

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505544

MARCIAL ZACARIAS		CLAIMANT
DAVID WOMBLE dba DAVE'S SIDING UNINSURED	NO. 1	RESPONDENT
CELTIC CONSTRUCTION UNINSURED	NO. 2	RESPONDENT

OPINION FILED DECEMBER 21, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by ANDREW HATFIELD, Attorney, Rodgers, Arkansas.

Respondents No. 2 represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 25, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on August 2, 2006. This pre-hearing order set out the stipulations offered by the parties, and outlined the issues to be litigated and resolved at the present time. As the parties had been unable to agree on the appropriate weekly compensation rate, this was added as an additional issue.

There were no stipulations offered by the parties.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The existence of an employee-uninsured employer relationship between the claimant and David womble dba Dave's Siding.

2. The existence of an employee-uninsured employer relationship between the claimant and Celtic Construction (either actual or statutory).
3. whether the claimant sustained a compensable injury to his left foot on May 6, 2005.
4. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from May 7, 2005 through a date yet to be determined with the exception of November 25, 2005 through March 7, 2006, and attorney's fees.
5. The appropriate weekly compensation rates.

In regard to these issues, the claimant contends:

"The claimant contends that he was injured while putting up siding on a house. The claimant was on a scaffold approximately 6 feet off the ground when the scaffold fell over and he landed on concrete. Claimant is seeking benefits for TTD, medical expenses ongoing and attorney's fees. David Womble doing business as Dave's Siding was working as a subcontractor for Celtic Construction at the time of all acts alleged herein. The claimant continues to need ongoing medical care which he cannot afford. Ongoing problems below his knee prevent him from standing or walking in a work setting. The claimant attempted to go back to work for Billy McMullen on a farm. He picked up dead turkeys from November 25, 2005 through March 7, 2006. Due to the problems in his leg he was unable to continue working there. No one will hire him now due to his limitations and pain."

In regard to these issues, respondent #1 contends:

"Respondents contend that no employer/employee relationship existed between the claimant and the respondent, and that if one did, the claimant did not suffer a compensable injury

under the State of Arkansas workers' Compensation laws."

In regard to these issues, respondent #2 contends:

"It is the contention of Celtic Construction, Inc. that it is not liable for any workers' compensation benefits to or on behalf of the claimant. Celtic Construction, Inc. did not employ the claimant. Pursuant to Arkansas workers' Compensation law, an employer/employee relationship did not exist between the parties. It is the position of Celtic Construction, Inc. that the claimant was an independent contractor and therefore, not entitled to workers' compensation benefits. Furthermore, respondent #2 asserts that the claimant cannot meet his burden of proof under Act 796 of 1993, that he sustained a compensable work related injury. Finally, Celtic Construction, Inc. asserts that if the claimant is awarded workers' compensation benefits, those benefits should be paid by David Womble dba Dave's Siding."

DISCUSSION

The greater weight of the credible evidence presented establishes that at approximately 10:00 a.m. on the morning of May 6, 2005, the claimant sustained an accidental fall. This fall occurred while he was installing aluminum siding on a house under construction and the scaffolding upon which he was standing collapsed. As result of this accidental fall, the claimant sustained physical injuries to his head and left ankle/foot.

The medical record presented clearly "establishes" the actual existence of physical injuries to the claimant's head and left ankle/foot. The medical record further shows that the physical injury to the claimant's head was in the form of a contusion and laceration. The actual existence of this physical injury is supported by objective findings in the form of a visible laceration

to the claimant's scalp, which required stapling. The medical record shows that the injury to the claimant's left ankle/foot was in the form of a comminuted calcaneal fracture. The actual existence of this physical injury is also supported by objective findings noted for radiographic studies, an MRI study, and visual observations made during the subsequent corrective surgery.

The greater weight of the evidence presented proves that these medically established and objectively documented physical injuries were the immediate and direct result of the claimant's accidental fall on May 6, 2005. There is absolutely no evidence that these injuries were present prior to the fall. Clearly, had the claimant been experiencing a laceration of his scalp and a severely fractured left ankle/foot, prior to the fall, it would have been obviously apparent to the claimant's co-employees and supervisor prior to his employment related fall. The evidence presented shows that these injuries initially manifested themselves contemporaneously with the accidental fall. Clearly, this fall could have reasonably and logically produced these types of injuries.

The greater weight of the credible evidence presented further proves that at the time of the claimant's accidental fall, he was an employee of David Womble dba Dave's Siding and was performing services in furtherance of this employment relationship. At the time of the accident David Womble was conducting business under the name of Dave's Siding, a sole proprietorship. This business installed aluminum trim and siding on houses and buildings. Mr.

womble stated that he had been in this business approximately 30 years. Although Mr. womble testified that he would merely “sub” work out to the claimant from time to time, I find his testimony to be totally lacking in credibility. Clearly, there was no independent contractual relationship between Mr. womble dba Dave’s Siding and the claimant.

Mr. womble acknowledged in his testimony that the claimant did not have or provide any of his own equipment and had only limited experience in the siding business. The claimant’s compensation was on an hourly basis and he was only compensated for the actual hours of labor he provided. Clearly, Mr. womble selected the jobs upon which the claimant would work and directed his employment activities, either in person or through supervisory personnel. Finally, the record shows that Mr. womble dba Dave’s Siding not only furnished the necessary tools and equipment, but also provided all of the actual materials to complete the job. Mr. womble indicated that for purposes of federal and state withholding, as well as state unemployment, the claimant was considered as “casual” or “contract” labor and was paid by personal check with no deductions withheld.

It is obvious from the evidence presented that Mr. womble maintained absolute control over the claimant and his work activities. He could determine whether or not the claimant worked on any given day, the amount of time the claimant would be able to work, and the location and nature of the labor to be provided. He could terminate the relationship between he and the claimant at any

time and without any reason and yet incur no liability to the claimant. On the other hand, the only thing the claimant brought to this relationship was his own time and labor. He too could terminate the relationship between himself and Mr. Womble at any time and for any reason without incurring any liability to Mr. Womble. Clearly, the relationship between the claimant and Mr. Womble dba Dave's Siding satisfies all of the criteria for an employee-employer relationship, as that term is used in the Act.

The greater weight of the evidence further proves that the employment relationship between the claimant and David Womble dba Dave's Siding represented an employment relationship that is covered by the Act. Clearly, Mr. Womble dba Dave's Siding was not only in the construction business, but also functioned entirely as a subcontractor. The evidence supports the conclusion that Mr. Womble had approximately three employees, at the time of the claimant's accident. These employees would include Mr. David Womble, as a self-employed employer, Larry Womble (David Womble's brother) and the claimant. However, even if David and Larry Womble are not considered as "employees" of David Womble dba Dave's Siding, the claimant's employment alone would be sufficient to create a covered employment, under Ark. Code Ann. §11-9-102(11)(D).

The greater weight of the credible evidence also shows that the work the claimant was performing at the time of his accidental fall and injury was in furtherance of a contractual agreement between David Womble dba Dave's Siding and Celtic Construction Company. Lee Scarlett, the owner of Celtic Construction Company

testified that he had entered into a contract with a Gene and Tammye Rollins to construct for them a custom home for their personal residence. Mr. Scarlett stated that he had subcontracted the siding portion of this construction to Dave Womble dba Dave's Siding. It was while the claimant was performing the siding work on this particular house that his accidental fall and injuries occurred.

Thus, it is apparent that the claimant's actual employer, Dave Womble of dba Dave's Siding, was a subcontractor of Celtic Construction at the time of the claimant's employment related injuries. It is further obvious that at the time of these injuries Dave Womble dba Dave's Siding was uninsured for workers' compensation purposes. According to Mr. Scarlett's own testimony, Celtic Construction was the prime or general contractor for the construction of this particular residence. Therefore, under the provisions of Ark. Code Ann. §11-9-402(a), Celtic Construction becomes the statutory employer of the claimant and becomes liable for any and all appropriate workers' compensation benefits to which the claimant may be found entitled. Under the provisions of Ark. Code Ann. §11-9-402(b) Celtic Construction can recover from Dave Womble dba Dave's Siding any amounts it is required to pay as workers' compensation benefits for the claimant's work related injuries.

As previously noted, the medical evidence presented is sufficient to satisfy the statutory requirements for a "compensable injury" contained in Ark. Code Ann. §11-9-102(4)(D). The greater

weight of the credible evidence presented is further sufficient to prove that the claimant's injuries to his head and ankle/foot arose out of and occurred in the course of his actual employment with Dave Womble dba Dave's Siding and his statutory employment with Celtic Construction. The greater weight of the evidence presented further proves that these injuries were caused by a specific incident, are identified by time and place of occurrence, caused both external and internal physical harm to the claimant's body, required medical services, and resulted in disability. Thus, the claimant has proven that the laceration of his head and the fracture of his ankle/foot constitute "compensable injuries" under Ark. Code Ann. §11-9-102(4)(A)(i).

Finally, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled for these compensable injuries. Clearly, he is entitled to reasonably necessary medical services. The record shows that the medical services provided the claimant by personnel at the emergency room of the Northwest Medical Center of Benton County, by and at the direction of Dr. Rodger C. Dickinson, and by and at the direction of Dr. Jason Pleimann were all necessitated by or connected with the claimant's compensable injuries and had a reasonable expectation of accomplishing the purpose or goal for which they were intended. Thus, these medical services represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are

liable for the expense of such services, subject to the medical fee schedule established by this Commission.

The claimant contends that he is also entitled to temporary total disability benefits from May 7, 2005 through a date yet to be determined, with the exception of the period of November 25, 2005 through March 7, 2006. In order to be entitled to such benefits, the claimant must prove that during this period he continued within his healing period from the effects of his compensable injuries and had not returned to work or was also rendered totally disabled from performing regular gainful employment as a result of the effects of these compensable injuries.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. A claimant's healing period from the effects of a compensable injury continues until the claimant achieves the maximum benefit of time and medical treatment in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, at a level where nothing further in the way of treatment or time offers a reasonable expectation of improvement, then the claimant's healing period has ended.

The medical evidence shows that the claimant was discharged from active medical treatment by Dr. Jason Pleimann (his last treating physician) on August 3, 2005. At that time, Dr. Pleimann indicated that x-rays showed complete healing of the fractures in

the claimant's ankle/foot. On physical examination, Dr. Pleimann did note that the claimant continued to experience mild swelling and some instability in the peroneal tendons. He also indicated that it might take months, if not years, for the claimant to achieve full improvement.

The claimant was last seen by Dr. Pleimann on August 2, 2006. At that time, Dr. Pleimann again noted, on his physical examination, that the claimant continued to experience mild swelling in his foot and ankle and some instability or subluxation of his peroneal tendons. However, he noted that the remainder of the exam was essentially normal. On that date, he assigned permanent restrictions on the claimant's physical activities and assessed a permanent physical impairment rating of 7% to the claimant's foot.

Based upon the medical evidence presented, I find that this evidence shows that the claimant continued within his healing period from the effects of his compensable injuries through August 2, 2006. However, he has failed to prove that he continued within his healing period from the effects of these compensable injuries after that date. Although the claimant obviously continued to experience some symptoms on that date, it would appear from the record that the actual physical damage causing these symptoms had become fixed and permanent and that these chronic symptoms were also likely permanent. The law is clear that the mere continuation of chronic symptoms under these circumstances, is not sufficient, in and of itself, to extend the healing period.

The evidence shows that the claimant returned to regular employment with another employer, on or about November 25, 2005, and continued to be so employed through March 7, 2006. During this period, the claimant worked on a turkey farm, where he fed, watered, removed dead turkeys, cleaned out turkey houses, and took care of baby turkeys by hand. During this time, he also assisted his wife in her office cleaning business and has continued in this capacity through the present time. At some point, during this time, the claimant also attempted to return to his previously siding work, but was physically unable to do so, without a significant increase in his symptoms.

In the claimant's testimony and from the medical evidence, it appears that the claimant's physical limitations and restrictions have remained essentially unchanged since late 2005. These restrictions consist of an inability to walk on uneven ground, climb ladders, or stand for extended periods of time (three to four hours).

After consideration of all the evidence presented, it is my opinion that the claimant has proven all of the elements necessary to entitle him to temporary total disability benefits for the period beginning May 7, 2005 and continuing through November 24, 2005. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period he has continued within his healing period from the effects of his compensable injuries and had not "returned to work." However, the claimant has failed to prove that his compensable injury has prevented him from

performing any type of regular gainful employment after his return to work on November 25, 2005.

The final issue requiring resolution is the question of the claimant's average weekly wage, at the time of his compensable injuries, and the resulting weekly compensation rates. The claimant testified that, at the time of his compensable injuries, he was earning \$10.00 an hour and working 40 hours a week. Mr. Womble testified that the claimant could have been making \$10.00 an hour, but that he thought it was \$9.00 an hour. Mr. Womble further testified that he didn't think that the claimant would average 40 hours per week. He acknowledged that some weeks the claimant could have worked 40 hours. However, he felt that the average hours worked would more likely be 32 to 45 hours per week. He testified that he paid the claimant by personal check. However, Mr. Womble provided no copies of these checks or any other records concerning the claimant's hours or earnings.

It is my opinion that the testimony of the claimant is more convincing. Clearly, Mr. Womble had access to all of the financial records concerning the claimant's compensation. However, he did not see fit to obtain and provide any of these documents. I would also note that Mr. Womble's testimony is somewhat lacking in certainty, both in regard to the claimant's hourly rate and the number of hours worked per week. In his testimony he does not clearly contradict either a \$10.00 hourly rate or an average 40 hour work week.

Therefore, I find that the claimant's average weekly wage, at the time of his compensable injuries, was \$400.00. This would yield appropriate weekly compensation rates of \$267.00 for total disability and \$200.00 for permanent partial disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On May 6, 2005, the relationship of employee-uninsured employer existed between the claimant and David womble dba Dave's Siding.

3. On May 6, 2005, the claimant was also a statutory employee of Celtic Construction, also uninsured. Specifically, the evidence presented proves that on May 6, 2005, the claimant was the actual employee of David womble dba Dave's Siding, that on that date David womble dba Dave's Siding was uninsured for workers' compensation purposes, that on that date David womble dba Dave's Siding was a subcontractor of Celtic Construction, and that on that date Celtic Construction was the prime or general contractor over the construction project on which the claimant was injured. Under Ark. Code Ann. §11-9-402(a), Celtic Construction would also be liable for appropriate workers' compensation benefits for any employment related injuries.

4. On May 6, 2005, the claimant sustained compensable injuries to his left ankle/foot and to his head.

5. On May 6, 2005, the claimant earned an average weekly wage of \$400.00, which would entitle him to weekly compensation benefits

of \$267.00 for total disability, and \$200.00 for permanent partial disability.

6. The medical services rendered to the claimant for his compensable head and ankle/foot injuries by and at the direction of physicians at the Northwest Medical Center of Benton County emergency room, by and at the direction of Dr. Rodger C. Dickinson, and by and at the direction of Dr. Jason H. Pleimann constitute reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

7. The claimant was rendered temporarily totally disabled, as a result of the effects of his compensable injuries, for the period beginning May 8, 2005, and continuing through November 24, 2005. The claimant has failed to prove his entitlement to temporary total disability benefits after March 7, 2006. Specifically, the evidence shows that the claimant returned to work on November 25, 2005, and has continued to work in some capacities ever since. The evidence presented fails to show that the physical restrictions and limitations on the claimant's potential employment activities caused by the compensable injury, after November 24, 2005, were sufficient to render him totally disabled from regular gainful employment,

8. Both respondents have controverted this claim in its entirety.

9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded.

ORDER

Pursuant to the provisions of Ark. Code Ann. §11-9-402(a), Celtic Construction is liable to the claimant for temporary total disability benefits, at the weekly rate of \$267.00, for the period beginning May 7, 2005, and continuing through November 24, 2005.

Pursuant to the provisions of Ark. Code Ann. §11-9-402(a) Celtic Construction Company is liable for the expenses incurred for the result of reasonably necessary medical services provided to the claimant for his compensable head and ankle/foot injuries rendered him by and at the direction of physician at the emergency room of the Northwest Medical Center of Benton County, by and at the direction of Dr. Rodger C. Dickinson, and by and at the direction of Dr. Jason Pleimann. These expenses are subject to the medical fee schedule established by this Commission.

Pursuant to Ark. Code Ann. §11-9-402(a), Celtic Construction is liable to the claimant's attorney for the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to such benefits. The remaining of one-half of this fee is to be withheld by the respondent from such benefits.

Pursuant to the provisions of Ark. Code Ann. §11-9-402(b), David Womble dba Dave's Siding is liable to Celtic Construction Company for the foregoing workers' compensation benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge