

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402650

CARY D. McCLAIN, EMPLOYEE

CLAIMANT

DAVENPORT ROOFING, INC., UNINSURED EMPLOYER

RESPONDENT

OPINION AND ORDER FILED MARCH 21, 2006

Hearing before Administrative Law Judge Barbara Webb in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by Mr. Norman C. Wilber, Attorney at Law, Mountain Home, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled case on December 21, 2005. A prehearing conference was held and a Prehearing Order filed on July 18, 2005. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Prehearing Order was introduced as Commission's Exhibit 1.

The following stipulation was submitted by the parties in the Prehearing Order and is hereby accepted:

1. Respondent controverts this claim in its entirety.

In addition, the following stipulation was agreed to by the parties at the hearing and is hereby accepted:

1. In the event it is determined that the employer/relationship existed, the Commission would have jurisdiction over this matter.

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The issues to be litigated as set forth are as follows:

1. Whether claimant was an employee of respondent on July 16, 2003.
2. Whether claimant sustained a compensable injury on July 16, 2003.
3. Whether claimant is entitled to medical benefits.

Claimant reserved all other issues.

The record consists of a transcript of the December 21, 2005 hearing. The record contains the testimony of Cary McClain, Billy Davenport, Aaron Dunn, Melissa McClain, and Andy O'Neill, and all documentary evidence, including Claimant's Exhibit No. 1 through 4. In addition, I am blue-backing the Motion to Recuse filed by claimant on August 24, 2005; Claimant's Brief and attached Affidavits in support of his Motion to Recuse; correspondence dated August 15, 2005 addressed to Attorney General Mike Beebe from Frederick S. Spencer; correspondence dated August 25, 2005 addressed to the Honorable D. Franklin Arey, Administrative Law Judge, accompanying the Motion to Recuse and Brief in Support of said motion; and the post-trial letter brief filed by respondent, which will also be included in the record in this proceeding.

1. Claimant's Motion to Recuse.

As a threshold issue, the claimant's Motion to Recuse must be considered. After reviewing all of the relevant pleadings before me, I deny the claimant's Motion.

The claimant's Motion to Recuse, which entails a recusal of the entire workers' compensation system's Administrative Law Judges and Commissioners,

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is not based on any objective showing of bias or a communication of bias and is therefore denied.

The court in Turner v. N.W. Ark. Neurosurgery Clinic, ___ Ark. App. ___, ___ S.W.3d ___ (2005) held the following in regard to recusal:

When recusal is in issue, a judge has a duty to sit on a case unless there is a valid reason to disqualify. Perroni v. State, ___ Ark. ___, ___ S.W.3d ___ (June 17, 2004). It is a rule of long standing that there is a presumption of impartiality on the part of judges. Kimbrough v. Kimbrough, 83 Ark. App. 179, 119 S.W.3d 66 (2003). A judge's decision whether to recuse is within his discretion and will not be reversed absent abuse of that discretion. Id. The party seeking recusal must demonstrate bias. Id. Further, unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for the implied bias. Id. The fact that a judge has ruled against a party is not sufficient to demonstrate bias. Searcy v. Davenport, 352 Ark. 307, 100 S.W.3d 711 (2003).

The claimant has not produced evidence that could be held as an objective showing of bias, nor has an actual communication of bias which would require a recusal for implied bias been produced. Without any actual evidence of bias there is no requirement to recuse. Since the claimant has failed to demonstrate prejudice or a conflict of interest against the claimant's attorney or his client, and the claimant has failed to produce evidence which would require the disqualification of the administrative law judges or Commissioners, this Administrative Law Judge denies the motion for recusal.

Arkansas Supreme Court has previously denied constitutional challenges to Arkansas Workers' Compensation Law. Arkansas Workers' Compensation Law is valid "as against general objections that they are unconstitutional, and as against

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the objections that they are class legislation, and make unreasonable classifications, deny equal protection and due process of law, impair the obligation of existing contracts, though applying such contracts, and interfere with the right to contract, the right to jury trial, and vested rights by abolishing existing statutory and common-law remedies and that they abridge privileges and immunities." Young v. G.L. Tarlton, Contractor, Inc., 204 Ark. 283, 162 S.W.2d 477 (1942); also see, Hagger v. Wortz Biscuit Co., 210 Ark. 318, 196 S.W.2d 1 (1946). Although the Court was referencing Act 319 of 1939 and not the present ACA 11-9-101 et al, the Commission has held that this holding is still germane and that constitutional challenges of the Arkansas Workers' Compensation Laws *in toto*, fail.

The constitutionality of the composition of the Commission was previously addressed in Kathryn Stewart v. Med Tech., Full Commission Order, Filed July 12, 1995 (Claim No. E020924). The court said "The Commission acts in a quasi-judicial capacity and its awards are in the nature of judgments. The Act provides a symmetry for the composition of the tripartite commission." Webb v. WCC, 292 Ark. 349, 730 S.W.2d 222 (1987). In Stewart, it was specifically held that the composition of the Full Commission does not violate or deny a party due process of law.

The due process provisions of the United States Constitution and the Arkansas Constitution require adequate procedural safeguards to protect against the mistaken or unjust deprivation of a protected property interest. Consequently, where the constitutionality of any procedure is challenged on due process grounds, the primary focus is on fairness and accuracy of decisions resulting from that procedure. United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d

424 (1980) (Blackmun, J. concurring); Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Arkansas General Assembly has designed a scheme for resolving contested workers' compensation claims which assures fair and accurate results by vesting the ultimate power and authority to decide claims in a balanced Commission composed of members representing the divergent interests involved in the workers' compensation system as well as an undesignated member. Our *de novo* review of the record and the composition of this Commission are both essential components of this legislatively mandated scheme.

The designation of members of a quasi-judicial tribunal as representatives of specified groups does not violate due process. [Internal citations omitted]. Although the designated representatives on this Commission are not obligated or expected to be partisan or biased, due process is not violated even where two members on a tripartite commission or board are actually obligated or expected to be partisan or biased by virtue or (sic) his or her designation. [Internal citations omitted]. With such commissions and boards, fundamental fairness is preserved because the opposing interests counterbalance each other, causing the decision of the third member, who is undesignated to necessarily be controlling. Therefore, any potential for a biased decision by the commission or board is eliminated by the participation of the neutral and impartial member. [Internal citations omitted]. In addition, the very nature of such tribunals promotes fairness and affords procedural protection by assuring that the viewpoint of both interests is included in the decision-making process. [Internal citations omitted].

However, nothing in the Arkansas Workers' Compensation Law obligate the designated representatives on this Commission to always rule in favor of, or be an advocate for, any particular party. On the contrary, each member of this Commission, including the designated representatives, is statutorily charged with the duty of deciding case "impartially and without giving the benefit of the doubt to any party." Ark. Code Ann. § 11-9-704(4) (1987). Consequently, no Commissioner is free to act in a capricious fashion, with disregard for the facts and the law, regardless of his or her statutory designation. Furthermore, the law is well settled that public officers, such as the members of this Commission, are presumed to act lawfully, sincerely and in good faith in the execution of their duties. [Internal citations omitted]. Therefore, it must be presumed that each member of this

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Commission, including the designees, will impartially decide cases on the basis of the facts elicited and in conformance with the law.

Constitutionally impermissible bias only occurs if the adjudicator's direct and personal interest or relationship with the parties, the subject matter, or the adjudicative facts of the particular case being decided creates a constitutionally impermissible probability that the adjudicator will be incapable of rendering a fair decision on the facts presented. [Internal citations omitted]. Assuming, *arguendo*, that a decision-maker has a preconceived philosophy or position about policy, law, or legislative facts is simply not sufficient in itself to create the presumption that the member is incapable of rendering a fair decision on the facts presented. [Internal citations omitted]. Consequently, decisions influenced by philosophical predispositions and general points of view pertaining to questions of law or policy do not violate due process. If such policy predispositions constituted impermissible bias, disqualification would be mandated any time a judge reflected a policy position through his or her past decisions.

In Stiger v. State Line Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000),

the court discusses the powers and duties of the Commission.

Arkansas Code Annotated section 11-9-207 (Repl. 1996) grants to the Commission the power and the duty to determine all claims for compensation. In addition, the statute gives the Commission the authority to appoint administrative law judges to conduct hearings and investigations and make whatever orders, decisions, and determinations are required by a rule or order of the Commission. See Ark. Code Ann. § 11-9-205 (Repl. 1996).

The court in Stiger also discusses the constitutionality of a statute.

Statutes are presumed to be constitutional and the burden of proving otherwise is placed upon the party challenging the legislation. Golden v. Westark Community College, 333 Ark. 41, 969 S.W.2d 154 (1998). All doubts are resolved in favor of a statute's constitutionality. *Id.* The U.S. Supreme Court has identified three factors to be considered when determining what type of due process is warranted. These factors, which were adopted by our court in Quinn v. Webb Wheel Prods., 59 Ark. App. 272, 957 S.W.2d 187 (1997), are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used,

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and the probable value, if any, of additional procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens that additional or substituted procedures would entail. Id.

After reviewing the Arkansas procedure, the foreign case law cited by the appellant, and the opinion expresses in 3 A. Larson, The Law of Workmen's Compensation, Judge Cooper concluded in Johnson v. Hux, 28 Ark. App. 187, 772 S.W.2d 362 (1989):

In Arkansas, it is the Commission's duty to make findings of fact and to assess the credibility of witnesses. In exercising this duty, the Commission may hear the parties, their representatives and witnesses, Ark. Code Ann. § 11-9-704(b)(6) (1987), permit the introduction of additional evidence, Ark. Code Ann. § 11-9-705(c); study briefs in pending cases; Rules of the Commission, Rule 18; or hear oral arguments if requested by either parties or the Commission; Rules of the Commission, Rule 17. Clearly the legislature and the Commission have provided statutes and Rules which provide a claimant with several opportunities to be heard without harming the purpose of speedy recovery. I believe that the procedure used in Arkansas does not violate due process.

The claimant implies that the Arkansas Workers' compensation system does not have any safeguards in place to assure claimants due process. This issue was addressed by the Full Commission in Douglas v. International Paper Co., Full Commission Opinion, Filed August 18, 1994 (Claim Nos. E213574 & E212573):

. . . the workers' compensation system is replete with safeguards. The primary focus of the due process safeguards is that everyone has a fair trial, not the best trial. The focus is on the opportunity to be heard. North Georgia (sic) finishing, Inc. v. Dillihue, 419 U.S. 601 (1975); Arnette v. Kennedy, 416 U.S. 134 (1974); Maekey v. Montrym, 443 U.S. 101 (1979). Under our workers' compensation system, a claimant is afforded much more than the minimal elements of due process. Claimants have the right to a hearing, can compel discovery, subpoena witnesses, and appeal an unfavorable decision.

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A Legislative declaration in reference to the Arkansas Workers' Compensation statute is set forth in Ark. Code Ann. § 11-9-1001:

The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. . . . if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

The power to change the Arkansas Workers' Compensation Statute is designated to the legislature. It is my duty to enforce the statute as set forth by the legislature. In the event that my interpretation of the statute is not agreed upon by either party to a claim, either party may then opt to appeal the claim for further review. Moreover, there has been no showing by affidavit or otherwise that this Administrative Law Judge has any bias, actual or implied, or any conflict of interest in the case.

Based on the foregoing, I deny the claimant's motions for recusal. I also find that the Arkansas Workers' Compensation laws are constitutional.

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2. Factual Background

The claimant is 36 years old and has completed high school and two years of college. He testified that on July 16, 2003, the alleged date of the injury, he was sitting at his home when his friend, Aaron Dunn, came by with some other men and asked him if he was ready to go to work. All of the men worked for Davenport Roofing. He testified that the others arrived at his home at approximately 1:00 p.m. and that he along with the others arrived on the job site between 1:20 and 1:30.

Claimant described what happened as follows:

Well, after we left Harp's, stopped at College Station and they picked up cigarettes and stuff like that. Then we went to the job site and everybody got on the roof and starting working. And I was working in the back of the roof doing tear-offs while everybody, while Aaron and Andy were shingling. And I was helping Josh move a ladder, and I stepped over the ridge of the roof and just, and just slipped and fell off the roof.

Claimant testified that he had worked for Davenport in the past and that he had been hired basically in the same way. He had previously worked for Davenport Roofing approximately one year as a laborer and had been paid in cash in amount roughly between \$8 to \$10 an hour. Claimant subsequently went to prison for about eight months. He testified that he had been home approximately two to three months. He stated that he had been talking to Dunn almost every day and asking him if he had talked to Billy Davenport to see if he could come back to work. On this particular day in July, Aaron Dunn said, "Hey, if you want to come to work, Billy said it was okay." Claimant testified that he knew how much he was going to be paid from his last position. He testified that when he was on the job site at Davenport

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Roofing, he used tools provided by Mr. Davenport, and was told by Dunn to do specific things, i.e., to go to the back of the roof and start tearing off. He explained that when Davenport wasn't there, the foreman on the job was either Aaron Dunn or Andy O'Neill. Claimant testified that as he was coming over the pitch of the roof, he slipped on a piece of felt that wasn't nailed down. He testified that he slid down straight down on the roof and right off the edge of the gutter. He fell about nine to ten feet and landed on grass and a roll of bricks used to outline the driveway. He said after he fell off the roof, he was taken to the hospital. Claimant subsequently had reconstructive back surgery by Dr. McCarthy, a neurosurgeon at St. Vincent Hospital. He testified that approximately a month and a half after he got out of the hospital, Billy Davenport came by to check on him. Claimant testified that Davenport gave him \$200 to help pay for groceries and bills. Davenport told him that "I didn't know you were there."

On cross-examination, claimant testified that he had been convicted of selling marijuana and methamphetamine and had served roughly six to eight months in the penitentiary. Claimant admitted that on the day that he went to the job site in July of 2003, he had not talked to Billy Davenport. He acknowledged that Dunn told him that Davenport didn't want to hire him back because of his drug charges. Claimant further agreed that there was no "meeting of the minds" with Billy Davenport or Aaron Dunn as to his wage.

Claimant testified that on the particular day in question, there were five people on the job site and that would be the minimum number that Mr. Davenport

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normally would have on a job site for doing a roof. He testified that he had been on the job site approximately two and a half to three hours before he fell. He testified that there had been other occasions in which Davenport had given him money to help pay bills. He testified that Davenport did not withhold any money for taxes and did not issue any 1099s relating to the wages that were paid in the past.

Billy Davenport, Jr., owner and operator of Davenport Roofing, also testified. He testified that he had been in the roofing business for nine years and used both subcontractors and laborers. He testified that the claimant had fallen off a roof that his company was roofing. He testified that Aaron Dunn did not have any supervisory instructions or authority. He testified that he could not recall whether he had ever withheld wages for the claimant when he had worked for Davenport Roofing. He testified that he had given the claimant money on several occasions. On the day of the injury, he had returned to the job site and learned that the claimant had been on the roof, had fallen off, and had been taken to the emergency room. He spoke with Dunn at that time and inquired as to what had happened. He said that he was told that the claimant had been on the roof and had fallen off. He was told that the claimant was waiting on him to get there to see if he could get a job or not. He testified that he had spoken with Aaron Dunn earlier that day, around lunch time. At that time, Dunn asked Davenport if the claimant could work because they needed more help with the cleanup and tear off. He recalled that he had told Dunn that he did not know how to get in touch with the claimant and agreed to talk with the claimant to "see how the claimant stands and go from there." Davenport

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testified that he did not know why the claimant was on the roof. He testified that he stopped by to see the claimant several weeks after the accident to see if he was okay. At that time, the claimant told him that he had not been working and asked him if there was any way that he could help him out until Medicaid or whatever kicked in. He said he told the claimant he would help him when he can. He recalled three occasions in which the claimant had contacted him and indicated that he needed money. He testified it was the claimant rather than himself that initiated the call. He testified that he loaned the money to employees all the time. He testified that he remembered one other person to which he had given money when they called and told him they needed money. He testified that during the year the claimant had worked for him, he was a good employee and that he had never observed him intoxicated or on drugs. He testified that he used subcontractors, including Aaron Dunn. He testified that he did not give Aaron Dunn permission to hire the claimant or to bring the claimant to the job site that day, and was not aware the claimant was coming to the job site that day. He did not consider the claimant an employee or subcontractor on that day. He testified that he had never hired anyone that he had not talked to and visually checked out. He said he wanted "eyeball to eyeball contact" with the claimant since he knew that he had been in prison for drugs. He said that he would have had to feel comfortable that the claimant was not involved in drugs or alcohol before he would let him on the roof. He testified that he had been very reluctant to hire the claimant. He testified there had been no discussion about a contract for employment. Further, there had been

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no discussion about any of the duties that would be performed, supervisory capacities, the length of time of employment, his status as an independent contractor or employee by the hour. He testified that the money he gave the claimant was not related for any work performed. He testified that he did not have workers' compensation coverage in place on the day of this occurrence, July 16, 2003. He testified that he had previously carried workers' compensation coverage for his employees.

Aaron Dunn also testified for the claimant. Dunn testified that he is self-employed and contracts with different roofing companies, including Davenport Roofing. Dunn testified that he had been a witness before the Social Security Administration and had testified that the claimant was an employee of Davenport Roofing. He did not recall whether he testified that claimant was an employee on the day he fell off the roof. He further testified that he had been offered the sum of \$10,000 by the claimant to testify and to say that he was an employee. He testified that he had never offered to lie for the claimant for money. He believed that claimant wanted him to go to court and to help him win the case, but did not tell him what to say. He testified that he did not know why the claimant was on the roof that day. He stated that they were going to get the claimant a job and were going to talk to Billy Davenport about getting him a job. He recalled that he had talked to Billy Davenport about claimant going to work for Davenport Roofing and that Billy had wanted to talk to the claimant first. He stated this conversation occurred around lunch time on the day in question. He stated that after that occurred, he went and

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picked up the claimant at his home. He said that at that time they swam in the pool for a minute and then went back to work. He testified that he told the claimant that he needed to come with him to work to talk to Billy about getting a job. When they arrived at the job site, he described what transpired:

We got out of the vehicle, and me and Andy went up the front of the roof on the ladder and started working. Next thing you know, we heard a tumble. Went around the edge of the roof to see what it was and he'd fell off the roof.

On cross-examination, Mr. Dunn testified that the claimant asked him to sign a statement stating that Billy Davenport authorized him to hire the claimant. He stated he did, in fact, write out such a statement and sign it. He testified that the statement was not truthful and he was embarrassed about the situation. He testified that when he was offered \$10,000, it was his understanding that he was to lie for the claimant. He was supposed to lie and say that he had been authorized by Billy Davenport to hire the claimant. He testified that he was not authorized by Mr. Davenport. He testified that he did not tell the claimant that he was authorized by Davenport to hire him. He testified that when he talked to Davenport the morning of the incident, Davenport wanted to speak with the claimant before he hired him. He did not tell Davenport that he was going to get the claimant. He did not discuss any authority with Davenport about hiring anyone. He did not ever tell the claimant that he was hired. He testified that Davenport had not arrived at the workplace when claimant had fallen off the roof. He testified that they had arrived back at the

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site around 2:00 and that the claimant fell off the roof only about 15 or 20 minutes later. He stated that there was not sufficient time for the claimant to have worked about three and a half hours on the job before he fell. He testified that he did not hire people to work with him under his subcontract. He testified there was really no foreman on the job, that everyone knew what to do and they would just get it done. He testified that he told the claimant that Davenport needed to talk to him first because he had just been released from the correctional facility over drugs. He denied ever receiving any compensation for his testimony at the hearing or any other proceeding that might be related to the case.

Melissa McClain was called as a witness on behalf of the claimant. Melissa has been married to the claimant for seven years. She testified that prior to going to the penitentiary, the claimant worked for Davenport and was paid cash either by the hour or by the job, depending upon which jobs they did. She was home on her lunch break when Aaron Dunn came to the house. She testified that they were standing by the pool and that Aaron Dunn said that he was picking up the claimant to go to work. She testified that Dunn told the claimant that Billy had told him to pick up the claimant and bring him to work and that he could go back to work. She learned her husband had fallen off the roof when she received a phone call. When she arrived at the hospital, she heard him screaming out in the hallway before she even got to the hospital room. She testified that he was screaming in pain due to

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the fact that he had shattered his spine and they didn't think he was going to live. She testified that Dunn was not offered anything to say something other than the truth. She testified that she was present when Dunn wrote out a piece of paper himself and signed it and provided it to the Social Security Administration.

Andy O'Neill was called to testify on behalf of the respondent. Mr. O'Neill testified that he had previously worked for Billy Davenport, and was familiar with both Aaron Dunn and the claimant. He testified that he went to the claimant's house on July 16, 2003. He testified that he did not hear Mr. Davenport authorize Aaron Dunn to hire the claimant. He testified that when they arrived at the house, Dunn went into the house to talk to the claimant and he remained in the car. He testified that when the claimant got in the car, Dunn asked the claimant if he wanted to work. He said that there was not a discussion about whether Davenport had approved the decision or not. In arriving back at the work site, he and Dunn went up the ladder to the front of the roof to shingle. He stated that two guys went back to tear off some areas to re-shingle. He stated that the claimant went back with the other guys. He testified that it wasn't very long, perhaps a couple of minutes, before he heard the claimant fall. He stated that if the claimant testified that he had been working three and a half hours before he fell, that would not be a true statement. He testified that to his knowledge, the claimant had not done any work on the house. He testified that because the claimant was on the back side and he was on

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the front side, he could not see what the claimant was doing. He stated that he believed the other two were actually tearing off. He stated that he did not believe the claimant had worked because of the short time that he was up there.

DISCUSSION

The claimant contends that he was working as a roofer and an employee of Davenport Roofing when he fell from a roof on July 16, 2003. He further contends he sustained a compensable injury and is entitled to medical benefits. He argues that an MRI taken on July 16, 2003 shows a number of problems with his thoracic spine, including compression fractures. He also contends that the compensable injury has been objectively established. The respondent contends that the claimant had no authority to begin work on the job and was not employed. They contend there was no contract for hire and therefore they are not responsible for any injury he might have suffered that would otherwise be compensable under workers' compensation law. In the alternative, respondent contends that the claimant performed no work and was on the roof in anticipation of getting work and, therefore, the respondents received no benefit from him.

Ark. Code Ann. § 11-9-102(9)(A) defines an employee to mean "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

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trade, business, profession, or occupation of his or her employer...” Ark. Code Ann. § 11-9-102(4)(B)(iii) provides that a compensable injury does not include “injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated.” After a careful review of the evidence in this case, I find that the claimant has failed to meet his burden of proof in establishing by a preponderance of the evidence that he was, in fact, an employee under a contract of hire with Davenport Roofing at the time of his injury. I further find that the claimant was not an employee of Aaron Dunn or any other subcontractor working on the job site at the time claimant was injured. The evidence clearly establishes that the injuries suffered by the claimant occurred before he was hired. The claimant never met with Billy Davenport prior to arriving at the job site and his subsequent fall from the roof. There was no discussion of employment terms or specific direction of work to be performed between Davenport and the claimant. The claimant seeks to establish an employment relationship under a theory that he relied on the apparent authority of Aaron Dunn or alternatively based on the monies received from the respondent after the injury. I find it difficult to attach any credibility to the testimony of the claimant or Dunn. Dunn admittedly participated in an alleged scheme with the claimant in which Dunn would offer false testimony helpful to the claimant in exchange for money. Although respondent contends that

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Dunn has now had a “change of heart” and is offering truthful testimony at the hearing held in this case with the risk of possible criminal charges in connection with his previous testimony, I find that his credibility is also lacking. The only witness in the case that appeared to have no bias and offered credible testimony was that of Andy O’Neill.

The only reasonable conclusion that can be reached from the credible evidence is that the claimant came to the job site for the purpose of obtaining employment from Davenport. It is clear from the testimony of both the claimant and Davenport that the claimant fell from the roof prior to any opportunity to discuss his employment with Davenport. There is no credible evidence offered as to why the claimant got on the roof or what he was doing while on the roof. There was no credible evidence that the claimant was given any specific direction as to what to do when he arrived at the job site. All witnesses, with the exception of the claimant, testified that the claimant was only on the roof a short time, perhaps minutes, before he fell off the house. There is simply no credible evidence that claimant performed any work at all on the job site. Claimant has not met his burden of proof to show that he was employed by Davenport or that he was performing employment services at the time of his injury. Moreover, I find that there is no evidence that the claimant ever received wages from Davenport in connection with any work performed. Claimant contends that the payments from Davenport to the claimant after the injury

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were more than just “a helping hand.” Such contention ignores the testimony of Davenport that he had loaned other employees money and had loaned the claimant money prior to his injury. In conclusion, there is simply no evidence of a “meeting of the minds” establishing a contract of hire, either express or implied, between the claimant and Davenport prior to his injury. See Sharp County Sheriff's Office v. Ozark Acres, 349 Ark. 20, 75 S.W.3d 690 (2002). I would also note that there is no evidence that the claimant had any intention or agreement to work for Dunn, the uninsured subcontractor of Davenport. Therefore, I find that Davenport cannot be liable either as an employer or as the prime contractor of a subcontractor who does not have workers' compensation insurance under the applicable provisions of the workers' compensation law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine whether the claimant was an employee of the respondent or its subcontractors.
2. The claimant has failed to prove by a preponderance of the evidence that he was an employee of Davenport Roofing or its subcontractors at the time of his injury on July 16, 2003, and therefore is not entitled to an award of compensation under the Arkansas Workers' Compensation laws.

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ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge