

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509872

BILLY THOMPSON	CLAIMANT
BLACKBYRD ESTATES	NO. 1 RESPONDENT
SMR HORNET FRAMING	NO. 2 RESPONDENT
SECOND INJURY FUND	NO. 3 RESPONDENT

OPINION FILED MARCH 26, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JERRY PRUITT, Attorney, Fort Smith, Arkansas.

Respondent No. 1 represented by DANIEL STEWART, Attorney, Fort Smith, Arkansas.

Respondent No. 2 represented by RANDY SHOCK, Attorney, Fort Smith, Arkansas.

Respondent No. 3 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 18, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 25, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. Respondent No. 2 was a subcontractor to Respondent No. 1 on July 11, 2005.

By agreement of the parties the issues to litigate are limited to the following:

1. Employment relationship.
2. Compensability of the claimant's left shoulder and arm injuries.
3. Related medical.
4. Temporary total disability from July 12, 2005, to a date to be determined.
5. Respondent No. 1's liability due to Respondent No. 2 not having insurance.
6. Possible permanent partial impairment.
7. Second Injury Fund liability.
8. Attorney's fees.
9. The correct compensation rate for the claimant.

In regard to the foregoing issues the claimant contends that he suffered a compensable injury on July 11, 2005, while working for the respondent, SMR Hornet Framing, an uninsured subcontractor for respondent, Blackbyrd Estates. A scaffold collapsed and he fell about 12 feet. He was thrown up in the air and came down head first. David Roberts took him to St. Edwards Hospital from the job site. He contends that he is entitled to medical expenses, temporary total benefits, permanent partial benefits and attorney's fees.

In regard to the foregoing issues Respondent No. 1 contends that it is entitled to a judgement against Respondent No. 2 for any benefits they may have to pay on behalf of the claimant.

In regard to the foregoing issues Respondent No. 2 contends that the claimant was not an employee on the date in question and the claimant did not suffer a work-related injury that date.

In regard to the foregoing issues Respondent No. 3 will state its contentions when discovery is complete.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence respectfully marked Claimant's Exhibit No. 1, Claimant's Exhibit No. 2, Claimant's Exhibit No. 3, and Claimant's Exhibit No. 4. Respondent No. 2 submitted medical records marked Respondent No. 2's Exhibit No. 1, payroll information marked Respondent No. 2's Exhibit No. 2, and the deposition of the claimant marked Respondent No. 2's Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was thirty-six years old and had acquired his GED in 1995. The claimant testified that in 1996 he injured his left shoulder in a work-related accident. The claimant testified that in 1998 he underwent surgery to repair his damaged left shoulder. The claimant testified that after his healing period his left shoulder was as strong as his right shoulder and he has not had any further problems with it until July 11, 2005.

The claimant testified that he went to work for Respondent No. 2, SMR Hornet Framing, in September 2004 as a laborer. The claimant testified that this business is owned and run by Tyler Stormes, David Roberts, and Curtis McFarland, all of whom he has known all of his life. The claimant testified that while working for Respondent No. 2 he was paid approximately half the time with cash and the other half by check. The claimant testified that it would depend on the job as to whether they were paid by cash or check and that sometimes they would be on a job and be paid by check the first time and then by cash there after. The claimant testified that on July 11, 2005, he was earning \$11.00 an hour and at that time was working approximately 42½ hours a week. The claimant testified that Respondent No. 2 was a framing business and that they worked as a subcontractor on different projects. The claimant testified that in July 2005 Respondent No. 2 was framing a house for Blackbyrd Estates. The claimant explained that Blackbyrd Estates is a project run by Wesley Byrd and Scott Black. The claimant testified that the house he was working on was the first house in the development, Blackbyrd Estates, Respondent No. 1 herein. The claimant testified that they had been working on this particular house about eight or nine days.

The claimant testified that on the morning of July 11, 2005, David Roberts picked him up for work like he did every morning. The claimant testified that he lives with his mother and that she was home that morning. The claimant testified that Jim Shackelford was also in the truck. The claimant testified that Mr. Shackelford

had been hired to do some clean up around the building site. The claimant testified that they arrived at the building site around 6:00 in the morning and he started rolling out the air hoses and cords for the air compressor and putting oil in all the guns getting ready to start work. The claimant testified that then he began putting up cornice so the roofers could get started. The claimant testified that Ty was encouraging him to work faster so the roofers could begin their job. The claimant testified that he was working on scaffolding which had been built around the house which was approximately four to five feet off the ground. The claimant testified that he was nailing up a piece of cornice and the next thing he remembers was waking up on the way to the hospital. The claimant testified that he vaguely remembers Ty running around the house yelling and that he knows that David and Ryan came over and got his tool belt off of him but that is all he can remember until he woke up in the hospital with people standing around him. The claimant testified that he was taken to St. Edwards Hospital. The claimant was asked if he remembers talking to the doctors or nurses in the hospital and the claimant responded that he did not talk to anyone that he was in such pain no one asked him any questions. The claimant testified that the medical personnel was just trying to get him stable so that he would quit moaning and groaning. The claimant testified that his shoulder had been separated and when he looked at it, it looked like it had been yanked off and it was just hanging there by some pieces of skin.

The claimant testified that while he was in the hospital he was seen by Dr. Bebout an orthopedic surgeon. The claimant testified that he was put under anesthesia and Dr. Bebout did surgery to get his shoulder back into place. The claimant testified that when he was released from the hospital he was instructed to do no lifting, pulling, and pretty much not to do anything with his left shoulder. The claimant testified that he was also instructed to wear a sling. The claimant testified that when he got home he laid in bed for several days and could not do anything. The claimant testified that he had payments coming due. The claimant testified that David Roberts stopped by his house and he told David about his financial problems. This witness stated that Mr. Roberts told him that he needed some help tearing up some linoleum at his house and he would make his car payment if he would tear up the linoleum. The claimant testified that he went over to Mr. Roberts' house but never got a chance to tear the linoleum out because his shoulder popped out of place again. The claimant testified that he wore an immobilizer over to Mr. Roberts' house and had planned just to use his right arm to remove the linoleum. The claimant testified that when he bent over his arm just fell out of place and he went straight to the hospital. The claimant testified that he called his mother and she took him to the hospital because Mr. Roberts refused to take him.

The claimant testified that when he went to the ER at St. Edwards he was again diagnosed with having dislocated his left shoulder. The claimant testified that Dr. Martimbeau had to put

him under anesthesia to put his shoulder back into place. The claimant testified that when he was released from the hospital he could not do anything and was instructed to keep his arm tied beside him and warned that his shoulder could come out at any minute. The claimant testified that he already had an appointment with Dr. Bebout in August which he kept. The claimant testified that Dr. Bebout took x-rays and instructed him to continue to wear his sling. The claimant testified that he experienced at least five other reoccurrences of his left shoulder dislocating for which he required medical treatment. The claimant agreed that it would take a major surgery to repair his shoulder so it would not pop out as it currently is doing.

The claimant testified that from July 11, 2005, to present he has been completely unable to work as a result of his shoulder. The claimant testified that there was no possible way that he could work since his shoulder would pop out so easily and the pain was so intense. The claimant testified that he does not put his arm up over his head, put his arm behind his back, pull on his socks, tie his shoes, or do anything that would jeopardize his arm popping out of place.

On cross examination by Respondent No. 2, the claimant testified that in the 90s he experienced a rotator cuff tear in his left shoulder. The claimant testified that he had surgery on October 31, 1999, to repair his left shoulder and subsequent to that he had rehabilitation for about a year. The claimant testified that prior to his surgery on October 31, 1998, he

experienced several dislocations of his shoulder. The claimant agreed that this shoulder injury in the 90s occurred while working and was handled through Texas workers' compensation. The claimant testified that he has been convicted of three felonies, burglary of habitation, retaliation, and delivery of cocaine. The claimant testified that he last used illegal drugs, cocaine and marijuana, in 1993. The claimant was asked if he was using drugs on July 11, 2005, and he responded, "No, I wasn't." The claimant testified that he does remember being given pain killers when taken to the emergency room in July 2005 but does not remember the exact amounts being given to him. The claimant was asked if he remembers telling the nurse on July 25, 2005, that he would not use drugs anymore. The claimant responded that he cannot answer that question because he does not know what that nurse looks like and does not remember what he said. The claimant was again asked if he was saying that he has not used any illegal drugs since 1993. The claimant responded, "None that I know of." The claimant testified that while working for Respondent No. 2 he was paid by check at least one time on every job. The claimant testified that at the end of the year he received a 1099 from Respondent No. 2 but it was incorrect. The claimant testified that he has never had a bank account and he does not have any pay check stubs from Respondent No. 2 after June 24, 2005. The claimant testified that if the nurse's notes on July 25, 2005, indicate that he was pulling up flooring and his left shoulder popped out, that information would have had to come from someone else because he does not remember

talking to the nurse, answering questions, or even being able to give his name at the time he was in the ER. The claimant testified again that when he went over to David Roberts' home to pull up the linoleum when he bent over his arm went out of place. The claimant was asked that when the nurse's notes reflect, "I was pulling up on some flooring and my shoulder popped out," was that information incorrect? The claimant testified, "I have no control over what they write." The claimant again was asked about an emergency room note dated January 17, 2006, where it indicates that the injury occurred that day at work. The claimant again indicated that he did not know where they got this information. The claimant testified that he has not been able to work since July 11, 2005. The claimant was read the ER record from July 11, 2005, which sets forth that the patient was awake, alert, oriented as to person, place and time, and the patient reports, "Fell on left shoulder this morning. was about four feet up on a ladder." The claimant testified that he did not provide that information to the medical provider because he was in no shape to tell them anything. The claimant testified that he had no idea why the various medical records do not indicate that his injury was job related. The claimant testified that on July 11 he was working and on the rest of the times he was not working because he had not worked since July 11. The claimant was asked about one of his exhibits specifically page 25 and asked if it was his hand writing on the patient history. The claimant testified that he did not know and when asked if he could identify his own hand writing the claimant

responded, "well, I mean, I don't know if I wrote that or not." The claimant was asked if he was handed a medical history questionnaire at Dr. Long's office and asked to fill it out before he saw the doctor. The claimant responded, "I don't recall. I mean, I don't know. I mean, that's been a long time. I just don't recall it." The claimant testified that on July 11, 2005, there were several people working on the house. The claimant testified that he knew that David, Ty, and Ryan were working on the house along with him and Jim Shackelford was cleaning up around the house. The claimant testified that there were other people there working on the roof but he did not know their names because he had never seen them before in his life. The claimant testified that Respondent No. 2 had some other people working over on another slab but he was not sure who all they were. The claimant testified that he has been compliant with the doctor's orders and that the different notations in the various medical records are incorrect as to what he was doing when his shoulder redislocated.

On cross examination by Respondent No. 1, the claimant testified that to his knowledge Blackbyrd Estates, Respondent No. 1 herein, had three slabs in the subdivision when he was working on one of the houses. The claimant testified that on July 8th or 9th, the Friday before the 11th of July he was up on the roof working and saw a gentlemen write Ty what appeared to be a check. The claimant testified that Ty and the man got in a car and drove off and came back and he was then paid in cash. The claimant testified that he does not know why the hospital records on July 11 set forth that he

fell off a ladder. The claimant testified that when he left the hospital he was instructed to use an immobilizer on his arm for four to six weeks. The claimant testified that when he was trying to pull up linoleum he was wearing his immobilizer. The claimant testified that he has got ten, twelve, fifteen immobilizers because every time he went to the hospital he was given one. The claimant agreed that he remembered saying in his deposition that he could not afford to buy an immobilizer and that was the reason why he quit wearing it. The claimant testified that he has not filed taxes for 2005 and that he has nothing to indicate the amount of income he earned for that year. The claimant was then asked a series of questions concerning how his accident happened, how the scaffolding was constructed, and what he was doing at the time of his fall. The claimant testified that the scaffolding was approximately chest high, was constructed around the exterior part of the building and that Ty was jumping up and down on a portion of the scaffolding and in the claimant's opinion this was the reason why part of the scaffolding fell. The claimant was asked why on August 11 Dr. Bebout had written that he was a noncompliant patient. The claimant testified that Dr. Bebout and he got in an argument over his inability to pay his medical bill as well as the recommended future treatment so their relationship ended. The claimant was asked who he was working for and the claimant responded, "I was working for Hornet Framing." The claimant testified that it was David Roberts that hired him.

On redirect examination, the claimant admitted that he had been in the penitentiary and subsequent to his incarceration he has been on parol. The claimant testified that one of the conditions of parol was that he be randomly drug tested. The claimant testified that Respondent No. 2 was aware that he was on parol and David Roberts had even visited with his parol officer. The claimant testified that he has been randomly drug tested approximately once a month and all of his tests have shown that he is drug free. The claimant agreed that the notations made on July 11, 2005, by the nurse is correct except that it was scaffolding he fell off of rather than a ladder. The claimant testified that he was not working on January 17, 2006, when he was seen at the hospital for his dislocated shoulder. The claimant testified that he was picking up a Pepsi can off the bumper of a car when his shoulder dislocated. The claimant testified that he last received a check for payment for work from Respondent No. 2 in June 2005. The claimant testified that all the jobs after that he was paid in cash. The claimant testified that the Friday before July 11, 2005, he was paid in cash. The claimant testified that he has tried to be compliant with the doctor's instruction and has tried to wear his sling but it is difficult.

On cross examination by Respondent No. 1, the claimant was asked why there was a difference in his answer to the question when was the last time he took illegal drugs from his testimony at the hearing and in his deposition. The claimant was reminded that in his testimony at this hearing he had testified that it was since

1993 that he had taken illegal drugs and that in his deposition he had testified that it was a matter of months or years. The claimant again testified that he must not have understood the question and again testified that he has taken several drug tests since his release from prison and they have all been clear.

James Shackelford testified that he has known the claimant as well as David Roberts, Tyler Storms, and Curtis McFarland for several years, noting that they all grew up around Hartford. Mr. Shackelford testified that he did not know Scott Black and Wesley Byrd. Mr. Shackelford testified that he worked for Respondent No. 2 a couple of times cleaning up around projects. Mr. Shackelford testified that David Roberts picked him up and then they picked up the claimant at his house and they went to a building project in Hackett. Mr. Shackelford testified that it was his job to clean up around the project. This witness testified that he remembers that morning that the claimant fell off of scaffolding although he did not see it. Mr. Shackelford testified that although he did not see the claimant fall, he did see the claimant being loaded up in a truck and that the claimant was taken to the hospital. Mr. Shackelford testified that he does not know who loaded the claimant up and although he did not see the claimant fall he understood from the other workers that he had fallen off the scaffolding. Mr. Shackelford testified that before the claimant was loaded into the truck the claimant was hollering and everyone else was hollering. Mr. Shackelford testified that if he had known that it was going to cause a bunch of problems between friends he would have never

gotten involved. Mr. Shackelford was asked are you saying what you are saying because it is the truth? Mr. Shackelford responded, "Yeah."

On cross examination by Respondent No. 2, Mr. Shackelford testified that he became aware that the claimant had been injured when he heard him hollering and he went around to see what was wrong. This witness testified that the claimant told him that his shoulder was hurting and he saw them load the claimant into the back of a truck. Mr. Shackelford testified that the scaffolding was approximately four, five or six feet high. This witness was asked what condition the scaffolding was in and Mr. Shackelford responded that he really was not paying attention. Mr. Shackelford testified that this event happened around 6:30 and he worked about another hour and a half and then he left the job site.

On cross examination by Respondent No. 1, Mr. Shackelford testified that he was unsure how many building slabs were in the subdivision but was sure that he was cleaning up around the house the claimant had been working on. Mr. Shackelford testified that he was paid sixty dollar in cash for the clean up work that he did. Mr. Shackelford testified that he cleaned up in the area where the claimant's accident occurred after the claimant had left the job site. The witness was asked what kind of trash he was picking up and Mr. Shackelford responded, "Just scraps and stuff they were cutting off the house." Mr. Shackelford was asked if he threw away any scaffolding and Mr. Shackelford responded, "No, unless I thought it was trash."

Joseph Daniel Carter testified that he lives in Huntington and he grew up knowing the claimant, Tyler Storm, Curtis McFarland, and David Roberts. Mr. Carter testified that he did not know Scott Black or Wesley Byrd. Mr. Carter testified that he worked for Respondent No. 2 off and on from January to July 2005. Mr. Carter testified that he worked framing house, laying green plate, painting walls and doing carpentry work. Mr. Carter testified that he recalls a time in July 2005 when the claimant was involved in an accident. This witness explained that he was laying plate on the house next to the one the claimant was working on in the Blackbyrd Estates. Mr. Carter testified that he was working on another slab and heard a ruckus, saw a bunch of guys running around and he saw them load the claimant into a black truck. This witness testified that he thinks that it was Mr. Roberts and Ryan who were helping the claimant. Mr. Carter testified that the next day he found out from Ty that the claimant fell off the scaffold. This witness testified that when he worked for Respondent No. 2 the method of payment varied noting that he was sometimes paid by check but the majority of the time he was paid in cash because they never had time to get to the bank before it closed. Mr. Carter was asked how the claimant knew to ask him to come and be a witness. Mr. Carter responded, "Because he knew that I was there." Mr. Carter was asked if he would be surprised if he knew that the claimant had already testified that he did not know that he was on the job site and Mr. Carter responded that yes he would because he was there. Mr. Carter testified that he did not hear the claimant fall off the

scaffolding, what he heard was a ruckus and observed a bunch of people running around and saw the claimant being loaded into a truck. Mr. Carter testified that he was working and that the scaffolding was on the other side of the house so he could not see what was going on. This witness was asked did he go over to see what was going on and Mr. Carter responded, "No. I kept working."

On recross examination by Respondent No. 2, Mr. Carter was asked how long he continued to work for Respondent No. 1 and Mr. Carter responded, "Not very long. About two or three days after that. That was the end of it." Mr. Carter was asked if he went back to work for Respondent No. 2 after this event happened and Mr. Carter responded, "No, not after what I seen going on there."

On redirect examination, Mr. Carter stated that the reason he did not go back to work for Respondent No. 2 was because he saw the way it was going with the claimant and he really did not think that the claimant was being treated right so he found other work.

Gloria Thompson testified that the claimant was her son and that he was living with her in July 2005. This witness testified that the claimant had been working for Respondent No. 2 for approximately one year. Ms. Thompson testified that David Roberts picked the claimant up at her house the morning of his accident. This witness testified that she learned that the claimant had been in an accident so she went to the hospital and he told her that he fell off the house. Ms. Thompson testified that after this event the claimant came back and lived with her and he could not do anything. Ms. Thompson indicated that there were several other

occasions when she would have to take the claimant to the hospital to have his shoulder put back into place. Ms. Thompson testified that when she would take the claimant to the hospital she would give the intake information to the nurse. Ms. Thompson was asked if the claimant had had any accidents before David Roberts picked him up that morning and Ms. Thompson responded, "No, he hadn't."

On cross examination by Respondent No. 1, Ms. Thompson testified that each time she went with the claimant to the emergency room because of his left shoulder problems, she would always go back in the area with him. Ms. Thompson testified that the claimant would talk to the medical personnel in order for them to determine his pain level. Ms. Thompson was asked if the medical personnel talked to the claimant before they gave him pain medications and she responded yes they did. Ms. Thompson was asked if the hospital personnel asked the claimant what happened and she responded, "Yeah, I guess they did. The times I took him they asked him how he did it and a lot of times he hadn't even done anything hardly to make it pop back out."

On recross examination by Respondent No. 2, Ms. Thompson again was asked about questions asked the claimant after he was given pain medication and she responded, "They did ask him how he done it and usually I answered all the questions because he was usually just in so much pain that he couldn't, you know." On recross examination by Respondent No. 1, Ms. Thompson testified that although she was not with him each time his shoulder went out she would talk to him before they got to the hospital and he would tell

her what happened. Ms. Thompson was asked if the information she got was information she received from the claimant and Ms. Thompson responded, "Yeah, usually."

Lori House testified that she was the sister of the claimant and was forty-one years old. Ms. House testified that when she arrived at the hospital she saw David and he told her that the claimant had fallen off a scaffold at work.

Kevin Boyd testified that he is dating the claimant's sister and he recalls going to the hospital in July 2005 to see the claimant. Mr. Boyd testified that he talked to David Roberts at the hospital and that Mr. Roberts told him that the claimant had gotten hurt real early in the morning and that he had driven him to the hospital. Mr. Boyd indicated that Mr. Roberts told him that the claimant had fallen at work.

Respondent No. 2 called Sharon Brewster to testify on their behalf. Ms. Brewster testified that she was the bookkeeper for Respondent No. 2 and that she was the mother of one of the partners, Tyler Stormes. Ms. Brewster testified that she had reviewed the claimant's payroll records for 2005 and that Respondent No. 2's Exhibit No. 2, page 1, is a copy of the claimant's payroll records. Ms. Brewster testified that the last paycheck issued to the claimant was dated June 24, 2005. Ms. Brewster testified that Respondent No. 2 did not pay their employees by cash because that would be foolish. Ms. Brewster explained that when they are paid by their employers they would be responsible for the full amount of tax if they had no way of

proving that they had paid laborers to do the work. Ms. Brewster testified that she also researched the payroll records on Daniel Carter and that her records reflect that he worked for Respondent No. 2 for three weeks in January 2005. Ms. Brewster testified that the last paycheck issued to Mr. Carter was January 21, 2005. Ms. Brewster, when asked, testified that James Shackelford has never received pay from Respondent No. 2. Ms. Brewster testified that her records do not reflect any payment to Mr. Shackelford of any kind during the three years that they were in business.

On cross examination by the claimant's attorney, Ms. Brewster testified that it is possible that Tyler Stormes paid employees in cash but not probable because she reconciled Respondent No. 2's work invoices to the money that went into the bank. Ms. Brewster testified that it was her job as a bookkeeper to keep up with Respondent No. 2's money. Ms. Brewster testified that she could always reconcile their accounts because they always deposited their money. Ms. Brewster was asked if it was possible that Respondent No. 2 could have paid these individuals in cash and Ms. Brewster responded, "I don't know where they would get the money because I reconcile the invoices to the deposits." Ms. Brewster was asked if the claimant, James Shackelford, or Daniel Carter was working for Respondent No. 2 on July 11, 2005, and she responded, "They were not paid," and indicated that she was saying that they were not working for Respondent No. 2.

Ryan Moses testified for Respondent No. 2 stating that he was working for Respondent No. 2 in the past but currently is not

working for them. Mr. Moses testified that he worked on Respondent No. 2's projects in Blackbyrd Estates. Mr. Moses testified that while he was working for Respondent No. 2 on the Blackbyrd Estates house the claimant, James Shackelford, nor Daniel Carter ever worked on this project. Mr. Moses testified that while he worked for Respondent No. 2 he was paid every Friday by check and never received cash for his work.

On cross examination by the claimant's attorney, Mr. Moses testified that he learned about the claimant's injury from Tyler Stormes. This witness testified that Mr. Stormes told him that the claimant separated his shoulder and that David Roberts was taking him to the hospital. Mr. Moses testified that he was unloading tools and hoses that morning at the job site at Blackbyrd Estates when he saw Mr. Roberts pull out and he asked Mr. Stormes where Mr. Roberts was going and was told that he was taking the claimant to the hospital. Mr. Moses testified that this was around 7:30 or 8:00 in the morning. Mr. Moses testified that he does not know what the claimant was doing before he got to the job site but he does know that the claimant was not working on that project. Mr. Moses testified that David Roberts drove into the job site sometime between 7:30 and 8:00 and after they had unloaded some tools from his truck, Mr. Roberts left and that is when he was told that Mr. Roberts was taking the claimant to the hospital. Mr. Moses testified that he had left the employment of Respondent No. 2 approximately eight months earlier due to better pay.

On redirect examination by Respondent No. 2, Mr. Moses testified that he worked on all three of the Blackbyrd projects and that the claimant did not work there. Mr. Moses was asked, "Other than that, Billy showed up, you unloaded the truck, and then Billy took off? Everything until Davie leaving was normal, and Davie leaving was abnormal?" Mr. Moses responded, "Yes."

David Roberts testified on behalf of Respondent No. 2 stating that he currently is working out of state and has been since October of last year. Mr. Roberts agreed that he was in a partnership with Tyler Stormes and Curtis McFarland in the framing business. This witness testified that Respondent No. 2 started working on the first house in Blackbyrd Estates on July 4, 2005. This witness was asked if the claimant was working for Respondent No. 2 at the Blackbyrd Estates project and he responded no. Mr. Roberts testified that the claimant had worked for Respondent No. 2 earlier but had last worked on June 24 and then after that he had a problem with his butt and he never came back to work. Mr. Roberts testified that the claimant came by his house on July 10 and asked if he could come back to work and he agreed. When asked, Mr. Roberts testified that Daniel Carter had worked for Respondent No. 2 earlier in the year but that Respondent No. 2 had never employed Mr. Shackelford because he was unreliable. Mr. Roberts testified that when the claimant contacted him on July 10 about coming back to work, he told the claimant that he would pick him up in the morning around 6:00 or 6:15. Mr. Roberts testified that when he picked the claimant up on July 11 the claimant was in bad

shape saying that he had fallen in the yard and that he needed to go to the hospital. Mr. Roberts testified that the claimant told him that his mother could not take him because his dad was sick with pneumonia. Mr. Roberts testified that he told the claimant that he would first have to go by and drop off the tools before he took him to the hospital. Mr. Roberts testified that when they got to the job site Mr. Moses came over and started pulling tools out of the truck and that Ty Stormes came over and he told him that the claimant had dislocated his shoulder or something and needed to go to the hospital. Mr. Roberts testified that he told Mr. Stormes that the claimant's mother could not take him so he had agreed to help him out. Mr. Roberts testified that he took the claimant to the hospital and stayed there until the claimant's sister arrived. Mr. Roberts testified that he heard the claimant tell the hospital personnel that he was up on a ladder, it shifted and he fell at his house. Mr. Roberts testified that he did not tell the claimant's sister that this accident happened at work. Mr. Roberts testified that two weeks later the claimant contacted him in need of money. Mr. Roberts testified that he told him that he had some carpet that needed to be taken up at his house and the claimant agreed to do this job. Mr. Roberts testified that when he got home around 4:00 the claimant was laying on the porch and told him that his shoulder had popped out. Mr. Roberts stated that the claimant told him that his mother was coming to take him to the hospital. This witness testified that he saw the claimant in Mansfield at the laundry mat and the claimant at that time told him that he was suing Blackbyrd

Estates for the medical treatment on his shoulder. Mr. Roberts testified that he had a discussion with the claimant about whether this was the right thing to do and the claimant told him he did not give a damn. Mr. Roberts testified that the claimant never worked for Respondent No. 2 while they were doing work on Blackbyrd Estates. Mr. Roberts explained that the claimant does not even know what house he was working on because the scaffolding on the one story house at Blackbyrd estates was two feet off the ground because the walls were only eight feet.

On cross examination by the claimant's attorney, Mr. Roberts testified that Respondent No. 2 was a subcontractor to Respondent No. 1. Mr. Roberts testified that James Shackelford has tried to get him to give him a job but to date he has not done so. Mr. Roberts testified that he was by himself when he picked the claimant up on July 11, 2005. Mr. Roberts testified that he had already arranged with the claimant to pick him up the next morning about 6:15 but when the claimant got in the truck he told him that he had popped his shoulder out and that his mother could not take him to the doctor. Mr. Roberts testified that the claimant did not tell him that he fell off a ladder, he just told him that he fell and dislocated his shoulder. This witness testified that he heard the claimant tell the hospital that he fell off a ladder. Mr. Roberts testified that he had planned on working that day but instead he took the claimant to the hospital because the claimant was his friend. Mr. Roberts testified that he stayed at the hospital until the claimant's sister arrived. Mr. Roberts

testified that he did talk to the claimant's sister and her boyfriend but he did not tell them that the claimant fell off the scaffold at work. Mr. Roberts testified that on July 26 when he arrived home the claimant was sitting on the porch and told him that his mother was coming to take him to the hospital. Mr. Roberts testified that Tyler Stormes handles the pay for the employees and that they all receive checks, even he received a check. Mr. Roberts was asked, "Is it your testimony that the claimant was never paid in cash?" Mr. Roberts responded, "Yes, Sir." Mr. Roberts denied paying Daniel Carter or James Shackelford in cash for any work done for Respondent No. 2.

On cross examination by Respondent No. 1, Mr. Roberts was asked if Blackbyrd had contracted to build a house for anyone else that he knew of and Mr. Roberts responded no.

Respondent No. 1 called Scott Black to testify on their behalf. Mr. Black testified that he was a partner in Blackbyrd Estates which is a small subdivision in Hackett, Arkansas. Mr. Black testified that he and Wesley Byrd were the only partners. Mr. Black testified that at the time the house that has been under discussion at this hearing today was being build, he and his partner owned the house. Mr. Black testified that they were not under contract to build the house for anyone else. Mr. Black testified that they in fact did sell the house after it was finished. Mr. Black testified that he was out at the job site every day and had dug the footings, helped pour the slabs, and did all the clean up. Mr. Black testified that there was never anyone

hired to do clean up because he did it himself every day. Mr. Black testified that he never saw the claimant out at the job site and had never seen the claimant before this hearing. Mr. Black testified that one of the houses has been sold to a police officer and that it was the third house built. Mr. Black testified that the permit for this house was issued on September 1, 2005, and agreed that this was two months after the alleged incident occurred.

On cross examination by the claimant's attorney, Mr. Black testified that Respondent No. 2 began working in Blackbyrd Estates on July 4. Mr. Black testified that he was aware that July 11 was a Monday because that is his daughter's birthday. Mr. Black was asked if he positively knew every employee of Respondent No. 2 during that first week of work in July. Mr. Black responded that it was his testimony that he had never seen the claimant until the date of this hearing. Mr. Black testified again that he was on the job every day, talking to Ty and making sure that there was enough material for the crew to do their work and that he never saw the claimant there. Mr. Black testified that he and his partner do not have workers' compensation and it was their understanding from Tyler Stormes that their crew was working under waivers. Mr. Black testified that the first that he learned of an alleged incident at the building project was when he received a letter from the claimant's attorney.

On cross examination by Respondent No. 2, Mr. Black testified that Blackbyrd Estates paid Respondent No. 2 by check. Mr. Black

agreed that it would make no sense for him to pay Respondent No. 2 in cash because he would have had to pay tax on the profit.

On rebuttal, the claimant testified that David Roberts and Ryan Moses are both liars. The claimant testified that if he had injured his shoulder earlier that morning before David Roberts picked him up, he would not have been able to get from his house to Mr. Roberts' truck. The claimant testified that his yard is so steep that Mr. Roberts does not pull up into the yard and he, the claimant, would have had to walk about 75 yards to get to the truck and he would not have been able to do this due to his shoulder. The claimant testified that he did not tell David Roberts when he got in the truck on July 11 that he had hurt his shoulder that morning or the night before and he does not remember what was said at the hospital on July 11. The claimant testified that Tyler Stormes paid him in cash and that was a common thing for him to do.

On cross examination by Respondent No. 2, the claimant was asked if the hospital records were incorrect when they set forth that his mode of arrival was ambulatory? The claimant responded, "That just shows how screwed up the records are then." The claimant testified that there was no possible way he could walk and certainly he could drag himself but the hospital would run out with a wheelchair and scoop him up.

On cross examination by Respondent No. 1, the claimant testified that he saw Ryan Moses at a pool hall in Midland, Arkansas, at a pool tournament. The claimant testified that he was

not playing pool because he was unable to, that he was playing video slot machines trying to win big money.

The claimant's deposition does not add much new information to the testimony that was given to the hearing although it was noted that when the claimant was being questioned about his illegal drug usage he was asked how long it had been since he had taken illegal drugs. The claimant responded, "Its been months, years. Probably longer than a year." The claimant indicated that he was trying to get his annual reporting for his parol and they were drug testing him pretty heavy right before that time and he was worried they were going to come back and drug test him again.

The medical records set forth that the claimant was seen at St. Edwards Mercy Medical Center on July 11, 2005, shortly after 7:00 a.m. The emergency room notes indicate that the claimant fell off a ladder onto his left shoulder. Dr. Hendren writes that the claimant fell off a ladder dislocating his left shoulder. Dr. Hendren notes that medications were administered as well as re-administered and once his shoulder was put back into place when they were trying to put him in a shoulder immobilizer the claimant started flopping around like a fish out of water and redislocated his shoulder. Dr. Hendren notes that obviously this means that it is chronic noting that the claimant started wanting more medicine before they worked on him any further. Dr. Hendren referred the claimant to Dr. Bebout. An operative report signed by Dr. Bebout dated July 11, 2005, indicates that he performed a closed reduction under general anesthesia on the claimant. The claimant was

discharged from the hospital on July 11, 2005, with instructions to keep his arm immobilized and to make an appointment with Dr. Bebout in four weeks. The claimant was again seen at St. Edwards Hospital on July 25, 2005, reporting pain in his left shoulder after pulling up some flooring. The nurse's notes indicate that the claimant was sitting in the lobby with his family. It is further noted that the claimant was awake, alert, and oriented times three with no drowsiness noted with the medications. The nurse quotes the claimant by writing, I promise I won't do drugs anymore. Dr. David Dias writes on July 25, 2005, that the claimant required general anesthesia for reduction, noting that the claimant is a known IV drug abuser and as a result he is highly tolerant of medications. Dr. James Long writes on November 24, 2005, that the claimant has had multiple dislocations of his left shoulder, noting that the claimant underwent shoulder surgery in 1997 or 1998. Dr. Long notes that the claimant reports that he fell at work and dislocated his shoulder and has now had four dislocations since that event. Dr. Long reduced the shoulder while the patient was under general anesthesia. The medical records are extensive and there is no question that this claimant has a very problematic left shoulder which dislocates easily.

After a complete review of this most unusual case, I find that the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury while working for the respondent on July 11, 2005. It is not questioned that this claimant has left shoulder problems for which he requires medical

attention to reduce it and most likely needs extensive surgery to repair it so it will not be so problematic for him. If I am to believe the claimant, I would have to find that all the respondents' witnesses as well as the personnel in the various ERs and the medical records are all inaccurate. I find one of the respondents' witnesses, Brian Moses, testimony very questionable, however, he may just be a bad historian. This claim for benefits, therefore, should be denied in its entirety.

FINDINGS & CONCLUSIONS

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

2. Respondent No. 2 was a subcontractor to Respondent No. 1 on July 11, 2005.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on July 11, 2005. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on July 11, 2005. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE