

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308944

RUSSELL HAYDEN, Employee	CLAIMANT
HAWLEY CONCRETE CONSTRUCTION, Uninsured Employer	RESPONDENT #1
SPMI and WAUSAU INSURANCE COMPANY	RESPONDENT #2
R.A. KING CONSTRUCTION and COMMERCE & INDUSTRY INSURANCE COMPANY	RESPONDENT #3

OPINION FILED JULY 22, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by JOE BYARS, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by JEFFREY RICKARD, Attorney, Fort Smith, Arkansas.

Respondent #3 represented by JACK TALBOT, Attorney, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

On June 28, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted by Judge Michael Ellig on March 2, 2004, and a pre-hearing order was filed on March 18, 2004. 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 has jurisdiction of this claim.
2. On all relevant dates, Wausau Insurance Company was the workers' compensation carrier for SPMI.
3. On all relevant dates, Commerce & Industry was the workers' compensation carrier for R.A. King Construction.

4. On all relevant dates, Hawley Concrete was uninsured.
5. The claim is controverted in its entirety.

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

1. Whether the claimant was an actual employee of Hawley Concrete on September 3, 2003.
2. Whether the claimant was a statutory employee of R.A. King Construction on September 3, 2003.
3. Whether the claimant was an employee of SPMI on September 3, 2003.
4. Whether the claimant sustained a compensable injury to his lumbar spine as the result of a specific incident on September 3, 2003.
5. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from September 4, 2003 through a date yet to be determined, and attorney's fees.

At the time of the hearing the parties also agreed to add as an issue the claimant's correct compensation rate.

The contentions of the parties are set out in the respective pre-hearing questionnaires.

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 stipulations agreed to by the parties at the pre-hearing conference conducted on March 2, 2004, and contained in a pre-hearing order filed March 18, 2004, are hereby accepted as fact.

2. On September 3, 2003, the claimant was an employee of Hawley Construction Company, Respondent #1.
3. On September 3, 2003, the claimant was not an employee of SPMI, Respondent #2.
4. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine while employed by Respondent #1 on September 3, 2003.
5. Respondent #1 was an uninsured subcontractor; therefore, respondent #3 as the general contractor is liable for payment of workers' compensation benefits pursuant to A.C.A. §11-9-402.
6. Claimant is entitled to payment of all reasonable and necessary medical treatment provided in connection with his compensable low back injury.
7. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable back injury.
8. Claimant's compensation rate is to be based upon payment at the rate of \$12.50 per hour.

#### FACTUAL BACKGROUND

The claimant is a 42-year-old-man who has primarily worked as a concrete finisher throughout his adult life. Claimant testified that he had two prior injuries for which he sought medical treatment. The first of these occurred in 1992 when claimant suffered a prior work-related injury to his low back. Claimant was off work for approximately one year before returning to work; was treated conservatively; and did not seek any additional medical treatment for his low back until after September 3, 2003. The second injury involved a non-work related rib injury in 1996.

Claimant testified that on September 3, 2003 he was working for respondent #1 as

a concrete finisher. Claimant testified that on that date he was lifting a troweling machine from the back of a trailer onto a concrete slab with Jeremy Hawley when he felt a pulling sensation in his back and sharp pain just below the belt line. Claimant testified that he continued to work throughout the remainder of the day, but that his pain progressively worsened. Claimant testified that he reported this incident to Bruce Hawley, the owner of respondent #1, late in the afternoon on September 3. That night claimant went home, took a hot bath, applied heat, and took aspirin.

Claimant testified that the next morning he returned to work and attempted to perform less physical work, but that as the day went on his pain gradually worsened. On September 5, 2003, the claimant again reported to work and worked approximately one to two hours before informing Bruce Hawley that he could not work anymore because of his back pain. Claimant was taken home by Don Duvall, an employee of respondent #1. Claimant sought medical treatment on September 5, 2003 from the emergency room at Sparks Medical Center where he was diagnosed as suffering from a lumbosacral sprain and released with medication. Claimant again returned to the Sparks emergency room on September 9, 2003 with complaints of worsening pain. As a result, an MRI scan was ordered which revealed degenerative disc disease at the L4-5 level with diffuse posterior disc bulge. It also revealed bilateral facet arthropathy at the L3-4 and L4-5 levels. The radiologist indicated that this finding was of unknown clinical significance.

Claimant has not received any additional medical treatment subsequent to the MRI scan and has not worked for respondent since September 5, 2003. Claimant filed this claim contending that he suffered a compensable injury while employed by Respondent #1. Claimant also contends that since Respondent #1 was an uninsured subcontractor, respondent #3 should be liable for payment of compensation benefits pursuant to A.C.A. §11-9-402.

ADJUDICATIONEMPLOYEE VERSUS INDEPENDENT CONTRACTOR.

The first issue for consideration is whether the claimant was an employee of respondent #1 on September 3, 2003, or whether he was an independent contractor as contended by respondent #1. The determination of whether at the time of an injury an individual is an independent contractor or an employee depends upon the facts of each case and the resolution of that issue requires an analysis of various factors related to an employer's right to control and to factors related to the relationship of the work to the asserted employer's business. *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W. 2d 286 (1982); *Garcia v. A & M Roofing*, Full Commission Opinion filed February 5, 2004 (F213331). In resolving this issue the Court in *Franklin* set forth several factors which may be considered in determining whether an individual is an employee or an independent contractor. These factors include:

1. The right to control the means and the method by which the work is done;
2. The right to terminate the employment without liability;
3. The method of payment, whether by time, job, piece, or other unit of measurement;
4. The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
5. Whether the person employed is engaged in a distinct occupation or business;
6. The skill required in a particular occupation;
7. Whether the employer is in business;
8. Whether the work is an integral part of the regular business of the employer; and,
9. The length of time for which the person is employed.

These are not all the factors which may be relevant in a particular case and it may not be necessary for the Commission to consider all of these factors in some cases. *Garcia, supra.*

After reviewing the relevant factors in this case, I find that claimant was an employee, not an independent contractor. Bruce Hawley is a contractor operating as respondent #1. The evidence indicates that claimant had worked for respondent #1 on several occasions in the past. According to claimant's testimony he was hired by respondent #1 to perform concrete finishing work as long as that work was available. Testifying at the hearing was Bruce Hawley who stated that he considered the claimant to be an independent contractor on September 3. Hawley explained that in the concrete finishing business it is sometimes necessary to have additional help for larger jobs. Hawley testified that he had a conversation with claimant and agreed to put claimant to work temporarily until claimant could find other employment. In short, Hawley testified that he was attempting to do a favor for the claimant. While I believe Hawley's testimony that he was attempting to do the claimant a favor, under Arkansas law the claimant was an employee, not an independent contractor.

First, it is important to note that claimant was paid by the hour by respondent #1, not by the job. In addition, while concrete finishing is a specialized skill, it is a skill which is integral to respondent #1's business. In fact, concrete finishing is respondent #1's business. It is also important to note that while claimant did provide his own hand tools, all other tools and materials were furnished by respondent #1.

I also note that although Hawley did not give claimant detailed instructions on every aspect of his job, the evidence clearly indicates that Hawley did supervise the claimant and the work he was performing.

Finally, the evidence indicates that respondent #1 had two other concrete finishers which were considered employees of respondent #1 (these employees and their

relationship with respondent #1 will be discussed in more detail later). Hawley testified that he did not direct the claimant any more or less than he directed the two concrete finishers who were considered employees of respondent #1.

Accordingly, for the foregoing reasons, after considering the relevant factors, I find that claimant was an employee of respondent #1, not an independent contractor. While respondent #1 may have considered the claimant to be an independent contractor, the relevant factors including supervision and right of control indicate that claimant was an employee, not an independent contractor.

#### WAS CLAIMANT AN EMPLOYEE OF SPMI (RESPONDENT #2)?

Respondent #2 is an employee leasing company that respondent #1 used for payroll and for the purpose of providing workers' compensation insurance for respondent #1's employees. Introduced into evidence is the contractual agreement between respondent #1 and respondent #2 regarding these employees. At issue is whether claimant was also an employee of respondent #2 at the time of his injury on September 3, 2003.

I find insufficient evidence that claimant was an employee of respondent #2 on September 3, 2003. First, I believe it is important to note that no one including the claimant, respondent #1, or SPMI, considered the claimant to be an employee of respondent #2. In fact, there is no indication that respondent #2 even knew that claimant was working for respondent #1. Wage records introduced by respondent #2 list other employees of respondent #1 but do not list the claimant. The employees of respondent #2 who were working for respondent #1 were paid by respondent #2. On the other hand, claimant was paid by check by respondent #1.

As previously noted, the parties introduced into evidence a copy of a contract entered into between respondent #1 and respondent #2. Although the contract indicates that it went into effect as of January 1, 2003, I note that the contract was not signed by the

respective parties until November 21, 2003, after the claimant's alleged injury.

Furthermore, to the extent that the contract would be controlling, I note that the contract contains language indicating that respondent #2 shall have the authority to hire all employees which are assigned to respondent #1. The contract states that no person will become an employee unless that person has made a written application for employment with respondent #2 and that person has been accepted by respondent #2 as an employee. Hawley testified that claimant did not complete an application for employment with respondent #2. Hawley testified that there is a specific procedure to be followed in order for employees of respondent #1 to become a part of respondent #2's leasing program. According to Hawley, that procedure was not followed in this particular case.

Given all of these facts, I find insufficient evidence that claimant was an employee of respondent #2 on September 3, 2003. Therefore, I find that respondent #2 has no liability for payment of any workers' compensation benefits with regard to claimant's alleged injury.

#### COMPENSABILITY.

Claimant contends that he suffered a compensable injury to his back while lifting a troweling machine on September 3, 2003. Claimant's claim is for an injury caused by a specific incident 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, I find that claimant has met his burden of proof. First, 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. Claimant testified that his injury occurred on September 3, 2003 when he and Jeremiah Hawley, the son of Robert Hawley, were lifting a troweling machine onto a concrete slab. Claimant testified that as they were lifting the troweling machine he developed a sharp pain in his back which gradually worsened over the next two days. Claimant testified that he informed Robert Hawley later that day that he believed he had pulled something in his back while moving the machine. As previously noted, claimant worked on September 4, 2003, but after working only one or two hours on September 5 was taken home and sought medical treatment from the emergency room.

Hawley testified that he does not recall the claimant indicating that he had injured his back on September 3. Hawley also testified that he did not notice the claimant having any physical difficulty performing his job on September 4 but did notice the claimant moving in "slow motion" on September 5. Hawley testified that claimant informed him that he could not work and that this was his first notice that claimant was having a problem with his back. Hawley testified that he did not learn that claimant was alleging a work-related injury until September 7.

Also testifying at the hearing were several other employees of respondent #1. One of these employees was Charles Green who was employed as a concrete finisher. Green

testified that he worked around claimant on a daily basis and that claimant made complaints about his back bothering him and other “stuff” each day. Green testified that claimant did not inform him that he had hurt his back on respondent #1's job, but instead indicated that he had injured his back in Bartlesville, Oklahoma some two to three years earlier. The second witness was Don Duvall, a form carpenter. Duvall testified that he drove the claimant home on September 5 and that he did not know about any injury to the claimant's back before that day. Duvall did testify that while taking claimant home he indicated that he had injured his back two days earlier while lifting the troweling machine. Finally, also testifying was Jeremiah Hawley, the son of Bruce Hawley. Hawley testified that while he was unloading the troweling machine with claimant on September 3 the claimant did state that his back was hurting; however, Hawley “didn't think anything of it”.

In addition to the testimony, I have also reviewed the medical records from the Sparks emergency room. Although the emergency room records indicate that the injury occurred on September 4, not September 3, the records do contain a history of injury consistent with claimant's testimony. The emergency room records both indicate that claimant gave a history of having injured his back while lifting a machine or concrete finisher at work.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back which arose out of and in the course of his employment with respondent #1 and that he suffered an injury caused by a specific incident identifiable by time and place of occurrence. I find claimant's testimony to be credible and supported by the remaining evidence; particularly, the testimony of Jeremiah Hawley stating that claimant complained of back pain while they were lifting the finishing machine. In addition, claimant's testimony is corroborated by the history contained in the medical records.

I also find that claimant has met his burden of proving that the injury caused internal

physical harm to his body which required medical services and that he has offered medical evidence supported by objective findings establishing an injury. The emergency room records from Sparks Medical Center on September 5 and September 9 both indicate the presence of muscle spasms. Muscle spasms are considered “objective findings” sufficient to satisfy compensability. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997). In addition, the MRI scan conducted on September 16, 2003 revealed a disc bulge at the L4-5 level. As a result of claimant’s complaints he was prescribed medication by the emergency room physicians.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by respondent #1.

Having found that claimant has met his burden of proving a compensable injury, the claimant is entitled to payment for all reasonable and necessary medical treatment provided in connection with his compensable low back injury. This includes the emergency room visits, the MRI scan, and any future medical treatment which is reasonable and necessary.

#### TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant contends that he is entitled to temporary total disability benefits beginning September 4, 2003, and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, I find that claimant has failed to meet his burden of proving

by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury. Even if one were to assume that claimant remained within his healing period, I find that claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from working as of September 4, 2003. While claimant has not worked for the respondent since that date, I note that the emergency room records do not indicate that claimant was totally incapacitated from working as of September 5, 2003. Furthermore, although claimant testified that he could not perform all functions as a concrete finisher, claimant did indicate that he was capable of performing some lighter concrete finishing work. In fact, subsequent to his injury the claimant has within the last three months performed some concrete-type work for an individual named Bill McIlroy. Claimant testified that he does not perform heavy lifting, but instead helps “lay out” and performs some supervisory-type work.

In summary, in order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. Here, even assuming that claimant does remain within his healing period, I find that claimant has failed to prove by a preponderance of the evidence that he suffers a total incapacity to earn wages. The medical records do not indicate that claimant should refrain from working. Furthermore, claimant testified that he was capable of performing some aspects of his concrete finishing job and in fact had performed some work for another employer. Given this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

### LIABILITY OF RESPONDENT #3.

Claimant contends that as an employee of an uninsured subcontractor, he is entitled to receive compensation benefits from respondent #3, the prime contractor.

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.

In order for respondent #3 to be a prime contractor, respondent #3 must be contractually obligated to a third party for the work being done by respondent #1. In this particular case, R.A. King who is doing business as respondent #3 was present at the hearing. King testified that he hired respondent #1 as a subcontractor on homes he was building in the Riley Farms area. I also note that Bruce Hawley testified that he was a subcontractor on this job for respondent #3, the general contractor.

Based upon this evidence, I find that respondent #3 was the prime contractor; therefore, respondent #3 is liable for payment of compensation benefits owed to claimant pursuant to A.C.A. §11-9-402(a). Respondent #3, while liable for payment of compensation benefits, is entitled to recover those benefits from amounts due and owing to respondent #1 as a subcontractor. A.C.A. §11-9-402(b).

#### COMPENSATION RATE.

The claimant's correct compensation rate was raised as an issue at the time of the hearing. I find based upon the evidence presented that claimant's compensation rate should be based upon an hourly rate of \$12.50. Claimant testified at the hearing that he believed he was paid at the rate of \$13.00 to \$13.50 per hour; however, he was unsure of the exact amount. On the other hand, Bruce Hawley testified that he agreed to pay claimant \$12.50 per hour for his work. I find that Hawley's testimony is more credible with respect to this issue and therefore find that claimant's compensation should be based upon payment at the rate of \$12.50 per hour.

Even though I have determined that compensation should be based upon a rate of

\$12.50 per hour, it is impossible to determine from the evidence presented the claimant's average weekly wage. Although Hawley testified that claimant earned a total of \$684.00 in gross wages, Hawley was unsure as to the number of days claimant actually worked. Likewise, claimant was unsure as to the exact period of time he worked for respondent #1. Absent additional evidence regarding this issue it is impossible to fairly determine the claimant's average weekly wage except to find that it should be based upon an hourly rate of \$12.50 per hour. Given my finding that claimant is not entitled to temporary total disability benefits as a result of his compensable injury, this lack of evidence may not be crucial.

#### DRUG DEFENSE.

During the hearing questions were asked of the claimant and of other witnesses regarding alleged drug use by the claimant on the job. Upon inquiry, counsel for respondent #1 indicated that it wished to raise the use of drugs as a defense. I denied respondent #1's request to raise this as an issue because it was not raised as an issue at the time of the pre-hearing conference and therefore it was not included as an issue in the pre-hearing order filed by Judge Ellig on March 18, 2004. Furthermore, even if it had been a legitimate issue, I would find that there was insufficient evidence offered indicating that illegal drugs were present in the claimant's body at the time of his accident on September 3, 2003. Given the nature of claimant's injury, even if illegal drugs had been present in the claimant's body I would find that claimant had overcome the rebuttable presumption that his injury was substantially occasioned by the use of those illegal drugs.

#### AWARD

\_\_\_\_\_ Claimant was an employee of respondent #1 on September 3, 2003. Claimant was not an employee of respondent #2 on September 3, 2003. Claimant has met his burden

of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by respondent #1 on September 3, 2003. Claimant is entitled to payment for all reasonable and necessary medical treatment provided in connection with his compensable low back injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury. Pursuant to A.C.A. §11-9-402(a) respondent #2 is liable for payment of all compensation benefits due and owing to claimant. Respondent #3 is entitled to reimbursement of these benefits from respondent #1. Claimant's compensation rate should be calculated based upon an hourly wage of \$12.50 per hour.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE