

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

Injury No.: 09-111071

Alleged Employee: Joseph Hamilton
Alleged Employers: Gregory and Toni Palm
Alleged Insurer: Unknown
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. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the decision to deny compensation is supported by competent and substantial evidence. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Collateral estoppel

The administrative law judge concluded that Joseph Hamilton (hereinafter "worker") is barred from litigating the issue whether Gregory and Toni Palm were his employers owing to the doctrine of collateral estoppel. We disagree. We believe collateral estoppel is inapplicable in this case. The courts have made clear that four questions must be answered in the affirmative before collateral estoppel applies:

- (1) Was the issue in the prior adjudication identical to the one in the present litigation?
- (2) Has the prior adjudication resulted in a judgment on the merits?
- (3) Is the party against whom collateral estoppel is asserted the party (or a party in privity with the party) to the prior adjudication?
- (4) Did the party have a full and fair opportunity to litigate the issues previously adjudicated?

Tatum v. St. Louis Metro Delivery, 887 S.W.2d 679, 683 (Mo. App. 1994).

We believe that collateral estoppel is not applicable here because the answer to both (1) and (4) above is "no." The dispositive issue before the district court was whether worker proved an employment relationship in the context of his civil lawsuit. To resolve that issue, the district court applied common law principles derived from The Restatement (Second) of Agency and Missouri cases discussing the "master-servant relationship." See *Transcript*, pages 669-73. On the other hand, the issue in this workers' compensation case is whether Gregory and Toni Palm are "employers" under either §§ 287.030 or 287.040 RSMo. To answer that question, we must consult the language of Chapter 287 and apply the relevant Missouri case law interpreting that language. Clearly, the analysis applied by the district court differs from that applied in

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this workers' compensation case, even if some of the same evidence is relevant. It follows that the district court did not consider or resolve an issue that is *identical* to the one now before this Commission, and that worker did not have a full and fair opportunity to litigate issues under §§ 287.030 and 287.040 before the district court.

Because we disagree with the administrative law judge that the doctrine of collateral estoppel is dispositive, we turn now to the question whether worker proved that Gregory and Toni Palm were his "employers" for purposes of the Missouri Workers' Compensation Law, and render the following supplemental findings of fact and conclusions of law.

Findings of Fact

Gregory Palm is a sales and marketing manager. His wife, Toni Palm, is a homemaker. Neither are engaged in the construction or roofing industry. In early 2009, the Palms decided to make some improvements to the barn on their residential property. Specifically, they decided to replace the roof, extend the eaves, and put a little porch on the front. Mr. Palm defers to Ms. Palm as to arranging for such improvements and other projects at their home.

Ms. Palm called Michael Hamilton to discuss the project. Michael Hamilton had previously performed some jobs around the Palm residence; Ms. Palm originally learned of Michael Hamilton's services from a friend whose kitchen Michael Hamilton had installed. Ms. Palm also contacted two other construction companies for quotes on the project. Ms. Palm ultimately decided to hire Michael Hamilton. Ms. Palm reviewed with Michael Hamilton some sketches she'd prepared to demonstrate how she wanted the barn to look. Michael Hamilton created a written agreement for the project from a form he purchased from a stationery store.

Ms. Palm authorized Michael Hamilton to make purchases of materials and equipment using her credit card, with the understanding that they would settle up at the end of the job. Michael Hamilton reimbursed Ms. Palm for any tools that he purchased for the job but that he ended up keeping for himself. Michael Hamilton consulted with Ms. Palm throughout the project to make sure she approved of various details, such as how far to extend the eaves on the barn. Ms. Palm was interested in the ultimate result in terms of what looked best to her, but she did not instruct Michael Hamilton as to the details of how to perform the work or accomplish the desired result. Michael Hamilton believes that Ms. Palm was present at the job site more than a typical customer. Ms. Palm got involved in such tasks as purchasing supplies, arranging for the delivery of materials, and cleaning up the worksite. Ms. Palm made multiple trips to the hardware store to buy things as they were needed.

Michael Hamilton was engaged in performing jobs for other customers besides Ms. Palm at the time. Ms. Palm was flexible regarding the time frame of accomplishing the work, and did not set Michael Hamilton's hours. Michael Hamilton had a general liability insurance policy, which he believes was called a "contractor's package." Michael Hamilton made his own decisions about who to hire to help him on jobs. Michael Hamilton hired worker to help on the job because of worker's experience in tin roofing. Michael Hamilton

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took worker's advice on how to perform the tin roofing aspects of the job. Michael Hamilton brought his own tools to the job site. He drove his own truck and paid for his own gas.

Ms. Palm paid Michael Hamilton at the end of the project when he gave her a "verbal bill." Ms. Palm had always paid Michael Hamilton by the job or task rather than by the hour, and this project was no different.

Ms. Palm believed Michael Hamilton was an independent contractor, and testified that she has never hired an employee. Ms. Palm testified, "I hire someone that works for themselves, that tells me they can do a job for me and that they're capable of doing the job." We credit Ms. Palm's testimony as to her understanding of the work relationship between herself and Michael Hamilton.

Conclusions of Law

Section 287.030 RSMo defines an "employer", as follows:

1. The word "employer" as used in this chapter shall be construed to mean:

(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

...

(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees.

Gregory and Toni Palm undoubtedly used worker's services for pay. But worker points to no evidence that, at the time he suffered his injuries, Gregory and Toni Palm employed five or more persons, or made an election to become subject to Chapter 287 by purchasing a workers' compensation insurance policy, or should be considered "construction industry employers" where Toni Palm is a homemaker and Gregory Palm is a sales manager. After reviewing the transcript, we can find no such evidence. Accordingly, we conclude that Gregory and Toni Palm were not "employers" for purposes of § 287.030.

Worker argues that Gregory and Toni Palm were statutory employers for purposes of § 287.040.1 RSMo, which provides, as follows:

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1. 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.

(emphasis added).

[A] putative employer's "usual business" as used in section 287.040 [are] those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement.

Bass v. National Super Mkts., 911 S.W.2d 617, 621 (Mo. 1995).

We have found that Gregory and Toni Palm are not engaged in the construction or roofing industry. Worker points to no evidence that would demonstrate Gregory and Toni Palm would need to hire permanent employees to perform the work involved in this case in the absence of the arrangement with worker. It follows that Gregory and Toni Palm are not statutory employers because worker was not injured while doing work that was in the usual course of their business.

Section 287.040.2 RSMo also specifically exempts the owner of a premises upon which improvements are being altered or repaired by an independent contractor, and shifts liability to the independent contractor:

2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.

The courts have described the foregoing section as creating an "improvements exception," applicable "to construction-type situations -- i.e., the property owner who hires a contractor to build him a house or such like improvement, to tear one down or make alterations or repairs upon one." *Sell v. Carlisle Power Transmission Prods.*, 298 S.W.3d 541, 545 (Mo. App. 2009). That is precisely the situation here. Gregory and Toni Palm hired Michael Hamilton to make alterations to their home and barn. Michael Hamilton in turn hired worker to perform the tin roofing aspects of the job. At oral argument in this matter, worker's counsel argued that Michael Hamilton was not actually an independent contractor, but rather an employee of the Palms. We are not persuaded. Given our findings with respect to the work arrangement, we conclude that Michael Hamilton was an independent contractor. This is because the overwhelming evidence reveals that the

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Palms were only interested in the results of the work to be accomplished, and did not retain the right to control the manner and means of accomplishing that work. See *DiMaggio v. Johnston Audio/D&M Sound*, 19 S.W.3d 185, 188 (Mo. App. 2000)(noting that “[t]he pivotal question in determining the existence of an employer-employee relationship is whether the employer had the right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service.”)

Given the foregoing supplementary findings and conclusions, we conclude that Gregory and Toni Palm were not statutory employers at the time worker suffered his injuries.

Costs under § 287.560 RSMo

Gregory and Toni Palm request an award of costs under § 287.560 RSMo, on the basis that worker pursues this claim without reasonable grounds. The courts have cautioned the Commission to limit an award of costs under § 287.560 to those cases where “the issue is clear and the offense egregious.” *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). Although we are of the opinion that the plain language of §§ 287.030 and 287.040 is dispositive of the issues herein, we are not persuaded that this case involves the type of egregious conduct for which the penalty under § 287.560 is reserved. For this reason, we deny the request for an award of costs.

Conclusion

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued January 22, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Alleged Employee: Joseph Hamilton

Injury No.: 09-111071

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Alleged Employer: Gregory and Toni Palm

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

Additional Party: Second Injury Fund

Insurer: Unknown

Hearing Date: January 17, 2013

Checked by: KOB

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? Unknown
3. Was there an accident or incident of occupational disease under the Law? Unknown
4. Date of accident or onset of occupational disease: May 17, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis County, MO
6. Was above employee in employ of above alleged employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Unknown
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 happened or occupational disease contracted: While installing a metal roof on a barn located on the Palm's property, Claimant fell from the roof sustaining injury.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Spine
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by alleged employer/insurer? None
16. Value necessary medical aid not furnished by alleged employer/insurer? None

Employee: Joseph Hamilton

Injury No.: 09-111071

17. Employee's average weekly wages: Disputed

18. Weekly compensation rate:

19. Method wages computation:

COMPENSATION PAYABLE

20. Amount of compensation payable: None.

21. Second Injury Fund liability: No

22. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Alleged Employee: Joseph Hamilton

Injury No.: 09-111071

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Alleged Employer: Gregory and Toni Palm

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

Additional Party: Second Injury Fund

Insurer: Unknown

Hearing Date: January 17, 2013

The matter of Joseph Hamilton (“Claimant”) was submitted for a final award before the Division of Workers' Compensation on January 17, 2013. Attorney Robert Kister represented Claimant. Attorney Martin Buckley represented the alleged employers Gregory & Toni Palm (“the Palms”). Assistant Attorney General Rodney Campbell represented the Second Injury Fund.

The same parties had previously appeared for hearing in the Division of Workers' Compensation before the Honorable Linda J. Wenman, wherein the parties submitted the limited issues of whether Claimant was an employee of the alleged employers subject to the Missouri Workers' Compensation Act; whether the alleged employers are subject to the Missouri Workers' Compensation Act; and whether Claimant is estopped from raising these issues by the judgment issued by United States District Court, Eastern District of Missouri, and affirmed by the United States Court of Appeals, 8th Circuit? On May 1, 2012, Judge Wenman issued a Partial Award wherein she found against Claimant on all issues, including a finding that Claimant is barred by estoppel from relitigating the issue, and denied the claim. No appeal was taken from that decision.

When the parties appeared for a final determination, the status of the case had not changed since it was before Judge Wenman. The parties requested the conversion of the Partial Award into a Final Award. I find the issues addressed in the May 1, 2012 Award fully dispose of the matter at hand, and a Final Award is appropriate.

I hereby fully adopt the decision of the Honorable Linda Wenman dated May 1, 2012 (attached hereto as Exhibit A) and incorporate that decision into this Final Award.

Dated: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

PARTIAL AWARD

Alleged Employee: Joseph Hamilton

Injury No.: 09-111071

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Alleged Employer: Gregory and Toni Palm

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

Additional Party: Second Injury Fund

Insurer: Unknown

Hearing Date: March 15, 2012

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? Unknown
3. Was there an accident or incident of occupational disease under the Law? Unknown
4. Date of accident or onset of occupational disease: May 17, 2009
5. State location where accident occurred or occupational disease contracted: St. Louis County, MO
6. Was above employee in employ of above alleged employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? Unknown
10. 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 happened or occupational disease contracted: While installing a metal roof on a barn located on the Palm's property, Claimant fell from the roof sustaining injury.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Spine
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by alleged employer/insurer? None
16. Value necessary medical aid not furnished by alleged employer/insurer? None

Employee: Joseph Hamilton

Injury No.: 09-111071

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

This award is only partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

FINDINGS OF FACT and RULINGS OF LAW:

Alleged Employee: Joseph Hamilton

Injury No.: 09-111071

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Alleged Employer: Gregory & Toni Palm

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

Additional Party: Second Injury Fund

Insurer: Unknown

Checked by: LJW

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on March 15, 2012. The parties seek issuance of a partial award. No party seeks a final award. Post-trial briefs were received on April 15, 2012. Attorney Robert Kister represented Joseph Hamilton (Claimant). Attorney Martin Buckley represented the alleged employers Gregory & Toni Palm (the Palms'). The Second Injury Fund (SIF) was represented by Assistant Attorney General Carol Barnard. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Prior to the start of the hearing, the parties identified the issues for disposition in this case: was Claimant an employee of the alleged employers subject to the Missouri Workers' Compensation Act; if yes, are the alleged employers an employer subject to the Missouri Workers' Compensation Act; and is Claimant estopped from raising these issues by the judgment issued by United States District Court, Eastern District of Missouri, and affirmed by the United States Court of Appeals, 8th Circuit.

Claimant offered Exhibits A- E and G-O, the Palms' offered Exhibits 2-5, Claimant and the Palms' offered Joint Exhibit F-1, and SIF offered Exhibit I. All exhibits were admitted without objection. All 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.

Procedural History

On May 17, 2009, Claimant sustained injury after falling off a barn roof located on the Palms' property. On August 20, 2009, Claimant filed an action in the United States District Court, Eastern District of Missouri (District Court), alleging he was an employee of the Palms' when he fell, and seeking damages for the injuries he sustained during the fall. On January 5, 2011, during the pendency of the District Court case, Claimant filed a Claim for Compensation with the Missouri Division of Workers' Compensation, alleging injury sustained on May 17,

2009.¹ Litigation proceeded in District Court, and a Motion for Summary Judgment was filed by the Palms'. On April 21, 2011, the District Court Magistrate Judge issued her findings, and granted the Motion for Summary Judgment. (Exhibit 2) Claimant appealed the District Court's action, on December 14, 2011, the United States Court of Appeals, 8th Circuit, affirmed the District Court (Exhibit 4), and on January 4, 2012, a Mandate issued. (Exhibit 5)

Findings of Fact

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

1. On May 17, 2009, Claimant sustained an injury after falling off a barn roof located on the Palms' property.
2. On January 5, 2011, Claimant filed a Claim for Compensation (Claim) for injuries sustained on May 17, 2009 following a fall from a barn.
3. Claimant's Claim listed himself as the "employee," and he listed the Palms' as the "employer."
4. The sole issue before the District Court Judge was whether at the time he fell from their roof and was injured was Claimant the Palms' employee. Following application of the Restatement (Second) of Agency, §220(2), and relevant Missouri case law, the District Court Judge concluded: "The court finds that the undisputed facts establish that Plaintiff Joe Hamilton was not an employee of Defendants . . ."
5. A Mandate from the United States Court of Appeals, 8th Circuit, has issued, and no further appeal of this issue exists for Claimant.

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:

Issues related to Estoppel by Judgment

The Palms' invoke the doctrine of collateral estoppel and/or res judicata because the issue of whether Claimant was their "employee" on the date of injury was fully and fairly litigated by District Court, and affirmed by the United States Court of Appeals, 8th Circuit. The principal to be applied in the instant case is one of issue preclusion (estoppel) as opposed to claim preclusion (res judicata). Because the issue decided by the District Court disposed of the entire case, when applied to the instant case, it becomes an Estoppel by Judgment.

¹ Administrative Judicial notice taken of the Missouri Division of Workers' Compensation file.

The doctrine of estoppel precludes parties from relitigating an issue that has been previously litigated by the same parties or those in privity with them. The trier of fact in an administrative adjudication has the jurisdiction to consider the defense of res judicata, and by extension principles of estoppel, to determine whether it should bar recovery. *Mikel v. Pot Industries*, 896 S.W2d 624 (Mo. banc 1995) citing *Overcash v. Yellow Transit Co.*, 180 S.W2d 684 (Mo banc 1944). A four part test is applied to determine if estoppel is applicable. *Tatum v. St. Louis Metro Delivery, Inc.*, 887 S.W.2d 679 (Mo.App. E.D. 1994), quoting *Miller V. Hubbert*, 804 S.W2d 819 (Mo.App. 1991), and *Oates v. Safeco Insurance Company*, 583 S.W2d 713 (Mo. banc 1979). Four questions must be asked:

1. *Was the issue in the prior adjudication identical to the one in the present litigation?* The issue in both the District Court proceeding and in the instant case is identical. The question presented to both courts is whether Claimant was an “employee” of the Palms’ on May 17, 2009, the date of injury.

2. *Has the prior adjudication resulted in a judgment on the merits?* A mandate from the United States Court of Appeals, 8th Circuit issued on January 4, 2012. No further appeal from the District Court Judgment is available and the judgment is final.

3. *Is the party against whom estoppel is asserted the party or a party in privity with the party to the prior adjudication?* In the instant case, estoppel is being asserted against Claimant by the Palms’. The District Court proceeding had identical parties.

4. *Did the party have a full and fair opportunity to litigate the issues previously adjudicated?* As thoroughly outlined in the District Court’s Memorandum Opinion, Claimant had a full and fair opportunity to litigate the issue prior to judgment. Full discovery was allowed, and Claimant presented his case to the District Court Judge before judgment was entered. Claimant exercised his right of appeal, and the United States Court of Appeals, 8th Circuit affirmed the District Court judgment following their review of the record, and review of the briefs presented by the parties.

Claimant argues that under the Workers’ Compensation Act (Act), the Palms’ may be secondarily liable to a subcontractor and its employees for injuries sustained in a work related accident, a remedy not available in the District Court action, therefore estoppel is inappropriate. However, in neither the District Court action nor the action under the Act, did Claimant name a subcontractor as a party for determination of primary liability. The only defendants before both Courts were the Palms’, and the only issue before both Courts was whether Claimant was an employee of the Palms’.

All the requirements for application of estoppel are present in the instant case. I find Claimant is barred by estoppel by judgment of the District Court from relitigating the issue of whether he was an employee of the Palms’ on May 17, 2009, the date of injury.

