

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STACI LEWIS, ET AL,)
)
 Appellants,)
)
 -vs-)
)
 NATHAN GILMORE, ET AL,)
)
 Respondents.)

No. WD72629

91834

FILED

OCT 28 2011

CLERK, SUPREME COURT

Appeal from the 9th Judicial Circuit Court of Linn County, Missouri
The Honorable Gary Ravens

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This action involves the question of whether the Appellants, whose husband/father was killed in a work related accident, and who obtained an award against a statutory employer, may bring a civil action against the employer, who did not carry workers' compensation liability coverage at the time of the accident, under the provisions of Section 287.280.1 R.S. MO and hence involves the construction of a state statute.

This appeal does not involve the validity of any treaty or statute of the United States, or any statute or provision of the Constitution of this state nor does it otherwise fall within the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction for this appeal is vested in the Missouri Court of Appeals, Article 5, Section 3, of the Missouri Constitution. Because this cause was briefed, and final judgment was entered in Linn County, jurisdiction is vested in the Missouri Court of Appeals, Western Division, R.S. Mo. §477.050.

POINT RELIED ON

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT SECTION 287.280.1 ALLOWED APPELLANTS TO PROCEED IN A CIVIL LAWSUIT AGAINST RESPONDENT BUDDY FREEMAN FOR HIS FAILURE TO INSURE HIS LIABILITY UNDER THE MISSOURI WORKERS' COMPENSATION LAWS.

STATEMENT OF FACTS

This lawsuit arises out of an incident that occurred on March 27, 2004 when Lonnie R. Lewis, who was in the course and scope of his employment with Respondent Buddy Freeman, d/b/a R & F Trucking was killed in a motor vehicle accident when the tractor trailer in which he was riding as a passenger overturned and killed him. (Legal File [hereinafter referred to as "LF"] Appellants' Second Amended Petition at 11-15)

The tractor trailer was operated by Respondent Nathan R. Gilmore, who was operating the tractor-trailer in the course and scope of his employment with Respondent Buddy Freeman, d/b/a R & F Trucking. (LF Appellants' Second Amended Petition, at 12 at ¶ 8.)

At the time of the accident Respondent Buddy Freeman was operating his tractor-trailer pursuant to a contract with DOT Transportation, Inc. (LF Affidavit of Pete Jinkens at 36) Plaintiff Staci M. Lewis was the wife of decedent, and plaintiff McCartney Lewis was the minor daughter of decedent and they brought this wrongful death action against Respondents Buddy Freeman and Nathan Gilmore (LF Appellants' Second Amended Petition at 11 ¶1 and ¶ 2)

DOT Transportation, Inc. maintained a policy of workers' compensation insurance which provided coverage to DOT Transportation, Inc. (LF Affidavit of Pete Jinkens at 36); but not to Buddy Freeman. (LF Award AT 51)

Section 287.280.1 provides that an employee (or the employee's dependents) may, when the employer fails to insure its liability under the workers' compensation laws, file a civil action against *such* employer.

Section 287.280.1 R.S.MO provides:

“1. Every employer subject to the provisions of this charter shall, on either an individual or group basis, insure his entire liability thereunder, except as hereafter provided, with some insurance carrier authorized to insure such liability in this state . . . If the employer or group of employers fail to comply with this section, an injured employee or his dependents may elect after the injury either to bring an action against such employer or group of employers to recover damages for personal injury or death and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee. . .”

Staci Lewis, wife of Lonnie Lewis, and their daughter, McCartney Lewis, a minor, filed a workers' compensation claim for the death of Lonnie Lewis against Buddy Freeman, d/b/a R & F Trucking, as employer of Lonnie Lewis and DOT Transportation, Inc., as statutory employer of Lonnie Lewis (LF Claim for Compensation at 24; and Amended Claim for Compensation at 37).

On behalf of DOT Transportation, Inc., Sentry Insurance filed an answer to these claims, however, no answer was ever filed on behalf of Buddy Freeman, either directly or through an insurance carrier, and it was subsequently learned that Buddy Freeman did not carry a workers' compensation liability policy or bond at the time of this incident. Because of this, claimants Staci Lewis and McCartney Lewis dismissed Buddy Freeman as a party in the workers' compensation claim and elected to proceed against Buddy Freeman in a civil lawsuit pursuant to Section 287.280.1 R.S. MO, all as provided for under the Missouri Workers' Compensation Laws. DOT Transportation, Inc. remained as a party in the workers' compensation claim as a statutory employer of decedent Lonnie Lewis. Thereafter DOT Transportation, Inc. brought back into the workers' compensation claim Buddy Freeman in his capacity as the employer of

Lonnie Lewis. Again no Answer to the Claim was filed on behalf of Buddy Freeman nor did any insurance carrier do so on his behalf, and at no time throughout the pendency of the workers' compensation claim did Buddy Freeman ever respond or appear.

DOT Transportation, Inc. did maintain a policy of workers' compensation insurance but it did not provide coverage to owner-operators under contract to DOT Transportation, Inc. *such* as Buddy Freeman and, in particular, did not provide coverage to Buddy Freeman on Buddy Freeman, d/b/a R & F Trucking. (LF Award at 51)

Since Respondent Buddy Freeman had failed to insure his liability under the Missouri Workers' Compensation Laws, Appellants therefore filed this civil action against Respondent Buddy Freeman and his employee driver Nathan Gilmore pursuant to Section 287.280.1. (LF Appellants' Second Amended Petition for Wrongful Death at 10-16)

Respondents thereafter filed a Motion to Dismiss which the trial court overruled but further ordered that no further action would be undertaken by the trial court until a decision was made by the Labor and Industrial Commission whether the death occurred out of and in the course of Lonnie Lewis' employment and that if the Commission determined the answer in the affirmative, this case would be ordered dismissed; and if in the negative, the case would be heard on the merits. (LF Judgment at 39-40)

Thereafter and on February 5, 2010 the Division of Workers' Compensation, Administrative Law Judge Vicky Ruth, entered an Award in favor of the dependents of Lonnie Lewis, that being Staci Lewis, wife and McCartney Lewis, minor daughter, both of whom are the Appellants in the instant action.

In that award Judge Ruth found that neither Buddy Freeman nor R & F Trucking carried workers' compensation insurance on the date of the accident and therefore liability to Lonnie

Lewis' dependents for workers' compensation benefits fell to DOT Transportation, Inc. as a statutory employer. Further Judge Ruth found that DOT Transportation, Inc. may be able to seek indemnification from Buddy Freeman, d/b/a R & F Trucking. Judge Ruth specifically made no findings and/or rulings as to the legal rights of claimants, Appellants herein, and/or DOT Transportation, Inc. as to Buddy Freeman, d/b/a R & F Trucking, stating that such rights are to be determined by the statutory and case law of the State of Missouri. (LF Award at 42-55)

Following the Award entered by Administrative Law Judge Ruth, Appellants filed a Motion to Lift Stay of Proceedings (LF at 30-31) which was granted. Defendants then filed a Motion for Summary Judgment (LF at 33) in line with the previous Order of the trial court and sought Summary Judgment on the grounds that the death of Lonnie Lewis arose out of and in the course of his employment (LF at 34, ¶ 8)

After the entry of the Workers' Compensation Award DOT Transportation, Inc. intervened in the civil lawsuit asserting its subrogation rights against Buddy Freeman (LF at 97-100; 102; 104-106; 108) and this was granted. Judge Gary Ravens thereafter granted the defendants' Motion for Summary Judgment; the basis for that judgment being that the Appellants had exercised an election of remedies by pursuing and obtaining a compensation award against DOT Transportation, Inc., as statutory employer, before the Labor and Industrial Commission and were therefore barred from proceeding in a civil suit against Buddy Freeman and Nathan Gilmore. It is from this judgment that Appellants appeal.

ARGUMENT

Point Relied On

The trial court erred in granting Respondent's Motion for Summary Judgment in that Section 287.280.1 allowed Appellants to proceed in a civil lawsuit against Respondent Buddy Freeman for his failure to insure his liability under the Missouri Workers' Compensation Laws.

Standard of Review

Summary Judgment is regarded as an "extreme and drastic remedy" that must be applied with the exercise of "great care". *Robinson v. Ahmad Cardiology, Inc.*, 33 s.w.3d 194, 198 (Mo. App. ED 2000).

Burden of Proof

The burden is on the movant (respondents) to show a right to judgment as a matter of law based on facts about which there is no genuine dispute. *ITT Commercial Fin. Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 378, 382 (Mo. Banc 1983).

Jurisdictional Issue

As to matters of workers' compensation jurisdiction exclusivity, this issue is no longer a matter to be ruled on by way of summary judgment but rather to be raised as an affirmative defense with the burden of proof being upon the defendant. *McCracken v. Wal-Mart Stores East L.P.*, 298 S.W.3d 473 (Mo. Banc 2009).

As a preliminary matter it is noted this is not a case where the Workers' Compensation Act is the exclusive remedy of an injured employee against his employer. *Hill v. John Chezik Imports*, 797 S.W.2d 528, 531 (Mo. App. 1990). Appellants brought this action pursuant to §287.280.1 R.S. MO because Respondent Buddy Freeman is uninsured. Thus, this is *not* a lack of jurisdiction case based on exclusivity of remedy.

Appellant's decedent died as a result of a work-related motor vehicle collision; he was in the course and scope of his employment with Respondent Buddy Freeman whose tractor trailer was being operated by a co-employee, Respondent Nathan Gilmore. The unit was being operated under contract with DOT Transportation, Inc. At the time of the collision Buddy Freeman had failed to insure his liability under the Missouri Workers' Compensation Laws and therefore Appellants brought a civil action for wrongful death against Buddy Freeman and his driver under the provisions of Section 287.280.1 R.S. MO.

Appellants further made a claim for the wrongful death of Lonnie Lewis against DOT Transportation, Inc. on the basis of it being a statutory employer of Lonnie Lewis. The Administrative Law Judge found in favor of Appellants ruling that DOT Transportation, Inc. was a statutory employer of Lonnie Lewis and that Lonnie Lewis was acting within the course and scope of his employment and ordered that DOT Transportation pay benefits to Appellants under the provisions of the workers' compensation laws. The Administrative Law Judge made no findings and/or rulings as to the legal rights of Appellants and/or DOT Transportation, Inc. as to Buddy Freeman stating that such rights are to be determined by the statutory and case law of Missouri. Following this Award DOT Transportation, Inc. was granted leave to intervene in this lawsuit to assert and protect their subrogation rights as against Buddy Freeman.

Thereafter, on motion filed by Buddy Freeman and Nathan Gilmore, the trial court granted summary judgment in Respondents' favor on the grounds that Appellants had elected their remedy for the wrongful death of Lonnie Lewis by proceeding and obtaining an Award under the Missouri Workers' Compensation Law. It is from this judgment that Appellants have appealed.

The Court erred in its application of the law to the facts of this case:

A. Section 287.280.1 provides that an employee (or the employee's dependents) may, when the employer fails to insure its liability under the workers' compensation laws, file a civil action against such employer;

B. There is nothing in Section 287.280.1 that in any way limits the election when some monetary value is obtained from a statutory employer.

The court's granting of Defendant's Motion for Summary Judgment rests on the Court's determination that Appellants made their election by pursuing and obtaining a compensation award against the statutory employee.

Section 287.280 provides that if the employer or group of employers (employee herein was not working for a group of employers) fail to comply with this Section (failing to insure under the workers' compensation laws) an injured employee or his dependents may elect after the injury either to bring an action against such employer (or group of employers) to recover damages for personal injury or death . . .

For clarification it should be pointed out that this case does *not* involve a “group of employers” such as an individual working as a security guard for several automobile dealerships, and each employer being liable in proportion to the employee’s wages.

In the instant case Defendant Buddy Freeman failed to comply with this Section and Appellants, pursuant to Section 287.280, elected to bring a civil action against such (Buddy Freeman) employer for the death of Lonnie Lewis.

Appellants fully agree that the statutory and case law provides generally that where an employer fails to insure under the workers’ compensation laws that an employee, or the employee’s dependents, are entitled to pursue an action against the employer under either the workers’ compensation laws or for personal injuries in circuit court, and that it is only after the employee receives something of value on the workers’ compensation claim or pursues the civil action to final judgment, that the employee is then precluded from pursuing the other inconsistent remedy. *Brookman v. Henry Transp.*, 924 S.W.2d 286 (App. ED 1996); *Bailey v. McClelland*, 848 S.W.2D 46 (App. SD 1993); *Neff v. Baiotto Coal Co.*, 234 S.W.2d 578 (Supp. 1950). This is not the law, however, when the employee receives something of value from a statutory employer, as in this instance, and no value from the employer and where the employer has incurred no loss nor paid any benefits.

The few cases referring to Section 287.280.1 are all the same factually: the employer or a group of employers have failed to insure and the employee has either received benefits under workers’ compensation or monies in a civil suit. In each of those cases the party who made the benefits or against whom a judgment was entered was the employer, or group of employers, who

failed to carry insurance. This is not the fact situation here and Appellants cannot find any case law applicable to the fact situation herein involving a statutory employer.

There is no case law interpreting Section 287.280.1 as applied to the facts of this case where the employer fails to comply with Section 287.280.1; the employee (Appellants herein) files a civil suit for wrongful death against such employer and makes a recovery in a workers' compensation claim against a statutory employer. For that reason the Court can only look to the Statute itself.

Statutes are to be construed, if possible, so as to harmonize and give effect to all of their provisions; *Gasconade County v. Gordon*, 145 S.W. 1160, "and provisions not therein found plainly written or necessarily implied from what is written will not be impacted or interpolated therein in order that the existence of such right may be made to appear when otherwise, upon the face of said act, it would not appear." *Allen v. St. Louis-San Francisco Ry Co.*, 90 SW2d 1050.

Courts are not at liberty to write into the Workers' Compensation Law, under the guise of construction, provisions which the legislature did not feel fit to insert. *Schmitz v. Carr Trombley Mfg. Co.*, 139 S.W.2d 1064. If the legislature wanted to limit an employee's recovery in the manner determined by this Court's Summary Judgment, it would have so provided in the statute by providing wording to that effect. Nowhere in Section 287.280.1 is there any wording to show that an employee may not recover from a statutory employer in the workers' compensation case in order to recover from the employer in a civil action. The wording of Section 287.280.1 is simple and precise. "If the employer, or group of employers, fail to comply with this section, an injured employee or his dependents may elect . . . to bring an action against such employer or group of employers." The legislature did not provide that if the employee, or his dependents,

recover from a statutory employer, that *no civil action* could be maintained against such employer who failed to comply with the statute.

As stated above Defendant Buddy Freeman failed to insure as required by law and Appellants elected to pursue their wrongful death claim of the employee against such employer by way of a civil action in circuit court.

This, however, did not prevent Appellants from pursuing the workers' compensation claim against the statutory employer DOT Transportation nor from recovering something of value from the statutory employer. To now pursue their claim against the "such" employer is not an inconsistent remedy. Had Appellants received something of value in a workers' compensation claim from or against such employer Buddy Freeman and had Buddy Freeman sustained a loss by way of an Award adverse to him or paid a benefit to Appellants, it would be an inconsistent remedy to now pursue a civil action against such employer Buddy Freeman as there was already a remedy. *State ex rel Hillerry v. Kelly*, 448 S.W.2d 926 (St. Louis Court of Appeals, 1969) holds that an election of remedies is not binding until there has been a gain by the plaintiff and a loss by the defendant. Also cited in *Knight v. Jones*, 819 S.W.2d 79 (Mo. App. 1991).

In the instant case it is undisputed that the Respondents Buddy Freeman and Nathan Gilmore did not, and have not, sustained a loss, or paid a benefit to Appellants, and it is further undisputed that Appellants did not, and have not gained from Respondents.

Here Appellants received monetary value by way of a workers' compensation claim against the statutory employer, DOT Transportation, and it is not an inconsistent remedy to now pursue a civil action against Buddy Freeman. In fact to allow the civil action against such

employer is a consistent theory of liability as is shown by the fact that the statutory employer may intervene, as is being done in this case, in the civil action to recover the losses brought about by the failure of such employer in failing to insure; thus requiring the Appellants to return their "gain" from the statutory employer. It is similar to a lawsuit brought by an employee who has recovered workers' compensation benefits and is now pursuing a third party claim in which the employer will be able to assert its subrogation lien. The purpose of the provisions of Section 287.280.1 is to force compliance with the insurance requirements or, in the alternative, to bear sanctions or penalty of a partially defense free suit. *Mays v. Williams*, 494 S.W.2d 289 (Supp. 1973). To rule otherwise is to allow an employer, such as Buddy Freeman, to defeat the intent of the legislature in enacting Section 287.280.1 of the Missouri Workers' Compensation Laws and to avoid responsibility and liability under the law; the very result which Section 287.280.1 is intended to avoid.

Appellants may thus proceed with a civil action as against Buddy Freeman and Nathan Gilmore.

CONCLUSION

Section 287.280.1 R.S. MO provides that an employee (or dependents) may elect to sue an employer in a civil proceeding where such employer has failed to maintain workers' compensation coverage. In the instant case Appellants have chosen to do so by the filing of their Petition herein on the basis that Buddy Freeman had not obtained workers' compensation liability insurance coverage and thus Appellants are properly before the Circuit Court and may proceed in a civil action against Buddy Freeman and the co-employee Nathan Gilmore.

For the foregoing reasons Appellants, Staci Lewis and McCartney Lewis, a minor, Appellants herein, respectfully requested that this Court reverse the decision of the Circuit Court in granting Respondents' Motion for Summary Judgment and to remand this lawsuit with directions to proceed with trial on the merits.

THE MILLER/SALSBURY LAW FIRM



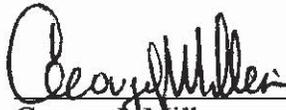
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CERTIFICATION

Comes now George J. Miller, Attorney for Appellants and hereby certifies that:

1. Appellants initial brief does not exceed 31,000.00 words or 2200 lines of text.
2. The number of words in the brief are 3,719.
3. The electronic copy of this brief has been scanned for viruses and it is virus-free.

THE MILLER/SALSBURY LAW FIRM



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CERTIFICATE OF SERVICE

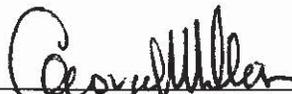
I hereby certify that an original and 7 copies of the Appellants' Brief were sent Certified U.S. postal service, postage paid, on this 8th day of November, 2010, to:

Clerk of the Court of Appeals
Missouri Court of Appeals, Western District
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and copies of Appellants' Brief was mailed by U.S. Mail, postage paid, this 8th day of November 2010, to the following:

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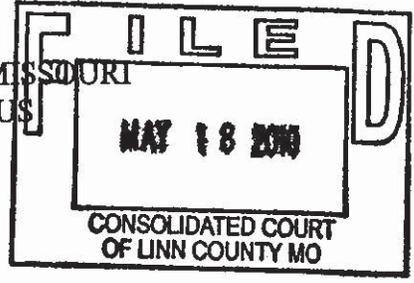


George J. Miller

APPENDIX

Judgment	A1 thru A5
Workers' Compensation Award	A6 thru A19
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Missouri Statute Section 477.050	A22

IN THE CIRCUIT COURT OF LINN COUNTY, MISSOURI
CONSOLIDATED DIVISION, AT LINNEUS



STACI M. LEWIS, et al.,)
)
 Plaintiffs,)
)
 v.) Case No. 07LI-CC00026
)
 NATHAN R. GILMORE, et al.,)
)
 Defendant.)

JUDGMENT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(A) The following are uncontroverted facts propounded by the Defendants Gilmore and Freeman and admitted by the Plaintiffs.

(1) This lawsuit arises out of an incident that occurred on March 27, 2004 when Lonnie R. Lewis, who was in the course of his employment, was killed in a motor vehicle accident when the tractor trailer in which he was riding as a passenger overturned and killed him.

(2) The truck was operated by Nathan R. Gilmore, who was operating the tractor trailer in the course of his employment with Defendant Buddy Freeman.

(3) Plaintiff Staci M. Lewis was the wife of decedent, and Plaintiff McCartney Lewis was the minor daughter of decedent and brought their wrongful death action against Defendants Nathan R. Gilmore and Buddy Freeman.

(4) Buddy Freeman operated his tractor trailer pursuant to a contract with DOT Transportation, Inc.

(5) Simultaneous to filing this civil lawsuit, counsel for Plaintiffs filed a Claim for Compensation in the name of decedent Lonnie R. Lewis.

(6) Pursuant to an order of this Court, this civil action was stayed until a determination was made by the Labor and Industrial Relations as to whether the death of Mr. Lewis occurred out of and in the course of his employment.

(7) On February 5, 2010, the Department of Labor and Industrial relations, Division of Workers' Compensation Administrative Law Judge Vicky Ruth entered an award in favor of the dependents of Lonnie Lewis, including his wife Staci Lewis and his daughter McCartney Lewis.

(8) In the Workers' Compensation Award, Judge Ruth found that the death of Lonnie Lewis arose out of and in the course of his employment.

(9) In Workers' Compensation Award, Judge Ruth found that DOT Transportation, Inc. was the statutory employer of Lonnie Lewis.

(10) Administrative Law Judge Ruth awarded Plaintiffs/Claimants financial benefits for past compensation, funeral expense and future requirements.

(B) Plaintiffs offered the following uncontroverted material facts which have neither been admitted nor denied by the Defendants:

(1) Defendant Buddy Freeman, by contract, agreed to provide sole financial responsibility for all workers' compensation withholding for performance of the contract with DTI.

(2) Defendant Buddy Freeman did not carry the required workers' compensation liability policy for employees, for employees such as Lonnie Lewis.

(3) Defendant Buddy Freeman, did not individually, or by any insurance carrier on his behalf, answer the Claim for Compensation for Injury 04-147781.

(4) Defendant Buddy Freeman did not appear in person or by representative for the final award hearing of November 5, 2009 before the Division of Workers' Compensation ALJ Vicky Ruth in regard to Lonnie Lewis' injuries and death, Injury number 04-147781.

(5) Claimants Staci Lewis and McCartney Lewis dismissed Buddy Freeman as a party in the Workers' Compensation Claim preserving their civil remedy against Buddy Freeman under RSMo 287.280(1).

(6) DOT Transportation, Inc. brought Buddy Freeman back into the claim as the employer of Lonnie Lewis.

(7) ALJ Ruth made no specific findings of liability in regard to Defendant Buddy Freeman regarding Lonnie Lewis Workers' Compensation Claim No. 04-147781 other than that Lonnie Lewis was Defendant Freeman's employee according to the [Workers' Compensation] Act and that Defendant Freeman did not carry worker's compensation insurance.

(8) ALJ Ruth specifically stated in the AWARD for injury No. 04-147781, "I make no findings and/or rulings as to the legal rights of claimants and/or DTI as to Buddy Freeman, d/b/a R&F Trucking, as such rights are to be determined by the statutory and case law of the State of Missouri,..."

(9) Norman Richard "Pete" Jenkins clearly establishes that Buddy Freeman, to his knowledge, had no workers' compensation insurance coverage at the time and place of the accident which is the subject of this lawsuit.

(10) The Division of Workers' Compensation has advised that there was no workers' compensation coverage located which would provide insurance to Buddy Freeman and R & F Trucking.

(C) The Plaintiffs uncontroverted material facts are not necessarily adopted by this Court but are set out only to show Plaintiffs position and argument as regards the Motion for Summary Judgment.

CONCLUSIONS OF LAW

It is Plaintiffs position that this case falls under Section 287.280(1). The basis for that being that employer Freeman did not furnish the required workers' compensation coverage and therefore the Plaintiffs may elect to proceed against him individually under common law with certain defenses as set out in the statute being unavailable. The Plaintiff is correct in that assumption, however, careful reading of the statute is that the employee must elect to: (1) sue the uninsured employer or (2) recover under Chapter 287 or (3) request payment under the second injury fund.

In this case, Plaintiff has elected to proceed to collect compensation under Chapter 287 and was successful by their own admission. They can no longer maintain this action.

In *Brookman v. Henry Transportation*, 924 SW 2d 286 (Mo App 1996) this identical issue arose. In that case, employee was hired to perform work for Henry Transportation. Henry Transportation had an agreement to "lease" employees from Advantage Financial. Neither Henry Transportation nor Advantage Financial had workers' compensation insurance and therefore the employee had the right to an election under Section 287.280 RSMo. The Court said at Page 289:

“When an employee is injured in the course of his employment and the employer lacks workers’ compensation insurance, the employee is entitled to pursue either an action under the workers’ compensation laws or an action for personal injuries in the circuit court. Section 287.280 RSMo 1994. It is only after an employee receives something of value on a claim or pursues an action to final judgment that the employee is then precluded from pursuing the other inconsistent remedy. *Brookman v. Henry Transportation*, 886 SW 2d 213, 215 (Mo. App. 1994).

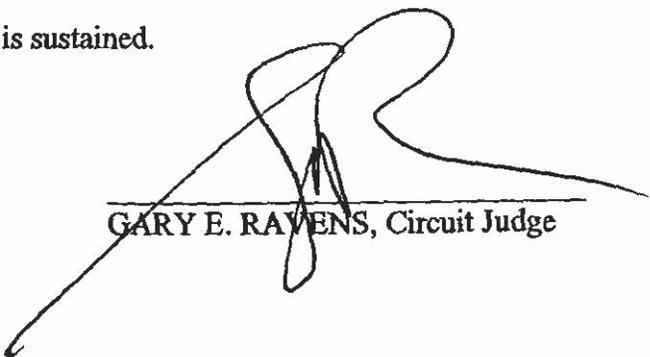
In the present case both employers lacked workers’ compensation insurance, therefore giving Employee the option to pursue either remedy. Employers now argue that Employee has already elected his circuit court remedy, preventing him from pursuing a workers’ compensation claim. Employers do not, however, allege that there has been a final judgment in the civil case or that Employee has received something of value, nor does the record reveal a final judgment or award. Therefore, there has not yet been a binding election of remedies. The Commission had authority to enter a disability award.”

The Plaintiffs rely heavily on the recent case of *McCracken v. Wal-Mart* 298 SW 3d 473. That case would have been helpful and controlling when this Court entered its order of February 15, 2008. That case holds that a claim for compensation and an action in circuit court can run simultaneously with the employer having an affirmative defense that a workers’ compensation claim has been filed. It does not eliminate the necessity of an election of remedies set out in the statute and the *Brookman* case.

The Plaintiffs have made their election by pursuing and obtaining a compensation award.

The Motion for Summary Judgment is sustained.

IT IS SO ORDERED.


GARY E. RAVENS, Circuit Judge

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Lonnie Lewis (deceased)
 Dependents: Staci Lewis (surviving spouse)
 McCartney Lewis (minor child)
 Employer 1: Buddy Freeman, d/b/a R & P Trucking
 Employer 2: DOT Transportation, Inc.

Injury No. 04-147781

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

Additional Party: N/A

Insurer for Employer 1: None.
 Insurer for Employer 2: Sentry Insurance Co.

Hearing Dates: November 5, 2009, and February 2, 2010¹

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: March 27, 2004.
5. State location where accident occurred or occupational disease was contracted: Linn County, Missouri.
6. Was above employee in employ of one of the above employers at time of alleged accident or occupational disease? Yes. (See Award.)
7. Did employer(s) 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? The statutory employer Dot Transportation, Inc., was insured by the above insurer; see Award.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: The claimant was involved in a motor vehicle accident.
12. Did accident or occupational disease cause death? Yes. Date of death? March 27, 2004.
13. Part(s) of body injured by accident or occupational disease: Body as a whole/death.

¹ The hearing was reconvened more than 30 days after the original hearing date as the parties had, after lengthy negotiations, resolved some issues and needed to submit additional, new evidence (Claimant's Exh. L). Reconvening the hearing also allowed the parties to clarify and resolve what could be perceived to be a conflict of interest issue regarding the apportionment of the death benefits among the dependents, who were jointly represented by counsel.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Lonnie Lewis

Injury No. 04-147781

14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
16. Value necessary medical aid not furnished by employer/insurer? None.
17. Death benefits paid to date: None.
18. Funeral benefits paid to date: None.
18. Employee's average weekly wages: \$807.34.
19. Weekly compensation rate: \$538.23.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: \$157,086.27, representing death benefits of \$538.23 per week for 291 and 6/7 weeks from the date of the death of Lonnie Lewis to the date of the hearing, to be divided 50% to Staci Lewis and 50% to Burle and Beverly Brown, as guardians of the person and estate of McCartney Lewis; plus \$5,000 in funeral expenses to Burle Brown pursuant to Section 287.240(1); plus future benefits as noted below.

23. Future Requirements Awarded: \$538.23 per week to the dependents of Lonnie Lewis pursuant to Section 287.240 of the Workers' Compensation Act, to be divided 50% to Staci Lewis and 50% to Burle and Beverly Brown, as guardians of the person and estate of McCartney Lewis. If either dependent shall no longer be entitled to benefits as provided by Section 287.240, then the share of the remaining dependent, if said remaining dependent is still entitled to benefits under Section 287.240, shall be 100% of the future benefits during the period of entitlement. Said payments to begin effective November 5, 2009, and be payable and subject to modification and review as provided by law.

The compensation awarded herein shall be subject to a lien of 25% of all payments hereunder, in favor of the following attorneys for necessary legal services rendered to the dependents of Lonnie Lewis: George Miller and Chris Tucker.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Lonnie Lewis

Injury No. 04-147781

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lonnie Lewis (deceased)

Injury No. 04-147781

Dependents: Staci Lewis (surviving spouse)
McCartney Lewis (minor child)

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

Employer 1: Buddy Freeman, d/b/a R & F Trucking
Employer 2: DOT Transportation, Inc. (DTI)

Additional Party: N/A

Insurer for Employer 1: None
Insurer for Employer 2: Sentry Insurance Co.

On November 5, 2009, Staci M. Lewis, the surviving spouse of employee Lonnie Lewis, DOT Transportation, Inc. (DTI), and Sentry Insurance Co. appeared for a final award hearing. Attorneys George J. Miller and Chris Tucker represented deceased claimant's dependents. Attorney Robert Hendershot represented the alleged statutory employer/insurer, DTI. No one appeared on behalf of the alleged employer, Buddy Freeman, d/b/a R & F Trucking.

At the trial, Staci Lewis and Burle Brown testified on behalf of the dependents of Lonnie Lewis. Norman Richard "Pete" Jenkins testified on behalf of DTI. On February 1, 2010, after lengthy negotiations, the dependents of Lonnie Lewis and DTI² submitted a Proposed Joint Award. The hearing was reconvened on February 2, 2010. The parties chose not to submit a revised Joint Proposed Award following the second hearing date.

STIPULATIONS

The dependents of Lonnie Lewis and DOT Transportation, Inc. (DTI) made the following stipulations:

1. On or about March 27, 2004, Lonnie Lewis sustained an injury by accident, when he was involved in a motor vehicle accident. This accident resulted in the death of Lonnie Lewis.
2. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Macon County is proper.
3. The alleged employer, Buddy Freeman, d/b/a R & F Trucking, and the alleged statutory employer, DTI, had notice of the injury.
4. A Claim for Compensation was filed within the time prescribed by law.

² The dependents of Lonnie Lewis and DTI are periodically addressed as "the parties" as they are the only parties that participated in the hearing. Buddy Freeman, d/b/a R & F Trucking, did not participate in any of the hearing dates.

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Employee: Lonnie Lewis

Injury No. 04-147781.

5. DTI's liability for workers' compensation was insured by Sentry Insurance Co.
6. At the time of the accident, the claimant's average weekly wage was \$807.34, which yields a weekly compensation rate of \$538.23.
7. Neither the alleged employer, Buddy Freeman, d/b/a R & F Trucking, nor the alleged statutory employer, DTI, has provided any workers' compensation benefits in this case.

In addition, the dependents of Lonnie Lewis and DOT Transportation, Inc. (DTI), agreed to certain stipulations found in Joint Exhibit 3; these stipulations are hereby incorporated into this Award.

ISSUES

At the November 5, 2009 hearing, the parties agreed that the following issues needed to be resolved in this proceeding:

1. Whether Buddy Freeman, d/b/a R & F Trucking, had workers' compensation insurance.
2. Statutory employment;
3. Liability for death benefits;
4. Dependency;
5. Apportionment of death benefits among the dependents;
6. Liability for funeral benefits;
7. To whom the funeral benefits should be paid;

During the second day of the hearing, held on February 2, 2010, counsel for the dependents of Lonnie Lewis and counsel for DTI indicated that they had resolved issue 5 (apportionment of death benefits) and issue 7 (to whom the funeral benefits should be paid).

EXHIBITS

On behalf of the dependents of Lonnie Lewis, the following exhibits were entered into evidence without objection:

Exhibit A	Copy of Marriage License.
Exhibit B	Certificate of Death.
Exhibit C	Certificate of Live Birth of Staci Marie Williams.
Exhibit D	Certificate of Live Birth of McCartney Marie Elaine Lewis.
Exhibit E	Certificate of Live Birth of Lonnie Ray Lewis.
Exhibit G ³	Franklin College Truck Driving School Certificate.
Exhibit H	Funeral home receipt.
Exhibit I	Letter from Amy Frank, Division of Workers' Compensation.
Exhibit J	Agreement between Staci Lewis and Burle Brown.
Exhibit K	Order Appointing Guardian of the Person and Estate.
Exhibit L ⁴	Letter from attorney Dennis G. Woodworth, dated February 2, 2010.

³ Exhibit F was withdrawn and not admitted into evidence.

⁴ Exhibit L was admitted during the hearing on February 2, 2010. All other exhibits were admitted on November 5, 2009.

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Employee: Lonnie Lewis

Injury No. 04-147781

On behalf of DOT Transportation, Inc., the following exhibits were entered into evidence without objection:

- Exhibit 1 Public Notice and Affidavit of Publication.
- Exhibit 2 Letters from Robert Hendershot.
- Exhibit 3 Letter from Robert Hendershot to Judge Allen.
- Exhibit 4 Additional letter from Robert Hendershot to Judge Allen.
- Exhibit 5 R & F Trucking document.
- Exhibit 6 List of employees of Buddy Freeman.

On behalf of the deceased's dependents and DOT Transportation, Inc., the following joint exhibits were offered and received into evidenced:

- Joint Exhibit 1: Deposition of Staci Lewis.
- Joint Exhibit 2: Deposition of Norman Richard Jenkins.
- Joint Exhibit 3: Agreed Statement of Facts.

FINDINGS OF FACT

Based on the stipulations of the parties, the exhibits, and the testimony presented at the hearings, I make the following findings:

1. The Missouri Division of Workers Compensation has jurisdiction over this case, and venue in Macon County is proper.
2. On March 27, 2004, Lonnie Lewis was involved in a motor vehicle accident that resulted in his death.
3. The alleged employer, Buddy Freeman, d/b/a R & F Trucking, and the alleged statutory employer, DTI, had notice of the injury and the resulting death of Lonnie Lewis.
4. A Claim for Compensation was filed within the time prescribed by law.
5. At the time of the accident, the claimant's average weekly wage was \$807.34, which yields a weekly compensation rate of \$538.23.
6. Neither the alleged employer, Buddy Freeman, d/b/a R & F Trucking, nor the alleged statutory employer, DTI, provided any workers' compensation benefits or burial/funeral benefits in this case.
7. No medical aid was provided, and there are no unpaid medical bills.

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The Contract

8. Buddy Freeman, as sole proprietor of R & F Trucking, entered into a contract with DOT Transportation, Inc. (DTI), on January 17, 2004. The contract, entitled "Independent Contractor and Lease Agreement," (referred to as the Agreement or the Contract) states that DTI, an interstate for hire common and contractor motor carrier, wished to obtain transportation and driving services for equipment it did not own through arrangements with independent contractors of motor truck equipment. The Agreement noted that Buddy Freeman owned a vehicle licensed and registered as a truck, road tractor, or truck tractor, and that he was engaged in the business of transporting freight by motor vehicles on behalf of, and pursuant to, operating agreements with private, contract, or common carriers or shippers.
9. Pursuant to this Agreement, Buddy Freeman agreed to provide equipment, drivers, and labor to transport, load, and unload, on behalf of DTI such commodities as DT may from time to time make available. Buddy Freeman agreed to retain all responsibility for hiring, setting the wages, hours and working conditions supervising, training, disciplining, and firing of all other drivers, drivers' helpers, and other workers necessary for the performance of Buddy Freeman's obligations under the terms of the agreement. Drivers, drivers' helpers, and other workers were to remain the employees of the contractor.
10. Under the Agreement, Buddy Freeman agreed to retain sole financial responsibility for all workers' compensation withholding and employment taxes due to federal, state, or local governments, on account of drivers', drivers' helpers, and other workers necessary for the performance of the contractor's obligations under the terms of the agreement. Buddy Freeman further agreed to maintain proper workers' compensation insurance coverage for all drivers, drivers' helpers, and laborers used in the performance of the agreement and to provide a certificate of workers' compensation insurance to DTI.
11. According to the Contract, Buddy Freeman further agreed to file all federal, state, and local income withholding employment or federal highway use tax forms and returns on account of himself and all drivers, drivers' helpers, and laborers used by him. Buddy Freeman also had the responsibility of satisfying the regulatory requirements of the Interstate Commerce Commission.
12. The Agreement states that it was the intent of the parties to maintain a relationship of carrier (DTI) and independent contractor (Buddy Freeman) and not an employer-employee relationship. The Agreement further states that neither Buddy Freeman nor his employees were to be considered employees of DTI. The Agreement does not refer to statutory employees.

Additional General Findings

13. Pursuant to the Agreement, Buddy Freeman, d/b/a R & F Trucking, provided drivers and tractors to haul DTI trailers and loads. In 2004, DTI paid Buddy Freeman \$612,291.34 in non-employee compensation for work performed pursuant to the above Agreement. Buddy Freeman's pay records indicate that in 2004, he paid Lonnie Lewis \$5,651.40 for truck driver duties that Lonnie Lewis

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Employee: Lonnie Lewis

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performed under this contract during the period of February 7, 2004, through March 27, 2004. In her testimony, Staci Lewis agreed that Lonnie Lewis worked for Buddy Freeman for this period and that Buddy Freeman paid Lonnie Lewis \$5,561.40 in wages.⁵

14. Pursuant to governmental regulations, DTI maintained a file for every driver that operated under its authority, including Lonnie Lewis. His file contained a copy of his commercial driver's licenses, as well as information in regards to his truck driving record, DOT physical, alcohol and drug testing statements, and certification tests.
15. Buddy Freeman had the responsibility for assigning Lonnie Lewis to make hauls pursuant to the agreement and Buddy Freeman had all authority for disciplining Lonnie Lewis in regards to job performance. DTI had no authority for disciplining Lonnie Lewis in regards to job performance. DTI had no authority to fire Lonnie Lewis or discipline Lonnie Lewis. DTI made no payments of compensation to Lonnie Lewis, nor did DTI withhold any payroll taxes for Lonnie Lewis.
16. On March 27, 2004, pursuant to the agreement between Buddy Freeman and DTI, Lonnie Lewis and Nathan Gilmore, his co-driver, were returning to Missouri from California and were co-drivers operating a tractor truck. Affixed to that tractor truck was a DTI Interstate Commerce Commission placard; the truck was pulling a DTI trailer and was hauling a load of frozen strawberries in the usual course of business of DTI. At the time of the accident on March 27, 2004, Nathan Gilmore was driving and Lonnie Lewis was in the sleeper cab. On that date, Nathan Gilmore and Lonnie Lewis were involved in a motor vehicle accident that resulted in the death of Lonnie Lewis.
17. Buddy Freeman failed to secure a workers' compensation policy on behalf of his drivers, which was in violation of the Agreement between Buddy Freeman and DTI.⁶
18. DTI is a wholly owned subsidiary of Dot Foods, Inc. DTI provides transportation for food and related products for Dot Foods, Inc. In addition, DTI performs transportation business for other companies.
19. DTI also employs its own drivers. In addition, DTI would contract with independent contractors because of driver shortages and to meet customer demands. At the time of the motor vehicle accident on March 27, 2004, DTI maintained workers' compensation coverage for its own employees, including statutory employees, through Sentry Insurance Co.
20. Norman Richard Jenkins, also known as Pete Jenkins, testified on behalf of DTI.⁷ He is the safety coordinator for DTI. He stated that at the time of the decedent's death, Buddy Freeman employed ten workers, including Mr. Freeman himself.⁸

⁵ See also Employer/insurer Exh. 5.

⁶ Claimant's Exh. I and Joint Exh. 3.

⁷ It is unclear whether Mr. Jenkins name is spelled thus or is spelled Jinkins. I apologize if I have misspelled his name in this Award.

⁸ See also Employer/insurer Exh. 6.

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Employee: Lonnie Lewis

Injury No. 04-147781

21. Staci Lewis and Lonnie Lewis were married on April 20, 2001.⁹ Staci Lewis testified that she has not remarried since the death of Lonnie Lewis. She acknowledged that prior to his death, Lonnie Lewis had filed a petition for divorce in Adams County, Illinois, and that the petition was pending when he died. A hearing regarding the divorce petition had been set for around April 14, 2004, but the petition was dismissed on or about March 30, 2004, due to the death of Lonnie Lewis. Thus, Staci Lewis was married to Lonnie Lewis at the time of his death on March 27, 2004.
22. Staci Lewis testified that she and Lonnie Lewis had one child together, McCartney M.E. Lewis, who was born on March 15, 2002.¹⁰ Ms. Lewis testified that she was not aware of Lonnie Lewis having any other children besides McCartney Lewis. Staci Lewis testified that she and McCartney Lewis were dependent on Lonnie Lewis for financial support at the time of his death.
23. Staci Lewis testified that she has not cared for McCartney Lewis since about November 9, 2004. She also testified that she has not provided any financial assistance to or for McCartney, nor has she had any personal (face-to-face) contact with her since that time. Staci Lewis indicated that she has sent some letters or had a few phone calls with the child.
24. Staci Lewis testified that she has lived in Florida since about 2006. Since moving to Florida, she has given birth to another child, Aden, whose father is Allen Clemmons. She testified that she has not married Mr. Clemmons and does not live with him.
25. Burle Brown testified that he is the paternal grandfather of Lonnie Lewis, and is McCartney's great-grandfather. At the time of the hearing, he was 76 years old. He stated that he and his wife Beverly Brown currently care for McCartney, and that they have done so full-time since approximately November 9, 2004. On or about that date, Burle and Beverly Brown petitioned the Adams County Court in Illinois for custody of McCartney, and have had custody of her ever since. On August 8, 2007, Mr. and Mrs. Brown filed a Petition for Appointment of Temporary and Permanent Guardianship. On September 20, 2007, the 8th Judicial Circuit for Illinois, Adams County, issued an Order appointing Burle Brown and Beverly Brown as guardians of the person and estate of the minor child, McCartney Lewis.¹¹ Mr. Brown testified that the September 2007 order has not been rescinded or modified since it was issued. Mr. Brown testified that McCartney is doing "really, really great" and does not have any physical or mental handicaps. Mr. Brown also testified that he is not aware of Lonnie Lewis having any other children besides McCartney Lewis.
26. Staci Lewis and Burle Brown testified that the death benefits should be apportioned equally between Staci Lewis (the surviving spouse) and McCartney Lewis (the minor child). Their agreement was entered into the record as Claimant's Exh. J, and is reiterated in the Joint Proposed Award that is submitted on February 1, 2010. Mr. Brown testified that at a 50/50 distribution was fair and equitable and is in the best interests of the child, McCartney Lewis. He stated that he is going to try to set aside all or most of that amount for the child's college education. He also testified that he receives, as the guardian of the person and estate of McCartney Lewis, social security survivor

⁹ Claimant's Exh. A.

¹⁰ Claimant's Exh. D.

¹¹ Claimant's Exh. K.

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Employee: Lonnie Lewis

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benefits in the amount of \$636 per month. He noted that this amount can change on a yearly basis. He uses these funds to care for McCartney Lewis, and does keep a thorough accounting of the moneys.

27. Ms. Lewis acknowledged that she understands that if she ever remarries, she would no longer be entitled to death benefits except to the extent provided under Section 287.204(4)(a), and that at that time, McCartney, if still entitled to benefits under Section 287.240, would receive 100% of the benefits payable. Ms. Lewis indicated that she understands that McCartney's share of benefits would proceed to her when McCartney is no longer eligible for benefits, provided Ms. Lewis remains eligible.
28. Mr. Brown testified that he paid \$8,259.52 for the funeral and burial of Lonnie Brown, as evidenced by Claimant's Exh. H.
29. Staci Lewis testified that when Lonnie Lewis died, she did not have the resources to pay for his burial and funeral. Therefore, the decedent's grandfather, Burle Brown, paid for the funeral and burial expenses. Ms. Lewis testified that she verbally agreed to reimburse Burle Brown when she could. She testified that she not yet reimbursed Burle Brown for any of these funeral and burial expenses. Ms. Lewis initially requested that she be paid \$5,000 for funeral expenses; she testified that she would then pay this amount to Burle Brown as reimbursement for burial and funeral expenses. In their Joint Proposed Award, submitted February 1, 2010, and during the hearing on February 2, 2010, the parties agreed that the \$5,000 funeral amount should be paid directly to Burle Brown.

CONCLUSIONS OF LAW

Based on the findings of fact and the applicable laws of the State of Missouri, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.¹² Proof is made only by competent and substantial evidence, and may not rest on speculation.¹³

Issues 1, 2, and 3: Whether Buddy Freeman, d/b/a R & F Trucking, had workers' compensation insurance; statutory employment; and liability for death benefits.

I find that on or about March 27, 2004, Lonnie Lewis (the decedent) was an employee of Buddy Freeman, d/b/a R & F Trucking. The decedent was listed as one of Buddy Freeman's employees in Mr. Freeman's own records.¹⁴ Staci Lewis testified credibly that the decedent worked for Buddy Freeman for the seven weeks prior to his death, and that Buddy Freeman paid the decedent \$5,651.40,

¹² *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹³ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁴ Employer/insurer Exhs. 5 and 6, and Joint Exh. 3.

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for that work. This amount is confirmed by Buddy Freeman's own pay records.¹⁵ I also find that the decedent's death on March 27, 2004, from the motor vehicle accident clearly arose out of and in the course of his employment with Buddy Freeman.

Under Missouri Workers' Compensation Law, employers are liable to compensate their employees for injuries that arise out of and in the course of employment.¹⁶ In general, an "employer" is an entity using the services of another for pay.¹⁷ As just noted, the decedent's employer is Buddy Freeman, d/b/a R & F Trucking. Buddy Freeman, d/b/a R & F Trucking, was required to have workers' compensation insurance pursuant to the Act, which defines an employer subject to the Act as an employer with five or more employees.¹⁸ The evidence shows that Buddy Freeman, d/b/a R & F Trucking, had ten employees at the time of the accident.¹⁹ However, as indicated by Claimant's Exh. I, the Division of Workers' Compensation's records, Buddy Freeman, d/b/a R & F Trucking, did not carry workers' compensation insurance.²⁰ Thus, the question becomes whether another entity is liable for the workers' compensation benefits.

In some instances, another entity may be deemed a "statutory employer" and may be liable for workers' compensation benefits. Section 287.040.1,²¹ refers to statutory employment as follows:

Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, which injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

Thus, in order to categorize an individual as a statutory employee under this section, a three-part test must be met. First, the work must be performed pursuant to a contract.²² Second, the claim must arise on or about the premises of the statutory employer. And third, the work must be the type of work that is in the usual course of business of the statutory employer.

In this case, the first prong of the test, that the work be performed pursuant to a contract, is clearly met. Buddy Freeman, d/b/a R & F Trucking, had entered into a contract with DTI in which he had agreed to "provide equipment, drivers, and labor to transport, load, and unload, on behalf of DTI such commodities as DTI may from time to time make available."²³ Decedent was one of those drivers provided by Buddy Freeman to perform the work agreed to in the contract.²⁴

¹⁵ Employer/insurer Exh. 5, and Joint Exh. 3.

¹⁶ Section 287.120.1, RSMo.

¹⁷ Section 287.030.1, RSMo.

¹⁸ Section 287.030.

¹⁹ Employer/insurer Exh. 6.

²⁰ Claimant's Exh. I.

²¹ All statutory references are to the Revised Statutes of Missouri (RSMo), unless otherwise noted.

²² The contract required here includes both express and implied contracts. *State ex rel J.E. Jones Cont. Co. v. Sanders*, 875 S.W.2d 154 (Mo. App. E.D. 1994).

²³ Employer/insurer Exh. 3.

²⁴ Employer/insurer Exh. 3.

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Looking at the third part of the test (leaving the review of the second prong until last), the work must be the type of work that is in the usual course of business of the statutory employer. DTI described itself as an interstate for hire common and contractor motor carrier.²⁵ Additionally, Pete Jenkins, DTI's safety coordinator, testified that DTI provides transportation of food-related products and transportation business for other companies. Mr. Jenkins acknowledged that DTI employed their own drivers in addition to hiring outside contractors.²⁶ I find that this part of the test is also met, and that the decedent, the driver of a tractor-trailer, was performing work in DTI's usual course of business.

The second prong of the test in Section 287.040(1) is that the claim must arise on or about the premises of the statutory employer. In the case of *Wilson v. C.C. Southern, Inc.*, the Court of Appeals addressed a similar situation.²⁷ *Wilson* involved a truck driver who was killed while operating a tractor-trailer rig for Robert Kerr and his company Kerr Cartage. Kerr owned the tractor-trailer that Wilson was operating, which had been leased by C.C. Southern under a contract with Kerr. It was noted that neither Kerr nor Kerr Cartage participated in that case. The Court found that the obligation to compensate Wilson's dependents fell to C.C. Southern, as the statutory employer of Wilson.²⁸ In evaluating whether Wilson's injury occurred on or about the premises of the employer contracting for the work, the Court noted that Wilson had "died in a highway crash - not at C.C. Southern's facilities - and of course, a public highway is not the contracting employer's premises."²⁹ The Court, however, construed "premises" as "being any place, under the exclusive control of the employer, where the employer's usual business is being carried on or conducted."³⁰ The Court noted that an employer had exclusive control of a place if the general public does not have a right to use it.³¹ The Court concluded that the tractor-trailer rig was the premises of C.C. Southern as the rig was the means by which C.C. Southern conducted its usual business of transporting goods; C.C. Southern required Wilson to be driving the rig in fulfillment of work for which it had contracted; and the general public did not have the right to use either the tractor or the trailer.³² Like C.C. Southern, the tractor-trailer that Lonnie Lewis was in at the time of his death was the means by which DTI conducted its usual business of transporting goods and other items. DTI required decedent to be inside the tractor-trailer in fulfillment of work for which it had contracted. Lastly, the general public did not have the right to use either the tractor or the trailer. Therefore, as in *Wilson*, the tractor in this case is deemed to be the premises of DTI. Consequently, the final part of the test in Section 287.040(1) is met, and I find that DTI is the statutory employer of Lonnie Lewis.

In the *Wilson* case, the Court found C.C. Southern to be Wilson's statutory employer and then found C.C. Southern to be liable for compensating Wilson's dependents, as the record showed that neither Kerr nor Kerr Cartage carried workers' compensation insurance. The Court noted that the Workers' Compensation Act provides:

²⁵ Employer/insurer Exh. 3.

²⁶ Employer/insurer Exh. 2.

²⁷ 140 S.W.3d 115, 117 (Mo. Ct. App. 2004).

²⁸ *Id.* at 119.

²⁹ *Id.* at 118.

³⁰ *Id.*, quoting *Sargent v. Clements*, 88 S.W.2d 174, 178 (Mo. 1935).

³¹ *Id.* at 118.

³² *Id.* at 119.

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Employee: Lonnie Lewis

Injury No. 04-147781

[t]he immediate contractor or subcontractor shall be liable as an employer for the employees of his subcontractors.... The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

As discussed above, neither Buddy Freeman nor R & F Trucking carried worker's compensation insurance on the date of decedent's death. Therefore, as in *Wilson*, liability to decedent's dependents for workers' compensation benefits falls to DTI as a statutory employer. I award death benefits payable to decedent's dependents, beginning from the date of decedent's death, March 27, 2004. However, DTI may be able to seek indemnity from Buddy Freeman, d/b/a R & J Trucking.

Issues 4 and 5: Dependency and Apportionment of Benefits.

Under the Revised Statutes of Missouri, Section 287.240(4) (2005), "[t]he word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury." The statute then lists those persons who are conclusively presumed to be totally dependent upon a deceased employee (namely a wife upon a husband and/or a natural, posthumous, or adopted child or children under 18 years of age, unless physically or mentally incapacitated, upon a parent), and notes that any death benefit shall be payable to them to the exclusion of other total dependents. Pursuant to Section 287.240, I find that Lonnie Lewis had two presumptive dependents at the time of his death: his widow, Staci Lewis, and his minor child, McCartney Lewis.

Section 287.040(4) also provides that death benefits shall be divided among dependents as determined by the Commission. I find that benefits shall be paid by DTI to decedent's dependents pursuant to the agreement the dependents entered into as demonstrated by Exhibits J and L: 50% to Staci Lewis and 50% to Burle and Beverly Brown as guardians of the person and estate of McCartney Lewis, the minor child of the decedent. These benefits will operate pursuant to Section 287.240 of the Act, continuing into the future until such time as both dependents are no longer entitled to benefits. This Award shall not be a bar to further proceedings to determine apportionment and entitlement to benefits pursuant to Section 287.240 of the Act.

Issues 6 and 7: Liability for funeral or burial expenses and to whom such benefits should be paid.

With regard to funeral expenses, Section 287.240.1 provides that "[i]n all cases the employer shall pay *direct to the persons furnishing the same* the reasonable cost of the burial of the deceased employee not exceeding five thousand dollars...." [Emphasis added.] Exhibit H shows that Burle Brown paid a total of \$8,259.52 for decedent's funeral expenses. The testimony indicated that these burial expenses were paid by Burle Brown with the agreement and consent of Staci Brown, as she did not have to funds to do so herself. Staci Lewis, however, agreed to reimburse Burle Brown later if she

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acquired the funds to do so. I find that DTI, the statutory employer, shall pay directly to Burle Brown \$5,000, in full satisfaction of the burial expense provision of the Act.

The death benefits awarded herein shall be subject to modification and review as provided by law. Staci Lewis shall annually report her marital status to the Missouri Division of Workers' Compensation, using the Division's applicable forms, and shall also provide such report to Sentry Insurance Co. Burle Brown or Beverly Brown shall also annually report the age and dependency status of the minor child, McCartney Lewis, to the Missouri Division of Workers' Compensation. Mr. and Mrs. Brown should also use the Division's applicable forms for the annual report.

I make no findings and/or rulings as to the legal rights of claimants and/or DTI as to Buddy Freeman, d/b/a R & F Trucking, as such rights are to be determined by the statutory and case law of the State of Missouri, other than what I have ruled in this Award pursuant to the Missouri Workers' Compensation Act.

Summary

Thus, the issues and their resolution are as follows:

1. Whether Buddy Freeman, d/b/a R & F Trucking had workers' compensation insurance.
Buddy Freeman, d/b/a R & F Trucking, did not have workers' compensation insurance at the time of the accident.
2. Statutory employment;
DTI is the statutory employer of the decedent.
3. Liability for death benefits;
DTI is responsible for death benefits in the amount of \$538.23 per week as discussed in the Award.
4. Dependency;
Staci Lewis and McCartney Lewis are the presumptive dependents of the decedent.
5. Apportionment of death benefits among the dependents;
Death benefits shall be apportioned as follows: 50% to Staci Lewis and 50% to Burle and Beverly Brown as guardians of the person and estate of McCartney Lewis, the minor child of the decedent.
6. Liability for funeral benefits;
DTI is responsible for funeral or burial benefits in the amount of \$5,000.
7. To whom the funeral benefits should be paid;
Funeral or death benefits shall be paid by DTI to Burle Brown, as agreed to by the parties and as required by law.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Lonnie Lewis

Injury No. 04-147781

Any pending objections not expressly addressed in this award are overruled. The compensation awarded to the dependents of the claimant shall be subject to a lien of 25% of all benefits awarded hereunder, in favor of George Miller and Chris Tucker.

Date: February 5, 2010

Made by: Vicky Ruth

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy. Attest:

Naomi Pearson
Naomi Pearson
Division of Workers' Compensation

Missouri Revised Statutes

Chapter 287 Workers' Compensation Law Section 287.280

August 28, 2010

Employer's entire liability to be covered, self-insurer or approved carrier--exception--group of employers may qualify as self-insurers--uniform experience rating plan--failure to insure, effect--rules--confidential records.

287.280. 1. Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure his entire liability thereunder, except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer or group of employers may themselves carry the whole or any part of the liability without insurance upon satisfying the division of their ability so to do. If an employer or group of employers have qualified to self-insure their liability under this chapter, the division of workers' compensation may, if it finds after a hearing that the employer or group of employers are willfully and intentionally violating the provisions of this chapter with intent to defraud their employees of their right to compensation, suspend or revoke the right of the employer or group of employers to self-insure their liability. If the employer or group of employers fail to comply with this section, an injured employee or his dependents may elect after the injury either to bring an action against such employer or group of employers to recover damages for personal injury or death and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee; or to recover under this chapter with the compensation payments commuted and immediately payable; or, if the employee elects to do so, he or she may file a request with the division for payment to be made for medical expenses out of the second injury fund as provided in subsection 5 of section 287.220. If the employer or group of employers are carrying their own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the division shall require the employer or group of employers to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and become immediately payable; provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but the employer or group of employers may carry their own risk for any excess liability. When a group of employers enter into an agreement to pool their liabilities under this chapter, individual members will not be required to qualify as individual self-insurers.

2. Groups of employers qualified to insure their liability pursuant to chapter 537 or this chapter, shall utilize a uniform experience rating plan promulgated by an approved advisory organization. Such groups shall develop ~~experience ratings for their members based on the plan.~~ Nothing in this section shall relieve an employer from remitting, without any charge to the employer, the employer's claims history to an approved advisory organization.

3. For every entity qualified to group self-insure their liability pursuant to this chapter or chapter 537, each entity shall not authorize total discounts for any individual member exceeding twenty-five percent beginning January 1, 1999. All discounts shall be based on objective quantitative factors and applied uniformly to all trust members.

4. Any group of employers that have qualified to self-insure their liability pursuant to this chapter shall file with the division premium rates, based on pure premium rate data, adjusted for loss development and loss trending as filed by the advisory organization with the department of insurance, financial institutions and professional registration pursuant to section 287.975, plus any estimated expenses and other factors or based on average rate

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classifications calculated by the department of insurance, financial institutions and professional registration as taken from the premium rates filed by the twenty insurance companies providing the greatest volume of workers' compensation insurance coverage in this state. The rate is inadequate if funds equal to the full ultimate cost of anticipated losses and loss adjustment expenses are not produced when the prospective loss costs are applied to anticipated payrolls. The provisions of this subsection shall not apply to those political subdivisions of this state that have qualified to self-insure their liability pursuant to this chapter as authorized by section 537.620 on an assessment plan. Any such group may file with the division a composite rate for all coverages provided under that section.

5. Any finding or determination made by the division under this section may be reviewed as provided in sections 287.470 and 287.480.

6. No rule or portion of a rule promulgated under the authority of this section shall become effective unless it has been promulgated pursuant to the provisions of section 536.024.

7. Any records submitted pursuant to this section, and pursuant to any rule promulgated by the division pursuant to this section, shall be considered confidential and not subject to chapter 610. Any party to a workers' compensation case involving the party that submitted the records shall be able to subpoena the records for use in a workers' compensation case, if the information is otherwise relevant.

(RSMo 1939 § 3713, A.L. 1957 p. 560, A.L. 1965 p. 397, A.L. 1974 S.B. 417, A.L. 1980 H.B. 1396, A.L. 1981 S.B. 382, A.L. 1993 S.B. 251, A.L. 1995 S.B. 3, A.L. 1998 H.B. 1237, et al)

Prior revision: 1929 § 3323

Missouri Revised Statutes

Chapter 477 Supreme Court and Court of Appeals Section 477.070

August 28, 2010

Territorial jurisdiction of the western district court of appeals.

477.070. The jurisdiction of the western district of the court of appeals shall be coextensive with all the counties in the state except those embraced in the jurisdiction of the eastern and the southern districts of the court of appeals.

(RSMo 1939 § 2061, A.L. 1973 S.B. 263, A.L. 1978 H.B. 1634)

Prior revisions: 1929 § 1897; 1919 § 2393; 1909 § 3915

Effective 1-2-79