

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307528

LEONARD W. WOODS, EMPLOYEE

CLAIMANT

**INSOL HOLZ BETON INTERNATIONAL, INC.,
UNINSURED EMPLOYER**

RESPONDENT

OPINION FILED FEBRUARY 26, 2004

Hearing before Administrative Law Judge J. Mark White on January 28, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Everett O. Martindale, Attorney at Law, Little Rock, Arkansas.

Respondent represented by Mr. Chris O. Parker, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 28, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on December 8, 2003, and a Prehearing Conference Order was entered that same day. A copy of the December 8, 2003, Prehearing Conference 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 Conference Order.

The parties stipulated that the claimant sustained an injury to his hand on October 25, 2002; that the respondent carried no workers' compensation coverage

at the time of the claimant's injury; that the respondent terminated its contract with the claimant on June 26, 2003; that the claimant earned an average weekly wage of \$500, entitling him to a compensation rate of \$333 per week for temporary disability and \$250 for permanent partial disability; and that the respondent paid the claimant his weekly wage during his time off from work, up until the termination of his contract on June 26, 2003.

The parties agreed that the threshold issue to be presented for determination was whether the claimant was an employee of respondent or an independent contractor. In the event the claimant is found to have been an employee, the following issues are to be presented for determination: whether the claimant sustained a compensable injury on October 25, 2003; whether the claimant is entitled to associated medical and indemnity benefits; whether the claimant is entitled to temporary total disability benefits from June 26, 2003, to a date yet to be determined; and controversion and attorney's fees. The issue of permanent impairment is reserved.

The claimant contends that he was injured while on the job working for the respondent; that he was an employee of the respondent and not an independent contractor; that the injuries he received were compensable; and that he is entitled to permanent impairment, payment of medical bills, temporary total disability,

reimbursement for travel costs and payment of attorney's fees.

The Respondent contends that the claimant was an independent contractor and not an employee of respondent.

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 stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
2. The claimant has proven by a preponderance of the evidence that he was an employee of the respondent and not an independent contractor.
3. The Arkansas Workers' Compensation Commission therefore has jurisdiction of this claim.
4. The claimant has proven by a preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment, caused by a specific incident identifiable by time and place of

occurrence; that his injury caused internal and external physical harm to the body requiring medical services; and that the existence and extent of his injury is established by medical evidence supported by objective findings.

5. The claimant has therefore proven by a preponderance of the evidence that he sustained a compensable injury on October 25, 2002.
6. The claimant has proven by a preponderance of the evidence that he is entitled to payment of all reasonably necessary medical expenses incurred in connection with this compensable injury.
7. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period on or after June 26, 2003.
8. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 26, 2003, to a date yet to be determined.
9. The respondent has controverted this claim in its entirety.

DISCUSSION

I. History

The respondent, Insol Holz Beton International (IHBI), is a South Carolina corporation. K-X Aggregate was an Arkansas corporation licensed by IHBI to produce blocks for building construction out of rice hulls, wood chips and cement. The blocks were produced using a special machine located at a plant in England, Arkansas. At some point in time, K-X Aggregate went out of business, and IHBI established a new company, Faswall, to take over the plant operations in England. Neither IHBI nor Faswall carried workers' compensation insurance.

In August, 2002, on behalf of IHBI, Hans Walter hired the claimant to work in the plant. His job duties are a matter of dispute – the claimant testified he was hired only as a laborer to work the machine, while Walter testified the claimant was hired as the plant foreman overseeing the other employees and the machine's production. Walter further testified that the claimant hired the other employees in the plant; the claimant denies doing so. Walter and the claimant agree the claimant was trained in the use of the machine, and that IHBI/Faswall provided all necessary equipment and supplies. The claimant testified he was paid \$100 per day worked, while Walter testified the claimant was paid \$1,000 every two weeks regardless of the days worked. Walter characterized the relationship as one of an independent

contractor and withheld no taxes or other deductions from the payments.

On October 25, 2002, the claimant sustained an injury to his hand when it was accidentally crushed by the block-producing machine. Mr. Walter arrived at the scene shortly thereafter, and the claimant was transported via ambulance to Baptist Memorial Medical Center in North Little Rock. The ER physician assessed a “crush injury to right hand.” The wound was full of debris from the machine – pieces of wood, cement, etc. – and the ER physician determined that the claimant’s hand problems were too complex to be handled in the emergency room. The claimant was transferred to Doctor’s Hospital in Little Rock, where he was treated that day by a hand specialist, Dr. Marcia Hixon. Dr. Hixon performed surgery that afternoon, debriding the claimant’s wound and examining it for other injuries. Dr. Hixon found no injury to the nerves, tendons or arteries. The claimant was discharged in stable condition and told to remain off of work until November 11, 2002.

The claimant testified he returned to work on November 11, 2002. He continued to work for Faswall until at least June 24, 2003. The claimant testified that he quit his employment with the respondent on that day. However, a letter introduced by the respondent purported to terminate the claimant’s employment as of June 26, 2003, and the parties have stipulated that the respondent terminated its contract with the claimant on June 26, 2003

II. Adjudication

A. Employment Status

The determination as to whether one is an employee or an independent contractor is a question of fact. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The primary factor to consider is whether the employer has the right to control the means and the method by which the work is done, but neither that factor nor any other feature of the relationship is alone determinative. *Id.* The courts have identified other factors that may be considered, including:

- (1) The right to terminate the employment without liability;
- (2) The method of payment, whether by time, job, piece or other unit of measurement;
- (3) The furnishing, or the obligation to furnish, the necessary tools, equipment and materials;
- (4) Whether the person employed is engaged in a distinct occupation or business;
- (5) The skill required in a particular occupation;
- (6) Whether the employer is in business;
- (7) Whether the work is an integral part of the regular business of the employer; and
- (8) The length of time for which the person is employed.

Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982).

Taken together, the testimony of the claimant and of Walter establish that the claimant's employment could have been terminated at any time without liability; that the respondent furnished the necessary tools and equipment; that the claimant was not engaged in a distinct occupation; that the skills required were taught to the claimant by the respondent; that the respondent is in business; that the claimant's work was an integral part of the respondent's regular business; and that the claimant was employed for an indeterminate amount of time. Each of these factors favors a finding that the claimant was an employee, not an independent contractor. The parties do dispute the method of the claimant's salary, but they agree the claimant was paid by time (the claimant says he was paid by the day, the respondent says he was paid by the week).

Moreover, the correspondence submitted by both parties establishes beyond a shadow of a doubt that the respondent retained the right to control the means and method by which the claimant's work was done. Respondents' Exhibit No. 2 is a series of letters and faxes sent by Walter to the claimant giving precise, detailed instructions of how the work was to be done. Because the respondent retained the right to control, and because of the other factors outlined above, I find that the claimant has proven by a preponderance of the evidence that he was an employee of the respondent and not an independent contractor. I therefore conclude the

Arkansas Workers' Compensation Commission has jurisdiction of this claim.

B. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

The parties have stipulated that the claimant sustained an injury to his hand on October 25, 2002. The respondent does not contest that the claimant injured his hand during his work for the respondent. Given the claimant's uncontradicted testimony, and given Walters' testimony insofar as it corroborates the claimant's

testimony regarding the accident itself, I find that the claimant has proven by a preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment, caused by a specific incident identifiable by time and place of occurrence. Given the medical treatment provided the claimant and the corresponding medical records submitted by the parties, I find that the claimant has proven by a preponderance of the evidence that his injury caused internal and external physical harm to the body requiring medical services. Given his doctors' observation of lacerations and puncture wounds, I find that the claimant has proven by a preponderance of the evidence that the existence and extent of his injury is established by medical evidence supported by objective findings. I therefore find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on October 25, 2002.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). I therefore find that the claimant has proven by a preponderance of the evidence that he is entitled to payment of all reasonably necessary medical expenses incurred in connection with this compensable injury.

C. Temporary Total Disability

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever occurs first. ARK. CODE ANN. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant contends he is entitled to temporary total disability benefits from June 26, 2003, until a date yet to be determined. The parties agree the claimant's employment ended on that date, and the claimant testified he has not worked since then. Therefore, the question is whether the claimant was in his healing period as of June 26, 2003, and whether he remains in it now.

Unfortunately, the claimant has introduced no documentary evidence regarding what medical treatment he received after the day of his injury. All of the medical records submitted are from that day, October 25, 2002. There are also bills from Arkansas Specialty Care Centers for treatment provided on October 31, November 7, and November 12, but none of the bills specifically identify what

treatment was provided or whether the treatment was connected with the compensable injury. The claimant submitted no treatment notes or other records substantiating what those visits were for.

Moreover, the record contains literally no evidence, beyond a single hearsay statement, to establish that further treatment provided on or after June 26, 2003, would improve the claimant's condition. The one hearsay statement was testified to by the claimant, saying that one of his doctors had recommended a "cat scan." There is nothing in the documentary evidence to determine why a CT scan was recommended, who recommended it, or when it was recommended – not to mention that as hearsay, this testimony is of little probative value.

Whether further treatment would improve the claimant's condition is a key factor in determining whether the healing period has ended. The claimant's testimony that he continues to suffer symptomatically is insufficient to meet this burden of proof – just because the claimant has symptoms does not necessarily mean that further treatment will improve his condition. Because the claimant has introduced no credible evidence to show that further treatment provided on or after June 26, 2003, would have improved his condition, I must find that the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period on or after June 26, 2003. Therefore, I find that the claimant has failed to

prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 26, 2003, to a date yet to be determined.

I note that in his testimony, the claimant also asserted an entitlement to temporary total disability benefits from October 25, 2002, to November 11, 2002. The December 9, 2003, Prehearing Order does not identify this as an issue to be considered in the hearing, nor does it list any contention by the claimant for entitlement to TTD for these dates. Rather, the Prehearing Order specifically identified the TTD dates as being from June 26, 2003, to a date yet to be determined. When the Prehearing Order was admitted into evidence at the beginning of the hearing, the claimant did not ask to have the issues or contentions amended to reflect a contention for TTD from October 25, 2002, to November 11, 2002. The respondent has not consented to a revision of the issues and contentions being considered herein. To avoid unfairness to the respondent, and because the parties have stipulated that the claimant was paid his weekly wage during his time off from work prior to June 26, 2003, I will not consider herein the claimant's entitlement to TTD benefits for any period prior to June 26, 2003.

AWARD

The claimant has proven by a preponderance of the evidence that he

sustained a compensable injury on October 25, 2002, and that he is entitled to payment of all reasonably necessary medical expenses incurred in connection with this compensable injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. ARK. CODE ANN. § 11-9-715. Therefore, no attorney's fees are awarded.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

Because the respondent in this case is an uninsured employer, a copy of this opinion shall be forwarded to the Operations and Compliance Division of the Commission for further investigation.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge