

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

Injury No.: 05-006009

Employee: Gary Densen
Employer: Ferguson Roofing
Daniel Densen d/b/a DLD Construction
Insurer: Travelers Indemnity Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 July 15, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued July 15, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Gary Densen

Injury No.: 05-006009

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Ferguson Roofing
Daniel Densen d/b/a DLD Construction

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Travelers Indemnity Company

Hearing Date: April 22, 2009 continued to April 23, 2009

Checked by: LJW

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: alleged as January 5, 2005
5. State location where accident occurred or occupational disease was contracted: alleged St. Louis County, MO
6. Was above employee in employ of above employer(s) at time of alleged accident or occupational disease?
No
7. Did employer(s) receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer(s) insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee alleges he fell from a ladder while working for either Employer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: alleged right leg, right knee, and left arm.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,006.15 paid by Ferguson Roofing

Employee: Gary Densen

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: unknown
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable: None

TOTAL: - 0 -

22. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Gary Densen	Injury No.: 05-006009
Dependents:	N/A	Before the
Employer:	Ferguson Roofing	Division of Workers'
	Danny Densen d/b/a DLD Construction	Compensation
Additional Party:	N/A	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Travelers Indemnity Company	Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 22, 2009, and continued to April 23, 2009. Post-trial briefs were received, and the case was formally submitted on May 22, 2009. Attorney Jeffrey Gault represented Gary Densen (Claimant). Two potential employers were identified: Ferguson Roofing (Ferguson) is insured by Travelers Indemnity Company, and represented by Attorney Steven Sharp; and Daniel Densen d/b/a DLD Construction (DLD) is also insured by Travelers Indemnity Company, and represented by Attorney Karen Mulroy.

Prior to the start of hearing the parties identified the issues for disposition in this case: arising out of and course and scope of employment; liability of either named employers as employers subject to the MO Workers' Compensation Act on the date of injury; notice as to alleged employer Ferguson; medical causation as relates to medical treatment received after December 2005; liability for past medical expenses; wage rate; past temporary total disability (TTD); permanent partial disability (PPD) including disfigurement; and allowance of a \$2,006.15 Ferguson credit if Claimant prevails against either employer.

Claimant offered Exhibits A-K. DLD voiced numerous objections to Exhibit J, and the objections are moot for reasons outlined in this award. Ferguson and DLD offered Joint Employers Exhibits 1-3, and the exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is fifty-five years old, and has worked as a roofer throughout his working life. During his working life, Claimant has worked for various roofing companies including DLD. When working for DLD, Claimant was hired on a job-by-job basis, was paid approximately \$20.00 per hour, and was paid gross wages in cash. Claimant filed no federal or state income tax returns, and reported no withholdings. Prior to the date of alleged injury, Claimant last worked for DLD in late December 2004, performing subcontractor roofing for Ferguson.
2. Mr. Danny Densen (Danny)¹ is the owner of DLD.² Danny's son manages the day-to-day operation of DLD. On the alleged date of injury Danny was an employee of Ferguson, performing work for only Ferguson. Ferguson directed his schedule, directed how he performed his work, what he wore while working, what he drove while working, paid him a weekly salary, withheld taxes from his salary, and reported his earnings to the I.R.S. As an employee of Ferguson, Danny was employed as an estimator/salesperson/inspector. When inspecting a property, Danny never performed a repair unless it was a very simple repair, but, he had to first obtain approval from Ferguson before making any repair.
3. On the alleged date of injury, January 5, 2005, it was raining and DLD was not working due to the rain. On his way to his job at Ferguson, Danny stopped by Claimant's house to pick up his son who was playing video games with Claimant's son. What occurred next is the subject of conflicting testimony received from Claimant and Danny.

Claimant: Claimant agreed Danny arrived to pick up his son, but testified Danny's son was going to work with his father. Claimant testified he went with Danny instead, and he understood he would be working with Danny. Claimant further testified the two men visited three Ferguson jobsites, and he climbed onto the roofs at all three sites.

Danny: Danny testified his purpose in picking up his son was to bring him home, but his son wanted to remain and play video games. Danny acknowledged Claimant did ride with him, but not to work, rather, to "catch up with him." Danny denied he ever hired Claimant to assist him, and never paid him wages that day. Danny also denied Claimant climbed the roofs of the three jobsites visited; rather, Claimant remained on the ground and held the ladder while he climbed the first two roofs. It was only at the third jobsite, after climbing a ladder to the roof, Danny turned around to find Claimant had followed him onto the roof.

4. While Claimant was descending the ladder, the ladder slid, and Claimant fell off the ladder sustaining a serious fracture of his right leg. Danny took Claimant to St. John's Mercy Medical Center, where Claimant underwent surgical repair of the fracture. During August 2006, Claimant underwent a right knee meniscus repair, and in February 2007 Claimant sustained a severe burn to his left arm, both injuries Claimant relates occurred due to the condition of his post-operative right leg.
5. Mr. Brett Shupp testified on behalf of Ferguson. Mr. Shupp is a production manager for Ferguson. Mr. Shupp confirmed Claimant was not an employee of Ferguson, and had never applied for employment at Ferguson. Mr. Shupp confirmed Danny was an employee of

¹ For clarity, the Court will refer to Mr. Densen utilizing his first name.

² Danny Densen is Claimant's cousin.

Ferguson, and he was sent out on January 5, 2005, to troubleshoot reported leaks at three Ferguson jobsites because it was raining. Mr. Shupp further testified Danny's job duties required no assistant. Mr. Shupp confirmed no DLD crews or any subcontractor roofing crews were working that day due to the weather conditions. Mr. Shupp also testified Ferguson had no knowledge Claimant was traveling with Danny on the alleged date of injury, and Ferguson did not know Claimant was alleging Ferguson to be his employer until Claimant's claim was filed.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Was Ferguson or DLD Claimant's employer on January 5, 2005?

Section 287.020.1 RSMo., (2000) defines "employee" as "every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, written or oral, or under any appointment or election . . ." An employer is defined under §287.030.1 RSMo., as "every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person or corporation operating a railroad and any public service corporation, using the service of another for pay." Whether a party from whom benefits are being claimed is an employer must be determined upon the peculiar facts presented by each case. *Hutchison v. St. Louis Altenheim*, 858 S.W.2d 304 (Mo.App. 1993) (overruled on other grounds). To secure benefits under the Workers' Compensation Act, a potential claimant has the burden to establish an employer-employee relationship existed. *Chouteau v. Netco Construction*, 132 S.W.3d 328 (Mo.App. 2004). To establish the employer-employee relationship, a claimant must demonstrate he worked in the service of the alleged employer, and the alleged employer controlled the services. *Id.*

Claimant alleges on January 5, 2005, he was an employee of either Ferguson or DLD. Claimant has failed to meet his burden as to either alleged employer. Claimant utterly fails to establish he was ever a direct employee of Ferguson. At most, Claimant established (by testimony only) on occasion he worked on a subcontracted crew at a Ferguson jobsite. However, the overwhelming evidence demonstrated no subcontracted crews were working for Ferguson on January 5, 2005, due to weather conditions. Ferguson did have an employee working on Claimant's date of injury, and that employee was Danny Densen, not Claimant.

Claimant did establish that *on occasion* he was an employee of DLD. Claimant established this relationship through his own testimony and corroborated by the testimony of Danny. Disputed is whether Claimant was a DLD employee on January 5, 2005. Claimant testified he worked and was to be paid by DLD on the date of injury. Danny testified Claimant rode with him that day for company and conversation. On January 5, 2005, Danny reported to Ferguson for his job assignment, Ferguson directed his schedule, directed how he was to perform his work, what he wore while working, what he drove while working, and paid him for his work that day. Danny's testimony was fully corroborated by Mr. Shupp who testified Danny was acting as an employee of Ferguson on January 5, 2005. In comparison, Claimant's testimony

regarding his work for DLD was that of a crew member, paid in cash, not reported for tax purposes, and dependent on when jobs were available. On January 5, 2005, neither DLD nor Ferguson had any crews working due to the weather conditions. Deciding which witnesses' testimony to accept is for the court to determine. I find Danny's testimony credible and consistent with the evidence in this case, and I find Claimant was not an employee of DLD or Ferguson on January 5, 2005.

CONCLUSION

In summary, Claimant's has failed to meet the essential elements to sustain his claim. As Claimant does not have a viable claim against either Employer, any remaining issues are moot.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation