

IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

90394

SHAUN JORDAN )  
)  
Appellant-Employee, )  
)  
vs. )  
)  
J.B. HUNT TRANSPORTATION, INC., )  
Respondent-Employer. )

Appeal No. WD 70140

MISSOURI COURT OF APPEALS  
WESTERN DISTRICT  
2008 DEC 23 AM 11:08  
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On Appeal to the Missouri Court of Appeals from the  
Labor and Industrial Relations Commission

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RESPONDENT-EMPLOYER'S BRIEF

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### *Statement of Facts*

At the hearing of October 31, 2007, the question of Missouri jurisdiction and the nature and extent of disability were identified as the only two issues submitted to the Court. (Tr. 6). Claimant Shaun Jordan testified that he was injured in a vehicular accident which occurred in the state of Tennessee. (Tr. 9). It was admitted that this event took place on May 10, 2005. (Tr. 3). Regarding his employment with J.B. Hunt Transportation, Inc., claimant described a preliminary meeting with a company representative at the Ameristar Casino in Kansas City, Missouri, which was then followed by two weeks of training in Lowell, Arkansas. (Tr. 25). Mr. Jordan also acknowledged that he "signed a lot of papers in Arkansas." (Tr. 26). This paperwork was offered and received in evidence and set forth between Tr. pp. 228-258 and confirmed that this orientation period occurred during the time period of late January-early February 2005. Among other things, these documents contain a "driver application" dated February 1, 2005, wherein the employee acknowledges that "J.B. Hunt is under no obligation to hire me, that any employment I am offered will not be for any specified period of time." (Tr. 234).

At trial, the employee agreed that in his deposition, he had testified that the training process in Arkansas had to be completed before he would be hired by J.B. Hunt. (Tr. 26). At trial, claimant also concurred that the employment records which were received in evidence summarized the various training and qualification requirements he completed while in Arkansas. These included a drug test, a driver evaluation, and a HAZMAT safety evaluation. (Tr. 27-28).

In describing the circumstances of his employment, claimant agreed that his truck was dispatched out of Arkansas. (Tr. 31). He described his weekly schedule as requiring him to retrieve his truck and load in Kansas City every Monday morning and then immediately begin his dedicated run to Tennessee. (Tr. 24). This process required him to

spend "a couple of minutes" at the J.B. Hunt facility in Kansas City. (Tr. 24). When the load was then returned on Fridays, this, too, required only a few minutes of time at the J.B. Hunt facility. (Tr. 25). On direct examination, a number of questions and answers attempted to provide specifics regarding the claimant's weekly employment routine. (Tr. 20-22). The trial transcript does not appear to include any breakdown of miles traveled in or outside the state of Missouri, the amount of time spent in the state of Missouri, or the amount of business conducted within the state of Missouri.

**POINTS RELIED ON**

- I. **THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT MISSOURI DOES NOT HAVE JURISDICTION OVER THE APPELLANT-EMPLOYEE BECAUSE THE FACTS FOUND BY THE COMMISSION DO NOT SUPPORT THE AWARD PURSUANT TO \$287.495 IN THAT EMPLOYEE SHAUN JORDAN'S EMPLOYMENT WAS PRINCIPALLY LOCALIZED IN MISSOURI AND EVIDENCE THAT THE EMPLOYEE SPENT MOST OF HIS TIME DRIVING IN THE STATE OF MISSOURI HAS NEVER BEEN REQUIRED TO ESTABLISH AN EMPLOYEE'S EMPLOYMENT IS "PRINCIPALLY LOCALIZED" IN THE STATE OF MISSOURI**

Bamber vs. Dale Hunt d/b/a Dale Hunt Trucking (Injury No. 96-441200) (LIRC August 6, 2002)

Cable vs. Schneider Transportation, Inc., (Injury No. 88-183019) (LIRC March 7, 1997)

Camargo vs. D.A.Y. Suburban Construction Co., L.L.P., (Injury No. 98-000963) (LIRC 1999)

Redden vs. Dan Redden Co., 859 S.W.2d 207 (E.D. Mo. 1993)

Scott vs. Elderlite Express, 148 S.W.3d 860 (E.D. Mo. 2004)

Smith vs. Donco Construction, 182 S.W.3d 693 (S.D. 2006)

National Commission on State Workers' Compensation Laws Model Act 1986, Part I, Section 7(d)(4)

II. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT MISSOURI DOES NOT HAVE JURISDICTION OVER THE APPELLANT-EMPLOYEE, BECAUSE THE FACTS FOUND BY THE COMMISSION DO NOT SUPPORT THE AWARD PURSUANT TO §287.495.1, IN THAT MISSOURI HAS A STRONG INTEREST IN ADJUDICATING THE CASE PURSUANT TO §287.1102 AND AS RULED ON IN GABRIEL WHERE THE APPELLANT'S MOST SIGNIFICANT CONTACTS ARE IN MISSOURI, AND THE APPELLANT-EMPLOYEE IS A MISSOURI RESIDENT AND HIS EMPLOYMENT IS PRINCIPALLY LOCALIZED IN MISSOURI

Friedman Textile Co. vs. Northland Shopping Center, Inc., 321 S.W.2d 9 (E.D. Mo. 1959)

Gabriel vs. Burlington Motor Carriers, (No. 97-013677) (LIRC August 31, 1998)

Miller vs. Hirschback Motor Lines, Inc., 714 S.W.2d 652 (S.D. 1986)

State ex rel. Bunting vs. Koehr, 865 S.W.2d 351 (S.Ct. 1993)

## ARGUMENT

**I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT MISSOURI DOES NOT HAVE JURISDICTION OVER THE APPELLANT-EMPLOYEE BECAUSE THE FACTS FOUND BY THE COMMISSION DO NOT SUPPORT THE AWARD PURSUANT TO §287.495 IN THAT EMPLOYEE SHAUN JORDAN’S EMPLOYMENT WAS PRINCIPALLY LOCALIZED IN MISSOURI AND EVIDENCE THAT THE EMPLOYEE SPENT MOST OF HIS TIME DRIVING IN THE STATE OF MISSOURI HAS NEVER BEEN REQUIRED TO ESTABLISH AN EMPLOYEE’S EMPLOYMENT IS “PRINCIPALLY LOCALIZED” IN THE STATE OF MISSOURI**

**A. Standard of Review**

In workers’ compensation matters, the employee has the burden of proving all essential elements of his claim, including jurisdiction. Redden vs. Dan Redden Co., 859 S.W.2d 207 (E.D. Mo. 1993). When the Labor and Industrial Relations Commission award incorporates the award and findings of the administrative law judge, the Court of Appeals considers the findings and conclusions to be those of the Commission as including the administrative award. Smith vs. Donco Construction, 182 S.W.3d 693 (S.D. 2006).

**B. The Test For Jurisdiction Under The Principally Localized Requirement Pursuant To Mo.Rev.Stat. §287.110 Requires Either**

- 1) The Employer Has A Place Of Business In Missouri And The Employee Regularly Works From That Place Of Business, Or 2)**

## **The Employee Be Domiciled In Missouri And Work A Substantial Part Of His Time In Missouri**

The appellant's brief appears to summarize a case that was not tried, and critiques an award from the Labor and Industrial Relations Commission that was not issued, at least in the context suggested.

The question of Missouri jurisdiction presents a process of elimination which is simple enough to apply to the facts in this case. The accident itself unquestionably occurred in Tennessee, so the location of injury would not give rise to Missouri jurisdiction.

The Commission correctly found that the contract of hire was consummated in the state of Arkansas. The employment records received in evidence clearly establish that upon arriving in Arkansas, the claimant, by his own signature, acknowledged that he had not yet been offered a job and had no guarantee of employment. The obvious purpose of his presence there was to determine whether he was qualified to receive an offer of employment. His initial encounter with a J.B. Hunt representative in Kansas City, Missouri, would appear to have been nothing more than an invitation to pursue an employment opportunity through the training facility in Arkansas. At most, the encounter in Kansas City was nothing more than the first step in a process that then culminated in Arkansas. Either way, authority such as Scott vs. Elderlite Express, 148 S.W3d 860 (E.D. Mo. 2004), would mandate that this contract, for purposes of jurisdiction, would be deferred to the state of Arkansas. Elderlite, *supra*, involved a similar factual situation in which it was determined that a contract is made at the place

where the last act necessary to complete the contract is performed. The Appellant's brief does not directly contend that this is the incorrect result.

That being the case, this result turns on a single jurisdictional issue; i.e., did the employee prove that his employment was "principally localized" in the state of Missouri? Interestingly, there appears to be no appellate authority in Missouri as to what factors constitute an employment arrangement "localized" within this state. The appellant's brief is correct in noting that this has been a topic largely discussed at the Commission level and, even then, on an infrequent basis. It is an open question as to what precedent these earlier opinions would establish on this Court, but even if continuity is desired, there is nothing in these earlier opinions, notwithstanding the assertions in appellant's brief, that would change this result.

As the appellant's brief acknowledges, the Camargo vs. D.A.Y. Suburban Construction Co., L.L.P., (Injury No. 98-000963) (LIRC 1999), and Bamber vs. Dale Hunt d/b/a Dale Hunt Trucking (Injury No. 96-441200) (LIRC August 6, 2002), opinions have both denied compensation under the theory that employment had not been sufficiently localized within the state. It is suggested that the facts are distinguishable, but there were questions posed in the Bamber opinion, in particular, which are germane to the transcript which has been delivered in this case. In Bamber, the Commission affirmed an administrative law judge whose opinion noted that he had been left to speculate what portion of actual working time had been spent in the state of Missouri. Coincidentally, Bamber also involved an over-the-road truck driver whose routine trip to and from North Dakota required him to be in Missouri only 14 to 16 hours over the

course of a two to three day journey. This was cited as one justification for the denial of jurisdiction. In other words, it was evidently felt to be significant that less than half of his working time occurred within this state.

Appellant also seeks to rely upon the Cable vs. Schneider Transportation, Inc., (Injury No. 88-183019) (LIRC March 7, 1997) opinion, which referenced the Model Act set forth by the National Commission on State Workers' Compensation Laws. This same Act, however, was noted to be problematic in its own right by the Camargo opinion which observed that the Model Act has never been codified by the Missouri legislature nor has it ever been so much as mentioned at the appellate level. Its applicability is dubious, but even the model code requires that a claimant establish that he spends a "substantial part of his working time" in the state from which jurisdiction is sought. Seemingly, this invites the same type of comparative analysis mentioned in Bamber. Here, the Commission appears to be basing its conclusion at least in part upon the failure to provide a breakdown of employment activities between the states involved.

The Commission's hesitancy to fully embrace the Model Act, as noted in Camargo, is well taken. These Model Acts are issued periodically, and in other areas, they are directly contrary to the provisions of Missouri Workers' Compensation Law. The requirement of an "accidental" injury, for example, is discouraged in the Model Act. This poses a direct conflict with Missouri law. There is no indication that the Missouri legislature has ever modified or amended existing workers' compensation law based upon the Model Act. The notion that the Model Act is somehow a gold standard in the interpretation of workers' compensation law generally overstates the impact it has

actually received, particularly in Missouri. Additionally, a model which is now 22 years old would, on that very basis, be reasonably discounted.

The Court should note that the transcript contains roughly 35 pages of actual testimony. This was a trial that apparently took less than an hour to complete. In a nutshell, the Commission was advised that this claimant had worked for J.B. Hunt for roughly three months at the time of his injury. He had taken up residence in Missouri shortly before his period of employment began. For “a few minutes” every Monday morning and every Friday afternoon, he picked up or returned a truck to the J.B. Hunt facility in Kansas City. The rest of his time was spent on the road traveling between Missouri and his ultimate destination in Tennessee. The Commission received no evidence whatsoever apportioning time between Missouri and any other states. The employee was dispatched from Arkansas. If he made business stops in the state of Missouri, this was not clarified. Appellant’s brief on page 15 alleges that his business activities included “stops in Missouri along the way” of his route. Ironically, there is absolutely no such evidence or testimony in the transcript. By emphasizing that which does not exist, the appellant essentially underscores the paucity of evidence that was offered. The Commission was essentially left to speculate, therefore, as to how his employment time was allocated between Missouri and any other states. Arguably, this in and of itself signals that the evidentiary burden was not met.

If there is any reasonable inference to be drawn, it would suggest that the employee may have spent five to six hours driving through the state on Mondays and Fridays. His total time in Missouri may well have approximated 14 to 16 hours. The rest

of his work week is unaccounted for. As the Commission noted, the evidence at most would suggest that the bulk of the employee's work time was spent outside the state of Missouri. This lack of "quantitative evidence" was specifically cited in the underlying conclusion that the employee had failed to carry his burden of proof of establishing employment principally localized in the state of Missouri. The petitioner's brief operates from the perspective that localized employment was incorrectly found to be non-existent. A closer reading of the opinion would suggest that, in fact, localized employment was simply not proven. It is fair enough to say that the concept of "principally localized" employment is not well defined. The fact that this may be a vague standard does not excuse the absence of specificity and, if anything, it would suggest that the party seeking relief on this basis address should clarify every possible issue that might allow a Court to quantify the acts between one state and another. The presentation in this case is nothing more than a thumbnail sketch. While this award appears to deny jurisdiction based upon the lack of quantitative evidence, the cursory review that was provided can also be seen as an indication that greater detail would have actually established employment that was principally localized in another state. The Commission appears to have suspected as much but, either way, this Court is left with a vacuum that reduces the appellant to M.I.A. status for at least three of the five days in the work week.

**II THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN FINDING THAT MISSOURI DOES NOT HAVE JURISDICTION OVER THE APPELLANT-EMPLOYEE, BECAUSE THE FACTS FOUND BY THE COMMISSION DO NOT SUPPORT THE AWARD PURSUANT TO §287.495.1, IN THAT MISSOURI HAS A STRONG INTEREST IN ADJUDICATING THE CASE PURSUANT TO §287.1102 AND AS RULED ON IN GABRIEL WHERE THE APPELLANT'S MOST SIGNIFICANT CONTACTS ARE IN MISSOURI, AND THE APPELLANT-EMPLOYEE IS A MISSOURI RESIDENT AND HIS EMPLOYMENT IS PRINCIPALLY LOCALIZED IN MISSOURI**

Point II devotes an entire section to the choice of law agreement that claimant executed as part of his employment contract with J.B. Hunt. The Commission award, merely as an aside, mentions that if a Missouri contract had existed, this language would have been controlling in deferring jurisdiction to Arkansas. Since no Missouri contract was established, however, the choice of law agreement was rendered moot. For what it's worth, cases cited by the petitioner, such as Miller vs. Hirschback Motor Lines, Inc., 714 S.W.2d 652 (S.D. 1986), involved situations where accidents occurred in the state of Missouri and where Missouri courts would unquestionably have had jurisdiction but for choice of law agreements. With a strong nexus resting in Missouri, the Courts of this state have simply pondered whether it is sound public policy to defer jurisdiction in this situations. None of these cases appear to be applicable here where Missouri has no contractual or geographic connection to the injury and, indeed, the Commission notes most of this authority to be distinguishable.

The appellant curiously relies upon the Commission ruling in Gabriel vs. Burlington Motor Carriers, (No. 97-013677) (LIRC August 31, 1998). The Appellant's

brief summarizes the employee's "sufficient contacts" with Missouri to include place of residence, place where payroll was delivered, and the place from which he was dispatched. While this appellant had taken residence in Missouri immediately before he began employment with J.B. Hunt, he acknowledged that he was dispatched from a facility in Arkansas. There is no evidence whatsoever regarding the issuance of his paychecks. Thus, the appellant here has failed to prove two of the three criteria that he argues to be controlling. Elsewhere, the appellant fails to note that the Gabriel opinion also found that the claimant therein had originally made application to and was trained to dispatch from the facility in Missouri. None of these factors would be present here. In other words, Gabriel, like the other authority cited, is materially distinguishable and presented a much stronger set of facts tending to support the argument for principally localized employment.

The Appellant's brief, on page 19, concludes with the observation that Missouri workers' workers' compensation benefits should be available to workers with "significant contact" to the State. This single sentence captures appellant's total argument; i.e., that a "significant contact" test should be substituted for the "principally localized" language contained in the statute. This Court is, in effect, being asked to re-write Missouri workers' compensation law. The word "principally" has been defined, and in State ex rel. Bunting vs. Koehr, 865 S.W.2d 351 (S.Ct. 1993), it was noted to be analogous to the term "primarily." This word, in turn, has been noted to be synonymous with "mainly" or "chiefly" in Friedman Textile Co. vs. Northland Shopping Center, Inc., 321 S.W.2d 9 (E.D. Mo. 1959). Missouri courts have clearly construed "principally," therefore, as a

term suggestive of some type of pre-eminence. In one sense or another, it reasonably suggests something of highest ranking. “Significant contact” would not carry this inherent suggestion of pre-eminence, and on its very face, would be a distinguishable standard which would be more liberally applicable. The fact that the two phrases are substantively different can only lead to the conclusion that this Court is being asked to rewrite the law.

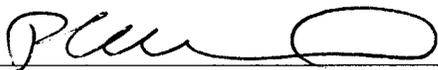
### Summary

This appellant has proved that his employment affords him a parking lot in the state of Missouri. He is there for “a few minutes” two days a week. The rest of his professional time is unaccounted for. It is known that his employment activities are not regulated or controlled by any office in the state of Missouri. His contract for hire took place in Arkansas. His injury occurred in Tennessee. The concept of “principally localized” employment cannot be established through a vacuum. At most, the appellant has established that he travels through Missouri on I-70 twice a week. In the absence of any other information or accounting of his employment activities, the Court is left to speculate as to how this might represent employment “localized” in Missouri as opposed to any other state. On this meager showing, there is no authority even at the Commission level that jurisdiction in Missouri would be available and, indeed, even the Model Act cited by the appellant calls for the very type of comparative analysis that is lacking in the case at hand. Appellant’s brief characterizes the Commission result as an interpretation of law, not binding on this Court. Since there were no factual disputes within the evidence presented, this is technically correct. A closer reading of the Commission opinion, however, suggests that the outcome is based not so much of an interpretation of law as an inability to interpret the law. The appellant has simply failed to quantify the nature of his alleged employment contacts with this state.

For all of these reasons, the finding of the Labor and Industrial Relations Commission should be affirmed.

Respectfully submitted,

EVANS & DIXON, L.L.C.

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that a copy of the compact disc containing the full text of the Respondent's Brief is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by rule 44.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 3,619 words and 411 lines, as calculated by the Microsoft Word software used to prepare this brief.

  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that an original and 10 copies of the above and foregoing and an original and 10 copies of Respondent's Appendix were hand-delivered this \_\_\_\_ day of December, 2008, to:

Clerk of the Court of appeals  
Missouri Court of Appeals, Western District  
1300 Oak Street  
Kansas City, Missouri 64106-2970

And that two copies of the above and foregoing and Respondent's Appendix were hand-delivered this 23 day of December, 2008, to:

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