

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM F602315**

**BURRELL BENJAMIN DIXON,  
EMPLOYEE**

**CLAIMANT**

**ROWBOTHAM CONSTRUCTION, LLC,  
GENE ROWBOTHAM CONSTRUCTION, INC.,  
& GENE ROWBOTHAM, INDIVIDUALLY,  
UNINSURED EMPLOYERS**

**RESPONDENTS**

**OPINION FILED APRIL 13, 2007,**

Pursuant to a hearing conducted November 2, 2006, before Administrative Law Judge D. Franklin Arey, III, in Harrison, Boone County, Arkansas, with

Mr. Jeffrey H. Watson, Attorney at Law, Springdale, Arkansas, appearing for the claimant, and

Mr. Jason L. Watson, Attorney at Law, Fayetteville, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This hearing was conducted to consider the threshold issues of (1) the existence of the employment relationship, (2) the occurrence of a compensable injury, and (3) entitlement to related benefits.

Following the hearing, and before an opinion was issued, Judge Arey left the Commission in order to serve out the term of a Circuit Judge who had taken another position. The Chief Administrative Law Judge then wrote counsel that the file would be assigned to another Administrative Law Judge for decision on the existing record, unless an objection was raised within ten days from the date of the letter. When no such objection was made, the file was transferred January 17, 2007.

A review of the record indicates that the claimant contends, in essence, that he was employed and suffered compensable injuries for which he should be awarded benefits, including reasonably

necessary medical and related expenses, as well as temporary total disability benefits, and an attorney's fee for controversion.

The respondents controverted the claim in its entirety, particularly the existence of the employment relationship. Alternatively, the respondents contended that, if the claimant was an employee, he was an employee of Rowbotham Construction, LLC, and, further, that his period of temporary total disability ended June 23, 2006.

The record, which included documentary evidence and the testimony of the claimant and Mildred and Gene Rowbotham, husband and wife, was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the potential parties respondent are Rowbotham Construction, LLC, Gene Rowbotham Construction, Inc., and Gene Rowbotham; the respondents have controverted this claim in its entirety; and the claimant's temporary total disability rate for purposes of this claim is \$373.00 per week.

3. The preponderance of the evidence shows that the claimant was jointly employed by the parties respondent and was also the employee of an uninsured subcontractor, so that he is entitled to recover jointly and severally from the respondents.

4. On or about December 19, 2005, the claimant suffered compensable injuries, arising out of and in the course of this employment.

5. As the result of his compensable injuries, the claimant was incapacitated to earn wages and within his healing period from the date of injury until he returned to the workforce June 23, 2006, a period of 26 weeks, 3 days, for which he is entitled to recover from the respondents, jointly and severally, temporary total disability benefits in the amount of \$9,857.86.

6. The claimant's medical care was reasonably necessary in connection with his compensable injuries, so that he is entitled to recover jointly and severally from the respondents medical and related expenses, subject to the limitations of Rule 099.30.

7. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

### **DISCUSSION**

In December, 2005, Gene Rowbotham was in the business of constructing new homes and remodeling existing homes in the Harrison, Arkansas, area and the claimant was working as a carpenter on at least two of Rowbotham's jobs, the Plumlee job and the Leu job. On December 19, 2005, while working on the Leu job, the claimant fell from a roof, landing on his feet and suffering injuries primarily to his right foot and ankle. The claimant now contends, and the respondents deny, that his injuries entitle him to workers' compensation benefits and an attorney's fee for controversion.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

At the hearing, Mr. Rowbotham and his wife, Mildred Rowbotham, testified concerning the operation of business. It was their testimony that his construction business was operated from the basement of their home through Gene Rowbotham Construction, Inc., [hereinafter GRC Inc] and Rowbotham Construction, LLC, [hereinafter the LLC].

Mr. Rowbotham was president and Mrs. Rowbotham was the secretary of GRC Inc, an organization they described as having few assets and no employees, but whose purpose was to enter into construction contracts with third parties, buy materials for the jobs, and collect money paid for the work, which was performed by subcontractors, such as the LLC. GRC Inc paid social security taxes on Gene Rowbotham, paid Mildred Rowbotham's health insurance, and also made payments to a bank on a dump truck and had some tools and possibly a tractor trailer rig.

The Rowbothams explained that GRC Inc distributed money from the profits to the LLC, also described as an organization without employees, which was nevertheless responsible for performance of a portion of the construction work pursuant to contracts entered into by GRC Inc. According to Mrs. Rowbotham, the LLC was there “for these carpenters that come in to share the profits that are made.” Tr. at 11.

In short, according to the Rowbothams, the LLC procured construction workers, such as the claimant, who were merely members of the LLC but not its employees or owners. The LLC then paid the workers at fixed hourly rates, based on the hours of work each had performed. There was no additional opportunity for “sharing profits” by the workers as members of the LLC. GRC Inc was the only source of income for the LLC, which was also said to be without assets, save the payroll funds it passed through to the workers. Furthermore, like all respondents, it was without workers’ compensation insurance coverage for its workers. Indeed, the three respondents operated this construction business, with its obvious risks of injury, wholly without workers’ compensation insurance protection for the workers who were essential to the functioning of the business.

Mr. Rowbotham testified that he had been a carpenter by trade for many, many years and was the general manager of the LLC and president of GRC Inc. He stated that one day the claimant called and wanted to meet with him about being an employee. He stated that during the meeting they talked about the work we had to do and that the claimant was wanting a job to work on. In response to a question, he answered that he did in fact put the claimant to work. Tr. at 38. He also testified that once there is a written contract to build a home, he pays carpenters by the hour to do the work. Tr. at 39. He further stated that the claimant was hired to do trim work, framing, or roofing and would be paid \$14.00 per hour to help compensate for insurance and stuff. Tr. at 40, 41.

Mr. Rowbotham also testified that he did not normally see most of the guys but that he gives lead men the plans and the lead men report to him. Tr. at 41. He stated that in December, 2005, there were about 14 carpenters working on his construction projects. Tr. at 42. He also confirmed that the home where the claimant was injured was being built pursuant to a contract between GRC Inc and Bobby Leu. Tr. at 44.

The claimant's testimony was similar to that of Mr. Rowbotham. He stated that most of his work had been in construction doing roofing, painting, sheetrock, or trim work, just about anything except not much electrical and very little plumbing. In the fall of 2005, he had done some construction on the side and had worked at Wal Mart but was unemployed by November, 2005, when he sought out Mr. Rowbotham. He stated that he had heard some really good things about him as an employer and got his telephone number from his trucks which he saw at the Leu job.

The claimant testified that he called Mr. Rowbotham on November 30, 2005, and met him at the Plumlee job the next day. There, they discussed the type of work the claimant had done in the past, what he was good at, what his weak points and good points were, as well as his pay. The claimant said that Mr. Rowbotham said he would hire him but never mentioned an LLC or that he was working for an LLC. No paperwork was signed. Instead, Mr. Rowbotham merely jotted down the claimant's name and telephone number and told him to show up at the Plumlee job the next day. The claimant testified that he thought he was working for Gene Rowbotham.

The claimant said that on December 1, 2005, he reported to the lead man and began working with the lead man and another laborer. The lead man explained to him that he would get paid by going to the basement of the Rowbotham home. However, the claimant stated that Mr. Rowbotham wrote him his first check from a little checkbook in his truck, since he had only worked for a couple

of days. Thereafter, checks were received from the big checkbook in the basement and were written by Mrs. Rowbotham.

The second full week of work was on the Leu job because they had run out of materials at the Plumlee job. That Saturday, the claimant worked stacking cinder blocks at the Plumlee jobs and then was told to help cut firewood and that he would be paid for that as well.

On Monday, December 19, 2005, at the Leu job, the claimant helped with different framing areas, such as putting up doors or putting windows in. Later in the day he was asked if he could put the felt paper on the roof and he said that he could probably do that. He testified that he was not “real experienced” in putting paper in the valley of a roof and he asked that Aaron Anderson to go up there and explain it all to him, which he did. Thereafter, while trying to put the felt paper on the roof, the claimant slid off and suffered injuries primarily to his right lower extremity, which would eventually require surgery January 11, 2006.

The preponderance of the evidence indicates that, at the time of his injury, the claimant was employed jointly by Gene Rowbotham, individually, Rowbotham Construction LLC, and Gene Rowbotham Construction, Inc., for purposes of the Workers’ Compensation Act, and is entitled to recover from them jointly and severally. The claimant was personally hired by Gene Rowbotham and thereafter subject to his direct supervision, with little reference or regard to his status as an individual businessman or representative of a corporation. Similarly, the claimant did the work of the respondents and should be considered a joint employee in the operation of their construction business, which depended on the labor of persons such as the claimant in order to operate. Even if the claimant was not a direct employee of Gene Rowbotham Construction, Inc, he is entitled to recover from that respondent because it was the prime contractor on a job where the claimant was

injured while working as an employee for an uninsured subcontractor, Rowbotham Construction LLC. The record also shows that the claimant was incapacitated to earn wages and in his healing period, so that he is entitled to temporary total disability benefits, from the date of injury until he returned to the workforce June 23, 2006, a period of 26 weeks, 3 days, for which he is entitled to recover \$9,857.86, based upon his temporary total disability rate of \$373.00 per week.

The record further shows that the claimant's medical care was reasonably necessary in connection with his compensable injuries, so that he may recover from the respondents, subject to the limitations of Rule 099.30.

### **AWARD**

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant, and the claimant shall have and recover, jointly and separately, from Rowbotham Construction LLC, Gene Rowbotham Construction, Inc., and Gene Rowbotham, individually, the total amount of \$9,857.86 for temporary total disability benefits through June 23, 2006, together with reasonably necessary medical and related expenses previously incurred, subject, however, to the limitations of Rule 099.30.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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RICHARD B. CALAWAY  
Administrative Law Judge