

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310784

TRAVIS R. OWENS,
EMPLOYEE

CLAIMANT

PHILLIP WILLIAMS,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 29, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Conway, Faulkner County, Arkansas.

The claimant was represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

The respondent was represented by HONORABLE SCOTT ADAMS, Attorney at Law, Morrilton, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 19, 2004 in Conway, Arkansas. A prehearing order was entered in this case on March 5, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. The parties can stipulate that the claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the respondent employer had three or more employees on the date of injury.
2. Whether the claimant sustained a compensable injury to his right great toe.
3. Whether the claimant is entitled to the payment of medical expenses and TTD between 5/8/2002 and 7/15/2002.
4. Whether the claimant is entitled to PPD equal to 100% of the right great toe, or 12% to the foot.
5. Controversion and attorney's fees.
6. Whether or not the employee-employer relationship existed at the time of the injury (employee vs. independent contractor).
7. Average weekly wage and compensation rate.
8. Whether the respondent timely raised an alleged intoxication issue.
9. Whether the claimant's claim for benefits is barred under Ark. Code Ann. § 11-9-102(4)(B)(iv)(Supp. 2003).

The record consists of the May 19, 2004 hearing transcript and the exhibits contained therein and the

respondent's post-hearing brief which I have "blue-backed" to designate as part of the record.

DISCUSSION

1. Independent Contractor vs. Employee and Required Number of Employees

In the present case, Phillip Williams asserts that his timber business engaged contract labor (independent contractors) and not employees. Therefore, Mr. Williams asserts that (1) the claimant was an independent contractor and not an employee so as to be covered by the Arkansas Workers' Compensation Law and (2) Mr. Williams' timber business did not have three or more regularly employed employees so as to be covered by the Arkansas Workers' Compensation Law.

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 Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). Ordinarily, no one feature of the relationship is determinative. Carter v. Ward Body Works, Inc., 245 Ark. 515, 439 S.W.2d 286 (1969). The right to control the method and manner of the work is the traditional test applied in Arkansas when considering whether an individual was an

employee or an independent contractor. The ultimate question with the right to control test is whether the employer has the right to control, not whether the employer actually exercises control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). However, the courts have also considered the "relative nature of the work" test in addition to the right to control test. Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976); Sands v. Stombaugh, 11 Ark. App. 38, 665 S.W.2d 902 (1984); Franklin, supra; Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The main consideration of the relative nature of the work test is "the relationship between the claimant's own occupation and the regular business of the asserted employer." Salter, supra; Lambert, supra.

Consequently, the resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the right to control the work and of factors related to the relationship of the work to the asserted employer's business. A number of factors were outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999), including:

the extent of control which, by the agreement, the master may exercise over the details of the work;

whether or not the one employed is engaged in a distinct occupation or business;

the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

the skill required in the particular occupation;

whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

the length of time for which the person is employed;

the method of payment, whether by the time or by the job;

whether or not the work is a part of the regular business of the employer;

whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business.

See also Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to the various factors must be determined by the Commission. Franklin, supra. However, the Supreme Court has stated that the "right of control" is the principal factor in determining

whether the relationship is one of agency or independent contractor. Sanders, supra.

Furthermore, the claimant must prove by a preponderance of the evidence that the respondent employed the requisite number of employees to be covered by the Arkansas Workers' Compensation Law. Under the current law, the claimant must establish that the respondent regularly employed three or more employees. Ark. Code Ann. § 11-9-102(11)(A) (Supp. 2003). The term "employee" includes a sole proprietor who devotes full time to the proprietorship or a partner who devotes full time to the partnership. Ark. Code Ann. § 11-9-102(9)(B) (Supp. 2003).

As construed by the Arkansas Supreme Court, the phrase "regularly employs" is not synonymous with "constancy." Wallace v. Wells, 221 Ark. 750, 255 S.W.2d 970 (1953); Aerial Crop Care, Inc. v. Landry, 235 Ark. 406, 306 S.W.2d 185 (1962). Instead, it is sufficient if the demands of the business are such that the requisite number of workers are regularly employed, although some or all of the workers may be employed only periodically. In this regard, the Arkansas Supreme Court quoted the following language from Mobile Liners v. McConnell, 220 Ala. 562, 126 So. 626:

The word 'regularly' is not synonymous with 'constancy.' There are businesses of importance which employ numbers of men regularly, who employ none of them continuously. And a number of businesses, as this, will require a large number of employees, nearly all or a large number of whom are employees only periodically, for the reason that the needs of the business require their services only at intervals or periods, whenever the business is in active operation.

In the present case, in early April of 2002 Travis Owens began work as a log stacker at a timber operation already underway near Batesville where cedar timber was being removed and sold. On May 8, 2004, Mr. Owens injured his foot while riding a skidder back to the logging camp at the end of the day's work. Mr. Owens asserts that he was an employee of Phillip Williams at the job site, and Mr. Owens seeks workers' compensation benefits as an employee of Mr. Williams. As indicated above, Mr. Williams asserts that he was not an employer at the site, and that Mr. Owens and the other individuals at the site were instead independent contractors.

On the day Travis Owens became injured, Jason Williams, Phillip Williams' son worked at the site cutting merchantable cedar trees into logs with a chain saw. Travis Owens stacked the logs cut by Jason Williams so that the logs could be more easily moved, piled and loaded onto a

truck by mechanical equipment. During his time at the site, Travis Owens also cut some timber himself. Phillips Williams operated equipment to move or pile the logs (i.e., a "pre-loader") and also drove the loaded log truck to Pilot Knob Cedar Works to sell the logs. Stanley Williams, Phillip Williams' brother, also cut at the site some during the period in question. The record is not clear exactly what duties Stanley Williams performed at the site, if any, besides cutting. Elmer Mitchell owned a skidder and also worked at the site for some period loading logs with the skidder. Richard Bell was also a cutter and worked at the site until approximately two weeks before Travis Owens was injured.

The logging operation did not have a written contract to supply logs to Pilot Knob Cedar Works. There is also no indication in the record that the logging operation obtained a timber deed from the landowner of the property near Batesville. The only persuasive testimony regarding transfer of ownership of timber from the landowner to anyone else only indicated that the landowner received one-third of the money (T. 77), and that Phillip Williams got paid for the logs from Pilot Knob Cedar Works when he delivered the logs to Pilot Knob Cedar Works.

When considered in light of the factors discussed above, I find that a preponderance of the evidence establishes that Travis Owens, Phillip Williams, Jason Williams, Stanley Williams, and Richard Bell were all employee's of Phillip Williams' logging operation, and therefore the claimant's injury is covered by the Arkansas Workers' Compensation Law.

In this regard, I find credible the claimant's testimony that Phillips Williams asserted control over the day to day work of Jason Williams and Travis Owens at the site. For example, I find credible the claimant's testimony that Phillip Williams directed Jason Williams and Travis Owens to cut a particular tract of timber on the day the claimant got hurt in order to complete a load before they were permitted by Phillip Williams to stop work for the day. With regard to the claimant, I note that the duties of a log stacker involve essentially heavy manual with little or no skill, education, training, or equipment required. Third, I note that cutting and stacking are an integral part of the operation's process of getting standing timber cut and delivered to a buyer. Fourth, there were no written contracts, and the testimony of the witnesses certainly indicates that the working relationship between the

individuals at the site was completely "at will". For example, Jason Williams acknowledged that Phillip Williams would have "fired" Jason had Phillip Williams learned that Jason Williams was smoking marijuana on the site. Richard Bell likewise conceded that he left the job site with no repercussions when he was accused by the landowner of stealing logs. Under the circumstances described by the witnesses, any worker at the site could have quit working at any time or been refused any further participation in the operation by Phillip Williams at any time without any type of contractual penalty to either Phillip Williams or the workers (except of course payment for work already performed).

In concluding that Travis Owens, Jason Williams, Stanley Williams, and Richard Bell were all employees of Phillip Williams' logging operation, I recognize that Jason Williams and Richard Bell both apparently owned their own saws, and I recognize that Phillip Williams paid each individual by check without withholdings for Social Security or income taxes. However, I point out that ownership of tools is certainly not determinative, especially when one devotes full time work to only one operation. See Garner v. Rogers, 234 Ark. 1069 (1962).

Likewise, where one holds himself out to the public as an independent business and claims business deductions on income taxes, the Commission has previously on at least two occasions found a cutter to be an independent contractor and not an employee of the logging operation. David A. Knapp v. Hooten Logging Company, Full Workers' Compensation Commission, Opinion filed August 18, 2003 (F105853); Eugene Fittin v. Travis Lumber Company, Full Workers' Compensation Commission, Opinion filed August 29, 1996 (E314170). On the other hand, the Commission has also recognized that an employer cannot avoid its legal obligations under the Arkansas Workers' Compensation Law to employees simply by not withholding Social Security and income taxes from their pay. Patrick Golden v. Randy Wiggins Logging, Full Workers' Compensation Commission, Opinion filed July 13, 1998 (E602244).

In the present case, there is no dispute that the claimant never held himself out to the public as an independent logging contractor, and there is no evidence in the record persuading me that either Travis Owens, Jason Williams, Stanley Williams, or Richard Bell had grounds to claim for tax purposes the business related expenses presented in Knapp, supra and in Fittin, supra.

At one point in his testimony, Jason Williams testified that he cut for himself (and not for his father). At another point Jason Williams testified that if he could not get his father to haul what Jason had cut, he and Travis could have gotten a truck and hauled the cedar logs to someone else to buy. If this testimony accurately reflected the situation at the Batesville work site, then clearly Phillip Williams could not be the employer of Jason Williams or Travis Owens, since under these circumstances, Phillip Williams would have neither the right to possess or to sell the logs Jason and Travis produced, and consequently, would have no legal right to control their work (notwithstanding the actual control that he exerted).

However, I conclude from Richard Bell's testimony that the landowner who owned the standing timber contracted with Phillip Williams, not with Jason Williams and/or Travis Owens, and I therefore do not find credible any suggestion in Jason Williams' testimony that Jason Williams and Travis Owens could had legally hauled and sold the logs themselves and cut out Phillip Owens had they chosen to do so.

Finally, I note that the cutting, stacking, piling, loading and hauling performed by Jason Williams, Travis Owens, Richard Bell, Stanley Williams and Phillip Williams

were all integral parts of Phillip Williams' logging operation. Therefore, both the relative nature of the work involved, as well as the legal right of Phillip Williams to control the work performed leads me to conclude that these individuals were engaged as employees of Phillip Williams' logging operation, and not as independent contractors to that operation.

2. Intoxication

I find that the intoxication issue was not timely when it was first raised at the start of the hearing under circumstances where the parties specified the issues to be litigated in a March 5, 2004 prehearing order, and the intoxication issue was not brought to my attention until the start of the hearing. Even if the issue had been timely raised, after observing the demeanor of the witnesses and hearing the live testimony, I find that the conflicting testimony of Jason Williams and Travis Owens does not establish by a preponderance of the evidence the presence of drugs in the claimant's body at the time the accident occurred, so as to create the rebuttable presumption contained in Ark. Code Ann. § 11-9-102(4)(B)(iv)(b)(Supp. 2003).

3. Compensable Injury

There is no dispute that the claimant sustained a crush injury on May 8, 2002 when a portion of the equipment that he was riding on back to camp crushed his foot. There is likewise no dispute that the injury ultimately demanded amputation of the great toe, and the nature and extent of the injury are established by documentary medical evidence in the record supported by objective findings. The claimant has therefore established the requirements necessary to establish a compensable injury to the foot which was caused by a specific incident and was identifiable by time and place of occurrence pursuant to Ark. Code Ann. § 11-9-102(4) (A) (i) (Supp. 2003).

4. Average Weekly Wage

Because the claimant worked for the respondent less than two months, I find that the most appropriate means of calculating a compensation rate is to divide his total earnings during the period by the number of weeks actually worked. The checks and testimony indicate by a preponderance of the evidence that Travis Owens began work on April 10, 2002 and became injured after his stacking was completed on May 8, 2002, 29 days later. He was paid \$1390 for work he performed during the 29 day period, and there is

no evidence that he took any time off during the 29 day period. Therefore, his average wages were \$47.93 per day or \$335.52 per week during the period.

Under the formulas in Ark. Code Ann. § 11-9-501(b) and (d) the compensation rates are \$224 per week for total disability and \$168 per week for permanent partial disability.

5. Temporary Total Disability Compensation

An employee with a scheduled injury is entitled to temporary total disability compensation while he is within his healing period and has not returned to work. Ark. Code Ann. § 11-9-521(a). The healing period continues until the claimant is as far restored as the permanent character of his injury will permit. When the underlying condition becomes stable, and when nothing further will improve that condition, the healing period has ended. Roberson v. Waste Management, 58 Ark. App. 11, 944 S.W.2d 528 (1997).

In the present case, after sustaining the fracture on May 8, 2002, the claimant's great toe developed gangrene by June 11, 2002. The toe was amputated on June 19, 2002. Dr. Thompson released the claimant with an impairment rating on July 15, 2002. There is no evidence in the record indicating that the claimant ever attempted to return to

work until after his medical release on July 15, 2002, and the first documentary reference to the claimant attempting to return to work is in a medical report dated September 24, 2002. The preponderance of the evidence therefore supports the claimant's contention that he was both within his healing period until July 15, 2002, and had not yet returned to work. Therefore, I find that the claimant is entitled to temporary total disability compensation during the period that he seeks.

6. Permanent Disability

The surgical report regarding the amputation indicates that the doctor amputated both the proximal and distal phalanx of the great toe, i.e., a complete amputation. Under Ark. Code Ann. § 11-9-521(a)(12), the claimant is entitled to 32 weeks of additional compensation for that amputation. Pursuant to Ark. Code Ann. 11-9-501(d)(2)(B), those benefits shall be paid at the total disability rate, not the permanent partial disability rate.

7. Medical Benefits

All of the medical treatment documented in the record for the claimant right foot was reasonably necessary for either the original fractures or the infection and amputation required as a result of the fractures.

Therefore, the respondents are liable for all of the right lower extremity treatment documented in the record.

8. Attorney's fees

Because this claim has been controverted in its entirety, the claimant's attorney is entitled to a 25% attorney's fee on all indemnity benefits awarded herein and on any additional indemnity benefits to which the claimant may become entitled in the future.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This claim is controverted in its entirety.
2. At the time of the claimant's injury the claimant was an employee of Phillip Williams.
3. The respondent employed the requisite number of employees to be covered by the Arkansas Workers' Compensation Law.
4. The intoxication issue was not timely raised.
5. Even if the intoxication issue had been timely raised, I find that a preponderance of the evidence does not establish the presence of drugs in the claimant's body at the time the accident occurred.
6. The claimant established by a preponderance of the evidence the requirements necessary to establish a compensable injury to the foot which was caused by a

specific incident and was identifiable by time and place of occurrence pursuant to Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003).

7. The claimant's average weekly wage was \$335.52; the claimant's compensation rate for total disability was \$224.00 per week and for permanent partial disability was \$168.00 per week.

8. The claimant is entitled to temporary total disability benefits from May 8, 2002 until July 15, 2002.

9. The claimant is entitled to 32 weeks of additional compensation under Ark. Code Ann. § 11-9-521(a)(12) at the total disability rate for his complete amputation of the great toe.

10. The respondent is liable for all of the right lower extremity treatment documented in the record.

AWARD

The respondent is directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid

by the respondent in accordance with Ark. Code Ann. § 11-9-715; and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge