

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512674

TERRY SHACKLEFORD,
EMPLOYEE

CLAIMANT

MERELYN HADDOCK,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 2, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by HONORABLE MICHELLE HARKEY, Attorney at Law, Mountain View, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 4, 2006 in Mountain Home, Arkansas. A Prehearing Order was entered in this case on June 22, 2006. This Prehearing Order contained no stipulations and outlined the issues to be litigated and resolved at the present time. This prehearing also indicated that the respondent, Merelyn Haddock, was prohibited from presenting evidence or defenses to this claim, to the greatest extent allowed by law, in light of Mr. Haddock's failure to file prehearing questionnaire answers. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The employment relationship between Mr. Shackelford and Merelyn Haddock.
2. Whether Mr. Shackelford sustained a compensable injury.

The record consists of the October 4, 2006 hearing transcript and the exhibits contained therein, except that the testimony of Merelyn Haddock and Ronnie Haddock are included as proffers only.

DISCUSSION

Terry Shackelford contends that he sustained a back injury and complications from an alleged fall from a ladder while allegedly employed by Merelyn Haddock as a laborer in the construction of a cabin on August 2, 2005. At the start of the October 4, 2006 hearing, the parties reserved the issue of appropriate benefits if this claim is found compensable.

1. Respondent's Objection To That Portion Of The June 22, 2006 Prehearing Order Prohibiting Respondent From Presenting Evidence

Because Mr. Haddock did not timely file answers to the prehearing questionnaire which I mailed to him for the

fourth time on May 11, 2006, my June 22, 2006 prehearing order provided that Mr. Haddock would be prohibited from presenting evidence or defenses to this claim, to the greatest extent allowed. Mr. Haddock's attorney was permitted to cross-examine Mr. Shackelford during the hearing without objection from Mr. Shackelford's attorney. To the extent that Mr. Haddock's attorney on page 41 of the hearing transcript also objected to that portion of the prehearing order prohibiting Mr. Haddock from presenting his own witnesses, I respectfully point out that Mr. Haddock's proffered testimony on that issue on pages 42 through 45 of the hearing transcript cannot justify Mr. Haddock's non-compliance with my May 11, 2006 directive that he either timely answer the prehearing questionnaire or be prohibited from presenting evidence at the hearing in this matter. Consequently, the proffered testimony of Merelyn Haddock and Ronnie Haddock will not be considered in deciding the issues presented for determination at the hearing.

2. Jurisdiction Of The Arkansas Workers' Compensation Commission

Mr. Shackelford, an Arkansas resident, contends that he was an employee of Merelyn Haddock, an Arkansas resident, and that Mr. Shackelford sustained work-related injuries

which sent him to the hospital in Stone County, Arkansas. I find that Arkansas has sufficient contacts with the parties, consistent with due process requirements, for jurisdiction of this workers' compensation claim to be appropriate in Arkansas.

I also note that Mr. Shackelford is afforded an option under Arkansas law to proceed against an alleged uninsured employer either for a claim for compensation under the Arkansas Workers' Compensation Law or to instead maintain a legal action in court for damages. Ark. Code Ann. 11-9-105(b)(1). In light of Mr. Shackelford's election to proceed in a workers' compensation claim, I also find that the Arkansas Workers' Compensation Commission has jurisdiction to decide the merits of the present claim for an alleged compensable injury under the Arkansas Workers' Compensation Law.

3. Employment Status

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). Ordinarily, no one feature of the relationship is determinative. Carter v. Ward Body Works, Inc., 245 Ark.

515, 439 S.W.2d 286 (1969). The right to control the method and manner of the work is the traditional test applied in Arkansas when considering whether an individual was an employee or an independent contractor. The ultimate question with the right to control test is whether the employer has the right to control, not whether the employer actually exercises control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). However, the courts have also considered the "relative nature of the work" test in addition to the right to control test. Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976); Sands v. Stombaugh, 11 Ark. App. 38, 665 S.W.2d 902 (1984); Franklin, supra; Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The main consideration of the relative nature of the work test is "the relationship between the claimant's own occupation and the regular business of the asserted employer." Salter, supra; Lambert, supra.

Consequently, the resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the right to control the work and of factors related to the relationship of the work to the asserted employer's business. A number of factors

were outlined in D. B. Griffen Warehouse, Inc. v. Sanders,
336 Ark. 456, 986 S.W.2d 836 (1999), including:

the extent of control which, by the agreement, the master may exercise over the details of the work;

whether or not the one employed is engaged in a distinct occupation or business;

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;

the skill required in the particular occupation;

whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

the length of time for which the person is employed;

the method of payment, whether by the time or by the job;

whether or not the work is a part of the regular business of the employer;

whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business.

See also Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some

cases. The relative weight to be given to the various factors must be determined by the Commission. Franklin, supra. However, the Supreme Court has stated that the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. Sanders, supra.

Furthermore, the claimant must prove by a preponderance of the evidence that the respondent employed the requisite number of employees to be covered by the Arkansas Workers' Compensation Law. Under the current law, a claimant must generally establish that the respondent regularly employed three or more employees. Ark. Code Ann. § 11-9-102(11) (A) (Supp. 2003). The term "employee" includes a sole proprietor who devotes full time to the proprietorship or a partner who devotes full time to the partnership. Ark. Code Ann. § 11-9-102(9) (B) (Supp. 2003).

As construed by the Arkansas Supreme Court, the phrase "regularly employs" is not synonymous with "constancy." Wallace v. Wells, 221 Ark. 750, 255 S.W.2d 970 (1953); Aerial Crop Care, Inc. v. Landry, 235 Ark. 406, 306 S.W.2d 185 (1962). Instead, it is sufficient if the demands of the business are such that the requisite number of workers are regularly employed, although some or all of the workers may

be employed only periodically. In this regard, the Arkansas Supreme Court quoted the following language from Mobile Liners v. McConnell, 220 Ala. 562, 126 So. 626:

The word 'regularly' is not synonymous with 'constancy.' There are businesses of importance which employ numbers of men regularly, who employ none of them continuously. And a number of businesses, as this, will require a large number of employees, nearly all or a large number of whom are employees only periodically, for the reason that the needs of the business require their services only at intervals or periods, whenever the business is in active operation.

However, employment also specifically means every employment in which two or more employees are employed by any person engaged in building or building repair work. Ark. Code Ann. § 11-9-102(11) (B).

In Simpson v. Wayne Moore Construction Company, Full Workers' Compensation Commission, Opinion filed February 23, 2004 (F207890), the Commission considered the issue as to whether or not a framing carpenter was an independent contractor or instead an employee of a business primarily engaged in home building and remodeling doing business as Wayne Moore Construction Company. The Full Commission found that the framing carpenter was an employee, and not an independent contractor, under circumstances where Mr.

Simpson was paid by the hour; either party could terminate the employment relationship at any time without liability; Mr. Simpson did not work for anyone else during the period of time that he worked on the job for Wayne Moore Construction Company; Wayne Moore Construction Company provided the vast majority of the tools and equipment needed to perform the work; Wayne Moore Construction Company would direct Mr. Simpson where he needed to work each day and essentially controlled all aspects of the work; Mr. Simpson never owned his own business; and Mr. Simpson believed that he was an employee of Wayne Moore Construction Company. The Commission reached this result even though Mr. Simpson had signed and presented a Certificate of Non-Coverage to Wayne Moore Construction Company, and Mr. Simpson filled out tax forms identifying himself as a "non-employee."

In Harold Gray (Dec'd) v. B. R. Skipper Construction, Inc., Full Workers' Compensation Commission, Opinion filed April 21, 2003 (F010523), a majority of the Full Commission likewise found that Mr. Gray, a journeyman carpenter, was an employee of B. R. Skipper Construction, Inc., a building contractor, and not a subcontractor or an employee of the home builders at the site where B. R. Skipper Construction was the contractor of record. The Commission found Mr. Gray

to be an employee of B. R. Skipper Construction, Inc. under circumstances where a written construction contract called for B. R. Skipper to construct a custom home; B. R. Skipper Construction had the right to control Mr. Gray's work, but did not exercise actual control; there were five carpenters on the site; the carpenters had no right to control the means and method of roof building, as their daily work was governed by blue prints subject to revision by others; the work schedule was determined for the carpenters; the carpenters could be terminated without liability or quit without liability at any time; the carpenters were paid by the hour, not by the job or by the square-foot; the carpenters only furnished their own apron and hammer and the property owner provided all major tools; carpentry was integral to the construction contract; and carpenters consider themselves employees. The Commission reached this conclusion notwithstanding the fact that Mr. Gray was a journeyman carpenter; that B. R. Skipper was seldom present at the work site and did not maintain day-to-day control of the construction; no taxes were withheld from Mr. Gray's checks; and B. R. Skipper did not furnish tools.

In Richard Wesson v. Shawn Gaddy D/B/A Rat A Tat Tat Construction, Full Workers' Compensation Commission, Opinion

filed December 3, 2002 (F011031), Mr. Wesson was a framing carpenter and a lead man for the construction performed by Shawn Gaddy's business. A majority of the Full Commission found Mr. Wesson to be an employee and not an independent contractor under circumstances where Mr. Wesson was paid \$15/hour weekly; Shawn Gaddy supplied equipment but not tools; Shawn Gaddy, the framing subcontractor, was paid \$3.25 per square foot to frame the house; Shawn Gaddy controlled the work hours and performance; and Shawn Gaddy had the right to control the means by which the work was done. The Full Commission reached this conclusion notwithstanding that Mr. Wesson paid his own Social Security and taxes; he had been a carpenter for ten years before the job; he used his own tool belt, saw, level, cords, and hoses; as head man, Mr. Wesson instructed other carpenters as per Shawn Gaddy's orders; Mr. Wesson had a Certificate of Non-Coverage that was never delivered; and Mr. Wesson had been hired in a leadership capacity to exercise leadership over his other workers.

In Moore v. MDH Builders, Inc., Full Workers' Compensation Commission, Opinion filed August 3, 2003 (E901863), Mr. Moore, a carpenter, was held to be an employee and not an independent contractor under

circumstances where Mr. Moore bid carpentry jobs on other sites but worked hourly at the current job; the employer had the right to control the work, although the employer exercised little control; Mr. Moore could be terminated without liability; the employer supplied all tools except a pouch, skill saws, and a nail gun; and construction was an integral part of Mr. Moore's employer's business.

In the present case, I likewise find that a preponderance of the evidence establishes that the claimant was an employee of Merelyn Haddock, and not an independent contractor. The claimant was engaged as a laborer for roofing at the job site where the claimant was injured. (T. 9) On the day he was injured, the workers were roofing a cabin. (T. 9) The roof was being put on by Merelyn Haddock and a helper (T. 9) For this job, the claimant was employed by Merlyn Haddock. (T. 11) Under these circumstances, the claimant's work as a laborer when he was injured appears to have been an integral part of Mr. Haddock's endeavor to roof a cabin. In addition, the claimant was paid by the hour and not by the job. (T. 9) Mr. Haddock owned the tools and other equipment, and Mr. Haddock told the claimant what he wanted the claimant to do. (T. 10)

To the extent that the respondent's attorney contended at the hearing that any potential employment relationship would be between the claimant and Ronnie Haddock, not Merelyn Haddock, I find credible instead the claimant's testimony that he was told that Merelyn Haddock (not Ronnie Haddock) was the boss, and that it was Merelyn Haddock's project (not Ronnie Haddock's project). (T. 19) The claimant has established by a preponderance of the evidence that his relationship on this project was with Merelyn Haddock, not Ronnie Haddock.

I also find that the claimant established by a preponderance of the evidence that Merelyn Haddock's effort to roof a cabin was "building or building repair work" within the meaning of Ark. Code Ann. § 11-9-102(11)(B), so that only two employees are required to bring the business within the coverage of the Arkansas Workers' Compensation Law. I also find that Mr. Shackelford established by a preponderance of the evidence the presence of three employees of Merelyn Haddock on the roofing project, in addition to Merelyn Haddock himself, when Mr. Shackelford allegedly became injured. The claimant identified in his testimony the following individuals present at the operation to roof the cabin in addition to Merelyn Haddock: Merelyn

Haddock's son (Ronnie Haddock), Mr. Shackelford himself, and another helper (Carl Odom). (T. 9 and 10)

4. Alleged Work-Related Injury

The claimant also proved by a preponderance of the evidence the occurrence of a compensable back injury identifiable by time and place of occurrence. To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant had a ladder slip out from under him when his feet were approximately six or seven feet above the ground. (T. 22) The ladder slipping and causing a fall is a specific incident identifiable by time

and place of occurrence. The claimant was on the ladder as part of his duties to attempt to put some Tyvek on the cabin. (T. 11) Therefore, I find that the incident also arose out of his employment duties. (T. 11)

The respondent's attorney contended in part at the hearing that the claimant seeks benefits for a pre-existing back condition. However, the claimant's testimony and the medical reports instead persuade me that the claimant sustained physical injury to his back in a fall on August 2, 2005, and that the injury is established by medical evidence supported by objective findings. In this regard, I note that the claimant was taken to the Stone County Medical Center emergency room by ambulance on August 2, 2005. Dr. Varela's consult report indicates that x-rays revealed a compression fracture at L1 with 25% anterior compression, and a CT scan revealed approximately 50% canal compromise of the L1 region. Clearly, the x-ray and CT test finds of an L1 compression fracture are objective findings within the meaning of Ark. Code Ann. § 11-9-102(16). Dr. Varela's impression was probable burst fracture, and Dr. Varela recommended transfer for evaluation by a spinal surgeon due to the amount of canal compromise.

Because I find the claimant's testimony regarding the ladder incident credible, I also find that the claimant has established a causal connection between the L1 burst fracture identified beginning on August 2, 2005, and his fall from a ladder earlier that day. I therefore find that the claimant has established by a preponderance of the evidence that the fall caused physical injury and required medical treatment for the L1 burst fracture.

By agreement of the parties, the issue of appropriate benefits is reserved. (T. 3-4)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this workers' compensation claim. The claimant has elected to proceed under the workers' compensation law.
2. The claimant was an employee of Merelyn Haddock, and not an independent contractor, on August 2, 2005.
3. The claimant sustained a compensable low back injury on August 2, 2005.

ORDER

Merelyn Haddock is liable for appropriate workers' compensation benefits for Terry Shackelford's compensable

injury. The claimant's attorney will also be entitled to a 25% attorney's fee on any indemnity benefits to which the claimant is entitled, one-half of claimant's attorney's fee to be paid by the claimant and one-half to be paid by the respondent in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge