

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600029

SCOTT PADGETT

CLAIMANT

GRAND POINT BAY APARTMENTS

RESPONDENT EMPLOYER

COMPANION PROPERTY & CASUALTY

RESPONDENT CARRIER

ORDER AND OPINION FILED JUNE 19, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DONALD C. PULLEN, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE JOSEPH H. PURVIS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on May 19, 2006. A prehearing conference was held on April 11, 2006 and a prehearing order was filed the same date. 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 stipulations:

1. There was a November 21, 2005, incident involving the claimant.
2. The compensation rate will be based on an average weekly wage of \$225.

The claimant contends that he sustained a specific incident injury on November 21, 2005 and is entitled to some medical benefits, temporary total disability benefits from November 21, 2005 through January 24, 2006, and attorney's fees. All other issues are specifically reserved.

Respondents contend the claimant was an independent contractor and was not an employee of the respondent employer. The claim has been controverted in its entirety.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Employee versus independent contractor.
5. 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. There was a November 21, 2005, incident involving the claimant.
2. The compensation rate will be based on an average weekly wage of \$225.
3. The preponderance of the evidence provides the claimant was an employee of the respondents and not an independent contractor.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury.

5. Respondents are liable for all reasonable and necessary medical benefits the claimant has pursued.

6. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was not able to work from November 22, 2005, through at least January 24, 2006.

7. 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.

DISCUSSION

The claimant, 28 years of age, began working for the respondent employer about three weeks before his November 21, 2005, incident. The claimant was hired after answering an ad in the newspaper for a maintenance helper to do power washing and painting. The claimant contacted the employer, completed an application and was hired to work for \$8.50 per hour. The claimant reported to Diana Peterson and began work at 8:00 a.m., advised Ms. Peterson when he left for lunch and when he returned and let her know when he was leaving at 5:00 p.m. The claimant brought no equipment of his own to the job; everything was furnished by the employer. The employer gave the claimant explicit instructions each day on what to accomplish. The claimant would not work 40 hours per week, if it was raining or too cold; otherwise, his hours were 8:00 a.m. to 5:00 p.m.

The claimant verified his signature on Respondents' Exhibit No. 1 but indicated that he did not read it and did not know what it was for. The claimant testified that he

did not know what an independent contractor was and had never worked where he was paid by the job and where he brought his own tools. He testified that he did not own tools. The claimant's assignments were power washing, cleaning and painting and working on the window trims and any other jobs as assigned.

The claimant sustained an injury to his hand on November 21, 2005, when he was ripping wood with a table saw and he cut several fingers off. James, another maintenance man, saw the incident. The claimant immediately sought medical assistance and underwent surgery by Dr. Robert Olive. He last saw the doctor on January 24, 2006, and was unable to return to the doctor because of no money. The claimant described the problems with his hand:

Yes, sir. My little finger stays numb and throbs a lot. And my third finger gets hot and stuff all the time and sticks out all the time. And then it's like real numb. When I wake up in the morning, my whole hand is numbed up. (T., p. 16, lines 11-14.)

The claimant is right handed and has a third grade level reading ability. The claimant did not complete the sixth grade and admits he has a learning disability with ADHD and bipolar disorder.

The claimant contends he was an employee of the respondent employer and the employer contends the claimant was an independent contractor. The determination of whether a person was an employee or an independent contractor at the time of injury is a factual one. *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, the Court has stated:

The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists. *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953).

The ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). Although no one factor of the relationship is determinative, see *Wright, supra*, the “right of control” is the principal factor in determining whether the relationship is one of agency or independent contractor. See, *Aloha Pools & Spa, Inc. v. Employer’s Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000).

The following factors are to be considered in determining whether one is an employee or independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Aloha, supra. The factors pertaining to the nature of the worker's occupation and whether it is a part of the regular business of the employer comprise the "relative nature of the work" test. *Ark. Transit Homes, supra*. In *Sandy v. Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976), our supreme court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the employer. This test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. *Id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. *Id.*

In the instant case, the claimant possessed no special skills or abilities but was hired for an hourly rate to do general maintenance, to include power washing, painting and other duties as assigned. I found the claimant to credibly testify that he reported each day to Diana Peterson and she gave him daily assignments and directed him to the tools he would need to accomplish the chores. Ms. Peterson testified that she advised the claimant that he was being hired as an independent contractor and that he signed a form acknowledging such. Merely signing a document to waive the right to

compensation is not valid alone. Ark. Code Ann. §11-9-108(a) (Rep. 2002) provides:

No agreement by an employee to waive his or her right to compensation shall be valid, and no contract, regulation, or device whatsoever shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this chapter, except as specifically provided elsewhere in this chapter.

The obvious intent of Ark. Code Ann. §11-9-108(a) is to prevent employees, as a result of coercion or persuasion, or because of the lack of information, from executing a waiver or other document that relieves their employer of the obligation to provide workers' compensation coverage. In the present case, it is clear the claimant had no knowledge that he was waiving his rights to any benefits or insurance coverage. The claimant was merely applying for work and was signing whatever paperwork was presented to him. I was clearly not convinced that the claimant was adequately explained the purpose of the form he signed nor was I convinced that if it had been explained to him that he could have understood it. Lastly, I was not convinced the document was proper for this employment.

Ms. Peterson verified that an ad was placed in the paper and the claimant responded to the ad and a copy of the ad was introduced as Claimant's Exhibit No. 1. The ad makes no reference to an independent contractor but merely advertises for a part time maintenance person. The position that was being filled required no special skills or abilities but was merely a general laborer.

I find the preponderance of the evidence supports the claimant's contention that he was an employee of the respondent and not an independent contractor. The claimant worked by the hour, reported each day to Ms. Peterson, was given instructions

of what, where and how to accomplish these jobs, and was provided all the necessary tools. The employer's business is apartments and the job of the claimant was general maintenance for these apartments. The claimant certainly did not possess specialized skills or have a specialized profession. The evidence demonstrated the employer maintained the right to control the claimant's activities.

The claimant presented a credible succinct account of using a power saw on November 21, 2005 and the wood caught in the saw, causing his fingers to be cut off. James, another maintenance employee, witnessed the event and emergency treatment was sought.

To receive workers' compensation benefits for a specific-incident injury, a claimant must establish (1) that the injury arose out of and in the course of the employment, (2) that the injury caused internal or external harm to the body and required medical services, (3) medical evidence supported by objective findings establishing the injury, and (4) that the injury was caused by a specific incident and identifiable by the time and place of the occurrence. Ark. Code Ann. §11-9-102(4) (Supp. 2005). Compensation must be denied if the claimant fails to prove any one of these requirements by a preponderance of the evidence. Ark. Code Ann. §11-9-402(4)(E); *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). While section 11-9-102(4) requires proof of a specific incident identifiable by time and place of occurrence, the statute does not require the claimant to identify the precise time and date upon which the injury occurred. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). However, the claimant's injury must be attributable to a particular, specific incident. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11,

26 S.W.3d 777 (2000).

The claimant has satisfied the elements of Ark. Code Ann. §11-9-102(4) for a specific incident injury. The medical documents the claimant amputated his right index finger, 95% amputation of the middle finger and destruction of PIP joint of the ring finger. The claimant required medical attention and has been followed up a couple times by Dr. Olive. I find respondents are responsible for all reasonable and necessary medical treatment the claimant has pursued for his compensable right hand injury. Ark. Code Ann. §11-9-508.

The claimant next contends that he is entitled to temporary total disability benefits from November 21, 2005, through at least January 24, 2006. The claimant sustained a scheduled hand injury and is entitled to temporary total disability compensation while he is within his healing period and has not returned to work. 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 medical clearly documents the claimant's amputations to his fingers and discusses the medical treatment being recommended. As late as January 24, 2006, the claimant was at Dr. Olive's office for removal of a pin in one of the fingers. The physician's note indicates this visit was a satisfactory follow-up. Taking the medical evidence into consideration along with the credible testimony of the claimant that he had not been able to return to work, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and remained unemployed at least from November 22, 2005, through January 24, 2006.

ORDER

The preponderance of the evidence provides the claimant was an employee of the respondents and not an independent contractor. The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury. Respondents are liable for all reasonable and necessary medical benefits the claimant has pursued. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was not able to work from November 22, 2005, through at least January 24, 2006.

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**