

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

Injury No.: 96-441642

Employee: Cassie Shupe
Employer: John Pizzo Trucking (Settled)
Insurer: Vanliner Insurance Co. (Settled)
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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 16, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued July 16, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Cassie Shupe

Injury No.: 96-441642

Dependents: n/a

Employer: John Pizzo Trucking (settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Vanliner Insurance Co. (settled)

Hearing Date: April 17, 2012

Checked by: KOB

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? No
3. Was there an accident or incident of occupational disease under the Law? Claimant had an accident, but it did not occur "under the Law" of Missouri.
4. Date of accident or onset of occupational disease: March 23, 1996
5. State location where accident occurred or occupational disease was contracted: South Dakota
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: Claimant was tossed around in the cab of the truck.
12. Did accident or occupational disease cause death? No
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: \$28,403.75
16. Value necessary medical aid paid to date by employer/insurer? \$24,984.15

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Not determined.
- 19. Weekly compensation rate: Not determined.
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

- 21. Amount of compensation payable: (Employer/Insurer previously settled)
- 22. Second Injury Fund liability: No

TOTAL: \$0.00

- 23. Future requirements awarded: None

Said payments to begin 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 -- 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:	Cassie Shupe	Injury No.: 96-441642
Dependents:	n/a	Before the Division of Workers' Compensation
Employer:	John Pizzo Trucking (settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Vanliner Insurance Co. (settled)	Checked by: KOB

PRELIMINARIES

The matter of Cassie Shupe ("Claimant") proceeded to hearing to determine whether Claimant was entitled to recover benefits from the Missouri Second Injury Fund. Attorney Ellen E. Morgan represented Claimant. Assistant Attorney General Carol Barnard represented the Second Injury Fund. Claimant previously settled the claim involving John P. Pizzo Trucking ("Employer" or "John Pizzo Trucking") and its insurer, Vanliner Insurance Co. ("Insurer").¹

The parties stipulated that on or about March 23, 1996, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury. The injury occurred in South Dakota when Claimant was thrown around in the cab of a truck. The parties agreed Claimant was an employee of John Pizzo Trucking, a sole proprietorship. Venue, notice and timeliness of the claim were established by stipulation. Employer/Insurer paid temporary total disability ("TTD") for 110 2/7ths weeks, from March 23, 1996 to June 26, 1999, or \$28,403.75. Employer/Insurer paid \$24,984.15 in medical expenses. Finally, the parties agreed that the date of MMI is June 26, 1999, and if the Second Injury Fund is found liable for permanent total disability ("PTD") benefits, the obligation to pay benefits would commence as of December 1, 2001.

The cornerstone issue is whether the state of Missouri has jurisdiction over this claim. If the issue of jurisdiction is decided in Claimant's favor, the remaining issues are 1) rate of compensation; and 2) liability of the Second Injury Fund. Claimant seeks to recover PTD from the Second Injury Fund.

FINDINGS OF FACT

Claimant is a 62-year-old woman who grew up around the trucking industry, earned her CDL at age 18, and has driven trucks in each of the 48 contiguous states. As of the date of hearing, she had lived in Temple, GA for about five years. She graduated from business college and kept books for small businesses, but has no computer-based business training. She bought her own truck (tractor) in 1981 and drove for North American Van Lines. She had no physical problems until the events described below.

¹ Vanliner is only a party to the claim as the insurer. The trucking entity referred to as "Vanliner" in testimony is also known as "United Van Lines," and will be referred to as such in this award to avoid confusion.

In late 1992, Claimant was living in Tennessee, but was considering a move to Montana. In December of that year, while unloading at a Wynn Dixie in Florida, she struck up a conversation with a fellow driver named John. The two soon started dating. In June, Claimant parked her truck and starting making runs together with John. By October 1993², Claimant and John were living together in North Dakota.

When Claimant started driving with John, he became her employer. John Pizzo Trucking paid her salary of \$1,000 per month, and arranged for meals, uniforms and rooming. Together they worked jobs that required co-drivers. These jobs were often high value loads with an expedited delivery schedule, particularly electronics and trade show exhibits. A second driver was not always necessary, but it extended the driving time and assured the load was always supervised. John Pizzo Trucking eventually had a specially built truck with a shower, TV, microwave and other home-like features. Before John Pizzo Trucking leased to United Van Lines, he leased to a company out of Tennessee.

In 1995, John Pizzo Trucking was based out of North Dakota. John learned of an opportunity to run high value convention center jobs with United Van Lines. He eventually leased on as a team to do a particular co-driver job. When asked if he worked for United Van Lines, John replied, "Well, we contracted. We were a lease operator to them. Contractor. I was. Cassie was just an employee in the truck with me." John and Claimant came to United Van Lines' Missouri headquarters to meet corporate, be fitted for uniforms, complete a records check, and add United Van Lines equipment and lettering to the truck. Claimant testified they "leased on as a team" in Fenton, Missouri, and United Van Lines would not have "hired" the team if she did not "pass muster." United Van Lines required John Pizzo Trucking to purchase workers compensation insurance through them, which covered Claimant. United Van Lines and John Pizzo Trucking entered into a lease, and Claimant was an employee of John Pizzo Trucking.

Claimant suffered two injuries while employed by John Pizzo Trucking. In December 1995, while in Las Vegas, Claimant was knocked out of the bunk when John backed the truck into a concrete pillar. She was tossed around, and hurt her back. On March 23, 1996, while in North Dakota, Claimant was sitting on the edge of the bunk when the truck hit a frost heave and caused her to be thrown around the cab. Claimant underwent extensive treatment, received TTD benefits for over two years, and was ultimately told by her treating doctors she should not return to driving. She has pain in her neck, migraines, mid-back pain from a fractured thoracic vertebrae, and lower back pain. She has been under continuous narcotic pain management since 1996, but has not had any surgery.

Claimant did not return to work. She paid a "questionable" doctor \$60 for a "no questions asked" DOT physical, but she never passed a real exam. The narcotics alone prevent her from meeting DOT requirements. She cannot climb into a cab, and pain prevents her from driving. She did drive to the hearing from Georgia in a Jeep over 3 days, stopping to visit friends along the way. Claimant's personal and business relationship with John Pizzo ended in 2007, and he sold the truck.

² The was conflicting testimony regarding the year Claimant joined John Rizzo Trucking as an employee and the year John and Claimant moved in together – 1993 or 1994.

RULINGS OF LAW

1. Jurisdiction.

The general rule is that claimant has the burden of proof as to her right to compensation under the Missouri Workers' Compensation statute. *McKiness v. Western Union Telegraph Co.*, 775 S.W.2d 345, 347 (Mo.App.1989). An award of compensation rendered without jurisdiction may be impeached at any time in any proceeding. *Woodruff v. Tourville Quarry, Inc.*, 381 S.W.2d 14, 19 (Mo.App.1964). Moreover, an employee bears the burden of proving all essential elements of his claim. *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App.1990). Jurisdiction over the claim is one of these elements. See § 287.110(2) RSMo 1986 and *Mosley v. Texas Continental Express*, 690 S.W.2d 482, 484 (Mo.App.1985); *Redden v. Dan Redden Co.*, 859 S.W.2d 207, 210 (Mo.App. E.D. 1993). The determination of whether Missouri has jurisdiction presents a factual issue, with the claimant having the burden of proof and persuasion on the question. *Redden v. Dan Redden Co.*, 859 S.W.2d 207 (Mo. App. 1993).

The Missouri Division of Workers' Compensation only has jurisdiction over cases covered by the Missouri Workers' Compensation Act. Like all administrative bodies, the division has only such jurisdiction as is conferred upon it by statute. *Mikel v. Pott Industries/St. Louis Ship*, 896 S.W.2d 624, 626 (Mo.,1995). The legislature has granted the division those powers necessary to the proper discharge of its duties under the workers' compensation law. *Id.*, citing § 287.650; *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo.1942). Section 287.110.2 provides that the Workers' Compensation Act:

... shall apply to (1) all injuries received ... in this state, ... and also to (2) all injuries received ... outside of this state under contract of employment made in this state, ..., and also to (3) all injuries received ... outside of this state where the employee's employment was principally localized in this state (numbering added for reference purposes).

The injury occurred in South Dakota, not Missouri, making the first prong inapplicable.

Missouri jurisdiction may exist if the injury was received under a contract of employment made in Missouri. *Liberty v. Treasurer for State of Missouri-Custodian of Second Injury Fund*, 218 S.W.3d 7, 10 (Mo.App. W.D. 2007). Claimant has failed to establish the injuries she received in South Dakota were under a contract of employment made in Missouri. The only evidence of a "contract of employment" is between John Pizzo Trucking and Claimant, a professional relationship that existed long before either Employer or employee traveled to Missouri to lease with United Van Lines. John Pizzo Trucking paid Claimant's wages, provided her uniform, whether it was that required by United Van Line or any other company, and paid for meals and lodging. Employer carried workers' compensation insurance to cover Claimant, his employee. The parties stipulated Claimant was the employee of Employer. There is certainly no credible evidence to establish an employment contact between United Van Lines, a Missouri based corporation, and Claimant.

Claimant emphasized facts suggesting the agreement between United Van Lines and John Pizzo Trucking was finalized in Missouri. Under Missouri law, a contract is deemed to have been made where the parties perform the last act necessary to complete the contract. *Id.*, citing

Gash v. Black & Veatch, 976 S.W.2d 31, 32 (Mo.App.1998). Claimant claims Missouri jurisdiction because her employer and United Van Lines entered into an agreement that was finalized in Missouri. Although the final steps of an agreement between United Van Lines and John Pizzo Trucking occurred in Fenton, Missouri, there is no basis to find that relationship was a “contract of employment.” Claimant testified the nature of the relationship between was a “lease” relationship. John Pizzo testified he was self-employed as a lease operator or contractor, and Claimant was just an employee of his sole proprietorship. Even if the broad interpretation of “under contract of employment “ advocated by Claimant allowed the contact in question to be that of third party, there was no evidence that a “contract of employment” existed between United Van Lines and John Pizzo Trucking. There is no direct or indirect employment contract under which Claimant was injured on which to base Missouri jurisdiction.

Finally, if the employee's employment was principally localized in Missouri, jurisdiction would attach to the claim. For many of the same reasons discussed above, Claimant cannot establish the “employee's employment was principally localized in this state” at any relevant time. In *Gabriel v. Burlington Motor Carriers and AIU Insurance Co.*, Injury No. 97-013677 (August 31, 1998)(1998 WL 559966, 2), the Labor and Industrial Relations Commission turned for guidance to the National Commission on State Workers' Compensation Laws Model Act, which defines “principally localized” as follows:

- (1) 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
- (2) 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.

Since it is definitely established Claimant’s employer was John Pizzo Trucking, not United Van Lines, there is no evidence to support a finding under the first prong of the principally localized test. As for the second prong, neither Claimant nor Employer was domiciled in Missouri, nor did they spend a substantial part of their working time in Missouri. Claimant simply does not meet the statutory mandate for Missouri jurisdiction.

The fact Employer/Insurer consented to Missouri jurisdiction in settling the primary claim does not bind the Second Injury Fund. In *Liberty v. Treasurer for State of Missouri-Custodian of Second Injury Fund*, 218 S.W.3d 7, 13 (Mo.App. W.D. 2007), the court addressed a situation where, as here, the employer settled, stipulating to jurisdiction, and the Second Injury Fund raised the jurisdiction defense. The court found the Second Injury Fund is entitled to all available defenses in all cases, stating, “[t]o claim lack of jurisdiction is to assert one of the most fundamental of defenses.” *Id* at 14. Because the Fund was not a party to that settlement, it is not bound by those stipulations. *Id*, citing *Totten v. Treasurer of Mo.*, 116 S.W.3d 624, 628 (Mo.App. 2003) (admission of settlement agreement as evidence does not bind the Fund to the terms of the agreement to which it was not a party).

2. Rate and Second Injury Fund Liability.

This tribunal lacks jurisdiction to decide any issues raised by Claimant. No decision is rendered regarding the remaining issues.

CONCLUSION

Claimant has failed to meet her burden of proving Missouri has jurisdiction over her claim. The claim is denied.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation