

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F305590

**RANDALL D. ARNOLD,
EMPLOYEE**

CLAIMANT

**TONY FALLEN D/B/A
FALLEN CONSTRUCTION,
PRIME CONTRACTOR**

RESPONDENT NO. 1

**LIBERTY MUTUAL
INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT NO. 1

**ZACH LACY D/B/A
ZACH LACY CONSTRUCTION,
UNINSURED SUBCONTRACTOR**

RESPONDENT NO. 2

OPINION FILED JUNE 29, 2005,

Pursuant to a hearing conducted March 31, 2005, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. C. Burt Newell, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant,

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1, and

Mr. J. Calvin Campbell, Attorney at Law, Hot Springs, Arkansas appearing for Respondent No. 2.

STATEMENT OF THE CASE

This is a dispute over the claimant's employment status and possible intoxication at the time of an otherwise compensable injury.

The claimant contended that he suffered compensable injuries and is entitled to benefits as a result of his work as an employee for the uninsured subcontractor, so that he is entitled to benefits from Respondents No. 1, pursuant to Ark. Code Ann. §11-9-402, which imposes liability on the prime contractor for injuries to employees of its uninsured subcontractors. Specifically, the claimant

requested benefits, including reasonably necessary medical and related expenses and temporary total disability benefits from May 1 through August 15, 2003. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The prime contractor and its insurance carrier, Respondents No. 1, contended that the claimant was not an employee of the subcontractor and, therefore, not entitled to benefits.

The subcontractor contended that the claimant was not its employee but was either a subcontractor or an independent contractor, hired only to perform services on the job in question and, further, that the claim should be barred due to the claimant's marijuana intoxication.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, a prime contract within the meaning of the Act existed between Tony Fallen d/b/a Fallen Construction and a third party; Tony Fallen had subcontracted to Zach Lacy d/b/a Zach Lacy Construction a portion of the work pursuant to the prime contract; Zach Lacy d/b/a Zach Lacy Construction was uninsured for workers' compensation at the time of the injury; the claimant suffered an injury May 1, 2003, while performing work that was the subject of the subcontract between Tony Fallen and Zach Lacy; the claimant's injuries are otherwise compensable if he is found to be an employee of Zach Lacy d/b/a Lacy Construction, if not substantially occasioned by marijuana intoxication; his average weekly wage was \$300.00; the claimant was temporarily totally disabled as a result of his injury from May 1 through August 15, 2003.

3. The preponderance of the evidence fails to show that the claimant's injuries were substantially occasioned by marijuana intoxication.

4. At the time of his injuries, the claimant was an employee of Zach Lacy d/b/a Zach Lacy Construction within the meaning of the Act, and is entitled to receive benefits from Respondents No. 1.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by Respondents No. 1.

DISCUSSION

The claimant testified that on May 1, 2003, he fell off the roof of the Kirk house where he and Kelley Short had been rolling felt. He testified that the incident happened fast and occurred when a roll of felt "gave out" and he slipped and fell from the roof.

The record from the St. Joseph's Mercy Health Center Emergency Department for May 1, 2003, shows that the claimant's examination indicated that he had a right calcaneus fracture and a left ankle sprain and, further, that he was referred to orthopedic surgeon Dr. Robert J. Olive for further evaluation. On May 16, 2003, Dr. Olive performed surgery, an open reduction and internal fixation of the right calcanea fracture with titanium plate and screws. The record shows that the claimant developed a postoperative wound infection for which he received additional medical attention. The parties have stipulated that the claimant's medical care was reasonably necessary and that his injury caused him to be temporarily totally disabled until August 15, 2003. The record also shows that at the time of the claimant's injury he was performing work on the Kirk house which was being built as the result of a contract between the Kirk family and Respondent Employer No. 1. The

record also reveals that Respondent No. 2 had been hired as a framing subcontractor and that he did about half of the framing work needed by Respondent Employer No. 1 in his business at the time. At the time of the injury, the framing subcontractor was uninsured for workers' compensation and the claimant sought benefits from Respondents No. 1. The only impediment to his request for benefits is the question of his employment status and the intoxication defense asserted by Respondent No. 2.

The intoxication defense arises from the provisions of Ark. Code Ann. §11-9-102(4)(B) which provides that "compensable injury" does not include enumerated injuries, such as an injury where the accident was substantially occasioned by the use of illegal drugs. The statute also provides that the presence of illegal drugs creates a rebuttable presumption that the injury or accident was substantially occasioned by their use and that every employee impliedly consents to reasonable and responsible testing for the presence of such substances in the employee's body. Finally, the provision states that an employee shall not be entitled to compensation unless it is approved by the preponderance of the evidence that the illegal drugs did not substantially occasion the injury or accident.

In this case, there is no test indicating the presence of marijuana at the time of the injury. Instead, Respondent No. 2 relied on the testimony of Kelley Short concerning his alleged suspicion about the claimant's use of marijuana. It was Short's testimony that he would smell marijuana on the claimant in the morning when he picked him up for work and did so specifically on the morning of the accident. He stated that he asked the claimant if he was going to be all right on the roof and the claimant said he would. When asked about the claimant's appearance or demeanor that morning that caused him to have such a conversation, Short testified that he smelled pot on the claimant. He

also testified that he would never tolerate anybody drinking or being under the influence on a job site and that after the claimant fell from the roof he took him to the hospital but never told anyone that the claimant had been smoking marijuana. Thus, there is no drug test evidence in the record. Short also testified that a substantial amount of his business has come from his relationship with Zach Lacy. Overall, Mr. Short's testimony about having a significant suspicion that the claimant was intoxicated, but permitting him to work on the roof, and then failing to report this suspicion to the hospital, detracts from his credibility on this issue. When all the evidence is considered, there is insufficient evidence of the claimant's alleged intoxication and the statutory presumption of intoxication does not arise in this case.

The evidence further shows that the claimant was injured at a time when he was an employee of Zach Lacy d/b/a Zach Lacy Construction. For example, he was hired by Zach Lacy to perform work on the Kirk house because Lacy was shorthanded at the time. Short testified that Zach Lacy mentioned to him that he needed some help and Short knew of the claimant from a previous job and told Lacy that the claimant was looking for work. Thus, Short drove the claimant to the job site where he was hired by Zach Lacy. Lacy testified that the claimant came to the job site with Tom Kirvin but Lacy admitted that he hired the claimant and also explained his work duties and what was expected of him. He also told the claimant that he needed to provide him with a Workers' Compensation Waiver, which the claimant never obtained. He also stated that he paid the claimant directly by check and had the authority to correct him if he thought he was not doing his work properly. He also told the claimant and others when they were hired that they were independent contractors so that they would be responsible for their own taxes and their own workers' compensation coverage. However, in other significant respects, the relationship between Zach Lacy

and the claimant was one of employer-employee, where Mr. Lacy retained the authority to direct and control the claimant's work activity and paid him by check directly. See, Franklin v. Arkansas Kraft, Inc., 12 Ark. App. 66 (1984).

AWARD

Pursuant to the foregoing opinion and the law, Respondents No. 1 are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge