

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

Injury No.: 07-135219

Employee: Jason E. Johnston

Employer: ABC Seamless Siding & Windows, Inc.

Insurer: Uninsured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 18, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued April 18, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jason E. Johnston

Injury No. 07-135219

Dependents: N/A

Employer: ABC Seamless Siding & Windows, Inc.

Insurer: N/A (Uninsured Employer)

Additional Party: N/A

Hearing Date: February 15, 2012

Checked by: LTW

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? N/A
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 21, 2007
5. State location where accident occurred or occupational disease was contracted: Greene County, 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? No
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in employment with the Employer, and while Employee was on a ladder installing gable vents, Employee lost his footing and fell to the ground. As a consequence of this work incident Employee sustained an injury to his left wrist.
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 Wrist
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Jason E. Johnston

Injury No. 07-135219

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

- 21. Amount of compensation payable: N/A (The Second Amended Claim for Compensation is denied on grounds that the claim was not filed within the statute of limitations period.)
- 22. Second Injury Fund liability: N/A

TOTAL: NONE

- 23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jason E. Johnston

Injury No. 07-135219

Dependents: N/A

Employer: ABC Seamless Siding & Windows, Inc.

Insurer: N/A (Uninsured Employer)

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on February 15, 2012. The evidentiary record was left open for 30 days in order to afford the parties opportunity to submit additional evidence, resulting in the record being closed on March 16, 2012. Further, the parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about March 26, 2012.

The claimant and alleged employee, Jason E. Johnston, appeared personally and through his attorney, Randy Alberhasky, Esq. The alleged employer, ABC Seamless Siding and Windows, Inc., appeared through its attorney, Ryan E. Murphy, Esq.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) The alleged accident of June 21, 2007, occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (2) ABC Seamless Siding & Windows, Inc. was a business operating in Missouri on or about June 21, 2007, and at that time was not insured under Chapter 287, RSMo.
- (3) Temporary disability benefits were not provided to the claimant (alleged employee, Jason E. Johnston).
- (4) The alleged employer, ABC Seamless Siding & Windows, Inc., has not provided any medical treatment to the claimant (alleged employee, Jason E. Johnston).

The issues to be resolved by hearing include:

- (1) Whether the alleged employer, ABC Seamless Siding & Windows, Inc., was operating under and subject to the Missouri Workers' Compensation Law on June 21, 2007?

- (2) Whether the claimant, Jason E. Johnston, was an employee of the alleged employer, ABC Seamless Siding & Windows, Inc., on June 21, 2007?
- (3) Whether the claimant, Jason E. Johnston, sustained an accident on or about June 21, 2007; and, if so, whether the accident arose out of and in the course of his employment with ABC Seamless Siding & Windows, Inc.?
- (4) Whether the claimant, Jason E. Johnston, notified the alleged employer (ABC Seamless Siding & Windows, Inc.) of his injury as required by Section, 287.420, RSMo?
- (5) Whether the Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo?
- (6) Whether the alleged accident of June 21, 2007, caused the injuries and disabilities for which benefits are now being claimed?
- (7) Whether the alleged employer, ABC Seamless Siding & Windows, Inc., is obligated to pay for certain past medical care and expenses?
- (8) Whether the claimant, Jason E. Johnston, has sustained injuries that will require additional or future medical care in order to cure and relieve the claimant from the effects of the injuries?
- (9) What is the applicable compensation rate?
- (10) Whether the claimant, Jason E. Johnston, is entitled to temporary total disability compensation? (The claimant, Jason E. Johnston, seeks payment of temporary total disability compensation for 21 weeks following the alleged accident of June 21, 2007.)
- (11) Whether the claimant, Jason E. Johnston, sustained any permanent disability as a consequence of the alleged accident of June 21, 2007; and, if so, what is the nature and extent of the disability?
- (12) Whether the alleged employer, ABC Seamless Siding & Windows, Inc., is entitled to costs, including allowance of attorney's fees, in having to defend against the prosecution of this claim?

EVIDENCE PRESENTED

The claimant and alleged employee, Jason E. Johnston, testified at the hearing in support of his claim. Also, Mr. Johnston presented at the hearing of this case the testimony of two additional witnesses – Ronnie Demault and Scott Martin¹. In addition, Mr. Johnston offered for admission the following exhibits:

¹ Mr. Martin is a co-owner of the alleged employer, ABC Seamless Siding and Windows, Inc., and is thus recognized as a hostile witness.

- Exhibit A.....Medical Records from Cox Medical Center
- Exhibit B.....Medical Records from Orthopaedic Specialists of Springfield
- Exhibit C.....Medical Records from Ozarks Medical Center
- Exhibit D.....Medical Records from TCMH Cabool Medical Clinic
- Exhibit E.....Medical Billing Records from Cox Medical Center
- Exhibit F.....Medical Billing Records from Orthopaedic Specialists of Springfield
- Exhibit G.....Medical Billing Records from Ozarks Medical Center
- Exhibit H.....Medical Billing Records from TCMH Cabool Medical Clinic
- Exhibit I.....Medical Report of Michael B. Grillot, M.D.
- Exhibit J.....Correspondence Dated February 19, 2009
(Regarding filing of Claim for Compensation against ABC Roofing & Contracting, LLC)
- Exhibit K.....Division of Workers' Compensation Response to Atty. Alberhasky
(Regarding Absence of a filing of First Report of Injury)
- Exhibit L.....Correspondence Dated March 12, 2009
(Regarding Address of ABC Roofing & Contracting, LLC)
- Exhibit M.....Correspondence Dated March 9, 2009
(Regarding filing of First Amended Claim for Compensation against ABC Roofing & Contracting, LLC; Stephen J. Schroff; and John R. Parker)
- Exhibit N.....Answer of Second Injury Fund to Claim for Compensation
- Exhibit O... Answer of Second Injury Fund to Amended Claim for Compensation
- Exhibit P.....Service of First Amended Claim for Compensation by Certified Mail
- Exhibit Q.....Second Amended Claim for Compensation
(filed against ABC Roofing & Contracting, LLC; Stephen J. Schroff; and ABC Seamless Siding & Windows, Inc.)
- Exhibit R..... Answer of ABC Seamless Siding & Windows, Inc. to Second Amended Claim for Compensation
- Exhibit S.....Motion to Dismiss Without Prejudice ABC Roofing & Contracting, LLC; Stephen J. Schrof; and John Parker
- Exhibit T..... Order of Dismissal for ABC Roofing & Contracting, LLC
- Exhibit U..... Order of Dismissal for Stephen J. Schroff
- Exhibit V..... Order of Dismissal for John Parker
- Exhibit W..... Order of Dismissal for Stephen J. Schroff d/b/a ABC Roofing
- Exhibit X.....Medical Report of Michael B. Grillot, M.D.
- Exhibit Y.....Correspondence from Atty. Murphy to Atty. Alberhasky
(Dated January 6, 2011)
- Exhibit Z.....Correspondence from Atty. Alberhasky to Atty. Murphy
(Dated January 27, 2011)
- Exhibit AA.....Correspondence from Atty. Murphy to Atty. Alberhasky
(Dated February 7, 2012)
- Exhibit BB..... Correspondence from Atty. Murphy to Atty. Alberhasky
(Dated February 8, 2012)
- Exhibit CC.....Correspondence from Atty. Murphy to Atty. Alberhasky
(Dated February 9, 2012)
- Exhibit DD.....Subpoena Duces Tecum Return for ABC Seamless Siding & Windows, Inc.
- Exhibit EE..... Photograph of Residential Construction Site

(2513 N. Albertha, Springfield, Missouri 65803)
 Exhibit FF Photograph of Residential Construction Site
 (2513 N. Albertha, Springfield, Missouri 65803)
 Exhibit GG Contract between ABC Seamless Siding & Windows, Inc. &
 Residential Owner (2513 N. Albertha, Springfield, Missouri 65803)

The exhibits were received and admitted into evidence.

The alleged employer, ABC Seamless Siding and Windows, Inc., did not present any witnesses at the hearing of this case. However, the alleged employer, ABC Seamless Siding and Windows, Inc. offered for admission the following exhibits:

Exhibit 1Correspondence from Atty. Murphy to Atty. Alberhasky
 (Dated May 12, 2011)
 Exhibit 2.....Correspondence from Atty. Murphy to Atty. Alberhasky
 (Dated June 28, 2011)
 Exhibit 3.....Not Offered
 Exhibit 4.....Summary of Costs & Attorney’s Fees
 Exhibit 5..... Claim for Compensation (filed Feb. 27, 2009)
 Exhibit 6..... First Amended Claim for Compensation (filed March 11, 2009)
 Exhibit 7...Second Amended Claim for Compensation (filed December 20, 2010)
 Exhibit 8..... Deposition of Jason Johnston
 Exhibit 9.....Medical Records from Cox Medical Center
 Exhibit 10.....Medical Records from Ozarks Medical Center

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers’ Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Notice of Lien on Workers’ Compensation Benefits – Support Obligees: Tina Kay Kembel and Anne M. Lankert
- Notice of Lien on Workers’ Compensation Benefits - Medical Services Lien (Inclusive of Affidavit)
- Order of Dismissal of Second Injury Fund
- Motion to Dismiss Without Prejudice the Second Injury Fund
- Answer of ABC Seamless Siding & Windows, Inc. to Second Amended Claim for Compensation (filed Jan. 6, 2011)
- Answer of Stephen Schroof d/b/a ABC Roofing and Contracting, LLC to Second Amended Claim for Compensation (filed Jan. 3, 2011)
- Second Amended Claim for Compensation (filed December 20, 2010)
- Answer of Stephen Schroof d/b/a ABC Roofing and Contracting, LLC to First Amended Claim for Compensation (filed August 27, 2010)
- Answer of Second Injury Fund to First Amended Claim for Compensation (filed April 1, 2009)

- First Amended Claim for Compensation (filed March 11, 2009)
- Answer of Second Injury Fund to Original Claim for Compensation (filed March 19, 2009)
- Original Claim for Compensation (filed February 27, 2009)
- Report of Injury (filed by Stephen Schroff, Inc. d/b/a ABC Roofing & Contracting LLC)

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I. Background

Claimant / Alleged Statutory Employee

The claimant, Jason Johnston, is 33 years of age, having been born on July 22, 1978. Mr. Johnston resides in Cabool, Missouri.

Mr. Johnston attended but did not graduate from high school. He has not obtained a GED or equivalent. Upon leaving high school at the age of 16, Mr. Johnston entered the work force and began working in construction as a laborer. In this employment Mr. Johnston performed a variety of construction work, including roofing and concrete work. Eventually, Mr. Johnston moved to the State of New York but continued to engage in construction. Notably, while in New York, Mr. Johnston installed gutters, soffits and siding.

In the spring of 2007 Mr. Johnston returned to Missouri from New York under the promise of a job through a high school acquaintance, Jeremy Atchley. Mr. Atchley worked as an independent contractor performing work (soffit and siding installation) for the alleged employer, ABC Seamless Siding and Windows, Inc. In moving from New York to work for Mr. Atchley, Mr. Johnston expected to continue to engage in construction work similar to the work he performed in New York.

Employer / Alleged Statutory Employer

ABC Seamless Siding and Windows, Inc. is a corporate entity formed in or around 2007, and engaged in the business of selling and installing siding, windows and gutters in residential homes. Christopher Scott Martin is the President and primary owner of this corporation. (The company sells not only the windows and siding, but also the labor needed to install the products.)

Mr. Martin is responsible for management of this business, including sales (securing and obtaining contracts with customers to sell and install siding, gutters, etc.). Initially, upon forming the business Mr. Martin did not obtain workers' compensation insurance coverage, believing it was not necessary since he employed less than five employees. (Mr. Martin did not consider or identify individuals working under a subcontract agreement and paid through the use of a Form 1099 to be an employee.)

II.

Employment / Jeremy Atchley

Initially, a determination must be made as to whether Jeremy Atchley was an employer operating under Chapter 287, RSMo (The Workers' Compensation Law for the State of Missouri) at all times relevant to this case. If so, the accident of June 21, 2007, is subject to Chapter 287, RSMo, and the Missouri Division of Workers' Compensation enjoys jurisdiction over this case.

The Workers' Compensation Law for the State of Missouri covers the following employers: all employers who employ five (5) or more employees; construction industry employers who employ one or more employees; and exempt employers who elect to become subject to The Workers' Compensation Law. Section 287.030, RSMo. In the present case, the evidence is supportive of a finding, and I find and conclude that at all times relevant to this case, Jeremy Atchley was a construction industry employer operating under and subject to The Workers' Compensation Law for the State of Missouri.

Notably, in or around April 2007, ABC Seamless Siding and Windows, Inc. entered into an agreement wherein Jeremy Atchley agreed to perform construction work involving removal and installation of certain siding, soffits and windows for a home located in Springfield, Missouri (2513 N. Albertha). Thereafter, Mr. Atchley secured the services of Jason Johnston to perform construction labor for the 2513 N. Albertha project at an agreed upon hourly rate of \$15.00 per hour. The evidence is thus supportive of a finding that Jeremy Atchley held himself out as construction contractor engaged in the business of removing and installing siding, soffits and windows.

Accordingly, in light of the foregoing, I find and conclude that that relative to the 2513 N. Albertha construction project, Jeremy Atchley was a subcontractor who had agreed to perform construction work for ABC Seamless Siding and Windows, Inc. I further find and conclude that on June 21, 2007, and at all times relevant to this case, Jeremy Atchley was an employer operating under and subject to the workers' compensation law but did not have workers' compensation insurance. In addition, I find and conclude that on June 21, 2007, and at all times relevant to this case, the claimant, Jason Johnston, was an employee of Jeremy Atchley working as a construction laborer.

III.

Statutory Employment / ABC Seamless Siding and Windows, Inc.

Employer liability and coverage under The Workers' Compensation Law for the State of Missouri is not limited to Section 287.030, RSMo, as Section 287.040, RSMo allows for inclusion of statutory employers. Section 287.040, RSMo, in pertinent part, states:

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.

* * *

3. 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 when employed on or about the premises where the principal contractor is doing the work.

4. In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer. (Emphasis added.)

In the present case, the evidence is supportive of a finding, and I find and conclude that at all times relevant to this case, ABC Seamless Siding and Windows, Inc. is a corporate entity engaged in construction involving sales and installation of siding, windows, soffits and gutters in residential homes. The installation of such material includes removal of material and other preparation work necessary to complete such remodeling construction projects. ABC Seamless Siding and Windows, Inc. is a construction industry employer, and at all times relevant to this case was an employer operating under and subject to The Workers' Compensation Law for the State of Missouri.

In context of this case ABC Seamless Siding and Windows, Inc. secured a remodeling construction contract with a residential owner of a home in Springfield, Missouri (2513 N. Albertha) in April 2007. This contract involved the purchase and sale of siding and windows, and further involved removal and installation of material, for the sum of \$18,250.00. At the time of this contract the company employed at least one employee. And in order to meet its contractual obligations regarding removal and installation of material, the company entered into subcontract agreements with other contractors to perform the varying construction activity. The company utilized Form 1099s in reporting the monies paid to the subcontractors and without paying payroll taxes.

Subsequent to obtaining the contract for the 2513 N. Albertha project, ABC Seamless Siding and Windows, Inc. entered into a subcontract agreement with Jeremy Atchley for performance of certain construction work. Thereafter, in or around June 2007, Mr. Johnston obtained employment with Mr. Atchley and began working as a laborer for Mr. Atchley on the 2513 N. Albertha project. The work performed by Mr. Johnston included installation of soffit, siding and other material. Although Mr. Martin couldn't say when the installation took place, he noted that it wasn't completed until July 7, 2007, when the final payment and waiver were executed. Mr. Martin acknowledged that he understood Mr. Atchley would contract with other employees or individuals to perform the construction work contemplated by the April 2007 contract.

Accordingly, in light of the foregoing, I find and conclude that ABC Seamless Siding and Windows, Inc. utilized Jeremy Atchley as a subcontractor for the construction of a remodeling project, which involved the 2513 N. Albertha project. Additionally, I find and conclude that on June 21, 2007, and while working on the 2513 N. Albertha project, the claimant Jason E. Johnston was a statutory employee of ABC Seamless Siding and Windows, Inc.

Therefore, in light of the applicability of Section 287.040, RSMo, Jeremy Atchley is the direct employer of Jason Johnston, and ABC Seamless Siding and Windows, Inc. is liable to Jason E. Johnston under Chapter 287, RSMo as a statutory employer. Also, because Jeremy Atchley and ABC Seamless Siding and Windows, Inc. were not insured under Chapter 287, RSMo at the time of the claimed accident, the liability of ABC Seamless Siding and Windows, Inc. is as an uninsured employer. (The liability of Jeremy Atchley is not subject to adjudication in this proceeding insofar as neither the claimant nor the statutory employer elected to file a claim against Jeremy Atchley as an employer liable under Chapter 287, RSMo.)

IV. Accident

On June 21, 2007, Mr. Johnston's first day of employment with Jeremy Atchley, and while performing his work duties that involved climbing a ladder and installing a gable vent on the home involving the 2513 N. Albertha project, Mr. Johnston fell from the ladder and landed on his left wrist. As a consequence of this incident Mr. Johnston sustained a significant injury that rendered him in immediate pain.

The severity of the injury was readily apparent; Mr. Johnston's bone was fractured and "sticking out." A co-employee working with Mr. Atchley, Ronnie Demault, provided assistance, and drove Mr. Johnston to the emergency room of Cox Medical Center for evaluation and treatment. Mr. Atchley was present when the accident occurred and knew that Mr. Demault was taking Mr. Johnston to the hospital. Mr. Atchley thus received timely notice of this accident.

In light of the foregoing, I find and conclude that the employee, Jason E. Johnston, sustained an accident that arose out of and in the course of his employment with the direct employer, Jeremy Atchley; and it arose out of and in the course of his employment with the statutory employer, ABC Seamless Siding and Windows, Inc. I further find and conclude that this accident caused Mr. Johnston to sustain an injury to his left upper extremity, which necessitated receipt of medical care.

Medical Treatment

Upon presenting to the emergency room the attending physician, Dr. Grillot, an orthopedic surgeon, examined Mr. Johnston and diagnosed Mr. Johnston with a distal radius fracture intra-articular and performed an open reduction internal fixation of the distal radius and carpal tunnel release. Post-operatively, Dr. Grillot diagnosed Mr. Johnston as having sustained a comminuted intra-articular fracture, left distal radius and acute carpal tunnel syndrome.

Mr. Johnston received post-operative follow-up care. During this period of recovery, Mr. Johnston continued to experience significant discomfort and pain in his left wrist. Eventually, in or around August 2007 he was identified to present with a stable condition. However, in October 2007 he presented to Dr. Grillot with continuing complaints of numbness and pain in the left wrist. At the time of this latter visit, Mr. Johnston was diagnosed as presenting with left distal radius fracture with pain.

In light of these continuing complaints of pain, Mr. Johnston received a prescription for physical therapy. The prescription was for physical therapy 3 times a week for 4 weeks. Unfortunately, however, the medical expenses were being paid by Medicaid, and Medicaid does not pay for physical therapy. Unable to afford to pay for it himself, Mr. Johnston did not obtain this physical therapy.

Present Complaints

Mr. Johnston continues to experience stiffness and weakness of grip in his left hand and wrist where he had no problems before. He has worked sporadically since the accident doing construction work. He saw Dr. Grillot again on December 1, 2010, and he noted popping and lack of range of motion in the wrist. Dr. Grillot recommended an MRI, as he suspected triangular fibrocartilage complex tear. Notably, at the time of this December 1, 2010, office visit, Dr. Grillot did not believe Mr. Johnston was at MMI relative to the June 21, 2007, injury.

III. Statute of Limitations

The statutory employer, ABC Seamless Siding and Windows, Inc., asserts as an affirmative defense that the applicable period of limitations is three years, and the employee, Jason Johnston, failed to file timely the Claim for Compensation against the company. ABC Seamless Siding and Windows, Inc. thus contends that on this basis alone the Claim for Compensation must be denied.

The statute of limitations provision governing this claim is set forth in Section 287.430, RSMo, which, as it relates to an accident, states:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the

employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475. The statute of limitations contained in this section is one of extinction and not of repose.

The courts have examined statute of limitations as a defense, and in context of this workers' compensation proceeding several principles bear reprise.

“[O]ne purpose of limitations statutes is to prevent the filing of fictitious claims at a late date when investigation as to their genuineness has been rendered difficult by lapse of time.” *DeRousse v. PPG Industries, Inc.*, 598 S.W.2d 106, 110 (Mo. banc 1980). “This purpose would be defeated entirely if a plaintiff were permitted to escape the limitation period by pleading that the alleged accident had not been reported by the employer.” *Id.* “Such a rule would open the door to the filing of fraudulent fictitious claims to which the limitation statutes has always been a bar.” *Id.*

“Statute of limitations are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within (an) exception.” *DeRousse v. PPG Industries, Inc. at 112.* The statute of limitations is not designed to affect merely the remedy but its effect is to extinguish the right itself. *Dees v. Mississippi River Fuel Corp.*, 192 S.W.2d 635, 640 (1946). Further, a workers' compensation employee has the burden of proving all elements of his claim. *Davidson v. Missouri State Treasure as Custodian of Second Injury Fund*, 327 S.W.3d 583, 588 (Mo. App.S.D. 2010). Unless a claim is timely filed, there is no jurisdiction to award compensation.

A.

What is the applicable period of limitations (two or three years)?

The facts relevant to the adjudication of this issue are summarized below:

- No First Report of Injury had been filed with the Missouri Division of Workers' Compensation.
- Christopher Scott Martin testified that Jeremy Atchley did not talk to him regarding the June 21, 2007, accident. Further, according to Mr. Martin, ABC Seamless Siding and Windows, Inc. has not made any payments to Jason Johnston on account of the June 21, 2007, accident. More specifically, Mr. Martin testified that he and the company have not provided or paid for any of the medical treatment furnished to Mr. Johnston on account

of the June 21, 2007, accident; and he and the company have not provided or paid for any of temporary disability compensation or any other benefits to Mr. Johnston on account of the June 21, 2007, accident. This testimony is without contradiction by the claimant.

- Mr. Johnston filed an original claim for compensation on February 27, 2009, listing as his employer:

ABC Roofing and Contracting, LLC
 5230 South Western
 Brookline, MO 65619

- Mr. Johnston filed the first amended claim for compensation on March 11, 2009, listing as his employers:

ABC Roofing and Contracting, LLC
 5230 South Western
 Brookline, MO 65619

Stephen J. Schroff
 5230 South Western
 Brookline, MO 65619

John R. Parker
 4139 S. Fremont Ave.
 Springfield, MO 65804

- Mr. Johnston filed the second amended claim for compensation on December 20, 2010, listing as his employers:

ABC Roofing and Contracting, LLC
 5230 South Western
 Brookline, MO 65619

Stephen J. Schroff
 5230 South Western
 Brookline, MO 65619

ABC Seamless Siding & Windows, Inc.
 1020 Eaglecrest Dr.
 Nixa, MO 65714

The second amended claim for compensation filed on December 20, 2010, was the first time ABC Seamless Siding and Windows, Inc. was named as an employer.

- On January 6, 2011, ABC Seamless Siding and Windows, Inc. filed an answer to the second amended claim for compensation disputing, among other things, that the

claimant filed the claim against ABC Seamless Siding and Windows, Inc. within the time required by law.

- Christopher Scott Martin, as the President and co-owner of ABC Seamless Siding and Windows, Inc., testified that ABC Seamless Siding and Windows, Inc. has never had any affiliation with ABC Roofing and Contracting, LLC. He further testified that they are separate and distinct corporate entities that have no relation to each other. He testified he does not know Steven Schroff, the owner of ABC Roofing and Contracting, LLC. Additionally, Mr. Martin testified that ABC Seamless Siding and Windows, Inc. has never been located at 5230 South Western, Brookline, Missouri 65619, and has never received mail at that address. Rather, ABC Seamless Siding and Windows, Inc. is located and receives mail at 1020 Eaglecrest, Nixa, Missouri 65714. This testimony is without contradiction by the claimant.
- Mr. Martin testified that ABC Seamless Siding and Windows, Inc. first learned of Jason Johnston's June 21, 2007, accident in December 2010 subsequent to the filing of the second amended claim for compensation on December 20, 2010. He testified that ABC Seamless Siding and Windows, Inc. was not a party to the claim for compensation filed on February 27, 2009, nor was his company served with a copy of the original claim filed on that date. He testified ABC Seamless Siding and Windows, Inc. did not receive notice of the accident, notice of the injury, or notice of the claim in February 2009. This testimony is without contradiction by the claimant.
- Mr. Martin testified ABC Seamless Siding and Windows, Inc. was not served with a copy of the first amended claim for compensation filed on March 11, 2009. He testified ABC Seamless Siding and Windows, Inc. did not receive any notice of the accident, any notice of the injury, or any notice of the claim on March 11, 2009. This testimony is without contradiction by the claimant.
- Mr. Martin testified that ABC Seamless Siding and Windows, Inc. was first served with a copy of the claim for compensation, which involved the second amended claim for compensation filed with the Division of Workers' Compensation on December 20, 2010. And the service of the second amended claim for compensation was the first time the company received any notice of the accident, the injury, or the claim for compensation. This testimony is without contradiction by the claimant.

In light of the foregoing, and after consideration and review of the evidence, I find and conclude that neither the direct employer (Mr. Atchley) nor the statutory employer (ABC Seamless Siding and Windows, Inc.) filed a first report of injury in this case. Certainly, no report of injury was filed timely with the Missouri Division of Workers' Compensation. The applicable period of limitations under Section 287.430, RSMo is three years.

B.

When does the statute of limitations begin to run?

Resolving this issue requires consideration of two questions: (1) When did the accident occur? (2) If payments have been made on account of the June 21, 2007, accident, when was the last date of payment? *See, Dees v. Mississippi River Fuel Corp. at 640.*

The work-related injury (accident) occurred on June 21, 2007. On this date, while performing his work duties that involved climbing a ladder and installing a gable vent on the home involving the 2513 N. Albertha project, the employee, Jason Johnston, fell from the ladder and landed on his left wrist. Although Mr. Johnston received medical care and missed time from work following the work injury, the direct employer, Jeremy Atchley, and the statutory employer, ABC Seamless Siding and Windows, Inc., did not provide Mr. Johnston with any compensation or benefits under Chapter 287, RSMo. No payments have been made on account of the June 21, 2007, accident by the direct employer or statutory employer.

Accordingly, in light of the foregoing, I find and conclude that the applicable three-year period of limitations under Section 287.430, RSMo began to run on June 21, 2007. The statutory right to file a timely claim for compensation against the statutory employer, ABC Seamless Siding and Windows, Inc. thus continued for three years, and became subject to extinction on June 22, 2010. Therefore, in order to avoid the applicability of the statute of limitations, Mr. Johnston must have filed the claim against the statutory employer, ABC Seamless Siding and Windows, Inc., on or before June 21, 2010. Otherwise, the claim will be deemed untimely and extinguished under Section 287.430, RSMo.

C.

When was the claim for compensation filed against ABC Seamless Siding and Windows, Inc.?

In regard to the June 21, 2007, accident, the claimant filed an original claim for compensation with the Missouri Division of Workers' Compensation on February 27, 2009. However, this claim named as the employer only ABC Roofing and Contracting, LLC. Shortly thereafter, on March 11, 2009, the claimant filed a first amended claim for compensation, and named as the employers - ABC Roofing and Contracting, LLC; Stephen J. Schroff; and John R. Parker. But both the original claim for compensation and first amended claim for compensation did not name the statutory employer, ABC Seamless Siding and Windows, Inc.

ABC Roofing and Contracting, LLC. is not an employer in this case, and does not enjoy any legal relationship or have any other connection with the direct employer, Jeremy Atchley. Similarly, ABC Roofing and Contracting, LLC. does not enjoy any legal relationship or have any type of connection with the statutory employer, ABC Seamless Siding and Windows, Inc.

Stephen J. Schroff is not an employer in this case, and does not enjoy any legal relationship or have any other connection with the direct employer, Jeremy Atchley. Similarly, Stephen J. Schroff does not enjoy any legal relationship or have any type of connection with the statutory employer, ABC Seamless Siding and Windows, Inc.

John R. Parker is not an employer in this case, and does not enjoy any legal relationship or have any other connection with the direct employer, Jeremy Atchley. Similarly, John R. Parker does not enjoy any legal relationship or have any type of connection with the statutory employer, ABC Seamless Siding and Windows, Inc.

ABC Seamless Siding and Windows, Inc. did not become a party to this case until the claimant filed the second amended claim for compensation with the Missouri Division of Workers' Compensation on December 20, 2010. Further, ABC Seamless Siding and Windows, Inc., as well as

Mr. Martin or any other corporate representative, did not receive notice of the filing of any claim for compensation until being served with the second amended claim for compensation in December 2010.

In light of the foregoing, the claimant did not file the claim against the statutory employer, ABC Seamless Siding and Windows, Inc., until December 20, 2010. This date is six months after the applicable period of limitations. If this date governs, the statute of limitations will be deemed to have run and the right of Mr. Johnston to file a claim against ABC Seamless Siding and Windows, Inc. would have expired prior to the filing date.

Misnomer & The Relation Back Doctrine

The employee, Jason Johnston, readily acknowledges that the second amended claim for compensation was filed outside the applicable period of limitations, but contends the filing date should relate back to the filing date of the original claim for compensation, which was filed within the applicable period of limitations. Mr. Johnston premises his argument on assertion that the naming of the statutory employer involved a misnomer. In making this assertion Mr. Johnston notes that he mistakenly identified in the original claim ABC Roofing and Contracting, LLC as the specific statutory employer instead of naming the proper entity, ABC Seamless Siding and Windows, Inc.

The statutory employer, ABC Seamless Siding and Windows, Inc., contends the pleadings in this case do not involve a misnomer, but rather the changing or adding of a party. Further, the statutory employer, ABC Seamless Siding and Windows, Inc., contends that it did not receive notice of the filing of any claim (“notice of the institution of the action”) until after the statute of limitations period expired. And the failure to receive such timely notice precludes application of the relation back doctrine.

Misnomer

In *Johnson v. Delmar Gardens West, Inc.*, et. al., 335 S.W.3d 83 (Mo. App.E.D. 2011) the Court discussed the concept of misnomer and the application of the relations back doctrine. Notably, in distinguishing the difference between a minomer and the changing of a party to a petition the Court propounded the following comments:

A misnomer is a misdescription or a mistake in some aspect of a party’s name. *Bailey v. Innovative Management & Investment*, 890 S.W.2d 648 (Mo. banc 1994). It occurs where a summons is served on the right party but with the wrong name. *P. & K Heating & Air Conditioning, Inc. v. Tusten Townhomes Redevelopment Corp.*, 877 S.W.2d 121, 125-126 (Mo. App. E.D. 1994).

As a misdescription, a correction of a misnomer is not considered to be a change in party requiring the plaintiff to meet the specific notice requirements of Rule 55.33. *Bailey*, 890 S.W.2d 651. A misnomer does not destroy the effectiveness of a petition, and its correction relates back to the date of the filing of the petition when it is clear that the proper party received notice. *Watson v. E.W. Bliss Co.*, 704 S.W.2d 667, 669-70 (Mo. banc 1986).

In light of the foregoing this is not a case of misnomer where a plaintiff sued the correct party but misdescribed the party in the petition (Claim for Compensation). The claimant was not simply mistaken as to some aspect of the correct party's name but was mistaken as to the identity of the party and filed the claim against the wrong entity. Claimant freely admits he did not name the correct legal entity as the statutory employer in the original claim for compensation and/or first amended claim for compensation. Thus, the joining of the correct legal entity, ABC Seamless Siding and Windows, Inc., does not relate back as a misnomer.

Change in Party

The courts recognize that a change in party may allow an amendment to relate back to the filing of the original petition pursuant to Rule 55.33(c). “[F]or the rule to apply, plaintiff must have made a mistake in selecting the proper party to sue, i.e., plaintiff must have brought an action against the wrong party.” *Johnson v. Delmar Gardens West, Inc.*, et. al., 335 S.W.3d 83, 88 (Mo. App.E.D. 2011), *quoting*, *Windscheffel v. Benoit*, 646 S.W.2d 354, 356 (Mo. banc 1983). However, upon meeting this requirement, the rule incorporates several additional requirements before an amendment to the pleadings changing the party against whom a claim is asserted will relate back to the date of the original petition. *Johnson*, 335 S.W.3d at 89.

First, the claim in the amended pleading must arise out of the conduct, transaction, or occurrence set forth in the original pleading. *Johnson*, 335 S.W.3d at 89, *citing*, Rule 55.39(c); *Garavaglia v. Mason of Missouri, Inc.*, 733 S.W.2d 53, 55 (Mo. App. E.D. 1987). The facts of the present case satisfy this requirement. All three pleadings (original claim for compensation, first amended claim for compensation and second amended claim for compensation) relate to the employee, Mr. Johnston, seeking workers' compensation benefits for his work injury of June 21, 2007.

The second requirement relates to notice and incorporates two elements, namely “that the party brought in by the amended petition had, within the statute of limitations period, (1) received “notice of the institution of the action as will not prejudice the party in maintaining the party’s defense on the merits” and (2) actual or constructive knowledge that but for a mistake concerning the identity of the proper party, the action would have been brought against him. *Johnson*, *citing*, Rule 55.39(c); *Garavaglia v. Mason of Missouri, Inc.*, 733 S.W.2d 53, 55 (Mo. App. E.D. 1987). In context of this notice requirement the courts have held that notice to the party actually sued would suffice to inform the party meant to be sued of a pending claim for relief, if the two parties enjoyed a “sufficient identity of interest or were so closely connected” to warrant notice being imputed. *Id.* The facts of this case do not satisfy this notice requirement.

ABC Roofing and Contracting, LLC., Stephen J. Schroff, and John R. Parker do not enjoy any legal relationship or have any type of connection with the statutory employer, ABC Seamless Siding and Windows, Inc. The only common thread existing between ABC Roofing and Contracting, LLC and ABC Seamless Siding and Windows, Inc. is that the two legal entities are engaged in construction and their corporate names begin with “ABC.” The name confusion explains the mistake, but it does nothing to establish or provide a basis for imputing notice of the claim to the statutory employer, ABC Seamless Siding and Windows, Inc.

Further, Mr. Johnston elected to file his claims (original claim for compensation, first amended claim for compensation and second amended claim for compensation) without naming the

direct employer, Jeremy Atchley. And Jeremy Atchley did not talk to Christopher Scott Martin (ABC Seamless Siding and Windows, Inc.) regarding the June 21, 2007, accident. Consequently, ABC Seamless Siding and Windows, Inc. had no knowledge of Mr. Johnston's injury or the filing of the claim until more than three years after the date of the accident. Further, there is no evidence that within the statute of limitations period ABC Seamless Siding and Windows, Inc. became aware (directly or indirectly) of the institution of the claim. The notice requirement has not been satisfied in order to trigger applicability of Rule 55.33(c).

Accordingly, in light of the foregoing, the claim against ABC Seamless Siding and Windows, Inc. does not relate back to the original or first amended claim brought within the statute of limitations. And the statute of limitations continued to run in favor of ABC Seamless Siding and Windows, Inc. until they were made a party by amendment on December 20, 2010. The employee's claim is thus barred by the statute of limitations.

Therefore, the Missouri Division of Workers' Compensation is without jurisdiction to award compensation. The Second Amended Claim for Compensation as filed against ABC Seamless Siding and Windows, Inc. is denied. All other issues not addressed herein are rendered moot.

Made by: _____
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation