

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 02-148212

Employee: Marty Warren, dec.

Claimants: Penny Warren, spouse; Mickey D. Warren, David L. Warren,  
Joshua J. Warren, children

Employer: David Warren

Insurer: Uninsured

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

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

Was Marty Warren an "employee" under the Missouri Workers' Compensation Law?  
Section 287.020.1 RSMo provides, in relevant part, as follows:

The word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election ...

Here, there is no credible<sup>1</sup> evidence of any employment contract between Marty Warren and David Warren, nor any credible evidence that Marty Warren actually earned, or stood to earn, any wages for the services he performed for David Warren on August 3, 2002. But these are not prerequisites to a finding of an employment relationship in Missouri:

An uncompensated volunteer can be covered by workers' compensation as an employee by "appointment." *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204, 206 (Mo. banc 1981); *Orphant v. St. Louis State Hosp.*, 441 S.W.2d 355, 360 (Mo. 1969); and *Fielder v. Production Credit Assoc.*,

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<sup>1</sup> We acknowledge Penny Warren's testimony that Marty Warren told her, on the night before the accident, that he would be working a job with his father for which he expected to earn \$600 to \$1000. We note that the administrative law judge found Ms. Warren's testimony lacking credibility. While we believe it is entirely possible that Marty Warren did tell Penny Warren that he was going to work for his father for pay, this statement from Marty Warren still amounts to hearsay from an individual not shown to be particularly credible.

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429 S.W.2d 307, 314 (Mo. App. 1968); *See also, Yaffe v. St. Louis Children's Hosp.*, 648 S.W.2d 549, 550 n.1 (Mo. App. 1982). However, a volunteer is not necessarily an employee within the meaning of § 287.020. To determine whether a volunteer is an employee by appointment requires examination of two factors: (1) whether the volunteer is in the service of the employer; and (2) whether the employer exercises control, or has the right of control, over the volunteer. *Stegeman*, 611 S.W.2d at 206; *Howard v. Winebrenner*, 499 S.W.2d 389, 394-95 (Mo. 1973).

*Talir v. Mid-West Area Agency on Aging*, 848 S.W.2d 517, 518 (Mo. App. 1993).

“In short, it is said that only two facts are necessary to an employer-employee relationship under the Compensation Law, namely, one, that the claimant was in the service of the alleged employer, and, two, that said services were controllable by the latter.” *Lawson v. Lawson*, 415 S.W.2d 313, 319 (Mo. App. 1967)(citation omitted). It is uncontested that Marty Warren was in the act of assisting David Warren in affixing a piece of siding to a customer’s house at the time of the accident that caused his death; we must conclude, therefore, that Marty Warren was in the service of David Warren at the time of the accident. Accordingly, the determinative inquiry herein is whether David Warren exercised, or retained the right to exercise, control over the manner and means whereby Marty Warren performed his services. We conclude that claimants are unable to satisfy their burden on this point, even under the required liberal construction<sup>2</sup> of the meaning of “employee.”

Although the record suggests that Marty Warren had performed some services for David Warren in past years, there is no evidence to suggest that there was any ongoing or regular expectation as of August 3, 2002, that Marty Warren would be subject to David Warren’s supervision or control simply by virtue of his presence at a job site. We defer to (and adopt) the administrative law judge’s determination that David Warren provided credible testimony at the hearing. We find that David Warren had no intention that Marty Warren would provide any services on August 3, 2002, and that Marty Warren was on the job site for the sole purpose that day of David Warren providing supervision in connection with Marty Warren’s history of alcohol abuse. In *Talir v. Mid-West Area Agency on Aging*, 848 S.W.2d 517 (Mo. App. 1993), the court held that a volunteer worker was unable to prove she was an employee where she undertook, of her own accord, to perform certain duties on a day she was not normally scheduled. Similarly, Marty Warren voluntarily undertook to perform services for David Warren of his own accord, absent any expectation from David Warren that Marty Warren would do so. Just moments before, Marty Warren had been casually conversing with a customer; there is no evidence on this record that Marty Warren would not have been permitted to continue in this idle activity for as long as he chose.

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<sup>2</sup> We acknowledge that under the law in effect on the date of the accident, the provisions of the Missouri Workers’ Compensation Law were to be “liberally construed as to the persons to be benefited,” *Lawson*, 415 S.W.2d at 318, with the aim of “extend[ing] benefits to the largest possible class and resolv[ing] any doubts as to the right of compensation in the employee’s favor.” *Sage v. Talbot Indus.*, 427 S.W.3d 906, 912 (Mo. App. 2014).

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Claimants understandably place much emphasis on the fact that David Warren told Marty Warren to remove a nail in the moments immediately preceding the accident. But after careful consideration, we are not persuaded that this fact, standing alone, is sufficient to support an inference that David Warren enjoyed the right to control Marty Warren on August 3, 2002. We note the absence of any evidence as to what would have occurred if Marty Warren had disregarded David Warren's instruction to remove the nail. Given the circumstances, we view David Warren's telling Marty Warren to remove the nail as more in the nature of a suggestion or recommendation, designed to aid Marty Warren in his voluntary performance of a service he was not expected nor asked to perform.

In light of the foregoing considerations, we find that David Warren did not exercise, nor did he retain the right to exercise, any control over Marty Warren on August 3, 2002. It follows that claimants have failed to prove that Marty Warren was an "employee" as that term is defined under § 287.020.1 RSMo.

**Conclusion**

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued December 31, 2013, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## FINAL AWARD

Employee: Marty Warren Injury No. 02-148212  
Dependents: Penny Warren (spouse), et al  
Employer: David Warren  
Insurer: Uninsured  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: December 11, 2013 Checked by: PAM/pd

### 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: August 3, 2002
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri
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? No
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
N/A
12. Did accident or occupational disease cause death? N/A 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? N/A
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Not determined
19. Weekly compensation rate: Not determined
20. Method wages computation: N/A

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Marty Warren Injury No. 02-148212  
Dependents: Penny Warren (spouse), et al  
Employer: David Warren  
Insurer: Uninsured  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: December 11, 2013 Checked by: PAM/pd

On December 11, 2013, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Marty Warren, is deceased. His widow, Penny Warren, appeared in person and with counsel, Mark Kelly. David Warren appeared in person and with counsel, Nancy Jackson. The Second Injury Fund was represented by Assistant Attorney General Richard Wiles.

For the reasons noted below, I find that Marty Warren was not an employee of David Warren and this claim for compensation is denied.

## **STIPULATIONS**

The parties stipulated to the following:

- 1) That Marty Warren sustained injury by accident which resulted in his death on August 3, 2002;
- 2) That Penny Warren is Marty Warren's surviving spouse;
- 3) That at the time of Marty's Warren's death, he had three minor children who were emancipated at the time of the hearing; and
- 4) That a timely claim for compensation was filed.

## **ISSUES**

The issues to be resolved by this hearing are as follows:

- 1) Whether Marty Warren was an employee of David Warren;
- 2) Whether David Warren is an employer under the workers' compensation law; and
- 3) What is Marty Warren's rate of compensation.

## FINDINGS OF FACT AND RULINGS OF LAW

There is no dispute regarding the circumstances leading to the injury and subsequent death of Marty Warren. On August 3, 2002, Marty Warren was with his father at the home of Steve Ross. David Warren was attempting to apply siding to the home but was having difficulty due to a protruding nail. Marty Warren assisted his father by taking the nail out. Marty Warren lost his balance on the walkboard in place and fell off backwards hitting his head on the ground. Marty Warren sustained a skull fracture. He was transported by ambulance to a local hospital where he later died.

There are significant disputes regarding why and how Marty Warren ended up on a walkboard at the home of Steve Ross on August 3, 2002.

According to Penny Warren, widow of Marty Warren, Marty was working for David Warren. She argues an employer/employee relationship existed between David and Marty Warren. She argues she is entitled to an award of compensation for the death of Marty Warren. Missouri Workers' Compensation Law defines an employee as any "person in the service of any employer...under any contract of hire, express or implied, oral or written." §287.020.1 RSMo 1994. "A claimant establishes an employer/employee relationship if the claimant worked in the service of the alleged employer and the employer controlled these services." *DiMaggio v. Johnston Audio/D&M Sound*, 19 SW 3d 185 (Mo. App. 2000).

Penny Warren testified that she spoke with Marty Warren by telephone the evening before August 3, 2002. Marty Warren was staying at the home of his sister, Teresa McClain. Penny and Marty Warren were not living together at this time and have a long history of marital problems due in part to Marty Warren's chronic alcoholism and substance abuse.

Penny Warren indicated that Marty told her that he would be working the following day on a siding job and would make \$600, \$800 or \$1,000 for the job. She testified he had done work for his father in the past, possibly six, seven or eight jobs. She had no further idea of where the job was, what he was to be doing or how long it might take.

David Warren, Marty Warren's father and the alleged employer, testified that Teresa McClain, daughter of David Warren and sister of Marty Warren, contacted him on Friday. McClain told her father that she and her husband were leaving town. She did not want her brother, Marty Warren, to be left alone in her home. She asked David Warren to spend some time with Marty Warren. He told McClain that he would pick Marty up the following morning and that Marty could hang out while he was doing siding work for a "buddy."

Teresa McClain testified that she called her father to request that he get Marty because she was leaving town and did not want Marty to be alone because of his drinking problems. McClain testified that her father said he had a job to do on Saturday but would call Marty to see if he wanted to "tag along."

I find the testimony of David Warren and Teresa McClain both to be credible and compelling. Marty Warren, who was on social security disability at the time of his death, had a history of severe alcohol and drug abuse. He frequently lived with his sister. She was concerned about him being alone at her house. McClain contacted David Warren to assist. David Warren complied with her request by allowing Marty Warren to “tag along.”

It was an unfortunate and tragic series of events that led to Marty Warren’s death, but it did not occur because he was an employee of David Warren. Marty Warren was helping out his father, David Warren, just as David Warren was helping out Teresa McClain. There was no evidence that Marty Warren was an employee of David Warren for workers’ compensation liability.

Penny Warren’s testimony is simply not credible. Her testimony was incomplete. She was a poor historian. She was not living with Marty Warren at the time and acknowledges that the relationship was contentious. Penny Warren’s version of her conversation with Marty Warren the night before August 3, 2002 is inconsistent with the credible testimony of David Warren and Teresa McClain.

I find based on the definition of employee under §287.020.1 RSMo and the credible testimony of David Warren and Teresa McClain that Marty Warren was not in the service of David Warren and, therefore, was not an employee under §287.020.1. No workers’ compensation benefits are awarded. Accordingly, Marty Warren’s claim for compensation is denied.

Since I did not find Marty Warren an employee under the Workers’ Compensation Act, I make no finding regarding whether David Warren was an employer under the Missouri Workers’ Compensation Act.

Finally, Terry Cordray, vocational expert, testified regarding wages paid to individuals performing general labor and construction work in 2002. Since I have found no employer/employee relationship existed between David and Marty Warren, I make no finding of a compensation rate.

Made by: \_\_\_\_\_

**Paula A. McKeon**  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*