

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 07-051137

Employee: Howard Saunders
Employer: Steve Bowen
d/b/a Steve Custom Builders
Insurer: None
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties did not provide any stipulations or identify any particular issues on the record at the hearing before the administrative law judge; it thus appears that each element of employee's claim is disputed by the Second Injury Fund.

The administrative law judge rendered the following findings and conclusions: (1) Steve Bowen d/b/a Steve Custom Builders was an employer and Howard Saunders was his employee; (2) employee's accident with a nail gun is the prevailing factor causing a subsequent motor vehicle accident and resulting injuries; (3) a contract of employment occurred in the State of Missouri and Missouri has jurisdiction in this case; (4) employee is entitled to temporary total disability benefits; (5) employee is entitled to permanent partial disability benefits; (6) employee is entitled to his past medical expenses; and (7) the Second Injury Fund is required to reimburse employee's past medical expenses.

The Second Injury Fund filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee was an employee of the alleged employer; (2) in finding employee was hired in the State of Missouri; and (3) in finding that the nail gun injury was the prevailing factor in the subsequent motor vehicle accident and resulting injuries.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Starting in 2006, employee performed seasonal carpentry work for an individual named Steven Bowen, who operated under the business name Steve's Custom Builders. Mr. Bowen works out of his home, which is located in Parkville, Missouri.

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Employee did not perform any work during the winter months in late 2006 and early 2007. At some point in March 2007, employee called Mr. Bowen to inquire whether there was any work to perform. The phone call took place at about 8:00 p.m. Employee was in Kansas when he made the phone call. Employee called Mr. Bowen's cell phone. Employee believes that Mr. Bowen was at home at his business location in Missouri, because Mr. Bowen is usually at home by that time. But employee admits he doesn't know where Mr. Bowen was physically located when he answered employee's phone call. Employee also admits that he wasn't friends with Mr. Bowen and did not associate with Mr. Bowen to the extent he knew his daily habits.

We view employee's testimony to lack persuasive force as to the question where Mr. Bowen was located during the March 2007 telephone call. We find the evidence on this record too speculative and insubstantial to support any finding of fact as to Mr. Bowen's location during the telephone call.

During the telephone call, Mr. Bowen informed employee he was doing a project at a residence above a bar called Fat Max in Kansas City, Kansas. Mr. Bowen told employee to come out to work at that location. Employee did not perform any work in the days or weeks leading up to the Fat Max job; employee started working there about a week before March 19, 2007, the date of the alleged accident.

On March 19, 2007, employee was working in the residence above Fat Max when the nail gun he was using double-fired and shot a nail into his left hand. Employee informed Mr. Bowen of his injury, then went into the bar, where he accepted two shots of whiskey from Mr. Bowen. Mr. Bowen then took employee to the emergency room at KU Hospital. During the ride, Mr. Bowen asked employee not to tell anyone he'd been working for him when he was injured. Employee arrived at the hospital, where he received multiple injections of Morphine and Ativan.

Employee's next memory is waking up in the hospital on a respirator machine. Employee later learned that he'd been involved in a motor vehicle accident after having been discharged from the hospital. Employee suffered injuries in the motor vehicle accident including a broken hip and broken bones in the right foot and ankle.

Conclusions of Law

Jurisdiction in Missouri

Section 287.110 RSMo provides, in relevant part, as follows:

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

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In order to establish jurisdiction under the foregoing section where (as here) the injury occurs outside the State of Missouri, the employee must show that either (a) the contract of employment was made in Missouri, or (b) the employee's work was principally localized in Missouri within 13 weeks preceding the injury. Employee failed to demonstrate that his work was principally localized in Missouri in the 13 weeks preceding the injury, as he testified (and we have found) that he did not work during the winter months of late 2006 and early 2007, or in the weeks preceding his going to work at the Fat Max bar. Accordingly, Missouri jurisdiction turns on the question whether employee proved he formed an employment contract in Missouri.

Under the relevant case law, employee was required to provide evidence of where he accepted employer's offer of employment or accomplished the last act necessary to complete the contract. "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 Transp.*, 208 S.W.3d 339, 342-343 (Mo. App. 2006). "[T]he issue of where an employment contract is concluded is one of fact, the claimant having the burden of proof and persuasion on the question." *Redden v. Dan Redden Co.*, 859 S.W.2d 207, 209 (Mo. App. 1993). We conclude that employee failed to meet his burden.

Applying the foregoing principles, it's clear that if the last act necessary to complete the employment contract was employee's acceptance, while on the phone in Kansas, of an employment offer from Steven Bowen, there is no jurisdiction in Missouri. To avoid this result, employee argues that the last act necessary to complete the employment contract was Mr. Bowen's acceptance of *his* offer to come work for Mr. Bowen. Employee suggests that because he called Mr. Bowen to inquire about work, it was his offer which Mr. Bowen accepted when he instructed employee to meet him at the work location the next morning.

But even if we accept employee's argument and view Mr. Bowen's instruction that employee report to the job site as the last act necessary to complete the employment contract, employee has failed to provide persuasive evidence to reveal where Mr. Bowen was located during the phone call. We have found that the evidence on this record is too speculative and insubstantial to support any finding of fact as to Mr. Bowen's location during that phone call.

Because employee has failed to provide evidence that would support a finding that the last act necessary to complete the employment contract occurred in Missouri, it follows that employee has failed to establish jurisdiction in Missouri.

We conclude that under § 287.110 RSMo, there is no jurisdiction in Missouri over this claim for compensation.

Conclusion

We reverse the award and decision of the administrative law judge. Employee has failed to prove Missouri jurisdiction over this workers' compensation claim. For this reason, we deny the claim.

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All other issues are moot.

The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued April 11, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 20th day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Howard Saunders

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the administrative law judge's award finding Missouri jurisdiction and awarding benefits is correct, and should be affirmed.

I acknowledge employee's admission that he doesn't know for sure where his employer, Steven Bowen, was located during the phone call that established the employment contract in this case. I note however, that employee testified credibly that Mr. Bowen was usually at home at that time, and that Mr. Bowen "turns in early." *Transcript*, page 60, 61. After carefully reviewing employee's testimony, I believe there is enough credible circumstantial evidence to affirm the administrative law judge's finding of an employment contract in Missouri.

Because I otherwise agree with the administrative law judge's findings and conclusions, I would affirm the award of temporary total and permanent partial disability benefits, as well as the administrative law judge's finding that employee is entitled to his past medical expenses from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Howard Michael Saunders

Injury No. 07-051137

Employer: Steve Bowen d/b/a Steve Custom Builders

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

Insurer: None

Hearing Date: February 2, 2012

Checked by: NGA

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: Yes.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Kansas.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was a carpenter and was using a nail gun. The nail gun misfired and drove a nail into his left hand.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Body as a whole.

- 14. Nature and extent of any permanent disability: 50% body as a whole.
- 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? \$176,132.83.
- 18. Employee's average weekly wages: \$440.00.
- 19. Weekly compensation rate: \$293.33/293.33.
- 20. Method wages computation: Section 287.250 RSMo.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$176.132.83
26 weeks of temporary total disability x 293.33 =	\$ 7,626.58
200 weeks of permanent partial disability from Employer x \$293.33 =	\$ 58,666.00
weeks of disfigurement from Employer	
Permanent total disability benefits from Employer beginning lifetime.	for claimant's TOTAL \$242,425.41

22. Second Injury Fund liability:

weeks of permanent partial disability from Second Injury Fund	
Uninsured medical	\$176.132.83
Permanent total disability benefits from Second Injury Fund:	
weekly differential beginning	payable by SIF for weeks and, thereafter, for claimant's lifetime.
	TOTAL: \$176.132.83

23. Future requirements awarded: None.

Said payments to begin one day after receipt 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%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Steven C. Effertz.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Howard Saunders

Injury No: 07-051137

Dependents:

Employer: Steve Bowen d/b/a Steve Custom Builders

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

Insurer: None.

Checked by: NGA

On February 2, 2012, the claimant appeared for final hearing. The alleged employer, Steven Bowen d/b/a Steve Custom Builders, although proper notice of the time and location of the hearing was given, did not appear. The Second Injury fund appeared by its attorney, Assistant Attorney General Benita Seliga. There was no stipulation entered into between the parties.

The alleged employer had failed to insure or self-insure as required by Section 287.280 RSMo. The employee is attempting to recover the fair, reasonable, and necessary expenses to cure and relieve the employee from the effects of his injury of March 19, 2007.

The claimant testified in person. He is 39-years-old. He is a non-union carpenter who works at various small types of construction activity. The employer Steve Bowen operated a small construction business out of his residence in Platte County, Missouri.

The claimant had worked for Steve Bowen in 2006. He said he had been introduced to Steve Bowen by his brother Henry Bowen who was a friend of the claimant.

The claimant said he started working for Steve Bowen painting an addition to a garage. He said in his deposition that this had evolved to a full-time position. However, the evidence was that the claimant only earned \$3,839.05 from Steve Bowen in 2006, hardly full-time wages.

Mr. Saunders said that he was living with a female friend by the name of Kristen in Independence, Missouri. Steve Bowen in his deposition said the claimant was living with his brother Henry Bowen in Kansas City, Kansas.

In any event, the claimant learned from Henry Bowen that Steve Bowen had employment available. The claimant placed a telephone call to Steve Bowen's cell phone on a Sunday night about 8:00 p.m. to ask for employment.

The claimant placed the telephone call from the home of a friend of his by the name of Dale, last name not known. The telephone call was placed while the claimant was in the State of Kansas and was made to Steve Bowen's cell phone, which had a Missouri area code.

The claimant did not ask Mr. Bowen where he was located when he answered the telephone, as the call was made on a Sunday evening about 8:00 p.m. There is no reason to believe that Steve Bowen was not at his personal residence in Platte County, Missouri.

I find that Steve Bowen was at his personal residence in the State of Missouri when he answered the telephone call. While this is circumstantial evidence, it is the more reasonable and probable of the possible conclusion. "The evidence being circumstantial is not a bar to recovery so long as the inference drawn from it is the more reasonable and probable of the possible conclusions." *Vaughn v. Taft Broadcasting Company*, 708 S.W.2d 656, 661 (Mo. Banc 1986); *Cooper v. medical center of Independence*, 955 S.W.2d 570, 576 (Mo.App.1997).

There was no real evidence of the actual conversation of the telephone call but what occurred was the claimant, while in Kansas, asked Steve Bowen for employment while he was in the State of Missouri. Mr. Bowen agreed to hire him and told him to be on a job site at the Fat Max Bar in Kansas City, Kansas the next morning.

Steve Bowen was remodeling a loft apartment for the owner above the Fat Max Bar, a bar in Kansas City, Kansas. The claimant went to work there as a carpenter the next morning. On March 16, 2007, Steve Bowen paid the claimant \$539.00 for 49 hours of work at the agreed rate of \$11.00 an hour. The \$11.00 an hour rate was the same rate the claimant had received the previous year.

Steve Bowen, in his deposition, claimed that Mr. Saunders was an independent contractor who worked for himself and not an employee. He did admit Mr. Saunders was paid the \$11.00 per hour for the time that the claimant had worked. He also admitted he provided all of the supplies for the job. The claimant had some carpenter tools he had on a belt but Mr. Bowen furnished the larger more expensive tools. Mr. Saunders was always under supervision by Steve Bowen or his brother, Henry Bowen.

He also admitted he had entered into an agreement to pay a fine of \$4,400.00 for violation of a Missouri law requiring an employer to maintain Workers' compensation insurance.

I find and believe that Steve Bowen d/b/a Steve Custom Builders wan an employer and Howard Michael Saunders was his employee.

On March 19, 2007, the claimant was working at the Fax Max job site. A little after the noon lunch break was over, the claimant was using a nail gun and the nail gun double fired. A nail was driven into the claimant's left hand. He was on a ladder driving nails at the time. Steve Bowen gave him a ride to KU Hospital. The claimant left his van at the Kansas job site.

The claimant testified that Steve Bowen told the claimant not to tell that he had injured his hand while he was working for Mr. Bowen.

The claimant said the hospital gave him pain medication and that was the last thing he remembered until he woke up in the ICU unit on a breathing machine.

The claimant has learned that he was involved in a motor vehicle accident in Independence, Missouri. The claimant has no independent recollection of anything from the time he received pain medication until he woke up in a hospital ICU room attached to a machine helping him breathe.

Steve Bowen testified by deposition that his brother, Henry, had given Mr. Saunders a ride back from KU hospital to his van at the job site and that the claimant had got in his van and drove off.

Diane Clevenger testified for the claimant in person. She is a registered nurse employed by KU Medical Center. She testified about the outstanding medical bills and the claimant's medical records at KU Medical Center. She said she was familiar with the claimant's medication and its effects. I believe her.

She noted the claimant was given four mg of Morphine by IV for pain at 15:19, and one mg Ativan by IV at 15:21 to calm him. The doses of Morphine and Ativan were repeated at 15:48 and 15:50. The nail was removed from claimant's hand by an emergency room doctor and he was noted to be sleeping at 18:25 and 19:30. Upon discharge at 20:25, the nurses' notes read that the patient's brother stated he was driving the patient to his home for the night.

The discharge summary includes the following note: "Discharge to home with brother driving 20:37".

Ms. Clevenger testified that Morphine when combined with Ativan could cause one to be drowsy and confused. When combined with each other they will increase the effect of the other drug.

The claimant was released from the hospital not with his brother to care for him but with Steve Bowen's brother, Henry Bowen. Only 34 minutes later, the claimant was involved in a motor vehicle accident in Independence, Jackson County, Missouri.

The Independence Police Report indicated the claimant was weaving in and out of traffic on east-bound 70 Highway when his van left the road just west of Lee Summit Road.

Considering this and the fact the claimant cannot remember anything from the time he first received pain medication until he was in the ICU unit of Independence Regional Hospital is consistent with the claimant's motor vehicle accident being the result of the claimant being under the influence of pain medication taken to relieve his pain from the nail being driven into his hand.

I find and believe that the claimant's accident with the nail gun was the prevailing factor in his motor vehicle accident and the resulting injuries.

The next issue to determine is if there is jurisdiction in Missouri. Were the claimant and Steve Bowen subject to the Missouri Workers' Compensation Act? Even though Steve Bowen denies the claimant was his employee and was an independent contractor, there is no believable evidence to support this. Mr. Bowen had complete control of the details of the work to be done and in the way in which it would be done, not merely in reference to the result being reached, but in reference to the method of reaching the result. Mr. Bowen furnished most of the equipment and all of the supplies. He paid the claimant by the hour for his work. Howard Michael Saunders was an employee of Steve Bowen.

Section 287.110 provides that the Missouri Workers' Compensation Act shall apply to all injuries received outside of this state under contract of employment made in Missouri.

The Second Injury Fund in its well written brief and quite correctly states that Missouri Courts have long held under Missouri law a contract is deemed to have been made where the parties perform the last act necessary to complete the contract. *Liberty v. Treasurer*, 218 S.W. 3d7, (Mo.App.2007); *Gash v. Black & Veatch*, 976 S.W.2d 31, 32 (Mo. App 2998). Where the applicant accepts an employment offer over the telephone while he is in another state, the employment contract is deemed to have been made in that state. *Id* at 32-33; *Whiteman v. Del-Jen Constr., Inc.* 37 S.W. 3d823, 831 (Mo. App. 2001).

In all of the cases I was able to locate, the employer, while located outside of Missouri, telephoned the employee while he was located in Missouri to offer him employment. The courts found the last act to complete the contract and create Missouri jurisdiction was the employee's acceptance of the employer's offer while the employee was in the State of Missouri.

This case differs in that the employee made the telephone call while he was in Kansas. He made the offer to be employed if the claimant had any work available for him. Both parties already knew the terms as the employee had worked for Mr. Bowen several months prior to March, 2007. Mr. Bowen said he had a position and agreed to hire the claimant and told him when and where the job site was. This was the last act necessary to complete the contract. I find that the contract of employment occurred in the State of Missouri and Missouri has jurisdiction in this case.

Dr. P. Brent Koprivica examined the claimant on May 16, 2008. He rates the claimant at five to ten percent disability to the body as a whole for fracture of his spine at L-2; 25 percent of his right hip for acetabular fracture; 15 percent to the body as a whole for sciatic palsy; ten percent of his right knee and 20 percent of the right ankle. Dr. Koprivica combined these and assigned a permanent partial disability of 50 percent of the body as a whole.

Dr. Koprivica also said the claimant was temporarily totally disabled from March 19, 2007 through September 13, 2007, a period of 26 weeks.

The claimant earned \$11.00 an hour and worked 40 hours a week for a weekly wage of \$440.00 resulting in a compensation rate of \$293.33 per week.

I believe Dr. Koprivica. I order and direct Steve Bowen to pay to the claimant the sum of \$293.33 per week from March 19, 2007 through September 13, 2007 or 26 weeks for a total of \$7,626.58 for temporary total disability.

I also order and direct Steve Bowen to pay to the employee the sum of \$293.33 per week for 200 weeks for a total of \$58,666.00 for permanent partial disability.

Mr. Saunders incurred the following medical expenses that were fair, reasonable and necessary to cure and relieve the claimant from the condition based by his accident arising out and in the course of his employment with Steve Bowen d/b/a Steve Custom Builders construction on March 19, 2007.

American Medical Response	\$ 2,060.07
Centerpoint/Independence Regional	\$ 52,232.50
University of Kansas Hospital	\$ 96,566.61
Kansas University Physicians	\$ 24,818.00
Professional Services	\$ 298.00
Visiting Nurses Association	\$ 157.65
Total	\$176,132.83.

I order and direct Steve Bowen d/b/a Steve Custom Builders to pay to the claimant the sum of \$176,132.83 for medical expenses.

Section 287.220.5 RSMo provides that when an employer failed to insure or self-insure as required by Section 287.280, the Second Injury Fund shall reimburse the claimant for his fair, reasonable and necessary medical expenses.

I order and direct The Treasurer of the State of Missouri to pay to the claimant the sum of \$176,132.83 for past medical expense.

The claimant and the Second Injury Fund have agreed that the Second Injury Fund may pay the portion owed to the University of Kansas Hospital and Kansas University Physicians and may be paid directly to them less a 25 percent reduction for attorney fees.

This amount is subject to a lien in the amount of 25 percent of this Award in favor of Steven C. Effertz for necessary legal services provided to the claimant.

Made by: /s/ Nelson G. Allen
Nelson G. Allen,
Chief Administrative Law Judge
Division of Workers' Compensation