

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308907

EVARISTO AYALA

CLAIMANT

EAGLE SIDING & GUTTERING (Uninsured)

RESPONDENT #1

HIGH J BUILDERS (Uninsured)

RESPONDENT #2

OPINION FILED APRIL 23, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondent #1 failed to appear at hearing and was not represented by counsel.

Respondent #2 represented by STEVEN D. GUNDERSON, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 31, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 29, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant was an employee of respondent #1.
2. Compensability of injury to claimant's right foot on August 14, 2003.
3. Temporary total disability from August 15, 2003 through a date yet to be determined.
4. Medical.
5. Attorney fee.

6. Compensation rate.

7. Whether respondent #2 is liable for compensation benefits.

At the time of the hearing the claimant clarified his request for temporary total disability benefits to include August 14, 2003 through January 31, 2004. Claimant also reserved as an issue his entitlement to permanent partial disability benefits as a result of his compensable injury.

The claimant contends he sustained a right foot injury for which he was temporarily totally disabled from August 14, 2003 through January 31, 2004. The claimant has incurred reasonable and related medical. No benefits have been paid on this case and it has been controverted in its entirety; therefore, claimant's attorney is entitled to a controverted attorney fee on all benefits found due. Claimant also contends that respondent #1 was an uninsured subcontractor of respondent #2; therefore, respondent #2 is liable for compensation benefits pursuant to A.C.A. §11-9-402. Claimant reserves entitlement to permanent partial disability benefits.

Respondent #1 contends that the claimant was not an employee.

Respondent #2 contends that it is not liable for any compensation benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The parties' stipulation that the Arkansas Workers' Compensation Commission has jurisdiction of the within claim which was agreed to by the parties at the time of the pre-hearing conference on January 29, 2004, and contained in a pre-hearing order of that same date, is hereby accepted as fact.

2. At the time of his injury on August 14, 2003, the claimant was an employee of respondent #1, an uninsured subcontractor.

3. Claimant suffered a compensable injury to his right foot while employed by respondent #1 on August 14, 2003.

4. As a result of his compensable injury, claimant is entitled to payment for all reasonable and necessary medical treatment provided in connection with that compensable injury.

5. Claimant is entitled to temporary total disability benefits beginning August 15, 2003, the day after his compensable injury, and continuing through January 31, 2004.

6. Based upon claimant's contract of hire at the time of his injury, his average weekly wage equals \$500.00 which entitles him to compensation at the rate of \$333.00 per week for temporary total disability benefits.

7. Pursuant to A.C.A. §11-9-402(a) respondent #2 as the prime contractor of respondent #1, an uninsured contractor, is liable for payment of compensation benefits to the claimant. Respondent #2 is entitled to recover from respondent #1 all benefits paid to the claimant.

8. Respondents have controverted claimant's entitlement to all indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 28-year-old man who at one point worked for Bynum's Home Furnishings. Claimant testified that on August 12, 2003, Jessie Minnick, a former employee at Bynum's, and an individual named Lynn Jordan, the owner of respondent #1, came to visit him after work. Claimant testified that he was offered a job that day by Jordan to hang gutters for respondent #1. Claimant's pay was to be \$100.00 per day and he was to work five days per week.

Claimant testified that on August 13 tools were furnished to him by Minnick and that

he and Minnick hung gutters on a house in Fayetteville. The next day, August 14, claimant again went to a house in Fayetteville to hang gutters and sometime that afternoon was on a ladder that began to fall which caused claimant to fall off the ladder and strike the ground with his right foot. Claimant was taken by Minnick to the emergency room at Washington Regional Medical Center where claimant was diagnosed with an ankle sprain. Subsequent review of the x-rays revealed a fracture and claimant was referred to Dr. Pleimann for further treatment. Dr. Pleimann ordered a CT scan which confirmed a significant displacement of claimant's fracture and he recommended surgery which was performed in September 2003.

Claimant has filed this claim contending that he suffered a compensable injury to his right foot on August 14, 2003 while an employee of respondent #1, an uninsured subcontractor. Claimant contends that he is entitled to temporary total disability benefits, medical benefits, and a controverted attorney fee. Claimant also contends that respondent #2 is liable for payment of compensation benefits pursuant to A.C.A. §11-9-402.

ADJUDICATION

Initially, I find that the claimant was an employee of respondent #1. This finding is based primarily upon the testimony of the claimant at the hearing which I find credible and entitled to great weight. Claimant testified that on August 12, 2003 he was approached after work by Jessie Minnick and Lynn Jordan, the owner of respondent #1, and that Jordan asked him to work for respondent #1 hanging gutters. Claimant testified that Jordan offered to pay him \$100.00 per day and that he was to work five days per week.

The next day, August 13, tools were provided to the claimant and he helped place gutters on a house in Fayetteville. On August 14, claimant was again placing gutters on a house in Fayetteville when his accident occurred causing him to fracture his right foot.

As previously noted, I find claimant's testimony to be credible and entitled to great weight. Lynn Jordan, the owner of respondent #1, participated in the pre-hearing conference conducted on January 29, 2004. Notice of the hearing was sent to Mr. Jordan by certified mail. The certified mail receipt (admitted as Commission Exhibit #1) indicates that Mr. Jordan received notice of the hearing on February 6, 2004. Despite having received notice of the hearing Mr. Jordan chose not to appear.

Accordingly, I find that claimant was an employee of respondent #1 at the time of his injury on August 14, 2003.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right foot while working for respondent #1 on August 14, 2003. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (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) 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 by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof. Initially, I find that claimant has met his burden of proving by a preponderance of the evidence that the injury

arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. As previously discussed, claimant testified that he was putting gutters on a house for respondent #1 when a ladder started to fall causing him to fall to the ground and strike his right foot. This resulted in the claimant seeking medical treatment and his subsequent diagnosis of a fracture. I find that claimant's testimony regarding the injury is credible and entitled to great weight. Based upon claimant's testimony I find that he has satisfied these elements of compensability.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. Here, as previously noted, testing on the claimant's right foot revealed a calcaneous fracture which required surgery by Dr. Pleimann. Based upon this medical evidence as well as the remaining evidence presented, I find that claimant has satisfied the remaining elements of compensability.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right foot in the form of a fracture while working for respondent #1 on August 14, 2003.

Having suffered a compensable injury, claimant is entitled to payment for all reasonable and necessary medical treatment provided in connection with his compensable injury. This includes, but is not limited to, the emergency room treatment on August 14, the surgery performed by Dr. Pleimann in September, and physical therapy which was ordered by Dr. Pleimann after claimant's surgical procedure.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning August 15, 2003, the day after his compensable injury, and continuing through January 31, 2004. The injury to claimant's right foot is a scheduled injury. A claimant who suffers a scheduled injury is

entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Here, I find that claimant remained within his healing period and that he had not returned to work between August 15, 2003 and January 31, 2004. First, claimant testified that he did not work during this period of time. Furthermore, claimant's treating physician, Dr. Pleimann, completed a form on March 18, 2004 indicating that claimant was unable to work from August 14, 2003 through January 31, 2004 due to his fracture. Based upon this evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning August 15, 2003 and continuing through January 31, 2004.

The next issue for consideration involves claimant's compensation rate. Pursuant to A.C.A. §11-9-518(a)(1), compensation shall be computed on the average weekly wage earned by the employee under contract of hire in force at the time of the accident. In this particular case, claimant testified that Jordan, the owner of respondent #1, hired him to work five days per week at the rate of \$100.00 per day. I find that claimant's testimony regarding his wages is credible and entitled to great weight. Therefore, I find that claimant's contract of hire at the time of his injury was for five days of work per week at the rate of \$100.00 per day. This results in an average weekly wage of \$500.00 and a compensation rate of \$333.00 per week for temporary total disability benefits.

The final issue for consideration involves respondent #2's liability for compensation benefits. A.C.A. §11-9-402(a) states:

Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor.

Before an entity can be found to be a subcontractor, it must be shown that the prime

contractor was contractually obligated to a third person for the work being performed. *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W. 2d 526 (1982). Testifying at the hearing on this matter was James Wetwiska. Wetwiska testified that he is a custom home builder operating as High J Builders, respondent #2. Wetwiska testified that he was a general contractor on the house claimant was working on at the time of his injury. Wetwiska testified that he had a contract with a third party for construction of this home. Wetwiska testified that he entered into a verbal agreement with Jordan of respondent #1 to put gutters on the home. It was Wetwiska's belief that Jordan was going to perform the job himself. Although Wetwiska was not aware that respondent #1 had any employees, much less that claimant was an employee of respondent #1, A.C.A. §11-9-402(a)(1) does not require such knowledge.

Based upon the evidence presented, I find that Wetwiska as respondent #2 was the prime contractor because he was contractually obligated to the person for whom the home was being built. Wetwiska then entered into a verbal contract to subcontract the guttering work to respondent #1. Respondent #1 was an uninsured subcontractor. Because the claimant was the employee of an uninsured subcontractor, respondent #2 as the prime contractor is statutorily liable for payment of compensation benefits to the claimant.

While respondent #2 is liable for payment of all compensation benefits due and owing to the claimant, I do note that pursuant to A.C.A. §11-9-402(b) that respondent #2 may recover from respondent #1 any compensation benefits paid. Furthermore, subsection (b)(2) states that this recovery shall constitute a lien against any monies due or to become due to the subcontractor from the prime contractor.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he was an employee of respondent #1, an uninsured subcontractor, on August 14, 2003.

Claimant has also met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right foot while working for respondent #1 on August 14, 2003. Claimant is entitled to payment of all reasonable and necessary medical treatment provided in connection with his compensable injury. Claimant is entitled to temporary total disability benefits beginning August 15, 2003 and continuing through January 31, 2004. Claimant's average weekly wage of \$500.00 entitles him to compensation at the rate of \$333.00 per week for temporary total disability benefits. Pursuant to A.C.A. §11-9-402(a) respondent #2 is liable for payment of compensation benefits to the claimant. Pursuant to Commission Rule 20, respondents are also liable for the transcript expense in this case. The cost of transcribing this case was \$352.00. Respondent #2 has previously paid a \$100.00 deposit toward the transcript cost leaving a balance of \$252.00. Finally, respondents have controverted claimant's entitlement to all indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE