

FINAL AWARD DENYING COMPENSATION

(Reversing Amended Award and Decision of Administrative Law Judge)

Injury No. 07-085292

Employee: Steven Florea
Employer: UPS Freight (Settled)
Insurer: Liberty Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an occupational trauma with the last date of exposure on May 11, 2007, occurring within the course and scope of his employment; (2) whether proper notice was given; (3) whether there is Missouri jurisdiction; and (4) Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained occupational exposure by repetitive lifting and performing his job duties within the course and scope of his employment with the last exposure on May 11, 2007; (2) employee did not properly notify employer of his injury, but employer was not prejudiced thereby; (3) the last act of the employment contract occurred in Missouri and jurisdiction is proper under § 287.110 RSMo; and (4) the Second Injury Fund is liable for permanent total disability benefits.

The Second Injury Fund filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee was hired in Missouri; (2) in finding employee suffered a work injury; (3) in finding employee was unable to work due to a combination of conditions; and (4) in analyzing and resolving the issue whether proper notice was given.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee began working for employer in October 2006. Employee performed all of his work for employer at employer's location in Kansas City, Kansas, and that is where he sustained the alleged injury at issue in this matter. Employee provided his own testimony regarding the hiring process at the hearing before the administrative law

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judge. On direct examination by his attorney, employee testified that the hiring process involved the following steps:

- (1) Employee filled out an application for employment in Kansas.
- (2) About a week later, someone with employer called employee at his home in Missouri; during that phone call, employer offered employee a job, and employee accepted the offer.
- (3) Employee then reported to work at employer's location in Kansas.

Transcript, pages 12-3.

On cross-examination, however, employee agreed that after he received the phone call from employer, he was required to complete a physical and undergo a drug test, and that these tasks were performed in Kansas. He further agreed that employer's initial offer of employment was *conditional* upon his completion of these steps, and that notwithstanding his acceptance of the conditional offer of employment, he was required to complete these additional steps before he could go to work for employer. When we add employee's concessions on cross-examination, it appears that the hiring process actually involved the following steps:

- (1) Employee filled out an application for employment in Kansas.
- (2) About a week later, someone with employer called employee at his home in Missouri; during this call, employee accepted a conditional offer of employment.
- (3) After the call, employee underwent a physical and drug test in Kansas.
- (4) After successfully completing the physical and drug test, employee was employed by employer.

Transcript, pages 54-5.

Under the foregoing, we would find that the last act necessary to complete the employment contract between employer and employee was employee's act of successfully completing the physical and drug test in Kansas. To avoid this result, employee directs us to his deposition testimony.

Turning to employee's deposition, we find employee testifying to the following series of steps in the hiring process:

- (1) Employee filled out an application for employment in Kansas.
- (2) Employer called employee a couple of days later, requesting employee come for an interview in Kansas. Employee did not identify where he was when he received this phone call.
- (3) Employee underwent an interview in Kansas, where he also filled out paperwork.
- (4) After the interview, employee submitted to a drug test in Kansas.
- (5) Employee then received a second call from an individual named Donna Lemmons, requesting that employee report to employer's

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- premises for a three-day orientation. Once again, employee did not identify where he was when he received this phone call.
- (6) For three days, employee watched safety films at employer's location in Kansas, and also filled out additional paperwork, including a forklift certification; afterward, employer told employee that employer would get in touch with him.
 - (7) A couple days later, employer called employee (again, employee did not say where he was when he received this call) and asked which shift he wanted to work; employee chose the night shift.

Transcript, page 1319.

As noted above, employee did not provide any testimony to identify where he was when he received any of the three phone calls identified in his deposition testimony. In this age of ubiquitous cell phones and where fewer and fewer individuals maintain "landline" telephone services at their homes, we cannot assume that employee was at his home in Missouri when he received each of these calls, nor can we base any factual findings on our own assumptions or speculation regarding where employee might have been if he received the phone calls on a cell phone. As a result, even if we accepted employee's deposition testimony as more persuasive than his testimony at the hearing before the administrative law judge, employee's deposition testimony does nothing to establish that any phone conversation occurred in Missouri that would constitute the last act necessary to complete the employment contract between himself and employer.

Ultimately, we find employee's testimony before the administrative law judge, including his concessions on cross-examination, to be the best evidence regarding the hiring process. We find that the last act necessary to complete the employment contract between employer and employee occurred when employee successfully completed the drug test, physical, and background check in Kansas.

Conclusions of Law

Jurisdiction in Missouri

Section 287.110 RSMo provides, in relevant part, as follows:

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.

In order to establish jurisdiction under the foregoing section where (as here) the injury occurs outside the State of Missouri, the employee must show that either (a) the contract of employment was made in Missouri, or (b) the employee's work was principally localized in Missouri within 13 weeks preceding the injury. Employee

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performed his work for employer at its location in Kansas City, Kansas. Accordingly, Missouri jurisdiction turns on the question whether employee proved he formed an employment contract in Missouri.

“As a rule, the place where the contract is made is considered to be the place where the offer is accepted or where the last act necessary to complete the contract is performed.” *Krusen v. Maverick Transp.*, 208 S.W.3d 339, 342-343 (Mo. App. 2006). “[T]he issue of where an employment contract is concluded is one of fact, the claimant having the burden of proof and persuasion on the question.” *Redden v. Dan Redden Co.*, 859 S.W.2d 207, 209 (Mo. App. 1993).

We have found that the last act necessary to complete the employment contract between employer and employee occurred in Kansas, because employee was required to successfully complete a physical and drug test in Kansas before employee was permitted to go to work. See *Whitney v. Country Wide Truck Serv.*, 886 S.W.2d 154 (Mo. App. 1994) (holding that where an employee is required to complete steps such as drug tests before going to work, those acts are properly considered the last necessary to complete the employment contract). We conclude, therefore, that under § 287.110 RSMo, there is no jurisdiction in Missouri over this claim for compensation.

Conclusion

We reverse the award and decision of the administrative law judge. Employee has failed to prove Missouri jurisdiction over this workers’ compensation claim. For this reason, we deny the claim.

All other issues are moot.

The award and decision of Administrative Law Judge Lisa Meiners, issued January 29, 2014, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 15th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Amended Final Award as to the Second Injury Fund Only

Employee: Steven Florea Injury No. 07-085292
Dependents: N/A
Employer: UPS Freight
Insurer: Liberty Mutual Insurance Company/Gallagher Bassett Services
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 23, 2013 Checked by: LM/pd

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: May 11, 2007
5. State location where accident occurred or occupational disease was contracted: Contract of hire in Missouri
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: While working in the course and scope of employment, Employee sustained occupational exposure lifting and unloading freight on a repetitive basis that caused injury of his low back.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: low back
14. Nature and extent of any permanent disability: 15 percent permanent partial disability of the low back
15. Compensation paid to-date for temporary disability: 13 weeks
16. Value necessary medical aid paid to date by employer/insurer? \$41.17
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$800.00
19. Weekly compensation rate: \$533.33/\$389.04
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Second Injury Fund liability: The Second Injury Fund is entitled to a credit of 60 weeks of permanent partial disability benefits paid by the Employer; and at that time, the Second Injury Fund is ordered to pay the differential payments of \$144.29 for 60 weeks. Thereafter, the Second Injury Fund is liable for permanent total disability benefits of \$533.33 commencing on December 4, 2009 and continuing for the remainder of the Claimant's lifetime.

TOTAL: Undetermined

Said payments to begin upon receipt of Award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. Mark Kelly

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Steven Florea Injury No. 07-085292
Dependents: N/A
Employer: UPS Freight
Insurer: Liberty Mutual Insurance Company/Gallagher Bassett Services
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 23, 2013 Checked by: LM/pd

On October 23, 2013, the parties appeared for a hearing. Mr. Florea appeared in person with counsel, Mark Kelly. The Employer, UPS Freight, through their insurer, Liberty Insurance Company, had settled in this matter, which leaves the remaining the party as the Second Injury Fund, who was represented by Benita Seliga.

STIPULATIONS

The parties stipulated to the following:

- 1) that the Employer was operating under and subject to Missouri's Workers' Compensation Law on May 11, 2007;
- 2) that Mr. Florea was their employee;
- 3) that the claim was filed within the time allowed by law;
- 4) that the average weekly wage was \$800 and that the wage rates are \$533.33/\$389.04; and
- 5) that the Employer provided 13 weeks of temporary total disability benefits and an amount of medical expenses of \$41.17.

ISSUES

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

- 1) whether the Claimant sustained a series of accidents due to occupational exposure with the last exposure on May 11, 2007;
- 2) that the exposures occurred within the course and scope of his employment;
- 3) whether Claimant provided proper notice;
- 4) whether there is Missouri jurisdiction;
- 4) the liability of the Second Injury Fund.

FINDINGS OF FACT AND RULINGS OF LAW

At the time of the hearing, Claimant was 56 years old and a high school graduate. The majority of his vocational history consisted of a heavy laborer and truck driver as well as loading and unloading freight. In 2006 Claimant began work with UPS after filing an application at the facility located in Kansas. He received a call from Thomas Stevens at his home in Butler, Missouri offering a conditional job at UPS subject to the completion of a physical examination and drug test at the Kansas facility as outlined in Second Injury Fund Exhibit No. 2. Claimant completed the paperwork, physical exam and drug test in Kansas. Claimant thereafter received a call while he was at home in Missouri from a person named Donna asking him which shift he preferred. This call occurred after completing the conditional requirements as outlined in Second Injury Fund Exhibit 2. *See Second Injury Fund Exhibit No. 4, Claimant's deposition testimony.*

Claimant began working for UPS in October 2006 where he mostly lifted and unloaded freight weighing anywhere from 15 to 80 pounds. He moved skids of freight and used forklifts unloading freight, as well as drove a UPS truck. Claimant continued working for UPS until his last day on May 11, 2007. Beginning in the month of January through March 1, 2007, Claimant was unable to work due to a hernia repair. Claimant returned to work March 30, 2007 through April 3, 2007. However, from April 9 through 12, 2007, he was off for sick time. At that time, he was under the care of Dr. Nickell who agreed he needed to take family leave due to low blood sugars, headaches, strife, jittery nerves and a complaint of low back pain. Dr. Nickell continued to keep him off work and eventually extended his leave until April 28, 2007. Claimant last worked on May 11, 2007.

On May 13, 2007, Claimant while at home became dizzy and fell on his sofa. Claimant had a long-standing history of diabetes that included dizzy spells and issues with maintaining blood sugar levels dating all the way back to 2003. He was told to go to the emergency room but instead saw Dr. Nickell. Dr. Nickell then ordered an MRI. The MRI showed spondylothesis throughout his lumbar spine. Dr. Nickell then referred Claimant to Dr. Charapata, a pain management doctor. Dr. Charapata performed two epidural injections without success of relieving Claimant's low back and leg pain. He was then referred to Dr. Amundson, a neurosurgeon. Claimant reported to Dr. Charapata of low back pain with radiation and numbness of his left leg. He reported that the pain had begun insidiously and that Claimant had a job where he did a fair amount of heavy lifting. Dr. Charapata diagnosed Claimant with lumbar radiculopathy, lumbago and a herniated lumbar disc.

Dr. Amundson, who was referred by Dr. Charapata, found Claimant had L5-S1 spondylothesis, spinal stenosis of L2-S1 levels, and lumbar spondylosis with radiculopathy. Dr. Amundson noted since all conservative measures had failed that he requested a CT myelogram of the lumbar spine. The CT myelogram confirmed spondylothesis at the L5-S1 levels and borderline spinal stenosis at every level affecting the lumbar spine. It should be noted that there was a delay in treatment due to authorization issues, but eventually on March 13 of 2008, Dr. Amundson performed an anterior total discectomy at the L5-S1 level, an anterior partial corpectomy at the L5 level, an interbody fusion at the L5-S1 level.

Postoperatively, Dr. Amundson fitted Claimant with a bone stimulator and a lumbar brace. Claimant continued to follow up with Dr. Amundson with pain medications and muscle

relaxers. However, medical records reveal Claimant began to suffer increased leg pain and numbness of the left leg and low back pain. Dr. Amundsen then referred Claimant to Dr. Geoffrey Blatt in October of 2008. There, Dr. Blatt reviewed the MRI of the spine and felt the fusion was solid but couldn't completely rule out the possibility of ongoing left L5 nerve root impingement. Dr. Blatt assessed left-sided low back pain and sensory changes of the left lower extremity due to L5 radiculopathy.

As noted earlier, Claimant prior to May 11, 2007 had some physical conditions that I find were hindrances and obstacles to his employment. Claimant had preexisting diabetes that caused him to be dizzy and problems with fatigue and stamina. Medical records dating back to 2003 reflected difficulty maintaining his blood sugars and, as a result, Claimant would miss work. Indeed, during one incident prior to 2007, Claimant abandoned his truck on the side of the road and called an ambulance due to low blood sugars. Claimant in 1985 also smashed his right hand; and as a result, Claimant underwent five surgeries. The Claimant also settled the right hand injury prior 2007 for 40 percent permanent partial disability of his right hand.

In 1991, Claimant sustained another work-related injury of his back, neck and right shoulder that required surgery and injections. The 1991 injury settled for 12.5 percent permanent partial disability body as a whole. In 1991, Claimant was seen by Dr. Harry Oberesch for an independent medical evaluation who opined at that time Claimant had a 55 percent permanent partial disability, body as a whole, due to the right upper extremity, upper back and neck. Claimant had a right knee injury and, as a result, missed several months of work prior to 2007. This injury settled for approximately 5.57 percent impairment in Kansas.

Claimant, as a result of the right hand injury, has loss of strength and motion of his hand which makes lifting and grasping very difficult. Claimant was diagnosed with diabetes in 2002 and the diabetic condition affected his blood pressure as well as caused extreme fatigue. Claimant also has loss of strength of his right arm and difficulty lifting overhead due to restricted range of motion with the right shoulder. As a result of the right knee injury, which did not require surgery, he continues to have swelling and pain when squatting, bending and prolonged standing.

As a result of the low back injury that occurred in 2007, Claimant continues to have significant problems. He lies down during the day due to the low back as well as the fatigue from the diabetes. He has difficulty sleeping at night. He is unable to lift more than a gallon of milk and has difficulty performing sustained activities such as walking, standing, sitting. Claimant continues to take pain medications as a result of the low back injury.

One issue to be addressed by this award is whether jurisdiction is proper in the state of Missouri. If the employment contract is formed in Missouri, then Missouri law applies to the injuries. To form a contract, a meeting of the minds must occur and the contract is formed when the last act necessary to complete the contract occurred in the state of Missouri. Whiteman v. Del-Jen Construction, Inc., 37 SW 3d 823, 831 (Mo. App. 2001), overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 SW 3d 220 (Mo. 2003). The acceptance of an offer of employment may constitute as the last act necessary to form the employment contract.

The Second Injury Fund argues that the last act of employment occurred in Kansas because he had to complete an exam and drug test in Kansas. The Second Injury Fund argues the offer of employment was in Missouri, but this offer was subject to passing those physical exams and drug tests in Kansas. While I find Claimant received a conditional offer (*See Second Injury Fund Exhibit No. 2*), based on passing the physical exam and drug test as well as orientation in Kansas, I also find based on the deposition testimony in Second Injury Fund Exhibit No. 4 that the last act of the contract occurred in Missouri. Indeed, Claimant, as outlined in Second Injury Fund Exhibit 4, testified in his deposition that he received a call in Missouri from Donna after successfully completing all the conditional requirements of employment. (*See Second Injury Fund Exhibit No. 4, p. 15*). I find the call was taken and accepted in the state of Missouri. As such, the last act of the contract occurred in Missouri and jurisdiction is proper under Statute 287.110.

Claimant, who I find credible based on the observations during the October 2013 hearing, was deposed in 2007 and 2010. Claimant testified in his deposition and at hearing he did not realize the symptoms of leg numbness and back pain were related to performing occupational duties. Instead, he assumed the leg pain was related to his pre-existing diabetes.

Claimant in November of 2007 did not believe his claim was work-related despite his attorney filing a claim on September 13, 2007. While I find this unusual, even at the time the claim was filed in 2007 that Claimant did not believe it was work related, at that time no doctor had issued an opinion stating Claimant's repetitive job duties at UPS were the prevailing factor of Claimant's low back condition until December of 2007. However, I find Claimant did not properly notify the Employer in writing based on the above facts because Claimant alleged his injury was work-related when he filed the claim three months after his last day of employment.

Regardless, I do not find the Employer was prejudiced since the Employer knew it was alleged as work related before Claimant underwent surgical treatment. The Employer had every opportunity to investigate the claim since Claimant alleges occupational exposure rather than an acute injury. The Employer knew exactly what duties Claimant performed and was on notice that the claim was work-related before Claimant underwent surgery. The Employer had the opportunity to direct the treatment; yet, it appeared they did not and, as such, the Employer was not prejudiced in this matter. Eventually, the Employer and the Employee reached a compromise settlement for 15 percent permanent partial disability body as a whole due to occupational exposure injury of May 11, 2007.

I also find Claimant sustained occupational exposure by repetitively lifting and performing his job duties within the course and scope of his employment with the last exposure on May 11, 2007. There was one uncontradicted medical expert's opinion regarding causation that was admitted into evidence in this matter. The Claimant presented the opinion of Michael J. Poppa who found the work-related activities Claimant performed within the course and scope of his employment was the prevailing factor of Claimant's low back condition and his need for further treatment. Indeed, Claimant's job at UPS required repetitive bending and lifting on a daily basis. In April of 2007, Claimant reported low back pain. Then in May of 2007, Claimant began to have numbness of his legs. Eventually, Claimant underwent a discectomy and a fusion of the L5-S1 level that Dr. Poppa relates to the occupational exposure that occurred at UPS with the last exposure on May 11, 2007.

Dr. Poppa performed an independent medical examination on December 4, 2007 and on January 17, 2012 where he determined that Claimant is permanently and totally disabled as a result of the low back combined with pre-existing conditions of diabetes, right upper extremity, right knee, neck and upper back. Dr. Poppa stated Claimant's pre-existing conditions based upon his examination and the review of the medical records were hindrances and obstacles to his employment. He also felt that when one combined the pre-existing disabilities with the present occupational exposure that occurred on May 11, 2007 that Mr. Florea was permanently and totally disabled as a result of the combination of these pre-existing conditions and this work-related injury. Dr. Poppa found Claimant had a pre-existing 20 percent permanent partial disability body as a whole referable to diabetes; 12-1/2 percent permanent partial disability body as a whole due to the prior shoulder surgery; 12-1/2 percent permanent partial disability body as a whole as a result of the pre-existing thoracic spine sprain/strain; 15 percent permanent partial disability of the right lower extremity at the level of the knee; and 20 percent permanent partial disability of the right hand. Dr. Poppa found that as a result of the May 11, 2007 repetitive trauma that involved the lumbar spine that Claimant sustained a 15 percent permanent partial disability body as a whole as a result of the primary injury.

Claimant experiences daily low back pain and left leg pain as a result of the compensable low back injuries. Claimant is unable to walk on a prolonged basis, unable to lift overhead and has to lie down several times a day due to low back pain as well as the residuals of the diabetes. Claimant is also unable to bend due to the interbody cage placed in his low back. I find as a result of the compensable occupational exposure of May 11, 2007 that Claimant sustained a 15 percent permanent partial disability body as a whole due to that occupational exposure. I do find, however, the last accident taken in isolation does not render Claimant unemployable in the open labor market.

Instead, I find Claimant's pre-existing conditions of diabetes, right shoulder, right hand and right knee combined with the last occupational exposure to render Claimant permanently and totally disabled. This finding is based on Claimant's testimony, medical records and the uncontroverted evidence of Dr. Poppa. I find Claimant sustained a pre-existing disability of 40 percent permanent partial disability of the right hand, 5 percent of the right knee, 15 percent permanent partial disability due to diabetes, and 12.5 percent of the right shoulder.

Another expert presented into evidence was vocational expert Terry Cordray. Cordray's opinion also supports this finding that Claimant is permanently and totally disabled based on the restrictions of the low back and the pre-existing conditions of diabetes, right hand, right shoulder and right knee. Cordray found after performing several tests that Claimant was not a candidate for rehabilitation training and possessed no transferable skills within the sedentary jobs sector. Cordray found no reasonable employer would hire Claimant in the open labor market based on the Claimant's overall vocational history, lack of transferable skills and medical restrictions as a result of both the back and the pre-existing conditions. I agree with Claimant's vocational expert.

Since I find the Second Injury Fund is liable to Claimant for permanent total disability benefits, the Second Injury Fund is liable to Claimant for weekly benefits in the amount of \$533.33 per week for Claimant's lifetime. Claimant reached maximum medical improvement on

October 10, 2008. The Second Injury Fund, however, is entitled to a credit of 60 weeks of permanent partial disability benefits paid by the Employer; and at that time, the Second Injury Fund is ordered to pay the differential payments of \$144.29 for 60 weeks. Thereafter, the Second Injury Fund is liable for permanent total disability benefits of \$533.33 commencing on December 4, 2009 and continuing for the remainder of Claimant's lifetime.

This award is subject to an attorney's lien for services rendered in the amount of 25 percent for Mark Kelly.

Made by: _____
Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation