

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 04-107056

Employee: David J. Wallace, deceased

Dependent: Davida Wallace, widow

Employer: Bell Brothers, LLC

Insurer: Uninsured

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

Date of Accident: September 26, 2004

Place and County of Accident: One-half mile east of Scandia, KS

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, read the briefs, 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 August 29, 2006, as supplemented herein.

The administrative law judge concluded that employee sustained fatal injuries due to a motor vehicle accident arising out of and in the course of his employment, and awarded appropriate workers' compensation death benefits. The Second Injury Fund (Fund) filed a timely Application for Review with the Commission alleging the administrative law judge made two erroneous determinations: 1) not applying the provisions of section 287.120.5 RSMo resulting in a reduction of death benefits by 15% due to a safety violation; and 2) not allowing the Fund a credit for payment of death benefits for monies paid the dependent/surviving spouse on account of an occupational accidental death policy. We disagree and affirm the benefits awarded by the administrative law judge.

The instant claim involves a request for workers' compensation death benefits. Employer was uninsured for the purposes of workers' compensation; therefore, the Fund assumes liability and any benefits are to be paid from the Fund pursuant to section 287.220.5 RSMo.

We will first address the issue of a credit for any monies paid on account of the occupational accident policy. The Commission agrees that the Fund is not entitled to any credit because payment from an occupational accident policy does not constitute payment from either employer or employer's workers' compensation insurance carrier, as required under section 287.270 RSMo. *Wilmeth v. TMI, Inc.*, 26 S.W.3d 476, 482 (Mo.App. S.D. 2000); see also *Leach v. Bd. of Police Comm'rs of Kan. City*, 118 S.W.3d 646 (Mo.App. W.D. 2003).

We next address the Fund's argument that it is entitled to a 15% reduction in death benefits. The Commission agrees that the evidence does not support a reduction in benefits for a safety violation. The Fund failed to meet its burden of proof with regard to the 15% reduction. The Fund is required to either prove a willful safety violation on the part of employee as set forth in section 287.120.5 RSMo, or show that it has satisfied the elements set forth in *Davis v. Roadway Express, Inc.* 764 S.W.2d 145 (Mo.App. S.D. 1989). The Court held in *Davis* that a 15%

reduction would apply if:

- i) The employee's death was caused by his failure to obey the employer's seat belt rule;
- ii) The rule was a reasonable rule adopted by the employer for the safety of its employees;
- iii) The rule had been kept posted in a conspicuous place on the employer's premises;
- iv) The employee had actual knowledge of the rule; and
- v) The employer had prior to employee's death, made a diligent effort to cause its employees to obey or follow the rule.

The Commission agrees that there was insufficient evidence in the record demonstrating a willful failure on the part of employee to wear his seat belt. The Commission further agrees that the Fund failed to satisfy the elements set forth in *Davis*; most significantly, that employee's failure to obey employer's seat belt rule caused his death. We emphasize that there is inadequate evidence in the record to deduce whether employee's death was in fact caused by his failure to wear his seat belt. There is no expert testimony establishing any causal relationship between employee's death and his failure to wear his seat belt. Additionally, the Commission finds that there was not sufficient evidence in the record to establish that employer made a diligent effort to enforce its safety rule.

The Commission agrees with the ultimate conclusion reached by the administrative law judge, that employee perished in an accident which arose out of and in the course of his employment with employer.

The Commission agrees that appropriate workers' compensation death benefits were awarded employee. The Fund is neither entitled to a credit for monies paid on account of an accidental death policy nor a reduction in death benefits due to a safety violation.

The award and decision of Administrative Law Judge Ronald F. Harris, issued August 29, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 29th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: David J. Wallace (deceased)

Injury No. 04-107056

Dependents: Davida Wallace

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

Employer: Bell Brothers, LLC

Additional Party: Second Injury Fund

Insurer: Uninsured.

Hearing Date: July 20, 2006.

Checked by: RFH/cs

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: September 26, 2004.
5. State location where accident occurred or occupational disease was contracted: One-half mile east of Scandia, KS.
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? Uninsured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Driving truck transporting material with destination of Salt Lake City, Utah.
12. Did accident or occupational disease cause death? Yes. Date of death?
September 26, 2004.
13. Part(s) of body injured by accident or occupational disease: Multiple.
14. Nature and extent of any permanent disability: Death.
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: \$1,056.44.
- 19. Weekly compensation rate: \$675.90.
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning , for
Claimant's lifetime

22. Second Injury Fund liability: Yes.

\$675.90 per week from Second Injury Fund (see award).

Uninsured medical/death benefits : Burial expenses of \$5,000.00 to be paid by Second Injury Fund.

TOTAL:

23. Future requirements awarded: \$675.90 per week from Second Injury Fund (see award).

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:

Gregory Mealy.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David J. Wallace (deceased)

Injury No: 04-107056

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

Dependents: Davida Wallace

Employer: Bell Brothers, LLC

Additional Party Second Injury Fund

Insurer: Uninsured.

Checked by: RFH/cs

FINDINGS OF FACT and RULINGS OF LAW:

The matter of David Wallace, deceased, proceeded to a final hearing on July 20, 2006. Attorney Gregory Mealy represented Davida Wallace, wife/dependent ("Ms. Wallace"). Attorney Terrence Farris represented Bell Bros., L.L.C. (Employer) and Katie Ambler represented the Second Injury Fund ("SIF" or "Fund").

The parties stipulated to the following facts:

- 1) On September 26, 2004, David J. Wallace was an employee of Bell Bros., LLC, 11 Industrial Drive, Auxvasse, Missouri 65231, and David J. Wallace had been employed continuously by Bell Bros., LLC for over one year;
- 2) On September 26, 2004, Bell Bros., LLC had five or more employees, and had five or more employees continuously for more than one year;
- 3) David J. Wallace was an over-the-road driver for Bell Bros., LLC and was not an owner-operator;
- 4) On September 26, 2004, David J. Wallace was driving a truck owned by Bell Bros., LLC, hauling a trailer owned by Bell Bros., LLC, and the contents of the trailer were refractor cement, joint compound and two cement mixers, and his destination was Salt Lake City, Utah;
- 5) On September 26, 2004, David Wallace was involved in a motor vehicle accident while driving the truck and trailer owned by Bell Bros., LLC;
- 6) At the time of the accident, David J. Wallace was not wearing his seat belt;
- 7) On September 26, 2004, Bell Bros., LLC did not have Workers' Compensation insurance and was not self-insured regarding workers' compensation insurance;
- 8) David J. Wallace was paid weekly based upon his output, mileage and allowance;
- 9) David J. Wallace's average gross wages over the last 13 full weeks prior to September 26, 2004, were \$1,056.44;
- 10) On September 26, 2004, Davida Wallace was married to David J. Wallace, Davida Wallace survives David J. Wallace, and Davida Wallace is not, and since September 26, 2004, has not been a married person;
- 11) As a result of the death of David J. Wallace, Davida Wallace incurred funeral expenses totaling \$8,050.34.

The parties also stipulated to a death benefit rate of \$675.90.

The following were identified as disputed issues to be resolved:

- 1) At the time of the accident was Claimant acting in the scope and course of employment
- 2) Are the Employer and/or the Second Injury Fund entitled to a credit for money paid and continuing to be

- paid to Ms. Wallace under an occupational insurance accident policy
- 3) Are any benefits to be reduced by Claimant's failure to follow safety rules by not wearing his seat belt
 - 4) Entitlement to funeral expenses
 - 5) Entitlement to death benefits
 - 6) Liability of the Second Injury Fund
 - 7) Right to subrogation

Claimant's Exhibits A, B, C, C1-C10, D, E, F, G and J were admitted into evidence. An objection to the relevance of Claimant's Exhibit I was sustained but the exhibit was retained for the purpose of a full and complete record. Employer's Exhibits 1 through 6 were admitted. The Fund offered no exhibits.

Ms. Wallace's attorney requests a fee of 25% of all benefits awarded.

Aaron Bell, a dispatcher and member of Bell Bros., LLC, testified that the Employer had determined preferred or recommended routes for their drivers to take to a particular destination. Those routes were determined based on safety and distance. The Employer would verbally instruct a new driver of the preferred route and would also provide the driver with a map and print out of the route. The Employer would only provide the driver with a preferred route one time and would not do so again unless the driver requested it.

Bell testified that Claimant left Auxvasse with a load he was to transport to Salt Lake City. Bell stated that the preferred route to take from Auxvasse to Salt Lake City is set out in Employer's Exhibit 5 and does not include travel on U.S. Highway 36 (the accident occurred ½ mile east of Scandia, Kansas on Highway 36). Bell testified at the hearing that 99% of the time drivers would take the preferred route unless road or weather conditions prohibited them from doing so. If a driver took a route other than the preferred route, the driver was expected to call the employer and advise what route the driver would be taking. However, Bell's deposition testimony differed in that when asked if he had any idea how often drivers would not follow the recommended route he responded "No" and went on to say "Usually they (drivers) would ask us or tell us if they were going to run another route" (Employer's Exhibit 6, p.85). Bell testified that it is possible to get to Salt Lake City by way of Highway 36 and that he has known of times when drivers did take that route. Bell had no knowledge whether any of the roads along the preferred route were closed on September 26, 2004, nor did he have any knowledge of the weather along that route that day.

Bell also testified that the Employer would instruct the drivers on safety issues, wearing seat belts, following all laws and that the employer had posters up at the workplace regarding safety rules and the wearing of seat belts. Federal Motor Carrier Safety Regulations state that if a commercial motor vehicle has a seat belt assembly installed the vehicle is not to be driven unless the driver has properly restrained himself/herself with the seat belt (Employer's Exhibit 1, page 396). Bell admitted that he did not know what exact posters were posted in September 2004.

Davida Wallace testified that she and the Claimant were married on October 25, 1997, were married on the date of the accident and that she has not remarried following the accident. Ms. Wallace testified that Claimant had a daughter, Ashley Wallace, from a prior marriage that Ashley has graduated from High School and is not enrolled in secondary education. Ms. Wallace stated that Ashley is emancipated and she is not claiming status as a dependent. (The claim for compensation filed in this case listed both Davida and Ashley Wallace as dependents at the time the claim was filed).

Ms. Wallace testified that she had accompanied the Claimant on a number of his trips, perhaps eight or nine trips to Salt Lake City, and that she recalled that he took Highway 36 on at least one of those trips. On other trips to Salt Lake City, Claimant would take various different routes. Ms. Wallace also testified that she received \$10,000 in February 2005, representing payment of \$2,000 a month for 5 months from Zurich Insurance Company and has continued to receive \$2,000 a month thereafter.

1. At the time of the accident was the Claimant acting in the scope and course of employment?

Section 287.120.1 states that an employer subject to the provisions of the Workers' Compensation Law is required to provide compensation for accidents arising out of and in the course of the employee's employment.

Both the Employer and the Fund argue the Claimant was not in the scope and course of his employment at the time of the accident because he had either deviated from or simply had not complied with the Employer's requirement to follow a specific, designated and required route for delivery to Salt Lake City.

Although the route set out in Employer's Exhibit 5 is portrayed as being the "required" route for delivery to Salt Lake City, the evidence simply does not support that contention. Repeatedly throughout the testimony at hearing as well as Bell's deposition, the terms "recommended" and/or "preferred" rather than "required" are used to describe the route to Salt Lake City. There was testimony by both Bell and Ms. Wallace indicating the route which included travel on Highway 36 was used by drivers to transport goods to Salt Lake City. There is no evidence to indicate that those trips using Highway 36 were all the result of weather or road conditions nor is there any evidence that any driver was ever disciplined for not following the route set out in Employer's Exhibit 5 for delivery to Salt Lake City. In fact Bell testified that he believed Claimant was engaged in the scope and course of employment at the time of the accident (Employer Exhibit 6 pgs. 27 and 92). I find at the time of the accident Claimant was performing the duties of his employment at a place where he could reasonably be expected to be in fulfilling those duties. As a result, the accident arose out of and was in the course of Claimant's employment.

2. Are the Employer and/or the Fund entitled to a credit for money paid and continuing to be paid to Ms. Wallace under an occupational insurance accident policy?

Section 287.270 RSMo 2000 provides in relevant part, "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder . . ." "Payments from an insurance company or from any source other than the employer or the employer's insurer for liability for Workmen's Compensation are not to be credited on Workmen's Compensation benefits." Ellis v. Western Elec. Co., 664 S.W.2d 639, 643 (Mo. App. 1984). Consequently, Employer is not entitled to any credit for monies paid on account of the occupational accident policy.

Ms. Wallace argues the same reasoning applies to the Fund and cites *Wilmeth v. TMI, Inc.*, 26 S.W.3d 476 (Mo. App. S.D. 2000) as support for her position. *Wilmeth* posed a similar situation to the present case and the Court applying the afore-cited section 287.270 determined the Fund was also not entitled to a setoff or credit because payment from an occupational-accident policy did not constitute payment from the employer or the employer's workers' compensation insurance carrier.

The Fund correctly points out that in *Phillips v. Par Electric*, 92 S.W.3d 278 (Mo. App. W.D. 2003) the Western District specifically declined to follow *Wilmeth*. It should also be noted that in *Mann v. Varney Constr.*, 23 S.W.3d 231 (Mo. App. E.D. 2000) the Eastern District also declined to follow *Wilmeth*. Both *Phillips* and *Mann* dealt with whether the Fund would be required to reimburse the claimant for medical bills that had already been paid by another source. In both cases the Court engaged in a thoughtful discourse and analysis of the purpose and the legislative intent in creating the Fund.

In deciding not to follow *Wilmeth*, the court in *Phillips* noted that the *Wilmeth* decision was based on section 287.270 but did not apply section 287.220.5, which addresses the Fund's responsibility in cases involving an uninsured employer. The Court then engaged in an analysis of the purpose and intent behind the establishment of the Fund and noted that 287.220.5, in relevant part, stated that "[i]f an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer." Ultimately, the Court concluded that it would not be "fair, reasonable, and necessary" to take money from the Fund for the purpose of paying medical bills that had already been paid.

However, the instant case is distinguishable from *Wilmeth*, *Phillips* and *Mann* in that this involves a death case and the payment of burial expenses (which all parties have stipulated have been paid by Ms. Wallace), rather than the payment of medical bills.

The Fund relies on the beginning language in 287.220.5 quoted in *Phillips* as supporting their contention they should be entitled to a credit or offset against funds already paid or to be paid in the future from the accident policy contending that to allow otherwise would exceed the statutory requirement to pay “fair, reasonable, and necessary expenses to cure and relieve the effects of the injury”.

However, the relevant language as pertains to a death case is found later in 287.220.5 where it states in relevant part, “or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241” (emphasis added). It should be noted that this latter language replaces “cure and relieve the effects of the injury or disability” with respect to a death case with the references to the specific statutes addressing death benefits. Section 287.241 allows the dependent and the employer to enter into a structured settlement which provides different weekly benefits than as set out in section 287.240 and is not applicable to the instant case.

Section 287.240 addresses how death benefits are determined, who are dependents and burial expenses. Subsection 2 of that statute states in relevant part “The employer shall also pay to the total dependents of the employee a death benefit. . .” and then goes on to provide a means for determining what the amount of the death benefit is to be. Nothing in this statute provides the employer with the right to a credit or offset.

It is important to note that while Section 287.220.5 does provide the Fund with a right to subrogation against “[a]ny funds received by the employee or the employee’s dependents, through civil or other action, . . .” there is no provision in the statute that specifically allows the Fund a right to a credit or setoff.

In arriving at the respective decisions in *Phillips* and *Mann* the Court in both cases found it significant that requiring the Fund to pay for medical expenses, which had already been paid, would result in a “windfall” to the claimant. In a death case such as this, one would be hard pressed to find that denying the Fund an offset or credit would result in a “windfall” to the widow. In fact allowing the Fund a credit here would result in indirectly rewarding an employer who, whether intentionally or inadvertently, failed to comply with the statutory requirement to provide workers’ compensation insurance for its employees. Applying the law to the facts presented in this case, the Fund is not entitled to a credit or offset for payments made or continuing to be made pursuant to the occupational accident policy.

3. Are any benefits to be reduced by Claimant’s failure to follow safety rules by not wearing his seat belt.

At the time of the accident, section 287.120.5 RSMo provided as follows:

“Where the injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee’s failure to obey any reasonable rule adopted by the employer for the safety of employee, which rule has been kept posted in a conspicuous place on the employer’s premises, the compensation and death benefit provided for herein shall be reduced fifteen percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a diligent effort to cause his employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.”

The instant case presents a situation that is similar in many respects to those present in *Davis v. Roadway Express, Inc.* 764 S.W.2d 145 (Mo. App. S.D. 1989). *Davis* involved a truck driver who was not wearing his seat belt, apparently fell asleep while driving and was involved in a fatal accident. The Commission determined there was insufficient evidence in the record to demonstrate a “willful failure” on the part of the decedent to wear his seat belt. With respect to the issue of the failure to obey a safety rule, the Commission felt bound by the decision in *Triola et al. v. Western Union Telegraph Co.*, 25 S.W.2d 518 (Mo. App. 1930) limiting violations of rules to instances occurring while on the employer’s premises only. The Court in *Davis* departed from *Triola* and held that if:

- a) The decedent’s death was caused by his failure to obey the employer’s seat belt rule;
- b) The rule was a reasonable rule adopted by the employer for the safety of its employees;
- c) The rule had been kept posted in a conspicuous place on the employer’s premises;
- d) The decedent had actual knowledge of the rule; and
- e) The employer had prior to decedent’s death, made a diligent effort to cause its employees to obey or follow the rule

then the 15% reduction in benefits would apply. The Court remanded the case back to the Commission for findings on issues a; b and c listed above.

Although the parties have stipulated Claimant was not wearing a seat belt at the time of the accident, just as in *Davis* there is insufficient evidence to demonstrate a “willful failure” on the part of the Claimant to wear his seat belt. As instructed by *Davis*, we must then look to whether the Claimant’s death was caused by his failure to obey the employer’s seat belt rule.

The Fund deposed Joel Cates, a state trooper for the Kansas Highway Patrol (Claimant’s Exhibit J). Trooper Cates was the officer who investigated the accident and filed the accident report (Claimant’s Exhibit B). Trooper Cates testified that he had undergone both basic and advanced accident investigation training and that over a period of some 24 years he had investigated between 60 and 70 accidents involving fatalities (Claimant’s Exhibit J, p.9). Trooper Cates stated that no one was in the cab of the truck when he arrived on the scene; the whole cab of the tractor was “pretty much smashed clear down to the frame”; and that in his opinion it was “highly unlikely” that anyone in the cab would still be alive (Claimant’s Exhibit J, p.13). The cause of death was listed as “multiple blunt force injuries” (Claimant’s Exhibits D, E and F).

There simply is no evidence indicating that Claimant’s failure to obey the employer’s seat belt rule caused his death so there is no reason to address the other factors set out in *Davis*. Any death benefits awarded in this award will not be reduced for a safety violation.

4. Entitlement to funeral expenses

The parties stipulated that Ms. Wallace incurred funeral expenses in the amount of \$8,050.34 (Claimant’s Exhibits A and G). Pursuant to 287.240.1 recovery is limited to reasonable burial expenses not to exceed \$5,000.00. I find Ms. Wallace is entitled to reimbursement of burial expenses in the amount of \$5,000.00.

5. Entitlement to Death Benefits

As noted earlier in this award, Claimant’s death is the result of an accident which arose out of and in the course of his employment. Therefore, death benefits are appropriate. The Claim for Compensation was filed on behalf of Davida Wallace, widow, and Ashley Wallace, daughter, as Claimant’s dependents. Ashley is now

