

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

Injury No.: 02-116993

Employee: Philip L. Riley

Employer: Don Julian Builders

Insurer: Kansas Building Industry Workers' Compensation Fund

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 September 25, 2012. The award and decision of Administrative Law Judge Emily Fowler, issued September 25, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 30th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Philip L. Riley

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge is in error, and should be reversed.

The parties presented conflicting evidence as to the facts surrounding employee's hiring with employer. It is agreed that employee contacted employer about a job; that employer advised employee to contact David Hill, a project manager with employer; that employee did so, and thereafter Mr. Hill interviewed employee in Lenexa, Kansas, on August 2, 2002, and offered employee a job with employer at \$12.00 per hour; that employee demanded \$14.00 per hour; that Mr. Hill told employee he did not have authority to offer him a job at \$14.00 per hour; and that Mr. Hill informed employee he would check with his supervisor and get back to employee. At this point, the testimony of the witnesses begins to deviate.

Employee testified that later that day, Mr. Hill called him at his home and offered him the job at \$14.00 per hour, and that he accepted. Meanwhile, Jeffrey Horn, production manager for employer, testified that Mr. Hill had no such authority, but that instead employee was required to report to employer's offices in Lenexa, Kansas, to undergo a second interview to determine whether it was worth it to pay employee \$14.00 an hour. Mr. Horn explained that laborers were generally only paid \$12.00 per hour, and that he wanted to meet with employee and question him regarding his background, customer relations skills, and general experience in light of his lack of experience in the construction industry. Mr. Horn testified that he interviewed employee in employer's offices in Lenexa, Kansas, and that thereafter he decided to hire employee and gave Mr. Hill authorization to offer the job to employee.

It was employee's burden to prove that jurisdiction over this workers' compensation claim properly lies in Missouri. *Liberty v. Treasurer for Mo.*, 218 S.W.3d 7, 11 (Mo. App. 2007). I disagree with the majority's finding that employee offered the more credible testimony regarding the circumstances of his hiring with employer. I find it highly unlikely that Mr. Horn would authorize Mr. Hill to offer employee a job at \$14.00 per hour where the uncontested evidence reveals that employee had no background in construction or home building. I would instead credit the testimony from Mr. Horn and find that employee was not offered employment by Mr. Hill over the phone on August 2, 2002, but instead that Mr. Hill instructed employee to report to employer's offices in Lenexa, Kansas. I find that a second interview took place there, at which employee, Mr. Horn, and Mr. Hill were all present in the conference room. I find that after the interview, Mr. Horn stepped outside of the conference room with Mr. Hill and authorized Mr. Hill to offer employee a job at a rate of pay of \$14.00 per hour. I find that Mr. Hill did so, and that employee accepted.

Given these facts, it's obvious that the last act necessary to complete this employment contract took place in Kansas, when employee accepted employer's offer of employment. "Under Missouri law, a contract is deemed to have been made where the parties perform the last act necessary to complete the contract." *Liberty v. Treasurer*

Employee: Philip L. Riley

- 2 -

for Mo., 218 S.W.3d 7, 10 (Mo. App. 2007). It follows that there is no jurisdiction over this workers' compensation claim in Missouri.

For the foregoing reasons, I would reverse the award of the administrative law judge and enter a final award dismissing employee's claim for lack of jurisdiction. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

Issued by: Division of Workers' Compensation

Employee: Philip Riley

Injury No. 02-116993

FINAL AWARD

Employee: Philip L. Riley

Injury No. 02-116993

Dependants: N/A

Employer: Don Julian Builders

Insurer: Kansas Building Industry Workers' Compensation Fund

Additional Party: N/A

Hearing Date: August 20, 2012

Checked by: ESF/pd

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: October 9, 2002
5. State location where accident occurred or occupational disease was contracted: Olathe, Kansas
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 occurred or occupational disease contracted: Employee fell off of a ladder and suffered a spinal cord injury

Issued by: Division of Workers' Compensation

Employee: Philip Riley

Injury No. 02-116993

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: spinal cord, body as a whole
14. Nature and extent of any permanent disability: permanent and total disability
15. Compensation paid to-date for temporary disability: \$125,818.95
16. Value necessary medical aid paid to date by employer/insurer? \$3,097,835.84
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$594.40
19. Weekly compensation rate: \$396.23 for permanent total disability
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: The Employer/Insurer shall pay permanent total disability benefits starting on October 9, 2002 to the present at the rate of \$396.23, subject to a credit for TTD benefits already paid in the amount of \$125,818.95. Thereafter, Employee is entitled to a weekly amount of \$396.23 and continuing on for as long as Employee remains permanently totally disabled.

Said payments are payable and 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ms. Brianne Thomas.

Issued by: Division of Workers' Compensation

Employee: Philip Riley

Injury No. 02-116993

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Philip L. Riley

Injury No. 02-116993

Dependants: N/A

Employer: Don Julian Builders

Insurer: Kansas Building Industry Workers' Compensation Fund

Additional Party: N/A

Hearing Date: August 20, 2012

Checked by: ESF/pd

FINDINGS OF FACT AND RULINGS OF LAW

On August 20, 2012, the Employer and the Employee appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Philip Riley, appeared in person and with counsel, Ms. Brianne Thomas. The Employer and Insurer appeared through their attorney, Mr. Rex Henoch. The Second Injury Fund was not a party to this case.

STIPULATIONS

At the hearing on August 20, 2012 the Employee and the Employer stipulated to the following:

1. That on or about October 9, 2002, Don Julian Builders was an Employer operating under the provisions of the Missouri workers' compensation law and that their liability under said law was fully insured by Kansas Building Industry Workers' Compensation Fund;
2. That on or about October 9, 2002, Philip Riley was an employee of Don Julian Builders and was working under the provisions of the Missouri workers' compensation law;
3. That his Claim for Compensation was filed within the time prescribed by law;
4. That the Claimant's average weekly wage was \$594.40 and the applicable compensation rate for permanent total disability is \$396.23;
5. That temporary total disability benefits in the amount of \$125,818.95 have been paid by the Employer; and
6. That medical aid has been furnished by the Employer in the amount of \$3,097,835.84.

ISSUES

The issue to be determined by this hearing is:

1. Whether Missouri has jurisdiction over this claim.

The following exhibits were admitted into evidence on behalf of the Claimant:

Claimant's Exhibit A – Claim for Compensation Injury No. 02-116993

Claimant's Exhibit B – Application for Employment

*Claimant's Exhibit C – Employee's Withholding Allowance Certificate,
Forms W-4 and I-9*

Claimant's Exhibit D – Copies of Claimant's Social Security card and Driver's License

Claimant's Exhibit E – Don Julian Builders Safety Responsibilities

Claimant's Exhibit F – Wage Statement

Claimant's Exhibit G – Portions of the Employee's Deposition

Claimant's Exhibit H – Document from the Employer's File

The following exhibits were admitted into evidence on behalf of the Employer/Insurer:

Employer/Insurer's Exhibit No. 1 – Portions of the Employee's Deposition

FINDINGS OF FACT

The only issue to be determined at this hearing is whether Missouri has jurisdiction over the Claimant's injury and his Missouri Claim for Compensation. For the reasons set forth below, I find that the Claimant was hired in Missouri and therefore, Missouri jurisdiction exists for his workers' compensation claim.

The Claimant testified at the hearing that on approximately Monday, July 29, 2002 he called the offices of Don Julian Builders in response to an ad in the *Kansas City Star* he had seen in the Sunday edition of that publication. He was given Dave Hill's contact information. He called Dave Hill, the project manager who was hiring a laborer to work for him at Don Julian. The Claimant left Dave Hill a voice message and sometime later that week, Mr. Hill returned his call. A formal interview was scheduled for Friday, August 2, 2002 at 10 a.m. at a gas station in Cedar Creek Subdivision in Lenexa, Kansas. The Claimant testified that the interview lasted approximately 45 minutes. The Claimant gave Mr. Hill his resume and they went over all of his qualifications. Mr. Hill admitted he considered it a formal interview. The Claimant considered it a formal interview. The Claimant told him about his self-taught electrical, plumbing, sheetrock, and carpentry experience. The Claimant did have some formal training at the Electronics Institute. Dave Hill testified that he was impressed with Mr. Riley and offered him the position of his laborer at Don Julian at \$12 per hour. Mr. Hill testified that at the time of the interview, he had the full authority to make his own decisions as to the qualifications of his laborers, had the full authority to vet his prospects and did not need anyone else's approval at

Employee: Philip Riley

Injury No. 02-116993

Don Julian to hire the Claimant. At the time the initial offer of employment was made, the Claimant had not met with anyone else at Don Julian.

The Claimant told Mr. Hill he had to have \$14 per hour. Mr. Hill said he would have to get approval from his supervisor to pay that much. Mr. Hill readily admits, however, that any determination about whether or not Mr. Riley was qualified to work at Don Julian could be made by him alone. In fact, of all of the other laborers ever hired by Dave Hill to work for him at Don Julian from 1997-2011, there had never been a second interview of any of his potential employees. Mr. Hill had never had to obtain permission, authority, or approval from any of his supervisors regarding a hiring decision. Jeff Horn, Dave Hill's supervisor, had never conducted a second interview of any of Mr. Hill's employment candidates.

The meeting ended and Mr. Riley traveled back to his home at 7707 N. Lydia Avenue in Kansas City Missouri. Around lunchtime or approximately one hour after the formal interview ended, Dave Hill called the Claimant on his home phone in Missouri at 816-436-3094. Mr. Hill admits that he made this phone call. Both Dave Hill and Jeff Horn testified that after the formal interview but before Mr. Hill made this phone call to the Claimant, a conversation between Dave Hill and Jeff Horn took place. The Claimant testified that Mr. Hill told him that he had gotten the authority to offer him the job at \$14 per hour and offered him the position over the phone. The Claimant testified that he accepted the job over the phone while at his home in Missouri. Dave Hill asked him to come to the offices of Don Julian to fill out paperwork later that day. The Claimant testified that there was no mention of a second interview, a meeting with Jeff Horn, or any type of orientation. The Claimant testified that he was offered the job without any qualifications or contingencies.

Immediately after the phone call with Dave Hill, the Claimant testified he called his wife and told her he had been hired by Don Julian Builders. He called to tell her this because his wife had to make the decision that day whether or not to accept a higher paying job. She felt she needed to accept the job if the Claimant had not obtained employment. The Claimant was aware of his wife's circumstances and testified he would have never told her he had been hired unless he was absolutely sure, because so much was riding on his employment. Marjorie Riley, who testified at the hearing, corroborated her husband's testimony and told the Court that she turned down the higher paying job that day because Philip had called her and told her he had just been hired.

When the Claimant arrived at the offices of Don Julian, he was given paperwork to fill out by a woman receptionist or office manager. This is confirmed by Exhibit C, which shows that he met with Ruby Reeves, the accounting manager at Don Julian Builders. The Claimant testified that immediately upon his arrival he filled out the paperwork and copies were made of his Social Security card and drivers' license (Claimant's Exhibits B through E). The Claimant testified that Don Julian and a man named Terry were at the offices and he met them and talked with them about what he would be doing in terms of job duties, but the Claimant described it as chit-chat. The Claimant testified he was not asked about his qualifications, background, personal experience or resume. The Claimant testified that a second interview never took place. He testified that he had never met Jeff Horn, the man who the Employer asserts interviewed him

Employee: Philip Riley

Injury No. 02-116993

again on August 2, 2002. The Claimant testified that Mr. Horn was not even at the offices of Don Julian that day. Notedly, the Employer could have called another independent witness to corroborate that a second interview took place with the Claimant, Dave Hill and Jeff Horn. Ruby Reeves, the accounting manager for Don Julian, obviously met with the Claimant that day and was present at the offices of Don Julian. She could have testified that, one, Jeff Horn was present and, two, that an interview or meeting took place between the three men. Ms. Reeves was not called as a witness.

Furthermore, the Claimant testified that while an employee of Don Julian Builders his immediate and only supervisor was Dave Hill. Mr. Hill was in charge of supervising and/or approving Mr. Riley's work. The Claimant testified that Mr. Hill is the only one that he would see on a daily, routine basis. No one from Don Julian Builders including Don Julian, Jeff Horn, or anyone else ever supervised Mr. Riley directly or interacted with him at all on the jobsite. In fact, the Claimant testified he did not see anyone else with Don Julian Builders besides Dave Hill while employed with the company for 9 1/2 weeks.

Employee also offered the testimony of Mr. David Hill who in 2002 was a project manager/superintendent with Don Julian Builders. He had started for Mr. Julian in 1997 and his last day was November 21st of 2011. He had also worked for Briarcliff Construction as a superintendent. He hired his own laborers who would work for him only during his projects. He testified that he met Employee on August 2, 2002 for a formal interview at a gas station in Cedar Creek Subdivision in Olathe, Kansas. He asked about his qualifications, went over his background and resume. The interview lasted approximately 20 to 30 minutes and he offered Employee a job for \$12 an hour. He stated that the Employee had not met with anyone else at this time and that he had the full authority to hire Employee. He did not need anyone else's permission to hire laborers at \$12 an hour. Employee had stated that he wanted \$14 an hour. Mr. Hill testified that he needed someone else's approval to hire at that pay. He admitted that he had hired other men such as Don Villa or Alan Hill without having additional authority and there was no second interview for these gentlemen. He had hired 6 to 8 laborers to work for him and the interview and hiring had been done by him alone. He never did a second interview with any of the laborers.

On cross-examination, it was confirmed that Mr. Hill offered the job for \$12 an hour, but that Employee wanted \$14 an hour and he only had authority for the \$12. He wanted to discuss with Jeff Horn whether or not he could hire the Employee for the \$14 an hour or whether it was worth it. He wanted to discuss the information that he had learned from Employee in order to determine whether Employee was worth the \$14 an hour. He said the second interview happened the same day. He said all three were in the Don Julian conference room. He said that after they had interviewed Employee they went to another part of the office where Jeff stated he felt Employee was worth the \$14 an hour and they made a formal offer of \$14 an hour in the conference room and Employee accepted the job at that time. This conference room was in Lenexa, Kansas at Don Julian Builders' offices. He said that the only the time the job was offered at \$14 an hour was at the office and that Employee accepted it, he had to take additional steps including filling out paperwork in order to get the job. He noted that Claimant's Exhibits B, C, D, E and G were all forms that Employee had to fill out as part of the employment process.

Employee: Philip Riley

Injury No. 02-116993

If he hadn't filled out the paperwork, he would not have been hired. He stated that the Employee was given this paperwork by an office manager. Mr. Hill testified that there was one final step in the process for employment which occurred on Monday, August 5. He met Employee in Cedar Creek in Olathe, Kansas to begin what he called an orientation. Because Employee had no prior experience in construction and was self-taught, he wanted to have Employee prove his skills to him by taking him to a property that was near completion. He stated that he would ask Employee to fill out a punch list, which is a list of problems he saw that needed to be fixed before the subcontractors could be signed off on and that he would do the same. He would then compare his punch list with Employee's punch list to see whether or not he knew basically what he was doing.

On redirect examination, the witness admitted that he had made an offer to Employee at the first interview and if Employee had said yes at the time, he would have been hired right then and there.

Employer offered the testimony of Mr. Jeff Horn. He was an employee for Don Julian Builders in 2002. At that time, he was a production manager. He stated that Mr. Hill had called him regarding Employee stating that he would like to hire him, but Employee wanted \$14 an hour. He stated that Mr. Hill asked him if he could get Employee to come to the office, would he be willing to interview him, because Employee wanted the \$14 an hour and he wanted to confirm that he was worth it. He stated that Employee did show up at the Don Julian Builders office on August 2nd and they interviewed him. He said that Mr. Hill was present in the conference room during the interview. He said the interview consisted of general discussion of Employee's background since he had no construction background and had been basically a Xerox employee whether or not he would have the requisite skills to handle the job. He also wanted to know how Employee handled difficult customers as he might have to deal with unhappy customers in his position. He stepped out and told Dave Hill that the \$14 an hour was justified. After he told Mr. Hill this, he did not go back into the interview room. He stated that Mr. Hill had never been authorized for more than the \$12 an hour before. Mr. Horn said that if Employee had not shown for the interview he would not have been hired. If he had not filled the paperwork, he would not have hired either.

On cross-examination, Mr. Horn admitted that throughout the years of employment with Don Julian Builders he had never had anyone have to show up for a second interview. He was asked whether Mr. Hill could have just called to get the authority, and Mr. Horn stated that he would have needed a rationalization such as an exceptionally skilled potential hire. He admitted that the signature on the papers, specifically, the U.S. Department of Justice form, had a signature of a Ruby Reeves who is their receptionist. Mr. Horn could not produce any documentation to say that anyone else had met with Employee other than Ruby Reeves on the day he came to Don Julian offices on August 2, 2002.

The Employer also asserts that there was an "orientation" that took place on the Claimant's first day of work, and that his employment was somehow contingent upon a successful completion of it. However, the evidence shows that the Claimant was an employee on August 2, 2002. The wage statement created by the Employer shows the Claimant was hired on August 2, 2002 (Exhibit F). The Employer's own file showed the date of hire as being August 2,

Employee: Philip Riley

Injury No. 02-116993

2002 (Exhibit H). Jeff Horn and Dave Hill admit that all Don Julian documents and internal paperwork contained in the Claimant's personnel file show that the Claimant became an employee on August 2. The Claimant did testify that the work he did on his first day of work was the same thing he did as his regular job with Don Julian for 9 weeks before he was injured

RULINGS OF LAW

If the employment contract was formed in Missouri, then Missouri law applies to injuries that occur outside of Missouri. Scott v. Elderlite Express, 148 S.W.3d 860, 863 (Mo. Ct. App. 2004); Mo. Ann. Stat. § 287.110.2. To form a contract, there must be a meeting of the minds of the parties to the contract. Scott, 148 S.W.3d at 863. A meeting of the minds occurs, and thus a contract is formed, when the parties to the contract “perform the last act necessary to complete the contract.” Whiteman v. Del-Jen Const., Inc., 37 S.W.3d 823, 831 (Mo. Ct. App. 2001) (overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)). Acceptance of an offer of employment may constitute the last act necessary to form the employment contract. *Id.* “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.” *Id.* (citing Gash v. Black and Veatch, 976 S.W.2d 31, 32-33 (Mo. Ct. App. 1998)).

I find that the Claimant is a credible witness, and his testimony, along with the weight of the evidence, supports the finding that there is Missouri jurisdiction over his claim. I find that the Claimant was offered the job at Don Julian Builders over the phone while he was at his home in Missouri. He accepted the offer of employment while at his home. Therefore, his acceptance was the last act necessary to complete the employment contract. Since the acceptance took place in Missouri, the contact of employment was formed in Missouri and this Court has jurisdiction over his claim.

The case of Whiteman v. Del-Jen Const., Inc., *supra*, is analogous. In Whiteman, the employer advertised a job opening for a journeyman carpenter in the Kansas City Star. After responding to the advertisement, the employee filled out a job application at the employer's office in Kansas. The employee also interviewed for the job there. A representative for the employer attempted to contact the employee at his home in Missouri, but the employee was not there. When the employee returned the call, on March 20th, the representative indicated that the employer decided to hire him. The next day, the employee called the employer and stated that he could begin working on March 22nd. He did start working for the employer on March 22nd. Whiteman at 825. Likewise, the employer's personnel records indicated that he was hired on March 20th. *Id.* at 832. On April 17th the employee finally took a physical examination and drug test. *Id.* at 825. The employee sustained an injury on May 25th at the employer's Kansas job site. *Id.* The employer contended that Kansas workers' compensation law applied to the action because the injury and contract of employment occurred there. The LIRC, however, held that the contract of employment was formed in Missouri and Missouri law applied. *Id.* In affirming the LIRC's decision, the Court of Appeals rejected the employer's argument, which heavily relied on Whitney v. Country Wide Truck Service.

“Although [the employer] required [the employee] to take a drug test and Physical examination, the evidence indicates that [the employee] was hired and actually began working for [the employer] before he took the drug test and physical examination. Thus, this case is distinguishable from Whitney v. Country Wide Truck Service, Inc., where the applicant was not allowed to begin working for the employer until after she completed a drug test, road test, and orientation.” *Id.* at 831, f.n. 4.

Thus, the Court articulated the general rule that “[w]here 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.” *Id.* at 831.

Even if it is true that Mr. Riley was required to perform a test or complete orientation, Mr. Riley's personnel file provides evidence that he was hired by Don Julian Builders and considered an employee on August 2, 2002 (Exhibits F and H). He was paid wages from August 2 to August 10, his first pay period (Exhibit F). Mr. Hill admitted that this "hire date" according to his file and documents, which he brought with him to the hearing, was August 2, 2002 (Exhibit H). Therefore, I find that despite the Employer's contention that there was some additional step required to complete the hiring of Mr. Riley, the Employer's own internal documents outweigh its testimony and provide sufficient evidence for me to find that Mr. Riley became an employee on August 2, 2002.

The weight of the evidence is sufficient for me to find that an offer and acceptance of employment took place over the phone while Mr. Riley was in Missouri, and his contract of employment was formed at that time. The testimony of the Claimant outweighs that of Mr. Hill and Mr. Horn. The Employer called no independent witness to prove that a second interview actually took place and the offer of employment was actually made in KS. Furthermore, the Employer's testimony that Mr. Riley was not an employee of Don Julian Builders until after he filled out paperwork is not dispositive. The offer and acceptance took place before that, and even if paperwork was required, the contract had already been formed on the phone earlier that day. It is not believable that Mr. Hill could not and did not obtain authority to pay Mr. Riley \$14.00 per hour by a simple conversation over the phone, before he called Mr. Riley at his home. It is not believable that a second interview was required in order to determine if the Claimant was qualified to work as Dave Hill's laborer, when Dave Hill and Jeff Horn both testified that a second interview had never been required of any of Mr. Hill's applicants and that Mr. Hill had complete discretion in his hiring decisions. In addition, Dave Hill was the Claimant's only direct supervisor. The Claimant worked for Dave Hill only, and no other project manager. It does not follow that anyone else's opinion about Mr. Riley's qualifications would matter. It is not believable that if the Claimant was not hired yet, that he would be asked to fill out a W-4 and copies would be taken of his social security card and drivers' license immediately upon arriving at the offices of Don Julian Builders. The testimony of Marjorie Riley and the Claimant provide evidence that Mr. Riley was hired on the phone while in Missouri on August 2, 2002. Both Mr. Hill and Mr. Horn admitted that they spoke before Mr. Hill called the Claimant at home. The Claimant testified that he was told over the phone by Mr. Hill that Mr. Hill had already received

Employee: Philip Riley

Injury No. 02-116993

the authorization to extend an offer of employment to the Claimant at \$14.00 per hour. Even if some additional paperwork needed to be completed, the contract of employment was formed before that in Missouri. The weight of the evidence proves that the Claimant was hired in Missouri.

In Gash, supra, the employee ("Gash"), a Kansas resident, sustained an injury which caused his death while working for the employer in Kansas. On April 7, 1996, while Gash was at his previous employer's job site in Kansas City, Missouri, he called the employer to accept an offer of employment. Gash showed up for his first day of work on April 24th and completed necessary forms. Gash at 33. The employer contended that, because completing the forms was necessary to employment, the employment contract was not completed until April 24th. A manager for the employer testified that he did not consider Gash to be an employee until the necessary forms were completed. *Id.* The Court of Appeals rejected the Employer's arguments. It noted that the employer sent a letter on April 11th confirming Gash's acceptance of the employment offer. The Court also rejected the manager's testimony because he admitted that the employer's offer was not contingent on anything and that Gash accepted an unqualified offer. *Id.* Moreover, the Court distinguished its holding from Whitney v. Country Wide Truck Service, Inc., 886 S.W.2d 154 (Mo. Ct. App. 1994). Unlike the offer in Whitney, the employer's offer to Gash contained no contingencies. Thus, the employment contract was formed in Missouri. *Id.*

In the case at bar, the Claimant similarly accepted an unqualified offer of employment without contingencies, before filling out any paperwork. Even though the Employer's witnesses testified that Mr. Riley was not considered an employee until after he filled out paperwork, the offer and acceptance of the employment came first, and their belief is not sufficient to undo a contract of employment that was already formed over the telephone on August 2, 2002. Missouri has jurisdiction over Mr. Riley's claim and benefits are awarded herein.

The Employer/Insurer shall pay permanent total disability benefits starting on October 9, 2002 to present at the rate of \$396.23, subject to a credit for TTD benefits already paid in the amount of \$125,818.95. Thereafter, Employee is entitled to a weekly amount of \$396.23 and continuing on for as long as Employee remains permanently totally disabled.

Claimant's attorney has requested a fee equal of 25 percent of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Made by: _____

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation