

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301894

BENNIE HOLLIMAN, EMPLOYEE	CLAIMANT
BOX LOGGING, EMPLOYER	RESPONDENT
AMERICAN INTERSTATE INS. CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 7, 2004

Hearing before Administrative Law Judge J. Mark White on August 26, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. James M. Pratt, Jr., Attorney at Law, Camden, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 26, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on June 23, 2004, and a Prehearing Order was entered that same day. A copy of the June 23, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated only that an incident occurred on May 28, 2002.

The parties agreed that the issues to be presented were whether the claimant

was an employee of the respondent-employer, or an independent contractor; whether the claimant sustained a compensable injury to his right foot and ankle; whether the claimant is entitled to associated medical and indemnity benefits; whether the claimant is permanently and totally disabled; determination of the claimant's average weekly wage and corresponding compensation rate; and controversion and attorney's fees.

The claimant contends that sometime during May or June of 2002 he was an employee of Box Logging and was working in the woods, cutting trees, when a fellow employee who was operating a loader dropped a tree on the claimant, breaking his right foot and ankle, which required surgery; and that he is permanently and totally disabled as a result of his injury.

Respondents contend that the claimant was not an employee of Box Logging. In the alternative, the respondents contend that because the claimant's injury was a scheduled injury, the claimant is not entitled under the law to permanent and total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with Ark.

Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence the existence of a contract of hire between the claimant and the respondent.
4. The claimant has failed to prove by a preponderance of the evidence that he was an employee of the respondent.
5. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment with the respondent.
6. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.
7. The respondents have controverted this claim in its entirety.

DISCUSSION

Bennie Holliman, the claimant herein, is 74 years old and has worked as a logger most of his adult life. On May 28, 2002, he was in a forest near Highway 82 in Ouachita County with a logging crew employed by the respondent, Ernest Box. Box is Holliman's nephew. The claimant's son, Bennie "Junior" Holliman, Jr., was working as a member of that logging crew. The claimant testified he was trimming logs when a log being moved by a loader hit his leg and broke his right ankle. The claimant testified he was an employee of Box at the time of the injury; Box denied that he had hired the claimant or that the claimant was his employee.

An "employee" is statutorily defined as:

[A]ny person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied.

ARK. CODE ANN. § 11-9-102(9)(A).

The question, then, is whether there was any contract of hire, whether express or implied, between the claimant and the respondent. It is not enough for the claimant to show that he was doing work on behalf of the respondent, or that he was at the respondent's job site. He must show that there was a contract of hire – in other words, he must show that the respondent had agreed to hire him. More specifically, for there to be an enforceable contract, it must be shown that there was

both an offer and an acceptance. *See, e.g., Gibson v. Boyd*, 206 Ark. 48, 172 S.W.2d 928 (1943). The claimant's performance of services alone is insufficient to show the existence of a contract. *Cf. Shuffield v. Hunter*, 268 Ark. 1003, 597 S.W.2d 852 (1980) (holding there to be no contract between real estate broker and property owner where broker successfully sold land even though owner had never agreed to employ the broker).

The question of whether there was a contract of hire between the claimant and respondent depends entirely on the credibility of the witnesses, for their testimony direct conflicts with one another. The claimant, his son, and his brother-in-law testified that Box had agreed to hire the claimant. Box denied having done so. After considering the record in its entirety, I find that Box's testimony is more plausible and credible and entitled to greater weight than that of the claimant, the claimant's son and the claimant's brother-in-law.

In making this finding, I first note that both the claimant and his son testified that there were other individuals working with them at this logging site the day of the accident. The claimant testified that he had been working at this job site for some three weeks. Yet the claimant called none of these other workers to corroborate his testimony that he had been working for Box for three weeks; he called instead only members of his family. The claimant testified that he was paid by check, yet he

produced no cancelled checks, check stubs, bank statements, or other records documenting these alleged payments. The claimant testified that other individuals cashed the paychecks for him, yet he called none of these individuals to testify. The claimant testified that he went to work for Box without knowing what his salary would be – testimony that I find to be implausible.

The claimant testified that he did not receive an IRS Form 1099 from Box, and Box testified that he did not issue a Form 1099 to the claimant. Yet it was in the financial interests of Box to issue a 1099 to the claimant if the claimant had indeed been employed by him, for without that documentation Box could not deduct the claimant's salary as a business expense from his income taxes.

I note that the hospital records admitted into evidence from the day of the claimant's accident identify the claimant, not the respondent, as the "responsible party." The same records list "retired" in the space for "employer name/address." In short, there is no evidence whatsoever, other than the testimony of the claimant and two of his family members, that there was an actual contract of hire between the claimant and the respondent.

Finally, I note that the claimant and his son admitted that the claimant would sometimes go along with his son to job sites just to have something to do. The claimant testified on cross-examination as follows:

Q. Now, have you worked with your son on some other jobs since May the 28th of 2002?

A. No, sir. I ain't worked none, no other jobs.

Q. Do you ever go with him just to have something to do?

A. I go around, sit and look at him sometimes, but other than that I don't go out there.

Q. And isn't that what you were doing back in May of 2002? Weren't you just out there watching the job so you'd have something to do?

A. Nope, I was working. He had hired me.

His son testified as follows:

Q. Does your dad ever go out on the job with you just for something to do?

A. Well, he used to.

Q. And what would he do when he'd go out just for something to do?

A. Just sit around and look.

Q. Is this while you're working in the logging woods?

A. Uh-huh (yes).

Q. So I'm assuming he did this before May the 28th of 2002?

A. On other jobs.

Q. On other jobs?

A. Uh-huh (yes).

Q. Has he been doing it since then?

A. No.

Q. Has he been riding with you in the truck or anything like that?

A. No, I don't drive the truck anymore.

Q. So since this ankle injury, your dad hadn't been out to see you work or just to observe or anything like that?

A. One time. Once.

Box testified that he knew the claimant was on the job site with Junior Holliman, and that Box had instructed the claimant not to use the logging equipment. The injury occurred after Box left the job site to attend to a problem at a different job site.

In short, given the lack of any corroborating documentary evidence, the lack of any corroborating testimony from someone other than a family member, and the implausibility of portions of the claimant's testimony, I cannot find credible his allegation that he was employed by the respondent, nor can I find credible the testimony of his son and brother-in-law. I find more credible the testimony of Box that the claimant accompanied his son to the job site that day for something to do,

not because he had been hired by Box.

I find that the claimant has failed to prove by a preponderance of the evidence the existence of a contract of hire between the claimant and the respondent. I therefore find that the claimant has failed to prove by a preponderance of the evidence that he was an employee of the respondent. Because I find there was no contract between the claimant and the respondent, it follows that the claimant is also not an independent contractor of the respondent.

Because he was not an employee, the claimant has no lawful claim for benefits for this injury. To be compensable, an injury must be shown to have arisen out of and in the course of employment. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to prove this element, or any other element of compensability, the claim must be denied. *Id.* If the claimant was not an employee of the respondent, then by definition his injury cannot have arisen out of and in the course of employment. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

AWARD

The claimant has failed to prove by a preponderance of the evidence that he was an employee of the respondent or that he sustained a compensable injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge