

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211548

DAVID DACUS, EMPLOYEE	CLAIMANT
LISA GEORGE, EMPLOYER	RESPONDENT NO. 1
EMPLOYERS MUTUAL INSURANCE CO., CARRIER	RESPONDENT NO. 1
CHRIS LANGLEY D/B/A LANGLEY CONSTRUCTION, UNINSURED EMPLOYER	RESPONDENT NO. 2

OPINION FILED DECEMBER 16, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 16, 2005 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROLL. WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was unrepresented.

ISSUES

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

At issue is whether or not the claimant is an employee of the respondent pursuant to Ark. Code Ann. §11-9-402 and whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find that the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties have agreed to the following stipulations: The claimant sustained an injury (broken right leg) when he fell through a roof on September 25, 2002. The claimant is subject to court-ordered child support payments from Faulkner County, see Ark. Code Ann. §11-9-110 and §11-9-115.

The claimant contends he was an employee of Lisa George at the time of his injury. He seeks payment of medical expenses and temporary total disability benefits from the date of injury to a date yet to be determined. The claimant contends his average weekly wage was \$560.00, (\$14.00 per hour @ 40 hour week), entitling him to a compensation rate of \$373.00.

Respondent No. 1 contends the claimant was not an employee or subcontractor. He was an independent contractor and had been issued a certificate of non-coverage from the Commission pursuant to Ark. Code Ann. §11-9-102(9)(10)(11) and §11-9-402. Therefore, the respondents are not liable for any benefits.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. Respondent's objection to claimant's packet of exhibits was sustained as they were not attached to the prehearing questionnaire and there was no proof they had ever been provided to opposing counsel. These exhibits are proffered for possible review on appeal, but they have not been considered in this decision.

The following witnesses testified at the hearing: Chris Langley, framer; and Charles George, co-owner. Credibility was a factor for both Mr. Langley and the claimant.

The claimant, age 52 (D.O.B. May 2, 1953), has an eleventh grade education and work experience as a carpenter. The claimant went to a subdivision where new houses were being built. He spoke with Chris Langley at a job site with a sign out front reading, "Charles George Builders." Mr. Langley hired him to work at \$14.00 per hour full-time.

Mr. George would come by to say hello but Mr. Langley was in charge of the job site. Materials and tools were furnished by Mr. George. Mr. Langley directed the claimant's job duties and hours.

The claimant was injured on September 25, 2002 when he fell while working on a roof. Mr. Langley took the claimant to a doctor and Mr. George met them there. Mr. George told the doctor

he would take care of the bills, but the doctor referred the claimant to the emergency room (ER). The claimant had not worked long enough for the respondents to receive a paycheck at the time of the accident. While he was in the hospital, Mr. Langley gave him \$500.00. The claimant had worked for Mr. Langley in the past at another job site. Ultimately, the claimant was treated by Drs. Ghormley and Stroope and has undergone two surgeries.

The claimant denied signing a "Certificate of Non-Coverage" with the Commission dated July 30, 2001. He stated that he was incarcerated during that time period for non-payment of child support, although the signature on the certificate did resemble his handwriting.

On cross-examination, the claimant admitted that his incarceration began August 4, 2001 according to the Detention Center Records. He has also been incarcerated for DUI and drug possession.

Chris Langley testified he was hired by Mr. George to frame the house. In turn, he engaged the services of carpenters to help on the job, designating them as subcontractors, not employees. According to Mr. Langley the crew were never instructed what to do and could come and go as they pleased. Mr. Langley stated the two or three crew members on the site were paid by the job and were not paid at an hourly rate. Mr. Langley stated he paid the claimant \$300.00 one week and \$400.00 the next week. He does not recall paying the claimant after he went to the hospital. Mr. Langley stated he requires all crew members to furnish a Certificate of Non-Coverage as he carries no insurance. Mr. Langley grudgingly admitted some crew members borrowed his tools; the materials were paid by Mr. George; and he did have the authority to fire crew members.

On cross-examination, Mr. Langley stated he wouldn't fire anyone, he just wouldn't use their services again. However, it should be noted that the claimant had worked for Mr. Langley previously and didn't show up to finish the work, yet he was "hired" again for this job with Mr. George. (Tr. p. 48) Mr. Langley testified he and Mr. George reached an agreement on the price of framing a house and he draws against that amount until the job is finished. Mr. George does not withhold taxes. Mr. Langley is under no obligation to work for Mr. George or do the framing at a particular job site.

Charles George is a homebuilder. He engages the services of plumbers, framers, electricians, etc. to construct homes. He testified these “specialists” are not given a deadline to complete their work, but it is understood that they need to complete the job as soon as possible. He considers these contractors to be independent. Mr. George worked with Mr. Langley on several occasions, but he has never inquired if Mr. Langley had insurance coverage.

On the day of the injury, Mr. George designated Dr. Robert Rook, his friend and family physician to treat the claimant. After x-rays were taken showing a broken leg, Dr. Rook advised that the claimant would need an orthopaedic surgeon. An ambulance transported the claimant from the doctor’s office to the hospital.

MEDICAL EVIDENCE

The medical evidence establishes a compensable injury and that issue does not appear to be in dispute.

FINDINGS AND CONCLUSIONS

The Workers’ Compensation Act is predicated on the social philosophy that the cost of providing benefits to an injured worker is ultimately paid by the consumer, through insurance, whose premiums are passed on in the cost of the product. Larson, Workmen’s Compensation, (Desk Ed.) §§1, “The Nature of Workmen’s Compensation.”

In the case of construction, the cost of insurance would be passed along to the home buyer in the price of the house. The consequences of injured uninsured workers on society affects hospitals, bankruptcy courts, charitable institutions and social programs (Welfare, food stamps, Social Security, Medicare, etc.).

The employment relationship is governed by Ark. Code Ann. §11-9-102(10)(11) and §11-9-402, see also Aloha Pools & Spas, Inc. v. Employer’s Insurance of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983), Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982) and Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976).

The evidence of record shows the contractors were paid by the job and no taxes were withheld. The contractors could hire a crew of employees and had the ability to control their work and fire them. Tools and materials were supplied for the employees. The claimant did not have a company of his own and a certificate of non-coverage is not binding on the Commission's determination of the employment relationship. Therefore, I find respondent No. 1 to be in the business of building homes and hiring subcontractors to complete the work. Mr. Langley is an uninsured framing subcontractor who hires carpentry crews. The claimant was an employee of Mr. Langley. As the prime contractor, Mr. George is liable for any uninsured employee of a subcontractor.

There were no wage records to verify the average weekly wage and testimony on this issue was conflicting. It appears the claimant received three payments, \$300.00, \$400.00 and \$500.00. Accordingly, I find the average weekly wage to be \$400.00, pursuant to Ark. Code Ann. §11-9-518(c), or an average of the three paychecks.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employment relationship existed among the parties on September 25, 2002. The claimant was an employee of an uninsured subcontractor, Chris Langley, hired by Lisa George, the prime contractor. The claimant's average weekly wage was \$400.00.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. Respondent No. 1 is directed to pay the claimant temporary total disability benefits from September 26, 2002 to a date yet to be determined, as he remains in his healing period and has not returned to work. These benefits are subject to a child support lien.
4. Respondent No. 1 is directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30.

5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge