

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F704259

TIMOTHY J. STEVENS, Employee	CLAIMANT
COKER FENCING & CONSTRUCTION CLEAN UP, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 4, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 15, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 5, 2007, and a pre-hearing order was filed on that same date. 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 respondents have controverted this claim in its entirety.

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

1. Whether claimant was an employee of respondent.
2. Compensability.
3. Compensation rate.
4. Temporary total disability benefits.
5. Medical.
6. Attorney fee.

At the time of the hearing the claimant withdrew and reserved as an issue his entitlement to temporary total disability benefits.

The claimant contends he was injured on August 16, 2006 when a nail from a nail gun shot through his Achilles tendon. He contends he is entitled to medical benefits relating to his compensable injury.

The respondents contend that the claimant was not an employee, but a subcontractor at the time of his injury. The claimant provided his own tools while working as a subcontractor.

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 June 5, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has proven by a preponderance of the evidence that he was an employee of the respondent on August 16, 2006.
3. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury while employed by respondent on August 16, 2006.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.
5. Claimant earned an average weekly wage of \$542.25 which would entitle him to compensation at the rate of \$362.00 for total disability benefits.

FACTUAL BACKGROUND

The claimant is a 21-year-old man who worked for the respondent for approximately five months. The respondent is a company which primarily builds fences and decks.

Claimant testified that on August 16, 2006 he was in the process of stepping over a pile of lumber when he accidentally shot a nail into his leg with a nail gun. The nail went through claimant's Achilles tendon and came out the front of his foot just above the heel. Claimant was taken to the emergency room where the nail was removed and he received medical treatment. Claimant was referred by the emergency room to Dr. Cooper, but claimant has not sought any medical treatment for his compensable injury since that date.

Claimant has filed this claim contending that he suffered a compensable injury while employed by the respondent on August 16, 2006. He seeks payment of medical benefits and a determination as to his compensation rate.

ADJUDICATION

The primary issue for consideration in this case is whether the claimant was an employee or an independent contractor/subcontractor at the time of his injury on August 16, 2006. Initially, I note that there was some testimony regarding a statement signed by the claimant indicating that he would be considered a subcontractor, not an employee. However, pursuant to A.C.A. §11-9-108 an employee cannot by agreement waive their right to workers' compensation benefits. The issue of whether an individual is an independent contractor/subcontractor is to be determined by the facts presented in each case. In making this determination, the Court has set forth several factors which should be considered. These include:

- (1) The right to control the means and method by which the work is done;
- (2) The right to terminate the employment without liability;
- (3) The method of payment, whether by time, job, piece or

other measurement;

- (4) The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
- (5) Whether the person employed is engaged in a distinct occupation or business;
- (6) The skill required in a particular occupation;
- (7) Whether the employer is in business;
- (8) Whether the work is an integral part of the regular business of the employer; and,
- (9) The length of time for which the person is employed.

See *Franklin v. Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W. 2d 815 (1984); and *Riddell Flying Service v. Callahan*, 90 Ark. App. 388, 206 S.W. 3d 284 (2005).

The ultimate question in determining whether a person is an independent contractor or whether they are an employee is not whether the employer actually exercises control over the work being performed, but whether the employer has the right to control the work. *Irvan v. Bounds*, 205 Ark. 752, 170 S.W. 2d 674 (1943); *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W. 2d 110 (1989).

All of these factors may not be relevant in a particular case, and it is not necessary for the Commission to consider all of the factors in some cases. The relative weight to be given to the various factors is to be determined by the Commission. *Franklin, supra*.

Here, there are some factors present which would support the finding that the claimant was an independent contractor, not an employee. For instance, claimant was paid by the foot and no taxes were withheld from his check. Claimant also provided some tools for his work such as a hammer and measuring tape. Evidence was also presented indicating that claimant had some leeway with respect to the hours he worked for the respondent. In fact, claimant testified that as long as the job was performed within the time period prescribed he had freedom as to when and if he showed up for work. Finally, there was also some evidence presented indicating that claimant had the ability to have

friends help him perform his work.

Despite these factors which would indicate that claimant was not an employee of the respondent, I find that the greater evidence does indicate that claimant was an employee of the respondent. Although claimant did have a friend helping him perform some of his work, claimant testified that the friend was paid by the respondent, not the claimant himself. Furthermore, claimant also testified that at various times the respondent provided other employees to help perform the work.

While claimant did provide some basic tools such as a hammer and measuring tape, the majority of the tools were provided by the respondent. These included specialty tools such as nail guns, air compressors, hoses, extension cords, posthole diggers, rock bars, et cetera. In addition, the respondent also provided all supplies used in the building of the fences.

Most importantly, the claimant is not engaged in a distinct occupation or business of building fences. During the time period claimant worked for the respondent he worked for no other employers. Claimant did not have the tools necessary to build fences.

While the claimant was not involved in the business of building fences, the respondent was in that business. The respondent is in the fence building business and fence building is an integral part of the respondent's regular business.

Finally, while a representative of the respondent was not present on a daily basis at a particular job site, the important issue is whether the respondent had the right to control the work performed by the claimant. In this particular case, I believe based upon the evidence presented that the respondent did have the right to control the work performed by the claimant. In order to obtain new work claimant was required to report to the respondent's shop and was told the site of the next job. Claimant and other employees were taken to the job site and shown the work to be performed. Materials and most of the tools necessary to perform the work were provided by the respondent.

Representatives of the respondent did periodically check on the process of the work which was being performed.

In short, I find based upon the evidence presented that the claimant was an employee of the respondent on August 16, 2006. While there is some evidence which would support a finding that claimant was not an employee, I find that the majority of the evidence indicates that claimant was an employee of the respondent on August 16, 2006. Respondent provided the supplies and most of the tools used in the building of the fences. In addition, the claimant was not in the fencing business while the respondent is in that type of business. Accordingly, I find that claimant was an employee of the respondent on August 16, 2006.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his foot while working for respondent on August 16, 2006. On that date, the claimant accidentally shot a nail into his foot while attempting to step over a pile of lumber. Claimant was taken to the emergency room where the nail was removed.

Based upon the evidence presented, I find that claimant has proven by a preponderance of the evidence that he suffered an injury which was caused by a specific incident identifiable by time and place of occurrence. This injury arose out of and in the course of claimant's employment with respondent and it resulted in an injury to the claimant's body which required medical services. Finally, claimant has offered medical evidence supported by objective findings establishing an injury. The medical records reflect observations from the emergency room personnel of the nail in claimant's foot.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

The final issue involves claimant's compensation rate. Claimant testified at the hearing that he earned an average of four to five hundred dollars per week depending on

the weather. Claimant also testified that he usually worked approximately 40 hours per week. Claimant introduced into the record two checks in the amounts of \$570.00 and \$514.50. While these two checks are dated two weeks apart, there is no indication that claimant was paid every two weeks as opposed to every week. Both of the checks have a notation of 40 hours on them and claimant testified that he usually worked approximately 40 hours per week. Furthermore, the amount of each check is close to the amount claimant testified he earned each week. Based upon the two checks presented into evidence, I find that claimant earned an average weekly wage of \$542.25. This would result in a compensation rate of \$362.00 for total disability benefits.

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)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he was an employee of the respondent on August 16, 2006. Claimant has also met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his foot while employed by respondent on that date. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant earned an average weekly wage of \$542.25 which would entitle him to compensation at the rate of \$362.00 per week for total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter’s charges for preparing the hearing transcript in the amount of \$214.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE