

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

Injury No.: 05-075668

Employee: Apolinar Sandoval, deceased

Employers: 1) Schlup Investments, Inc.
2) Michael Schlup
3) Plaza Gardens on the Lake

Insurer: Continental Western Insurance Company

Date of Accident: March 23, 2005

Place and County of Accident: Camden County, Missouri;
venue Kansas City by agreement

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated April 11, 2006.

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

The award and decision of Administrative Law Judge Paula A. McKeon, issued April 11, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Apolinar Sandoval (Deceased)

Injury No. 05-075668

Dependents: N/A

Employers: Schlup Investments, Inc.
Michael Schlup
Plaza Gardens on the Lake

Insurer: Continental Western Insurance Company

Additional Party: N/A

Hearing Date: February 17, 2006

Briefs Due:

Checked by: PAM/lh

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: March 23, 2005.
5. State location where accident occurred or occupational disease was contracted: Camden County, Missouri; venue Kansas City by agreement.
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: Apolinar Sandoval fell while in the course and scope of his employment.
12. Did accident or occupational disease cause death? Yes. Date of death? May 23, 2005
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A.

18. Employee's average weekly wages: Not determined.
19. Weekly compensation rate: \$373.35.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Death benefits
47 weeks of past or \$17,547.45 through February 16, 2005 with ongoing weekly benefits of \$373.35 per week
22. Second Injury Fund liability: N/A

TOTAL:

23. Future requirements awarded: None.

Said payments to begin as of the date of this award 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Angela Williams.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Apolinar Sandoval (Deceased) Injury No: 05-075668

Dependents: N/A

Employers: Schlup Investments, Inc.
Michael Schlup
Plaza Gardens on the Lake

Insurer: Continental Western Insurance Company

Additional Party: N/A

Hearing Date: February 17, 2006

Briefs Due:

Checked by: PAM/lh

On February 17, 2006, the parties appeared for hearing the Employee. Apolinar Sandoval, deceased, appears by counsel Angela Williams. The Employer Michael Schlup, Schlup Investments, Inc., and Plaza Gardens on the Lake appears and is represented by Theresa Otto and Clayton Fielder. Steven Quinn also appears for the Employer Schlup Investments, Inc., only. Continental Western appears through its counsel Eric Lanham. Joe Ebbert and Michael Belancio appear for Claimants Medina and Torres.

STIPULATIONS

At the hearing the parties stipulated to the following:

- 1) that Apolinar Sandoval sustained an accident arising out of and in the course of his employment on March 25, 2005, which resulted in his death;
- 2) that Apolinar Sandoval is entitled to death benefits of \$17,547.45 for 47 weeks through February 16, 2006, with ongoing benefits at a compensation rate of \$373.35 per week.

ISSUES

The parties requested the Division to determine:

- 1) whether Apolinar Sandoval was employed by Michael Schlup, Schlup Investments, Inc., or Plaza Gardens on the Lake;
- 2) whether Continental Western has workers' compensation liability under its policy with Schlup Investments, Inc.

Apolinar Sandoval was killed while installing arches on terraces at the Plaza Gardens on the Lake construction project. Sandoval was standing with a co-worker Hector Torres on a make-shift platform when Sandoval lost his balance. Sandoval fell pulling Torres with him. Torres and Sandoval fell approximately 4 stories down to the ground. Torres lost consciousness. Sandoval died at the scene.

The insurer Continental Western takes the position that Sandoval was not an employee of Schlup Investments, Inc.,

The only testimony regarding Apolinar Sandoval's employment came from Hernon Simonetti. Simonetti, an employee of Schlup Investments, Inc., hired individuals to work for the company. Simonetti testified Sandoval had worked with him for 1 ½ to 2 years. Sandoval was a friend of his father. Simonetti said Sandoval was hired by his father in Kansas and performed general maintenance and repair work at Plaza Gardens South and Plaza Gardens on the Lake. Both are Schlup properties. Simonetti testified that Sandoval was sent to help with construction at the Plaza Gardens on the Lake project.

Mike Schlup testified that any construction workers who were hired to work at the Plaza Gardens on the Lake project were employees of Schlup Investments, Inc. Schlup testified that Plaza Gardens on the Lake is a development company. He testified that Plaza Gardens on the Lake does not employ any construction workers. Schlup Investments, Inc., is the general contractor for the construction aspect of the Plaza Gardens on the Lake and is responsible for employing the construction workers necessary to do the actual building and construction work.

Elbert Pardon, Schlup Investments, Inc., and Plaza Gardens on the Lake employee, testified that he would manage and pay the workers hired to perform services for the Lake project. Pardon would take "roll call," assign tasks, supervise and pay the workers in cash. All records developed as a result of the "roll call" have been destroyed.

There is no dispute as to the lack of formalities of alleged employment with Schlup Investments, Inc. There

were no applications for employment. There are no employment files. There are no W-2 forms. A social security card was not required. A Green Card was not required. An address was not obtained. Telephone numbers were not obtained. Dependent information was not obtained. Federal income taxes were not withheld from pay. Social security was not withheld. Medicare was not withheld from pay. Time cards were not maintained. "Roll call" sheets have been destroyed. No payroll account reflects payments because "employees" were paid in cash. No documentary evidence of any kind prior to the accident or in the week or two after the accident exists which indicate the employees worked for Schlup Investments, Inc.

Missouri law does not require an express contract, either written or verbal, to establish the employee-employer relationship. See Kelsall v. Riss & Co., 165 S.W.2d 329 (Mo. App. 1942). The employment may be implied or presumed from the acts of the parties. *Id.* In order to determine whether or not an employment relationship exists, Missouri courts apply a two-factor test known as the "controllable services test." See Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363 (Mo.App. 1973). The first factor is that the worker must be "in the service" of the alleged employer. *Id.* Secondly, the services must be controlled by the alleged employer. *Id.*, see also Howard v. Winebrenner, 499 S.W.2d 389 (Mo. 1973). "Service" has been defined as the performance of labor for the benefit of another. *Id.*

In this case, Mr. Sandoval was "in the service" of Schlup Investments, Inc., i.e., he was performing labor for the benefit of Schlup Investments, Inc. Mr. Sandoval's services were also being controlled by Schlup Investments, Inc.

Despite Schlup's inconsistent testimony surround the employment arrangement, I find based on the testimony of Pardon, Simonetti, Schlup and applicable Missouri law that Apolinar Sandoval was an employee of Schlup Investments, Inc.

Since I have found Sandoval to be an employee of Schlup Investments, Inc., a determination must be made whether Schlup Investments, Inc., is insured for workers' compensation.

Schlup Investment's policy of workers' compensation insurance is a Kansas policy of insurance that applies generally to employee claims for workers' compensation benefits filed against the employer-insured (Schlup Investments, Inc.) in the state of Kansas. The policy of workers' compensation and employers' liability insurance includes a Residual Market Limited and Other States Insurance Endorsement (hereinafter "Other States Provision") that extends coverage in certain limited situations to claims for workers' compensation and claims for money damages against the insured that are filed in states other than Kansas. The Other States Provision insurance coverage afforded by the policy of workers' compensation issued to Schlup Investments, Inc., is applicable only if all three of the following conditions are met:

- a. The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A of the Information Page (Kansas) or was, at the time of injury, principally employed in a state listed in Item 3.A of the Information Page (Kansas); and
- b. The employee claiming benefits is not claiming benefits in a state where, at the time of injury, (i) you have other workers' compensation insurance coverage, or (ii) you were, by virtue of the nature of your operations in that state, required by that state's law to have obtained separate workers' compensation coverage, or (iii) you are an authorized self-insurer or participant in a self-insured group plan; and
- c. The duration of the work being performed by the employee claiming benefits in the state for which that employee is claiming benefits is temporary.

The Other States Provision, contains at the bottom, in bold type, an "**IMPORTANT NOTICE**" which provides that "[i]f you hire any employees outside those states listed in Item 3.A on the Information Page or begin operations in any such state, you should do whatever may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers' compensation law." Schlup Investment, Inc., and Michael Schlup did not obtain any Missouri workers' compensation insurance for their operations in the state of Missouri and had no such Missouri workers' compensation insurance on the accident dates in question – February 2, 2005 and March 23, 2005.

The insurer asserts that Sandoval even if he was an employee was not hired under a contract made in Kansas and was not working on a temporary basis. I disagree.

Continental Western's policy states that in order for injuries sustained outside the state of Kansas to be covered under the Other States Provision, the claimants must have been either principally employed in the state of Kansas, or the contract of employment must have been made in Kansas.

The claimant was principally employed in Kansas. Most of the duration of claimant's employment occurred in the state of Kansas. Therefore, the claimant was principally employed in Kansas.

I also find the contract of employment was made in Kansas. In Kansas, whether the contract of employment made is within the state is dependent upon when and where the contract was consummated. Pearson v. Electric Service Co., 166 Kansas City. 300 (1949). When an offer is made by telephone, the place of contracting is the state where the "accepter speaks his acceptance." Accord, Neumber v. Yellow Freight System, Inc., 220 Kansas City. 300 (1976).

Hernon Simonetti testified that his father hired his friend Sandoval in Kansas at the Plaza Gardens South in Overland Park, Kansas. He further testified that the majority of the Schlup Investments, Inc., employees were hired by him or his father. Therefore, the last act necessary to complete the employment contract occurred in the state of Kansas at Plaza Gardens South in Overland Park, Kansas when Hernon Simonetti's father met with Sandoval, the job was offered and accepted.

Schlup Investments, Inc., had no other workers' compensation policy. The second requirement has been satisfied.

Continental Western's policy states that in order for injuries sustained outside the state of Kansas to be covered under the Other States Provision, the employee's work outside the state must be "temporary." The policy does not define "temporary." Kansas case law indicates that unless a contrary intent is shown, undefined words in an insurance policy are to be given their natural and ordinary meaning. Harmon v. Safeco Insurance Co. of America, 24 Kansas City.App.2d 810, 812, 954 P.2d 7 (1998). Accordingly, the word should be given its plain, ordinary, and popular sense. American Media, Inc., v. Home Indemnity Co., 232 Kansas City. 737, 740, 658 P.2d 1015 (1983).

"Temporary" is an adjective that is generally defined as "lasting for a long time only; existing or continuing for a limited (usually short) time; transitory." *Black's Law Dictionary*, 8th Edition, p. 1504 (1999). There is nothing in the Other States Provision that suggests that "temporary" is used in any other way than its ordinary sense and common meaning.

Construction projects, by their very nature, are temporary projects. As soon as the condominium complex was completed, the work at that site would end. Mike Schlup testified that the project at Plaza Gardens on the Lake started with the "dirt work" in 2002 and the construction work ceased in late summer or early fall of 2005. The work being performed at Plaza Gardens on the Lake was not permanent, perpetual or indefinite work as it lasted only for a limited time.

Therefore, I find that Sandoval's accident of March 23, 2005, is covered under the provisions of Schlup Investments, Inc., workers' compensation policy and its Residual Market Limited and Other States Insurance Endorsement.

The parties stipulated that Sandoval is entitled to death benefits in the amount of \$17,547.45 or 47 weeks at \$373.35 per week. Hence, Sandoval is awarded \$17,547.45 through February 16, 2006 with ongoing death benefits. Finally, counsel for Sandoval did not offer any evidence regarding whether Sandoval had a surviving spouse and/or minor dependent children. Therefore, no determination of who is entitled or eligible to receive benefits has been made.

This award is subject to a lien in the amount of 25 percent for necessary legal services rendered claimant in

favor of Angela Williams.

Date: _____

Made by: _____

Paula A. McKeon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation