

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F210267**

**BRAD MAYNARD**

**CLAIMANT**

**GLENWOOD HOMES  
(UNINSURED)**

**RESPONDENT EMPLOYER**

**ORDER AND OPINION FILED JANUARY 31, 2005**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

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

Respondent represented by the HONORABLE C. BURT NEWELL, Attorney at Law, Hot Springs, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Hot Springs, Arkansas on December 3, 2004. A prehearing conference was held and a prehearing order was filed on October 20, 2004. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulation:

1. The claimant was involved in an incident on August 9, 2002.

The claimant contends he was an employee of the respondent employer and was involved in an accident at work on August 9, 2002. The claimant contends he is entitled to medical benefits, temporary total disability benefits from August 9, 2002 through April 3, 2003 and a 10% anatomical rating to the foot and attorney's fees.

Respondent contends that the claimant was not an employee of Glenwood Homes on August 9, 2002 and was not authorized to be performing any services for Glenwood Homes. Alternatively, if the claimant is found to be engaged in an employment relationship, then respondent contends the claimant was not within the course and scope of his employment at the time of the injury. The claim has been controverted in its entirety.

### **ISSUES TO BE LITIGATED**

1. Whether there is an employer/employee relationship.
2. Compensability.
3. Medical benefits.
4. Temporary total disability benefits.
5. Anatomical rating.
6. Attorney's fees.

From a review of 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 made in accordance with Ark. Code Ann.

§11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The claimant was involved in an incident on August 9, 2002.

2. The claimant has proven by a preponderance of the evidence that the claimant was an employee of the respondent employer and the claimant's injury is governed by the provisions of the Arkansas Workers' Compensation Law.

3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of the employment.

4. The respondents are liable for reasonable and necessary medical expenses.

5. The claimant has proven by a preponderance of the evidence that he has remained in his healing period and did not return to work from August 10, 2002 through April 3, 2003.

6. The claimant's average weekly wage should be based on an average of the money paid him on the three separate occasions. Ark. Code Ann. §11-9-518.

7. The claimant has proven by a preponderance of the evidence that he sustained a 10% permanent impairment rating to his right foot.

8. Respondents are ordered to pay the court reporting costs pursuant to Rule 20 of the Arkansas Workers' Compensation Rules and Regulations.

### **DISCUSSION**

The claimant, 42 years old, was injured on August 9, 2002, when he shattered his heel coming off a roof of a mobile home. According to the claimant, he spoke with Jacky, son-in-law of Ron O'Neal and co-owner of Glenwood Homes, about working with Tommy Reppo, another employee of Glenwood Homes. According to the claimant, Tommy needed help underpinning the mobile homes. Glenwood Homes is a mobile home dealership. According to the claimant, Jacky agreed to pay the claimant \$8 per hour on an "as needed" basis and the pay was in cash. Before the August 9, 2002,

incident, the claimant had worked three days for the respondent. The claimant had worked in putting up fence around the mobile home business and had pulled up some carpet in a mobile home. According to the claimant, Mr. O'Neal had told him to pull the carpet and Jacky and Tommy had told him to help build the fence.

According to the claimant, on August 9, 2002, the claimant arrived at the Glenwood Homes office about 8:00 a.m. and was sent out to a mobile home by Jacky to clean up after repairing a leak. The claimant climbed on top of a mobile home to retrieve a hammer that had been left there and as he was coming off the roof, his right heel hit a rock and his heel was shattered. The claimant sought immediate medical treatment and was hospitalized.

Under cross examination, the claimant verified that he never completed a job application for the respondent and was paid on three occasions in cash and never by check. The claimant verified that he never received a W-2 Form but did receive cash from Jacky on three occasions for work performed for Glenwood Homes. The claimant verified that his joint income tax form showed no income for him for the past three years. The claimant verified that he did not indicate that Glenwood Homes was his employer when he checked into the hospital nor did he go to Glenwood Homes to file an accident report. The claimant verified that about two months after the accident he filed a report of injury with the Workers' Compensation Commission

The claimant testified that he took instructions on work from Tommy Reppo and he considered him to be his foreman and his work was spot work, one day one week, maybe two days in another week. The largest weekly sum the claimant received was for three days, \$220 in cash.

The respondent employer, Glenwood Homes, was uninsured at the time of the accident. According to the claimant, the employees were: Mr. O'Neal, Mr. O'Neal's wife, Jacky, the son-in-law, Jacky's wife, Tommy Reppo, Tommy Reppo's wife and Judy.

Tommy Reppo, employee of Glenwood Homes, testified that the claimant did some work for Glenwood Homes, to include helping build a fence. According to Mr. Reppo, Jacky Don, co-owner of the business, told him to check on a mobile home and to pick up the claimant. Mr. Reppo and the claimant repaired a leak on the home and then the hammer was spotted on the roof. Because Mr. Reppo had a knee problem, the claimant volunteered to get the hammer. As the claimant was descending from the roof, he jumped and crushed his heel.

Ronny O'Neal, co-owner of the respondent employer, testified in the August 9, 2002, time frame, the employees of the business were himself, his wife, his daughter, her husband, Tommy Reppo, Priscilla Reppo and maybe Judy Harbour. These people were issued pay checks and W-2 Forms. Mr. O'Neal testified the claimant was not an employee.

Judy Harbour, service manager for the employer, began her employment on May 7, 2002. Ms. Harbour handles payroll and testified she has never issued pay to the claimant.

The central issue in this case is whether the claimant meets the definition of an "employee" as defined in Ark. Code Ann. §11-9-102(9)(A), and whether the claimant's injury is one governed by the provision of the Arkansas Workers' Compensation Law. Respondents argue the claimant simply was not an employee and the claimant

contends he was an employee. In determining the status of the claimant in this case, an analysis of employee, casual employee and independent contractor must be made.

Employment is defined as “[e]very employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business. . .” Ark. Code Ann. §11-9-102 (11) (Supp. 2003).

Ark. Code Ann. §11-9-102(9)(A) (Supp. 2003) defines “employee” as:

‘Employee’ means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

The Arkansas Workers’ Compensation Law excludes from the coverage of the Act “one whose employment is casual and not in the course of the trade, business, profession, or occupation of his employer.” As this provision has been interpreted by the Arkansas Supreme Court, an employee is not excluded unless his employment is both casual and not in the course of the trade, business, profession, or occupation of his employer. *Purdy’s Flower Shop v. Livingston*, 262 Ark. 575, 559 S.W.2d 24 (1977); *Meek v. Brooks*, 237 Ark. 717, 375 S.W.2d 671 (1964).

While the claimant’s employment with the respondent might be casual, it would be difficult to find that the work claimant performed was “not in the course of the...occupation of the employer.” The claimant helped build a fence around the office site and helped underpin a mobile home and repair a leak on a mobile home and

ultimately retrieve a hammer left on top of a mobile home after some installation.

These activities seem to clearly be functions arising out of the course and scope of the employer's business. Therefore, the claimant might be a casual employee but still not excluded from coverage.

While a specific contention that the claimant was an independent contractor was not made, a review of the factors that help decide if a worker is an employee or independent contractor should be considered. In *Wright v. Tyson Foods*, 28 Ark. App. 261, 773 S.W.2d 110 (1989), the Arkansas Court of Appeals noted that there are nine factors to be considered in the determination of status: (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. A review of these factors when applied to the facts in the present case weigh in favor of the claimant's being classified as an employee rather than an independent contractor.

When Factor (1), right to control, is considered, the testimony presented was persuasive that the claimant performed tasks assigned to him by the co-owner of the business and had little, if any, independent control of any work activity. As to Factor (2), the right to terminate without liability, there is no evidence in the record that a contract existed between the claimant and the employer. The claimant was employed

“at will” and was subject to the employer’s instructions. These observations are more consistent with an employer/employee relationship.

As to Factor (3), the manner of payment, the evidence indicates that the claimant was paid by the hour rather than by the job. This evidence is more consistent with the claimant being an employee rather than independent contractor. As to Factor (4), the claimant’s furnishing or obligation to furnish tools or materials for performance of the work, the evidence indicated the claimant furnished no tools or materials in performing his tasks. Instead, the employer furnished the tools and materials.

As to Factor (5), whether the claimant is employed in a separate occupation or business when performing the relevant work, the claimant had some previous fencing skills but was basically a general laborer. The jobs the claimant performed for the employer were not separate and distinct from the employer’s primary business but were activities in the general scope of the business. As to Factor (6), whether the claimant’s occupation required any special skill, there was only testimony that the claimant had some previous experience with fencing and that was one of the tasks the claimant participated with other employees of the business. The jobs the claimant participated in with his limited tenure were basically unskilled laborer jobs.

As to Factor (7), whether the employer is in business, it is clear that the employer was in business and was employing the claimant in furtherance of its business interests. As to Factor (8), whether the work was an integral part of the regular business of the employer, claimant’s job assignments were an integral part of the employer’s business. As to Factor (9), the length of time for which the claimant was

employed, the evidence indicates that the claimant was employed on an “as needed” basis and not for any specific period of time.

In summary, a consideration of the nine factors weighs more in favor of an employee rather than an independent contractor. Therefore, I must conclude that the claimant’s injury is one governed by the provisions of the Arkansas Workers’ Compensation Law.

Even though the claimant did not complete a W-2 Form nor an application, these are not factors that are dispositive of not being an employee of the employer. There does not appear to be case law that indicates the employer’s subjective handling of employment records to be pertinent to the determination of employee status.

After considering all the credible evidence, I find the claimant has proven by a preponderance of the evidence that he was an employee of the respondent employer and is subject to the other elements of compensability as established by Ark. Code Ann. §11-9-102. I further find the claimant has met his burden of proof and did sustain a compensable foot injury in the course and scope of his employment on August 9, 2002. The medical evidence provides the claimant sustained a right intra-articular comminuted calcaneal fracture which satisfies the objective findings requirement of Ark. Code Ann. §11-9-102 (16). Respondents are liable for reasonable and necessary medical treatment the claimant has incurred.

Respondents alternatively contended that if the claimant was found to be an employee, then he was not in the course and scope of his employment at the time of the incident. There was testimony from the claimant and the co-worker who witnessed the incident that the claimant went to the roof of a mobile home to retrieve a hammer

that had been left there. The claimant's foot hit a rock on his exit from the roof. While the employer did not specifically tell the claimant to go up on the roof to get the hammer, retrieving the hammer was a necessary task for completion of the mobile home installation or repair. This was furthering the employer's interest and was an integral part of the employer's business. I find the claimant was performing employment services at the time of his injury.

The claimant next contends that he is entitled to temporary total disability benefits from August 9, 2002 until April 3, 2003. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and have not returned to work. *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

In the present case, the claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work from August 10, 2002 through April 3, 2003. See, Ark. Code Ann. §11-9-521(a)(Supp. 1999); *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The claimant underwent right heel surgery on August 23, 2002 and continued to see Dr. Chris Young and receive physical therapy until he was released on April 3, 2003. Dr. Young assigned a 10% permanent impairment rating at that time. Medical documentation supports the claimant's contention.

The claimant contends his temporary total disability rate should be based on an average weekly wage of \$220 per week. The claimant testified that is the most he earned in any week. Ark. Code Ann. §11-9-518 provides that with no specific contract of hire in place, the Commission may determine the average weekly wage in a just and

fair method. Since the claimant received cash on three different occasions, I find averaging the three pay periods and determining an average weekly wage would be the most appropriate.

The claimant next contends that he is entitled to a 10% permanent impairment rating to his right foot. Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F)(ii)(a), provides that “Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” “Major cause” means more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14). Any determination of the existence of extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. §11-9-704(c)(1)(B). Pursuant to Ark. Code Ann. §11-9-522(g), the Commission has adopted the *Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Ed.*, for assessing anatomical impairment. However, to the extent that they allow subjective criteria to assess an impairment rating, the *Guides* must yield to the statutory definition of anatomical impairment as defined by the legislature. *Rizzi v. Sam’s Wholesale Club*, Workers’ Compensation Commission, E515370 and E112991 (April 1, 1999). The Commission may assess its own impairment rating rather than rely solely on the determination of the validity of ratings assigned by physicians. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

In support of this, Dr. Young’s April 3, 2003, report assigns a 10% permanent impairment to the foot while utilizing the *AMA Guides, 4<sup>th</sup> Ed.* Dr. Young has delineated

how he arrived at his rating, using the various tables in the *AMA Guides, 4<sup>th</sup> Ed.* After a review of the *Guides*, I find Dr. Young's anatomical rating is consistent with the injury the claimant sustained. I find the claimant has proven by a preponderance of the evidence that he is entitled to the 10% permanent impairment rating to the foot.

### **ORDER**

The claimant has proven by a preponderance of the evidence that the claimant was an employee of the respondent employer and the claimant's injury is governed by the provisions of the Arkansas Workers' Compensation Law. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of the employment. Respondents are liable for reasonable and necessary medical expenses. The claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work from August 10, 2002 through April 3, 2003. The claimant's average weekly wage should be based on an average of the money paid him on the three separate occasions. Ark. Code §11-9-518. The claimant has proven by a preponderance of the evidence that he sustained a 10% permanent impairment rating to his right foot.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

---

**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**