

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312438

SHAWN HOWARD	CLAIMANT
BRIDGEPOINT OF ARKANSAS, INC.	NO. 1 RESPONDENT
TRAVELERS INSURANCE INSURANCE CARRIER	NO. 1 RESPONDENT
POE'S AERIAL COMMUNICATIONS	NO. 2 RESPONDENT

OPINION FILED JUNE 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JAMES FILYAW, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by JASON BROWNING, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on March 11, 2004, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 23, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. The claimant is entitled to the maximum compensation rate for 2003.

3. The parties stipulated that the claimant filed his claim with an AR-C with the Commission on November 19, 2003.

By agreement of the parties the issues to litigate are limited to the following:

1. Employment status of the claimant.
2. Related medical.
3. Temporary total disability from about July 12, 2003, to a date to be determined.
4. Lack of notice to the date the AR-C was filed.
5. Attorney's fees.

In regard to the foregoing issues the claimant contends that as a result of his compensable leg injury, he has suffered and is suffering temporary total disability. At the end of his healing period, the claimant anticipates he will have suffered a degree of permanent partial disability.

In regard to the foregoing issues Respondents No. 1 contend that the claimant is an independent contractor or, alternatively, an employee of Poe's Aerial Communications. If the claimant is found entitled to benefits under authority of Ark. Code Ann. §11-9-402, then respondents Bridgepoint/Travelers claim recovery over against Poe's Aerial Communications pursuant to Ark. Code Ann. §11-9-104(b)(1). Lack of notice is also asserted.

In regard to the foregoing issues Respondent No. 2 contends that the claimant was an independent contractor and not an employee of Poe's Aerial Communications. Further, separate respondent, Poe's Aerial Communications contends that any and all medical

treatment and/or surgeries obtained by claimant were not approved and no workers' compensation claim was made to separate respondent prior to said medical services. Further separate respondent, Poe's Aerial Communications, asserts that claimant has concluded his healing period and has not suffered a degree of permanent partial disability and that separate respondent, Poe's Aerial Communications, makes such a contention without waiving its position that the claimant was an independent contractor.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and medical bills marked Claimant's Exhibit No. 2. Respondent No. 2 submitted documentary evidence marked Respondent No. 2's Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that in July 2003 he was working as a lineman for Respondent No. 2. The claimant testified that he was running a crew for Respondent No. 2 hanging cable. The claimant explained that he had contacted Respondent No. 2 looking for work and that Rick had taken his number and a couple of weeks later, after the initial contact, had called him to come work for them. The claimant described his job of hanging cable as picking up the map and information as well as materials from Respondent No. 2 as to the location he was to be working and then go out on the job and climb poles and hang cable. The claimant testified that he would

go in early each morning to submit his bill. The claimant testified that he worked with some other gentlemen who were working as linemen before he started.

The claimant testified that he was working with Rick, Jeff and three of Respondent No. 1's employees on the day he got injured. The claimant testified that he had been stringing fiber and had come down off the pole but still had on his gaffs. The claimant explained that gaffs are the apparatus which you put on your legs in order to climb poles. The claimant testified that he was trying to go through a fence that was on the side of a hill or bluff and when he was going through the fence, one of his gaffs got caught, he fell and did a couple of somersaults before he hit. The claimant testified that he hit the ground and there was a rock right beside him which in his opinion was what did the damage to his left knee. The claimant testified that he tried to walk it off and kept working. The claimant testified that he climbed up one more pole but his knee was hurting so bad that he could hardly get down. The claimant testified that when he did finally get down off the pole he took his hooks off and reported to the rest of the crew that he could not climb that he was hurting too bad. The claimant testified that the crew knew he had hurt himself.

The claimant testified that when he would go by to pick up his materials and tools he would usually report to either Gail or Rick Poe in order to pick up his maps, materials and tools. The claimant testified that then he would usually go and see what he needed for the day's work. The claimant testified that after he

hurt himself he told Jeff as soon as he got off the pole that he could not do this and that Respondent No. 1's employees were also told and one of them had suggested that he go to the hospital. The claimant testified that he tried to finish out his day's work but thinks that he quit a few hours early because he was hurting so bad. The claimant stated that other employees were on the job site to bring back all the tools so he got in his truck and left. The claimant testified that he came to work the next day and that within a few days Respondent No. 2 provided a bucket truck so he could work. The claimant testified that he continued to work off and on for about a month and a half. The claimant testified that other employees would drive the truck out to the job site because he did not have a driver's licence and he would work out of the truck. The claimant testified that he continued working in this manner up until he went to the hospital.

The claimant agreed that he was seen at St. Edwards on July 14, 2003, for problems with his left leg. The claimant testified that an MRI was scheduled the following Monday and he thinks that he underwent surgery on the Monday after that. The claimant testified that he tried to go back to work within six weeks after his surgery because he had been promised his job back but when he went back there was no work for him. The claimant testified that he did not work any more for Respondent No. 2 after his surgery. The claimant testified that he underwent a second surgery on his knee in January 2004. The claimant testified that his knee is a lot better now but he still does not have full use of it. The

claimant testified that he is not back climbing poles because he has changed to working on satellites. The claimant was asked how much work he missed besides the six weeks after his surgery and the claimant stated that he went back to work for another company right before Christmas but this work did not last due to his employer not paying him regularly. The claimant testified that the only time he has been off work was as a result of his first surgery indicating that he went right back to work after his second surgery.

The claimant testified that when he went to work for Respondent No. 2 he was given a paper to sign by Gail Poe, one of the owners. The claimant testified that Ms. Poe told him that he was signing something saying that they would furnish the equipment to perform the job and past that he does not remember what else was said that day. The claimant was then asked if he had read the document and the claimant testified yes and no indicating that he took her word for it. When asked, the claimant testified that he had gone as far as the eighth grade in school and could read and write somewhat. The claimant was then shown Respondent No. 2's exhibit and identified his signature on the third page of that exhibit. The claimant agreed that he signed this document on July 7, 2003, and that he had signed this document before he got hurt. The claimant indicated that Ms. Poe did not tell him that this was an independent contractor agreement and when asked if he knew what an independent contractor is, the claimant responded, "Someone with workers' comp and makes more money than the guy that goes and does it." The claimant testified that when he went to work for

respondent No. 2, he understood that he was to be paid every Friday and was to be paid based on so much a foot of cable that was strung. The claimant testified that he did understand that he was to pay his own taxes on his wages at the end of each year and that Ms. Poe never told him anything about workers' compensation. The claimant testified that later on Ms. Poe had him sign something that had something to do with workers' compensation. The claimant testified that he did not understand at all that he was not covered by workers' compensation and it was never explained to him.

On cross examination, the claimant agreed that before he went to work for Respondent No. 2 he was well experienced in hanging cable and had done this for several years. The claimant testified that he has some equipment needed to do the lineman type work and that before working for Respondent No. 2 and working for other employers stringing cable, he sometimes would use his own equipment if it was better than that being furnished to him. The claimant explained that he did that so that he could do the work faster and make more money because more feet of cable would be laid each day. The claimant testified that he probably has enough equipment to hang cable. The claimant testified that he would not provide cable nor could he afford to provide lashers because it was much too expensive. The claimant agreed that he had enough equipment to splice two pieces of cable together so that it would be a continuous strand. The claimant testified that when he went to work for Respondent No. 2 he was not told that he would have to provide his own equipment to do the job. The claimant agreed that

it was his understanding that Respondent No. 2 was going to furnish all the equipment needed to do the job. The claimant agreed again that he was paid by the number of feet of cable strung, that he was paid every Friday and that taxes were not withheld from his pay. The claimant testified that he would report into Respondent No. 2's office each morning in order to get a map as to the location where cable was to be strung. The claimant testified that usually it was a new map each day but if he had not finished what had been scheduled for the previous day, he would go and finish that or sometimes he would be instructed or pulled off a job to do a priority job. The claimant agreed that each morning he would also give a progress report to respondent No. 2 but that he relied on Respondent No. 2 to keep all the records because he did not do his own billing. The claimant agreed that he would know from day to day how many feet of cable he had hung. The claimant testified that he was well acquainted with the type work which was required of him and although he did not have a direct supervisor, his work was inspected and if it was not done correctly he would be sent back to correct it. The claimant testified that there were no mandatory hours for him to work but he usually reported to the office every morning at 7:15 to get his instructions, materials and turn in his billing. The claimant testified that due to some licencing problems he did not drive the bucket truck to the job site but that another employee would drive the truck for him and maintenance of the bucket truck was the responsibility of Respondent No. 2. The claimant agreed that he had most of the

equipment needed to carry out his job, however, he used Respondent No. 2's equipment except when his was better and he could work faster with the better equipment. The claimant again stated that the more feet of cable laid the more money he would be making. The claimant testified that he was walking between poles when his knee injury happened. The claimant testified that the day of his injury he reported his fall to Rick Poe, one of the owners of Respondent No. 2's business. The claimant was asked if he went to work the next day following his injury and the claimant testified that he was not sure but that he thought so. The claimant agreed that it was not until July 14, 2003, that he received medical treatment for his knee. The claimant testified that it was after this visit that he began working with the bucket truck and he continued working in this manner until he had his surgery in August. The claimant testified that although he is fuzzy on the numbers, he was off work following his surgery for six to eight weeks. The claimant agreed that he underwent a second surgery in January to remove hardware which had broken in the surgical site. The claimant testified that he went back to work within two to three days following his second surgery.

In cross examination by Respondent No. 2, the claimant agreed that he has hung cable all over the United States and considers himself knowledgeable in the cable hanging business. The claimant also agreed that he has all the necessary tools to do the cable hanging job and he uses his own safety belt as well as gaffs. The claimant agreed that Respondent No. 2 worked on a production basis

and this was pretty standard throughout the country for this type of work. The claimant testified that when he went to work for Respondent No. 2, he understood that they were to provide all of his equipment but that as he had stated earlier in his testimony the drill which they provided him did not have a reverse, therefore, he used his own because he could work faster with it. The claimant testified that because the chain hoist which Respondent No. 2 had was "messed up" he also used his own equipment. The claimant testified that he worked for Respondent No. 2 and he was their foreman on the job. The claimant testified that he was in control out on the job site but that Respondent No. 1 sent out quality control people to check their work. The claimant testified that to his knowledge the materials were furnished by Respondent No. 1 because Respondent No. 2 was a subcontractor. The claimant was asked if he continued to work for Respondent No. 2 after his July injury and the claimant responded, "Yes. I tried." The claimant testified that after the six weeks he was off work following his surgery, he tried to go back to work for Respondent No. 2 but was told that he did not have a job because there was no work and he was referred to Tad Shelton. The claimant testified that he went to work for Mr. Shelton for a couple of months but during this time he continued to see his doctor every few weeks and was taking pain pills. The claimant testified that Respondent No. 2 never discussed with him purchasing his own coverage for workers' compensation.

Gail Lynn Poe testified that she and her husband were subcontractors of Respondent No. 1. Ms. Poe testified that the claimant showed up at Respondent No. 2's office and spoke with her husband around the end of May 2003. This witness testified that the claimant told them that he had his own equipment and tools to do the job of ariel construction and hanging strand. This witness testified that Respondent No. 1 was provided maps by their employer each day and that Respondent No. 1 in turn provided them with maps and notes that specified what needed to go up on the pole and this was the information that they worked off of. Ms. Poe testified that the claimant did not report to her every morning before he would go out into the field. Ms. Poe testified that when the claimant would pick up a map he would also pick up materials for that particular job that needed to be done before he went out. Ms. Poe testified that a map might involve one days work or it might involve up to a weeks work. Ms. Poe testified that when a map was finished the next morning the crew would come in and another map would be turned over to them along with their ticker tape with their footage because that was how the crew was paid. Ms. Poe testified that there might be two or three days before the claimant would come in. Ms. Poe testified that the contract which Respondent No. 2 and the claimant entered into in July set forth that he was to provide his own equipment as well as be responsible for gas and payment of his own fuel. This witness testified that she also explained to the claimant that they had to provide their own workers' comp insurance as well as explained to him what it

would cost. This witness testified that the claimant rejected the workers' comp insurance. Ms. Poe testified that she thinks that the claimant told her that he had been to see a doctor the day after he had in fact been seen by the doctor but she does remember that she told the claimant that he would have a job when he returned after his surgery. Ms. Poe testified that the claimant had been talking about his previous motorcycle injury where he hurt his knee. This witness testified that the work was getting very slow and they encouraged him to go ahead and have his knee surgery because his work depended on his leg. Ms. Poe testified that the claimant was hesitant to take off to have knee surgery but that they had assured him that they would have work for him when he came back. Ms. Poe testified that by the time the claimant returned to work after his surgery they had run out of work and there was no work available. This witness stated that Tad Shelton had been given work by Respondent No. 1 and that they encouraged and recommended that the claimant work for Mr. Shelton.

Ms. Poe testified in cross examination by the claimant's attorney that the claimant actually began working on May 24. Ms. Poe testified that besides the claimant there were five other people working for them as subcontractors and they were all under the same type of subcontractor agreement. Ms. Poe testified that she also explained to all of them at the same time about the workers' compensation insurance and that they would have to provide their own insurance. This witness testified that she disagreed with the claimant's testimony that her husband, Rick, was out on

the job frequently checking to see how well the job was being done. Ms. Poe testified that the quality control people working for Respondent No. 1 did this job. Ms. Poe testified that Respondent No. 2 did provide the bucket truck but it was explained to the crew that if they tore anything up on the truck they would have to repair it as well as pay for fuel. This witness stated that Respondent No. 1 provided the cable which was being strung. Ms. Poe testified that the claimant did quality work although they did have problems with the claimant not staying out in the field all day which they found out about through the other people that were working with him.

Ms. Poe testified under cross examination by Respondent No. 1's attorney that Respondent No. 2 and Respondent No. 1 had had a working relationship for approximately four years. Ms. Poe agreed that Respondent No. 1 is kind of a master contractor and that Respondent No. 1 will contract with businesses like Respondent No. 2 in the area where they have work. Ms. Poe also testified or agreed that the agreement between Respondent No. 1 and Respondent No. 2 is that Respondent No. 2 will hire people to work and get the job done in the area.

On rebuttal testimony, the claimant stated that in the beginning of his working relationship with Respondent No. 2 Ms. Poe had pointed out to him that, "We will provide all equipment that's necessary to perform the job." The claimant testified that he was not told that he would have to bring his own tools although he did choose to use some of his own tools in order to speed up the work.

The claimant stated that if he was a contractor or a subcontractor he would have gone to get his own workers' compensation and then subcontract to Respondent No. 1. The claimant was asked if Ms. Poe had gone over a document with him as she had testified and the claimant responded, "No, No."

The medical records set forth that the claimant was seen at the emergency room at St. Edwards Mercy Medical Center on July 14, 2003, where it is reported that he twisted his knee while hanging fiber Wednesday. It is also noted that the claimant had an old motorcycle injury and has bipartite patella from an old nonunion fracture. The claimant was diagnosed with having internal derangement of his left knee and he was placed in a knee immobilizer and an MRI was scheduled. An MRI of the claimant's left knee done on July 16, 2003, sets forth that he has large joint effusion possibly with disruption of at least a portion of the attachment of the upper patella. There may be attachment present along the extreme lateral aspect and clinical correlation recommended as this could be a chronic finding since the claimant is apparently not complaining of this area. It is also noted that there are no other significant abnormalities seen. The claimant underwent surgery for his left knee on August 18, 2003, to repair an acute injury to his chronic nonunion left patella. The procedure performed was an open reduction of his internal fixation left patella. In the operative report, Dr. Sudbrink writes that once the site was opened there was absolutely nothing that looked like acute injury at that point and time but there was very dense

chronic fibrous type tissue at the reticulum corners of the patella. It was also noticed that there were larger pieces of bone fragment for which the procedure mended and pieced together with the use of hardware. The claimant underwent a second surgical procedure on January 6, 2004, to remove the implants from his left patella following his open reduction and internal fixation for long standing nonunion. The procedure performed at this time was metal removal.

In the non-medical documentation there is an agreement marked Respondent No. 2's Exhibit No. 1 which is dated July 7, 2003, and has been signed by the claimant as identified by the claimant during testimony as his signature. This agreement sets forth the terms between Respondent No. 2 and the claimant as to his status of being an independent contractor.

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas Craft Inc., 5 Ark. App. 264, 635 S.W. 2d 286 (1982). Ordinarily, no one feature of the relationship is determinative. Carter v. Ward Bodyworks, Inc., 246 Ark. 115, 439 S.W. 2d 286 (1969). In recent years, the Courts have considered the "relative nature of the work test" in addition to the right to control test. Sandy v. Salter, 216 Ark. 486, 541 S.W. 2d 929 (1976). The resolution of whether an individual is an independent contractor or an employee requires an analysis of factors related to the employer's right to control and of factors related to the relationship of the work to the asserted employers

business. In Franklin Supra, the Court listed the following factors, which may be relevant to both of these considerations, depending on the facts of the particular claim:

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, place 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;
9. The length of time for which the person is employed.

The Courts have set out that these are not all of the factors which may conceivably be relevant in a given case, and it also may not be necessary for the Commission to consider all of these factors in each case.

After consideration of all the evidence as well as Arkansas law, I find that the claimant has proven by a preponderance of the evidence that he was an employee of Respondent No. 2. This finding is based on the nature of the claimant's work as well as Respondent No. 2's business as well as Respondent No. 2's right to control the claimant's employment. Respondent No. 2 is in the business of

ariel cable hanging and could not perform or complete this task without employing individuals to hang the cable. It is true that this claimant has unique skills but these skills are unique to the business which Respondent No. 2 is engaged in for which he was employed to perform. It is also noted that the working relationship between the claimant and Respondent No. 2 could be terminated at will by either party without liability. It is noted that the claimant did sign a document indicating that he was an independent contractor, however, upon listening to this claimant's testimony it is obvious that he is not particularly sophisticated and even in his testimony it is evident that he has little concept as to what an independent contractor is in fact.

I further find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for Respondent No. 2. The claimant has testified that he was on the job site walking between poles when he got caught in a fence and fell twisting or injuring his left knee. The medical reports have set forth that this claimant had a preexisting chronic nonunion fracture of his left patella. The medical reports have set forth that the claimant reported that after twisting his knee at work it became symptomatic thus resulting in the need for medical treatment. The very earliest of the medical reports all indicate that he had an event at work resulting in pain in his left knee and the claimant has testified that he reported to his fellow crew members as well as Jeff Poe that he had injured his knee at work. Although the claimant did not file his AR-C until November

19, 2003, I find that Respondent No. 2 was aware of and was on notice of this claimant's injury on the day that it happened. Therefore, Respondent No. 2 should pay for all this claimant's medical treatment for his injured left knee as well as for the six weeks he was off following his knee surgery. The indication is that Respondent No. 2 is uninsured and is a subcontractor of Respondent No. 1, therefore, Respondent No. 1 being the general contractor shall be liable for the payment of this claimant's medical treatment as well as indemnity in accordance with Ark. Code Ann. §11-9-402. Respondent No. 1 shall be entitled to recover from Respondent No. 2 any and all amounts which they have paid on behalf of this claimant for his compensable injury in accordance with Ark. Code Ann. §11-9-11-9-402(b)(1).

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant is entitled to the maximum compensation rate for 2003.
3. The parties stipulated that the claimant filed his claim with an AR-C with the Commission on November 19, 2003.
4. The claimant has proven by a preponderance of the evidence that he was an employee of Respondent No. 2 at the time of his compensable injury. See discussion above.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for Respondent No. 2. See discussion above.

6. Respondent No. 2 is liable for the payment of this claimant's medical treatment as well as indemnity payments following the claimant's surgery for a period of six weeks. Since Respondent No. 2 is uninsured their general contractor, Respondent No. 1, shall be liable for the payments of all benefits to this claimant subject to recovery from Respondent No. 2 for the benefits which are paid. See Ark. Code Ann. §11-9-402. Also see discussion above.

7. That Respondent No. 2 had notice of this claimant's injury on the day which it occurred. See discussion above.

8. The respondents have controverted this claim in its entirety.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he was an employee of Respondent No. 2.

Respondent No. 2 is liable for the payment of all the medical as well as six weeks of temporary total disability for this claimant. Since Respondent No. 2 is uninsured, Respondent No. 1, the general contractor, is hereby ordered to pay for this claimant's medical treatment as well as six weeks of temporary total disability with the right to recover the cost of all these benefits from Respondent No. 2 in accordance with Ark. Code Ann. §11-9-402.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE