Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 09-067542

Employee: Mauro Brito-Pacheco, deceased

Dependents: Michelle Pacheco, widow; Mauricio Brito-Pacheco and Briana Marie Brito-Pacheco, dependent children

Employer: Tina's Hair Salon

Insurer: Uninsured

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge issued July 1, 2011 , and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued July 1, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and Mauro Brito-Pacheco's (employee) dependents should be awarded a death benefit.

Facts

The facts in this case are not in dispute. On August 10, 2009, employee was shot in the upper abdomen by an unknown assailant at Tina's Hair Salon. Employee subsequently died from his wounds that same day.

On August 10, 2009, Tina's Hair Salon was a sole proprietorship owned by Augustina Diaz. Including Ms. Diaz and employee, Tina's Hair Salon had six beauticians total. Ms. Diaz had no written agreements with any of the operators. The customers would pay the operators directly and the operators would pay Ms. Diaz 50% of what they were paid by the customers. Ms. Diaz collected money from the operators one time per day. Ms. Diaz did not set the prices. Ms. Diaz maintained a book where the operator would write down the name of the customer and how much was charged for the services rendered.

Each operator had their own clients. Ms. Diaz did not have any control over the clients and did not keep a list of each operator's clients. Each operator had a key to the store.

The operators were not charged for their stall. The operators received no side benefits from Ms. Diaz of any kind. The operators furnished their own scissors, combs, and brushes, but Ms. Diaz did furnish liquid supplies like shampoo and hair coloring. If the operators could not show up for work, it was the custom and practice to call another operator to cover for them.

On August 10, 2009, employee was at home caring for his two small children when he received a call from another operator requesting that employee come into work and cover for him. Employee arranged for his wife to come home to watch the children. Employee then went into work and was shot and killed later that afternoon.

Discussion

The sole issue on appeal is whether employee was a statutory employee of the beauty salon at the time of his death. Section 287.040.1 RSMo provides, 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, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The Missouri Supreme Court simplified the analysis of § 287.040.1 in *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532 (Mo. 1988) by establishing three basic requirements that must be met in order to find statutory employment. Those requirements are as follows:

> (1) the work was being performed pursuant to a contract;
>
> (2) the injury occurred on or about the premises of the alleged statutory employer; and
>
> (3) when injured the alleged statutory employee was performing work which was in the usual course of business of the alleged statutory employer.

Id. at 534.

The ALJ correctly pointed out that the contract need not be in writing and can be verbal. However, the ALJ incorrectly concluded, without analysis, that there was no evidence that employee's work was performed pursuant to either a written or verbal contract.

I agree with the ALJ that there was not a written contract between employee and Ms. Diaz, but I disagree with the ALJ's finding that there was not a verbal contract.

In *McGuire*, the Court held that the contract requirement of § 287.040.1 does not mean that there has to be a specific delegation of the employer's usual business activity to the contractor. *Id*. at 535. The Court also held that the statute does not require that the contract provide a complete assignment of a business or operation to a contractor or subcontractor. The contract element of § 287.040.1 only requires that the alleged statutory employee be assigned duties routinely performed by the employer. *Id*.

In this case, employee was assigned the duties of working on men's hair. The other operators worked on both men and women's hair. Therefore, employee was assigned duties routinely performed by the employer. Consideration for a verbal contract exists because Ms. Diaz was paid 50% of what employee charged for his services. I believe employee was performing work pursuant to a verbal contract with Ms. Diaz and that a statutory employment relationship existed.

It appears that Ms. Diaz was operating her salon in a manner designed to evade numerous federal and state statutes. The concept of statutory employment is actually designed "to prevent an employer from evading workmen's compensation liability by hiring independent contractors to perform the usual and ordinary work which his own employees would otherwise perform." *Miller v. Municipal Theatre Association of St. Louis*, 540 S.W. 2d 899, 906 (Mo. App. 1976). By finding that a statutory employment relationship was not established, the majority is allowing Ms. Diaz to carry on a business in a manner that § 287.040 RSMo was specifically designed to prevent.

Conclusion

In light of the foregoing, I find that employee's dependents should be awarded a death benefit. As such, I would reverse the award of the ALJ and award employee the same.

Therefore, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

FINAL AWARD

Employee: Mauro Brito-Pacheco, deceased Injury No. 09-067542

Dependents: Michelle Pacheco, wife
Mauricio Brito-Pacheco, child
Briana Marie Brito-Pacheco, child

Employer: Tina's Hair Salon

Insurer: Uninsured

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

Hearing Date: May 16, 2011 Checked by: PAM/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

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

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

4. Date of accident or onset of occupational disease: August 10, 2009.

5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

9. Was Claim for Compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? N/A.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Pacheco was shot and killed during an attempted robbery at Tina's Hair Salon.

12. Did accident or occupational disease cause death? Yes. Date of death? August 10, 2009.

13. Part(s) of body injured by accident or occupational disease: N/A.

14. Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: N/A.

16. Value necessary medical aid paid to date by employer/insurer? N/A.

17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: N/A.

19. Weekly compensation rate: N/A.

20. Method wages computation: N/A.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: None.

23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jerry Kenter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mauro Brito-Pacheco, deceased Injury No. 09-067542

Dependents: Michelle Pacheco, wife
Mauricio Brito-Pacheco, child
Briana Marie Brito-Pacheco, child

Employer: Tina's Hair Salon

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

Hearing Date: May 16, 2011 Checked by: PAM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On May 16, 2011, the parties appeared for a final hearing. Michelle Brito-Pacheco, the deceased's widow, appeared with counsel, Jerry Kenter. The Employer, Tina Diaz (Tina's Hair Salon) appeared with attorney Gregory Abella. The Second Injury Fund appeared by Andrew Dickson.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

1) That on August 10, 2009, Mauro Brito-Pacheco was shot and killed at Tina's Hair Salon in Kansas City, Missouri;

2) That notice and timeliness of the claim are not in dispute;

3) That Tina's Hair Salon did not have workers' compensation insurance.

ISSUES

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

1) Whether Mauro Brito-Pacheco was an employee of Tina's Hair Salon under the Missouri Workers' Compensation Act;

2) The liability of the Second Injury Fund for uninsured benefits.

EVIDENCE

Mauro Brito-Pacheco, hairdresser, was shot and killed by a robber at Tina's Hair Salon on August 10, 2009. His widow and minor children seek workers' compensation benefits.

The primary issue is whether Tina Diaz was an employer/statutory employer under the Missouri Workers' Compensation Act.

Tina's Hair Salon operates as a sole proprietorship by Tina Diaz. Diaz testified that she supplied a work station and shampoo/chemical supplies to the hairdressers. Diaz also provided salon business address cards to which operators could add their name. Diaz did not schedule appointments, limit or mandate work hours, provide employee benefits, pay taxes or mandate fees. Basically the hairdressers would use the space provided and divide the proceeds of compensation paid by customers. Diaz did not have workers' compensation, fire or liability insurance.

On August 10, 2009, Pacheco was home caring for his children when another hair dresser "Hugo" called to see if Pacheco could cover his appointments at Tina's Hair Salon. It was during that shift that the salon was robbed and Pacheco killed.

Diaz did not call for Pacheco to work that day and was unaware that he was working.

Missouri uses the right to control test to determine whether the worker is an employee or an independent contractor. Cole v. Town and Country Exteriors, 837 S.W.2d 580 (Mo.App. E.D. 1992). There is no evidence to support that Diaz had the right to control the means and manner of Pacheco's work. Accordingly, Pacheco is unable to sustain the burden of proof regarding employer/employee relationship.

Pacheco argues that if the Court finds that the deceased was an independent contractor, the issue of statutory employment comes into play. The right to control and the right to replace a worker are not significant factors in the determination of statutory employment under § 287.240 RSMo. The absence of either may be consistent with the worker's status as a statutory employee. Dillard v. Leon Dickens/Forklift of Cuba, 869 S.W.2d 317 (Mo.App. S.D. 1994); Wood v. Proctor & Gamble Manufacturing Co., 787 S.W.2d 816 (Mo.App. E.D. 1990); McDonald v. Bi-State Development Agency, 786 S.W.2d 201 (Mo.App. E.D. 1990).

The elements necessary to establish statutory employment are as follows:

1. Work done under contract;
2. On or about the premises of the employer;
3. Which is in the usual business of the employer (§ 287.040-1 RSMo.)

The contract need not be in writing and can be verbal. McGuire v. Tenneco, Inc., 756 S.W.2d 532 (Mo. 1988); Mooney v. Missouri Athletic Club, 859 S.W.2d 772 (Mo.App. E.D. 1993); Employers Insurance of Wausau, 842 S.W.2d 208 (Mo.App. E.D. 1992).

There is no evidence in this case that the work of the deceased was pursuant to contract either written or verbal. Tina Diaz, (Tina's Hair Salon) was not Pacheco's statutory employer.

The events surrounding Mr. Pacheco's death are tragic; however, since I did not find an employer/employee or statutory employer relationship, Pacheco's claim for compensation is denied.

Made by: _____
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation