

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

Injury No.: 02-147473

Employee: Donald Roberts

Employer: Leggett & Platt, Inc.

Insurer: United States Fidelity & Guarantee Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. Because of a potential due process problem, the Commission remanded this matter to the Division of Workers' Compensation (Division) on June 24, 2008. In satisfaction of such remand, the Division conducted a supplemental hearing on October 14, 2008.

Having reviewed the evidence, read the briefs, and considered the entire 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 (Award) of Administrative Law Judge L. Timothy Wilson dated January 11, 2008. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the Award. The Award is attached hereto and incorporated herein by reference.

INTRODUCTION

Administrative Law Judge Wilson concluded that the Division had no jurisdiction over this case because its facts did not fit into any of the jurisdictional circumstances set forth in §287.110 RSMo. The administrative law judge's decision, thus, denied employee's claim for benefits. Employee filed an Application for Review with the Commission.

DISCUSSION

As indicated in the administrative law judge's decision, §287.110 RSMo extends jurisdiction under the Missouri Workers' Compensation Law to injuries received and occupational diseases contracted in three circumstances:

1. When such injuries are contracted in this state;
2. When such injuries are contracted outside this state under contract of employment made in this state (unless the contract provides for jurisdiction in another state); or
3. When such injuries are contracted outside this state but the employee's employment was principally localized in this state.

We agree with the administrative law judge that neither one nor two above apply in the case before us.

Employee's injuries were sustained outside this state, and he had virtually no work contact with this state (other than his paycheck and about one meeting at corporate headquarters per year). He performed his work primarily in the northeast part of our country.

The question, then, is whether employee's contract of employment was made in Missouri or in another state. "As a rule, the place where the contract is made is considered to be the place where the offer is accepted or where the last act necessary to complete the contract is performed." *Krusen v. Maverick Transportation*, 208 S.W.3d 339, 342-343 (Mo.App. S.D. 2006).

The best evidence from the record establishes the following series of events (in chronological order) in connection with the contract created between employee and employer:

- During the time employee began his employment with employer in 2000, he lived in Noble, Arkansas.
- Employee met employer's witness, Roger Bougher, in Poplar Bluff, Missouri. Mr. Bougher did not offer employee a job. Mr. Bougher said he would talk with his supervisor and get back with employee.
- Employee recalled that Bill Ellis called employee at his home in Noble and offered a job during that conversation. Employee accepted. Employee understood, however, that there were still conditions on his employment. He knew he must pass a drug test.
- Mr. Bougher called employee at his home during this same period of time and said that employer was going to move forward with employee's employment if he was still interested, which employee indicated he was. Mr. Bougher told employee that employer would put the job offer, along with details, into a letter that it would send to employee.
- On August 3, 2000, employer sent a letter to employee's home in Noble offering him employment. The letter concluded with the statement, "Don, the above offer is contingent on the passing of a company drug test."
- Sometime after employee received this letter, he spoke with employer and accepted the offer. Since Noble had no facility for a drug test, the parties made arrangements for employee to take the drug test in Bettendorf, Iowa, where employee had family. Employee complied with these arrangements and passed his test.
- By the time employee came to employer's facility in Carthage for training, he was already considered an employee. Employer paid him his agreed salary for the two weeks of training time.

These facts are similar to those presented to the court in the *Krusen* case cited above. In *Krusen*, the employee claimed he had already accepted the truck driving position during conversations on the telephone in Missouri. But just as in our case, even if that were true, there were conditions precedent to the employee beginning his employment. *Krusen* had to go to Arkansas for orientation that included successfully completing a driving test, drug test, physical examination, and road test. The court found that the last act necessary for the completion of the contract was the employee's satisfaction of such conditions.

In fact, Missouri's courts have decided this jurisdictional issue for a number of truck drivers who were injured in other states but filed a claim under this state's Workers' Compensation Law. Another case very similar to the one at hand is *Scott v. Elderlite Express*, 148 S.W.3d 860 (Mo.App. E.D. 2004). In that case, the claimant testified that employer offered her the job and she accepted over the telephone while she was in Missouri. The best evidence in that case showed, though, like in our case, that such offer was contingent; the claimant still had to pass a drug test and a road test. Accordingly, the *Scott* court concluded that the contract was made in Indiana, where the last acts necessary for the formation of a contract -- drug and road tests -- were completed.

In the case at hand, both parties agreed that claimant had a condition he had to satisfy in order to become employed for employer. He had to take and pass a drug test. Employee completed that last step in Iowa,

not Missouri.

Thus, none of the jurisdictional requirements set forth in §287.110 RSMo were met in the facts of this case.

Accordingly, since employee has not proved the essential element of jurisdiction in this state, we affirm the administrative law judge's decision to deny him benefits.

DECISION

The Commission affirms the decision of the administrative law judge dated January 11, 2008, and awards no compensation.

Given at Jefferson City, State of Missouri, this 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Don Roberts

Injury No. 02-147473

Before the
DIVISION OF WORKERS'
COMPENSATION

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

Dependents: N/A

Employer: Leggett & Platt, Inc.

Additional Party:

N/A

Insurer: United States Fidelity & Guaranty

Hearing Date: October 22, 2007

Checked by:

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? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
N/A
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
13. Part(s) of body injured by accident or occupational disease: N/A
 - Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$329.42
 - Method wages computation: STIPULATION

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: -0-

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

Total: -0-

23. Future requirements awarded: NO

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: Don Roberts

Injury No. 02147473

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Leggett & Platt, Inc.

Additional Party: Second Injury Fund

Insurer: United States Fidelity & Guaranty

AWARD ON HEARING

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases for hearing, was heard before the undersigned Administrative Law Judge on October 22, 2007. The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about November 28, 2007.

The employee, Donald Roberts, appeared personally and through his attorney, Ronald Caimi, Esq. The employer, Leggett & Platt, Inc., and its insurer, United States Fidelity & Guaranty Company, appeared through their attorney, Ronald Sparlin, Esq. The Second Injury Fund appeared through its attorney, Christina Hammers, Assistant Attorney General. (The Second Injury Fund is an additional party in Injury No. 02-151658; but it is not a party in Injury No. 02-147473.)

Injury No. 02-151658

The parties entered into a stipulation of facts in Injury No. 02-151658. The stipulation is as follows:

- (1) On or about April 1, 2002, Leggett and Platt, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by United States Fidelity & Guaranty Company.
- (2) On the alleged injury date of April 1, 2002 Donald Roberts was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Jasper County, Missouri. The parties agree to venue lying in Joplin (Newton) County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) At the time of the alleged accident the employee's average weekly wage was sufficient to allow a compensation rate of \$329.42 for temporary total and permanent disability compensation.
- (7) The employer and insurer have not provided medical treatment or temporary disability compensation to the employee.

The issues to be resolved by hearing in Injury No. 02-151658 include:

- Whether the Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo?
- Whether the claimant sustained an accident on or about April 1, 2002; and, if so, whether the alleged accident arose out of and in the course of employment?
- Whether the alleged accident of April 1, 2002 caused the injuries and disabilities for which benefits are now

being claimed?

- Whether the employee sustained any permanent disability as a consequence of the alleged accident of April 1, 2002; and, if so, what is the nature and extent of the disability?
- Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

Injury No. 02-147473

The parties entered into a stipulation of facts in Injury No. 02-147473. The stipulation is as follows:

- (1) On or about June 1, 2002, Leggett and Platt, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by United States Fidelity & Guaranty Company.
- (2) On the alleged injury date of June 1, 2002, Donald Roberts was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident of June 1, 2002, occurred in Jasper County, Missouri. The parties agree to venue lying in Joplin (Newton) County, Missouri. Venue is proper.
- (4) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident of June 1, 2002 the employee's average weekly wage was sufficient to allow a compensation rate of \$329.42 for temporary total and permanent disability compensation.
- (7) The employer and insurer have not provided medical treatment or temporary disability compensation to the employee.

The issues to be resolved by hearing in Injury No. 02-147473 include:

- Whether the Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo?
- Whether the claimant sustained an accident on or about June 1, 2002; and, if so, whether the alleged accident arose out of and in the course of employment?
- Whether the employee sustained any permanent disability as a consequence of the alleged accident of June 1, 2002; and, if so, what is the nature and extent of the disability?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. In addition, the employee offered for admission the following exhibits:

Exhibit A Deposition of Shawn L. Berkin, D.O.
Exhibit B Deposition of Timothy Lalk
Exhibit C Medical Records from Dr. George Patton
Exhibit D Medical Records from Clarian Health
Exhibit E Medical Records from Corning Area Healthcare, Inc. &
Family Medical Center

The exhibits were received and admitted into evidence .

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

Exhibit 1 Medical Report from Ted A. Lennard, M.D.
Exhibit 2 Iowa Workers' Compensation File (injury date: May 25, 1989)
Donald Roberts v. City of Bettendorf, Iowa File No. 979219
Exhibit 3 Medical Records from Family Medical Center
Exhibit 4 Medical Records from Genesis Medical Center
Exhibit 5 Medical Records from Caritas Good Samaritan Medical Center
Exhibit 6 Medical Records from Concord Hospital
Exhibit 7 Medical Records from Corning Area Healthcare, Inc.
Exhibit 8 Medical Records from The Pain Management Center
Exhibit 9 Medical Records from Nashville Family Medicine

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. The Second Injury Fund, however, offered for admission the following exhibit:

Exhibit I Deposition of Donald Roberts (Employee)

Exhibit I was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which, relative to each injury number, were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the two Legal Files. In Injury No. 02-151658, the documents contained in the Legal Files include:

- Minute Entries
- Request for Hearing-Final Award
- Notice of Hearing
- Answer of Second Injury Fund to Amended Claim for Compensation
- Answer of Employer & Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer & Insurer to Claim for Compensation

Claim for Compensation

In Injury No. 02-147473, the documents contained in the Legal Files include:

- Minute Entries
- Request for Hearing-Final Award
- Notice of Hearing
- Answer of Employer & Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

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.

DISCUSSION

This case involves the filing of a Claim for Compensation by the employee, which asserts that the employee sustained an accident in Jasper County, Missouri. In response, the employer and insurer filed an answer denying generally the claim, but without contesting jurisdiction. Subsequently, the parties appeared for hearing, and in the preliminary proceedings, stipulated to the employee enjoying employment with the employer, as well as sustaining an accident, in Jasper County, Missouri. In light of these stipulations, the parties appeared for the hearing, implicitly affirming that Missouri enjoyed jurisdiction over this case, and specifically neglecting to identify jurisdiction as an issue for adjudication.

Notwithstanding, during the course of the employee's case, the employee presented testimony contradicting the allegation in the claim that he sustained an accident in Missouri, as well as the parties stipulation that the employee's employment and accident occurred in Missouri. Specifically, the employee testified that the employment in question occurred in the New England area, not Missouri; and the accident in question occurred in the State of Massachusetts. Consequently, although not identified as an issue, the undersigned raised as an issue in this case the issue of jurisdiction.

Jurisdiction is not presumed and may not be waived by any party. Similarly, the parties may not stipulate or otherwise confer upon Missouri jurisdiction, where none exists. The issue is thus addressed in the Findings and Conclusions section of this Award.

Personal Fact Summary of Employee

The employee, Donald Roberts, is 55 years of age, having been born on November 25, 1952. Mr. Roberts resides in Knobel, Arkansas with his girlfriend, Pauline Payne. Mr. Roberts is not presently employed, and has not engaged in employment since leaving his employment with Leggett & Platt, Inc. in January 2003. Mr. Roberts is seeking payment of permanent total disability compensation.

Mr. Roberts is a high school graduate, but enjoys no other schooling other than high school. Mr. Roberts possesses a commercial driver's license (CDL), and enjoys the ability to read and write. Similarly, Mr. Roberts enjoys familiarity with, and the ability to operate, computers, including use of word processing programs and other programs, such as Excel.

Mr. Roberts' prior employment history is varied, and includes working in sales and management.

Notably, in the years preceding his employment with Leggett & Platt, Inc. Mr. Roberts worked as the store manager of Back 9 Golf shop in Rock Island, Illinois; he worked as the operations manager of Rock Island Waste Management in Rock Island, Illinois; and he worked as the plant manager of Browning Ferris Industry (BFI) in St. Louis, Missouri. In the management positions, Mr. Roberts managed or supervised a number of employees and oversaw operation or parts of the operation of the various businesses.

Employment with Leggett & Platt, Inc.

In or around October 2000, Mr. Roberts obtained employment with Leggett & Platt, Inc. as a sales technician. In obtaining this employment, Mr. Roberts, who resided in Arkansas, interviewed for the position with Leggett & Platt, Inc. with representatives in Popular Bluff, Missouri. Later, upon returning to his home in Arkansas, Mr. Roberts received an offer of employment by telephone. According to Mr. Roberts, he accepted the employment offer, while situated in Arkansas.

Subsequent to accepting employment with Leggett & Platt, Inc., Mr. Roberts traveled to Carthage, Missouri (home base of Leggett & Platt, Inc.) and underwent a two-week training course provided by Leggett & Platt, Inc. Thereafter, Mr. Roberts moved to the New England area, working for the company with an assigned geographical territory that included the New England and New York areas. In his employment with Leggett & Platt, Inc., Mr. Roberts sold wiring and machinery to customers, and repaired parts related to Leggett & Platt, Inc. products. Notably, this employment included making sales calls, as well as entertaining customers with dinners and golf. Also, this work included climbing on top of machines, as well as having regularly to bend, squat, kneel, and reach overhead.

According to Mr. Roberts, in his employment with Leggett & Platt, Inc., he worked an average of 60 hours work a week. The work included 10-hour days, five days a week, and work on Saturdays and Sundays.

April 1, 2002 Accident

On April 1, 2002, Mr. Roberts sustained an injury while fixing a wire tie machine for a client (Atlantic Packaging Co.) in Massachusetts. At the time of this incident, Mr. Roberts jumped off a bale of cardboard on which he was standing. When he landed, he twisted his right ankle and his low back, which “popped”, and then fell to the ground. (The fall off the bale was approximately four feet.) Apparently, however, Mr. Roberts did not seek or obtain immediate medical treatment.

The ankle symptoms resolved quickly; however, Mr. Roberts continued to have pain in his low back. In May 2002, Mr. Roberts developed pain in his right leg. In this regard, Dr. Berkin notes, that, on or about May 9, 2002 Dr. Robb Stidwell treated Mr. Roberts for complaints of low back pain with sciatica, and again on May 24, 2002. The treatment provided by Dr. Stillwell included prescription medication in the nature of Vicodin, Prednisone, Prilosec, and Flexeril. Additionally, Dr. Stidwell prescribed physical therapy, but, apparently, traveling obligations associated with work deterred Mr. Roberts from undergoing this treatment. Mr. Roberts continued to work full-time and at full-duty, as well as golf recreationally.

June 1, 2002 Accident

On June 1, 2002, Mr. Roberts suffered a subsequent injury to his lower back while playing golf with his supervisor (Bill Ellis) and the manager of Atlantic Packaging Co. (client of Leggett & Platt, Inc.), which occurred in Massachusetts, and as part of his employment with Leggett & Platt, Inc. Notably, at the time of this incident, Mr. Roberts hit a drive, which involved a twisting of his back. The swing caused Mr. Roberts to experience immediate pain and a “pop” in his lower back. Mr. Roberts did not seek immediate medical treatment for his low back pain, but the pain progressed during the course of the day.

Dr. Berkin notes that, on or about June 6, 2002, Mr. Roberts presented to the emergency room of Caritas Good Samaritan Medical Center in Brockton, Maine with complaints of acute low back pain. The attending physician diagnosed Mr. Roberts with an acute lumbar strain, and treated him Percocet, Robaxin, and Motrin. Later, on or about June 24, 2002, Mr. Roberts presented to Family Physicians and underwent a diagnostic study in the nature of an MRI of the lumbar spine, which revealed a “moderate disk herniation at L4-L5 lateralizing to the right and post-operative changes at L4-S1 on the left.”

Subsequently, on or about July 8, 2002 Mr. Roberts obtained surgical consultation from Clifford Levy, M.D., who is an orthopedic surgeon. Upon examining and evaluating Mr. Roberts, Dr. Levy recommended that Mr. Roberts receive an epidural steroid injection for his low back pain. Shortly thereafter, Leggett & Platt, Inc. transferred Mr. Roberts to the State of Indiana, as Mr. Roberts continued to work through his pain and to engage in his employment with Leggett & Platt, Inc.

Upon moving to Indiana, Mr. Roberts initiated treatment with Enoch Brown, M.D., who is a physician with The Pain Management Center in Bloomington, Indiana. Dr. Brown administered a series of epidural steroid injections to Mr. Roberts’ lumbar spine, and prescribed Ultram and Soma for his symptoms. Also, Dr. Brown prescribed physical therapy.

Later, Mr. Roberts underwent treatment with Michael Groff, M.D., who is a neurosurgeon with Indiana University School of Medicine. Initially, Dr. Groff treated Mr. Roberts conservatively, which included a transforaminal epidural steroid injection of the lumbar spine at the level of L5-S1, and a right sacroiliac injection. In addition, Mr. Roberts received pain management treatment from John Alessi, M.D., who is a physician in Nashville, Indiana, and Kam Tiwari, M.D., who is a physician in Bloomington, Indiana.

In January 2003, Dr. Groff opined that the conservative treatment was not successful, and Mr. Roberts was a surgical candidate. Thereafter, on or about January 27, 2003, Mr. Roberts underwent a microdiscectomy of his lumbar spine at the level of L4-L5 on the right for a herniated lumbar disk, performed by Dr. Groff. Following the surgery, in January 2003, Leggett & Platt, Inc. terminated Mr. Roberts’ employment. In March 2003, Mr. Roberts moved to Arkansas.

Present Complaints & Activity

Mr. Roberts continues to complain of chronic pain and tenderness to his lower back, but he no longer experiences radiating pain down his right leg. Additionally, Mr. Roberts notes that he experiences fatigue, lacks mobility, and takes a cautious approach to life. In regards to continuing receipt of medical treatment, Mr. Roberts indicates that he recently discontinued the use of prescription medication for treatment of his low back, and now takes only over-the-counter medication. In addition, Mr. Roberts indicates that he is presently being treated for his bipolar disorder and depression, which includes prescription medication.

At the hearing, Mr. Roberts noted that he no longer is able to play golf, fish or hunt, practice martial arts, or engage in any of his other hobbies (except watching TV or being on the computer). A normal day for Mr. Roberts generally involves only four hours of sleep per night, and the sleep is not uninterrupted. Further, he does not perform any work around the house, and does not “get out” much because of the back pain. Further, since 2002, he has gained approximately 80 pounds, which he attributes to lack of activity.

Pre-existing Disability or Prior Medical Conditions

In 1989, Mr. Roberts received a diagnosis and underwent treatment for depression and bipolar disorder. This treatment included use of prescription medications, including Depakote, which he continues to

take and has taken since approximately 1996. According to Mr. Roberts, he did not receive any counseling, and the medication sufficiently calmed him to allow for a normal life. Notably, despite the bipolar disorder and depression, Mr. Roberts did not experience any difficulty interacting with the many people he worked with in his sales position for Leggett & Platt, Inc.

Also, in 1989, Mr. Roberts suffered a workers' compensation injury involving his low back, which resulted in him receiving benefits under Iowa's workers' compensation laws. Notably, this injury involved a low back injury, diagnosed as a left S1 radiculopathy secondary to a herniated disk of the lumbar spine at the level of L5-S1, on the left. Treatment for this injury included surgery of his low back. During his treatment, Mr. Roberts missed time from work, and eventually received a release to return to work. However, in returning to work, Mr. Roberts was governed by work restrictions that included no lifting more than 5 pounds, no bending and no climbing ladders. In 1992, Mr. Roberts entered into a settlement agreement with the employer, resulting in the parties compromising and resolving the workers' compensation claim.

According to Mr. Roberts, subsequent to his treatment and recovery from the 1989 Iowa workers' compensation injury, he became considerably better. In this regard, Mr. Roberts noted that, subsequent to recovery from his 1989 injury and prior to the April 2002 incident, he engaged in a vigorous lifestyle. Notably, at one point during this period, he held two jobs simultaneously, working 80 hours per week. And, while working as a sales technician for Leggett & Platt, Inc., he would drive up to 600 miles per day with no difficulty, and he would occasionally lift up to 160 lbs. with assistance while repairing machines. He stated he had no problems doing any of his job duties while working for Leggett & Platte, Inc., prior to the 2002 incidents.

In comparing his present condition, to his pre-2002 condition, Mr. Roberts indicates that, prior to the 2002 incidents, particularly during the period of 1991 to 1996, he played golf everyday, enough to enjoy a 2 handicap. Additionally, during this pre-2002 period, Mr. Roberts fished and hunted as often as possible.

Yet, during the pre-2002 period, and subsequent to the 1989 injury and recovery, Mr. Roberts continued to experience low back pain and symptomology. In 1999, and in 2001, Mr. Roberts visited his personal care physician. Additionally, Mr. Roberts received pain management treatment for his low back in 2000.

Medical Testimony

- Ted A. Lennard, M.D., who is a physician practicing in the specialty of physical medicine testified in behalf of the employer and insurer, through the submission of a complete medical report. Dr. Lennard performed an independent medical examination of Mr. Roberts on June 27, 2005. At the time of this examination, Dr. Lennard took a history from Mr. Roberts, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Roberts, Dr. Lennard opined that Mr. Roberts was at maximum medical improvement, and presented with a permanent partial disability of 30 percent to the body as a whole, referable to the low back.

In addition, in considering the multiple injuries, Dr. Lennard apportioned the permanent disability. In this regard, Dr. Lennard attributes 10 percent disability attributable to the disc herniation referable to the 1989 low back injury; he attributes 5 percent disability to the April 1, 2002 injury; he attributes 10 percent disability to the June 1, 2002 injury and subsequent second low back surgery; and he attributes 5 percent disability to the degenerative changes. Additionally, Dr. Lennard notes that Mr. Roberts is governed by permanent work restrictions that include a 25 pound lifting restriction, and avoiding more than occasional bending activities.

- Shawn Berkin, D.O., who is a physician practicing in the specialty of occupational medicine, testified

by deposition in behalf of the employee. Dr. Berkin performed an independent medical examination of Mr. Roberts on October 2, 2003. At the time of this examination, Dr. Berkin took a history from Mr. Roberts, reviewed various medical records, and performed a physical examination of him. According to Dr. Berkin, however, the history provided to him revealed only one injury occurring in Mr. Roberts' employment with Leggett & Platt, Inc., which Dr. Berkin identified as an April 1, 2002 golfing injury.

In light of his examination and evaluation of Mr. Roberts, Dr. Berkin opined that the April 2002 golfing injury caused Mr. Roberts to sustain an injury in the nature of a lumbosacral strain and a herniated disk of the lumbar spine at the level of L4-L5, which necessitated receipt of surgery involving a lumbar discectomy. Dr. Berkin further opined that, as a consequence of this April 2002 golfing injury, Mr. Roberts sustained a permanent partial disability of 40 percent to the body as a whole, referable to the lumbar spine. Dr. Berkin further opined that, prior to the April 2002 golfing injury, Mr. Roberts suffered from a preexisting permanent partial disability of 25 percent, referable to the low back. Additionally, Dr. Berkin opined that both disabilities present hindrances and obstacles to employment, combine to create a significantly greater disability than the simple sum of the disabilities. Similarly, Dr. Berkin opined that, if Mr. Roberts is permanently and totally disabled, the permanent total disability would be attributable to the combination of the injuries, and not the April 2002 injury, considered alone.

Vocational Testimony

Timothy Lalk, LPC, who is a vocational rehabilitation counselor, testified by deposition in behalf of Mr. Roberts. Mr. Lalk performed a vocational evaluation of Mr. Roberts on March 25, 2005. This evaluation included a review of medical records, a review of Mr. Roberts employment history, and certain vocational testing. In light of his vocational evaluation, Mr. Lalk opined that Mr. Roberts is not employable in the open labor market, primarily due to his presentation – both physically and mentally. Notably, in rendering this opinion, Mr. Lalk assumes that Mr. Roberts suffers from affective disorder, which causes him to exhibit a lack of animation, sadness, and an appearance of extreme fatigue, all of which “would cause reluctance” on the part of any employer to hire Mr. Roberts. Similarly, Mr. Lalk assumes that, because of Mr. Roberts sleep patterns, Mr. Roberts must lie down and take naps twice during the day.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on June 1, 2002, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on June 1, 2002, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667,

670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I. Jurisdiction

Section 287.110, RSMo extends jurisdiction to the State of Missouri in workers' compensation cases in three possible situations:

1. All injuries received and all occupational diseases contracted in the state of Missouri;
 2. All injuries received and all occupational diseases contracted outside the state of Missouri under contract of employment made in the state of Missouri, unless the contract of employment provides for jurisdiction in another state; and
- All injuries received and all occupational diseases contracted outside the state of Missouri, but the employee's employment was principally localized in the state of Missouri.

In light of the accident occurring in the State of Massachusetts, jurisdiction in Missouri must exist on the basis of one of the two latter possibilities. Namely, whether the employment was principally localized in Missouri; or whether the contract of employment entered into by and between Mr. Roberts and Leggett & Platt, Inc. was made in the State of Missouri, without the contract of employment providing for jurisdiction in another state. After consideration and review of the evidence, I find and conclude that the State of Missouri does not enjoy jurisdiction over the present case.

In Missouri, "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." *Whitney v. Countrywide Truck Service*, 886 S.W.2d 154, 155 (Mo. App. E.D. 1994). 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.

In the present case, the employee and employer did not enter into a written employment agreement. Rather, Mr. Roberts and Leggett & Platt, Inc. orally entered into a contract of employment, which occurred primarily through a conversation held over the telephone. Mr. Roberts testified that he received an offer of employment through a telephone call made to him while he was at home in the State of Arkansas and he accepted the offer of employment during this telephone conversation (while in Arkansas). The parties did not offer any evidence of where the offer of employment originated over the telephone.

Admittedly, Mr. Roberts traveled to Missouri and engaged in two weeks of training in Carthage, Missouri, prior to moving to and commencing work in the New England area. However, Mr. Roberts readily acknowledged at the hearing that the training occurred subsequent to him accepting the offer of employment and being hired by Leggett & Platt, Inc. In light of the evidence presented at the hearing, the training cannot be seen, or understood, to be pre-employment training. Therefore, the contract of employment was not made in Missouri.

Nor is the evidence supportive of a finding that Mr. Roberts' employment with Leggett & Platt, Inc. was "principally localized" in Missouri. Notably, In *Gabriel v. Burlington Motor Carriers*, No. 97-013677 (Aug. 31, 1998), the Labor and Industrial Relations Commission (LIRC) used the definition of "principally localized" contained in the National Commission on State Workers' Compensation Laws Model Act as a guide in defining the term. *Bambler* at 8. The Model Act defined "principally localized" as follows:

- A person's employment is principally localized in this or another State when his employer has a place of business in this or such other State and he regularly works at or from such place of business, or
- If clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State.

Id.

In *Bambler v. Dale Hunt*, 2002 WL 1824987 Mo.Lab.Ind.Rel.Com., the LIRC held that the claimant did not meet his burden of proving Missouri jurisdiction in that Dale Hunt Trucking is located in Arkansas, and the claimant worked from only the Arkansas location. *Id.* at 8. The LIRC also noted the claimant lived in Arkansas, not in Missouri, and spent most of his actual time working outside of the State of Missouri. Finally, the LIRC found that claimant was hired in Arkansas, called Arkansas for instructions, received his paychecks from an Arkansas bank, and lived in Arkansas. *Id.* at 9.

In this case, Mr. Roberts testified that, while Leggett & Platte, Inc.'s headquarters is in Missouri, he personally was principally located in the Northeast, working out of Massachusetts and New York. At the time of the accident, Mr. Roberts lived in New England. His supervisor, the person from whom he took instruction and worked most closely, resided in Milan, IL. The work injury occurred in Massachusetts, and medical treatment for the injury was provided in New England. There is no evidence Mr. Roberts spent any time working in Missouri.

Therefore, in light of the foregoing, I find and conclude that this office and the State of Missouri does not have jurisdiction over the claimed injury. The employee failed to sustain his burden of proof. The Claim for Compensation is denied. All other issues are rendered moot.

Date: _____ January 11, 2008 _____

Made by: _____ /s/ L. Timothy Wilson _____

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
Signed January 8, 2008

A true copy: Attest:

_____/s/ Jeffrey W. Buker _____
Jeffrey W. Buker
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-151658

Employee: Donald Roberts

Employer: Leggett & Platt, Inc.

Insurer: United States Fidelity & Guarantee Company

Additional Party: Treasurer of Missouri as Custodian
of Second Injury 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. Because of a potential due process problem, the Commission remanded this matter to the Division of Workers' Compensation (Division) on June 24, 2008. In satisfaction of such remand, the Division conducted a supplemental hearing on October 14, 2008.

Having reviewed the evidence, read the briefs, and considered the entire 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 (Award) of Administrative Law Judge L. Timothy Wilson dated January 11, 2008. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the Award. The Award is attached hereto and incorporated herein by reference.

INTRODUCTION

Administrative Law Judge Wilson concluded that the Division had no jurisdiction over this case because its facts did not fit into any of the jurisdictional circumstances set forth in §287.110 RSMo. The administrative law judge's decision, thus, denied employee's claim for benefits. Employee filed an Application for Review with the Commission.

DISCUSSION

As indicated in the administrative law judge's decision, §287.110 RSMo extends jurisdiction under the Missouri Workers' Compensation Law to injuries received and occupational diseases contracted in three circumstances:

1. When such injuries are contracted in this state;
2. When such injuries are contracted outside this state under contract of employment made in this state (unless the contract provides for jurisdiction in another state); or
3. When such injuries are contracted outside this state but the employee's employment was principally localized in this state.

We agree with the administrative law judge that neither one nor two above apply in the case before us. Employee's injuries were sustained outside this state, and he had virtually no work contact with this state (other than his paycheck and about one meeting at corporate headquarters per year). He performed his work primarily in the northeast part of our country.

The question, then, is whether employee's contract of employment was made in Missouri or in another state. "As a rule, the place where the contract is made is considered to be the place where the offer is accepted or where the last act necessary to complete the contract is performed." *Krusen v. Maverick Transportation*, 208 S.W.3d 339, 342-343 (Mo.App. S.D. 2006).

The best evidence from the record establishes the following series of events (in chronological order) in connection with the contract created between employee and employer:

- During the time employee began his employment with employer in 2000, he lived in Noble, Arkansas.
- Employee met employer's witness, Roger Bougher, in Poplar Bluff, Missouri. Mr. Bougher did not offer employee a job. Mr. Bougher said he would talk with his supervisor and get back with employee.
- Employee recalled that Bill Ellis called employee at his home in Noble and offered a job during that conversation. Employee accepted. Employee understood, however, that there were still conditions on his employment. He knew he must pass a drug test.
- Mr. Bougher called employee at his home during this same period of time and said that employer was going to move forward with employee's employment if he was still interested, which employee indicated he was. Mr. Bougher told employee that employer would put the job offer, along with details, into a letter that it would send to employee.
- On August 3, 2000, employer sent a letter to employee's home in Noble offering him employment. The letter concluded with the statement, "Don, the above offer is contingent on the passing of a company drug test."
- Sometime after employee received this letter, he spoke with employer and accepted the offer. Since Noble had no facility for a drug test, the parties made arrangements for employee to take the drug test in Bettendorf, Iowa, where employee had family. Employee complied with these arrangements and passed his test.
- By the time employee came to employer's facility in Carthage for training, he was already considered an employee. Employer paid him his agreed salary for the two weeks of training time.

These facts are similar to those presented to the court in the *Krusen* case cited above. In *Krusen*, the employee claimed he had already accepted the truck driving position during conversations on the telephone in Missouri. But just as in our case, even if that were true, there were conditions precedent to the employee beginning his employment. Krusen had to go to Arkansas for orientation that included successfully completing a driving test, drug test, physical examination, and road test. The court found that the last act necessary for the completion of the contract was the employee's satisfaction of such conditions.

In fact, Missouri's courts have decided this jurisdictional issue for a number of truck drivers who were injured in other states but filed a claim under this state's Workers' Compensation Law. Another case very similar to the one at hand is *Scott v. Elderlite Express*, 148 S.W.3d 860 (Mo.App. E.D. 2004). In that case, the claimant testified that employer offered her the job and she accepted over the telephone while she was in Missouri. The best evidence in that case showed, though, like in our case, that such offer was contingent; the claimant still had to pass a drug test and a road test. Accordingly, the *Scott* court concluded that the contract was made in Indiana, where the last acts necessary for the formation of a contract -- drug and road tests -- were completed.

In the case at hand, both parties agreed that claimant had a condition he had to satisfy in order to become employed for employer. He had to take and pass a drug test. Employee completed that last step in Iowa, not Missouri.

Thus, none of the jurisdictional requirements set forth in §287.110 RSMo were met in the facts of this case.

Accordingly, since employee has not proved the essential element of jurisdiction in this state, we affirm the administrative law judge's decision to deny him benefits.

DECISION

The Commission affirms the decision of the administrative law judge dated January 11, 2008, and awards no compensation.

Given at Jefferson City, State of Missouri, this 25th day of March 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Don Roberts

Injury No. 02-151658

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Leggett & Platt, Inc.

Additional Party: Second Injury Fund

Insurer: United States Fidelity & Guaranty

Hearing Date: October 22, 2007 Checked by:

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? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
N/A
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
13. Part(s) of body injured by accident or occupational disease: N/A
 - Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-

16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$329.42

- Method wages computation: STIPULATION

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: -0-

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

22. Second Injury Fund liability: NO

Total: -0-

23. Future requirements awarded: NO

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: Don Roberts

Injury No. 02-151658

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Leggett & Platt, Inc.

Additional Party: Second Injury Fund

Insurer: United States Fidelity & Guaranty

Hearing Date: October 22, 2007 Checked by:

AWARD ON HEARING

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases for hearing, was heard before the undersigned Administrative Law Judge on October 22, 2007. The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about November 28, 2007.

The employee, Donald Roberts, appeared personally and through his attorney, Ronald Caimi, Esq. The employer, Leggett & Platt, Inc., and its insurer, United States Fidelity & Guaranty Company, appeared through their attorney, Ronald Sparlin, Esq. The Second Injury Fund appeared through its attorney, Christina Hammers, Assistant Attorney General. (The Second Injury Fund is an additional party in Injury No. 02-151658; but it is not a party in Injury No. 02-147473.)

Injury No. 02-151658

The parties entered into a stipulation of facts in Injury No. 02-151658. The stipulation is as follows:

- (1) On or about April 1, 2002, Leggett and Platt, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by United States Fidelity & Guaranty Company.
- (2) On the alleged injury date of April 1, 2002 Donald Roberts was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident occurred in Jasper County, Missouri. The parties agree to venue lying in Joplin (Newton) County, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) At the time of the alleged accident the employee's average weekly wage was sufficient to allow a compensation rate of \$329.42 for temporary total and permanent disability compensation.
- (7) The employer and insurer have not provided medical treatment or temporary disability compensation to the employee.

The issues to be resolved by hearing in Injury No. 02-151658 include:

- Whether the Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo?
- Whether the claimant sustained an accident on or about April 1, 2002; and, if so, whether the alleged accident arose out of and in the course of employment?
- Whether the alleged accident of April 1, 2002 caused the injuries and disabilities for which benefits are now being claimed?
- Whether the employee sustained any permanent disability as a consequence of the alleged accident of April 1, 2002; and, if so, what is the nature and extent of the disability?
- Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

Injury No. 02-147473

The parties entered into a stipulation of facts in Injury No. 02-147473. The stipulation is as follows:

- (1) On or about June 1, 2002, Leggett and Platt, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by United States Fidelity & Guaranty Company.
- (2) On the alleged injury date of June 1, 2002, Donald Roberts was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident of June 1, 2002, occurred in Jasper County, Missouri. The parties agree to venue lying in Joplin (Newton) County, Missouri. Venue is proper.
- (4) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident of June 1, 2002 the employee's average weekly wage was sufficient to allow a compensation rate of \$329.42 for temporary total and permanent disability compensation.
- (7) The employer and insurer have not provided medical treatment or temporary disability compensation to the employee.

The issues to be resolved by hearing in Injury No. 02-147473 include:

- Whether the Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo?

- Whether the claimant sustained an accident on or about June 1, 2002; and, if so, whether the alleged accident arose out of and in the course of employment?
- Whether the employee sustained any permanent disability as a consequence of the alleged accident of June 1, 2002; and, if so, what is the nature and extent of the disability?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. In addition, the employee offered for admission the following exhibits:

- Exhibit A Deposition of Shawn L. Berkin, D.O.
- Exhibit B Deposition of Timothy Lalk
- Exhibit C Medical Records from Dr. George Patton
- Exhibit D Medical Records from Clarian Health
- Exhibit E Medical Records from Corning Area Healthcare, Inc. & Family Medical Center

The exhibits were received and admitted into evidence .

The employer and insurer did not present any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

- Exhibit 1 Medical Report from Ted A. Lennard, M.D.
- Exhibit 2 Iowa Workers' Compensation File (injury date: May 25, 1989)
Donald Roberts v. City of Bettendorf, Iowa File No. 979219
- Exhibit 3 Medical Records from Family Medical Center
- Exhibit 4 Medical Records from Genesis Medical Center
- Exhibit 5 Medical Records from Caritas Good Samaritan Medical Center
- Exhibit 6 Medical Records from Concord Hospital
- Exhibit 7 Medical Records from Corning Area Healthcare, Inc.
- Exhibit 8 Medical Records from The Pain Management Center
- Exhibit 9 Medical Records from Nashville Family Medicine

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. The Second Injury Fund, however, offered for admission the following exhibit:

- Exhibit I Deposition of Donald Roberts (Employee)

Exhibit I was received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which, relative to each injury number, were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the two Legal Files. In Injury No. 02-151658, the documents contained in the Legal Files include:

- Minute Entries
- Request for Hearing-Final Award
- Notice of Hearing
- Answer of Second Injury Fund to Amended Claim for Compensation
- Answer of Employer & Insurer to Amended Claim for Compensation
- Amended Claim for Compensation
- Answer of Employer & Insurer to Claim for Compensation
- Claim for Compensation

In Injury No. 02-147473, the documents contained in the Legal Files include:

- Minute Entries
- Request for Hearing-Final Award
- Notice of Hearing
- Answer of Employer & Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

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.

DISCUSSION

This case involves the filing of a Claim for Compensation by the employee, which asserts that the employee sustained an accident in Jasper County, Missouri. In response, the employer and insurer filed an answer denying generally the claim, but without contesting jurisdiction. Subsequently, the parties appeared for hearing, and in the preliminary proceedings, stipulated to the employee enjoying employment with the employer, as well as sustaining an accident, in Jasper County, Missouri. In light of these stipulations, the parties appeared for the hearing, implicitly affirming that Missouri enjoyed jurisdiction over this case, and specifically neglecting to identify jurisdiction as an issue for adjudication.

Notwithstanding, during the course of the employee's case, the employee presented testimony contradicting the allegation in the claim that he sustained an accident in Missouri, as well as the parties stipulation that the employee's employment and accident occurred in Missouri. Specifically, the employee testified that the employment in question occurred in the New England area, not Missouri; and the accident in question occurred in the State of Massachusetts. Consequently, although not identified as an issue, the undersigned raised as an issue in this case the issue of jurisdiction.

Jurisdiction is not presumed and may not be waived by any party. Similarly, the parties may not stipulate or otherwise confer upon Missouri jurisdiction, where none exists. The issue is thus addressed in the Findings and Conclusions section of this Award.

Personal Fact Summary of Employee

The employee, Donald Roberts, is 55 years of age, having been born on November 25, 1952. Mr. Roberts resides in Knobel, Arkansas with his girlfriend, Pauline Payne. Mr. Roberts is not presently

employed, and has not engaged in employment since leaving his employment with Leggett & Platt, Inc. in January 2003. Mr. Roberts is seeking payment of permanent total disability compensation.

Mr. Roberts is a high school graduate, but enjoys no other schooling other than high school. Mr. Roberts possesses a commercial driver's license (CDL), and enjoys the ability to read and write. Similarly, Mr. Roberts enjoys familiarity with, and the ability to operate, computers, including use of word processing programs and other programs, such as Excel.

Mr. Roberts' prior employment history is varied, and includes working in sales and management. Notably, in the years preceding his employment with Leggett & Platt, Inc. Mr. Roberts worked as the store manager of Back 9 Golf shop in Rock Island, Illinois; he worked as the operations manager of Rock Island Waste Management in Rock Island, Illinois; and he worked as the plant manager of Browning Ferris Industry (BFI) in St. Louis, Missouri. In the management positions, Mr. Roberts managed or supervised a number of employees and oversaw operation or parts of the operation of the various businesses.

Employment with Leggett & Platt, Inc.

In or around October 2000, Mr. Roberts obtained employment with Leggett & Platt, Inc. as a sales technician. In obtaining this employment, Mr. Roberts, who resided in Arkansas, interviewed for the position with Leggett & Platt, Inc. with representatives in Popular Bluff, Missouri. Later, upon returning to his home in Arkansas, Mr. Roberts received an offer of employment by telephone. According to Mr. Roberts, he accepted the employment offer, while situated in Arkansas.

Subsequent to accepting employment with Leggett & Platt, Inc., Mr. Roberts traveled to Carthage, Missouri (home base of Leggett & Platt, Inc.) and underwent a two-week training course provided by Leggett & Platt, Inc. Thereafter, Mr. Roberts moved to the New England area, working for the company with an assigned geographical territory that included the New England and New York areas. In his employment with Leggett & Platt, Inc., Mr. Roberts sold wiring and machinery to customers, and repaired parts related to Leggett & Platt, Inc. products. Notably, this employment included making sales calls, as well as entertaining customers with dinners and golf. Also, this work included climbing on top of machines, as well as having regularly to bend, squat, kneel, and reach overhead.

According to Mr. Roberts, in his employment with Leggett & Platt, Inc., he worked an average of 60 hours work a week. The work included 10-hour days, five days a week, and work on Saturdays and Sundays.

April 1, 2002 Accident

On April 1, 2002, Mr. Roberts sustained an injury while fixing a wire tie machine for a client (Atlantic Packaging Co.) in Massachusetts. At the time of this incident, Mr. Roberts jumped off a bale of cardboard on which he was standing. When he landed, he twisted his right ankle and his low back, which "popped", and then fell to the ground. (The fall off the bale was approximately four feet.) Apparently, however, Mr. Roberts did not seek or obtain immediate medical treatment.

The ankle symptoms resolved quickly; however, Mr. Roberts continued to have pain in his low back. In May 2002, Mr. Roberts developed pain in his right leg. In this regard, Dr. Berkin notes, that, on or about May 9, 2002 Dr. Robb Stidwell treated Mr. Roberts for complaints of low back pain with sciatica, and again on May 24, 2002. The treatment provided by Dr. Stillwell included prescription medication in the nature of Vicodin, Prednisone, Prilosec, and Flexeril. Additionally, Dr. Stidwell prescribed physical therapy, but, apparently, traveling obligations associated with work deterred Mr. Roberts from undergoing this treatment. Mr. Roberts continued to work full-time and at full-duty, as well as golf recreationally.

June 1, 2002 Accident

On June 1, 2002, Mr. Roberts suffered a subsequent injury to his lower back while playing golf with his supervisor (Bill Ellis) and the manager of Atlantic Packaging Co. (client of Leggett & Platt, Inc.), which occurred in Massachusetts, and as part of his employment with Leggett & Platt, Inc. Notably, at the time of this incident, Mr. Roberts hit a drive, which involved a twisting of his back. The swing caused Mr. Roberts to experience immediate pain and a “pop” in his lower back. Mr. Roberts did not seek immediate medical treatment for his low back pain, but the pain progressed during the course of the day.

Dr. Berkin notes that, on or about June 6, 2002, Mr. Roberts presented to the emergency room of Caritas Good Samaritan Medical Center in Brockton, Maine with complaints of acute low back pain. The attending physician diagnosed Mr. Roberts with an acute lumbar strain, and treated him Percocet, Robaxin, and Motrin. Later, on or about June 24, 2002, Mr. Roberts presented to Family Physicians and underwent a diagnostic study in the nature of an MRI of the lumbar spine, which revealed a “moderate disk herniation at L4-L5 lateralizing to the right and post-operative changes at L4-S1 on the left.”

Subsequently, on or about July 8, 2002 Mr. Roberts obtained surgical consultation from Clifford Levy, M.D., who is an orthopedic surgeon. Upon examining and evaluating Mr. Roberts, Dr. Levy recommended that Mr. Roberts receive an epidural steroid injection for his low back pain. Shortly thereafter, Leggett & Platt, Inc. transferred Mr. Roberts to the State of Indiana, as Mr. Roberts continued to work through his pain and to engage in his employment with Leggett & Platt, Inc.

Upon moving to Indiana, Mr. Roberts initiated treatment with Enoch Brown, M.D., who is a physician with The Pain Management Center in Bloomington, Indiana. Dr. Brown administered a series of epidural steroid injections to Mr. Roberts’ lumbar spine, and prescribed Ultram and Soma for his symptoms. Also, Dr. Brown prescribed physical therapy.

Later, Mr. Roberts underwent treatment with Michael Groff, M.D., who is a neurosurgeon with Indiana University School of Medicine. Initially, Dr. Groff treated Mr. Roberts conservatively, which included a transforaminal epidural steroid injection of the lumbar spine at the level of L5-S1, and a right sacroiliac injection. In addition, Mr. Roberts received pain management treatment from John Alessi, M.D., who is a physician in Nashville, Indiana, and Kam Tiwari, M.D., who is a physician in Bloomington, Indiana.

In January 2003, Dr. Groff opined that the conservative treatment was not successful, and Mr. Roberts was a surgical candidate. Thereafter, on or about January 27, 2003, Mr. Roberts underwent a microdiscectomy of his lumbar spine at the level of L4-L5 on the right for a herniated lumbar disk, performed by Dr. Groff. Following the surgery, in January 2003, Leggett & Platt, Inc. terminated Mr. Roberts’ employment. In March 2003, Mr. Roberts moved to Arkansas.

Present Complaints & Activity

Mr. Roberts continues to complain of chronic pain and tenderness to his lower back, but he no longer experiences radiating pain down his right leg. Additionally, Mr. Roberts notes that he experiences fatigue, lacks mobility, and takes a cautious approach to life. In regards to continuing receipt of medical treatment, Mr. Roberts indicates that he recently discontinued the use of prescription medication for treatment of his low back, and now takes only over-the-counter medication. In addition, Mr. Roberts indicates that he is presently being treated for his bipolar disorder and depression, which includes prescription medication.

At the hearing, Mr. Roberts noted that he no longer is able to play golf, fish or hunt, practice martial

arts, or engage in any of his other hobbies (except watching TV or being on the computer). A normal day for Mr. Roberts generally involves only four hours of sleep per night, and the sleep is not uninterrupted. Further, he does not perform any work around the house, and does not “get out” much because of the back pain. Further, since 2002, he has gained approximately 80 pounds, which he attributes to lack of activity.

Pre-existing Disability or Prior Medical Conditions

In 1989, Mr. Roberts received a diagnosis and underwent treatment for depression and bipolar disorder. This treatment included use of prescription medications, including Depakote, which he continues to take and has taken since approximately 1996. According to Mr. Roberts, he did not receive any counseling, and the medication sufficiently calmed him to allow for a normal life. Notably, despite the bipolar disorder and depression, Mr. Roberts did not experience any difficulty interacting with the many people he worked with in his sales position for Leggett & Platt, Inc.

Also, in 1989, Mr. Roberts suffered a workers' compensation injury involving his low back, which resulted in him receiving benefits under Iowa's workers' compensation laws. Notably, this injury involved a low back injury, diagnosed as a left S1 radiculopathy secondary to a herniated disk of the lumbar spine at the level of L5-S1, on the left. Treatment for this injury included surgery of his low back. During his treatment, Mr. Roberts missed time from work, and eventually received a release to return to work. However, in returning to work, Mr. Roberts was governed by work restrictions that included no lifting more than 5 pounds, no bending and no climbing ladders. In 1992, Mr. Roberts entered into a settlement agreement with the employer, resulting in the parties compromising and resolving the workers' compensation claim.

According to Mr. Roberts, subsequent to his treatment and recovery from the 1989 Iowa workers' compensation injury, he became considerably better. In this regard, Mr. Roberts noted that, subsequent to recovery from his 1989 injury and prior to the April 2002 incident, he engaged in a vigorous lifestyle. Notably, at one point during this period, he held two jobs simultaneously, working 80 hours per week. And, while working as a sales technician for Leggett & Platt, Inc., he would drive up to 600 miles per day with no difficulty, and he would occasionally lift up to 160 lbs. with assistance while repairing machines. He stated he had no problems doing any of his job duties while working for Leggett & Platte, Inc., prior to the 2002 incidents.

In comparing his present condition, to his pre-2002 condition, Mr. Roberts indicates that, prior to the 2002 incidents, particularly during the period of 1991 to 1996, he played golf everyday, enough to enjoy a 2 handicap. Additionally, during this pre-2002 period, Mr. Roberts fished and hunted as often as possible.

Yet, during the pre-2002 period, and subsequent to the 1989 injury and recovery, Mr. Roberts continued to experience low back pain and symptomology. In 1999, and in 2001, Mr. Roberts visited his personal care physician. Additionally, Mr. Roberts received pain management treatment for his low back in 2000.

Medical Testimony

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Ted A. Lennard, M.D., who is a physician practicing in the specialty of physical medicine testified in behalf of the employer and insurer, through the submission of a complete medical report. Dr. Lennard performed an independent medical examination of Mr. Roberts on June 27, 2005. At the time of this examination, Dr. Lennard took a history from Mr. Roberts, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Roberts, Dr. Lennard opined that Mr. Roberts was at maximum medical improvement, and presented with a permanent partial disability of 30 percent to the body as a whole, referable to the low back.

In addition, in considering the multiple injuries, Dr. Lennard apportioned the permanent disability. In this regard, Dr. Lennard attributes 10 percent disability attributable to the disc herniation referable to the 1989 low back injury; he attributes 5 percent disability to the April 1, 2002 injury; he attributes 10 percent disability to the June 1, 2002 injury and subsequent second low back surgery; and he attributes 5 percent disability to the degenerative changes. Additionally, Dr. Lennard notes that Mr. Roberts is governed by permanent work restrictions that include a 25 pound lifting restriction, and avoiding more than occasional bending activities.

Shawn Berkin, D.O., who is a physician practicing in the specialty of occupational medicine, testified by deposition in behalf of the employee. Dr. Berkin performed an independent medical examination of Mr. Roberts on October 2, 2003. At the time of this examination, Dr. Berkin took a history from Mr. Roberts, reviewed various medical records, and performed a physical examination of him. According to Dr. Berkin, however, the history provided to him revealed only one injury occurring in Mr. Roberts' employment with Leggett & Platt, Inc., which Dr. Berkin identified as an April 1, 2002 golfing injury.

In light of his examination and evaluation of Mr. Roberts, Dr. Berkin opined that the April 2002 golfing injury caused Mr. Roberts to sustain an injury in the nature of a lumbosacral strain and a herniated disk of the lumbar spine at the level of L4-L5, which necessitated receipt of surgery involving a lumbar discectomy. Dr. Berkin further opined that, as a consequence of this April 2002 golfing injury, Mr. Roberts sustained a permanent partial disability of 40 percent to the body as a whole, referable to the lumbar spine. Dr. Berkin further opined that, prior to the April 2002 golfing injury, Mr. Roberts suffered from a preexisting permanent partial disability of 25 percent, referable to the low back. Additionally, Dr. Berkin opined that both disabilities present hindrances and obstacles to employment, combine to create a significantly greater disability than the simple sum of the disabilities. Similarly, Dr. Berkin opined that, if Mr. Roberts is permanently and totally disabled, the permanent total disability would be attributable to the combination of the injuries, and not the April 2002 injury, considered alone.

Vocational Testimony

Timothy Lalk, LPC, who is a vocational rehabilitation counselor, testified by deposition in behalf of Mr. Roberts. Mr. Lalk performed a vocational evaluation of Mr. Roberts on March 25, 2005. This evaluation included a review of medical records, a review of Mr. Roberts employment history, and certain vocational testing. In light of his vocational evaluation, Mr. Lalk opined that Mr. Roberts is not employable in the open labor market, primarily due to his presentation – both physically and mentally. Notably, in rendering this opinion, Mr. Lalk assumes that Mr. Roberts suffers from affective disorder, which causes him to exhibit a lack of animation, sadness, and an appearance of extreme fatigue, all of which “would cause reluctance” on the part of any employer to hire Mr. Roberts. Similarly, Mr. Lalk assumes that, because of Mr. Roberts sleep patterns, Mr. Roberts must lie down and take naps twice during the day.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on April 1, 2002, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on April 1, 2002, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in

favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo.App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo.Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo.App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo.App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo.App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo.App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo.App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575,577 (Mo.App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo.App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo.App. W.D. 1993).

I. Jurisdiction

Section 287.110, RSMo extends jurisdiction to the State of Missouri in workers' compensation cases in three possible situations:

1. All injuries received and all occupational diseases contracted in the state of Missouri;
 2. All injuries received and all occupational diseases contracted outside the state of Missouri under contract of employment made in the state of Missouri, unless the contract of employment provides for jurisdiction in another state; and
- All injuries received and all occupational diseases contracted outside the state of Missouri, but the employee's employment was principally localized in the state of Missouri.

In light of the accident occurring in the State of Massachusetts, jurisdiction in Missouri must exist on the basis of one of the two latter possibilities. Namely, whether the employment was principally localized in Missouri; or whether the contract of employment entered into by and between Mr. Roberts and Leggett & Platt, Inc. was made in the State of Missouri, without the contract of employment providing for jurisdiction in another state. After consideration and review of the evidence, I find and conclude that the State of Missouri does not enjoy jurisdiction over the present case.

In Missouri, "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." *Whitney v. Countrywide Truck Service*, 886 S.W.2d 154, 155 (Mo. App. E.D. 1994). 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.

In the present case, the employee and employer did not enter into a written employment agreement. Rather, Mr. Roberts and Leggett & Platt, Inc. orally entered into a contract of employment, which occurred primarily through a conversation held over the telephone. Mr. Roberts testified that he received an offer of employment through a telephone call made to him while he was at home in the State of Arkansas and he accepted the offer of employment during this telephone conversation (while in Arkansas). The parties did not offer any evidence of where the offer of employment originated over the telephone.

Admittedly, Mr. Roberts traveled to Missouri and engaged in two weeks of training in Carthage, Missouri, prior to moving to and commencing work in the New England area. However, Mr. Roberts readily acknowledged at the hearing that the training occurred subsequent to him accepting the offer of employment and being hired by Leggett & Platt, Inc. In light of the evidence presented at the hearing, the training cannot be seen, or understood, to be pre-employment training. Therefore, the contract of employment was not made in Missouri.

Nor is the evidence supportive of a finding that Mr. Roberts' employment with Leggett & Platt, Inc. was "principally localized" in Missouri. Notably, in *Gabriel v. Burlington Motor Carriers*, No. 97-013677 (Aug. 31, 1998), the Labor and Industrial Relations Commission (LIRC) used the definition of "principally localized" contained in the National Commission on State Workers' Compensation Laws Model Act as a guide in defining the term. *Bambler* at 8. The Model Act defined "principally localized" as follows:

- A person's employment is principally localized in this or another State when his employer has a place of business in this or such other State and he regularly works at or from such place of business, or
- If clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State.

Id.

In *Bambler v. Dale Hunt*, 2002 WL 1824987 Mo.Lab.Ind.Rel.Com., the LIRC held that the claimant did not meet his burden of proving Missouri jurisdiction in that Dale Hunt Trucking is located in Arkansas, and the claimant worked from only the Arkansas location. *Id.* at 8. The LIRC also noted the claimant lived in Arkansas, not in Missouri, and spent most of his actual time working outside of the State of Missouri. Finally, the LIRC found that claimant was hired in Arkansas, called Arkansas for instructions, received his paychecks from an Arkansas bank, and lived in Arkansas. *Id.* at 9.

In this case, Mr. Roberts testified that, while Leggett & Platte, Inc.'s headquarters is in Missouri, he personally was principally located in the Northeast, working out of Massachusetts and New York. At the time of the accident, Mr. Roberts lived in New England. His supervisor, the person from whom he took instruction and worked most closely, resided in Milan, IL. The work injury occurred in Massachusetts, and medical treatment for the injury was provided in New England. There is no evidence Mr. Roberts spent any time working in Missouri.

Therefore, in light of the foregoing, I find and conclude that this office and the State of Missouri does not have jurisdiction over the claimed injury. The employee failed to sustain his burden of proof. The Claim for Compensation is denied. All other issues are rendered moot.

Date: ___January 11, 2008___

Made by: ___/s/ L. Timothy Wilson___
L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
Signed January 8, 2008

A true copy: Attest:

___/s/ Jeffrey W. Buker___
Jeffrey W. Buker
Director
Division of Workers' Compensation

The workers' compensation cases joined for hearing include Injury Nos. 02-147473 and 02-151658.

This stipulation of fact, if deemed true, would provide the State of Missouri with jurisdiction over this case. However, this stipulation of fact, although consistent with the allegations set forth in the Claim for Compensation, is inconsistent with the testimony of the employee, as well as the medical records admitted into evidence. This concern is addressed in the Award.

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