Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 09-061058

Employee: James W. Auxier

Employer: HP Distribution LLP

Insurer: Farmers Insurance Exchange

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 6, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert B. Miner, issued April 6, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3rd day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James W. Auxier Injury No.: 09-061058

Employer: HP Distribution LLP

Insurer: Farmers Insurance Exchange

Hearing Date: December 10, 2009 Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

4. Date of accident or onset of occupational disease: March 16, 2009.

5. State location where accident occurred or occupational disease was contracted: Dallas, Texas.

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? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleges he fell from the back of a trailer.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Alleged: Head, legs, arms, abdomen, torso, ears (both), left knee, body as a whole.

14. Nature and extent of any permanent disability: Not determined.

15. Compensation paid to-date for temporary disability: $21, 704.60.

16. Value necessary medical aid paid to date by employer/insurer? $32,912.00.

17. Value necessary medical aid not furnished by employer/insurer? Not determined.

18. Employee's average weekly wages: $991.28.

19. Weekly compensation rate: $660.85 for temporary total disability and $404.66 for permanent partial disability.

20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee's claim is denied and dismissed for lack of jurisdiction under the Missouri Workers' Compensation Law.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James W. Auxier Injury No.: 09-061058

Employer: HP Distribution LLP

Insurer: Farmers Insurance Exchange

Hearing Date: December 10, 2009 Checked by: RBM

PRELIMINARIES

A non-Section 287.203 temporary hearing was held in this case on Employee's claim against Employer on December 10, 2009 in Gladstone, Missouri. Employee, James W. Auxier, appeared in person and by his attorney, Benjamin S. Creedy. Employer, HP Distribution LLP, and Insurer, Farmers Insurance Exchange, appeared by their attorney, Bren R. Abbott. The Second Injury Fund is not a party to this case. Benjamin S. Creedy deferred any request for attorney's fees relating to Employee's request for additional temporary total disability benefits that is the subject of this hearing.

It was agreed that the record would be left open to permit Employer's attorney to submit records showing the amounts paid for temporary total disability and medical aid, and the average weekly wage. Records showing amounts paid for temporary total disability and medical aid, were received by the Administrative Law Judge on January 6, 2010 via fax, and on January 8, 2010 via mail with a January 7, 2010 letter from Bren Abbott. A copy of the January 7, 2010 letter is shown to have been copied to Employee's attorney, Benjamin S. Creedy. The records showing amounts paid for temporary total disability and medical aid and the January 7, 2010 letter from Bren Abbot received on January 8, 2010 (which are more legible than those received on January 6, 2010) have been marked by the Court Reporter, Employer's Exhibit 1 with the date January 8, 2010. Employer's Exhibit 1 has been admitted in evidence.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about March 16, 2009, James W. Auxier ("Claimant") was an employee of HP Distribution LLP ("Employer").

2. On or about March 16, 2009, Employer was fully insured by Farmers Insurance Exchange ("Insurer").

3. On or about March 16, 2009, Claimant sustained an injury by accident in Dallas, Texas, arising out of and in the course of his employment.

4. Employer had notice of Claimant's injury.

5. Claimant's Claim for Compensation was filed within the time allowed by law.

6. If Missouri has jurisdiction in this workers' compensation case, the rate of compensation for permanent partial disability is $404.66 per week.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about March 16, 2009, Claimant was working under the provisions of the Missouri Workers' Compensation Law, and if Missouri has jurisdiction in this case, Employer/Insurer's liability for past and future temporary total disability benefits.

2. Average weekly wage and temporary total disability rate.

Claimant testified in person. Barbara Auxier and Walter Michael Copp were also called to testify by Claimant's attorney. In addition, Claimant offered the following exhibits which were admitted in evidence:

Exhibit A—telephone records
Exhibit B—Business card of Copp Transportation

Employer called Valerie Eggert to testify. Employer's Exhibit 1, a printout showing medical and temporary disability benefits paid, has been admitted in evidence.

On March 25, 2010, the Administrative Law Judge received a letter dated March 25, 2010 from Employee's attorney, Benjamin Creedy, advising that the parties reached an agreement that Employee's average weekly wage is $991.28 per week. A copy of the letter is shown to have been faxed to Employer's attorney, Bren Abbot. The March 25, 2010 letter from Benjamin Creedy has been marked by the Court Reporter, Court's Exhibit 1 with the date March 25, 2010, and has been admitted in evidence.

The post-trial briefs of the attorneys have been considered.

Findings of Fact

Summary of the Evidence

James Auxier testified that he was injured on the job on March 9, 2009 in Texas while he was working as a driver for Employer. Claimant is an over-the-road driver. He had a regular route from Kansas to Ft. Worth, then from Ft. Worth to Oklahoma, and then returning to Kansas. Claimant worked for Copp Transportation before he worked for Employer.

Claimant testified that before he was hired by Employer, and while he was in Texas working for Copp Transportation, he received a phone call from Bill Hope, a dispatcher, who told him to report to Employer in Kansas City, Kansas. Mr. Hope told Claimant to take his tractor to Southwest Boulevard and take the Copp Transportation decals off his truck and to put Employer's decals on his truck. Claimant changed the decals. Claimant's personal vehicle was at Copp Transportation when he returned from Texas. Mike Copp took Claimant to get his personal vehicle. After he got his vehicle, he returned to his home in Missouri.

Claimant testified he went to Employer on a Friday and filled out paperwork at Employer. Claimant said that on Friday, Employer was not sure who it was going hire. He testified they told him they would let him know if he was hired. He said he took a drug test at North Kansas City, Missouri the same day that he changed his decals. He said he did not get the results of the drug test then.

Claimant testified that the next day, which was a Saturday, he received a phone call on his cell phone from Bill Hope. Bill Hope had been a dispatcher at Copp Transportation and had begun working as a dispatcher for Employer. Claimant testified that Bill Hope told him that his dispatch would be in the mailbox at Employer, and that it would tell him where to go. Claimant reported to work for Employer on Sunday and was given his route. His pay did not change after he was hired by Employer.

Claimant testified on cross-examination that Copp Transportation went out of business around the end of July. He said he got a call from Bill Hope to return to Employer. He met with Valerie Eggert at Employer and filled out an application then.

I find this testimony of Claimant to be credible except as noted later in this award. In particular, and as discussed later in this award, I do not believe Claimant's testimony that on the Friday he went to Employer and filled out his application, he was told they would let him know if he was hired. I do not find credible Claimant's testimony that he was hired when Bill Hope called him while Claimant was at home. I also do not find credible Claimant's testimony that he took a drug test at North Kansas City shortly before

being hired by Employer. Claimant produced no records of any such drug test at the hearing. I believe Valerie Eggert offered Claimant his job with Employer in Employer's office in Kansas City, Kansas, and that Claimant accepted the job offer while he was in Employer's office in Kansas City, Kansas.

Barbara Auxier testified that she is married to Claimant. She said Claimant's cell phone number is 816-718-9042. He has had that number for six years. Ms. Auxier identified Exhibit A, copies of her and her husband's cell phone bill for the period July 8, 2008 and August 28, 2008.

Ms. Auxier identified Exhibit B as a list of dispatching phone numbers, including Bill Hope's, of Copp Transportation.

Ms. Auxier testified that when Claimant first was injured, he received temporary disability benefits at a higher rate than he was currently receiving them. The checks were $648.00 per week at first, but then changed to either $524.00 or $529.00 per week.

I find this testimony of Ms. Auxier to be credible.

Walter Michael Copp was called as a witness. Mr. Copp testified that his job title is Director of Transportation for Employer. He is a salesman and oversees dispatches. He is Claimant's supervisor.

Mr. Copp testified he owned Copp Transportation prior to July 31, 2008, and that he had owned that company for twenty-three years. Copp Transportation was an over-the-road trucking company. Claimant was an employee of Copp Transportation and was an over-the-road driver.

Mr. Copp testified that on July 31, 2008, he closed the doors of Copp Transportation. Copp Transportation had loans and the bank took all of Copp Transportation's assets at an asset sale. Mr. Copp testified Copp Transportation is in an involuntary bankruptcy case in Kansas.

Mr. Copp testified the employees of Copp Transportation were notified within one week before July 31, 2008 about the company's closing. There was a transition of customers from Copp Transportation to Employer. Employer did not buy any assets from Copp Transportation. Employer bought assets from Copp Transportation's lenders. Employer purchased all of Copp Transportation's equipment, including tractors and trailers.

Mr. Copp testified that employees were told about Employer's business. All who worked at Copp Transportation were given an opportunity to fill out applications with

Employer. Not all Copp Transportation employees were hired by Employer. He testified a great deal of the drivers were hired by Employer.

Mr. Copp testified he has no ownership interest in Employer. His wife works at Employer as well. She also worked at Copp Transportation. He and his wife owned Copp Transportation. His wife does billing at Employer. She works part time for Employer, but worked full time for Copp Transportation. His wife is not in a supervisory capacity at Employer. Mr. Copp testified that he and his wife do not own any part of Employer. They did not sell Copp Transportation's assets to Employer. He was not involved in the transfer of assets to Employer.

Mr. Copp testified he had relationships with Copp Transportation's customers. Most direct customers of Copp Transportation went to Employer, and some brokers went to Employer. Mr. Copp took about 80% of his customers with him when he came to Employer.

Drivers are paid the same rate at Employer as they were paid at Copp Transportation. Their routes are different at Employer. Claimant was a Texas driver. He drove from Kansas City to Texas and back.

Mr. Copp testified that he supplied a letter about health insurance to new employees after Employer hired them. Employees were told to come in and fill out paperwork at Employer and take a drug test.

Mr. Copp testified on cross-examination that he is familiar with federal regulations regarding the hiring of drivers. Employees are required to fill out a standard application, complete a drug test, have a physical, have a road test, and have a valid safety record the past three years. Mr. Copp testified that drivers had to see Valerie Eggert regarding hiring.

Mr. Copp said Bill Hope is a dispatcher, not a supervisor, at Employer. Mr. Copp is Bill Hope's supervisor. Dispatchers give load information to drivers so they can have as little down time as possible.

All drivers of Copp Transportation were asked to come to Employer. Copp had about fifty to sixty employees when it closed. Copp Transportation did no business after July 31, 2008.

I find Mr. Copp's testimony to be credible.

Valerie Eggert testified she is the Safety Director of Employer. She does background checks, monitors logs, and sends persons for drug screens. She was

employed with Employer in July and August 2008. She was involved with the hiring of Copp Transportation employees by Employer. The drivers had to come into Employer's office in Kansas and fill out an application and provide a driver's license.

Ms. Eggert testified that Claimant filled out an application with Employer on August 1, 2008, which is the date of the application. He filled out the application in Employer's office, which is in Kansas. Drivers could bring in a current physical. Claimant and other drivers had been in a random drug program. Because of that, they did not have to go through a physical and a drug screening before being hired. Claimant did not have to take a drug screening to be hired. Ms. Eggert remembered seeing Claimant on August 1, 2008. They had known each other before that date.

Ms. Eggert testified that the only thing that she had to do to hire Claimant after he submitted his application was to run his driver's license. If it was okay, he was hired. She ran Claimant's driver's license and it was okay. She had Claimant's driver's license and other drivers' licenses a few days before she hired Claimant. Claimant's driver's license check was made before August 1, 2008. Ms. Eggert said she has the applications and notice of compliance.

Ms. Eggert testified that she offered Claimant his job on August 1, 2008 in Employer's office in Kansas City, Kansas, and that Claimant accepted the job offer on August 1, 2008 while he was in Employer's office in Kansas City, Kansas.

Ms. Eggert testified on cross-examination that some Copp Transportation drivers did not get jobs. The drivers' licenses were checked, and if they were too bad, due to insurance, they were not offered the job.

Ms. Eggert testified that she knew Claimant had a clean driving record when he was hired on August 1, 2008. Claimant did not have to take the drug test. It was part of her responsibility to hire drivers. Employer had drug screen information for random tests from Copp Transportation.

Ms. Eggert also testified that there was a condition of Employer that an application had to be filled out at Employer. A driver would not be hired without an application being there.

I find Ms. Eggert's testimony to be credible.

The Administrative Law Judge takes administrative notice that Claimant's Claim for Compensation filed on August 14, 2009 alleges that on March 16, 2009, Claimant fell from the back of a trailer and injured his head, legs, arms, abdomen, torso, ears (both), left knee, body as a whole.

Employer's Exhibit 1 documents Employer/Insurer has paid $21,704.60 in temporary disability to December 19, 2009. Employer's Exhibit 1 also documents Employer/Insurer has paid $32,912.00 in medical aid to November 24, 2009.

The parties stipulated that on or about March 16, 2009, Claimant sustained an injury by accident in Dallas, Texas, arising out of and in the course of his employment.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony, the exhibits in evidence, and the stipulations of the parties, I make the following Rulings of Law:

Section 287.800, RSMo[1] provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

> The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.030.2, RSMo provides: "2. Any reference to the employer shall also include his or her insurer or group self-insurer."

287.110, RSMO provides:

> 1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law.

---

[1] All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

> 2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

Section 287.170.4, RSMo provides:

> (4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

Court's Exhibit 1 notes the parties agreed that Claimant's average weekly wage is $991.28. I find that Claimant's compensation rate for temporary total disability is $660.85 per week pursuant to Section 287.170.4, RSMo.

Claimant argues that his employment with Employer was merely a continuation or transfer of his employment contract with Copp Transportation. He argues a new employment contract was not formed when he went to work for Employer. He argues that Employer assumed liability for the employment contracts of Copp Transportation's employees including Claimant.

Claimant cites *Harashe v. Flinknote Co.*, 848 S.W.2d 506, 509 (Mo.App. 1993) and *Flotte v. United Claims, Inc.*, 657 S.W.2d 387, 388-389 (Mo.App. 1983). Claimant also cites *Brockman v. O'Neal*, 565 S.W.2d 796, 798 (Mo.App. 1978) that recites the general rule in Missouri:

> Where one company sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts or liabilities for the transfer, except: (1) Where the purchaser expressly or impliedly agrees to assume assets, debts or liabilities; (2) Where the transaction amounts to the consolidation or merger of the companies; (3) Where the purchasing corporation is merely a continuation of the

> selling corporation; and (4) Where the transaction is entered into fraudulently in order to escape liability from assets and debts.

Claimant also cites *Harashe*, 848 S.W.2d at 509 which states:

> The elements of a defacto merger are (a) A continuation of management in personnel and general business operations; (b) A continuity of shareholders resulting from the purchasing corporation paying for the assets with shares of its own stock so the selling corporation stockholders become a constituent part of the purchasing corporation; (c) The seller corporation ceasing ordinary business operations and dissolving as soon as possible; and (d) The purchasing corporation assuming those obligations necessary to continue normal, ordinary business operations. 'It is not necessary to find all of the elements to find a defacto merger.'

Employer asserts that none of the elements of a defacto merger established in *Harashe* and *Flotte* exist in this case. Employer asserts there was no continuation of management in the general business operations. Employer notes Mr. Copp owned Copp Transportation and does not have an ownership interest in Employer. Employer also notes Copp Transportation simply went out of business and Employer bought some of the assets from the banks, but bought no assets from Copp Transportation. Employer also notes it did not take on any of the Copp Transportation's debt, did not purchase Copp Transportation, and did not take on any business operations of Copp Transportation, other than to make Copp's services available to Employer. Employer also notes none of the shareholders of Copp Transportation are shareholders of Employer.

I find that Claimant's employment with Employer was not merely a continuation or transfer of his employment with Copp. I find that the evidence establishes that Copp Transportation went into bankruptcy and that Employer purchased some assets from Copp Transportation's creditors. There is no evidence that Employer purchased Copp Transportation's assets directly from Copp Transportation or the bankruptcy trustee in the bankruptcy case. Employer did not acquire any ongoing business from Copp Transportation. There is no evidence of any contract between Employer and Copp Transportation to purchase assets or stock. Employer did not acquire any ongoing ownership interest in a business. The proceeds of the sale of Copp Transportation's assets went to the creditors, not Copp Transportation. No consideration was paid to Copp Transportation for Employer acquiring certain customers of Copp Transportation. Employer was not required to hire all of Copp Transportation's personnel and did not hire all of Copp Transportation's personnel. Mr. Copp is not an owner of Employer. There was no evidence that Employer assumed obligations of Copp Transportation necessary to continue normal, ordinary business operations.

Claimant's reliance on *Golden State Bottling Co. v. Nat'l Labor Relations Board*, 414 U.S. 168 (1973) is misplaced. That case involved the liability of a corporate successor for a predecessor's obligations. Here, there was no obligation relating to any worker's compensation claim of Claimant at the time of the alleged merger because the claim was not yet in existence. The case at hand involves a worker's compensation case. It involves an allegation of successor liability in a dual jurisdiction case. The liability for Claimant's injury did not exist on the date of the alleged merger or alleged continuation or transfer of Claimant's employment contract to Employer. In the case at hand, Copp Transportation closed its doors on July 31, 2008. Claimant filled out his application with Employer and was hired by Employer on August 1, 2008. Claimant was injured on March 16, 2009.

I find there was a new contract of employment between Claimant and Employer. I further find that Claimant's employment originated in Kansas and not in Missouri. I believe Valerie Eggert's testimony, and I find that Valerie Eggert offered Claimant his job with Employer on August 1, 2008 in Employer's office in Kansas City, Kansas, and that Claimant accepted the job offer on August 1, 2008 while he was in Employer's office in Kansas City, Kansas. I find that Claimant was hired in the State of Kansas when he accepted the offer of employment by Valerie Eggert of Employer at Employer's office in Kansas City, Kansas.

I do not believe Claimant's testimony that on the Friday he went to Employer and filled out his application, he was told they would let him know if he was hired. I do not find credible Claimant's testimony that he was hired when Bill Hope called him while Claimant was at home. I also do not find credible Claimant's testimony that he took a drug test at North Kansas City shortly before being hired by Employer. Claimant produced no records of any such drug test at the hearing. As noted above, I believe Valerie Eggert offered Claimant his job with Employer in Employer's office in Kansas City, Kansas, and that Claimant accepted the job offer while he was in Employer's office in Kansas City, Kansas.

I find Claimant was hired by Employer in the State of Kansas. I find Claimant was injured in the State of Texas, and not in the State of Missouri. No evidence was presented that Claimant's employment was principally localized in the State of Missouri within thirteen calendar weeks of the injury.

I find that the State of Missouri does not have jurisdiction in this case. Claimant's claim is denied and dismissed for lack of jurisdiction, and all other issues are moot. Because the claim is dismissed, this award is final and subject to immediate appeal.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 6th day of April, 2010.

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