

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F701685**

RALPH S. BEISNER, EMPLOYEE	CLAIMANT
TODD CHRISTEN CONSTRUCTION, EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED AUGUST 21, 2008**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 were represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 waived appearance at the hearing.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on June 24, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on April 16, 2008. The following stipulations were submitted by the parties either in the Prehearing Order or during the course of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction to decide this claim for workers' compensation benefits.
2. The claimant's average weekly wage was \$338 entitling him to compensation rates of \$225 per

week for temporary total disability and \$169 per week for permanent partial disability if this claim is found compensable.

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

Claimant:

1. Compensability.
2. Attorney's fees.
3. The cost of reporting and transcribing the deposition of Todd Christen under Rule 099.20(2)(C).
4. Average weekly wage if necessary (resolved by stipulation).
5. TTD from February 6, 2007, to April 27, 2007.

Respondent:

1. Compensability of the claimant's alleged hernia.
2. Whether the claimant was an employee or an independent contractor.
3. Whether the respondents received notice of an alleged work-related injury prior to the filing of a Form AR-C.

4. Whether the respondents are liable for medical and indemnity associated with a hernia in the event compensability is found.

The record consists of the June 24, 2008, hearing transcript and the exhibits contained therein.

#### DISCUSSION

The claimant contends that he sustained a work-related right inguinal hernia injury on February 6, 2007, while employed by Todd Christen Construction. The claimant contends that the respondents are liable for the expense of taking Mr. Christen's pre-hearing deposition. In addition, the claimant seeks an award of benefits under the Arkansas Workers' Compensation Law for treatment and disability associated with his right inguinal hernia.

#### **1. The Cost Of Reporting And Transcribing The Deposition Of Todd Christen Under Rule 099.20(2)(C) .**

Commission Rule 099.20(2)(C) provides:

The cost of reporting and transcribing depositions, including expenses incurred as a result of providing a non-English language interpreter where necessary, taken after a case has been controverted, *and where said depositions are to be made part of the record*, shall be borne by the respondents. [Emphasis mine]

In the present case, the parties took the deposition of Todd Christen, President of Todd Christen Construction, before the hearing at the claimant's attorney's request.

Mr. Christen was also called as a witness by the claimant's attorney to testify at the hearing. Under these circumstances, the respondents have refused to pay for Mr. Christen's deposition costs.

I find that the issue of deposition costs under Rule 099.20(2)(C) are moot in this case because neither party ever proffered Mr. Christen's deposition as evidence to be made part of the record. Absent a request that a deposition be made part of the record, the cited Rule provision simply does not conceivably provide for the respondents paying for a deposition requested by the claimant or his attorney.

Even if the issue was somehow preserved, absent a request by either party that the deposition be made a part of the record, I note that the Commission has previously interpreted Rule 20 (subsequently re-designated as Rule 099.20) as distinguishing between discovery depositions and evidentiary depositions and found that respondents are not liable for discovery depositions on the following basis in William Aldridge v. Pace Industries, Full Workers' Compensation Commission Opinion filed April 14, 1992 (E008168 & E015078):

The final issue to consider on appeal is claimant's contention that the Administrative Law Judge erred in failing to require respondent to pay for the discovery

depositions pursuant to Rule 20. Respondent correctly points out in its brief that Rule 20 requires respondent to pay for depositions only in those cases where the depositions "are to be made part of the record". This is consistent with the respondent's liability for the transcript itself. Evidentiary depositions are taken in lieu of an individual's testimony at the hearing. However, claimant wants us to find that respondent is liable for the taking of discovery depositions. Rule 20 does not require respondent to pay for the taking of discovery depositions. The taking of such depositions is at the expense of the respective party requesting the deposition. Here, Rule 20 requires respondent to pay only for those depositions which are to be introduced into evidence. Therefore, we find that the Administrative Law Judge did not err in failing to require respondent to pay for the discovery deposition.

There is no contention, stipulation or evidence in this case indicating that the parties took Mr. Christen's deposition in anticipation that the deposition would be offered into evidence in lieu of witness testimony. Under these circumstances, the claimant has failed to present any evidence or persuasive argument as to why the respondents should be liable under Rule 099.20 for Mr. Christen's pre-hearing deposition taken at the request of the claimant, not the respondents. I therefore find that the respondents are not liable for the cost of reporting and transcribing Mr. Christen's deposition.

## **2. Whether The Claimant Was An Employee Or An Independent Contractor.**

The Supreme Court of Arkansas "has long held that an independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work." Arkansas Transit Homes, Inc. v. AETNA Life & Casualty, 341 Ark. 317, 321, 16 S.W.3d 545, 547 (2000) (citing Johnson Timber Corp. v. Sturdivant, 295 Ark. 622, 752 S.W.2d 241 (1988); Moore and Chicago Mill & Lbr. Co. v. Phillips, 197 Ark. 131, 120 S.W.2d 722 (1938); W. H. Moore Lumber Co. v. Starrett, 170 Ark. 92, 279 S.W.4 (1926).

The determination of whether a person is an employee or an independent contractor must be made on a case by case basis. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 267, 635 S.W.2d 286, 288 (1982). "There are numerous factors which may be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage." Id. at 269, 635 S.W.2d at 289. These factors include:

- (1) the right to control the means and the 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 unit of 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.

Id. 5 Ark. App. at 269-70, 635 S.W.2d at 289.

"[T]he right to control is the principle factor in determining whether one is an employee or an independent contractor." Arkansas Transit Homes, Inc., 341 Ark. at 322, 16 S.W.3d at 548 (citing Dickens v. Farm Bureau Mut. Ins. Co., 315 Ark. 514, 517, 868 S.W.2d 476, 477-78 (1994) (internal citations omitted)). With regard to control, "[t]he governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee

shall work in the discharge of his duties, then the relation of independent contractor exists." Id. (quoting Massey v. Poteau Trucking Co., 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953) (internal citations omitted)).

Additionally, the factors that pertain to the correlation between the claimant's occupation and the regular business of the "employer" comprise the "relative nature of the work" test. Arkansas Transit Homes, Inc., 341 Ark. at 322, 16 S.W.3d at 548 (citing Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976)). "This test requires consideration of two factors: (1) whether and how much the workers' occupation is a separate calling or profession, and (2) what relationship it bears to the regular business of the employer. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee." Id.

In the present case, the claimant worked in the construction of residential homes in what he described as rough framing, carpentry and contract labor. The Arkansas courts have not recently addressed the arrangements under which a person engaged in housing construction may or may not be considered an employee versus an independent contractor in building construction. However, I note that

the Full Commission has issued published decisions on this topic several times in recent years.

For example, 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; and 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; 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.

The preponderance of the evidence in the present case establishes that the claimant was an employee of Todd Christen Construction and not an independent contractor. In this regard, Mr. Christen's testimony establishes that Todd Christen Construction primarily engages in carpentry work and rough framing but will take on other jobs such as laying

a foundation. At the time the claimant became injured, Todd Christen Construction used Paul Glover and Damon Mitchell to direct how people such as Mr. Beisner performed their job. In fact, on the day in question, Todd Christen Construction moved the claimant from one job site to a different job site. The evidence therefore establishes that Todd Christen Construction had the right to control the type of work performed by the claimant, where he performed the work, as well as the details of the work.

The evidence also establishes that the claimant was not engaged in a distinct occupation or business. Instead, Mr. Christen conceded at the hearing that it required little or no experience or training to perform the type of work that the claimant was hired to do. In addition, the claimant's work for Todd Christen Construction was not a separate calling, but was instead central to the framing and foundation business performed by Todd Christen Construction.

The evidence also establishes that Todd Christen Construction furnished the tools for the claimant to do his job except small hand tools. The employment relationship was completely at the will of either party, and the claimant was paid by the hour.

The evidence establishes that Todd Christen distinguished his employees from his purported independent contractors solely on the basis of whether or not Todd Christen Construction deducted payroll taxes from an individual's pay. If an individual's check did not have payroll taxes deducted, Todd Christen considered that individual an independent contractor for his purposes and would pay for that individual to obtain a Certificate of Non-Coverage from the Arkansas Workers' Compensation Commission. However, as the Commission concluded in Wesson and Simpson, the Certificate of Non-Coverage does not prevent a finding that a worker was an employee, where as here, the evidence establishes an employee-employer relationship.

For all of the reasons discussed herein, I find that the claimant was an employee of Todd Christen Construction on February 6, 2007.

### **3. Compensability Of The Claimant's Alleged Hernia.**

In order to prove that a hernia is compensable, a claimant must satisfy all of the requirements of Ark. Code Ann. § 11-9-523(a) which requires:

1. That the occurrence of the hernia immediately followed as a result of sudden effort, severe

strain, or the application of force to the abdominal wall;

2. That there was severe pain in the hernial region;
3. That the pain caused the employee to cease work immediately;
4. That notice of the occurrence was given to the employer within forty-eight(48) hours thereafter; and
5. That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two(72) hours after the occurrence.

The claimant contends that he sustained his right inguinal hernia while bending down to lift up a rebar on February 6, 2007. After reviewing the entire record, however, I find that preponderance of the credible evidence establishes that the claimant had a right inguinal hernia before February 6, 2007. I therefore find that the claimant failed to establish that he sustained his hernia at work on February 6, 2007, as he contends.

The following evidence persuades me that the claimant's hernia pre-existed any lifting on February 6, 2007. First, the Emergency Physician Record from St. Anthony's Medical Center from February 6, 2007, contains a history of the claimant having a right inguinal hernia for one year. (C. Exh. 1 p. 4) Second, an Emergency Department History And

Physical from Baptist Health Medical Center-Little Rock dated March 8, 2006, contains a medical history of hernia repair. (R. Exh. 1 p.1) Third, Paul Glover, who I consider to be a disinterested witness in this matter, testified that the claimant told Mr. Glover, his supervisor on February 6, 2007, that he had hurt himself six months earlier. (R. Exh. 3 p. 5-6) Fourth, Todd Christen testified that he had a conversation with the claimant's wife five or six days after February 6, 2007, and that Mrs. Beisner informed him that her husband had been hurt for quite some time. (T. 48) Fifth, although the claimant contended at the hearing that he sustained a hernia lifting rebar, the Form C which he signed on February 11, 2007, makes no reference to lifting rebar. When considered in light of these pieces of evidence, I do not find credible the hearing testimony of the claimant and his wife that he did not have a hernia before February 6, 2007, or the claimant's testimony that he sustained a hernia lifting rebar on February 6, 2007.

Because I find that the claimant failed to establish by a preponderance of the evidence that he sustained a compensable hernia on February 6, 2007, I find that the issues of notice, appropriate benefits and controverted attorney's fees are moot.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction to decide this claim for workers' compensation benefits.
2. The claimant's average weekly wage was \$338 entitling him to compensation rates of \$225 per week for total disability and \$169 per week for permanent partial disability if this claim is found compensable.
3. The respondents are not liable for the cost of reporting and transcribing the deposition of Todd Christen.
4. An employee-employer relationship existed between the claimant and Todd Christen Construction on February 6, 2007.
5. The claimant failed to prove by a preponderance of the evidence that he sustained a compensable right inguinal hernia on February 6, 2007.

**ORDER**

For the reasons discussed herein, this claim must be,

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and hereby is, respectfully denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge