

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

Injury No.: 02-141643

Employee: Clarence Krusen
Employer: Maverick Transportation
Insurer: Liberty Mutual Fire Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (open)
Date of Accident: July 10, 2002
Place of Accident: Michigan

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (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 January 3, 2005, as supplemented herein, and awards no compensation in the above-captioned case.

The dispositive issue is jurisdiction, i.e., whether or not the Division of Workers' Compensation has jurisdiction to address the employee's claim. The administrative law judge determined that the Division of Workers' Compensation was without jurisdiction to address appellant's claim, and, accordingly, dismissed the action. The Commission agrees with this determination.

Section 287.110.2 RSMo addresses the jurisdiction of the Division of Worker's Compensation:

"This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state."

Employee contends his situation falls within the purview of the second condition above and argues his contract of employment with the employer was made in Missouri. The Commission disagrees.

The Commission is guided by the following standard rules of contracts succinctly set forth in *Scott v. Elderlite Express*, 148 S.W.3d 860 (Mo. App. E.D. 2004):

[3-5] "[F]or a contract to be formed, there must be a meeting of the minds of the parties, to the contract regarding the same thing, at the same time." *Whitney*, 866 S.W.2d at 155. In determining where the minds of the parties met, the trier of fact must consider all of the facts and circumstances and the parties' conduct. *Id.* It is generally assumed that the contract was made at the place where the last act necessary to complete the contract was performed. *Id.*; *Whiteman v. Del-Jen Constr., Inc.* 37 S.W.3d 823, 831 (Mo.App. W.D.2001), *overruled in part on other grounds, Hampton*, 121 S.W.3d at 225.

It is employee's contention that the last act necessary to complete the employment contract occurred during a

telephone conversation between himself and a recruiter for the employer. This telephone conversation occurred approximately two weeks before employee's orientation with the employer in Arkansas. Employee was in Missouri when this telephone conversation took place. Employee testified that the recruiter for the employer, during this telephone conversation, told the following to the employee: "you got the job". Employee did not adduce any evidence corroborating this alleged statement.

The Vice President of Human Resources testified in behalf of the employer. As to the issue of the employer's employment practices and procedures, we find the testimony of the Vice President of Human Resources, cogent and probative, as well as more credible, trustworthy, persuasive and believable, when compared and contrasted to the testimony of the employee.

In summary fashion, the Vice President of Human Resources testified to the following: she was extremely familiar with the employment practices of the employer; she was adamant that no driver for the employer was ever hired or would be hired sight unseen; that the employer receives and processes applications for hire; once applications have been processed and completed, and driving requirements have been validated, a recruiter of the employer contacts any would-be applicant and extends an invitation to come to the employer's principal place of business in Arkansas, for pre-employment orientation. The employer's recruiters do not have any authority to hire an individual.

The Vice President of Human Resources further testified the employer's recruiter contacts an applicant and invites an applicant to come to Arkansas for pre-employment orientation; while in Arkansas the applicant must take and successfully complete a driving test; must pass a drug test; must pass a physical; must pass a road test; and complete all additional orientation prior to any employment or hiring.

In the case at bar, the exact same procedure was applicable, and any offer of employment was dependent upon the employee successfully participating in and completing the employer's orientation in Arkansas. In the case at bar, after employee successfully completed the orientation in Arkansas, an employment contract was executed in Arkansas.

As stated above, the Commission finds the testimony of the Vice President of Human Resources more credible, persuasive and worthy of belief, as to the issue of employment. In light of this finding, the Commission does not find credible or worthy of belief the testimony of the employee that the recruiter allegedly told the employee that "you got the job"; and, consequently, render the fulfillment and completion of orientation in Arkansas meaningless.

Accordingly, the Commission finds that the employer never extended an unconditional offer of employment to the claimant as alleged; that the employee was only told to report to Arkansas for the completion of all necessary tests and orientation for employment; and it was only after employee arrived in Arkansas and successfully completed the various tests and orientation as described above, that the last act necessary to complete the contract to be performed was fulfilled. All of these activities/actions occurred in Arkansas, not in Missouri.

Accordingly, the last act necessary to complete the employment contract was performed in Arkansas and the Missouri Workers' Compensation Law does not apply.

The award and decision of Administrative Law Judge Holden, issued January 3, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest:

John J. Hickey, Member

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be reversed.

The Commission majority concludes that the last act necessary to form employee's contract of employment occurred in Arkansas. I disagree. The facts of this case are similar to the facts in *Whiteman v. Del-Jen Constr., Inc.*, 37 S.W.3d 823 (Mo. App. 2001).

Courts deem a contract to have been made where the parties to the contract perform the last act necessary to complete the contract. The last act necessary for the formation of the employment contract in this case was Mr. Whiteman's acceptance of Del-Jen's offer of employment. Where an applicant accepts an offer of employment over the telephone while the applicant is in Missouri, the employment contract is deemed to have been made in Missouri.

Whiteman, 37 S.W.3d at 831 (Mo. App. 2001)(citations omitted).

Employee testified that, two weeks before reporting for training in Arkansas, he had a telephone conversation with employer's recruiter while employee was in Missouri. During the phone conversation, employer's recruiter informed employee "[y]ou've got the job." Employee immediately accepted recruiter's offer of employment. Accordingly, the last act necessary to complete the employment contract occurred in Missouri. *Id.*

The Commission majority finds that employee adduced no evidence to corroborate the recruiter's alleged statement. Employee produced a multitude of evidence tending to corroborate the statement:

- Employee quit his job at Ford after the conversation;
- Employer began paying employee June 17, 2002 – before the written contract was signed;
- Employer reported employee's hire date as June 17, 2002, on the Report of Injury;
- Employer reported employee's hire date as June 17, 2002, on the wage statement.

Employer offered no evidence to rebut employee's testimony regarding recruiter's statement.

As in the *Whiteman* case, employer's own records, which identify employee's hire date as June 17, 2002, belie employer's assertion that employee's contract was not made until June 21, 2002.

I find credible employee's testimony that the recruiter told employee he had the job – an unconditional job offer -- and that employee accepted recruiter's job offer during the telephone conversation.

The majority places undue emphasis on employer's requirement that employee pass a driving test and DOT physical. Employer's requirement that employee meet certain qualifications to *maintain* his employment is not inconsistent with the formation of a contract during the telephone conversation. Employee's failure to meet the qualifications is merely a condition subsequent which could divest employee of his employment. This conclusion is consistent with employee's testimony that employer would fire him if he failed to pass the driver's test administered during his orientation/training. This conclusion is also consistent with employer adding employee to the payroll and beginning to pay him on June 17, 2002.

Based upon the foregoing, I conclude that the Division of Workers' Compensation has jurisdiction to consider employee's claim.

Employee credibly testified that he suffered an injury by accident arising out of and in the course of his

employment. Employee has shown he is in need of further medical treatment to cure and relieve the effects of his work injury. Employee has shown that he is unemployable in his current condition and is entitled to temporary total disability benefits.

I would reverse the award of the administrative law judge. I would issue a temporary award of medical treatment, temporary total disability, and costs as required by § 287.203 RSMo.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Clarence Krusen Injury No. 02-141643

Dependents: N/A

Employer: Maverick Transportation

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: Liberty Mutual Fire Insurance Company

Hearing Date: 10/20/04

Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? NO
3. Was there an accident or incident of occupational disease under the Law? NO
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: MICHIGAN
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
N/A
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: N/A
14. Nature and extent of any permanent disability: N/A
14. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: CLARENCE KRUSEN

Injury No. 02-141643

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:
Unpaid medical expenses: N/A
0 weeks of temporary total disability (or temporary partial disability)
0 weeks of permanent partial disability from Employer
0 weeks of disfigurement from Employer
Permanent total disability benefits from Employer beginning, for Claimant's lifetime
22. Second Injury Fund liability: Yes No Open N/A
0 weeks of permanent partial disability from Second Injury Fund
Uninsured medical/death benefits:
Permanent total disability benefits from Second Injury Fund:
weekly differential (N/A) payable by SIF for N/A weeks, beginning
and, thereafter, for Claimant's lifetime

TOTAL:

23. Future requirements awarded:

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Clarence Krusen

Injury No. 02-141643

Dependents: N/A

Employer: Maverick Transportation

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: Liberty Mutual Fire Insurance Company

The parties appeared before the undersigned administrative law judge on October 20, 2004, for a temporary hardship hearing, or in the alternative a final hearing. The claimant appeared in person represented by David Jerome. The employer and insurer appeared represented by Ray Whiteaker. The Second Injury Fund did not appear. Memorandums of law were filed by December 3, 2004.

The parties stipulated to the following facts. On or about July 10, 2002, Maverick Transportation was an employer. The employer's liability was fully insured by Liberty Mutual Insurance Company. On the alleged injury date of July 20, 2002, Clarence Krusen was an employee of the employer. On or about July 20, 2002, the claimant sustained an accident, which arose out of and in the course and scope of employment. The accident occurred in the state of Michigan. The claimant notified the employer of his injury as required by Section 287.420, RSMo. The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo. Temporary disability benefits have been paid to the claimant in the amount of \$12,567.84. The employer and insurer have paid medical benefits in the amount of \$20,958.89. The attorney fee being sought is 25%.

ISSUES:

1. Whether the award should be entered as a temporary award or a final award.
2. Whether on or about July 20, 2002, the employer was operating subject to the Missouri Workers' Compensation Law and where proper jurisdiction and venue lie.
3. Whether the employer is obligated to pay past medical expenses.
4. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
5. What is the proper rate.
6. Any temporary total benefits owed to the claimant, there is a dispute as to the date TTD last paid.
7. Whether any penalties should be assessed under Sections 287.203 and 287.560.

FINDINGS OF FACT:

In June 2002 the claimant was living in Alton, Missouri. He was working at Ford Motor Company in South Carolina. The claimant had learned of a position with Maverick Transportation and called them. The employer was located in Arkansas. He was faxed an application which he completed and returned. He was in Missouri on a leave from Ford when he received a call from a recruiter at Maverick Transportation. The recruiter was calling from Arkansas. The claimant testified that in the first call from the recruiter, he was asked for additional information regarding a previous truck fire. A second call occurred when the same recruiter called him from Arkansas to Alton, Missouri. The claimant testified that the recruiter told him "You've got the job" and asked him to get down to Arkansas by Monday. The claimant said that he believed he had the job and quit his job at Ford Motor Company and went to Arkansas a couple of weeks later. The claimant believed he was hired after this second conversation and felt he would be fired if he failed the orientation tests in Little Rock. The recruiter's name is unknown and the conversation was not recorded in any way.

The claimant arrived in Arkansas on June 17, 2002. The employer paid the claimant mileage from Alton to North Little Rock, Arkansas. When he arrived, he received a new DOT physical, although he already had a DOT license. He also had a driving test and a drug test. He had previously signed an authorization, and his references had been checked. He does

not recall a written test, but a certificate was signed showing he had completed it on June 17, 2002. At the conclusion of the orientation, the claimant testified that he signed numerous documents, one of which was admitted as Exhibit O. It is entitled "Maverick Transportation, Inc. Employment Agreement." It states, "I was offered employment by Maverick Transportation, Inc., by Randy Rymel effective 6/21/02. I, Clarence Krusen, agree that my principle state of employment is Arkansas." Both the claimant and Randy Rymel signed it. Both signatures are dated June 21, 2002.

The claimant was driving for the employer on July 10, 2002. He was driving with David Lewis, a driver trainer. He was in Detroit, Michigan, on top of a load. He fell approximately 18 feet. He hit the drive shaft between the cab and trailer and then the ground. He had immediate pain in his right arm, back and hip. He went to the emergency room and was driven back to Missouri by Mr. Lewis. When he arrived, he went to the doctor in Alton, Missouri, and then to Cox Hospital in Springfield, Missouri. He was diagnosed with a compression fracture of the thoracic spine, L5-S1 disc involvement and a rotator cuff tear. Dr. Crabtree and Dr. Hubbard treated him. He last saw Dr. Crabtree on January 3, 2003. Dr. Crabtree was recommending further treatment, which has not been provided. The claimant is requesting further treatment and temporary disability benefits.

The report of injury completed by the employer, and the wage statement, show a hire date of June 17, 2002. Letha Bryant, the Vice President of Human Resources, testified that this date is shown because it is when he arrived in Arkansas. She said that the procedure for hiring drivers is, an application is received and processed, driving requirements are validated, a recruiter contacts the individual and extends an invitation to come to a pre-employment orientation in Little Rock, Arkansas. When the individual arrives in Little Rock, the process is explained and the written test, the physical, the drug test and the driving test are performed. Only after all of this is finished, she said, is an offer of employment made. She testified that Exhibit O is the offer of employment. As far as the employer is concerned, employment occurred in this case on June 21, 2002, when the orientation was complete and the offer made. Ms Bryant testified that the recruiter only has authority to extend an invitation to come to Little Rock for orientation and does not have authority to make an offer.

Claimant has been paid benefits of temporary disability and medical treatment has been provided under Arkansas Workers' Compensation Law. Ms. Bryant testified that light duty is available in Arkansas for the claimant. They pay transportation to and from Little Rock and provide a hotel room there. They will also pay \$10 an hour for the light duty. She said that this has been offered to claimant but he has declined.

The employer terminated his employment in October 2003. In March 2004 he went to work for Rising Fenix driving a truck. He drove for three weeks and quit because of the physical problems he was having. In June 2004 he returned to drive a truck and had another accident. This occurred in Oregon. He was a passenger and the truck veered off the road and struck a mountain. He hurt the same body parts as he did in the July 2002 injury. He has moved to Virginia Beach, Virginia. He is treating with doctors in Virginia Beach for the June 2004 injury.

CONCLUSIONS OF LAW:

The first issue to be determined is whether or not proper jurisdiction is in the Missouri Workers' Compensation Law.

Section 287.110.2 states:

This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state.

In *Whitney v. Country Wide Truck Service*, 886 S.W.2d 154 (E.D. 1994), overruled in part on other grounds, *Hampton*

v. *Big Boy Steel Erections*, 121 S.W.3d 220, 228 (Mo. Banc 2003), the court applied this section to facts that are almost identical to this case:

It is a well-accepted rule of contract law that, in order for a contract to be formed, there must be a meeting of the minds of the parties to the contract regarding the same thing, at the same time. In determining the place where the minds of the parties met, the trier of fact must consider all of the facts and circumstances and the conduct of the parties. It is generally assumed that the contract was made at the place where the last act necessary to complete the contract is performed.

The *Whitney* case has been followed as recently as November 2, 2004, in *Scott v. Elderlite Express*, ED84311. Therefore, it is necessary to determine where the last act necessary to complete the employment contract occurred, in Missouri during the call with the recruiter in early June 2002, or in Arkansas during the orientation that occurred between June 17, 2002, and June 21, 2002.

The facts in the *Scott* case are directly on point with the facts in this case with one exception. *Id.* In *Scott* the claimant acknowledged in her deposition that part of applying for the job was completing a drug test. *Id.* In this case, the claimant testified that he knew he would be “fired” if he did not pass the drug test as well as the other tests during orientation. In both of these situations, the claimant’s knew that the job was contingent on them passing the tests.

There is no recording or other documentation of the telephone call between the recruiter and the claimant. The claimant insists that he felt the contract was complete on the phone as the recruiter told him “You’ve got the job.” The claimant also testified that he would have been fired if he did not pass the requisite tests in Arkansas. The claimant was aware that his employment was contingent on meeting the requirements. Furthermore, Exhibit O, which is signed and dated by the claimant on June 21, 2002, states he was offered employment effective on June 21, 2002. I find that the last act necessary did not occur in Missouri, rather it occurred in Arkansas upon successful completion of orientation. As a result, I do not have jurisdiction to rule on any other issue in this case and therefore, all other issues are moot.

Date: January 3, 2005

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia “Pat” Secrest
Patricia “Pat” Secrest
Director
Division of Workers' Compensation