

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F505880**

**GEORGE S. KING, EMPLOYEE**

**CLAIMANT**

**WYLIE CONSTRUCTION, UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED JANUARY 31, 2006**

Hearing before Administrative Law Judge J. Mark White on January 12, 2006, in Hope, Hempstead County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. James Pilkinton, Attorney at Law, Hope, Arkansas.

**STATEMENT OF THE CASE**

On January 12, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on November 14, 2005, and a Prehearing Order was entered that same day. A copy of the November 14, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the respondent is a sole proprietorship and is a licensed building contractor; that the respondent retained

subcontractors to perform some of the contract under which the respondent and the claimant were working at the time of the accident; that the claimant earned \$10 per hour from the respondent; and that the claimant fell and broke his left arm on June 2, 2005.

The issues to be presented were defined as follows: Whether the claimant was an employee of the respondent or an independent contractor; whether the respondent is an employer subject to the Workers' Compensation Act; whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to medical treatment; and determination of the claimant's average weekly wage and corresponding compensation rate. The issue of permanent benefits was expressly reserved.

The claimant contends that he was an employee of the respondent; that he earned \$400 per week for his work for respondent; that he sustained a compensable injury to his left arm on June 2, 2005 in the course and scope of his employment; and that he is entitled to medical treatment and to temporary total disability benefits from June 2, 2005 through a date yet to be determined.

The respondent contends that claimant was an independent contractor doing framing for a house at the rate of \$10 per hour for whom no workers' compensation

coverage was required under the Arkansas Workers' Compensation Law; that claimant was solely responsible for his own negligence and injury; and that if claimant should be determined to be an employee for which workers' compensation coverage is required, the respondent reserves its right to contest the duration of the claimant's injury and the reasonable and necessary medical associated therewith.

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

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that the respondent retained the right to control the means and the method by which the claimant's work was done.

4. The claimant has proven by a preponderance of the evidence that he was an employee of the respondent and not an independent contractor.
5. The claimant has proven by a preponderance of the evidence that the respondent is an employer subject to the provisions of the Workers' Compensation Act.
6. The claimant has proven by a preponderance of the evidence that he sustained an injury to his left wrist arising out of and in the course of his employment with the respondent; that the injury caused internal physical harm to the body requiring medical services; that the existence and extent of his injury is established by medical evidence supported by objective findings; and that his injury was caused by a specific incident identifiable by time and place of occurrence.
7. The claimant has therefore proven by a preponderance of the evidence that he sustained a compensable injury to his left wrist.
8. The claimant has proven by a preponderance of the evidence that the medical treatment he has received as documented in the record has been reasonably necessary in connection with the compensable injury.
9. The claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from June 3, 2005,

through November 3, 2005.

10. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from June 3, 2005, through November 3, 2005.
11. The claimant has proven by a preponderance of the evidence that he earned an average weekly wage of \$355, entitling him to a compensation rate of \$237 for total disability benefits and \$178 for permanent partial disability benefits.
12. The respondent has controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The respondent, Steve Wylie, is a licensed building contractor who was under contract to build a home for Chad and Christy Aires. In the course of performing that contract, he hired the claimant to work as a framing carpenter. The claimant has more than twenty years of construction experience, though most of his experience is in building chicken houses. The claimant signed an IRS Form W-9 waiving tax withholding and took responsibility for paying all his own taxes. He was paid at the rate of \$10 per hour.

The claimant testified that in his work, he was supervised by Wylie and by

Doyle "Junior" Faulk. Faulk testified that he and the claimant were hired as "contract labor." Faulk testified that he works for several different contractors, always as "contract labor," responsible for his own taxes and insurance. Faulk testified that he and the claimant worked a regular schedule, usually from 7 a.m. until 4:30 p.m.

Wylie testified that he has no employees and that he hired the claimant as an independent contractor. He testified that he informed the claimant at the beginning that the claimant would be self-employed, responsible for his own taxes, and responsible for his own injuries and workers' compensation insurance. Wylie described Faulk as the "leadman" on the job.

In the fourth week of his work on the Aires home, on June 2, 2005, the claimant broke his left wrist when he fell off some scaffolding. He initially declined medical treatment, but on June 4 he went to the emergency room. Wrist x-rays revealed an impacted comminuted fracture of the left distal radius, and the claimant was referred to an orthopedic specialist, Dr. Clemons Soeller. Dr. Soeller saw the claimant on June 7 and recommended surgery to repair the fracture, but the claimant declined surgery. As explained in later medical records and in his testimony, the claimant could not afford surgery and put it off until he was able to obtain government assistance. By the time he told Dr. Soeller he was ready for

surgery, on July 7, Dr. Soeller opined that it was too late and that the claimant should wait for the fracture to naturally heal before pursuing additional treatment.

The claimant sought a second opinion from Dr. Greg Smolarz on July 22. Dr. Smolarz recommended an ostectomy and carpal tunnel release, which was eventually performed on September 19. On November 3 Dr. Smolarz recorded significant improvement in the claimant's reports of pain, and he released the claimant to return to work without restrictions.

## **II. Adjudication**

### **A. Employment Status**

The determination as to whether one is an employee or an independent contractor is a question of fact. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). The primary factor to consider is whether the employer has the right to control the means and the method by which the work is done, but neither that factor nor any other feature of the relationship is alone determinative. *Id.* The courts have identified other factors that may be considered, including:

- (1) The right to terminate the employment without liability;
- (2) The method of payment, whether by time, job, piece or other unit of measurement;

- (3) The furnishing, or the obligation to furnish, the necessary tools, equipment and materials;
- (4) Whether the person employed is engaged in a distinct occupation or business;
- (5) The skill required in a particular occupation;
- (6) Whether the employer is in business;
- (7) Whether the work is an integral part of the regular business of the employer; and
- (8) The length of time for which the person is employed.

*Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982).

There is no evidence of any written contract between the claimant and the respondent. The claimant agreed in his testimony that he and the respondent had the authority to terminate the relationship at any time without liability. He testified that at the time of his injury he was working only for the respondent. He testified that Wylie provided all of the needed tools; Wylie testified that the claimant provided some tools, but Wylie acknowledged providing other tools. The claimant worked under the supervision of Faulk; he testified that Wylie would provide instructions first thing in the morning, and that Faulk would direct him through the rest of the day. The claimant testified that he was paid at the rate of \$10 per hour.

It is clear from the record that the claimant was engaged in a distinct occupation, albeit an occupation requiring relatively little skill or specialized

training; that the respondent is in business; and that the work performed by the claimant was an integral part of the regular business of the respondent. I find that the claimant has proven by a preponderance of the evidence that the respondent retained the right to control the means and the method by which the claimant's work was done. Given this finding, and the facts discussed above, I find that the claimant has proven by a preponderance of the evidence that he was an employee of the respondent and not an independent contractor. *Cf. Simpson v. Wayne Moore Construction Co.*, A.W.C.C. F207890 (Feb. 23, 2004).

In making this finding, I note that the claimant took direction from Faulk, who described himself as an independent contractor – raising the suggestion, at least, that he was the claimant's employer. Faulk's status ultimately matters not; if Faulk was an employee of the respondent, then he acted as Wylie's agent in exercising control over the claimant. If Faulk was an independent contractor and was the claimant's actual employer, then Wylie remains liable as a prime contractor, per Ark. Code Ann. § 11-9-402.

### **B. Employer's Status**

The Workers' Compensation Act purports to apply to "every employer and every employee" in the state of Arkansas, as those terms are defined by the Act.

ARK. CODE ANN. § 11-9-103 (a). Generally, an “employer” is defined to be, “any individual carrying on any employment.” ARK. CODE ANN. § 11-9-102 (10). More specifically, “employment” is defined to include every employment in which “one (1) or more employees are employed by a contractor who subcontracts any part of his or her contract.” ARK. CODE ANN. § 11-9-102 (11)(C).

The parties have stipulated that the respondent subcontracted part of his contract, and Wylie testified that he was working under contract to build a home. Therefore, given my finding above that Wylie had at least one employee in the person of the claimant, I find that the claimant has proven by a preponderance of the evidence that the respondent is an employer subject to the provisions of the Workers’ Compensation Act.

### **C. Compensability**

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of 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 existence and extent of the injury; and (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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

There is no dispute that the claimant broke his wrist when he fell from a scaffold while on the job with the respondent. Given the testimony and medical evidence of record, I find that the claimant has proven by a preponderance of the evidence that he sustained an injury to his left wrist arising out of and in the course of his employment with the respondent; that the injury caused internal physical harm to the body requiring medical services; that the existence and extent of his injury is established by medical evidence supported by objective findings; and that his injury was caused by a specific incident identifiable by time and place of occurrence. The claimant has proven every element of a compensable injury; I therefore find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left wrist.

#### D. Benefits

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Nothing in the record disputes the recommendations made by the claimant's treating physicians. Given the medical evidence herein, I find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received as documented in the record has been reasonably necessary in connection with the compensable injury.

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever occurs first. ARK. CODE ANN. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant testified he has not worked since his compensable injury, and Dr. Smolarz released him from care as of November 3, 2005. I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from June 3, 2005, through November 3, 2005. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from June 3, 2005, through November 3, 2005.

#### **E. Compensation Rate**

Compensation is payable at a rate computed from the claimant's average weekly wage under the contract of hire in force at the time of the accident. ARK. CODE ANN. § 11-9-518(a)(1). The average weekly wage is to be determined based on no less than a full workweek in the employment. *Id.* The Commission is empowered in exceptional circumstances to determine the average weekly wage by a method that is just and fair to the parties. ARK. CODE ANN. § 11-9-518(c).

The claimant testified that he earned \$10 per hour, and that he worked for no more than four weeks. Wylie's wife, Sherry Wylie, testified that the claimant worked 71 hours in the two weeks preceding the week of the injury. She also testified that he worked 24 hours in his first week of work, and 24 hours in the last week. I find

that the first and last weeks should be excluded from the calculation since neither represents a "full workweek in the employment." ARK. CODE ANN. § 11-9-518(a)(1). I find that the claimant has proven by a preponderance of the evidence that he earned an average weekly wage of \$355 (71 hours x \$10 ÷ 2 weeks), entitling him to a compensation rate of \$237 for total disability benefits and \$178 for permanent partial disability benefits.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he was an employee of the respondent; that the respondent is an employer subject to the Workers' Compensation Act; that he sustained a compensable injury to his left wrist; that he is entitled to the medical treatment documented in the record; and that he is entitled to temporary total disability benefits from June 3, 2005, through November 3, 2005, to be paid at the rate of \$237 per week. The respondent is hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

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 Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge