

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

Injury No.: 95-404736

Employee: Richard Henson
Employer: Richard Henson d/b/a Richard Henson Construction
Insurer: Liberty Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged October 8, 1995
Place and County of Accident: Alleged Phelps County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 3, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued June 3, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23rd day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Claimant: Richard Henson

Injury No. 95-404736

Dependents: N/A

Employer: Richard Henson d/b/a Richard Henson Construction

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Company

Hearing Date: March 10, 2005

Checked by: JK/sm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? See findings
3. Was there an accident or incident of occupational disease under the Law? See findings
4. Date of accident or onset of occupational disease? October 8, 1995
5. State location where accident occurred or occupational disease contracted: Phelps County, Missouri
6. Was above claimant in employ of above employer at time of alleged accident or occupational disease? See findings
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? See findings
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? See findings
11. Describe work claimant was doing and how accident happened or occupational disease contracted: Claimant was working on a roof when he fell, injuring his right knee and back
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right knee and back
14. Nature and extent of any permanent disability: Claim denied
15. Compensation paid to date for temporary total disability: \$16,910.97
16. Value necessary medical aid paid to date by employer-insurer: \$16,764.02
17. Value necessary medical aid not furnished by employer-insurer: None
18. Claimant's average weekly wage: Undetermined
19. Weekly compensation rate: \$491.19 for temporary total disability and \$257.29 for permanent partial disability
20. Method wages computation: By agreement
21. Amount of compensation payable: Claim denied
22. Second Injury Fund liability: Claim denied
23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

On March 10, 2005, the claimant, Richard Henson, appeared in person and by his attorney, Mr. Lawrence Ray, for a hearing for a final award. Liberty Mutual Insurance Company was represented at the hearing by its attorney, Mr. Ed Vokoun. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Becky Dias. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Accident – If the administrative law judge finds that Richard Henson, d/b/a Henson Construction was a covered employer and Richard Henson was a covered employee, the parties agreed that on or about October 8, 1995 Richard Henson sustained an accident that arose out of and in the course of his employment.
2. The employer had notice of the claimant's accident.
3. Mr. Henson's claim for compensation was filed within the time allowed by law.
4. The claimant's rate of compensation is \$491.19 for temporary total disability and \$257.29 for permanent partial disability.
5. The claimant's injuries to his back and right knee were medically causally related to his accident.
6. The employer-insurer furnished medical aid in the amount of \$16,764.02.
7. The employer-insurer paid temporary total disability benefits at the rate of \$491.19 from October 9, 1995 through June 5, 1996 for a total of \$16,910.97.
8. Mr. Henson is not claiming any additional sums for previously incurred medical expenses, medical travel expenses or future medical aid.

ISSUES:

1. Covered employer
2. Covered employee
3. Nature and extent of disability
4. Liability of the Second Injury Fund

SUMMARY OF THE EVIDENCE:

The threshold issue in this case is whether the claimant, Richard Henson, was a covered employee working under the provisions of the Missouri Workers' Compensation Act. During the mid 1990s, Mr. Henson was a sole proprietor with two or three employees. His business was known as Henson Construction or Henson Construction Company, and was primarily involved in carpentry work.

On November 7, 1994, Mr. Henson went to Shelter Insurance Agent, Mark Malone, to purchase a workers' compensation insurance policy. Mr. Malone was a "captive" Shelter agent, but since Shelter did not issue workers' compensation policies, Mr. Malone was allowed to sell workers' compensation insurance policies through other companies. In Mr. Henson's case, Mr. Malone decided to submit an application through NCCI (National Council on Compensation Insurance), as part of the assigned risk section. Both the testimony of Mr. Malone and Mr. Henson indicate that it was Mr. Henson's intent to purchase a workers' compensation policy that covered both Mr. Henson and his other employees.

To avoid confusion about whether partners and sole proprietors who purchase workers' compensation insurance for their businesses are also requesting coverage for themselves, as owners, Section 287.035.1 provides as follows:

The benefits provided by this chapter resulting from work-related injuries shall apply to partners or sole proprietors only when such partners or sole proprietors have individually elected to procure insurance policy protection for themselves against injuries sustained while in the pursuit of their vocation, profession or business.

The statutory requirement of Section 287.035.1 is also reflected in the NCCI information and procedures manual for Missouri Workers' Compensation Plans. On page X-1 under the heading, "Section III Appendix," the manual provides "sole proprietors and partners are not automatically covered under the compensation law, but they may elect coverage." The manual further provides "if a sole proprietor or partners elect to come under the law at the time of application, a letter clearly stating the intent to elect **must** accompany the application. That question **must** be answered 'yes,' and each electing party's payroll included in the premium." (Insurer's Exhibit 1). A sample of the application referred to in this rule is included in the NCCI manual as part of "Section II Procedures." This application includes a specific question under paragraph IV about

whether there are any partners or sole proprietors seeking coverage, and if the answer is “yes,” requires a separate letter stating “clear intent to elect” be attached to the application (Insurer’s Exhibit 1). The manual indicates these applications were available through the NCCI mid-western office.

Although Mr. Malone acknowledged that he did have a copy of the NCCI manual, and was aware of the provisions that required sole proprietors to be treated differently, the application prepared for Mr. Henson by Mr. Malone did not satisfy the requirements of Section 287.035.1 or the NCCI policy manual. The application submitted by Mr. Malone were labeled “Acord 133” (Employee's Exhibit V and Insurer’s Exhibit 7B), and “Acord 130” (Insurer’s Exhibit 7A and Employee's Exhibit Q and P). Although Mr. Malone believed these forms were furnished by NCCI, Acord 130 and Acord 133 were different than the sample application in the NCCI manual. The applications submitted by Mr. Malone did not address the issue of whether there were any sole proprietors electing coverage. Mr. Malone also failed to attach a letter stating that Mr. Henson was electing to be covered as a sole proprietor.

It should be noted that the original Acord 130 was admitted as Insurer’s Exhibit 7A. While this form did not address sole proprietors, it did ask whether there were any partners, officers or relatives to be included or excluded. Mr. Malone wrote, “none,” in this section in black ink. At some point after the application was submitted, someone at NCCI or Liberty Mutual Insurance used blue ink to add Mr. Henson’s name as “owner,” and indicated that he was excluded. There is no evidence, however, indicating that these “blue ink” additions were communicated to either Mr. Henson or Mr. Malone prior to Mr. Henson’s accident. These additions, therefore, will not be considered as part of the original application.

After the Acord 130 and 133 forms were submitted to NCCI, NCCI processed the forms and issued a workers' compensation and employer's liability policy binder on November 9, 1994. The binder identified “Henson Construction” as the employer, and coverage was assigned under the assigned risk pool to Liberty Mutual Insurance Company (Employee's Exhibit S). After receiving the assignment, Liberty Mutual Insurance Company issued a “Workers' Compensation and Employer's Liability” policy that was effective on November 9, 1994. Under the category, “name of insured,” the policy listed “Richard Henson, d/b/a Henson Construction.” The employer’s status was listed as “individual.” There was no endorsement or other provision in the policy indicating that Mr. Henson had elected coverage as a sole proprietor.

Approximately one year after purchasing the workers' compensation policy, Mr. Henson fell on October 8, 1995, while working on a roof, and suffered injuries to his right knee and back. Although Liberty Mutual Insurance initially paid for Mr. Henson’s medical treatment and temporary total disability benefits, in June of 1996, a case manager for Liberty Mutual Insurance reviewed the claim and denied further payments. Liberty Mutual’s denial was based on their conclusion that Mr. Henson was a sole proprietor, and was not entitled to benefits because he had not “elected coverage as a sole proprietor” (Employee's Exhibit V and Insurer’s Exhibits 7C and 7D).

Mr. Henson is seeking an award for permanent partial disability against Liberty Mutual Insurance Company. He has also filed a claim against the Second Injury Fund for permanent partial disability benefits based on a combination of his last injuries with alleged preexisting disabilities.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Claimant’s Exhibits

- A. Curriculum vitae of Dr. David Volarich
- B. Report of Dr. David Volarich
- C. Deposition of Dr. David Volarich
- D. Not offered
- E. Medical records of Cox Medical Center
- F. Medical records of Mercy Medical Group
- G. Medical records from Springfield Physical Medicine and Rehabilitation
- H. Medical records of Mid-Missouri Internal Medicine, Inc. (updated)
- I. Medical records from Mid-Missouri Internal Medicine, Inc.
- J. Medical records of Mid-County Orthopedic Surgery and Sport Medicine
- K. Medical records from Phelps County Regional Medical Center (updated)
- L. Medical records from Phelps County Regional Medical Center
- M. Medical records of Crocker Chiropractic
- N. Medical records of Dr. Don James
- O. Medical records of Central Missouri Pain Management
- P. Photocopy of back page of Acord 133 (unsigned with additions)
- Q. Photocopy of back page of Acord 133 (signed, without additions)
- R. Photocopy of checks written to Shelter Insurance and Liberty Mutual Insurance Company
- S. November 28, 1994 workers' compensation and employer's liability policy binder from NCCI
- T. Workers' compensation and employer's liability policy issued by Liberty Mutual Insurance
- U. July 23, 1996 letter to Mr. Henson from Christie Faulkner, case manager with Liberty Mutual Insurance
- V. Additional photocopy of Acord 133

- W. Photocopy of front page of Acord 130
- X. Receipt for premium paid for workers' compensation policy purchased from Shelter Insurance Agent, Mark Malone
- Y. Duplicate copy of November 9, 1994 workers' compensation and employer's liability policy binder issued by NCCI
- Z. Memo from Mark Malone to NCCI dated June 17, 1996 appealing Liberty Mutual's denial of coverage
- AA. July 2, 1996 response from NCCI to Mark Malone
- BB. Not offered
- CC. October 25, 1995 Notice from Liberty Mutual Insurance to Henson Construction requesting a report of injury
- DD. Not offered
- EE. April 11, 1996 letter from Liberty Mutual Insurance to Mr. Henson scheduling an EMG by Dr. Woodward

Insurer's Exhibits

1. Manual of information and procedures for the Midwest Division of NCCI on Missouri Workers' Compensation Insurance Plan
2. Deposition of Kathy Scott
3. Deposition of Christie Faulkner
4. Deposition of Mark Malone
5. Insurance company audit
6. Deposition pages of Claimant, Richard Henson
- 7a. Original Acord 130 completed by Mark Malone with additions in blue ink (two-sided copy)
- 7b. Original Acord 133 application
- 7c. July 2, 1996 letter from NCCI to Mark Malone explaining denial of claim
- 7d. July 23, 1996 letter from Christie Faulkner to Mr. Henson denying coverage

Second Injury Fund Exhibits

None offered

FINDINGS OF FACT AND RULINGS OF LAW:

Notwithstanding all of the complicated insurance forms and rules, the important facts in this case are simple and straightforward, and lead to an unavoidable conclusion.

- Section 287.035.1 excludes sole proprietors from receiving benefits unless they "have individually elected to procure insurance policy protection for themselves."
- The NCCI manual addressed this provision by requiring sole proprietors to attach a separate letter electing coverage. The NCCI manual also contained a sample application that allowed a sole proprietor to elect coverage.
- Mr. Henson advised Mr. Malone that he wanted to purchase a workers' compensation policy that covered both himself and two other employees.
- Although Mr. Malone had a copy of the NCCI manual and was aware that there was a special provision related to sole proprietors, he did not comply with the requirements of Section 287.035.1 or the NCCI manual. Mr. Malone did not use the application contained in the NCCI manual, and the forms he submitted did not indicate that Mr. Henson was electing coverage as a sole proprietor. Mr. Malone also failed to attach a separate letter clearly indicating Mr. Henson's election of coverage.
- Based on the application submitted by Mr. Malone, the policy issued by Liberty Mutual Insurance Company does not contain any endorsement or other provision that extends coverage to Mr. Henson as a sole proprietor.

Based on these facts, there is only one conclusion that is supported by the evidence. Richard Henson, as a sole proprietor, did not elect coverage as required under Section 287.035.1, and was therefore not a covered employee entitled to benefits under Chapter 287.

The responsibility for this lack of coverage rests squarely on Mr. Henson's agent, Mr. Mark Malone. Under Missouri law, an insurance broker is ordinarily the agent of the one for whom insurance is procured. *A.G. Edwards v. Drew*, 987 S.W.2d, 386, 384 (Mo.App.1998); *Weekly v. Missouri Property Insurance Placement Facility*, 538 S.W.2d, 375, 279 (Mo.App.1976). As Mr. Henson's agent, Mr. Malone owed him a fiduciary duty, and was required to act with reasonable care, skill and diligence. *A.G. Edwards v. Drew*, at 394-395. Mr. Malone's representations of coverage, however, cannot be imputed to nor binding on Liberty Mutual Insurance Company since Mr. Malone was acting as an agent of Mr. Henson. *Kelly v. Shelter Mutual*, 748 S.W.2d 54, 58 (Mo.App.1988).

Mr. Henson's attorney has argued that since Liberty Mutual Insurance was in a position of superior knowledge, Liberty Mutual Insurance should somehow be responsible for Mr. Malone's error and still be liable for coverage. Mr. Henson's attorney, however, has failed to cite any authority that supports a finding that Liberty Mutual Insurance had any affirmative duty to discover and rectify errors contained in applications submitted by independent insurance agents.

Based on the evidence submitted, I therefore find that Richard Henson was a sole proprietor, and is not entitled to benefits under Chapter 287 because he did not individually elect to procure insurance policy protection as required under Section 287.035.1. Mr. Henson was therefore not a "covered employee," and his claim for compensation against Liberty Mutual Insurance Company and the Second Injury Fund must both be denied.

Date: _____ Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Pat Secrest
Director
Division of Workers' Compensation