Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 11-076364

Claimant: Michael Densmore

Employer: Barnes Industrial Group, Inc.

Insurer: N/A

This 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, read the parties' briefs, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Employee and employer subject to the law

On July 16, 2011, in the course of performing an installation job for one of employer's customers, the middle finger on claimant's left hand was crushed, resulting in this claim for permanent partial and temporary total disability benefits, disfigurement, and past medical expenses. The parties dispute whether claimant was working as an employee of employer at the time of his injury, or alternatively, as an independent contractor. The administrative law judge found claimant failed to meet his burden of proof, in part because claimant and James Amelung, employer's owner/president, had not yet "finalized" certain details of their work relationship before embarking on the July 2011 project. See *Award*, page 8. Claimant appeals.

Section 287.020.1 RSMo defines an "employee," in relevant part, as follows:

> The word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.

In focusing on whether various terms of the parties' work relationship were finalized on July 16, 2011, it appears that the administrative law judge ultimately determined that claimant was not an "employee" for purposes of the foregoing definition, because the parties did not enter a "contract of hire." We agree that the record before us shows that claimant and Mr. Amelung remained, at the time of the injury, in negotiations concerning various aspects of claimant's prospective full-time work for employer as a supervisor overseeing its expansion into field service and fabrication work. However, we disagree that this circumstance requires us to conclude that there was not a qualifying "contract of hire" on July 16, 2011, between claimant and employer, for purposes of § 287.020.1. Accordingly, we discern a need to supplement the administrative law judge's analysis on this point.

We first recognize that the relevant language of § 287.020.1 is remarkably broad, in that it expressly encompasses "**any**" contract of hire. Our legal dictionary defines the words "contract" and "hire," in relevant part, as follows:

> **Contract**, *n.* ... An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law <A binding contract>
>
> **Hire**, vb. ... To engage the labor or services of another for wages or other payment.

Black's Law Dictionary, 389 and 847 (10th ed. 2014).

Especially when modified by the word "any," we find nothing within the foregoing definitions, or within the language of § 287.020.1 itself, to suggest or require a conclusion that there is no contract of hire where the parties contemplate further negotiation or adjustment of various details of a work relationship at a later date. In using such broad language, we believe the legislature recognized that the various terms of any agreement between parties to perform work for remuneration may—and probably will—evolve over time.

Here, the uncontested evidence compels a finding that the parties agreed, at minimum, that claimant would assist employer in performing the installation job on July 16, 2011, in exchange for consideration in the form of an hourly rate of $50 per hour. This is not a case such as *Leslie v. Sch. Servs. & Leasing*, 947 S.W.2d 97, 100 (Mo. App. 1997) or *Knupp v. Potashnick Truck Serv.*, 135 S.W.2d 1084 (Mo. App. 1940) where the worker was still engaged in the application process when injured, and thus no actual work agreement could be found. Instead, claimant and Mr. Amelung were parties to an agreement whereby claimant undertook an obligation to assist employer in accomplishing a specific service in exchange for employer's obligation to provide specific remuneration. In our view, this was a "contract of hire," regardless whether the parties had fully worked out the terms of claimant's future, anticipated role in employer's operation, including those ancillary matters such as whether employer would provide the cell phone claimant wanted, or give him various paid vacation days. We so conclude.

Having clarified the issue whether there was a qualifying contract of hire in this case, we nevertheless conclude that the parties' relationship was, ultimately, not subject to the Missouri Workers' Compensation Law. This is because we agree with the administrative law judge's conclusion that claimant's evidence fails to satisfy the so-called "right-to-control" test applied by the Missouri courts where there are questions whether a worker was an employee or an independent contractor:

> The factors to determine if a "right to control" exist are: (1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right of discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished equipment, (7) the extent to which the work is the regular business of the alleged employer, and (8) the employment contract.

Harp v. Malone Freight Lines, Inc., 16 S.W.3d 667, 671 (Mo. App. 2000).

It was claimant's burden to satisfy the foregoing test: "[a] claimant establishes an employer/employee relationship if the claimant worked in the service of the alleged employer and the employer controlled these services." *Leslie v. Sch. Servs. & Leasing*, 947 S.W.2d 97, 99 (Mo. App. 1997)(emphasis added). We find that claimant failed to meet that burden.

Apart from claimant's conclusory assertion that Mr. Amelung "controlled the job," see *Transcript*, page 35, the record before us is bereft of the kind of necessary evidentiary detail as to the means and manner of the parties' performance of the installation job on July 16, 2011, to support affirmative factual findings with regard to factors 1, 2, 4, and to a certain extent, 6 above. Further, it is not even clear from claimant's testimony whether his global assertion of "control" referenced the July 2011 job at issue in this claim, or a previous job claimant worked for employer in Springfield, Missouri, in early 2011, at which job claimant concedes he worked as an independent contractor.

Because claimant failed to prove that employer had the right to control his services, we conclude claimant was working as an independent contractor, rather than as an "employee" for purposes of § 287.020.1, on July 16, 2011. For this reason, we conclude that employer is not liable to claimant for workers' compensation benefits pursuant to § 287.120 RSMo, because the parties' work relationship was not subject to the Missouri Workers' Compensation Law.

All other issues are moot.

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Lorne J. Baker, issued April 26, 2017, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 22nd day of August 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

Reid K. Forrester, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

After a careful review of this matter through the lens of strict construction, I am convinced that the Commission majority errs in denying this claim based on their finding that the employment relationship was not covered by the Missouri Workers' Compensation Law. For the benefit of the reader, I will first summarize the relevant, and essentially uncontested, facts involved in this case.[1]

The employment relationship

As of early 2011, Barnes Industrial Group (hereinafter "employer") was in the business of selling equipment and automation in the concrete industry. At that time, employer's president, James Amelung, was considering expanding employer's business to include a field service division, which would involve welding and fabrication. Mr. Amelung had previously met employee while employee was working for a concrete company that had done business with employer. Because Mr. Amelung did not have personal experience in welding or fabrication, and because he had been impressed with employee's skills in this area, he reached out to employee sometime in April 2011, and the two began discussing Mr. Amelung's desire to hire employee to help accomplish the expansion of employer's operations into field service work.

Mr. Amelung told employee he wanted him to be the welder and fabricator for employer, and thereafter work as a supervisor in the event employer hired more workers in its field service division. Employee was to earn an hourly wage of $30.00 per hour, with employer furnishing most of the tools, and providing the facility out of which employee would work. Employer was to procure business, while permitting employee, as a supervisor, some discretion in scheduling the work. At some point during their discussions, Mr. Amelung flew employee to Omaha where the products employer sold were manufactured. Employer also requested that employee sign a non-compete agreement preventing employee from doing any work for rival companies; employee signed that agreement on July 6, 2011.

At some point in early July 2011, Mr. Amelung received a query from a customer in Columbia, Missouri, whether he knew anyone that could install a bin inside of an aggregate container that the customer had purchased from employer. Mr. Amelung replied that, yes, employer had someone who could do that work. Mr. Amelung accepted the job, handled all communications with the customer, arranged for payment of the work, and scheduled the work. Employer furnished straps, chains, and some other items, but because employer had not yet acquired all of the necessary tools and equipment to complete the installation job, Mr. Amelung arranged for employee to bring his own, and agreed to pay employee an increased rate of $50.00 per hour to account for this. At that time, employee was working full-time for another employer as a

[1] I acknowledge that the administrative law judge deemed the testimony of Mr. Amelung to be generally more persuasive than the testimony from employee; the judge did not, however, identify any specific conflict in the testimony that he resolved in favor of Mr. Amelung. Apart from the fact that these non-attorney witnesses obviously disagree as to the legal issue whether their employment relationship was covered under the Missouri Workers' Compensation Law, I do not perceive any material conflict in the evidence that is determinative of the issues herein.

mechanic. He gave that employer a two-week notice, on his assumption he was going to work for Mr. Amelung on a full-time basis as of July 16, 2011.

On that date, Mr. Amelung didn't have workers' compensation insurance, because his insurance agent had previously told him he didn't need it unless he had five employees.[2] Mr. Amelung's insurance agent had informed him, however, that if he started the field service work, he would need workers' compensation insurance at that point. In his testimony, Mr. Amelung failed to explain why, despite this clear awareness that he needed to do so before undertaking field service work, he did not procure a policy of workers' compensation insurance to cover the job on July 16, 2011.

While performing the installation job, the middle finger on employee's left hand was crushed while lowering a piece of steel into the bin. Mr. Amelung took employee to the hospital for treatment. Later that same day, Mr. Amelung suffered a heart attack. As a result of this and several subsequent cardiac incidents, Mr. Amelung briefly stepped away from employer's business. On or about July 22, 2011, Mr. Amelung's wife called employee and told him employer had decided against hiring him. Employer thereafter delayed the expansion of its business into field service operations until January 2012. Employer now employs two full-time employees to run this operation; these individuals perform the work employee would have performed.

Mr. Amelung concedes that he would have considered employee to be an employee of employer if the expansion in employer's operations had occurred according to plan. Nevertheless, Mr. Amelung believes that because employer's plans were put on hold, the work that employee did on July 16, 2011, cannot be deemed the work of an employee, because the two parties had not yet finalized various terms of the employment. Among other things, the two had some disagreement over the scope of tools and equipment employer would provide, including employee's request for a particular cell phone.

Covered "employee" and "employer" under Chapter 287
Section 287.120 RSMo provides that:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment.

(emphasis added).

Section 287.020 RSMo defines an "employee," in relevant part, as follows:

> The word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter,

[2] On July 16, 2011, in addition to employee, employer had three other workers on its payroll: a parts manager, an office manager, and Mr. Amelung.

> under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.

(emphasis added).

Section 287.030 RSMo, meanwhile, defines an "employer" as follows:

> 1. The word "employer" as used in this chapter shall be construed to mean:
>
> (1) Every person ... using the service of another for pay;...
>
> (3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees. An employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer.

(emphasis added).

Finally, § 287.800.1 RSMo provides that:

> Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

Given that § 287.020.1 includes, as a component of the definition of an "employee," a showing that the individual is in the service of an "employer," I deem it most logical to begin with an analysis whether Barnes Industrial Group, Inc., was an "employer" for purposes of § 287.030 on July 16, 2011. On that date, employer was engaged in a job installing a bin inside of an aggregate container. I can easily conclude that this work involved the "erection" of an "improvement." The more difficult question is whether employer was a "construction industry employer" at the time of the accident, such that it needed only one employee to be considered an "employer" for purposes of the foregoing definition, as opposed to the more general five employee requirement.

It does not appear that the Missouri courts have, to date, provided any particular guidance as to how we should construe the reference to a "construction industry employer" under § 287.030. Accordingly, I will apply the plain and ordinary meaning of these words. I take these words to mean an employer whose business largely revolves around construction; as opposed to say, those employers whose primary source of

revenue is derived from activities which do not involve the erection, demolishing, alteration, or repair of improvements.

Although employer's primary business *prior* to July 2011 was sales, it is uncontested that employer eventually expanded its business to include field service and installation work of the exact type employer performed on July 16, 2011. The statute does not contain a limitation that a "construction industry employer" must have been in said business for any length of time to qualify, nor can we impose such a limitation under the mandate of strict construction, which requires that we "presume nothing that is not expressed" in the statutes. See *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Accordingly, I conclude that employer became a "construction industry employer" the moment it began taking on jobs of the type it performed on July 16, 2011, regardless of the circumstances thereafter that resulted in a brief delay in employer's planned expansion. I conclude, therefore, that if employer had one or more employees on July 16, 2011, it was an "employer" for purposes of the statutory definition, because it is uncontested that employer was "using the services of another for pay" on that date.

To determine whether employer had one or more employees on July 16, 2011, I turn now to the question whether employee was an "employee" as defined by § 287.020.1, because if he was, then he would constitute the requisite one employee, and the definition of "employer" would be satisfied.

There is no contention that employee was not a "person" on July 16, 2011, nor would there appear to be any reasonable argument that he was not "in the service of" employer on that date, where he was unquestionably performing services in the context of furthering employer's business operations. I also agree with the Commission majority's sound legal analysis concluding that there was a qualifying "contract of hire" in this case, where it's uncontested the parties had a meeting of the minds at least as to employee's offer to assist employer in installing the bin on July 16, 2011, in exchange for consideration in the form of pay at the rate of $50 per hour. Accordingly, I conclude that employee was an "employee" for purposes of § 287.020.1 when he was injured on July 16, 2011, because the uncontested facts of this case show that he was a "person in the service of [an] employer ... under [a] contract of hire."

Under strict construction, the analysis would seem to end there, as I have concluded that both of the relevant statutory definitions are satisfied in this case. However, as referenced by the Commission majority, the courts have historically construed the word "service" in § 287.020.1 to mean *controllable* service: "[t]he employer-employee relationship by the statutory definition rests on service, construed by judicial definition to mean controllable service." *Ceradsky v. Mid-America Dairymen*, 583 S.W.2d 193, 197 (Mo. App. 1979)(emphasis added). In other words, the courts have added the word "controllable" to the definition of "employee" under § 287.020.1; it is from this judicial amendment of the statute that the "right-to-control" test has been imposed. It has further been generally assumed that it is the *employee's* burden to present evidence sufficient to satisfy the right-to-control test, in order to avoid a finding that he was an "independent contractor." Indeed, the majority's award denying compensation expressly turns upon this very assumption, in that they have faulted employee for the

dearth of evidence regarding the right-to-control factors. As further explained below, I am not prepared to join in this assumption, because I believe it conflicts with the 2005 legislative mandate of strict construction pursuant to § 287.800.1 RSMo.

The right-to-control test - whose burden?

It is well-settled in Missouri that the employee has the burden of proof on all essential elements of the claim. *Brooks v. General Motors Assembly Div.*, 527 S.W.2d 50, 53 (Mo. App. 1975). So, where there is a dispute over the existence of an "employment relationship," the employee will have the initial burden to prove the statutory definitions are satisfied. Where the fact-finder is persuaded those definitions are satisfied, the burden is then appropriately shifted to the putative employer to prove, as an affirmative defense, some reason the act shouldn't apply, because, pursuant to § 287.808 RSMo, "[t]he burden of establishing any affirmative defense is on the employer[,]" and "[i]n asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Here, as I have shown above, the employee has satisfied his initial burden of proof, in that he has shown he was an "employee" working for an "employer" pursuant to the *actual language* of the statutes in question. Consequently, the burden of proof should shift to the employer to prove some reason the act doesn't apply: namely, that employee was an independent contractor. I acknowledge that the Commission majority cites a case from 1997 in support of their assumption that it was, instead, employee's burden to prove he was not an independent contractor. However, the court in *Leslie v. Sch. Servs. & Leasing*, 947 S.W.2d 97 (Mo. App. 1997) did not—for obvious reasons—have an opportunity to reconcile the strict construction mandate with the judicial amendment of § 287.020.1 to involve a "right-to-control test." Nor has any court, to date, addressed this question, or instructed how we are to comply with the mandate to "presume nothing that is not expressed" while continuing to read a word into the statute that is not there.

To be clear, I am not proposing that we do away with the right-to-control test altogether, or that independent contractors should be deemed covered under the Missouri Workers' Compensation Law as a result of the 2005 amendments. But where § 287.020.1 does not contain an express requirement of "controllable service," or say anything at all about independent contractors,[3] I am convinced that where (as here) the employee makes a prima facie case that he was a "person in the service of an employer," the burden should shift to the employer, as the party claiming a "defense based on a factual proposition," to prove as an affirmative defense that the injured worker, despite being a

[3] In fact, the only explicit reference to "independent contractors" in the entirety of Chapter 287 is found within § 287.040.2 RSMo, which states that a premises owner (here, employer's customer) is not liable under workers' compensation for injuries suffered by independent contractors wherever the "improvements exception" applies. In a 1935 decision, the Missouri Supreme Court read this as a generalized indication the legislature intended to exclude all independent contractors who are not otherwise qualified as statutory employees. See *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 912 (1935). Again, though, the *Maltz* court was not bound, as we are now, to strictly construe § 287.020.1.

"person in [its] service," was nevertheless not an employee, but an independent contractor.

It's worth noting that this result would mirror the burden-shifting framework under the Missouri Employment Security Law. See § 288.034.5 RSMo, instructing that "[s]ervice performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown ... that such services were performed by an independent contractor." It's also worth noting that this result would be far from the most unusual "side effect" of strict construction that we have seen over the years, from the imposition of co-employee liability for workplace injuries,[4] to the removal of occupational diseases from the exclusivity provision under § 287.120 RSMo.[5]

In sum, I conclude that the definitions under §§ 287.020.1 and 287.030 RSMo are satisfied in this case, and that employee was working as an "employee" of an "employer" at the time he suffered his injuries. I further conclude that employer failed to satisfy its burden of proving its affirmative defense that employee was working as an independent contractor. Consequently, I conclude that the employment relationship between the parties was covered by the Missouri Workers' Compensation Law, and that employer is liable, pursuant to § 287.120.1 RSMo to furnish compensation to employee for his injury by accident arising out of and in the course of the employment.

Because employee's evidence is essentially uncontested as to the remaining elements of his claim, I would award 28.6 weeks of permanent partial disability benefits; 10 weeks of disfigurement; 2 weeks of temporary total disability benefits; and employee's past medical expenses in the amount of $8,335.32.

Because the Commission majority has decided otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

[4] See *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. 2010).

[5] See *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293, 298 (Mo. App. 2013).

AWARD

Employee: Michael Densmore

Dependents: N/A

Employer: Barnes Industrial Group, Inc.

Additional Party: N/A

Insurer: None

Hearing Date: January 23, 2017

Injury No.: 11-076364

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

Checked by: LJB

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? No.
4. Date of accident or onset of occupational disease: N/A.
5. State location where accident occurred or occupational disease was contracted: Columbia, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? N/A.
10. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant injured his left middle finger when it was smashed in between two pieces of steel while he was lowering a piece of steel.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left middle finger.
14. Nature and extent of any permanent disability: None
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? None.

18. Employee's average weekly wages: Disputed.

19. Weekly compensation rate: Disputed.

20. Method wages computation: Disputed.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: N/A.

TOTAL:

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: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Densmore Injury No.: 11-076364

Dependents: N/A

Employer: Barnes Industrial Group, Inc.

Additional Party: N/A

Insurer: None

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

Checked by: LJB

The matter of Michael Densmore ("Claimant") proceeded to hearing on January 23, 2017, to determine the liability of Barnes Industrial Group, Inc. ("Employer"). Attorney Steve Trefts represented Claimant. Attorney Stephen Banton represented Employer.

The parties stipulated that on or about July 16, 2011, Claimant sustained an accidental injury. The accident occurred in Columbia, Missouri. The parties further stipulated venue is proper in the City of St. Louis. The parties stipulated Employer received proper notice, and Claimant filed the claim within the time required by law. The parties dispute that Claimant was an employee of Employer at the time of the accidental injury. The parties also dispute the average weekly wage and applicable rates for temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits. Employer denied the claim and paid no benefits. The parties agreed that Claimant reached maximum medical improvement ("MMI") from his work-related injury on January 12, 2015.

The issues for determination are whether Claimant was an employee under the Missouri Workers' Compensation Act ("the Act") and, if so, whether Employer is liable for any past medical benefits, any TTD and PPD benefits, and any disfigurement benefits.

At the hearing, Claimant testified in person and offered a certified copy of Barnes-Jewish St. Peters Hospital medical and billing records, Dr. Subbarao Polineni's medical and billing records, billing records for Woodsmill Anesthesia, and Barnes Industrial Group, Inc. documents. Claimant's exhibits were admitted into evidence without objection.

FINDINGS OF FACT

Employer is a (manufacturer) representing a company selling equipment and automation to the concrete industry.[1] James S. Amelung is the owner/president of Employer. Claimant first met James S. Amelung one to two years prior to the date of injury. At the time of their initial encounter, Claimant was employed by a different employer, Kienstra Concrete Company ("Kienstra"). Mr. Amelung had seen the Claimant's work for Kienstra. Mr. Amelung's company, Employer, had sold a couple of plants to Kienstra and Claimant had been involved in

[1] Transcript p. 47

setting the plants up. Mr. Amelung told Claimant's supervisor at Kienstra that if Claimant was ever let go, or otherwise available, he would be interested in speaking to him.

In April 2011, Mr. Amelung learned that Claimant had been let go from Kienstra. Employer was entertaining the idea of starting up another new division of the company, a field service business, which would involve welding and fabrication, and contacted Claimant with the idea. However, by this time, Claimant was now newly employed full-time with another company, Craftsmen Trailer, doing mechanical maintenance. He started working at Craftsmen on May 23, 2011. When Claimant first began discussions with Mr. Amelung regarding employment, he had not yet started at Craftsmen. Claimant testified then Mr. Amelung negotiated a deal and Claimant started working for him in July 2011.

While Claimant was employed by Craftsmen, he and Mr. Amelung met in person and spoke on the phone about the idea of the field service division and Claimant coming to work for Employer. Claimant testified he was being hired to expand Employer's business. Claimant testified that his job title would be lead mechanic and that he would run a crew.

Claimant testified he met on one occasion during his lunch hour to find out about some jobs Mr. Amelung was going to start lining up. He testified that on another occasion Employer flew him up to Omaha, Nebraska to visit a concrete company manufacturer. Discussions regarding the idea were held on the plane ride back. Claimant testified Mr. Amelung told him he was wanted to do concrete plant maintenance, to help install or set up the concrete plants, and to do maintenance mechanical work.

Claimant testified Employer was to supply all of the tools necessary for the projects and Employer would also secure the work the company was to do. Claimant testified he was to work out of Employer's facility.[2] Claimant testified and offered, as an exhibit at hearing, a flyer Employer printed up to send to already-existing clients which showed the new kind of business Employer was going to start up. The flyer reads, in part, "Barnes Industrial Group, Inc. SOLUTIONS: WELDING and FABRICATION SOLUTIONS TO (*capital letters not added*): Small batch sizes, Slow truck charging, Limited aggregate and cement storage, Worn out components, Dust control, Installations." It also reads, "Call for free estimates 636-227-5777."[3]

Claimant testified they agreed that he would be paid $30.00 per hour and would be an employee of Employer, not an independent contractor. The issues of extra pay for overtime and weekend work, as well as benefits such as vacation pay, medical and dental insurance were also discussed. Employer asked Claimant to sign a non-compete agreement. Claimant offered said document (the "Document") into evidence and testified he signed it, as the Document reads, on July 6, 2011.[4]

Claimant testified that, prior to signing the Document, he was hired by Employer to do an auger installation in Springfield, Illinois. Claimant supplied most of the equipment used in the job; Employer supplied some of its own. Claimant testified that this type of work done was

[2] Transcript p. 27.
[3] Exhibit 5D.
[4] Exhibit 5C.

previously part of Employer's already-established business. Claimant admitted he was not an employee of Employer at the time of the Springfield job.

Claimant sustained the alleged work injury on Saturday, July 16, 2011, in Columbia, Missouri. He testified that the job was done on a Saturday because Mr. Amelung did not have all of his equipment purchased at the time the job opportunity arose and Employer wanted to do this job after Claimant had signed the Document. , Claimant was still employed by Craftsmen at the time of the injury. Claimant considered himself an employee of Employer on July 16, 2011, because he had "already agreed to the signing of the (Document)" and had given his resignation notice to Craftsmen. He also testified that the reason the job was done on a Saturday was that he still was working for Craftsmen and had not fulfilled his two-weeks' notice yet.[5] He asked Employer if they could do the job after his two-weeks' notice had been fulfilled, but the job had to be done at the time due to Employer's client's needs.

On the day of injury, Claimant and Mr. Amelung went to Columbia, Missouri. Claimant testified he drove his service truck to Columbia with his tools in it. Claimant was to install a bin inside of an aggregate container area to separate two parts of aggregate on concrete. For this job, Claimant was to be paid $50.00 per hour because they were going to use Claimant's equipment for the job, as Employer had not yet secured its own equipment. (Claimant was to be paid an additional $20.00 per hour for supplying the equipment for the job.) Claimant did not set up or plan the job and did not communicate with the client prior to the job.

During the course of the job, Claimant was inside of a bin, and while he and Mr. Amelung were lowering a piece of steel, Claimant was using his hands to guide it in. Claimant turned his head briefly and, while doing so, "something happened" and his left middle finger became smashed in between two pieces of steel.

Claimant was immediately driven to the emergency room at Barnes-Jewish St. Peters Hospital where the tip of his left middle finger was amputated by Dr. Subbarao Polineni.

The Friday following the accident Mr. Amelung's wife called Claimant and told him "he's (Amelung) not going to employ me." [6] Mr. Amelung's wife told him that Employer had decided not to start the new area of business. According to Claimant, the phone call occurred on the same day as Claimant's last day of employment with Craftsmen, so he went and begged Craftsmen to keep his job. He missed between one and a half to two-weeks of work at Craftsmen due to the finger injury. To explain the injury, Claimant completed a document for Craftsmen which falsely indicated the finger injury happened during a boating accident. He testified he did not list the true cause of the injury because he didn't want anyone with Craftsmen to know he "was fixing to go to work for Mr. Amelung, Barnes Industrial Group, Inc. I didn't want – I didn't want to leave on a bad note."[7]

Claimant received a paycheck from Employer for four hours of work and a Form 1099 for 2011 reflecting pay in the amount of $700.00 which accounted for both the work Claimant did in Springfield, Illinois and Columbia, Missouri. No money was withheld for taxes. Claimant never

[5] Transcript p. 33.
[6] Transcript p. 24, see also p. 36 "told me they weren't going to employ me."
[7] Transcript pp. 25-26.

completed any paperwork for the IRS regarding his employment. Claimant agrees that Mr. Amelung never signed the Document reflecting his job description, his pay and benefit package, or a non-compete agreement. He also never received a contract back from Mr. Amelung. However, he testified he would not have given two-weeks' notice to Craftsmen if he didn't believe to have been hired by Employer.

Claimant testified he met with Mr. Amelung and another of Mr. Amelung's employees at Culpepper's restaurant on July 6, 2011, the day he signed the papers.

Claimant now has a problem gripping hard with his left hand. He always drops material down through his finger because he has a hard time holding it.

Claimant called James S. Amelung as a witness. Mr. Amelung is not a welder or fabricator and he reached out to Employee in mid-April 2011. He heard Employee was let go from Kienstra and Mr. Amelung was entertaining the idea of starting up a field service business for Employer. Mr. Amelung had seen the work Claimant had done for Kienstra and reached out to him. He testified the flyer was something he was getting ready to send out to customers that indicated Employer was going to start a new field service division of the company. Once the division was formed, Employer would solicit the jobs and purchase all of the tools and vehicles. He admitted that if Employer had started the new division, Claimant would have been an employee and not an independent contractor.

Mr. Amelung drafted the paperwork which discussed the job description, compensation and benefits, and the non-compete agreement and gave the paperwork to Claimant after their first meeting. However, Mr. Amelung said after that first meeting, Claimant wanted Employer to include paid holidays and days off as well as vacation availability. Claimant also wanted a more thorough job description of what he would be doing.

Mr. Amelung stated the Columbia job, at which Claimant was injured, was done on a Saturday because Claimant was still employed by Craftsmen and the client needed to have the job completed by Monday. Mr. Amelung testified the Columbia job was scheduled around Claimant's work schedule with Craftsmen. Mr. Amelung testified Claimant agreed to do the work if he could do it on a weekend.[8] Once the job was committed to, the intention was for Claimant to do it over the weekend so it would be ready for the client on Monday. The Columbia client was Employer's client and Claimant was there to do installation. Claimant did not know the client.

Mr. Amelung testified that later on, the same as Claimant's injury, he sustained a heart attack. After driving Claimant to the emergency room, he went back to the job site in Columbia. While there, he began feeling ill and was driven to the hospital where it was determined he was having a massive heart attack. He stayed in the hospital in Columbia until the following Wednesday and then went back to St. Louis. On Thursday he had another incident and then coded the next four nights in a row until which time a pacemaker was inserted. Following the heart attack, Mr. Amelung's cardiologist advised him to work less. He slowed down his work schedule until December 2011.

[8] Transcript p. 64.

In January 2012, Employer started up the new division with two people other than Claimant. The two workers are employees of Employer and are doing the work Claimant was going to do. Employer has a written agreement with those two employees. Mr. Amelung testified that anyone who is an employee of Employer would also have gotten an employee handbook. Claimant was never given an employee handbook. Mr. Amelung testified that at the time of Claimant's injury, he had two employees on payroll, one a parts manager, the other an office manager. Employer's salesmen are 1099 subcontractors who work on straight commission.

Mr. Amelung never considered Claimant to be an employee, rather an independent contractor, because Claimant had the service truck and the tools and Employer didn't have any of those to do the field service work at the time. Mr. Amelung testified that Claimant was never hired as an employee because of some extra demands Claimant made at the meeting at Culpepper's. Claimant demanded a special military grade phone so he could call his parents in Panama, as well as some other requests involving equipment and tools. That is why Mr. Amelung never signed the contract or pursued his employment. When Claimant handed him the paperwork at Culpepper's, Mr. Amelung told Claimant he would consider his demands and get back to him. Mr. Amelung did not know Claimant had given his notice to Craftsmen until the meeting at Culpepper's.[9]

Mr. Amelung testified Claimant brought the paperwork back to Employer after the injury had already occurred. The following Thursday he met with his cardiologist who advised against starting the new division. At the time, he didn't know if he would recover from his heart attack and, if he were to die, there would be a new division of the company. Mr. Amelung testified that the meeting at Culpepper's occurred *after* his heart attack. He recalls this specifically because he had to be driven to Culpepper's because he had not yet been cleared to drive an automobile. Mr. Amelung also testified that at the time of the injury, he did not have his company in a position to commit to the division. Employer did not yet have the proper insurances needed for that kind of work and also had not hired any more employees who would be needed to actually perform the work, all of whom would serve under Claimant.

RULINGS OF LAW

Based on the substantial and competent evidence described above, including live testimony, the medical records, and my personal observations of Claimant at hearing, I find the following:

The central issue in this case is whether Claimant was employed by Employer on the date of injury or whether he was working in the capacity of an independent contractor. The parties agree if the former is determined, then Employer will be liable for permanent partial disability in an amount reflecting the amputation of Claimant's left middle finger as well as disfigurement. In addition, Claimant will be entitled to payment of the outstanding medical bills and reimbursement for his out-of-pocket medical expenses to date, as well as temporary total disability compensation for lost time at work following the injury. If the latter is determined, the above issues are moot.

[9] Transcript pp. 64-65.

Chapter 287.020 states "the word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations."

To determine whether an employment relationship exists, Missouri courts first apply a two-factor test, sometimes referred to as the controllable services test. *Lynn v. Lloyd A. Lynn, Inc.*, 493 S.W. 2d 363 (Mo.App.E.D.; 1973). First, the worker must be "in the service" of the alleged employer; second, the services of the worker must be controllable by the alleged employer. *Howard v. Winebrenner*, 499 S.W. 2d 389 (Mo. 1973).

The factors to determine if a "right to control" exist are: (1) The extent of the control, (2) the actual exercise of control, (3) the duration of employment, (4) the right of discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished the equipment, and (8) the employment contract. *Hutchison v. St. Louis Altenheim*, 858 S.W. 2d 304, 305 (Mo. App. E.D. 1993).

Overall, I find Mr. Amelung to be a more credible witness than Claimant. In the instant case, Employer secured the job at which Claimant injured himself. The job itself was of limited duration. Employer would not have been able to secure the job without Claimant's direct participation. Due to the client's need to have the job completed soon within a narrow time frame, and Claimant still being employed full-time at Craftsmen during the workweek, the job was performed on a weekend to accommodate Claimant's work schedule. Employer was not able to control the terms of Claimant's job performance as Mr. Amelung had no experience or knowledge of how to complete the job and relied solely on Claimant. Employer was completely dependent on Claimant's availability and participation for the Columbia job.

In addition, Employer did not furnish any of the equipment needed for the job because it did not yet own any. Because Claimant owned the necessary tools and equipment needed for the Columbia project, Employer was willing to pay Claimant a premium of $50.00 per hour for his time. Both parties admitted this type of project was not performed as part of Employer's regular course of business. Employer was contemplating starting a new division of its company to perform this kind of work and began discussions with Claimant regarding hiring him for that purpose. The details of their relationship had not been finalized by July 16, 2011.

Although an offer of hire can be verbal and a written agreement is not required, Claimant and Employer were still in negotiations concerning the salary and benefits of Claimant's contemplated position. Claimant made specified additional demands of Employer during their negotiations, many of which were never agreed to even verbally. When Claimant finally presented the signed Document to Employer, he did so after the injury and Employer explained to Claimant that he would consider them. I find Mr. Amelung's (Employer) testimony more credible than that of Claimant regarding the date Claimant returned the signed employment agreement to Employer. He testified that they met at a restaurant at a time after the injury had already occurred. Ultimately, and for whatever reason, no offer of hire was extended.

Employer testified that it had both salaried employees and independent contractors on its payroll. The salaried employees were provided an employee handbook. One wasn't provided to Claimant. Nor did Claimant ever complete any forms and was paid as an independent contractor, the same way as he was paid for a job with Employer only three months earlier. Claimant concedes that he served as an independent contractor for the prior Springfield job but argues he was an employee at the time of the Columbia job (*despite still being a full-time employee of Craftsmen*). The Court disagrees.

Instead, it appears an unanticipated and mutually beneficial opportunity arose, despite Employer not having yet established a new field service division and Claimant not having resigned from his full-time employment with Craftsmen. To secure the job, each party accommodated the other. Neither party could have predicted unrelated and unexpected health issues to derail not only the job at hand, but an eventual employment relationship between the parties. While unfortunate for Claimant, in doing so it seems the cart was, metaphorically, placed before the horse and no employment relationship existed at the time of the injury.

I find Claimant was not an employee of Employer at the time of the injury. As such, all other disputed issues are moot and Employer is not liable for any temporary total disability, permanent partial disability, disfigurement, or past medical expenses.

I certify that on 4-26-17, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By _____

Made by: _____
Lorne J. Baker
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS