

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

Injury No.: 07-135580

Employee: Fausto Franco-Lopez
Employer: Jose Martinez
Insurer: Travelers Indemnity Company (Alleged)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, 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 with this supplemental opinion.

Discussion

Correction

On page six of her award, in the eleventh numbered paragraph, the administrative law judge states:

Claimant testified that he was in Columbia, Missouri, when Mr. Martinez called him regarding the Kansas project. Claimant did not provide details regarding the phone call, nor did he testify regarding where Mr. Martinez was when he called claimant.

We have carefully reviewed the transcript of the hearing. At no time during that hearing did employee testify that he received a phone call from Mr. Martinez in Columbia, Missouri, about the Kansas project. Accordingly, we do not adopt the foregoing finding, nor the administrative law judge's comment about employee's failure to provide details about any such phone call. Likewise, we must disclaim the administrative law judge's recitation of this erroneous factual finding throughout her analysis and conclusions of law.

Because we otherwise agree with the administrative law judge's findings, analysis, and conclusions, and in particular her determination that employee failed to meet his burden of proving Missouri jurisdiction in this matter, we affirm the award denying employee's claim for lack of jurisdiction under § 287.110 RSMo.

Decision

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Vicky Ruth, issued September 27, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Fausto Franco-Lopez

DISSENTING OPINION

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 administrative law judge's award denying benefits is in error, and should be reversed.

Employee worked for the employer, Jose Martinez, on numerous roofing and construction jobs in the past. Employee worked on a project-by-project basis. Employer never required employee to fill out an application, sign any documents, or undergo any of the other formal trappings of initiating an employment relationship. Instead, employer informed employee when he had a job, and instructed employee where to go and what to do to begin the work.

In November 2007, employee agreed to work for employer on a roofing job in Lawrence, Kansas. For two or three weeks before the Lawrence job began, employee was unemployed and living in Columbia, where he and the employer shared a residence. Employee testified that he started working for employer for the Lawrence job in Columbia. Employee testified that to begin the Lawrence job, he bought materials for the job in Columbia on November 15, 2007. I find employee's testimony credible and find that employee started working for employer for the Lawrence job on November 15, 2007, in Columbia, Missouri, by going to buy materials.

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.

"[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). "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).

Employee's employment relationship with employer was not the product of any formal process involving applications, interviews, or the like. I have credited employee's uncontested testimony and found that the way he started working for employer for the Lawrence job was by purchasing materials in Columbia using the employer's credit card on or about November 15, 2007. I find that the last act necessary to complete the employment contract was employee's starting work by purchasing those materials. I conclude, therefore, that employee and employer entered a contract of employment in Missouri, and that jurisdiction in Missouri is proper under § 287.110.

On November 26, 2007, while working for employer on the Lawrence job, employee slipped on a piece of plywood and fell off a roof and broke his left arm and pelvis. Employee suffered a displaced, comminuted, intra-articular fracture of the distal radius as well as the distal ulna, a non-displaced but comminuted fracture of the sacrum, and fractures of the left inferior pubic ramus. Dr. Schlafly opined that the work injury caused employee to suffer a 35% permanent partial disability of the left upper extremity measured at the 222-week level, and a 15% permanent partial disability of the body as a whole referable to the pelvis.

Employee: Fausto Franco-Lopez

- 2 -

Dr. Cantrell, on the other hand, opined that the work injury caused employee to suffer a 9% permanent partial disability of the body as a whole referable to the multiple pelvic and sacral fractures, and a 13% permanent partial disability of the left upper extremity at the level of the wrist.

Employee continues to experience pain in his left arm that he rates at a 5 on a scale from 1 to 10; the pain increases to an 8 out of 10 when the weather is cold. Employee's left arm surgeries resulted in a one inch scar on the top of the left arm, a $\frac{3}{4}$ inch scar on the top of the hand, and another scar on the wrist that is less than half an inch long. Employee is unable to do much lifting with the left hand and arm, and thinks he can lift about ten pounds. Employee sometimes has pain in his hip when he moves.

At the hearing before the administrative law judge, the parties were able to stipulate that employee's average weekly wage at the time of the injury was \$450.00, and that the appropriate rate for permanent partial disability benefits is \$300.00 per week. I find that employee sustained a 12% permanent partial disability of the body as a whole referable to the pelvic and sacral fractures, and a 25% permanent partial disability of the left upper extremity measured at the 222-week level.

I would reverse the award of the administrative law judge and enter an award holding employer liable for permanent partial disability benefits. Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Fausto Franco-Lopez

Injury No. 07-135580

Dependents: N/A

Employer: Jose Martinez

Additional Party: N/A

Insurer: Travelers Indemnity Company (alleged)

Hearing Date: June 18, 2012

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

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? See Award.
4. Date of accident or onset of occupational disease: November 26, 2007.
5. State location where accident occurred or occupational disease was contracted: Lawrence, Kansas.
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? N/A.
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: Claimant fell off a roof, landing on the ground.
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: Left arm and body as a whole.
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? N/A.

Employee: Fausto Franco-Lopez

Injury No. 07-135580

18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: N/A.
20. Method of wages computation: N/A.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: None.
22. Second Injury Fund liability: N/A.
23. Future medical awarded: N/A.

Employee: Fausto Franco-Lopez

Injury No. 07-135580

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Fausto Franco-Lopez

Injury No: 07-135580

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Jose Martinez

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

Additional Party: N/A

Insurer: Travelers Insurance Company (alleged)

On June 18, 2012, the parties appeared for a final award hearing. Fausto Franco Lopez, the claimant, appeared and was represented by attorney Brian Stokes. Jose Martinez, the employer, did not appear. Attorney David Ware appeared on behalf of Travelers Insurance Company, the alleged insurer. Claimant testified in person at the hearing. Dr. Bruce Schlafly and Dr. Russell Cantrell testified by deposition. Claimant and the insurer submitted briefs on July 16, 2012. With the permission of the Administrative Law Judge, the insurer submitted a reply brief on July 27, 2012, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about November 11, 2007, Fausto Franco-Lopez, the claimant, sustained an injury by accident.
2. The accident occurred in Lawrence, Kansas.
3. Notice is not an issue.
4. A Claim for Compensation was timely filed.
5. Temporary total disability (TTD) benefits were paid to claimant in the amount of \$9,924.59; the parties, however, dispute whether the TTD benefits were paid pursuant to Missouri law or pursuant to Kansas law.
6. Although the insurer provided medical aid in the amount of \$28,226.04, the parties dispute whether the medical aid was provided pursuant to Missouri or Kansas law.
7. Counsel for claimant requests an attorney's fee of 25%.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Jurisdiction.
2. Whether the employer was insured by the insurer for purposes of Missouri's Workers' Compensation liability.

Employee: Fausto Franco-Lopez

Injury No. 07-135580

3. Average weekly wage and compensation rate.
4. Nature and extent of permanent partial disability.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence¹:

- | | |
|-----------|--|
| Exhibit A | Deposition of Dr. Bruce Schlafly. |
| Exhibit B | Copies of temporary total disability checks issued by Travelers. |
| Exhibit C | Audit letter from Travelers to Jose Martinez, dated 1/09/08. |
| Exhibit D | Medical records from Dr. Stull and Lawrence Memorial Hospital. |

On behalf of the employer/insurer, the following exhibits were admitted into the record:

- | | |
|------------|--|
| Exhibit 1 | Deposition of Dr. Russell Cantrell. |
| Exhibit 2 | Travelers' Workers' Compensation and Employer's Liability Policy, issued to Jose Martinez. |
| Exhibit 3 | Summary of medical expenses and temporary total disability benefits paid to claimant by Travelers. |
| Exhibit 4 | Transcript of proceeding before the Kansas Division of Workers' Compensation, 5/01/09. |
| Exhibit 5 | Claim for Compensation. |
| Exhibit 6 | Employer/insurer's Answer to Claim for Compensation, filed 7/20/09. |
| Exhibit 7 | Employer/insurer's Amended Answer to Claim for Compensation, filed on 10/23/09. |
| Exhibit 8 | Amended Claim for Compensation, filed 2/04/10. |
| Exhibit 9 | Employer/insurer's Answer to Amended Claim for Compensation, filed 3/05/10. |
| Exhibit 10 | Employer/insurer's Amended Answer to Amended Claim for Compensation, filed on 4/18/11. |
| Exhibit 11 | Insurer's Amended Answer to Amended Claim for Compensation, filed 6/14/12 (filed solely on behalf of insurer). |
| Exhibit 12 | Report/letter from Dr. Stull (11/07/08). |
| Exhibit 13 | Work hardening and physical therapy records (late-filed by agreement of parties). |

On behalf of claimant and the insurer, the following exhibit was offered jointly by the two parties:

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|--------------|---|
| Joint Exh. 1 | The Limited Other States Insurance Endorsement to the Travelers Workers' Compensation and Employers Liability Policy. |
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¹ All depositions were received subject to the objections contained therein.

Employee: Fausto Franco-Lopez

Injury No. 07-135580

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born in Honduras; his primary language is Spanish. Claimant acknowledged that he can read or write very little in English. Although the Administrative Law judge offered to reschedule the hearing to allow an interpreter to participate in the proceeding, the claimant's attorney insisted that an interpreter was not necessary.
2. Claimant came to the United States and lived here for several years, but returned to Honduras in 2000. After staying in Honduras for approximately four years, he returned to the United States, arriving in Texas. Prior to 2000, claimant had known Jose Martinez for several years. Mr. Martinez was also from Honduras.
3. In 2004 or 2006,² while claimant was living in Texas, Mr. Martinez called him and inquired whether he would go to work for Mr. Martinez. Mr. Martinez's business involved carpentry and construction. Some time thereafter, claimant moved to Missouri. Claimant did not fill out any paperwork or sign any documents as to employment.
4. When Mr. Martinez secured a project, he would tell claimant and other employees where to go to perform their work. While working for Mr. Martinez, claimant would go to stores, such as Home Depot, and buy materials. Claimant performed framing work when he worked for Mr. Martinez. The work was of an intermittent nature. Mr. Martinez paid claimant \$10 per hour or \$450 per week. If Mr. Martinez sent claimant on an out-of-state job, Mr. Martinez paid his rent/lodging.
5. During this time period, claimant did not work full time for Mr. Martinez. When Mr. Martinez did not have work for claimant, claimant would work for others or for himself. When working on other projects, claimant would perform framing and roofing work of the nature of the work he performed for Mr. Martinez.
6. From the fall of 2006 through November 2007, claimant worked on several projects for Mr. Martinez and on jobs for other individuals. In 2006, claimant worked on a job for Mr. Martinez in Jefferson City, Missouri. This project involved a hotel and lasted one to two months. After finishing this project, claimant did not work Mr. Martinez for two or three months. Claimant instead worked for himself.
7. In the spring of 2007, claimant worked on a project for Mr. Martinez at the Lake of the Ozarks in Missouri. This project lasted two to three months and involved framing and

² Claimant was uncertain of the date.

roofing. When that project ended, claimant worked for about one month on a project for Travis Reynolds.

8. After Mr. Reynold's project, claimant was unemployed for about a week. Then, claimant started working on a project in Tulsa, Oklahoma, for Mr. Martinez. The project involved framing a hotel, and it lasted about four months. When the Tulsa project was finished, claimant did not work for two or three weeks.
9. During the fall of 2007, claimant and Mr. Martinez lived with claimant's sister in Columbia, Missouri. Mr. Martinez and claimant's sister had a child together.
10. In October 2007, claimant began a two-week project in Columbia, Missouri, for Mr. Martinez. This project again involved framing and roofing work. After this project, claimant was again unemployed for a period.
11. Claimant next worked for Mr. Martinez in Lawrence, Kansas. Claimant testified that he was in Columbia, Missouri, when Mr. Martinez called him regarding the Kansas project. Claimant did not provide details regarding the phone call, nor did he testify regarding where Mr. Martinez was when he called claimant. Claimant testified that after speaking with Mr. Martinez about the job, he bought materials at Lowe's and/or Home Depot in Columbia, Missouri, on or about November 15, 2007. He purchased a compressor, nail gun, and other items. Claimant testified that he made multiple trips to Home Depot and/or Lowe's. He used a credit card from Mr. Martinez to pay for the purchases. After purchasing the materials, there was a period of several days during which claimant did not work.
12. Claimant later drove to Lawrence, Kansas. While working on the Kansas project, claimant lived in a hotel. There were three individuals working on the Kansas project – claimant, Jose Martinez, and one other worker. The Kansas project involved framing multiple buildings.
13. On November 26, 2008, claimant was on a roof using plywood when he fell to the ground. He broke his left arm and his pelvis in the fall. Jose Martinez took claimant to the hospital.
14. Claimant was on the Kansas job for less than two weeks before the accident. Claimant has not performed any work for Mr. Martinez since the Kansas project. In fact, claimant has not seen him since the accident. Claimant believes that Mr. Martinez has returned to Honduras. Since the accident in November 2007, claimant has worked for other employers and for himself. In 2009, claimant was working on a roofing job for Travis Reynolds when he fell off an eight-foot ladder, injuring his back and left leg.

Kansas

15. A workers' compensation case was initiated in Kansas for the November 26, 2007 accident. Claimant acknowledged that he participated in a workers' compensation

proceeding in Kansas, and that the insurer offered a claimant a settlement in Kansas. Claimant indicated that he rejected that settlement.

16. Following the November 26, 2007 accident, claimant was unable to work. During this period, claimant received temporary total disability benefits in the amount of \$450 per week for approximately 6 months. The parties disagree as to whether the benefits were paid pursuant to Missouri law or Kansas law.
17. The employer is insured by the insurer for purposes of Kansas workers' compensation liability. The parties disagree as to whether the employer is insured by the insurer for purposes of Missouri workers' compensation liability.

Treatment

18. On November 26, 2007, the date of the accident, claimant treated at Lawrence Memorial Hospital Emergency Room. The records reflect that claimant reported that he fell from a two-story roof and landed in the mud, injuring his back and left wrist. He indicated that he did not lose consciousness. A CT scan of the left wrist showed a comminuted intra-articular fracture of the distal left radius, with impaction and dorsal angulation, and an extra-articular comminuted fracture of the distal left ulna. X-rays of the left hand showed an acute comminuted, impacted, intra-articular fracture of the distal left radius, with an associated fracture of the distal left ulna.³ The x-rays of the pelvis showed fractures of the left pubic rami. A CT scan of the abdomen and pelvis, also taken on November 26, 2007, revealed fractures involving the left inferior pubic ramus and a comminuted fracture of the left sacrum. A CT scan of the head revealed a mild left frontal scalp hematoma, but no acute intracranial process.
19. At the hospital, claimant was diagnosed with a pelvic fracture, stable, without evidence of significant hemorrhage; fracture of the left wrist; possible left rib fractures; fracture of the sacrum; and abrasion and contusion of the left forehead. He was admitted to the hospital.
20. On November 28, 2007, Dr. Stull performed an open reduction internal fixation of the left comminuted distal radius fracture with placement of external fixation and percutaneous pinning. Dr. Stull's post-operative diagnosis was comminuted intra-articular left distal radius fracture.
21. On November 30, 2007, claimant was discharged from Lawrence Memorial Hospital. Claimant returned to Dr. Stull on December 7, 2007, December 26, 2007, and January 8, 2008. At the January visit, claimant was complaining of less wrist pain. Examination showed all pin sites were well-healed. The pins were removed without difficulty. A neurologic exam was normal. Claimant had significant deficit in dorsiflexion of the left wrist. Left wrist x-rays showed a healed distal radius fracture. Claimant was referred to occupational therapy for the left wrist and directed to remain off work.
22. From January 15, 2008 through February 15, 2008, claimant underwent occupational

³ Exh. D.

therapy for his left wrist. The goal of the therapy was to decrease left wrist pain and increase strength and range of motion.

23. On February 19, 2008, claimant followed up with Dr. Stull, at which time claimant had significant gains in range of motion of the left wrist but still had weak grip strength and reduced lifting ability on the left. X-rays of the left hand showed the fracture was in an acceptable position. Employee was directed to continue therapy, principally work hardening. Claimant was not ready to return to work.
24. A March 11, 2008 Work Hardening Baseline evaluation stated that claimant was a good candidate for work hardening and that he demonstrated excellent motivation. A March 31, 2008 Work Hardening Update indicated that claimant attended 12 of 14 work hardening sessions. Claimant reported a decrease in his pain level. His pain rating at rest was one out of a ten-point scale; with lifting tasks his pain rating was two out of ten. The notes indicate that claimant demonstrated excellent progress overall. He showed improved left grip strength and lifting tolerances. Claimant was directed to increase work hardening to six hours.
25. On April 1, 2008, claimant returned to Dr. Stull. At that time, claimant's grip strength was decreased on the left when compared to the right. Claimant had active dorsiflexion of the left wrist at 40° and 50°. Dr. Stull kept claimant off work for an additional three weeks while claimant continued work hardening.
26. On April 21, 2008, Dr. Stull examined claimant and noted that he had done extremely well with therapy and was ready to return to full-duty work. The range of motion of the left wrist was slightly deficient when compared to the right; work hardening records showed full range of motion on the left. Claimant was neurologically intact. X-rays showed a healed distal radius fracture; the joint surfaced appeared to be fairly congruent. Dr. Stull's diagnosis was healed left distal radius fracture. Dr. Stull released claimant to full-duty work without restriction. Claimant has not undergone any treatment on his left wrist or pelvis since Dr. Stull released him in April 2008.
27. Dr. Stull opined that, based on the AMA Guidelines, that claimant had sustained a "5% of the upper extremity rating."⁴ The doctor also opined that this corresponded to a "3% permanent partial impairment rating of the whole person."⁵

Dr. Cantrell's IME

28. On March 26, 2012, claimant was evaluated by Dr. Russell Cantrell. Since English is not claimant's primary language, Dr. Cantrell used an interpreter during the examination. Dr. Cantrell noted that claimant's left upper extremity revealed atrophy in the web space between the thumb and index finger, without any atrophy overlying the thenar eminence of the left hand. Claimant had healed surgical scars on the dorsum of the left hand and the mid and distal aspect of the radial forearm that appeared to be related to placement of

⁴ Exh. 12.

⁵ *Id.*

the external fixator device he wore for the wrist fracture. Claimant also had a healed scar along the ulnar aspect of his left palm, extending to the ulnar side of his volar wrist. The scar was related to the machete injury claimant sustained when he was eight years old. This scar extended to the area where the ulnar nerve passed through the Guyon's canal.⁶

29. According to Dr. Cantrell, it is significant that there was atrophy in the web space between the thumb and index finger of claimant's left hand but no atrophy in the thenar eminence of the hand. Dr. Cantrell explained that for individuals who sustain distal radial fracture, one complication of such a fracture can be swelling, which causes compression of the median nerve, resulting in carpal tunnel symptoms. Depending on the severity of the median neuropathy, more severe symptoms could occur, including atrophy at the thenar eminence, which is supplied by the median nerve. The muscles in the web space between the thumb and the index are supplied by the ulnar nerve. Atrophy in that area implies an ulnar nerve condition, whereas atrophy in the thenar eminence implies a median nerve condition.
30. Dr. Cantrell opined that the physical finding of ulnar nerve neuropathy, coupled with claimant's prior history of a laceration over the ulnar aspect of his wrist and overlying the Guyon's canal, suggests that the atrophy was not related to the work injury but was instead related to the prior machete injury to the ulnar nerve.
31. Dr. Cantrell opined that as a result of the November 2007 fall, claimant sustained a comminuted intra-articular distal radial fracture and a distal ulnar fracture that was extra-articular. The fracture had healed. Dr. Cantrell found that as a result of the distal radius fracture, claimant was experiencing some symptoms associated with post-traumatic arthritis or arthralgias at the radial-carpal junction, and limitation in movement of his wrist in flexion and extension, as well as weakness in those movements. As to claimant's lower extremities, Dr. Cantrell found that the 2007 fall resulted in superior and inferior pubic rami fractures and a sacral fracture, none of which required surgical treatment.
32. Dr. Cantrell found that claimant did not require any permanent limitations or work restrictions related to his work injury. Dr. Cantrell determined that, from a physical standpoint, claimant could work in any capacity. The doctor also opined that claimant had reached maximum medical improvement as to the work injuries.
33. Dr. Cantrell further opined that as a result of the November 2007 work injury, claimant had sustained a 9% permanent partial disability of the body as a whole referable to the pelvic and sacral fractures. Claimant also sustained an 18% permanent partial disability of the left arm at the level of the wrist; however, Dr. Cantrell attributed 13% of this amount to the work injury and the remaining 5% of the prior laceration injury. Dr. Cantrell explained that a distal radius injury cannot, anatomically, cause ulnar nerve atrophy. In Dr. Cantrell's opinion, the distal radius fracture claimant sustained in the 2007 fall did not cause an ulnar nerve injury.

Dr. Schlafly's IME

⁶ Exh. 1.

34. Dr. Bruce Schlafly evaluated claimant on December 21, 2010. Dr. Schlafly noted that claimant had a scar on the palm of his left hand that was the result of a laceration that occurred when claimant was ten⁷ years old. Claimant indicated that he regained the use of his left hand after this injury, and that the left hand and wrist were fine prior to the November 2007 fall. Dr. Schlafly noted that claimant had atrophy of the left hand and wrist, and atrophy at the left forearm and upper arm. X-rays taken during the examination showed a healed fracture of the left distal radius. Dr. Schlafly diagnosed fractures of the left distal radius and ulna and fractures of the pelvis, including the sacrum and left pubic rami, along with a contusion of the head with a mild scalp hematoma. In Dr. Schlafly's opinion, claimant sustained these injuries as a result of the November 26, 2007 work accident.
35. Dr. Schlafly opined that, due to the work accident, claimant sustained the following permanent partial disabilities: (1) 35% permanent partial disability of the left upper extremity, measured at the level of the left arm; and (2) 15% of the body as a whole, referable to the pelvis. The doctor opined that the fall from the roof was the prevailing factor causing these disabilities.
36. Dr. Schlafly found that claimant was best suited for employment on the ground and for employment that did not require heavy or forceful lifting and gripping with the left hand. He opined that claimant should not return to work as a roofer or perform similar work at heights. Dr. Schlafly found that claimant received appropriate treatment for his left wrist fracture. In his opinion, claimant had residual atrophy that involved both the muscles of the left hand and those of the forearm and upper arm. Dr. Schlafly did not, however, recommend additional surgical treatment.

Current Complaints

37. Claimant still experiences pain in his left arm. He testified that the pain is normally at the level of a five on a ten-point scale. When it is cold, however, the pain increases to an eight out of ten. Claimant is not able to do much lifting with the left hand and arm; he thinks he can lift about ten pounds. He is right handed. Claimant can make a fist with his left hand and turn his left wrist, but he experiences pain when he does so.
38. Claimant occasionally has pain in his pelvis, primarily when he moves. The pain is in the front of the hip. At its worst, this pain is a seven on a ten-point scale.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

The injury in this case occurred on November 26, 2007. Thus, the substantive changes that became effective in August 2005 apply to this case. The Workers' Compensation law is

⁷ It is unclear whether this previous accident occurred when claimant was eight or ten years old.

Employee: Fausto Franco-Lopez

Injury No. 07-135580

now to be strictly construed and the administrative law judge is to weigh the evidence impartially, without giving the benefit of a doubt to any party when weighing evidence and resolving factual conflicts.

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.⁸ Proof is made only by competent and substantial evidence, and may not rest on speculation.⁹ Medical causation not within lay understanding or experience requires expert medical evidence.¹⁰ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹¹

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹² Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹³ The fact finder is encumbered with determining the credibility of witnesses.¹⁴ It is free to disregard that testimony which it does not hold credible.¹⁵

Issue 1: Jurisdiction

Claimant contends that the Missouri Division of Workers' Compensation has jurisdiction over this case. The alleged insurer disagrees. Section 287.110, RSMo, addresses jurisdiction as follows:

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 the thirteen calendar weeks of the injury or diagnosis of the occupational disease.

Thus, the Missouri Workers' Compensation Act covers on-the-job injuries to employees in three instances: 1) where the injuries are received within the state of Missouri, regardless of where the contract of employment was made; 2) where the injuries are received outside of the state of Missouri, under a contract of employment made within the

⁸ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

⁹ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁰ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹¹ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹² *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹³ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

¹⁴ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

¹⁵ *Id.* at 908.

state of Missouri; or 3) where the injuries are received outside of the state of Missouri, and the worker's employment was principally localized in the state of Missouri.¹⁶

Thus, the first question is whether the accident occurred within Missouri. In this case, all parties agree that the accident occurred in Lawrence, Kansas. Thus, the first clause of Section 287.110, RSMo, does not apply.

The next question is whether there was contract of employment made in Missouri for purposes of establishing jurisdiction in a workers' compensation case. This question is one of fact; the burden of sustaining that fact is on the claimant.¹⁷ The general test of where the relationship of employee and employer was created or entered into is a question as to the intention of the parties, as evidenced by their acts and conduct, the nature of the business, the situation of the parties, and all the facts and circumstances.¹⁸ In order for a contract to be formed, there must be a meeting of the minds of the parties to the contract regarding the same thing at the same time.¹⁹ In determining the place where the minds of the parties have met, the fact finder must consider all the facts and circumstances, as well as the conduct of the parties.²⁰ Courts generally deem a contract to have been made at the place where the last act necessary to complete the contract is performed.²¹ In making this determination, the fact of an employee's residence in a state may be considered, but the fact of the residence does not in and of itself compel a finding that the employee and employer intended to contract for employment in that state.²²

In this case, claimant testified that when he was in Columbia, Missouri, Jose Martinez called him regarding the Kansas project. Claimant also testified that after the phone call, he purchased materials for the project at Lowes and/or Home Depot in Columbia. The purchased items included a compressor, nail gun, and other items. Claimant used a credit card provided by Mr. Martinez in order to make the purchases. Claimant did not testify that Mr. Martinez told him to buy the materials in Missouri. There was no evidence that the purchasing of materials in Missouri was a precondition to the completion of any employment contact between claimant and Mr. Martinez for the Kansas project. After he purchased the materials, there was a period of several days during which claimant did not do any work, including any work for the Kansas project. Claimant was not able to provide the date he drove from Missouri to Kansas, nor was he able to provide an exact date on which he began working on the Kansas project. The fact that claimant lived in Missouri does not, in and of itself, compel a finding that claimant and Mr. Martinez intended to make a contract for employment in this state.²³ Claimant did not provide details as to the initial employment agreement with Mr. Martinez. Claimant's testimony as to his hiring was cursory, vague, and disjointed. In fact, much of claimant's testimony throughout the hearing

¹⁶ *Cable v. Schneider Transportation*, 957 S.W.2d 802, 803 (MoApp. S.D. 1997).

¹⁷ *Hall v. Denver -Chicago International*, 481 S.W.2d 622, 625 (MoApp. 1972).

¹⁸ *Hall* at 625.

¹⁹ *Whitney v. Countrywide Truck Service*, 886 S.W.2d 154, 155 (MoApp. E.D. 1994).

²⁰ *Id.*

²¹ *Whiteman v. Del-Jen Constr.*, 37 S.W.3d 823, 831 (Mo.App. W.D. 2001); *Whitney*, 886 S.W.2d at 155.

²² *Johnson v. Great Lakes Pipeline Co.*, 215 S.W.2d 460, 464 (Mo. 1948).

²³ *Johnson v. Great Lakes Pipeline Co.*, 215 S.W.2d 460, 464 (Mo. 1948).

was difficult to understand. I find that claimant did not sustain his burden of proof that there was a contract for employment made in Missouri.

The third provision is whether claimant's employment was principally localized in Missouri during the 13 weeks prior to the injury or the diagnosis of occupational disease. Neither the Missouri Court of Appeals nor the Supreme Court appear to have issued a published opinion construing and applying the phrase "principally localized" as contained in Section 287.110.2, RSMo. The Missouri Labor and Industrial Relations Commission, however, has addressed the issue. In *Bamber v. Dale Hunt d/b/a Dale Hunt Trucking*, 2002 WL 1824987 (Mo.Lab.Ind.Rel.Com.), the Commission used the definition of "principally localized" as contained in the National Commission on State Workers' Compensation Laws Model Act in order to determine the meaning of the phrase. Specifically, the Model Act defines "principally localized" as 1) a person's employment is principally localized in this or another state when his employer has a place of business in this or such other state, and he regularly works at or from such place of business; or 2) if clause 1 is not applicable, the employee is domiciled and spends a substantial part of his working time in the service of the employer in this or such other state. The Commission noted that neither the Missouri legislature nor the Commission has adopted the Model Act. The Commission also consulted Black's Law Dictionary, which defined the term "principal" to mean "chief, leading, most important or considerable; primary; original. Highest in rank, authority, character, importance or degree."²⁴

Using those definitions as a guide in this case, I find that claimant failed to provide any competent or substantial evidence to show that his employment with Mr. Martinez was principally localized in Missouri during the 13 weeks prior to the November 26, 2007 accident, so as to trigger the third clause of Section 287.110.2. Claimant testified that between 2004 or 2006, when Mr. Martinez first hired him, and the November 26, 2007 accident, he had worked for Mr. Martinez on several occasions. Those jobs were located in Missouri and Oklahoma. Claimant failed to provide any testimony, documentary evidence, or other competent or substantial evidence showing that during the 13-week period preceding the November 26, 2007 injury, he worked primarily in Missouri. In fact, claimant's testimony shows that, in the weeks preceding the injury, he spent the greatest amount of time working for Mr. Martinez in Oklahoma.

Moreover, claimant's testimony indicated that he did not work continuously for Mr. Martinez, whether in Missouri or outside Missouri, in the 13 weeks proceeding November 2007. While claimant worked on several projects with Mr. Martinez during those 13 weeks, there were also periods during that timeframe when claimant worked for other employers or worked for himself. At trial, claimant testified that during the spring of 2007, he worked for Mr. Martinez on a project at the Lake of the Ozarks, Missouri. This project lasted 2 to 3 months. After that project, claimant worked for one month for Travis Reynolds. Claimant was then unemployed for about a week. Next, claimant worked for Mr. Martinez for about four months in Tulsa, Oklahoma. When that project was completed, claimant did not work for anyone for two to three weeks. Claimant then worked for two weeks in Columbia, Missouri, for Mr. Martinez; that project was completed in October

²⁴ *Id.*

Employee: Fausto Franco-Lopez

Injury No. 07-135580

2007. After that project, claimant was unemployed for an unspecified period. Claimant testified that his next job was working for Mr. Martinez in Kansas. He also testified that he worked for Mr. Martinez in Kansas for less than two weeks when he fell.

Thus, claimant's testimony fails to demonstrate that the greatest portion of his actual working time during the 13 weeks before he was injured was spent working for Mr. Martinez in Missouri. To the contrary, it appears that the greatest interval of claimant's time working for Mr. Martinez was spent in Oklahoma. Claimant has failed to show his work for Mr. Martinez was principally localized within Missouri, so as to trigger the third clause of Section 287.110.2.

I find that the Missouri Division of Workers' Compensation does not possess jurisdiction over claimant's Claim for Compensation under section 287.110.2, RSMo. The accident did not occur in Missouri; claimant has failed to prove that there was a Missouri contract of employment; and claimant did not prove that his employment with Mr. Martinez was principally localized in Missouri during the 13 weeks prior to the accident. Since the Division does not have jurisdiction over the Claim for Compensation, it must dismiss the claim and all other issues are moot.

Any pending objections not expressly ruled on in this award are overruled.

Made by: _____
Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation