

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-075629

Employee: Joseph Kuegler

Employer: Jim Martin, L.L.C.

Insurer: American Family Mutual Insurance Company

Date of Accident: July 19, 2004

Place and County of Accident: St. Charles County, Missouri

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, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated May 24, 2005.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Koren M. Mueller, issued May 24, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of August 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Joseph Kuegler

Injury No. 04-075629

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Employer: Jim Martin, L.L.C.

Add. Party: n/a

Insurer: American Family Mutual Insurance Company

Hearing Date: April 4, 2005

Checked by: KMM:df

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 19, 2004
5. State location where accident occurred or occupational disease contracted: St. Charles County, MO
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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: Motor vehicle accident.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: Neck, back
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? No
16. Value necessary medical aid not furnished by employer/insurer? Stipulated

Employee: Joseph Kuegler

Injury No. 04-075629

17. Employee's average weekly wages: \$1,010.00
18. Weekly compensation rate: \$673.33/\$354.05
19. Method wages computation: By Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable:

The parties stipulated that the only issue was whether accident arose out of and in the course of employment.

TOTAL: N/A

Each of said payments to begin as of date of Award and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Thomas J. Lech

FINDINGS OF FACT and RULINGS OF LAW

Employee: Joseph Kuegler

Injury No: 04-075629

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri

Employer: Jim Martin, L.L.C.
Add. Party: n/a
Insurer: American Family Mutual Insurance Company

Checked by: KMM:df

FINDS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARIES

A temporary hearing was held April 4, 2005 at the St. Charles Division of Workers' Compensation office. The parties submitted post-hearing briefs by April 25, 2005 and therefore the claim was finally submitted on that date. Joseph Kuegler (hereinafter "Claimant") was represented by Thomas J. Lech. The employer was Jim Martin, L.L.C., the insurer was American Family Mutual Ins. Co. and Stephen A. McManus represented the Employer/Insurer. The parties stipulated that the Second Injury Fund was not applicable. Mr. Lech requested a 25% attorneys fee on the benefits awarded.

The parties stipulated that on or about July 19, 2004, Claimant while in the employment of Jim Martin L.L.C. sustained an injury by accident in St. Charles County, Missouri. The parties further stipulated that the Employer had notice of the injury and a claim for compensation was filed within the time prescribed by law. The parties agreed that Claimant's average weekly wage was \$1010.00 and the rates for temporary total disability and permanent partial disability were \$673.33 and \$354.05 respectively. Employer has denied the claim and therefore Claimant has not been paid any benefits to date. Employer/Insurer provided no medical aid.

The parties agreed that the only issue for disposition in this case is whether the injury was arising out of and in the course of employment. The parties further stipulated that the medical bills and charges were reasonable in this geographic area and that the medical treatment Claimant received on account of this injury was reasonable and necessary.

Claimant appeared at the hearing and testified on his own behalf. Employer appeared at the hearing and testified on his own behalf. Waldo Schellenger also appeared at the hearing and testified on Claimant's behalf.

EXHIBITS

Claimant offered the following exhibits which were admitted into evidence without objection:

Claimant's Exh. A: Claim for Compensation and Attorney Representation Agreement

Claimant's Exh. B: Anderson Hospital medical records

Claimant's Exh. C: Internal Hospital of Highland medical records

Claimant's Exh. D: St. Joseph's Hospital medical records

Claimant's Exh. E: Neurosurgical Associates, Inc. medical records

Claimant's Exh. F: Assimilated medical bills

Claimant's Exh. G: Joseph Kuegler paycheck stub

Claimant's Exh. I: Verizon Wireless Bill

Claimant's Exh. J: Letter dated October 28, 2004 from J. Bradley Young

Claimant offered the following exhibit, which was NOT admitted after relevancy objection by Employer/Insurer attorney:

Claimant's Exh. H: Agreement to Reimburse the Carpenter's Health and Welfare Fund

Claimant and Employer/Insurer offered the following joint exhibit, which was admitted into evidence without objection:

Joint Exh. I: Parties' Stipulation

No other exhibits were offered into evidence by either party.

SUMMARY OF LIVE TESTIMONY

Claimant:

Claimant testified he was working as a carpenter for Employer since February 2004 on a remodel housing project in Wentzville, Missouri. Claimant met with Employer at the Wentzville site prior to beginning work in February 2004. His supervisor on the job was Waldo Schellenger and the job was to finish around July 19, 2004. Claimant inspected job sites for the presence of materials at the Wentzville job site. On the date of injury Claimant started working at 7:00 a.m. and ate lunch at the job site from 11:30 a.m. until 12:00 p.m. He testified he did not talk to Employer on that date, however Mr. Schellenger told Claimant that Employer may split the crew and start another job in O'Fallon, Missouri. Claimant and Mr. Schellenger left for the O'Fallon job site after lunch on July 19, 2004 to make sure needed materials were present, count the windows, measure the feet of soffit needed and check that the "over digs" were also present. Claimant testified they proceeded directly to the O'Fallon site, which took about 20-25 minutes to reach.

On cross-examination Claimant stated he had worked with Waldo Schellenger previously and that all information from Employer came from Mr. Schellenger. Claimant did not speak with Employer from the O'Fallon site and did not contact Employer after the motor vehicle accident that is the subject of this claim. Claimant admitted to a felony possession of drugs conviction.

Waldo Schellenger:

Mr. Schellenger testified he worked as the General Foreman for Employer at the Wentzville job site. His duties included payroll and basic supervision. He and Claimant split crews at the job site. He talked to Employer, Jim Martin almost every morning regarding the materials needed at the Wentzville site. On July 19, 2004 Mr. Schellenger's cell phone bill (Claimant's Exh. I) reveals he made a call to Mr. Martin at 7:00 a.m. to touch base and provide a progress report since they were working the last building at the Wentzville site. There were one or two homes left at the Wentzville site and Mr. Schellenger did not know which crew would stay and complete the punch list. He talked to Mr. Martin the day before about the O'Fallon job. Mr. Schellenger testified that at 9:45 a.m. on July 19, 2004 Mr. Martin gave him driving instructions to the O'Fallon job site. Mr. Schellenger testified that originally Mr. Martin was going to check the O'Fallon site, but instead Mr. Martin told Mr. Schellenger to check the back fill, windows and material at the O'Fallon site. Mr. Schellenger had lunch at 11:30 a.m. and by that time he knew he was going to go check the O'Fallon site.

Mr. Schellenger testified that he and Mr. Martin talked about splitting crews. After lunch that day he and Claimant went to the O'Fallon site and found on inspection that some of the back fill was not done. They were at the site for approximately 15 minutes and upon returning directly to the Wentzville site they were involved in a motor vehicle accident on Highway A. The motor vehicle accident occurred between 1:00 p.m. and 1:20 p.m. on July 19, 2004. Employer paid Mr. Schellenger for the day of work until 1:00 or 1:30 p.m.

On cross-examination, Mr. Schellenger testified he was Claimant's supervisor at the Wentzville site. He and Claimant ran two crews at the site. He had worked as Claimant's supervisor in the past. Mr. Schellenger met Mr. Martin at the Wentzville site prior to beginning work. Mr. Schellenger maintained that Mr. Martin instructed him to inspect the O'Fallon job site. Mr. Schellenger placed two calls on July 19, 2004 to Mr. Martin. Mr. Schellenger testified he was anxious to find out where they

might work after the Wentzville project was completed. Mr. Schellenger testified that Mr. Martin had asked him who should work at the O'Fallon site in order to obtain the most profitable deal. The Wentzville project was remodeling work, but the O'Fallon job was new siding only. Mr. Schellenger testified that Mr. Martin and he discussed taking Claimant with him to the O'Fallon site because it was unclear who would complete the Wentzville punch list. Mr. Schellenger admitted he did not call Mr. Martin from the O'Fallon job site. Mr. Schellenger also admitted on cross that he has a claim pending regarding this motor vehicle accident and he has a record of a felony conviction for possession of stolen mail. Mr. Schellenger testified that no one else heard his conversations with Mr. Martin.

Jim Martin:

Mr. Martin testified he is a siding contractor and he owns James Martin L.L.C. He subcontracts vinyl siding on mainly new construction. He generally hires workers or crews and instructs them to complete jobs. Mr. Martin testified that Claimant and Mr. Schellenger worked together on the Wentzville job site. Mr. Martin testified that he had given driving instructions to the O'Fallon job site to Mr. Schellenger. Mr. Martin testified the crew determines who is in charge of the crew. Mr. Martin testified he did not talk to Mr. Schellenger about the O'Fallon job on July 19, 2004. He testified he did not send anyone to the O'Fallon job site because it was twenty miles from the Wentzville site in the middle of the day and he was paying each worker at that time. He admitted he spoke to Mr. Schellenger every day about who was present at the job site, what was done and what materials were needed to complete the work. Mr. Martin testified the Wentzville job was almost complete on July 19, 2004 and he and Mr. Schellenger talked about clean up, materials and inspections. He talked to Mr. Schellenger a few days before July 19, 2004 about what job to do next. He testified that he required certain ratios to make money at new construction because it is a faster pace and he needs a quicker crew. When Claimant worked for Mr. Martin in Fairview Heights, Illinois he lost money. Therefore Mr. Martin testified he had concerns about this crew working new construction at Fairview Heights and O'Fallon and he expressed these concerns to Mr. Schellenger.

Mr. Martin testified he told Mr. Schellenger that he could inspect the O'Fallon site on his way home from work, not on paid time. He testified he has never paid a crew to look at a job site before. He testified he had not told Mr. Schellenger or Claimant to check the O'Fallon job site because he completes this function. Mr. Martin testified he was surprised when he received a call regarding the motor vehicle accident. Mr. Martin testified he does not recall talking to Mr. Schellenger about the O'Fallon job. Mr. Martin testified that Mr. Schellenger was the leader for the crew and that workers were to take direction from Mr. Schellenger when Mr. Martin was not present. Mr. Martin testified that Mr. Schellenger sometimes had to pick up items for the Wentzville job in his pick-up truck. At the Wentzville job site Mr. Schellenger and Claimant would check and if they needed materials they would tell Mr. Martin. Mr. Martin testified he paid Mr. Schellenger and Claimant on July 19, 2004 for the time up to the motor vehicle accident.

DISCUSSION OF ISSUES

The parties stipulated to all issues with the exception of whether Claimant's injury arose out and in the course of employment. To be compensable under the Workers' Compensation law, an injury must arise out of and in the course of employment. Sec. 287.120 RSMo 2000. "Arising out of," means that a causal connection exists between the employee's duties and injury. Auto Club Ins. Exchange v. Bevel, 663 S.W.2d 242, 245 (Mo banc 1984). Claimant was injured on July 19, 2004 while traveling with his foreman from a prospective job site in O'Fallon, Missouri back to his current job site in Wentzville, Missouri during work hours. Employer paid him for his time traveling to the prospective job site, up to the time of the motor vehicle accident, which is the subject of this claim. Claimant was traveling with his immediate supervisor, Waldo Schellenger. Claimant alleges he was told by Mr. Schellenger to travel with Mr. Schellenger to a prospective job site in O'Fallon to investigate whether the site was ready for siding installation. Claimant reasonably relied upon Mr. Schellenger as he did most days concerning instruction at the job site. Claimant regularly received information and instruction from Mr. Schellenger since all witnesses agreed he was the construction foreman. Employer/Insurer argues that Claimant was outside the scope and course of his employment because Mr. Martin did not instruct Mr. Schellenger to investigate the prospective job site. However, each witness agreed that Mr. Schellenger was in charge of the work site in Mr. Martin's absence and Mr. Schellenger testified that he needed to bring Claimant to the prospective job site because he did not know which crew would be responsible for the punch list at the Wentzville job site. On the date of the accident Mr. Schellenger called Mr. Martin and the dispute arises as to whether Mr. Martin instructed Mr. Schellenger to investigate the new job site on the clock or after work hours. Mr. Martin admitted he paid Claimant for his time in this endeavor, reasoning that he did not want to "weasel" out of the obligation.

It is clear that Employer benefited from the investigation of the prospective job site. Mr. Martin needed the information to see if the job could be done profitably and whether the necessary steps had been completed to begin the new job immediately

upon completion of the Wentzville job. I find Claimant to be a credible witness who did not overhear the conversations between Mr. Martin and Mr. Schellenger. When a construction supervisor instructs an employee to perform a reasonable task it is unrealistic to impose a burden on the employee, which would require him to investigate the source of the instruction and whether the supervisor could possibly be misstating the policy or procedure of superiors. I believe that is the logical conclusion of the argument that Employer/Insurer makes. Mr. Martin admitted that Mr. Schellenger was in charge of the construction project. Mr. Schellenger instructed Claimant to travel with him to the prospective job site and was returning to the current job site when he was injured in a motor vehicle accident.

Therefore I find that Claimant was in the course and scope of his employment when he was injured in a motor vehicle accident while with his supervisor traveling to the Wentzville job site after inspecting a prospective job site in O'Fallon, Missouri. I find that the claim is compensable. The parties stipulated to the remaining issues.

Date: _____

Made by: _____

KOREN M. MUELLER

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

Patricia Secret

Director

Division of Workers' Compensation

