

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503899

RUSSELL COMPTON, Employee	CLAIMANT
FOX HOMES, INC.	RESPONDENT #1
UNION STANDARD INSURANCE CO.	RESPONDENT #1
LOY FOX d/b/a FOX CONSTRUCTION	RESPONDENT #2

OPINION FILED SEPTEMBER 7, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by ANDREW HATFIELD, Attorney, Rogers, Arkansas.

STATEMENT OF THE CASE

On August 9, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 24, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

There were no stipulations entered into by the parties.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Employee/employer relationship.
2. Compensability.
3. Temporary total disability benefits.
4. Medical benefits.
5. Attorney's fee.
6. Compensation rate.

The claimant contends he was injured on March 24, 2005 when his left thumb was

cut off while using a skill saw. He contends he is entitled to temporary total disability, medical, and an attorney's fee.

Respondent #1 contends that the claimant was not an employee of Fox Homes. In particular, the claimant was working as a self proprietor for Loy Fox of Fox Construction, which is a completely different entity. At no time did Fox Homes direct any of the claimant's work, nor was he ever under the control of Fox Homes. Instead, the claimant was performing framing work on a spec house which was to be sold. At no time was Fox Homes contractually obligated to a third party which is required for Fox Homes to be a prime contractor in this matter. Respondent #1 has no liability in this matter, either as the employer or the statutory employer.

Respondent #2 contends that claimant was not its employee and that claimant did not suffer a compensable injury.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At the time of his injury the claimant was an employee of respondent #2. Respondent #2 is liable for payment of all compensation benefits owed to the claimant. Respondent #1 is not liable for payment of any compensation benefits.

2. Claimant suffered a compensable injury to his left thumb while employed by respondent #2 on March 24, 2005.

3. Claimant is entitled to temporary total disability benefits beginning March 25, 2005 and continuing through November 1, 2005, with the exception of a one week period of time. Respondent #2 is not entitled to a credit for disability benefits claimant received

from social security.

4. Respondent #2 is liable for payment of all medical treatment provided in connection with claimant's compensable injury. Respondent #2 is entitled to a credit for any medical benefits it has previously paid.

5. Claimant's average weekly wage while working for respondent #2 was \$263.00 which would entitle him to compensation at the rate of \$175.00 for temporary total disability benefits.

6. Respondent #2 has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

This case is somewhat unusual in that it involves three separate entities. The first entity is respondent #1, Fox Homes, a corporation owned by Rex and Carolyn Fox. Carolyn Fox testified at the hearing that respondent #1 builds homes by hiring various subcontractors to perform construction work. These subcontractors include dirt work, concrete, framers, cabinetmakers, electricians, plumbers, et cetera. Those subcontractors would also include framing subcontractors. Carolyn Fox testified that these framing contractors would include both a framing company operated by their son, Joe Fox, and a second framing company operated by another son, Loy Fox, who operated a business known as Fox Construction. In addition to the companies operated by their two sons, Fox Homes also hired other framers to perform construction work.

The second entity involved in this case is Joe Fox who apparently operated his own framing company and performed some framing work for Fox Homes. Joe Fox was not made a party to this claim individually or as a business.

The third entity involved is Fox Construction which is operated by Loy Fox. Loy Fox was present at the hearing and testified that he does business as Fox Construction. He

testified that he has had his own construction company for some eight to ten years and performed construction work for various companies including Fox Homes. Loy Fox testified that at the time of claimant's injury his company performed framing work.

The claimant is a 47-year-old man who testified at the hearing that it was his understanding that he was employed by Fox Homes and that he was hired by Joe Fox who was his direct supervisor. Claimant testified that he was hired in October or November to pick up waste such as sticks, wood, et cetera on various job sites. Claimant testified that at some point in time his job changed and he began to perform framing work in addition to his other duties. Claimant testified that Joe Fox was his direct supervisor and that he always believed Joe worked for Rex and Carolyn Fox and Fox Homes.

Claimant testified that approximately two to three weeks before his accident Joe Fox informed him that he was having some problems and was no longer going to perform construction work; instead, claimant would be working for Loy Fox performing the same type of work. Claimant testified that after this conversation took place he continued to perform the same type of work and worked on the same house. While Joe Fox still came by the job site on occasion, claimant testified that he primarily took directions from Loy after that date. In addition, while Joe had previously paid claimant for his work in cash, Loy Fox paid claimant by check drawn on a Fox Construction account.

Claimant testified that on March 24, 2005 he was in the process of using a circular saw to cut rafter ends when the electrical cord on the saw was struck by another employee causing the saw to strike his left thumb and amputate a portion of it. Claimant was taken to the hospital and subsequently underwent a revision surgery by Dr. Tang.

Claimant has filed this claim contending that he suffered a compensable injury while employed by Fox Homes. He seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATIONEMPLOYEE/EMPLOYER RELATIONSHIP.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant was an employee of respondent #2, Fox Construction, at the time of his injury on March 24, 2005. While claimant may have previously been employed by Joe Fox, at the time of his injury he had become employed by Loy Fox and respondent #2.

In reaching this decision, I initially find that claimant was not employed by respondent #1, Fox Homes. As previously noted, respondent #1, Fox Homes, is a company owned by Carolyn and Rex Fox. Carolyn Fox testified at the hearing that they are a company which builds homes through the use of various subcontractors who perform the actual construction work. These subcontractors include various framing companies and on this particular home included the framing company owned by their son, Joe Fox. However, Carolyn Fox testified that Joe Fox operates his own framing company and that he is not an employee of Fox Homes. Carolyn Fox also testified that claimant was not employed by Fox Homes.

Claimant testified that he believed that Joe Fox did work for Fox Homes and did not know if Joe Fox owned his own company. While Carolyn and Rex Fox were sometimes present on the job site, claimant admitted that he had no documentation indicating that he was ever employed by Fox Homes and that he had never been told what to do by Carolyn or Rex Fox. Instead, claimant was given job instructions by either Joe or Loy Fox. In addition, claimant testified that he was hired by Joe Fox, not Carolyn or Rex Fox.

In summary, I find that claimant has offered insufficient evidence proving that he was employed by Fox Homes, respondent #1.

It appears that claimant was initially hired by and was an employee of Joe Fox and his framing company. However, neither Joe Fox individually or his company were made

parties to this claim. Furthermore, even if Joe Fox had been a party to this claim, the relevant issue is who was claimant's employer at the time of his accident on March 24, 2005.

As previously noted, approximately two to three weeks before claimant's accident claimant had been informed by Joe Fox that he was no longer going to build houses; instead, claimant would work for Joe's brother, Loy Fox, and Fox Construction, respondent #2. While claimant did continue performing the same type of work on the same house after this occurrence, other aspects of the claimant's job changed. For instance, when claimant worked for Joe Fox he was always paid in cash. When claimant began working for Loy Fox he was paid by check. Copies of these checks are contained in the documentary evidence. In addition, claimant testified that after this occurred Loy Fox fired all of Joe's crew except for the claimant.

I believe these factors are important because they clearly indicate that approximately two to three weeks before claimant's injury he no longer worked for Joe Fox, but instead became employed by Loy Fox and Fox Construction. Claimant was employed by Loy Fox and Fox Construction on the date of his accident of March 24, 2005.

In its defense of this claim, respondent #2 contends that claimant was not its employee but rather an independent contractor and cites as evidence a Certificate of Non-Coverage which it contends was provided by the claimant.

Whether an individual is an employee or an independent contractor depends on the facts of the case. *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W. 2d 286 (1982). In determining this issue the Commission may consider various factors including but not limited to: (1) the extent of control; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the skill required in the particular occupation; (4) whether the employer or the workman supplies the tools and place of work; (5) the length of time for which the person is employed; (6) the method of payment, whether time or by

the job; and (7) whether or not the work is a part of the regular business of the employer.

These are not all the factors which may be considered and it is not necessary for the Commission to consider all of the factors in some cases. The relative weight to be given to the various factors is to be determined by the Commission. *Franklin, supra*.

In this particular case, I find after consideration of the various factors that the claimant was an employee of respondent #2 on the date of his accident, not an independent contractor.

First, claimant testified that he was given instructions as to his job duties by either Loy or Joe Fox. Thus, respondent #2 exercised control over the details of claimant's work. Second, there is no indication that the claimant was engaged in a distinct occupation or business. Instead, the claimant began work for the respondent as a general laborer with no specific skills until he was asked to perform some framing work. In addition, claimant testified that he provided no tools or supplies to perform his work. Instead, those tools were provided by respondent #2 which part of the time used tools of Joe Fox. The evidence also indicates that framing work is a regular part of the business of respondent #2. Respondent #2 at the time of claimant's injury was in the framing business. Finally, claimant was not paid for a particular job, but instead was paid hourly wages for his work. After consideration of all of these relevant factors, I find that the claimant was an employee of respondent #2 on the date of his injury, not an independent contractor.

With respect to the Certificate of Non-Coverage, I note that there was some conflicting evidence as to whether or not the Certificate of Non-Coverage was supplied by the claimant. Having found that claimant was an employee, any Certificate of Non-Coverage provided to respondent #2 is invalid. The Arkansas Court of Appeals and the Arkansas Workers' Compensation Commission have both held that Certificates of Non-Coverage do not act as a waiver for individuals who are employees. Certificates only apply to sole proprietors or partners who are conducting independent businesses. Under

Arkansas law, an employee cannot waive his right to workers' compensation coverage. See *Clover Leaf Express v. Fouts*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W. 3d \_\_\_ (April 27, 2005); *Simpson v. Wayne Moore Construction Company*, Full Commission Opinion filed February 23, 2004 (F207890). Because claimant was an employee of respondent #2, any certificate provided by him is invalid.

Although I have found that claimant was not an employee of Fox Homes, respondent #1, at the time of his injury, it might be argued that respondent #1 is liable for payment of compensation benefits pursuant to A.C.A. §11-9-402 which provides that prime contractors are liable for compensation to employees of subcontractors if a subcontractor fails to provide compensation. In this particular case, respondent #2 did not provide workers' compensation insurance. However, in order for respondent #1 to be considered a prime contractor, it must first be established that respondent #1 was contractually obligated to a third person for the work being performed by the subcontractor. *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W. 2d 526 (1982).

Carolyn Fox testified that the home being built where claimant was injured was a "spec" house to be sold after it was built. Carolyn Fox testified that there was no contract to build the house for any third party. Absent a contractual obligation to a third party, Fox Homes cannot be liable as a prime contractor pursuant to A.C.A. §11-9-402.

Thus, respondent #2 is the sole entity liable for payment of compensation benefits.

COMPENSABLE INJURY.

I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left thumb while employed by respondent #2 on March 24, 2005.

The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring

after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 injury;
- (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.

Claimant testified that he suffered a partial amputation to his left thumb when the electrical cord on the circular saw he was using to cut rafters was struck by another employee causing the saw to jerk. As a result of this injury claimant was taken to the hospital for immediate treatment and eventually underwent surgery which was performed by Dr. Tang. Based upon the testimony presented at the hearing as well as the medical evidence which was submitted, I find that claimant has proven by a preponderance of the evidence that his injury arose out of and in the course of his employment with respondent #2 and that the injury was caused by a specific incident identifiable by time and place of occurrence. I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury.

In short, claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of a partial amputation to his left thumb while working for respondent #2 on March 24, 2005.

#### MEDICAL

Respondent #2 is liable for payment of all reasonable and necessary medical

treatment provided in connection with claimant's compensable injury. Testimony at the hearing indicated that respondent #2 initially paid for some of claimant's medical treatment. Respondent #2 is entitled to a credit for any medical benefits previously paid.

TEMPORARY TOTAL DISABILITY.

The injury to claimant's left thumb is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). In this particular case, I find that claimant is entitled to temporary total disability benefits beginning March 25, 2005, the day after his injury, and continuing until November 1, 2005. Claimant testified that beginning in November 2005 he began working for a land development company. I also find that respondent #2 is entitled to a one week credit for temporary total disability benefits based upon claimant's testimony that he attempted to return to work at a lawn mowing job for approximately one week. However, claimant testified that he was unable to perform that job because of the vibration.

Accordingly, I find that claimant is entitled to temporary total disability benefits beginning March 25, 2005 and continuing through November 1, 2005, with the exception of one week.

With respect to this issue, respondent #2 requests a credit for benefits claimant received from social security disability. According to claimant's testimony, he began receiving social security disability benefits beginning in 1996 based upon injuries to his head in 1984 and again in 1996. Claimant testified that even though he drew social security disability benefits, he is eligible to earn approximately \$500.00 a month and still draw those benefits.

I find that respondent #2 is not entitled to a credit for the social security disability

benefits paid to claimant during the period awarded. Credit for disability benefits is governed by the provisions of A.C.A. §11-9-411. Subsection (a) of that statute states that benefits payable to an injured worker shall be reduced dollar-for-dollar the amount of benefits the injured worker previously received for the same medical services or period of disability. First, I do not find that the disability benefits claimant received from social security are for the same disability. In this particular case the claimant was already receiving disability benefits from social security for another disability. The disability benefits awarded in this case are for a work-related injury which are totally unrelated to claimant's social security disability benefits.

I also note that the Commission in *Hickok v. Stone Express*, Full Commission Opinion filed May 3, 2006 (F408999), stated that the purpose of this statute is "specifically intended to prevent a double recovery for benefits which an injured worker has already received." In this case, the claimant is not receiving a double recovery because he was already receiving social security disability benefits prior to his compensable injury.

Based on the foregoing, I find that respondent is not entitled to a credit for social security disability benefits received by the claimant between March 24, 2005 and November 1, 2005.

#### COMPENSATION RATE.

At the time of his injury, claimant was employed by Loy Fox and Fox Construction, respondent #2. Therefore, any wages claimant earned while previously employed by Joe Fox are irrelevant. Documentary evidence introduced at the hearing indicates that claimant received three payroll checks from Fox Construction. The first dated March 18, 2005 is for \$375.00. Claimant received two checks from Fox Construction on March 25, 2005 for the amounts of \$21.00 and \$130.00. Claimant testified that the \$21.00 check was to make up the difference between \$7.00 per hour and \$8.00 per hour which he had previously been paid by Joe Fox.

Based upon these payroll checks, I find that claimant was paid a total of \$526.00 for two weeks of work. This results in an average weekly wage of \$263.00 which would entitle claimant to compensation at the rate of \$175.00 per week for temporary total disability benefits.

#### ATTORNEY FEE.

Respondent #2 has controverted claimant's entitlement to all unpaid indemnity benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

#### AWARD

At the time of his injury on March 24, 2005, the claimant was an employee of respondent #2. Claimant suffered a compensable injury to his left thumb on that date while employed by respondent #2; therefore, respondent #2 is liable for compensation benefits. This includes payment of all reasonable and necessary medical treatment as well as temporary total disability benefits beginning March 25, 2005 and continuing through November 1, 2005, with the exception of one week. Respondent #2 is entitled to a credit for any medical benefits it previously paid, but not for social security disability benefits received by the claimant. Respondent #2 has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE