

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702297

OSCAR CORTEZ

CLAIMANT

MARTIN AVILA  
UNINSURED

RESPONDENT

OPINION FILED SEPTEMBER 12, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

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

Respondents represented by KEN SWINDLE, Attorney, Rogers, Arkansas.

STATEMENT OF THE CASE

On June 17, 2008, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 21, 2008, and a pre-hearing order was filed on April 22, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. Medical.
2. Temporary total disability from January 20, 2007, to August 1, 2007.
3. Attorney's fee.

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

1. Employment relationship.

2. Compensability of the claimant's injuries in the form of an L1 fracture, torn ligaments and right thumb injury.

3. Jurisdiction.

Claimant's contentions are:

"Claimant was injured on January 20, 2007. His back and right thumb were injured when he fell off a roof."

Respondents' contentions are:

"That the claimant was never an employee of the respondent."

#### DISCUSSION

At the hearing the claimant testified that he had met the respondent through a friend named Rojelio. He stated that on January 19, 2007, he spoke with Rojelio who told him, "Mr. Avila needed some help with some roofing and some drywall."

The claimant contacted the respondent who confirmed he needed some help and he would be by early the next morning to pick up the claimant. The claimant testified that he was picked up on January 20, 2007, at about 6:00 in the morning. The claimant stated that he asked how much he would be paid and was told by the respondent ten dollars per hour. The claimant went with the respondent and Rojelio to a farm in Missouri and began putting shingles on a roof.

The owner of the property was also present and worked with all three men. The claimant testified that he did not have or bring any kind of roofing or construction equipment to the job site. He also stated that the first time he met the property owner was the morning of January 20, 2007, when he arrived at the job site.

The claimant testified that he was on the roof working when it began to sleet or snow. He attempted to reach for a drill, slid, and fell from the top of the roof. The ambulance came and picked up the claimant and took him to Grove General Hospital in Oklahoma. The claimant was later transferred to a hospital in Tulsa, Oklahoma. The claimant had injuries which included an L1 fracture, torn ligaments, and a right thumb injury.

The respondent has stipulated that all the medical evidence presented in this case was the result of the fall described by the claimant. The respondent also stipulated that, if the claim was compensable, the claimant would be entitled to temporary total disability from January 21, 2007, until August 1, 2007, and the claimant's attorney would be entitled to a fee on these benefits. However, the respondent contends that the employer/employee relationship did not exist at the time of the injury; the Commission does not have jurisdiction over this matter; and accordingly the claim is not compensable.

#### ADJUDICATION

The central issue in this matter is whether the employee/employer relationship existed between the claimant and the respondent at the time of the injury. Whether an individual is an employee or an independent contractor depends on the facts of the case. Franklin v Arkansas Craft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982) states, in determining this issue the Commission may consider various factors including but not limited to:

1. The extent of control.

2. whether or not the one employee is engaged in a distinct occupation or business.

3. The skill required in a particular occupation.

4. whether the employer or workman supplies the tools and the place of work.

5. The length of time for which the person is employed.

6. The method of payment, whether time or by the job.

7. whether or not the work is part of the regular business of the employer.

These are not all the factors which can be considered and it is not necessary for the Commission to consider all of the factors in such cases. The relative weight to be given to the various factors is to be determined by the Commission. Franklin, Supra. Below are my conclusions regarding the stated factors and the evidence in this case.

#### I. EXTENT OF CONTROL

The respondent testified on direct examination as follows:

“Q. When you -- when you got to that job site, did you consider yourself a boss?”

A. No. Because somebody else was telling me what to do.

Q. Were you there telling Rojelio and Oscar what they needed to be doing?

A. Yes. Everything that Mr. Morey would tell me -

Q. Were you giving instructions, or were you translating?

A. Translating.

Q. If Mr. Morey would not have been there, would you have known what to do?

A. In one area, only.

Q. Did you consider yourself the employer for Mr. Cortez?

A. Not really."

The respondent was acting as a contractor would. He was taking direction from the property owner and telling the other men what to do. The property owner, James Morey, also testified on cross examination by the respondent's attorney:

"Q. When Mr. Avila showed up with two other persons, did you realize that the two other persons would be working on your property?

A. Yes.

Q. And you allowed that to happen?

A. It's whatever he wanted.

Q. It's your property. Right?

A. I asked him to help me put my roof on my barn.

Q. Okay. I'm just asking you to answer -

A. Uh-huh.

Q. -- my questions.

A. Okay.

Q. It's your property. Right?

A. Yes.

Q. And you allowed these two people to work on your property that Mr. Avila brought with him. Right?

A. Yes."

The testimony of the property owner shows that the respondent had control over who worked at the job site.

II. WHETHER OR NOT THE ONE EMPLOYED IS ENGAGED IN A DISTINCT OCCUPATION OR BUSINESS

The testimony is void of any specialized training, occupation, or business in which the claimant was engaged. I find from all the testimony as a whole that he was a general laborer.

III. SKILLS REQUIRED IN THE PARTICULAR OCCUPATION

There is no particular skill required in that of being a general laborer. The claimant simply had to have the physical ability to do general labor and follow the directions of a supervisor.

IV. WHETHER THE EMPLOYER OR THE WORKER SUPPLIES THE TOOLS AND PLACE OF WORK

The only testimony regarding tools is that the claimant had no tools and did not arrive with any tools at the work place. It is also clear that the respondent obtained the job and thus the work site by being hired by the property owner to do repairs at that site.

V. LENGTH OF TIME WHICH THE PERSON IS EMPLOYED

The testimony is clear from both sides that the day of the injury was the claimant's first day to work with or for the respondent.

VI. METHOD OF PAYMENT WHETHER TIME OR BY THE JOB

On direct examination by the claimant's attorney James Morey testified"

"Q. Okay. Did you ask Mr. Avila how many people he would bring -

A. No.

Q. -- to work with him?

A. No.

Q. Okay. When these people got there to work on your barn, did you ever anticipate paying anyone other than Mr. Avila?

A. No.

Q. Okay. Did you, indeed, end up paying Mr. Avila?

A. Yes."

On direct examination by the respondent's attorney the respondent testified as follows:

"Q. Right. And so did he give you money, anticipating that you would pay other people?

A. Yeah, he gave me the money for me and for Rojelio, because Rojelio doesn't speak any English, so he gave me the money. He said, "This is for y'all two."

The claimant also testified that he was to receive an hourly rate for his work. It is clear that the respondent handled the money from the property owner and was to pay the men working for him with that money.

VII. WHETHER OR NOT THE WORK IS PART OF A REGULAR BUSINESS OF THE EMPLOYER

The only testimony about the respondent's engagement in this kind of work comes from the claimant when on direct examination he testified:

"Q. Did you ever have any experience with an answering machine that he had?

A. Oh, yes. I called him before that, and then his answering machine said something about some sort of company; drywall company."

The respondent denies that he had any type of business and that this was just a group of individuals working together.

In considering all of the factors, I find that the employer/employee relationship did exist between the respondent and the claimant on January 20, 2007, the date of injury. The issue of jurisdiction is also raised in this matter. It is agreed through the respondent's counsel that both the respondent and the claimant lived in Springdale, Arkansas, at the time of the accident. Testimony also shows that the work and injury did occur in Missouri. Even though the actual injury and the job site were in another state, the record as a whole and the testimony reflects that the offer to work and the men themselves originated from the state of Arkansas, thus the respondent in this matter would be subject to the laws of the State of Arkansas including the jurisdiction of this Commission.

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:

MEDICAL

After review of all the medical records and stipulations of the parties, I find that all reasonable and necessary medical

treatment received by the claimant related to his June 20, 2007, injury shall be paid by the respondent.

TTD

\_\_\_\_\_The credible testimony of the claimant is that he was to be paid \$10.00 an hour. This was his first day to work for the respondent and no evidence was presented as to what his hours of employment would have been. I find a forty hour work week to be the norm. Thus, the claimant would have had an allowable average weekly wage of \$400. Thus, I find his temporary total disability rate to be \$267 per week. Which is to be paid by the respondent from June 21, 2007, through August 1, 2007.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 21, 2008, and contained in a pre-hearing order filed April 22, 2008, are hereby accepted as fact.

2. The Commission has jurisdiction over this matter.

3. The employee/employer relationship did exist between the respondent and the claimant on January 20, 2007.

4. That the claimant proved by a preponderance of the evidence that he suffered a compensable injury on June 20, 2007, while employed by the respondent.

5. The claimant is entitled to medical treatment and expenses related to the injury sustained in the fall.

6. The claimant is entitled to temporary total disability from January 21, 2007, to August 1, 2007, at a rate of \$267 per week.

7. The claimant's attorney is entitled to an attorney's fee as set out by Ark. Code Ann. §11-9-715.

ORDER

The respondent is to pay all medical expenses related to the claimant's compensable injury on June 20, 2007. The respondent shall also pay temporary total disability from June 21, 2007, until August 1, 2007, at the rate of \$267 per week. The respondent is also responsible for one-half of the attorney's fee as set out in Ark. Code Ann. §11-9-715.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE