

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F510221**

**MATHEW S. BOLDIN**, EMPLOYEE

CLAIMANT

**CONYERS CONSTRUCTION CO.**,  
UNINSURED EMPLOYER

RESPONDENT

**OPINION FILED MAY 18, 2006**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 17, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent appeared pro se.

**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 the employment status between the claimant and respondent pursuant to Ark. Code Ann. §11-9-102(9)(10)(11) and §11-9-402. 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 preponderates in favor of the claimant and benefits are hereby awarded.

**STATEMENT OF THE CASE**

The parties did not enter into any stipulations.

The claimant contends he sustained a compensable injury to his left foot on July 22, 2005 while performing his job as a framer and employee of Conyers. The claimant seeks payment of medical expenses (including mileage) temporary total disability benefits from July 22, 2005 to October 20, 2005 and attorney's fees.

The respondent contends the claimant signed a WCC AR-A, "Certificate of Non-Coverage" and was therefore not an employee. The respondent further contends that he was in compliance with the Rules of the Commission and was not required to maintain workers' compensation insurance coverage. Alternatively, if the claim is found to be compensable, the claimant was working in an unsafe manner and the respondent should not be held accountable for the injury.

The following were submitted without objection and comprise the evidence of record: the claimant's prehearing questionnaire and exhibits contained in the transcript. The respondent did not file a prehearing questionnaire nor submit exhibits in a timely fashion. Those documents have not been reviewed for this decision but have been proffered in the event of appeal.

The claimant, age 22 (D.O.B. December 5, 1983) has a high school education and work experience in construction. He worked for the respondent for two years prior to the accident and was paid \$11.00 per hour for a forty hour week. There were five employees on the job site at the time of the injury (Tr. p. 13, 16). The respondent provided tools and supplies, set the work hours, and had the right to terminate the claimant's employment (Tr. 15, 22-23).

The claimant conceded that he signed a WCC Form AR-A "Certificate of Non-Coverage" in December, 2004, because his employer, Mr. Conyers, required it as a condition of continued employment. However, the employment relationship did not change after the certificate was obtained (Tr. p. 16-18, 20).

The claimant fell off a roof on July 22, 2005 and broke a bone in his left foot. Mr. Conyers was aware of the accident (Tr. p. 14, 18-19). The claimant was treated conservatively and returned to work October 20, 2005 for a different employer. He

stated he was financially unable to pursue medical treatment but he would like to return to Dr. Shock to discuss the loss of range of motion in his foot.

On cross-examination, the claimant admitted that the employer provided safety equipment (toe boards on the roof, safety harness) on the job. The claimant also testified he was aware that Mr. Conyers had incorporated his business in May, 2005, and dropped his workers' compensation insurance coverage. The claimant also stated that Mr. Conyers had offered to rehire him after the accident but the claimant declined.

### **MEDICAL EVIDENCE**

Medical records show the claimant was treated for a talar fracture of the left foot. He gave a history of injury of falling off a roof on July 22, 2005 and lodging his foot between a piece of lumber and a brick. After x-rays, the claimant was given a cast boot, medication and crutches. The claimant was advised to elevate the leg, use ice for swelling, and avoid weight bearing. Dr. Shock's report of July 28, 2005 indicates the claimant should return in three weeks for more x-rays but there is no indication the claimant returned to the doctor for follow-up. No physician has specifically commented on the healing period.

The claimant received treatment from the Baptist Emergency Room, his general practitioner, Dr. Joe Abrams, and orthopaedic specialist, Dr. Ethan Shock. The claimant submitted bills for mileage, \$26.35, a pharmacy receipt for \$65.99, a receipt for the cast boot \$182.00, Dr. Abrams' office visit of \$135.00, and a receipt for \$150.00 (medical provider unknown). Presently these medical expenses total \$559.34.

## **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." For example, in the case of construction, the cost of insurance would be passed along to the home buyer.

In exchange for this system of workers' compensation, the employee gives up the right to sue the employer in tort for damages to be decided by a jury. Because of this arrangement, workers' compensation insurance coverage is mandatory. Employers cannot avoid liability by having an employee sign an agreement waiving their rights, Ark. Code Ann. §11-9-108. The consequences of uninsured injured workers on society affects hospitals, bankruptcy courts, charitable institutions and social programs (Welfare, food stamps, Social Security, Medicare, etc.).

An employer who fails to obtain workers' compensation insurance coverage is subject to criminal penalties, Ark. Code Ann. §11-9-406. Although the Workers' Compensation Act provides for a "certificate of Non-Coverage", Ark. Code Ann. §11-9-402, the Commission decides the employment status of an injured worker based on the facts of each case and the Certificate of Non-Coverage is not binding on the Commission's determination.

The employment relationship is governed by Ark. Code Ann. §11-9-102(9)(10)(11) and §11-9-402. In deciding the employment status of the parties (general contractor, subcontractor, independent contractor, employee), the

Commission takes into account several factors:

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.

Aloha Pools & Spas 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).

In the case at bar, the evidence of record shows the respondent, a home builder, has a crew of five laborers for construction work. The work was unskilled manual labor and the respondent provided tools and supplies. The respondent had the authority to hire and fire the laborers, set their wages and supervise their activities. The claimant has worked for the respondent on several houses over a two year period of time as a framer and roofer. Based on the evidence of record, I find the respondent employed enough laborers to require him to provide workers'

compensation insurance coverage. I also find the claimant was an employee of the respondent and suffered a compensable scheduled injury.

The "Certificate of Non-Coverage" does not apply to employees and the employer cannot contract away his liability by agreement, Ark. Code Ann. §11-9-402. §11-9-108. Even if the employee was working in an unsafe manner, the Workers' Compensation Act is based on a no-fault concept, Ark. Code Ann. §11-9-401, and the employer remains liable for any work-related accidents.

The claimant has requested temporary total disability benefits from July 22, 2005 to October 20, 2005. Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. For a scheduled injury, a claimant is entitled to temporary total disability compensation during the time that the employee is within the healing period or until the employee returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of physical capabilities. Carroll General Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996). If the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, the temporary disability is deemed "total." Pyles v. Triple F. Feeds of

Texas, 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980). The determination of the end of the healing period and whether the claimant has made a good faith effort to “return to work” are factual questions to be decided by the Commission. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Based on the claimant’s testimony, I find he is entitled to temporary total disability benefits based on his work restrictions and need for treatment.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which an uninsured employer-employee relationship existed among the parties on July 22, 2005, at which time the claimant was earning an average weekly wage of \$440.00, entitling him to a compensation rate of \$293.00.
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. The respondent is directed to pay the medical providers or reimburse the claimant for all medical expenses incurred within thirty days pursuant to Commission Rule 30.
4. The respondent is directed to pay temporary total disability benefits from July 22 to October 20, 2005, as the claimant was in a healing period and had not returned to work.
5. The respondent is directed to pay court reporting costs pursuant to Commission Rule 20, totaling \$185.80.
6. 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.

7. A copy of this Order has been forwarded to the Compliance Division for possible sanctions against the employer pursuant to Ark. Code Ann. §11-9-406.

### **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.

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ELIZABETH W. HOGAN  
Administrative Law Judge