20, 2004.

Loretta Clay testified that (at least until mid-2003), Claimant was paid for the first 25 hours of each week by "the circus", and the remaining hours each week were paid by a ranch check or by a personal check from George Carden. For 2002 and early 2003, Clay's testimony in this regard is corroborated by photocopies of checks in evidence. In 2002, there is one check from "George Carden" for \$1,184.53, with the memo: "bills and cash". Also in 2002, there are 22 checks to Claimant from "GC Ranch", all signed by George Carden, totaling \$7,280.82. A portion of that amount was reimbursement for out-of-pocket expenses. For the first six months of 2003, there are three checks to Claimant from "GC Ranch", all signed by George Carden, totaling \$1,388.30.

There were no W-2 Forms in evidence from "GC Ranch" or from "George Carden".

Most of Claimant's work, over the years was done at the "ranch". According to Claimant's testimony, his work on the ranch was "cutting wood, building fence, taking care of the buffalo". According to Claimant's 2003 journal, his work included taking care of barn stock, taking care of pen stock, feeding hay bales and food cubes to cows, pushing and piling brush, checking on calves, finding and retrieving cattle that had gotten loose, feeding bulls, horses and buffalo, setting fence posts, and cleaning fence rows.

A portion of Claimant's work was done at the "circus winter quarters" near Springfield, where the circus kept its equipment and elephants during the winter months. Claimant estimated that he spent "100 days in 13 years" working at the circus winter quarters, or an average of eight days per year.

On May 30, 2003, Claimant sustained an accident on the ranch when his left hand was caught in a John Deere "round" baler (i.e., this machine made the large round bales as opposed to the smaller "square" bales). He sustained multiple lacerations of the hand, including a severe laceration of the palm with partial degloving. Claimant's foreman, Mike McCroskey was made aware of the injury immediately. George Carden also was made aware of Claimant's injury and told Claimant that he (Carden) would take care of Claimant's medical treatment "just like work comp would do". According to Claimant's testimony, Carden also told

Claimant: "Work comp won't cover it, because they know the elephants don't use big bales."

Shortly after this injury, Claimant's method of compensation was changed as detailed above. Claimant testified that he only worked part-time after the left hand injury.

Claimant testified that he began having problems with his right hand when the weather got cold in late 2003. Claimant testified that he told Mike McCroskey about his right hand problem on November 18, 2003. Claimant's journal (as well as the pay records) indicates that Claimant's work hours diminished in 2004. Claimant's journal for 2004 also indicates that he was no longer working with the cattle in 2004, which was a substantial part of his job prior to May 30, 2003. Claimant's last day of work was May 20, 2004.

On May 31, 2005, Claimant filed a claim for compensation in Injury No. 03-146629 against "George Carden Circus International, Inc." regarding the May 30, 2003, left hand injury. Also on May 31, 2005, Claimant filed a claim for compensation in Injury No. 04-144518 against "George Carden Circus International, Inc." for "right fingers, hand, wrist, arm" alleging that he "developed carpal tunnel syndrome culminating on or about 5/20/04 when he was replacing old fence posts".

On June 29, 2005, Answers were filed in each case by attorneys Katharine Collins and Christina Madrigal on behalf of "George Carden Circus" and "St. Paul Travelers". The body of each Answer is identical and reads as follows:

Employer and Insurer admit that on the date of the alleged accident or work-related injury, the Employer was operating under the terms of the Missouri Workers' Compensation Act and that all liability thereunder was fully insured by Insurer.

Employer and Insurer deny that Employee sustained an accident or work-related injury arising out of and in the course of the employment for the said Employer.

Employer and Insurer deny that the Employee sustained any disability related to or as the result of any accidental or work-related injury as contemplated under the law.

Employer and Insurer deny each and every allegation contained in the Employees (sic) Claim for Compensation contained herein and not specifically admitted.

Employee failed to give due notice to the Employer and Insurer of his/her alleged accidental or work-related injury, as claimed, and as required in §287.420, R.S.Mo 1969.

Employment. Both claims were filed against "George Carden Circus International, Inc." (hereinafter sometimes referred to as "Employer"). Employer denies that Claimant was in its employ at the time of either injury. Employer states in its brief:

Both of these claims are lodged against a corporate entity by the name of George Carden Circus International, Inc. No evidence has been introduced that Mr. Carden's farm where the Claimant worked and allegedly was injured is owned or operated, in whole or in part, by the named employer. The fact that Mr. Ullum was paid, in part, from of (sic) the circus account, is an acknowledgment that part of his employment at the farm, clearing away and harvesting timber, did have a benefit to the circus and payment was made as an accounting recognition of same.

For the first five months of 2003, Claimant was paid in excess of \$5,000 by George Carden Circus International, Inc., and less than \$1400 by all other entities combined. Payment of wages by George Carden Circus International, Inc., was more than an "accounting recognition"; George Carden Circus International, Inc., was Claimant's primary employer. Employer is a corporation; it may operate circuses or theme parks or restaurants or nightclubs or trash hauling services or farms. It can send its employees to do work at any location it sees fit. **On May 30, 2003, Claimant was clearly an employee of George Carden Circus International, Inc.**

As far as Claimant's employment status on May 20, 2004, the conclusion cannot be the same. As of May 20, 2004, Claimant had been paid exclusively by "GC Ranch" for eight months. While his duties may not have changed materially since his last paycheck from George Carden Circus International, Inc. (although there is evidence to suggest otherwise), Claimant simply was not an employee of the corporate entity named in the claim for compensation: "George Carden Circus International, Inc." on May 20, 2004, nor for at least eight months prior to May 20, 2004. Claimant may have been an employee of George Carden during that time, but there is no proof that Claimant was an employee of the corporate entity at that time.^[5] Claimant argues in his brief that "payment of wages is not conclusive on who is the employer. It is necessary to look at all the circumstances of the relationship."

For that proposition, Claimant cites two cases, *Hill v. 24th Judicial Circuit*, 765 S.W.2d 329 (Mo.App.E.D. 1989) and *Stone v. Heisen*, 777 S.W.2d 664 (Mo.App.S.D. 1989). As stated in *Hill* at p. 331:

(P)ayment alone does not create an employer-employee relationship (although payment of wages is a circumstance to look at in determining who the employer is, it is insufficient in itself to establish that fact). ... The factors to consider in determining whether an employer-employee relationship exists are whether the claimant was performing services for the alleged employer and whether the services were controllable by the alleged employer.

Regarding the May 20, 2004 claim, Claimant has not proven that George Carden Circus International, Inc., controlled Claimant's services, nor has Claimant proven that he was performing services for George Carden Circus International, Inc. **I find that Claimant was not an employee of Employer as regards to the Claim for Compensation in Injury No. 04-144518.**

"Farm Labor" and Election of Coverage. Employer and Insurer contend that Claimant was engaged in "farm labor" at the

time of both alleged injuries. “Farm labor” is an “exempt occupation” under the Missouri Workers’ Compensation Law. Claimant contends that he was not engaged in “farm labor”, or, alternatively, that Employer had elected coverage for “farm labor”.^[7]

A good synopsis of this area of the law is found in Missouri Practice Volume 29, Workers’ Compensation Law and Practice (Korte, 1997) at pages 37-40 (citations omitted):

The Workers' Compensation Law does not apply to the employment of farm labor. The term “farm labor” is interpreted according to its ordinary and customary usage, so as to not exclude from the jurisdiction of The Workers' Compensation Law all workers who could be included in the broadest definition of the term “agriculture”.

Agriculture is not synonymous with farming; it is more comprehensive and refers to activities consisting of or directly related to the cultivation of the ground in the sense of husbandry. In addition to cultivation of the soil, it also includes the raising and gathering of crops and the raising of livestock.

Whether or not a worker is engaged in farm labor at the time the claim for workers’ compensation benefits arises is to be determined from the character of the work that the worker is required to perform, and not from the general occupation or business of the worker’s employer, the particular work the worker was performing at the time the claim arose, or the place where such work was being performed. A worker’s status cannot be classified according to the uses for which the products of the farm are possible or are designed, or by the kind and nature of the products.

At the time the claim arises, the worker must be engaged in an act that is usually performed in the operation of a farm, although that alone is not determinative of the claim. The worker may be a farm laborer if the work in which the worker is engaged was performed for the sole purpose of carrying on farm operations, or if the worker was employed to perform ordinary farm work on a farm.

A worker is not a farm laborer, however, simply because the task being performed at the time the workers’ compensation claim arises is sometimes performed by a farm laborer, is an incident of farm labor, or is labor being performed on a farm, if the task is being performed within the scope of the worker’s principal employment, and that principal employment is not agricultural in nature. A worker who is hired for one project only does not become a farm laborer simply because the worker’s services are rendered on a farm, even if the services the worker renders would be considered farm labor if performed by a farm laborer.

If, on the other hand, the task in question has not been imposed upon the worker by the employer in the scope of the business in which the worker is employed by the employer, the worker may be held to be a farm laborer if otherwise appropriate. As in other areas of The Workers' Compensation Law, a worker may render services to an employer in dual or multiple capacities, and may be subject to the jurisdiction of The Law when engaged in one capacity, but exempt from its application while engaged in another. Many disputes have arisen precisely under such circumstances.

The employment of an employer’s farm laborer in an employment subject to The Workers' Compensation Law subsequent to an injury or death arising out of the farm labor is irrelevant, as is the worker’s intention render non-farm labor services to the employer subsequent to the worker’s injury or death arising out of farm labor. It is also irrelevant that the farming operation out of which the farm labor that is the basis of the workers’ compensation claim arose is not as significant as the employer’s other, non-farming businesses.

A previous election by the employer to accept the jurisdiction of The Workers' Compensation Law that mentions other businesses of the employer but not the employer’s farming operation does not subject the employer to the jurisdiction of The Workers' Compensation Law as to the employer’s farm laborers, especially when the employer’s farming operations commence after the filing of the election, and the employer’s insurance policy in effect at the time of the election contains a denial by the employer that it conducts any businesses other than those listed in the policy.

Activities which have been held by Missouri courts to constitute farm labor include the care of livestock, the milking of cows, and the care and breeding of cows on a farm. Activities which have been held by Missouri courts to not constitute farm labor include operation of a greenhouse and the operation of a bulldozer to prepare land for agricultural uses. Whether or not a farm manager is a farm laborer is a question upon which Missouri courts either disagree, or which they have left to the Labor and Industrial Relations Commission of Missouri to decide on a case-by-case basis.

Other activities from authorities outside Missouri have been noted with approval as constituting farm labor. These include:

- (5) care of horses:
- (6) plowing the fields of a dairy farm:
- (7) cutting and raking hay;
- (8) care and/or marketing of crops, livestock, or products yielded by stock, including:
 - (a) wool and sheep;
 - (b) dairy products;

- (c) swine;
- (d) manure;
- (e) cordwood;
- (f) hay;
- (g) vegetables;
- (h) fruit;
- (i) eggs;
- (j) lard;
- (k) tobacco;
- (l) cotton; and
- (m) other provisions for the mouth.

Applying these principles to Claimant's employment, I find that Claimant was clearly engaged in "farm labor". Claimant's principal duties were care of livestock and cutting of wood, both of which are recognized as "farm labor". Claimant's 5/30/03 injury was sustained while engaged in baling hay, which also comes under the purview of "farm labor". Claimant's alleged 5/20/04 injury was from "replacing old fence posts", which (although not specifically mentioned in the listing above) is part of any livestock farmer's duties. I find that Claimant's principal occupation was the exempt occupation of "farm labor". Claimant was engaged in "farm labor" at the time of each claimed injury. As noted above, even though the general business of Employer may have been "circus" (not "farming"), it is the character of Claimant's work that determines whether that work constitutes the exempt occupation of "farm labor". I find that, without question, Claimant's work was "farm labor". The fact that Claimant worked an average of eight days per year at the circus's winter headquarters performing (presumably) work other than exempt "farm labor", has no legal significance in this case, because, as *Korte* states: "... a worker may render services to an employer in dual or multiple capacities, and may be subject to the jurisdiction of the (Workers' Compensation) Law when engaged in one capacity, but exempt from its application while engaged in another." Therefore, if Claimant had injured himself while working in a non-exempt occupation at the circus's winter headquarters, the result might be different. Based on the facts of this case, there is no question that Claimant was engaged in the exempt occupation of "farm labor" at all times relevant to both claims herein.

The next issue that must be addressed is whether Employer elected that its farm labor be covered under the Missouri Workers' Compensation Law. Claimant argues that George Carden Circus International, Inc., elected to have its exempt farm labor employees covered under the Missouri Workers' Compensation Law by purchasing a policy of workers' compensation insurance. The pertinent portion of Section 287.090.2 states as follows:

Any employer exempted from this chapter as to the employer or as to any class of employees of the employer pursuant to the provisions of subdivision (3) of subsection 1 of section 287.030 or pursuant to subsection 1 of this section may elect coverage as to the employer or as to the class of employees of that employer pursuant to this chapter by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member.

An analysis of the clear language of this section yields the conclusion that an election may be made by an employer which would otherwise be totally exempt from the Workers' Compensation Law (e.g., a non-construction industry employer with less than five employees) **or** by an employer (such as George Carden Circus International, Inc.) which has a "class of employees" exempt from the act (which presumes that that employer also has one or more classes of employees which are not exempt). The clear language of the statute also states that there are three methods to make the election: (1) by purchasing and accepting a workers' compensation insurance *policy*; (2) by purchasing and accepting a workers' compensation insurance *endorsement*; or (3) by written notice to the group self-insurer of which the employer is a member. An employer who make an election by utilizing method 2 or 3 *already has workers' compensation coverage*; utilizing method 2, the employer would purchase and accept an endorsement to its already existing workers' compensation policy to cover an exempt class of employees; utilizing method 3, the employer would notify its group workers' compensation self-insurer, of which it is already a member (i.e., already covering its covered employees).

Thus, if George Carden Circus International, Inc., had less than five employees, the purchasing and acceptance of a workers' compensation insurance policy would, *ipso facto*, constitute an election. But George Carden Circus International, Inc., had approximately 30 employees, and was required to maintain a policy of workers' compensation on its non-exempt employees. By complying with the law and purchasing a policy for those employees, George Carden Circus International, Inc., did not automatically elect coverage for Claimant, an employee engaged in exempt "farm labor". It would be necessary to examine the contents of that policy, or any endorsements thereto, to determine if an election was made to cover Claimant. Unfortunately, the policy was not in evidence (nor were endorsements, if any). Claimant argues in his brief: "Although the lawyer appearing on behalf of the employer/insurer did not have a copy of the policy at the hearing as required by law, the fact that the insurer for the circus entered its appearance on both claims conclusively proves that workers' compensation insurance exists. §287.300." It is debatable whether §287.300 provides for such "conclusive proof", nevertheless, it would only be proof that St. Paul Travelers provided a valid workers' compensation policy to George Carden Circus International, Inc., covering the dates of Claimant's injuries

(to which fact counsel for St. Paul Travelers stipulated), and would **not** constitute proof that such policy constituted an election under §287.090.2. As I find that Claimant has the burden of proof on the issue of election (as opposed to Employer having the burden of proving a *non-election*), I find that George Carden Circus International, Inc., did **not** elect to have Claimant, an employee engaged in exempt “farm labor”, covered under the Missouri Workers’ Compensation Law. [\[8\]](#)

As both of Claimant’s alleged injuries occurred while in the exempt occupation of “farm labor”, and as Employer did not make an election to cover “farm labor”, **Claimant’s Claim for Compensation against George Carden Circus International, Inc., in Injury No. 03-146629 is denied, Claimant’s Claim for Compensation against George Carden Circus International, Inc., in Injury No. 04-144518 is denied, and Claimant’s Claim for Compensation against the Second Injury Fund in Injury No. 04-144518 is denied.**

All other issues are moot.

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) It is certainly possible that the “G.C. Ranch” account was owned by George Carden Circus International, Inc., but there is no evidence to support such a finding. Likewise, there is no evidence that Claimant received a Form W-2 from George Carden Circus International, Inc., for 2004.

[\[2\]](#) Section 287.090.1 (1) states: “1. This chapter shall not apply to: (1) Employment of farm labor, domestic servants in a private home, including family chauffeurs, or occasional labor performed for and related to a private household”.

[\[3\]](#) Section 287.090.2 governs the “election” of coverage of exempt employment. It reads:

Any employer exempted from this chapter as to the employer or as to any class of employees of the employer pursuant to the provisions of subdivision (3) of subsection 1 of section 287.030 or pursuant to subsection 1 of this section may elect coverage as to the employer or as to the class of employees of that employer pursuant to this chapter by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member. The election shall take effect on the effective date of the workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member, and continue while such policy or endorsement remains in effect or until further written notice to the group self-insurer of which the employer is a member. Any such exempt employer or employer with an exempt class of employees may withdraw such election by the cancellation or nonrenewal of the workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member. In the event the employer is electing out of coverage as to the employer, the cancellation shall take effect on the later date of the cancellation of the policy or the filing of notice pursuant to subsection 3 of this section.

[\[4\]](#) Although the policy was not in evidence, counsel for Employer and Insurer attached to his brief what is purported to be a copy of the policy. It provides coverage for employee classification codes 8742 (salespersons), 8810 (clerical office employees), and 9186 (circus and carnival employees and drivers), but does not provide coverage for “farm labor”.

[\[5\]](#) It is certainly possible that the “G.C. Ranch” account was owned by George Carden Circus International, Inc., but there is no evidence to support such a finding. Likewise, there is no evidence that Claimant received a Form W-2 from George Carden Circus International, Inc., for 2004.

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endorsement, or by written notice to the group self-insurer of which the employer is a member. The election shall take effect on the effective date of the workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member, and continue while such policy or endorsement remains in effect or until further written notice to the group self-insurer of which the employer is a member. Any such exempt employer or employer with an exempt class of employees may withdraw such election by the cancellation or nonrenewal of the workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member. In the event the employer is electing out of coverage as to the employer, the cancellation shall take effect on the later date of the cancellation of the policy or the filing of notice pursuant to subsection 3 of this section.

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