

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

Injury No.: 05-056769

Employee: Hector Torres-Olivares

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 4<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## TEMPORARY AWARD

Employee: Hector Torres-Olivares

Injury No. 05-056769

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: Hector Torres fell while in the course and scope of his employment.
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: Not determined.
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? Not determined.

- 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:  
 47 weeks of past temporary total disability or \$17,547.45 through February 16, 2005  
 with ongoing weekly benefits of \$373.35 per week  
 Cost of proceedings under §287.560 against Schlup Investments only to Joe Ebbert and  
 Michael Belancio .....\$14,712.50
- 22. Second Injury Fund liability: N/A

TOTAL:

- 23. Future requirements awarded: Future medical treatment as necessary consistent with  
 Dr. Koprivica's recommendations.

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: Joe Ebbert and Michael Belancio (See Findings and Rulings regarding payment by Schlup Investments).

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Hector Torres-Olivares Injury No: 05-056769

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

On February 17, 2006, the parties appeared for hearing the Employee. Hector Torres appears in person and with counsel Joe Ebbert and Michael Belancio. 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. Angela Williams appears for Claimant Apolinar Sandoval.

## STIPULATIONS

At the hearing the parties stipulated to the following:

- 1) that Hector Torres sustained an accident arising out of and in the course of his employment on March 25, 2005;
- 2) that Hector Torres is entitled to past temporary total disability of \$17,547.45 for 47 weeks through February 16, 2006, with ongoing benefits at a compensation rate of \$373.35 per week;
- 3) that Hector Torres is in need of medical treatment consistent with Dr. Koprivica's report.

## ISSUES

The parties requested the Division to determine:

- 1) whether Hector Torres 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.,
- 3) whether Hector Torres is entitled to costs of recovery under §287.560.

Hector Torres was severely injured while installing arches on terraces at the Plaza Gardens on the Lake construction project. Torres was standing with a co-worker Apolinar Sandoval 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.

Torres is currently temporarily and totally disabled. Torres has incurred significant past medical expenses and is in current need of medical treatment.

The circumstances surrounding Torres' hiring and employment status are in dispute.

Torres learned of the job from a radio advertisement. Torres called the phone number which was listed in the advertisement and he was "pretty certain" that the number had a 913 area code and was a Kansas phone number. Torres was asked some basic questions about his experience over the telephone and then was told that if he was interested in the position, a meeting could be arranged. Torres testified a meeting was held at a gas station in Overland Park, Kansas. Torres said he met with "Miguel" and Miguel's son. Torres said he was offered the job at this meeting in Overland Park, Kansas and was given a map to the job site.

Torres drove down to the Lake of the Ozarks and started working on a Monday in January 2005. Torres received work instructions from the supervisors at the job site. Torres never received any directions or work instructions from Mike Schlup. Torres testified that he was paid cash for the work he performed until the date of his injury. The only check that Mr. Torres received was on April 1, 2005. This check was payment for work that Mr. Torres performed in the week immediately preceding his accident. The check was in the amount of \$760.00 and was

from Schlup Investments, Inc.

Torres received no employment contract, W-2, pay stub, time sheet, or any other indicia of employment. Torres was unclear what entity he worked for.

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.

Hernon Simonetti, an employee of Schlup Investments, Inc., hired individuals to work for the company. Simonetti testified that one of the duties that he performed as an employee of Schlup Investments, Inc., was to answer telephone calls in response to the radio advertisement seeking construction workers. Simonetti testified that the radio advertisement specifically stated that construction workers were needed for Schlup Investments, Inc. Torres testified that he was hired after responding to a similar, if not identical radio advertisement. Simonetti does not specifically remember meeting Torres but does recall meeting with some applicants at gas stations in Overland Park, Kansas.

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.

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

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. Torres was "in the service" of Schlup Investments, Inc., i.e., he was performing labor for the benefit of Schlup Investments, Inc. Mr. Torres' 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 Torres, Pardon, Simonetti, Schlup and applicable Missouri law that Torres was an employee of Schlup Investments, Inc.

Since I have found Torres 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 Torres 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 not principally employed in Kansas. The entire duration of claimant's employment occurred in the state of Missouri. No part of the employment occurred in Kansas; therefore, the claimant was not principally employed in Kansas.

However, I 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).

Torres responded to the radio advertisement by calling the number to Plaza Gardens South in Overland Park, Kansas. He then drove to a gas station in Overland Park, Kansas and met with either Miguel Simonetti or his son, Hernon Simonetti. At this meeting in Overland Park, Kansas, Torres accepted the job to work at Plaza Gardens on the Lake for Schlup Investments, Inc. Mr. Torres testified that after accepting the job, he traveled to the lake to work at the Plaza Gardens on the Lake jobsite. Schlup Investments, Inc., did not require anything further to complete the employment contract. Once Mr. Torres had accepted the offer in Kansas, the job was his.

Hernon Simonetti testified that he does not specifically remember Torres and that he remembers meeting potential workers at a gas station 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 a gas station in Overland Park, Kansas when Hernon Simonetti

and/or his father met with Mr. Torres, the job was offered and accepted, and the time and place to report to work were disclosed.

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*, 8<sup>th</sup> 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. Torres did not permanently move to the lake. Torres had no promise of permanent employment. 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 Torres' 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 Torres is entitled to past temporary total disability in the amount of \$17,547.45 or 47 weeks at \$373.35 per week. Hence, Torres is awarded \$17,547.45 or past temporary total disability through February 16, 2006, and ongoing temporary total disability as long as Torres remains so disabled.

The parties further stipulated that Torres is entitled to medical treatment as necessary to cure and relieve the effects of his March 23, 2005 injury. Torres is awarded such medical treatment as Dr. Koprivica deems necessary.

Finally, Torres seeks an award of his costs of recovery and attorney fees under §287.560.

§287.560 provides:

[I]f the division or commission determines any proceedings have been... defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so...defended them.

RSMo. §287.560. The Courts that have interpreted this provision of law have held that attorney's fees is part of the whole cost of the proceedings. Monroe v. Wal-Mart Associates, Inc., 163 S.W.3d 501, 506 (Mo.App. E.D. 2005); DeLong v. Hampton Envelope Co., 149 S.W.3d 549, 555 (Mo.App. E.D. 2004). [\[1\]](#)

Schlup Investments' entire basis for defending the matter is that it has insurance. However, the workers' compensation statutes make it clear that Schlup Investments' duty to pay is a non-delegable duty. Missouri Revised Statute §287.170 states that "[f]or temporary total disability, the employer shall pay compensation." Section 287.140 states that "the employer shall provide such medical...treatment...to cure and relieve the effects of the injury.

Schlup Investments had a duty to pay temporary total disability benefits and to provide medical care to Mr.

Torres. Schlup Investments, by its own testimony, knowingly did neither. Instead Schlup Investments sat back and waited for its insurer to pay, when it knew that its insurer was not going to timely pay because of the outstanding coverage dispute. Schlup Investments does not dispute that Mr. Torres was its employee or that he was injured in the course and scope of his employment with Schlup Investments. The only medical testimony in the record is that Torres has been totally disabled since the date of the injury, and will continue to be for the foreseeable future. Schlup Investments could have requested an Independent Medical Evaluation; but it did not.

In sum, with its non-delegable duty to provide these benefits, and no factual basis with which to contest the benefits, Schlup Investments has not paid and has defended this action without reasonable grounds. In a situation such as this, it is not permissible for the employer to fail to provide benefits to an injured employee for over 13 months. The non-delegable duty requires that Schlup Investments pay these benefits out of its own pocket if the insurer refuses to pay, and then seek recompense from the insurer. The insurer in this claim raised several serious questions regarding the employee/employer relationship and whether or not the policy of insurance covered these accidents. The Insurer had reasonable grounds for denying the claim for compensation.

Accordingly, no grounds for an award of costs, including attorneys' fees, under RSMo. 287.560 have been advanced against the Insurer. However, based on the admissions of the employer Schlup Investments is wholly responsible for Torres' cost of recovery under §287.560. Schlup Investments is directed to pay the whole costs of proceedings as delineated in Claimant's Exhibits G and H or \$14,712.50.

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*

[1]

For additional references concerning "whole costs of proceedings," *See*, Landman v. Icecream Specialties, Inc., 107 S.W.3d 240 (Mo. Banc 2003); Wilson v. CC Southern, Inc., 140 S.W.3d 115); P.M. v. Metromedia Steakhouses Co., 931 S.W.2d 846 (Mo.App. E.D. 1996); Arledge v. Progressive Tire Distrib., 924 S.W.2d 506 (Mo.App. W.D. 1996). Some of the above authorities have been overruled on other grounds (but are otherwise good law) regarding the standard of review by Hampton v. Big Boy Steel Erection, 1212 S.W.3d 220 (Mo.Banc 2003).