

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213331

JUAN GARCIA, EMPLOYEE

CLAIMANT

**A & M ROOFING, INC.,
UNINSURED EMPLOYER**

RESPONDENT

OPINION FILED JULY 9, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 11, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE ERIC BUCHANAN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant is an employee of the respondent pursuant to Ark. Code Ann. §11-9-402 and whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find that the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties are unable to agree to any stipulations.

The claimant contends he was employed by Harold Mills at an average weekly wage of \$500.00, resulting in a compensation rate of \$333.75 for temporary total disability and \$250.31 for permanent partial disability. The claimant further contends he injured his left leg and wrist on April 12, 2002 when he fell off a roof. He seeks payment of medical expenses totaling \$21,719.21, temporary total disability benefits from April 12, 2002 to March 6, 2003 totaling \$16,020.00, and attorney's fees totaling \$6,567.50. Permanent partial disability benefits were not specified in the prehearing order filed March 4, 2003 and are reserved as an issue.

The respondent contends Jesus Garcia, the claimant's brother, obtained a waiver as a sole proprietor pursuant to Ark. Code Ann. §11-9-102(10) and §11-9-402. The respondent then contracted with Jesus Garcia to perform roofing jobs. The respondent did not hire Juan Garcia and does not know how he obtained employment. After the accident, some benefits were paid to the claimant by his brothers, Jesus and Pablo Garcia. Respondent further contends the claimant is not entitled to workers' compensation benefits because he is an illegal immigrant.

At some point between the prehearing conference and the date of the hearing, the respondent became incorporated.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant, his nephew, Pedro and his brother, Jesus, and the owner, Harold Mills. Ernie Sanya acted as interpreter for the claimant. The claimant, however, did not always wait for the translation and it is evident that he understands some English. Apparently the Garcia brothers are estranged and Jesus characterized Juan's testimony as a lie (Tr. p. 49, 56).

The claimant testified his brother, Jesus, contacted him about work and paid him \$100.00 per day. He used his brother's tools to perform the job. On cross examination, he conceded that Harold Mills had never called him to work on a job and had never paid him by check or by cash. He thought Mr. Mills was his employer because he sometimes checked on the jobs. The claimant stated he had worked on other jobs in the past for A & M Roofing.

The claimant testified he injured his left arm and leg on April 12, 2002 when he fell off a roof while removing shingles at the Drigger's house. He was treated by Dr. Thomas Rooney with surgery and physical therapy for a broken leg and wrist. The claimant has been unable to work since the accident.

Dr. Rooney completed an AR-3 dated March 12, 2003 showing A & M Roofing as the employer. He released the claimant on March 6, 2003 with a 7% rating to the upper extremity and

a 30% rating to the lower extremity. No work restrictions were specified.

Harold Mills testified he calls on the customers, surveys the roofing job, estimates the costs of materials and quotes a price to the customer. But he “farms out” the labor to six different contractors like Jesus Garcia. Mr. Mills testified he does not supervise the roofing jobs. He explained that he was at the job site on April 12, 2002 to help move a truck stuck in the customer’s yard. However, the agreement signed with Jesus Garcia indicates the contractor is responsible for damage to the customer’s property. Mr. Mills stated he had known the claimant for eight years and visited him at his home.

Jesus Garcia testified Mr. Mills pays him by check depending on the size of the roofing job and Mr. Mills supplies the shingles and nails. Jesus Garcia explained that he is paid for several jobs throughout the week with only one check, and it is difficult to isolate the cost of the Drigger’s job or estimate the profit.

Jesus Garcia signed a certificate of non-coverage with the Commission effective March 12, 1999 to June 3, 2002. He also signed an undated contract with A & M Roofing acknowledging his status as an independent contractor and outlining his responsibilities. Jesus Garcia was expected to provide the necessary tools, obtain insurance coverage (both workers’ compensation and liability), remove debris from the customer’s property and repair damage to the property and pay employment taxes. There is no mention of Jesus Garcia hiring a crew. Jesus Garcia stated that Mr. Mills sometimes gave him special instructions but basically Mr. Garcia was an experienced roofer.

Jesus Garcia also testified that his brother, Pablo called looking for work and Jesus passed along the job at the Drigger’s house to Pablo. Jesus was given to understand that Pablo also has a certificate of non-coverage. Unbeknownst to Jesus Garcia or Harold Mills, Pablo Garcia hired his brother, Juan Garcia, the claimant, to work on the Drigger’s house. Jesus Garcia paid Pablo for the work.

Pablo Garcia signed a certificate of non-coverage with the Commission on March 16, 2001.

A certificate of non-coverage for a Mr. Juan J. Garcia was introduced into evidence for the

time period of April 15, 1999 to June 30, 2002. No testimony was offered from the claimant concerning this matter. The Commission requires a social security number before a certificate can be issued. According to the AR-C in the Commission's file, the claimant has no social security number. Without some further means of identification, (testimony, picture ID, fingerprint) the respondents have not met their burden of showing the claimant was exempted by this certificate of non-coverage.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993. The provisions of Act 796 of 1993, are to be "strictly" construed, Ark. Code Ann. §11-9-704, §11-9-717. All prior case law contrary to or in conflict with Act 796, has been repealed, Section 35 of Act 796. Under Act 796 of 1993, the claimant has the burden of proving the following requirements, as defined in Ark. Code Ann. §11-9-102, (Cum. Supp. 1993), by a preponderance of the credible evidence of record, which means "evidence of greater convincing force, "Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death
- (3) proof of medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury
- (4) proof by a preponderance of the evidence that the injury was caused (a) by a specific incident and is identifiable by time and place of occurrence

In precedent set by the Full Commission, if the claimant fails to establish by a preponderance of the evidence any of the definitional requirements of the Act, the claimant has failed to establish the compensability of the claim, and compensation must be denied, Cater v. Aid Temporary Services, (Opinion of May 12, 1995)(E404813). Based on the lay testimony and medical records,

I am satisfied the claimant sustained an on-the-job injury.

The employment relationship is governed by Ark. Code Ann. §11-9-102(10)(11) and §11-9-402, see also Aloha Pools & Spas, Inc. v. Employer's Insurance of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), Silvcraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983), Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W. 286 (1982), and Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976).

The testimony shows the contractors are paid by the job without any withholding for taxes. Roofers are usually considered unskilled manual laborers. Mr. Mills is in the roofing business and roofers are an integral part of that business. Mr. Mills hires and fires the contractors, and there has been a continuous connection between the parties. Therefore, I find the claimant was an employee of an uninsured subcontractor at the time of his injury. The certificates of non-coverage exempt only Jesus or Pablo Garcia. The certificates do not apply to the employees of Jesus or Pablo Garcia. Accordingly, A & M Roofing is liable as the prime contractor.

Respondent offered no statutory or case law which would prevent an illegal immigrant from receiving workers' compensation benefits and I am not aware of any precedent. Accordingly, I find this argument to be without merit.

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employment relationship existed between the parties on April 12, 2002 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$333.00 for temporary total disability based on an average weekly wage of \$500.00.
2. At the time of his injury, the claimant was an employee of an uninsured sub contractor. The respondent is liable for this claim as the prime contractor.
3. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

4. Respondent is directed to pay all reasonable and necessary medical expenses subject to audit under Rule 30.
5. The claimant is entitled to payment of temporary total disability benefits from April 13, 2002 to March 6, 2003 as he remained in his healing period, totally unable to work.
6. Respondent has failed to prove by a preponderance of the evidence that the claimant was exempted by a certificate of non-coverage.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

_____ Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

_____ IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge

Entered Nunc Pro Tunc July 11, 2003