

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307527

GILMAR VALLADARES		CLAIMANT
MUSSON CUSTOM BUILDING, INC. UNINSURED	NO. 1	RESPONDENT
JUAN GUERRERO dba J&M ROOFING, UNINSURED	NO. 2	RESPONDENT
EDGAR VILLANEUVA, UNINSURED	NO. 3	RESPONDENT

OPINION FILED AUGUST 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondent No. 1 represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondent No. 2 represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondent No. 3 not represented by counsel and not appearing.

STATEMENT OF THE CASE

A hearing was initially held in the case, on March 29, 2004, in Springdale, Arkansas. This hearing was continued, at the request of all parties, to allow the joinder of another party respondent, an Edgar Villanueva. Mr. Villanueva was subsequently joined as a party respondent and an additional hearing was scheduled. Mr. Villanueva (as well as the other parties) were give notice of a second hearing in the manner prescribed by law. This second hearing was held on June 7, 2004, in Springdale, Arkansas. All parties, except Mr. Villanueva, were present and represented by counsel.

The following stipulations were offered by all of the parties, except Mr. Villanueva, and in regard to the parties offering these stipulations, they are hereby accepted. These stipulations are:

1. On January 25, 2003, the claimant sustained injuries to his left leg, left knee, and face when he fell from the roof of a house being constructed at 1517

Northeast Dysart Wood Lane in Bentonville, Arkansas.

2. Musson Custom Building, Inc. was the general contractor for the house at 1517 Northeast Dysart Wood Lane and had subcontracted the roofing of the house to Juan Guerrero dba J & M Roofing.
3. Neither Musson Custom Building, Inc. nor Juan Guerrero were insured for workers' compensation purposes.
4. The claim is controverted in its entirety by all respondents.
5. The appropriate weekly compensation rates, should such benefits be appropriate, are \$200.00 for total disability and \$154.00 for permanent partial disability.

The following issues were addressed at the hearings in this case and will be resolved in this Opinion:

1. Whether the claimant was an actual or statutory employee of any or all of the respondents.
2. Whether the injuries sustained by the claimant on January 25, 2003, represent "compensable injuries" within the meaning of the Act.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from January 26, 2003, through August 25, 2003, and an appropriate attorney's fee for the claimant's attorney.

In regard to these issues, the claimant contends:

"The claimant contends that on January 25, 2003, he was acting during and within the scope of his employment as a roofer assigned to the residential real estate under construction at 1517 Northeast Dysart Wood Lane in Bentonville, Arkansas. The claimant was employed by J&M Roofing, an insured subcontractor that was contracted by Musson Custom Building, Inc., the respondent, as a general contractor on this residential real estate. Pursuant to Ark. Code Ann. §11-9-402(a), the respondent, Musson Custom Building, Inc., is the statutory employer of the claimant. The claimant was earning sufficient wages to entitle him to the maximum compensation rate of \$440.00 for temporary total

disability benefits and \$330.00 for permanent partial disability benefits. The claimant received medical treatment at Bates Medical Center with Dr. Rodger Dickinson, Jr. and has incurred in excess of \$26,500.00 in medical expenses. The claimant is entitled to temporary total disability benefits from January 25, 2003 to August 25, 2003, and attorney's fees on all indemnity benefits. This claim is controverted in its entirety. The respondent, through its attorney, has denied the compensability of this claim by letter to the Commission of August 8, 2003."

In regard to these issues, the respondent Musson Custom Building, Inc. contends:

"The claimant (sic) contends he is not a prime contractor (sic) as defined by Ark. Code Ann. §11-9-402. The claimant also contends that the first notice the respondent received was the Commission's letter of July 24, 2003."

In regard to these issues, the respondent Juan Guerrero dba J&M Roofing contends:

"The respondent #2, Juan Guerrero dba J&M Roofing, contends that the claimant was not an employee within the meaning of the Act, and respondent #2 was not an employer and therefore the claimant is not entitled to any benefits payable from respondent #2."

In regard to these issues, the respondent Edgar Villanueva makes no contentions and is presumed to controvert this claim in its entirety.

## DISCUSSION

### I. EMPLOYER-EMPLOYEE RELATIONSHIP

\_\_\_\_\_The central issue in this case concerns the existence of any employment relationship between the claimant and any or all of the respondents, at the time of his accidental fall on January 25, 2003. This issue is controlled by the provisions of Ark. Code Ann. §11-9-102(9), §11-9-102(10), §11-9-102(11), and §11-9-402.

After consideration of all the evidence in this case, it is my opinion that the greater weight of the credible evidence establishes that, at the time of the claimant's accidental fall on January 25, 2003, he was an "employee" of Edgar Villanueva, as that term is defined by Ark. Code Ann. §11-9-102(9), and was not a "partner" or "co-member" of a limited

liability company with Mr. Villanueva. Although the claimant, Mr. Villanueva, and other individuals engaged in roofing the house, at 1517 Northeast Dysart Wood Lane, were obviously acquainted and even room mates. Mr. Villanueva was solely responsible for negotiating and obtaining the contract from Mr. Guerrero to roof the house. It was also within the sole discretion of Mr. Villaneuva whether the claimant worked on this contracted job, when and how much he worked, and how much he was to receive for his work.

The evidence presented further shows that this employment relationship between the claimant and Mr. Villaneuva represented an employment covered by the provisions of Ark. Code Ann. §11-9-102(11). The particular job, on which the claimant was working at the time of his injury would unquestionably meet the definition set out in subdivision (B) of the aforesaid subsection. All of the evidence shows that at the time of the claimant's accidental fall, there were at least four people regularly engaged in performing the job. Even if the other individuals were, in fact, partners of Mr. Villanueva, both Mr. Villanueva and these "partners" would be countable toward determining the requisite number of employees.

Further, the mere existence of the employee-employer relationship between the claimant and Mr. Villanueva, in light of Mr. Villanueva's capacity as a "subcontractor" would also satisfy the definition for a "covered" employment, under subdivision (D) of §11-9-102(16). Clearly, if the claimant was the only employee of Mr. Villanueva, at time of his fall, the requirements contained in this subdivision would be satisfied.

At the time of the claimant's accidental fall and resulting injuries, he was performing employment activities in furtherance of a contract entered into between Mr. Villanueva and Juan Guerrero dba J&M Roofing. The record further shows that Mr. Guerrero dba J&M Roofing had previously contracted to perform this roofing job with Musson Custom Building, Inc. Thus, Edgar Villaneuva was clearly a subcontractor of Juan Guerrero dba J&M Roofing, and, in regard to Edgar Villaneuva, Juan Guerrero dba J&M Roofing would

be the “prime” contractor. It is undisputed that at the time of the claimant’s fall and resulting injuries, Edgar Villaneuva was uninsured for workers’ compensation purposes. Therefore, under the provisions of Ark. Code Ann. §11-9-402, the claimant became a statutory employee of Juan Guerrero dba J&M Roofing, and Mr. Guerrero becomes jointly and severally liable for any and all appropriate benefits provided by the Arkansas Workers’ Compensation Act for any compensable injuries to the claimant. However, under the provisions of this subsection, Mr. Guerrero is entitled to reimbursement from Mr. Villaneuva for any compensation or benefits which he may be required to pay.

I find no foundation for Mr. Guerrero’s mistaken belief that the claimant was a “partner” of Mr. Villaneuva. As previously noted, the greater weight of the credible evidence clearly shows that the claimant was an employee of Mr. Villaneuva and not a partner. I would further note that Mr. Guerrero testified that he had obtained certificates of non coverage from Mr. Villaneuva and possibly from another individual named Rodrigo, but had not received a certificate of non coverage for the claimant. There is no evidence presented to indicate that the claimant has ever applied for has ever received a certificate of non coverage from this Commission.

The stipulations reflect that at the time of the claimant’s fall and resulting injuries, Musson Custom Building, Inc. was the “general” contractor for the house where the fall occurred and had “subcontracted” the roofing of this house to Juan Guerrero dba J&M Roofing. However, a “general” contractor is not necessarily synonymous with a “prime” contractor. There is no evidence in the record that Musson Custom Building, Inc. was under any contractual obligation to any third party to perform the roofing of the house that it contracted to Mr. Guerrero dba J&M Roofing. Without this outside contractual obligation, Musson Custom Building, Inc. would not be a “prime” contractor and Juan Guerrero dba J&M Roofing would not be its “subcontractor” for the purpose of applying the provisions of Ark. Code Ann. §11-9-402.

Use of the term “subcontracted” in the stipulation is contrary to Musson’s continued specific contention that it is not liable for any benefits to the claimant, under the provisions of Ark. Code Ann. §11-9-402. In light of this position, and the lack of evidence concerning an outside contractual obligation on the part of Musson, I am reluctant to impose liability against Musson based solely on the wording of the second stipulation. However, I recognize that the claimant may have been misled by this stipulation and as a result felt it unnecessary to present any evidence of an outside contractual obligation on the part of Musson. Thus, any ruling on the liability of Musson Custom Building, Inc. is reserved until the claimant is allowed the opportunity to present additional evidence on the existence of this outside contractual relationship, if such exists.

## II. COMPENSABILITY

The stipulations reflect that the claimant sustained physical injuries to his left leg, left knee, and face in the accidental fall on January 25, 2003. The evidence further shows that at the time of this fall, the claimant was performing activities in furtherance of his employment with Edgar Villaneuva.

Thus, the claimant has proven the occurrence of physical injuries to these portions of his body that arose out of and occurred in the course of his employment, that were caused by a specific incident, that are identifiable by time and place of occurrence, that caused internal physical harm to his body, that required medical services, and that resulted in, at least, a period of temporary disability. This satisfies all of the requirements for a “compensable injury”, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i).

The claimant has also “established” by medical evidence the actual existence of these physical injuries which is further supported by the independent observation of findings beyond the claimant’s voluntary control. Thus, the claimant has also satisfied the statutory requirement for a “compensable injury”, which are contained in Ark. Code Ann. §11-9-102(4)(D).

### III. REASONABLY NECESSARY MEDICAL SERVICES

The medical record proves that all of the medical services rendered the claimant at Bates Medical Center and by and at the direction of the Dr. Rodger C. Dickinson, were necessitated by or connected with the claimant's compensable injuries. The medical evidence also shows that these medical services were of a type and nature generally recognized as appropriate by the medical community for the treatment of injuries such as those experienced by the claimant. It is not only appears that these medical services had a reasonable expectation of accomplishing their desired goals, but have, to date, actually accomplished their intended purposes.

Therefore, I find that the medical services rendered to the claimant by and at the direction of Dr. Rodger Dickinson and the Bates Medical Center emergency room constitute "reasonably necessary medical services" for the claimant's compensable injuries, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the expense of these services are the liability of the respondents Edgar Villaneuva and Juan Guerrero dba J&M Roofing. This liability is subject to the medical fee schedule established by this Commission. As previously indicated in this Opinion, and decision on the liability of the Musson Custom Building, Inc. for the expenses of these services is reserved for future determination, if necessary.

### IV. TEMPORARY TOTAL DISABILITY

The medical evidence shows that the claimant continued within his healing period from the effects of his compensable injury, when last seen by Dr. Dickinson on August 25, 2003. On that date, Dr. Dickinson released the claimant to return to employment without restrictions. However, it is apparent from this report that he did not believe that the claimant had achieved the maximum benefit of time and medical treatment, in regard to the resolution of the physical damage caused by his compensable leg injury. Dr. Dickinson noted that the claimant was getting some irritation from the prosthetic device used to

stabilize the significant fracture of his left femur. He indicated that, if this continued, it would ultimately require the surgical removal of this stabilizing device. However, it was his expert opinion that the surgical removal of the device should not be performed for “at least another year”. He scheduled the claimant to return for follow up in six months from this visit. Finally, while he noted that x-rays taken at that time showed that the fractures of the claimant’s left femur were in good position with “good healing”, he in no way indicates that these x-rays revealed that the fractures had actually healed.

The claimant testified that he had returned to Dr. Dickinson for the scheduled follow up in late February of 2004. He stated that at that time that Dr. Dickinson recommended the removal of the stabilizing hardware, but would not perform the procedure without guaranteed payment of the expense. No actual report of this visit has been introduced.

The claimant testified that in September of 2003, he returned to work in the construction field. He related that although he continued to experience some difficulties with his leg, he had been able to continue this employment through the present time.

As the primary injury sustained by the claimant was to a portion of his body that is scheduled under Ark. Code Ann. §11-9-521, the claimant is entitled to temporary total disability benefits during his healing period or until he returns to work (whichever occurs sooner). It is my opinion that the greater weight of the credible evidence shows that the claimant continued within his healing period and had not returned to work from the date of his injury through August 25, 2003. Therefore, he is entitled to temporary total disability benefits for the period beginning January 26, 2003, and continuing through August 25, 2003. The respondents Edgar Villanueva and Juan Guerrero dba J&M Roofing are jointly and severally liable to the claimant for temporary total disability benefits during this period. For the reasons heretofore discussed in this Opinion, the liability of Musson Custom Building, Inc. for these benefits is reserved for future determination, if necessary.

## FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 25, 2003, the relationship of employee-employer existed between the claimant and Edgar Villaneuva.
3. On January 25, 2003, Edgar Villanueva was uninsured for workers' compensation purposes.
4. On January 25, 2003, Edgar Villaneuva was an uninsured subcontractor of Juan Guerrero dba J&M Roofing. Pursuant to the provisions of Ark. Code Ann. §11-9-402, the claimant was a statutory employee of Juan Guerrero dba J&M Roofing at the time of his injury.
5. On January 25, 2003, Juan Guerrero dba J&M Roofing was also uninsured for workers' compensation purposes.
6. The record is insufficient to make a determination on the relationship between Juan Guerrero dba J&M Roofing and Musson Custom Building, Inc. Thus, any determination on the nature of this relationship and the issue of whether the claimant was also a statutory employee of Musson Custom Building, Inc. must be reserved for future determination, if necessary.
7. On January 25, 2003, the claimant sustained compensable injuries to his left leg, left knee, and face.
8. The medical services provided to the claimant for these injuries at the emergency room of Bates Medical Center and by and at the direction of Dr. Rodger Dickinson represent reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents Edgar Villaneuva and Juan Guerrero dba J&M Roofing are jointly and severally liable for the expense of these services,

subject to the medical fee schedule established by this Commission. Any determination on the liability of Musson Custom Building, Inc. for these expenses must be reserved for future determination, if necessary.

9. The claimant was rendered temporarily totally disabled by his compensable injuries for the period of January 26, 2003 through August 25, 2003.
10. The appropriate weekly compensation rate for temporary total disability benefits, in this case, is \$200.00.
11. All respondents have controverted this claim in its entirety.
12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted weekly benefits, which are herein awarded and which may hereinafter be awarded.

#### ORDER

The respondents Edgar Villanueva and Juan Guerrero dba J&M Roofing are jointly and severally liable to the claimant for temporary total disability benefits, at the weekly rate of \$200.00, for the period of January 26, 2003 through August 25, 2003.

The respondents Edgar Villanueva and Juan Guerrero dba J&M Roofing are jointly and severally liable for the medical expenses incurred for services rendered to the claimant for his compensable injuries at the emergency room of Bates Medical Center and by and at the direction of Dr. Rodger Dickinson. This liability shall be subject to the medical fee schedule established by this Commission.

The respondents Edgar Villaneuva and Juan Guerrero dba J&M Roofing are jointly and severally liable to the claimant's attorney for the maximum statutory attorney's fee on the temporary total disability benefits herein awarded and any future payments of compensation to the claimant which may hereinafter be awarded. One-half of this fee is the obligation of these respondents in addition to such benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from such benefits.

The temporary total disability benefits herein awarded, and which have heretofore accrued, are payable in a lump sum without discount. These benefits total \$6,028.57 (30 weeks and 1 day at \$200.00 per week).

All medical expenses herein awarded, and which have heretofore accrued, are payable in a lump sum without discount.

The attorney's fees on the accrued benefits herein awarded total \$1,507.14. These fees have also accrued and are payable in a lump sum without discount.

All benefits herein awarded shall bear the maximum legal rate of interest until paid.

For the reasons heretofore set forth in this Opinion, any decision on the liability of Musson Custom Building, Inc. is reserved for future determination, if necessary.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge