

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

Injury No.: 05-141500

Employee: Lenton Eason

Employer: Adams Towing, Inc.

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 for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence and considered the whole record, we find 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 Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion. The December 15, 2010, award and decision of Administrative Law Judge Karen Wells Fisher is attached and incorporated by this reference.

Employee asserts the Second Injury Fund owes him interest on past medical expenses from July 20, 2006, the date employee amended his claim to add a claim against the Second Injury Fund. Employee relies on § 408.020 RSMo and *McCormack v. Stewart Enterprises*.² Employee argues that, as of that date, all three prongs of the *McCormack* test were satisfied in this matter. The administrative law judge concluded that the interest issue was not ripe for consideration while the matter was pending before the administrative law judge because there was no award upon which interest could accrue. For the reasons set forth below, we agree.

Law

Section 287.140.1 RSMo, provides, in relevant part:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Section 287.220.5 RSMo, provides, in relevant part:

If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair,

¹ References are to the Revised Statutes of Missouri 2004, unless otherwise indicated.

² *McCormack v. Stewart Enters.*, 956 S.W.2d 310 (Mo. App. 1997).

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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, 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. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer. Any funds received by the employee or the employee's dependents, through civil or other action, must go towards reimbursement of the second injury fund, for all payments made to the employee, the employee's dependents, or paid on the employee's behalf, from the second injury fund pursuant to this subsection. ...

Section 408.020 RSMo provides:

Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts **after they become due** and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.
(Emphasis ours).

In *McCormack*, the court considered whether an employer is liable for interest on unpaid medical expenses under § 408.020 RSMo, the general interest statute. The *McCormack* test is summarized as follows: "[A] claimant is entitled to interest on his medical expenses if he establishes that: 1) the expenses were "due," i.e., he actually paid the expenses, his providers were demanding interest of him, or he suffered a loss by the delay of payment; 2) the amount due was readily ascertainable by computation or by reference to a legal standard; and 3) he had demanded the employer to pay the expenses."³

Discussion

Employee accurately points out that in *State ex rel. Otte v. State Treasurer (Otte III)*, the court ruled that an injured worker is entitled to interest from the Second Injury Fund under the general interest statute if the worker satisfies the *McCormack* test.⁴ Notably, however, the *Otte III* court did not address *when* that interest begins to accrue.

Nature of Second Injury Fund liability for medical expenses

It is worth discussing the nature of employee's entitlement to funds from the Second Injury Fund regarding these past due medical expenses. Is the obligation of the Second

³ *State ex rel. Otte v. State Treasurer*, 182 S.W.3d 638, 642 (Mo. App. 2005).

⁴ *State ex rel. Otte v. State Treasurer*, 182 S.W.3d 638 (Mo. App. 2005).

Employee: Lenton Eason

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Injury Fund to pay the medical expenses under § 287.220.5 RSMo identical to the employer's obligation to pay those medical expenses? We think it is not.

"There is...a well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect."⁵

Employer's obligation is described as follows: "the employer **shall provide** such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." "Provide" means, "to supply for use."⁶

The Second Injury Fund's obligation is described as follows: "[F]unds 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..." "Withdraw" means, "to remove (money) from a place of deposit or investment."⁷ "Cover" means, "to be adequate to defray or compensate : defray the cost of : pay for : BALANCE <a reserve fund to ~ unexpected expenses><a special grant to ~ the research program>."⁸

A comparison of the two subsections reveals that employer has an affirmative duty to provide medical care whereas the Second Injury Fund is required only to allow funds to be withdrawn to cover the cost of care.

We conclude that by the affirmative and mandatory language of § 287.140.1 ("employer shall provide") the legislature intended to impose a much greater obligation upon employer as regards medical care than it intended to impose upon the Second Injury Fund by the passive and directory language of § 287.220.5 ("funds may be withdrawn to cover"). Because the legislature imposed distinct obligations upon employers and the Second Injury Fund, we reject employee's argument that employee is entitled to the same interest from the Second Injury Fund as he would be entitled to from employer.

When does interest begin to run?

Section 408.020 RSMo says "*creditors* shall be allowed to receive interest..." Employee asserts he is the creditor in this case. So there must be a debtor. Employer was indebted to provide medical treatment to employee as soon as the treatment was needed. The Second Injury Fund was not a debtor until December 15, 2010, the date the administrative law judge found the employee was entitled to have funds withdrawn from the Second Injury Fund to cover his fair, reasonable and necessary medical expenses.

⁵ *Kirkwood Drug Co. v. Kirkwood*, 387 S.W.2d 550, 554 (Mo. 1965), quoting *Morgan v. Jewell Const. Co.*, 91 S.W.2d 638, 640 (Mo. App. 1936).

⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1827 (2002).

⁷ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2626 (2002).

⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 524 (2002).

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In summary, interest does not begin to accrue on Second Injury Fund medical expense obligations until the entry of an award finding the Second Injury Fund liable for medical expenses pursuant to the provisions of § 287.220.5 RSMo.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest consistent with our opinion herein and as otherwise provided by law.

Given at Jefferson City, State of Missouri, this 19th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lenton Eason

Injury No. 05-141500

Dependents: N/A

Employer: Adams Towing, Inc.

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: August 24, 2010

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

Checked by:

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: AUGUST 26, 2005
5. State location where accident occurred or occupational disease was contracted: VERNON COUNTY, MO
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:
WORKING ON A CARRIER CAR
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: RIGHT LOWER LEG, ANKLE
14. Nature and extent of any permanent disability: NO
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

- 17. Value necessary medical aid not furnished by employer/insurer? \$46,802.66
- 18. Employee's average weekly wages: \$700.00
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$46,802.66

N/A weeks of temporary total disability (or temporary partial disability)

N/A weeks of permanent partial disability from Employer

N/A weeks of disfigurement from Employer

- 22. Second Injury Fund liability: YES

TOTAL: \$46,802.66

- 23. Future requirements awarded: YES

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:

Daniel Doyle

Employee: Lenton Eason

Injury No 05-141500

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Lenton Eason

Injury No. 05-141500

Dependents: N/A

Employer: Adams Towing, Inc.

Additional Party: Second Injury Fund

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

Checked by:

AWARD ON HEARING

The above referenced matter was presented for hearing in Joplin, Missouri on August 24, 2010. In attendance at the hearing was the Claimant, in person and through counsel, Dan Doyle, and the Missouri Second Injury Fund, through counsel, Assistant Attorney General Christina Hammers. The employer, Adams Towing, Inc., was not in attendance and did not have counsel appear. Adams Towing, Inc. has been pled as a party in this matter, and service was attempted by sending certified copies of the Notice of the Hearing to its registered offices of 1314 SW 21st, Moore, Oklahoma 73170.

ISSUES

The following issues were identified to be resolved:

1. Whether Adams Towing, Inc., was an employer under the Missouri workers' compensation statute and, therefore, was required to carry workers' compensation insurance?
2. Whether Lenton Eason was an employee of Adams Towing, Inc. on or about August 26, 2005?
3. Whether the employee, Lenton Eason, provided notice of his alleged work-related injury as required by the workers' compensation statute?
4. Whether the accident of August 26, 2005, caused the injuries that required medical treatment and any subsequent permanent disability?
5. Whether this alleged work-related injury occurred in the course and scope of his employment with Adams Towing, Inc.?

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6. Whether employer, Adams Towing, Inc., is liable for the payment of past medical expenses in the amount of \$46,802.66 with interest pursuant to Section 408.020, RSMo.?

7. Whether or not claimant, Lenton Eason is entitled to future medical treatment as a result of the August 26, 2005, accident?

8. Whether the Second Injury Fund is liable for payment of past medical treatment and any future medical treatment if Adams Towing, Inc., is found to be an uninsured employer?

Employee stated he is seeking neither temporary total disability nor permanent partial disability benefits as employer, Adam's Towing, Inc., has been declared bankrupt in federal court.

EVIDENCE

The employee testified on his own behalf as well as offered the following exhibits which were admitted into evidence.

Exhibit A	Michael Geist, M.D. deposition
Exhibit B	Nevada Regional Medical Center records
Exhibit C	Kansas City Bone and Joint records
Exhibit D	Nevada Regional Medical Center records
Exhibit E	Certificate of Good Standing
Exhibit F	Payroll records
Exhibit G	Correspondence to employer
Exhibit H	Certified postal returns
Exhibit I	Bill amounts

The Second Injury Fund offered the following exhibit which was admitted into evidence:

Exhibit Roman Numeral I	Discharge to Debtor
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FACTS

Employee worked for Adams Towing, Inc., managing its Harrison, Missouri satellite facility for almost two years. He testified he managed three other employees named Ron, Raymond and Stan, who along with employee drove four tow trucks for Adams Towing, Inc., out of its Harrison, Missouri satellite office, which was located within the Sapulpa Auto Pool facilities. Paul Adams owned and operated Adams Towing Inc., which was located in Moore, Oklahoma. Employee testified there were at least five employees working out of the Moore, OK, facility. Paul Adams would drive up from Oklahoma to Harrison, Missouri one to two days each week to do payroll and help with Sapulpa Auto Pool's auctions. Occasionally, other employees from the Moore, OK, facility would work out of the Harrison location if extra help was needed. Employee testified he would drive down to the Oklahoma facility three to four times a month, or more if needed, and work out of the Moore, OK, facility.

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Employee suffered an injury to his right lower extremity on August 18, 2005. He was unloading a wrecked vehicle off his tow truck. He was balanced on a two-inch rail when he lost his balance and fell to the ground landing on his right leg. Employee treated in the Nevada Regional Medical Center emergency room. X-rays showed a distal tibia fracture just above the right ankle. Employee was referred to Dr. Gurley at Kansas City Bone and Joint Clinic. A CAT scan, showed a comminution of the distal tibia with some step-off and displacement. On August 19, 2005, Employee underwent an open reduction and internal fixation of his distal tibia. On September 28, 2005, Employee underwent a second surgery to remove one of the screws. He last treated for his right ankle injury on April 27, 2006.

Employee returned to work for Adams Towing, Inc. soon after his second surgery and, after a few months on light duty, returned to driving a tow truck. He quit working for Adams Towing, Inc., in May 2006, after he discovered that Paul Adams was not paying the medical bills related to Employee's work related injury.

Dr. Michael Geist performed an independent medical evaluation for Employee on May 22, 2007. Dr. Geist practices occupational medicine, however, he is not board certified in this specialty. Dr. Geist opined in his report that "it was reasonably probable [Employee] will need future medical care for [his ankle] injury, which would most likely entail hardware removal at some point in time, although many people who don't have any problems with it would leave it in indefinitely." He noted in his report that Employee was not interested in removal of the hardware at the time of his IME. In his deposition taken on April 22, 2010, Dr. Geist acknowledged he could not say with a reasonable degree of medical certainty that Employee would need future medical treatment, only that it was a possibility.

Employee testified that Adams Towing, Inc., carried workers' compensation insurance in the state of Oklahoma, but not in the state of Missouri. Employee initially pursued a workers' compensation claim in the state of Oklahoma, but was told by an attorney he did not have a claim in Oklahoma because he was hired in Missouri. The primary place of his employment was in Missouri and his accident occurred in Missouri. Employee did not take his Oklahoma case to hearing, but voluntarily dismissed that claim to pursue a claim through Missouri's workers' compensation system.

FINDINGS

There is no dispute that the Claimant injured his ankle when he fell off the car carrier on August 26, 2005 in Nevada, Vernon County, Missouri.

Mr. Eason testified that he worked for Paul Adams doing business as Adams Towing, Inc. in the State of Missouri for several years and actually ran the Missouri location of Adams Towing, Inc.

Mr. Eason testified that the main office was located in the State of Oklahoma and that there were at least four employees working full time in Oklahoma and that he and three other drivers worked full time in Missouri and that Mr. Paul Adams worked in both locations.

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I find the Claimant's testimony to be credible and therefore find that the Claimant was working for Adams Towing, Inc. on the day of the accident, August 26, 2005. I find that the unrefuted testimony established that Adams Towing, Inc. had more than five employees on the day and time of the accident in Missouri. I find that on August 26, 2005, Mr. Eason was injured while working for Adams Towing, Inc. in the Nevada, Missouri area. I have therefore reached the conclusion that Adams Towing, Inc. was an employer subject to the requirements of the Missouri Workers' Compensation Act.

The claimant's injury occurred while he was on top of a car carrier trying to unhook one of the cars when he lost his balance and fell approximately 15 to 20 feet. I find that he immediately received treatment at the Nevada Regional Medical Center but eventually had to have two surgeries which were performed at Research Medical Center. I find the testimony of Dr. Michael J. Geist to be credible. I find that Dr. Geist reviewed all the medical records and medical bills and testified that the treatment and the amount of the bills was reasonable and necessary and that falling off the car carrier was the proximate cause of both the injury and disability suffered by Mr. Eason, as well as the medical bills that were generated. The medical bills amounted to \$46,802.66. All the bills were admitted into evidence without objection. The specific amounts were as follows:

KC Bone & Joint	\$3,733.00
Research Medical Center	16,409.53
Research Medical Center	23,494.13
Anesthesia Assoc. of KC	1,725.00
Nevada Reg. Med. Ctr.	1,441.00
Total	\$46,802.66

I find these medical bills and amounts to be reasonable and necessary and award these amounts to claimant. Based on the foregoing, I order the Second Injury Fund to pay Mr. Eason the full amount of the medical bills, \$46,802.66.

I believe the facts, as I have found them, substantiate that Lenton Eason was working for Adams Towing, Inc. on August 26, 2005, and that Adams Towing, Inc. was an employer subject to the workers' compensation laws of the State of Missouri as they were doing business in Missouri within the meaning of 287.030 RSMo. and *Busby v. D.C. Cycle, LTD*, 292 S.W.2d, 546 (2009). I further find that Adams Towing, Inc. was given proper notice of the claim and of the hearing and has failed to appear.

One issue in this case is whether Adams Towing Inc., was covered for workers' compensation claims arising out of the State of Missouri. The fact that the employer may have been insured in the State of Oklahoma is not relevant to my determination of their required coverage in the State of Missouri. There is no evidence that Adams Towing Inc., was covered for workers' compensation purposes in Missouri. A certified copy from the Division of Workers' Compensation signed by Amy Frank, indicated that Adams Towing, Inc. did not have Workers' Compensation insurance in the State of Missouri on the date of the accident. I find that they

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were uninsured and that the Second Injury Fund is liable subject to the provisions of §287.220(5) RSMo.

The employee argues that he is entitled to interest on all medical awarded herein. I find that the issue as to payment of interest is not ripe for the reason that there has not been an award of benefits issued by an Administrative Law Judge or the Commission on which interest could possibly be awarded. The statute does not contain language allowing an order of interest on medical benefits. Section 287.160(3) allows an order of interest on temporary total disability benefits only. Applying strict interpretation I cannot find specific authority in the statute to award interest on a claim of past medical benefits. Claimant offers two cases in support of his position. I find that these cases are not on point. *McCormack v. Stewart Enterprises, Inc.*, 956 S.W.2d 310 is a case where interest is awarded against an employer/insurer, not against the Second Injury Fund as is the case here. While §287.220(5) allows the Second Injury Fund the defenses of an employer in an uninsured case, it does not impose on the Second Injury Fund the obligation of an employer prior to a finding that the employer was in fact uninsured and the case is compensable. More importantly in *McCormack* and in the second case, which claimant submits, *Otte v. Missouri State Treasurer*, 182 S.W.2d 638, an award had already issued which is also not the case here. I deny employee's claim for interest against the Second Injury Fund.

I find that medical treatment should remain open for the purpose of curing and or relieving the affects of the injury to Mr. Eason's right lower extremity.

I order 25 percent of all amounts awarded herein to Daniel Doyle as attorney's fees which shall constitute a lien upon this award.

Date: December 15, 2010

Made by: /s/ Karen Wells Fisher
Karen Wells Fisher
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation