

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F508019

JOHN A. BRITT, EMPLOYEE

CLAIMANT

**THE SIDING GUYS,
UNINSURED EMPLOYER**

RESPONDENT NO. 1

**BURKE HENRY HOMES, EMPLOYER/
UNION STANDARD INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 2

OPINION FILED JUNE 30, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Mr. Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

Respondent No. 2 was represented by Mr. Michael Lee Wright, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas, on April 3, 2008. A prehearing conference was conducted on January 30, 2008, and a Prehearing Order was filed on the same date. A copy of the Prehearing Order was marked as Commission Exhibit "1", and made a part of the record without objection, subject to any modifications made on the record at the full hearing.

At the prehearing conference, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has

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jurisdiction of this claim.

- 2) This claim has been controverted in its entirety and all issues related to permanency are reserved.
- 3) The parties agree to reserve the issues of compensation rates and average weekly wage.

At the full hearing, the claimant contended that he suffered a compensable right heel injury and pelvic injury on May 13, 2005, during the course of his employment with Respondent No. 1, The Siding Guys. The claimant contended at the full hearing that he is entitled to temporary total disability benefits from May 13, 2005, to a date yet to be determined, all associated medical benefits, and attorney's fees. The claimant contends all issues related to permanent impairment and wage loss should be reserved.

Respondent No. 1 contended at the full hearing that it has less than two employees or had less than two employees on the date of the injury, May 13, 2005. Respondent No. 1 contends that they are a residential building subcontractor and are required to have insurance if it has two or more employees; however, Respondent No. 1 contends that it has insufficient employees to be considered an employer under the Arkansas Workers' Compensation Commission Act. Respondent No. 1 further contends that the claimant was an independent contractor and not an employee of anyone; that the claimant was able to pick his own working hours, was required to

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provide his own tools, and was paid by the square foot.

Alternatively, Respondent No. 1 contended at the full hearing that if they are found to be an uninsured employer, and if claimant is found to have a compensable injury, that the liability for benefits rests with the general contractor, Burke Henry Homes and its carrier, as Respondent No. 2 is the statutory employer. Respondent No. 1 contends that the claimant cannot sustain a burden of proving the compensable injury assuming that claimant is found to be an employee of one of the respondents. Since Respondent No. 1 contends that the claimant is not entitled to benefits for any reason, Respondent No. 1 contends that the claimant is not entitled to an award of attorney's fees.

At the full hearing, Respondent No. 2 contended that the claimant was an independent contractor of Respondent No. 1 and not an employee of anyone or any entity. In the alternative, Respondent No. 2 contends that if Respondent No. 1 is found to be an uninsured employer and claimant is found to have a compensable injury, that Respondent No. 2 is not the statutory employer. Respondent No. 2 contends that if it is found to be a statutory employer, they reserve the right to recover any payment of compensation that should be paid to the claimant on behalf of Respondent No. 1 should it be found to be an uninsured employer pursuant to A.C.A. § 11-9-402(b)(1)(2).

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At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether Respondent No. 1 had a sufficient number of employees on May 13, 2005, to be considered an employer under the Arkansas Workers' Compensation Commission Act, and whether the claimant was an employee or independent contractor of Respondent No. 1.
- 2) Whether the claimant was a statutory employee of Respondent No. 2.
- 3) Compensability of claimant's right heel and pelvis by specific incident on May 13, 2005.
- 4) Liability of the respondents.
- 5) A determination of temporary total disability benefits, medical benefits, and attorney's fees.

DISCUSSION

The claimant, 58 years of age, worked as a home siding installer for Respondent No. 1. The claimant testified that he began working for Respondent No. 1 installing vinyl siding to homes on or about April 10, 2005. (T. pg. 14, lines 19-23). The claimant testified that he was paid per the running foot of vinyl siding that he installed.

The claimant testified that on May 13, 2005, he was assigned by Respondent No. 1 to install vinyl siding on a house off of Chenal Parkway. The claimant testified as follows regarding the incident wherein he alleges he sustained compensable right lower extremity injuries and pelvic injuries:

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A So I got over there and got set up. And whenever I got up on the ladder I had a bunch of stuff in my hands, and I just set it down over a top of another man's scaffold to – you know, so that I could negotiate myself off the ladder.

Well, after I got onto my scaffold and reached over to where I got this other stuff, I just used this other scaffold as just a balance, you know, to reach over. And when I did they didn't have the other end blocked and it flipped up and down I tumbled.

Q How high were you?

A I was looking at 28 feet.

Q So how tall are you?

A About five-ten.

Q So if you take basically six feet from 28 that's –

A Right.

Q – how far you fell?

A Yeah.

Q And tell me where you landed.

A Right out in the yard.

Q How did you land?

A Hard.

Q What part of your body hit first?

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A I don't have a clue. It was probably five or six minutes before I gathered my senses. My best guess is that I landed directly on my hip.

(T. pp. 21-22, lines 19-25 & 1-18).

The claimant testified that after his fall some nearby workers saw the claimant and called 911. The claimant was immediately taken to Baptist Health Medical Center where he was treated for injuries to his pelvis and right lower extremity.

Ultimately, the claimant testified that he underwent surgery on his right ankle. The claimant testified that his heel was "rebuilt" and his ankle was fused. The claimant testified that with regard to his pelvis, his medical providers advised him that it would have to heal on its own. (T. pg. 24, lines 18-21). The claimant testified that after his surgery on his right lower extremity he was released from the hospital, but his movement was restricted to a wheelchair. The claimant testified that he had to remain in a wheelchair until the middle of December of 2005. The claimant testified that he was not able to return to any employment until June of 2006. (T. pg. 26, lines 11-16).

The central issue in this claim is whether the claimant was an employee or independent contractor for Respondent No. 1, The Siding Guys. A sub-issue of whether the claimant was an employee or independent contractor for Respondent No. 1, is whether Respondent No. 1, The Siding Guys, qualify as an "employer" under the Arkansas Workers' Compensation Commission Act. In that regard, Respondent No. 1, The Siding Guys, contend that they did not have the requisite number of employees

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to be considered an employer under the Arkansas Workers' Compensation Commission Act. Specifically, Respondent No. 1 contended that they had less than two employees on May 13, 2005.

The only credible evidence contained in the record regarding the number of employees The Siding Guys had on May 13, 2005, came from the claimant's testimony. The claimant credibly testified that he knew of at least four other people that worked for The Siding Guys on or about May 13, 2005. (T. pg. 20, lines 8-17). Although the claimant could not testify as to the arrangement The Siding Guys had with the other four workers, the claimant did credibly testify that the other four people who worked for The Siding Guys around May 13, 2005, were doing substantially the same work as the claimant. For reasons that will be discussed later in this opinion, I have found that the claimant was an employee of The Siding Guys on May 13, 2005, and based upon the evidence in the record I find that the other four workers (Gunner, Mark, Mike, and Earl) who were doing substantially the same work as the claimant gave Respondent No. 1 a sufficient number of employees on May 13, 2005, to qualify The Siding Guys as an employer under the Arkansas Workers' Compensation Commission Act. It is also worth noting, that the owner of The Siding Guys, Randy Smith, was present for the full hearing of April 3, 2008, and no evidence was presented at the full hearing to refute the claimant's credible testimony as to the other

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employees or the number of other workers for The Siding Guys on or about May 13, 2005. Therefore, I find that The Siding Guys qualified as an employer under the Arkansas Workers' Compensation Commission Act as of May 13, 2005. As such, I find that The Siding Guys, Respondent No. 1, were uninsured employers on May 13, 2005, and therefore a copy of this Opinion will be forwarded to the Compliance Division of the Arkansas Workers' Compensation Commission to conduct further inquiries regarding The Siding Guys' failure to secure workers' compensation insurance for its employees.

When determining whether the claimant was an employee or independent contractor of The Siding Guys on May 13, 2005, several factors must be addressed. In Riddell Flying Service v. Callahan, 90 Ark. App. 388, 206 S.W.3d 284 (2005), the Court set out numerous factors that may be considered in determining whether an injured person is an employee or independent contractor for coverage purposes. Included in these factors are: (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

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in business; (8) whether the work is an intricate part of the regular business of the employer; and, (9) the length of time for which the person is employed.

The Full Commission in Callahan v. Riddell Flying Service, Inc., (Full Commission Opinion filed March 12, 2004, Claim No. E702846) stated that “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. However, the Arkansas 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.”

In Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), other factors were also listed to be considered when making a determination of independent contractor versus employee. Some additional factors outlined in Aloha Pools & Spas are (1) whether or not the parties believe they are creating a relationship of master and servant and whether the principal is or is not in business; and (2) the kind of occupation, with reference to whether in that locality, the work is usually done under the direction of the employer or by a specialist without supervision. The issue of whether one is an employee or independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. As

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stated the right of control is the principal factor; however, the ultimate question in determining whether a person or entity is an independent contractor is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control the work.

Undoubtedly, this is a very close call as to whether the claimant was an independent contractor or employee for The Siding Guys on May 13, 2005. There are several factors which lead one to classify the claimant as an independent contractor and there are several factors which tend to show that the claimant was an employee. For instance, the claimant testified that with regard to the instruments necessary to perform the task of putting siding on a home, the claimant supplied some of the tools and The Siding Guys supplied some of the tools. The claimant testified that the scaffolding and brake were supplied by him; however, the claimant testified that the nail gun he was using on May 13, 2005, belonged to and was supplied by The Siding Guys. (T. pg. 41, lines 14-15).

It appears from the record, that the parties did not believe they were creating the relationship of master and servant, because the claimant admitted he was paid by a 1099 and no taxes were withheld for unemployment, FICA, or Medicare. Also, the claimant was paid by the job and not by his time. For these and other reasons, they tipped the scales toward a finding of independent contractor. However, when looking

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at the principal factor, the right of control, the scales tip in favor of an employer-employee relationship.

As stated earlier, the right to control the work is the main factor to consider when determining independent contractor versus employee. In this case, the claimant credibly testified that The Siding Guys, Respondent No. 1, told the claimant they were going to pay a helper for the claimant between \$12.00 and \$14.00 an hour. The claimant testified that he had no real choice in the matter of The Siding Guys hiring him a helper except for whether or not to hire someone at \$12.00 an hour or \$14.00 an hour. The claimant credibly testified that he was not going to pay the helper but rather that The Siding Guys would pay for the helper. The claimant's testimony regarding the helper was unrefuted and in my opinion the deciding factor on the issue of employee versus independent contractor. An independent contractor would act "independent" and not be forced to hire extra help at the direction of an employer/contractor. Therefore, after considering all the factors outlined herein and applying them to the specific facts of this case, I find that the claimant was an employee of The Siding Guys on May 13, 2005.

Claimant has alleged that he incurred compensable injuries to his right lower extremity and pelvis on May 13, 2005. Arkansas Code Annotated § 11-9-102(4)(A)(i) defines compensable injury: (i) an accidental injury causing internal or external

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physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury accidental only if it is caused by specific incident and is identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by objective findings. A.C.A. § 11-9-102(4)(D). Objective findings are those findings that cannot come under the voluntary control of the patient. The element “arising out of and in the course of employment” relates to the causal connection between the claimant’s injury and his employment. An injury arises out of a claimant’s employment when a causal connection between work conditions and the injury is apparent to the rational mind. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). A causal relationship may be established between an employment related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962).

In the instant case, I find that the claimant has proven by a preponderance of the evidence all of the elements necessary to prove compensability of his pelvis and

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right lower extremity by specific incident on May 13, 2005. The claimant has proven by a preponderance of the evidence that he was working for The Siding Guys installing siding on a speck home on May 13, 2005, when he fell from the scaffolding causing bodily injury to his pelvis and right lower extremity. The records indicate that the claimant needed substantial medical treatment as a result of those injuries and there are clearly objective medical findings contained in the record supporting the claimant's pelvic and right lower extremity injuries. Therefore, I find that the claimant sustained compensable pelvic and right lower extremity injuries on May 13, 2005.

I find the evidence contained in the record herein to be clear in showing that Respondent No. 1, The Siding Guys, were an uninsured subcontractor of Burke Henry Homes, Respondent No. 2. As such, I find that Burke Henry Homes, Respondent No. 2, were the prime contractor at the job site where claimant sustained his compensable injuries and the statutory employer of the claimant. Therefore, pursuant to A.C.A. § 11-9-402, I find that since Respondent No. 1 failed to secure workers' compensation insurance as required by the Act, that the prime contractor, Respondent No. 2, Burke Henry Homes, shall be liable for compensation benefits to the claimant.

An employer shall promptly provide for an injured employee such medical treatment as may reasonably necessary in connection with the injury received by the

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employee. Arkansas Code Annotated § 11-9-508(a). The employee has the burden of proving by a preponderance of the evidence the medical treatment is reasonable and necessary. My review of the transcript and attached medical documents lead this examiner to find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received and is contained in the record herein to be reasonable, necessary, and related to the claimant's compensable injuries. Therefore, I find that Respondent No. 2, the prime contractor, Burke Henry Homes, is responsible for all associated medical treatment contained in the record related to the claimant's compensable pelvic and right lower extremity injuries.

The claimant has requested temporary total disability benefits associated with his compensable pelvic and right lower extremity injuries from the date of injury until June of 2006. An employee with a scheduled injury is to receive compensation for temporary total disability during the healing period or until the employee returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The claimant's injuries to his right lower extremity were scheduled injuries and the claimant credibly testified that he could not return to work until June of 2006. The medical records are also consistent with the claimant's testimony concerning the substantial nature of his injuries; therefore, I find that the claimant has proven by a preponderance of the evidence that he did not return to work

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until June of 2006 as a result of his compensable injuries. Therefore, I find that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 13, 2005, through June 1, 2006. The claimant is entitled to the maximum statutory attorney's fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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, and without giving the benefit of the doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) Respondent No. 1 had the requisite number of employees on May 13, 2005, to be considered an "employer" under the Arkansas Workers' Compensation Commission Act.
- 4) Due to Respondent No. 1 being found an uninsured employer, this claim is being referred to the Compliance Division of the Arkansas Workers' Compensation Commission to investigate.
- 5) The claimant was an employee and not an independent contractor for Respondent No. 1 on May 13, 2005.
- 6) The claimant has proven by a preponderance of the evidence that

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he sustained compensable injuries to his pelvis and right lower extremity by specific incident on May 13, 2005.

- 7) Respondent No. 1, The Siding Guys, were an uninsured subcontractor for Burke Henry Homes, Respondent No. 2. I find Respondent No. 2 to be the prime contractor and statutory employer of the claimant; and therefore, liable for all compensation benefits awarded to the claimant herein pursuant to A.C.A. § 11-9-402(a).
- 8) Respondent No. 2, Burke Henry Homes, and their carrier, Union Standard Insurance Co., shall be given a statutory lien against Respondent No. 1 for any compensation paid on behalf of the claimant pursuant to A.C.A. § 11-9-402(b)(1).
- 9) The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date and contained in the record regarding his compensable pelvic and right lower extremity injuries was reasonable, necessary, and related to the claimant's compensable injuries and therefore the responsibility of the prime contractor, Respondent No. 2.
- 10) The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injuries from May 13, 2005, through June 1, 2006.
- 11) The claimant is entitled to the maximum attorney's fees allowed by Arkansas law consistent with the findings herein.

AWARD

Respondent No. 2 is herein directed and ordered to pay the claimant TTD benefits from May 13, 2005, through June 1, 2006. Further, Respondent No. 2 is to pay all reasonable, related medical expenses for treatment to the claimant's

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compensable pelvic and right lower extremity injuries. Said sums accrued shall be paid in a lump sum without discount.

Respondent No. 2 is granted a statutory lien against Respondent No. 1 for any benefits paid on behalf of the claimant pursuant to this award according to A.C.A. § 11-9-402(b)(1).

Maximum attorney's fees are herein awarded to the claimant's attorney, The Honorable Walter Murray, pursuant to A.C.A. § 11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb