

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F303165

WARREN SCHMUTZLER, Employee	CLAIMANT
NORTHWEST ARKANSAS STEEL	RESPONDENT #1
CORPORATE SOLUTIONS	RESPONDENT #2
AMERICAN INSURANCE MANAGERS	RESPONDENT #3
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #4

OPINION FILED JANUARY 11, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by CONSTANCE G. CLARK, Attorney, Fayetteville, Arkansas.

Respondent #2 represented by EARL BUDDY CHADICK, Attorney, Fayetteville, Arkansas.

Respondent #3 failing to appear at hearing.

Respondent #4 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On December 7, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 27, 2006, and a pre-hearing order was filed on September 29, 2006. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant suffered a compensable injury on November 22, 2002.
3. The claimant was paid compensation benefits through November 23, 2003.

4. The claimant earned an average weekly wage sufficient to entitle him to compensation at the rate of \$281.00 for temporary total disability benefits and \$210.00 for permanent partial disability benefits.

5. Claimant reached the end of his healing period and maximum medical improvement on February 18, 2004.

6. Claimant has been assigned the following impairment ratings: 10 percent right wrist; 10 percent left wrist; 28 percent to the body as a whole - lumbar; 11 percent right ankle; and 7 percent left ankle.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant was an employee of Northwest Arkansas Steel and/or Corporate Solutions on November 22, 2002.

2. Whether Northwest Arkansas Steel or Corporate Solutions is liable for payment of compensation benefits either individually, jointly, or severally.

3. Temporary total disability benefits from November 24, 2003 through February 18, 2004.

4. Related medical.

5. Claimant's entitlement to permanent total disability benefits; alternatively, claimant's entitlement to wage loss in excess of his permanent physical impairment.

6. Attorney fee.

The claimant contends that while in the course and scope of his employment with the respondent employer on or about November 22, 2004 while working on a crane he fell 20 feet onto the concrete floor. He sustained catastrophic injuries and has had numerous surgeries on his hand, back, and treatment over various and many parts of his body. Claimant contends he is entitled to temporary total disability benefits beginning November 24, 2003 and continuing through February 18, 2004; unpaid medical treatment; and permanent total disability benefits. Claimant also requests a controverted attorney fee.

Respondent #1, Northwest Arkansas Steel, contends that at the time of claimant's compensable injury he was employed by Corporate Solutions, Inc. and, therefore, any workers' compensation benefits to which the claimant is entitled are the sole responsibility of Corporate Solutions, Inc. and its workers' compensation carrier. In the event that the Commission should find NWA Steel responsible for any workers' compensation benefits in this matter, NWA Steel is entitled to be fully indemnified and reimbursed by Corporation Solutions, Inc. Respondent #1 also contends that, "It is NWA Steel's position that the provisions of A.C.A. §23-92-301 et seq., the Arkansas Employee Leasing Act, are applicable to this claim. Specifically, NWA Steel contends that Corporate Solutions, Inc. is an employee leasing firm as defined by that Act. A.C.A. §23-92-315 provides, 'A licensed employee leasing firm shall be deemed an employer of its leased employees and shall perform the following employer responsibilities in conformity with all applicable federal and state laws and regulations: ... (3) ensure that all of its employees are covered by workers' compensation insurance provided in conformance with the laws of this state.' This Act was repealed in 2003 and replaced by Act 1750 of 2003, known as the Arkansas Professional Employer Organization, Recognition and Licensing Act. However, it was the predecessor Act which was in effect on the date of the contract between NWA Steel and Corporate Solutions, as well as on the date of Mr. Schmutzler's injury."

Respondent #2, Corporate Solutions, contends that it was not claimant's employer and that it is not liable for claimant's compensation benefits. In addition, respondent #2 contends claimant is not entitled to permanent total disability benefits.

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 A.C.A. §11-9-704:

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 27, 2006, and contained in a pre-hearing order filed September 29, 2006, are hereby accepted as fact.

2. NWA Steel and Corporate Solutions were joint employers of the claimant; therefore, they are jointly liable for payment of workers' compensation benefits. Under the terms of the "Client Service Agreement," NWA Steel is entitled to recover any workers' compensation payments it makes to claimant from Corporate Solutions.

3. Claimant is entitled to additional temporary total disability benefits beginning November 24, 2003 and continuing through February 18, 2004.

4. Claimant is entitled to all unpaid medical treatment provided in connection with his compensable injuries.

5. As a result of his compensable injuries, claimant is permanently totally disabled.

6. Claimant's attorney is entitled to the maximum attorney fee on all unpaid indemnity benefits.

### FACTUAL BACKGROUND

The claimant is a 63-year-old man who completed the eighth grade and started the ninth grade, but did not finish it. Claimant joined the Army in 1960 where he was initially in the infantry and became a drill sergeant before his release in 1976. While in the Army the claimant obtained his GED and also received training in maintenance, supply, and heavy-equipment operation.

After his discharge from the Army in 1976 the claimant went to work for a sawmill, performing maintenance work for approximately three years. Claimant also performed construction work in El Dorado before he went to work at an asphalt plant which he supervised before it was closed down.

Claimant eventually moved to Fayetteville and was self employed for a period of time performing maintenance work on heavy equipment at various construction sites. Claimant also operated heavy equipment during this period of time.

NWA Steel's records indicate that claimant began working for it in November 1995. NWA Steel is a company which fabricates and erects structural steel and steel water storage tanks and stand pipes. Claimant testified that he performed various jobs for NWA Steel including maintenance, operating machinery, and welding. Claimant testified that he was hired by Joseph Carmen, an individual who was also claimant's supervisor the entire time he performed this job.

NWA Steel and Corporate Solutions entered into a Client Service Agreement effective March 3, 2001, which provided that Corporate Solutions would perform various functions for NWA Steel. In effect, all employees of NWA Steel became employees of Corporate Solutions and were leased back to NWA Steel. Corporate Solutions was responsible for various things including payroll, employee benefits, and providing workers' compensation insurance. It should be noted at this time that Corporate Solutions made some effort to provide workers' compensation insurance through an entity known as American Insurance Managers. American Insurance Managers was made a party to this claim but has failed to respond or appear before this Commission despite having been sent notice of these proceedings.

The parties have stipulated that claimant suffered a compensable injury on November 22, 2002. On that date, the claimant fell approximately 20 feet from a crane inside NWA Steel's facility. Claimant landed on a concrete floor and suffered a multitude of injuries; including, a fractured back, rib fractures, a fractured left wrist, a fractured left ankle, and a right pneumothorax. Claimant testified that he was hospitalized for approximately two months as a result of these various injuries. A review of the medical records indicates that claimant has undergone multiple surgeries as a result of these

injuries. The parties have stipulated that as a result of claimant's compensable injuries he has been assigned impairment ratings equal to 10% to the right wrist, 10% to the left wrist, 28% to the body as a whole for his lumbar injury, 7% to the left ankle, and 11% to the right ankle. With respect to the right ankle, I note that claimant testified that he did not injure his right ankle in the fall and has not had surgery on his right ankle; therefore, this condition will not be considered compensable for purposes of this opinion.

Following claimant's compensable injury he was initially paid workers' compensation benefits by Corporate Solutions or its workers' compensation carrier. In September 2003 Corporate Solutions terminated its contract with NWA Steel.

The parties have stipulated that claimant was paid compensation benefits through November 23, 2003. However, claimant has not been paid any temporary total disability benefits or medical benefits subsequent to that date. In addition, claimant has not been paid permanent disability benefits in accordance with the impairment ratings assigned by his treating physicians.

Claimant has filed this claim contending that regardless of his relationship with Corporate Solutions, he was an employee of NWA Steel on November 22, 2002; therefore, NWA Steel is liable for compensation benefits. Claimant also requests temporary total disability benefits from November 24, 2003 through February 18, 2004, payment of medical treatment, and he also contends that he is entitled to permanent total disability benefits or benefits in excess of his permanent physical impairment.

### ADJUDICATION

The initial issue for consideration is whether claimant was an employee of NWA Steel and/or Corporate Solutions on November 22, 2002, and whether one or both of those parties is liable for payment of compensation benefits either separately or jointly.

I find based upon the evidence presented that NWA Steel and Corporate Solutions

were joint employers of the claimant; therefore, they are jointly liable for workers' compensation benefits. The Arkansas Courts have held that if an employee is engaged in "joint employment", meaning that the employee is performing for and under the control of two employers at the same time, that liability for workers' compensation benefits is joint. *Cook v. Recovery Corporation*, 322 Ark. 707, 911 S.W. 2d 581 (1995); *Dillaha Fruit Company v. LaTourrette*, 262 Ark. 434, 557 S.W. 2d 397 (1997).

I believe it is clear from a review of the evidence in this case that claimant was performing for and under the control of both NWA Steel and Corporate Solutions at the time of his injury on November 22, 2002. As previously noted, the claimant became employed by NWA Steel in November 1995. NWA Steel and Corporate Solutions entered into their "Client-Service Agreement" effective on March 3, 2001. Despite that agreement, the only real change affecting claimant was the name on his check. Claimant continued to perform the same job duties he had performed prior to this agreement, he was supervised by the same person, and he performed the same job. Furthermore, paperwork signed by the claimant states that he could be terminated at any time, with or without cause, by either Corporate Solutions or NWA Steel. Thus, claimant's employment provided a benefit to both NWA Steel and Corporate Solutions and he was under the control of both entities.

More importantly, I believe that the "Client-Service Agreement" which was entered into by NWA Steel and Corporate Solutions proves that claimant was jointly employed by both of these entities. The documentary evidence contains a copy of the Client-Service Agreement entered into between NWA Steel and Corporate Solutions. Paragraph 2 of the TERMS & CONDITIONS contains the following language:

**(2) Definition of Services.**

Corporate Solutions and Client agree to jointly employ certain employees ("Assigned Employees").  
(Emphasis added.)

Thus, the agreement between NWA Steel and Corporate Solutions indicates that the parties agreed to “jointly employ” individuals such as the claimant. Therefore, regardless of the actual working relationship and the day-to-day activities of the claimant, NWA Steel and Corporate Solutions contractually agreed to jointly employ the claimant.

With respect to this issue, it should also be noted that NWA Steel submitted into evidence a letter from Patricia Nielson-Johnson, the President/CEO of Corporate Solutions, to Carol Gillean, NWA Steel’s bookkeeper. That letter was dated September 30, 2003, and indicates that the termination date of the service agreement between the parties was September 20, 2003. Significantly, the letter also states:

Corporate Solutions, Inc. and NWA Steel entered into a co-employment agreement through our Service Agreement. This letter is to inform you that the official term date will be 9/20/03 as it was the last day that payroll was run for your company. (Emphasis added.)

Furthermore, a Corporate Solutions brochure entered into evidence by NWA Steel contains the following language:

As a client you become the client company, we become co-employers. Our client companies retain ownership of their business and still manage every day operations within their business and employees. (Emphasis added.)

In response to the contention that NWA Steel was the employer of claimant, NWA Steel contends that the provisions of the Arkansas Employee Leasing Act codified at §23-92-301, et al., are applicable. This Act was repealed in 2003, but was in effect at the time the agreement was entered into between NWA Steel and Corporate Solutions as well as on the date of claimant’s injury. NWA Steel relies upon §23-92-315 which states that a licensed leasing firm is “deemed an employer of its leased employees” and requires leasing firms to insure that all employees are covered by workers’ compensation insurance.

However, the Act does not indicate that the client company is not an employer as well or state that client company is not liable for compensation benefits should the employee leasing firm not provide the required workers' compensation insurance. To the contrary, it appears from a reading of the Act that it contemplates that the employee leasing firm and the client would be joint employers. A.C.A. §23-92-315(4) states:

... be entitled, and entitle the claimant, together as joint employers, to the exclusivity of the remedies set forth in §11-9-105 under both the workers' compensation and employer's liability provisions of a workers' compensation policy or plan that either party has secured within the meaning of §11-9-105. (Emphasis added.)

Furthermore, §23-92-316(a)(1) indicates that employee leasing firms are prohibited from purporting to be the sole employer of an employee it leases:

- (a) No employee leasing firm or other individual, association, company, firm, partnership, or corporation who leases employees may:
  - (1) Evade or attempt to evade the provisions of this sub-chapter by purporting to be the sole employer of the employees it leases:

In other words, my reading of the Arkansas Employee Leasing Act does not indicate that Corporate Solutions as an employee leasing firm is the sole entity responsible for workers' compensation benefits. To the contrary, the Act specifically states that the employee leasing firm and the client are joint employers for purposes of workers' compensation and that any attempt by the employee leasing firm to purport to be the sole employer is prohibited.

In short, I find that the claimant was jointly employed by NWA Steel and Corporate Solutions at the time of his injury on November 22, 2002. The Client-Service Agreement entered into between NWA Steel and Corporate Solutions specifically states that the parties agree to "jointly employ" employees. Furthermore, the Arkansas Employee

Leasing Act does not support a finding that Corporate Solutions as an employee leasing firm was solely liable for workers' compensation benefits. Instead, the Act contemplates joint employment and specifically prohibits the employee leasing firm from purporting to be the sole employer of the employees it leases. Accordingly, for the foregoing reasons, I find that claimant was an employee of NWA Steel and Corporate Solutions on November 22, 2002. Therefore, both NWA Steel and Corporate Solutions are jointly liable for payment of workers' compensation benefits. This ruling should not be interpreted as a finding that NWA Steel and Corporate Solutions are each liable for paying one-half of all workers' compensation benefits. Under the terms of the Client Service Agreement Corporate Solutions is ultimately responsible for payment of benefits. However, if Corporate Solutions does not make payment after this order becomes final then NWA Steel must pay the appropriate benefits and then proceed against Corporation Solutions for reimbursement.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning November 24, 2003, and continuing through February 18, 2004. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages for his unscheduled lumbar injury or that he remains within his healing period and that he has not yet returned to work for his scheduled injuries.

In this particular case, the parties stipulated that claimant's healing period did not end until February 18, 2004. In addition, even though the claimant had been released to return to work by his treating physician for his scheduled injuries including his left and right wrist and right ankle, claimant had not been released to return to work by his treating physician for his back injury. As previously noted, claimant was last paid compensation benefits on November 23, 2003. Shortly before that date, claimant had been evaluated

by Dr. Brooks who was managing claimant's pain with medication. In a report dated November 10, 2003, Dr. Brooks recommended that the claimant see a neurosurgeon to further evaluate the stability of his spine. Claimant again returned to Dr. Brooks on January 12, 2004, at which time Dr. Brooks again recommended a neurosurgical or orthopaedic evaluation. Dr. Brooks noted that the claimant might be capable of performing sedentary type work; however, he considered the claimant to be unemployable given his restrictions. Shortly after this January visit with Dr. Brooks, the claimant was evaluated by Dr. Blankenship who provided a disability determination report dated February 18, 2004. This is the date the parties have stipulated that claimant reached maximum medical improvement.

Based upon the claimant's testimony that he was unable to perform any work subsequent to November 22, 2002, as well as my review of the medical reports from claimant's treating physicians, I find that claimant has met his burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages from November 24, 2003 through February 18, 2004, the date the parties have stipulated that claimant reached maximum medical improvement.

NWA Steel and Corporate Solutions are also liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries.

The final issue for consideration involves claimant's request for permanent disability benefits. The parties have stipulated that claimant was assigned permanent physical impairment ratings in an amount equal to 10% to his right wrist; 10% to his left wrist; 28% to the body as a whole as a result of his lumbar injury; 11% to his right ankle; and 7% to the left ankle. I find that these impairment ratings which were assigned by Dr. Tomlinson and Dr. Blankenship are credible and entitled to great weight. Accordingly, I find that

NWA Steel and Corporate Solutions are liable for payment of permanent disability benefits associated with these impairment ratings, with the exception of the 11% to the right ankle. As previously noted, claimant testified that he did not injure his right ankle during his fall.

I also find that claimant is entitled to permanent total disability benefits as a result of his compensable injury. When considering claims for permanent disability benefits in excess of an employee's percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of permanent physical impairment itself, the claimant's age, education, work experience, and all other matters which may reasonably be expected to affect their future earning capacity.

As previously noted, the claimant has been assigned impairment ratings to both wrists and to his left ankle. In addition, claimant has been assigned a significant impairment rating to his lumbar spine in the amount of 28% to the body as a whole. At the request of Dr. Blankenship, the claimant underwent a functional capacities evaluation which indicates that claimant gave a consistent effort. Dr. Blankenship in his report of February 18, 2004 indicated that claimant might be capable of performing some type of sedentary type work. Dr. Blankenship also placed a permanent weight lifting restriction of 10 pounds on the claimant.

However, based upon the remaining wage loss factors, I do not believe that the claimant is capable of performing even sedentary-type work. As previously noted, the claimant is 63 years old and he has obtained his GED. While the claimant has performed some jobs which had duties which were non-physical in nature, claimant's primary jobs have involved heavy physical labor. These include work at a saw mill, construction work, work in an asphalt plant, maintenance work on heavy equipment, operation of heavy equipment, and welding. Claimant testified that he must take medication for his wrists and that his left wrist throbs. He also suffers a constant throbbing pain in his back which radiates into his hips. Claimant also has swelling and throbbing pain in his left ankle.

Claimant testified that his pain affects his ability to concentrate.

Given claimant's age, his education, and his prior work history, and the restrictions placed upon claimant's ability to sit, stand, and lift, I do not believe that claimant is capable of performing even sedentary-type employment. Therefore, I find that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon all indemnity benefits awarded. This fee is to be paid one-half by the respondents and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

#### AWARD

NWA Steel and Corporate Solutions were the joint employers of the claimant at the time of his accident on November 22, 2002. Therefore, they are jointly liable for payment of workers' compensation benefits. Under the terms of the client's service agreement, NWA Steel is entitled to recover any workers' compensation payments from Corporate Solutions. NWA Steel and Corporate Solutions are jointly liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. In addition, claimant is entitled to additional temporary total disability benefits beginning November 24, 2003, and continuing through February 18, 2004. Finally, claimant is entitled to permanent total disability benefits as a result of his compensable injury. NWA Steel and Corporate Services have controverted claimant's

entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE