

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301302

FREDERICK D. WAALK, EMPLOYEE	CLAIMANT
CARSON & ASSOCIATES, INC., EMPLOYER	RESPONDENT
CRAWFORD & CO., CARRIER	RESPONDENT

OPINION FILED APRIL 13, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on January 16, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE JAMES W. STANLEY, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, anatomical impairment and attorney's fees.

At issue is the employment relationship pursuant to Ark. Code Ann. §11-9-102(9, 10); employment services pursuant to Ark. Code Ann. §11-9-102(4)(B)(iii); and the duration of the healing period pursuant to Ark. Code Ann. §11-9-102(12). All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

STATEMENT OF THE CASE

The parties were unable to agree on any stipulations.

The claimant, a mechanic, contends he was injured on May 23, 2001, while working on a

vehicle. The hood fell, throwing him backward and causing him to fall and break his right hip. The claimant seeks payment of medical expenses, temporary total disability benefits from May 24, 2001 to November 11, 2003, a 2% rating and attorney's fees. The claimant contends he is entitled to the maximum compensation rate of \$410.00/\$308.00. Some expenses have been paid by Medicare and Blue Cross Blue Shield.

The respondents contend the claimant was an independent contractor and therefore they are not liable. Alternatively, in the event the claimant is found to be their employee, he was not performing employment services at the time of the injury and therefore the claim is not compensable. Respondents further contend that in the event of an award, the healing period ended June 12, 2003.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the deposition of the claimant, incorporated by reference.

The following witnesses testified at the hearing: the claimant and Carson Harris, president of his general contracting company.

The claimant age 79 (D.O.B. October 29, 1924) has a tenth grade education and I assume a G.E.D. as he testified he took some college courses in management. He was a motor machinist in the Navy. The claimant attended service school and has 60 years of experience as a construction mechanic. His health history includes a pacemaker and elbow surgery.

The claimant was working on a truck at the job site when the hood fell, knocking him to the ground. He was taken by ambulance to the emergency room where he was diagnosed with a fractured right hip. The claimant came under the care of Dr. Thomas Rooney who performed surgery on May 25, 2003. He stayed in rehabilitation until June 1, 2001. Gradually he began weight bearing

with a cane. Repeat x-rays taken during March 2003, showed a healed fracture, which would seem to confirm the end of the healing period.

In his report of November 11, 2003, Dr. Rooney assessed a 2% rating to the body as a whole. He commented that it might be necessary to remove the hardware in his hip if the pain persisted, however, that would not change the rating.

Dr. Rooney was not specifically asked to comment on the healing period and the significance of the date used by the respondents in their contentions, June 12, 2001, is unknown.

Dr. Rooney was not specifically asked to comment on the claimant's work restrictions. The claimant testified he has been unable to work since his injury and his hip remains painful.

EMPLOYMENT RELATIONSHIP

The claimant described himself as "self-employed" since his retirement from Farrell Cooper Mining Company in 1990. He charged \$20.00 per hour plus 50¢ per mile for his services as a mechanic. Individuals and companies would call him when their equipment broke down. The claimant would drive to the job site (using his truck and equipment, worth over \$50,000.00), and evaluate the problem. Then he would obtain the necessary parts and repair the equipment.

The claimant repaired equipment for Carson off and on over a two year period. However, during that same time, he was repairing equipment for other individuals and companies. He stated he worked for "who ever called whenever I was available." "That's the thing about being in business for yourself, they don't designate or dictate to you who you work for if you get a job." He fixed the equipment as long as they agreed to his charges.

The claimant stated he was hired on a project by project basis. He was paid from the time he left his house until he returned to his "in-home business." He was not on a regular payroll. He

could not be fired from his job. He was not instructed how to repair the equipment – that was his area of expertise. He furnished his own tools and equipment. He reported \$25,000 - \$30,000 yearly earnings on his income tax.

On the day of his injury, the Carson superintendent, Phil Ashton called the claimant and asked him to fix a backhoe. While he was there, either Phil or another superintendent, Herbert Cox asked him to take a look at the landscaping truck. The claimant commented that while he was working on equipment, someone from Carson would occasionally walk by but they didn't help him with the repairs. He stated his truck was equipped with a boom to aid in lifting. He worked a total of 30 hours over a two or three day period prior to his injury.

Carson Harris testified he was a general contractor. Phil Ashton and Herbert Cox were superintendents at the job site but Mr. Harris was the only one with the authority to engage the services of the claimant. This statement, however, conflicts with the claimant's testimony that he had done jobs for the company in the past two years and was always "hired" by Phil Ashton. The superintendents acted on behalf of the owner engaging the services of the claimant, who was performing employment services on the day of the injury.

FINDINGS AND CONCLUSIONS

Workers' compensation benefits are payable only to employees, Ark. Code Ann. §11-9-102.

There are numerous factors to be considered in determining whether an injured person is an employee or an independent contractor. The relative weight to be given to these factors must be determined by the Commission. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982), Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983), Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976).

Those 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.
- Franklin id.

The Internal Revenue Service also offers publications (#937) and forms (SS-8) describing the difference between an employee and an independent contractor. The Internal Revenue Service standards have not been adopted by the Commission or the courts, but they do offer practical guidelines:

In a nutshell, if the person who employs you sets your work hours, provides you with tools, tells you what to do and how to do it, and can fire you, then chances are you're an employee... not an independent contractor. Your employer must withhold income tax on your wages, and must pay social security tax (FICA) as well as withhold your portion of FICA. Also, your employer is responsible for unemployment tax (FUTA). If your employer does not withhold or deposit these taxes, because you are misclassified, you will not be covered by unemployment or workers' compensation and you may be hit with a big tax bill or filing time if you have not been credited with paying these taxes during the year through withholding.

If someone has the right to control only the result of your work and not the way in which you get that result, then you are probably an independent contractor. You are responsible for paying your own

income tax and self-employment tax.

The Internal Revenue Service uses a list of 20 factors to determine the employment relationship:

- Someone tells you when, where and how to work
- The business trains you to perform services in a particular manner.
- Your services are part of the business operations because they are important to the success of the business.
- Your services are rendered personally.
- The business hires, supervises, and pays workers.
- You have a continuing relationship with the business.
- The business sets your work hours.
- You are required to work or be available full-time.
- You work on the premises of the business, or on a route or at a location designated by the business.
- You perform services in the order or sequence set by the business.
- You submit reports to the business.
- You are paid by the hour, week or month.
- The business pays your travel and business expenses.
- The business provides your tools, materials and other equipment.
- You have no significant investment in the business.
- You don't make a profit or suffer a loss from the business.
- You normally work for one business at a time.
- You don't offer your services to the general public.
- The business has the right to fire you.
- You have the right to quit without incurring liability.

Using any definition, the claimant in this case is an independent contractor, not an employee, and therefore the respondents are not liable for this claim.

The evidence of record shows the claimant is a hard-working and experienced mechanic who prides himself on being able to fix equipment that others have given up on as irreparable. Now retired, he works out of his home, charges by the hour, and accepts jobs from various individuals or businesses. The claimant can accept or reject jobs without liability, has no set working hours, and is not on anyone's regular payroll. He is not engaged in the respondent's construction business – he

is a mechanic called in to repair their equipment. He receives no help or instruction in repairing the equipment from the respondent and provides his own tools. Accordingly, I find that the claimant is an independent contractor.

1. The Workers' Compensation Commission has jurisdiction of this claim. At the time of his injury on May 23, 2001 the claimant, a mechanic was employed as an independent contractor repairing a backhoe and truck for the respondent's general contracting and construction company.
2. The respondents are not liable to the claimant for payment of this claim as he was not their employee as defined by Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge