

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F612971**

WENDY L. HENSLEY, EMPLOYEE

CLAIMANT

CUSTOM LANDSCAPING & NURSERY,  
UNINSURED EMPLOYER

RESPONDENT

**OPINION FILED FEBRUARY 22, 2008**

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on December 17, 2007, in Searcy, White County, Arkansas.

The claimant was represented by The Honorable J. Mark White, Attorney at Law, Bryant, Arkansas.

The respondent was represented by The Honorable William C. Frye, Attorney at Law, North Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on December 17, 2007, in Searcy, Arkansas. A Prehearing Order was previously entered in this case on November 5, 2007.

The following stipulations were submitted by the parties, either in the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer relationship existed at all relevant times, including October 25, 2006.

3. Claimant's average weekly wage is \$291.40; her compensation rate for temporary total disability compensation

is \$195.00.

4. No benefits have been paid, as this claim has been controverted in its entirety.

5. Mr. Leggett is the owner of both the company, (Custom Landscaping) and the corporation, Kendellwood Nursery.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Whether claimant's alleged left eye injury is compensable.
2. Whether claimant is entitled to medical benefits.
3. Whether claimant is entitled to temporary total disability compensation from November 18, 2006, through January 27, 2007.
4. Whether the respondent is exempt under the agriculture farm labor category of the Act.
5. Notice-October 26, 2006.
6. Constitutionality of the exemption.

The claimant contends that on October 26, 2006, she sustained a compensable injury to her eye while in the employ of the respondent; that the respondent is an employer as that term is defined in the Workers' Compensation Act; that the respondent is therefore subject to the Act and is un-insured; that claimant is entitled to medical treatment; that she is entitled to temporary total disability benefits from **November 18, 2006**, through on or about January 27, 2007, when she returned to work at a new job; and that she is entitled to maximum attorney's fees. Claimant further

contends that if respondent qualifies for the agricultural exemption, this Section of the Act is unconstitutional.

The respondent contends that claimant alleges a left eye injury on October 25, 2006. However, not only did the claimant fail to report an injury, she continued working without complaints on the alleged injury date. The claimant did seek medical attention at the Conway Regional Emergency Room on October 26, 2006, at which time it was noted that a foreign object was removed from her left eye. This is the first notice of injury the respondent/employer received. Subsequent to this, the claimant was seen by Dr. David Baker, who, based upon the history of the claimant, opined that the claimant had suffered a chemical burn to her left eye. However, it should be noted that the claimant returned to work the following Monday, October 30, 2006, and continued working her normal job duties until her termination on November 17, 2006, for unrelated reasons. The claimant then filed for unemployment benefits, which she was disqualified from receiving.

Therefore, it is the respondent's contention that the claimant did not suffer a compensable injury. In addition, it should also be noted that a common cause of chemical conjunctivitis is contact lenses, which the medical records reflect that the claimant wears. Moreover, the claimant did not use nor work around any chemicals during the week of October 25, 2006.

The documentary evidence in this case consists of the Commission's Prehearing Order, the claimant's Response to the Prehearing Questionnaire, and the respondent's Response to the Prehearing Questionnaire, which were all marked as Commission's Exhibit No. 1. The claimant's medical packet was marked as Claimant's Exhibit No. 1. The claimant's letter brief of December 26, 2007, has been marked as Claimant's Exhibit No. 2, it is hereby incorporated herein by reference. The respondent's letter of May 10, 2007, to the Commission with two attached cases were marked as Respondent's Exhibit No. 1. The Form AR-C was marked as Respondent's Exhibit No. 2. The 2005 Tax Form for the Kendallwood Nursery was marked as Respondent's Exhibit No. 3. Three color photocopies were marked as Respondent's Exhibit No. 4. The May 7, 2007, deposition of Ms. Wendy Hensley was marked as Respondent's Exhibit No. 5.

The following witnesses testified at the hearing: the claimant, Mr. Jeb Leggett, and Ms. Rhonda Rickenbacker.

#### **DISCUSSION**

The claimant, age 44 (1/10/64), maintains that she sustained a compensable injury to her left eye on October 25, 2006, while working for the respondent-employer. According to the claimant, her job duties entailed planting shrubs, fertilizing, and then pre-emerging them. She testified that at the time of her injury, the employer had approximately eight employees.

With respect to her alleged eye injury, the claimant gave the following testimony:

A. Well, we were planting or planting the shrubs in the barn. After we had got all done, Rhonda Rickenbacker said you can go ahead and fertilize and pre-emerge those. Well, I did. After I was done I started having problems with my eye. I noticed it was messing with me, irritating me.

Q. Describe what you were feeling in your eye.

A. A burning. It was burning real bad. I don't know -- I didn't know why until I went to the doctor.

Q. Were you wearing contact lenses that day?

A. No.

Q. Why not?

A. On them rainy days that we pot in the barn, my -- I can't wear them. I mean, you know, I just couldn't wear them. I had to have my glasses because my glasses I could see, you know, better with them. I don't know how to explain it.

Q. But you could see better with glasses?

A. Uh-huh.

Q. After you began to experience this burning sensation in your eye, was it the right or left eye?

A. Left.

Q. What did you do next?

A. I went and reported it to Rhonda Rickenbacker.

Q. What did you tell her?

A. I told her I did something, something had got in my eye. I didn't know what it was, you know, it just started burning. I didn't know if it was the, oh, the stuff we used to pot, you know, the plants in like the dirt. I didn't know what it was until I went to the

hospital.

Q. Now who is Rhonda Rickenbacker?

A. She's the supervisor.

The claimant admitted to seeking treatment from Conway Regional due to severe pain and swelling of the eye. According to the claimant, she was referred to Dr. David Baker of the Arkansas Eye Center, who took her off work for the next few days.

According to the claimant, when she saw Dr. Baker on November 20<sup>th</sup>, although her eye was doing a little bit better, she was still experiencing burning of the eye and difficulty seeing, with exposure to bright lights, for which she was prescribed eyedrops. The claimant admitted to being off work for a couple of days.

The claimant essentially testified that as of November 17<sup>th</sup>, she no longer worked for the respondent. According to the claimant, she started working for Greenbrier Rehab on February 1<sup>st</sup>. She denied having worked any place else except for Greenbrier Rehab after leaving her employment with the respondent.

On cross examination, the claimant admitted to being fired on November 17<sup>th</sup>. According to the claimant, she was discharged due to pulling some dead shrubs out of the greenhouse as she had been instructed to do. The claimant denied having any knowledge as to how the 450 evergreen cuttings got pulled from the small pots. However, she admitted the live plants should not have been pulled. The claimant admitted to filing for unemployment benefits about a

week after she had been fired, at which time she started looking for work. According to the claimant, she looked for work at fast food places, the type work she had performed in the past. She admitted she would have gone to work right then had she been hired.

The claimant essentially admitted her deposition testimony of having been taken off work after November 17<sup>th</sup> by a doctor was incorrect, as she had been off only for a couple of days due to the antibiotics. Other than the couple of days off work, the claimant admitted there had been no other times that a doctor had her off work.

She admitted that when she returned to work on October 30<sup>th</sup> and worked up until November 17<sup>th</sup>, she performed her same job duties, except for the pre-emerge or the fertilizer, as she trimmed and clipped. The claimant testified that she told Rhonda on the date (October 25<sup>th</sup>) of the incident that she had gotten something in her eye, around 9:00 a.m. Upon being questioned about having reported to emergency room personnel that her injury had occurred at 11:10 a.m. the prior day, the claimant explained that she was in so much pain, she could not remember anything and may have told them that.

The claimant testified that she told Rhonda on the 25<sup>th</sup> that she had something in her eye, that it felt like it was "burning and stinging real bad." According to the claimant, the next morning she went to Rhonda again and they went to Jeb, who cussed her and called her a liar and everything else and told her it did not

happen at his place.

She agreed that on the morning of the 25<sup>th</sup> when she got something in her eye, while doing pre-emerge, it was around 9:00 a.m. According to the claimant, although it burned and really bothered her, she suffered through it. The claimant essentially admitted that she was confused and did not remember with specificity what duties she had performed.

According to the claimant, on the date of the incident, she wore glasses, but the chemical got in her eye due to the wind blowing. She denied having gotten something on her glasses.

The claimant admitted that the report from Dr. Baker on November 20<sup>th</sup> demonstrates that she could read at 20/20. She denied having gone back to see him since, because she still had the antibiotics and pain medicine that he gave her. However, she could not specifically recall the date that she ran out of the antibiotics.

On redirect examination, the claimant admitted she could not state for certain, the exact time of day her symptoms started. She testified that the burning in her eye started after she used the pre-emerge, and that this happened the day before she went to the emergency room. The claimant agreed that she was told she was being discharged for pulling out the live shrubs instead of the dead ones. However, the claimant denied having done this.

Jeb Leggett was called as a hostile witness by the claimant.

He testified that his occupation is wholesale nursery, as he operates Custom Landscapes, which is a corporation. He admitted that Kendellwood Nursery, Incorporated was the claimant's actual employer. According to Mr. Leggett, he started Custom Landscapes in 1983, and when they moved to Mt. Vernon and started a wholesale nursery, they incorporated into Kendellwood, but they were already known for years as Custom Landscapes, so they continued to do business under the name Custom Landscapes, but Kendellwood is the corporation, which is owned and operated by Mr. Leggett.

With respect to Kendellwood, Mr. Leggett testified that it is in the business of growing trees and scrubs, a wholesale nursery. He further testified that they sell to retail nurseries and landscapers.

He admitted that the hospital contacted him on the 26<sup>th</sup>. He also admitted that they use several different chemicals in the course of his work. According to Mr. Leggett, his employees primarily do potting up and then pull orders to be loaded and shipped. He has one delivery truck and they have people who do pick up also.

Mr. Leggett testified that the babies are started in the greenhouse. He testified that they just grow ornamental trees and shrubs. He denied having food crops, but he agreed that he averages about eight employees. According to Mr. Leggett, his wife works for him, but she works part-time. He admitted to

withholding taxes for his employees and paying taxes to the government. He testified that he has an office manager and an outdoor supervisor. He denied carrying any workers' compensation coverage on the office manager. He admitted that his business is regulated by the plant board, as they perform yearly inspections.

On cross examination, upon being given a copy of his 2005 tax return, Mr. Leggett admitted that the code 111400 is the code for the IRS, which entails greenhouse, nursery, and horticultural production, as it under agriculture. He admitted to having insurance through Southern Farm Bureau for general liability.

With respect to his business activities, Mr. Leggett testified:

Q. And you -- Mr. White was asking, you all grow trees and shrubs --

A. Trees, shrubs, ground covers. It's everything for the landscape industry or what typically might be planted out in your landscape around your house.

Q. How is this different from just a nursery where someone like myself goes and buys something?

A. We are production. Your typical retail nursery, and I definitely learned over the years that a lot of people may assume that maybe they grow, but they're really just a shelf, a place that something is brought in and that they resell. Very few retail nurseries grow anything. So we really are a production facility.

Q. Do y'all grow the product, a lot of the products that they eventually buy from you and then they put on their shelves?

A. We grow the bulk of it. Now we do buy a little bit

of stuff in whenever we're short on our crop we may buy in for resell. But we attempt to propagate everything we grow. Or I'll buy in the young plants to grow on.

Q. If I'm just from the public and I'm coming out to your facility, am I one of the ones that's going to be buying something from you, or is it primarily retail?

A. We're, no, we're primarily wholesale.

He testified that is it unlikely that on October 25<sup>th</sup> his employees would have been using Regal at that time, since that is not the time year that things germinate.

Rhonda Rickenbacker also gave testimony during the hearing. She testified that she is the nursery manager for Custom Landscape. As of the date of the hearing, she had worked there approximately three years. She admitted that they do not use pre-emerge often during the fall.

She testified she first became aware that the claimant had gotten something in her eye the morning she went into the greenhouse and she was crying, as she told her she had gotten something in her eye the day before. She denied that the claimant said anything to her on the day of the alleged incident. According to Ms. Rickenbacker, she sent the claimant home on the 26<sup>th</sup>, and she later called her or stopped by her house on her way from the doctor. Ms. Rickenbacker testified that once the claimant returned to work the next week, she had her doing her same duties until the 17<sup>th</sup>. She testified the claimant was discharged because she threw away some expensive plants that had nothing wrong with them.

On cross examination, she admitted that she did not observe the claimant throwing away the good plants.

The claimant's deposition was taken on May 7, 2007. The claimant admitted to wearing prescription glasses, and to being nearsighted. However, at the time of her deposition, the claimant acknowledged that she was wearing contacts.

At the time the claimant's deposition was taken, she was employed by Greenbrier Rehab Nursing, as she had worked there for approximately four months, as a CNA.

The claimant essentially testified she has problems seeing out of her left due to blurry vision and is unable to read to patients. She also testified she has been having migraine headaches and a lot of burning. According to the claimant, her right eye is fine. She testified her duties include, giving showers, as she works from 7:00 until 3:00. The claimant also testified she has been unable to see any print whatsoever since October.

The claimant began working for Custom Landscaping on February 1, 2006. She testified her duties included pre-emerging, which is fertilizing. According to the claimant, her duties included training other people, and teaching them how to fertilize. The claimant admitted that she pretty much worked with herbicide on a weekly basis, but denied working with it if was raining. The claimant gave an explanation of how the herbicide is applied.

With respect to the plants, the claimant essentially

testified she would plant crape myrtles, evergreens, and all kinds of plants, but she could not recall the names of them. She testified that most of the trees were baby shrubs. The claimant admitted to seeking treatment for her eyes in April of 2006 due to symptoms of burning and itching.

The claimant denied any prior workers' compensation claims or motor vehicle accidents. The claimant testified that her alleged injury occurred on October 25, 2006. She also maintains that she told Rhonda about her injury on the 25<sup>th</sup>, and that the 26<sup>th</sup> is when she went to the emergency room for her eye problems.

The claimant testified:

Q. Okay. The 25<sup>th</sup>, what kinds of things did you do around the farm that day?

A. Preemerged, fertilized, potted seedlings, shrubs in the barn. It was raining, so we couldn't really get out there and do it then. But she said after it quit - you know, because it was a stormy day and then the sun come out, and she said, "Go out there and preemerge and fertilize." And that's what I did.

Q. And you're saying it was windy?

A. Yeah.

Q. And where is this farm located?

A. Boa Creek Road.

Q. Greenbrier?

A. Naylor.

Q. Nay --

A. Where is that at?

Q. Between Enola and Mount Vernon.

The claimant testified she probably preemerged for about two hours on the day of the incident. According to the claimant, she noticed problems with her eye about 3:00 o'clock that afternoon, between 3:00 and 4:00. She described her symptoms as a little burning sensation, and it felt like something was sticking in it, but there was nothing in it. She testified she went into work the next morning around 8:00 and left there at 10:00 and got to the emergency room around 11:00.

The claimant admitted to having applied for unemployment benefits after being discharged by the respondent. According to the claimant, she was disqualified from receiving unemployment benefits for eight weeks. She admitted to going to CNA school in December, which lasted for two weeks. She denied being taken off work by any doctor between November 17<sup>th</sup> and the time that she went to school to become a CNA.

On cross examination, the claimant testified the pre-emerge got into her eye around 1:00, which she explained to be about the time that she felt the burning sensation.

A review of the medical evidence of record shows that the claimant was seen at Conway Regional Medical Center emergency room on October 26, 2006 due to having gotten something in her eye the prior day. The claimant was noted to have redness, tearing and blurred vision. The claimant gave a history of left eye pain with

an onset date of yesterday after having gotten something in her eye at work around 11:10 a.m. The examining physician was unable to make a definitive diagnosis of the cause of the claimant's eye problems, therefore, the claimant was referred to an ophthalmologist.

The claimant saw Dr. David Baker on October 26, 2006. He assessed the claimant with chemical conjunctivitis, for which he started her on Acular for pain and Maxitrol ointment every two hours.

On October 27, 2006, the claimant saw Dr. Baker for follow-up care of a chemical burn. He noted that the claimant was feeling better, he changed to her medication to Pred Forte every one hour while awake and directed her to return to the clinic on Monday or Tuesday.

The claimant returned to see Dr. Baker on October 30, 2006. He continued her eyedrops for every two hours, and directed her to return to the clinic in one week.

On November 20, 2006, the claimant saw Dr. Baker for follow-up care. His assessment was:

Chemical conjunctivitis; the patient complains of decreased vision in the left eye, but, with a 4.25 + 0.50 x 95, I can get her to read 20/20, only missing one letter on the eye chart. I started with the 20/10 line and worked my way up.

Therefore, he started the claimant on Patanol eyedrops, twice a day and directed her to return to the clinic in six months, or sooner

for problems.

## ADJUDICATION

### A. Constitutional Challenge

The claimant asserts that the "agriculture farm labor exemption" as set forth in Ark. Code Ann. § 11-9-102 (11) (a) (iii), is unconstitutional. This provision specifically exempts agricultural farm labor from coverage under the Workers' Compensation Act. The claimant contends that there is no rational basis for the agricultural exemption under said Act. Therefore, the claimant asserts that the exemption is unconstitutional for violation of the equal protection provisions of the Arkansas and United States Constitutions. Specifically, the claimant further contends, in part:

The purpose of the Workers' Compensation Act is to pay timely... benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of employment. Ark. Code Ann. § 11-9-101(b). The agricultural exemption subverts this stated purpose by excluding from the coverage and protection of the Act workers who happen to work in the agriculture industry.

It is well-settled that statutes are presumed to be constitutional, and the burden of proving it otherwise is placed on the party challenging its constitutionality\the legislative enactment. Golden v. Westark Community College, 333 Ark. 41, 969 S.W. 2d 154 (1998). In the present matter, I am unable to find a equal protection violation, in that those workers falling within the category of the agricultural farm labor exemption are being

treated differently from those similarly situation. Nor am I able to find that the stated purpose of the Act is being subverted by excluding from coverage those workers who are engaged in employment in "agricultural farm labor." Therefore, based on the evidence of record and the claimant's assertions, I find that the claimant has failed to rebut the presumption of the constitutionality of Ark. Code Ann. § 11-9-102(11) (a) (iii).

B. Compensability

A work injury is not compensable if it arises out of and in the course of an employment engaged in "agricultural farm labor." Ark. Code Ann. § 11-9-102 (11) (a) (iii).

In determining whether an employment is engaged in "agricultural farm labor," the courts have placed emphasis on the nature and character of the employer's business as opposed to the tasks performed by the employee. Dockery v. Thomas, 226 Ark. 946, 295 S.W. 2d 319 (1956).

The question of whether an employment consists of "agricultural farm labor" is one of law. Griffith v. International Cattle Embroy, Inc., 23 Ark. App. 58, 742 S.W. 2d 124 (1988).

Mr. Leggett testified that his business consists of growing trees, shrubs, and ground covers, which is a wholesale nursery. The testimony elicited from the claimant and Ms. Rickenbacker also corroborate said activities of the respondent. Mr. Leggett testified that he sells to retail nurseries and landscapers, as he

is a production facility. According to Mr. Leggett, he produces everything for the landscaping industry or what typically might be planted out in your landscape around a house. He further testified that he grows in bulk. (See full discussion above).

Based on the record as a whole, I find that the primary function of the respondent at the time of the claimant's alleged injury was greenhouse, nursery, and horticultural production. The nature and character of these activities clearly amount to agricultural farm labor. Therefore, I am constrained to find that the respondent is exempted from workers' compensation coverage by the "agricultural farm labor" exemption.

As a result, all other issues raised by the parties are rendered moot. This claim for benefits must be, and is hereby respectfully denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed on or about October 25, 2006, and at all other relevant times.
3. Claimant's average weekly wage is \$291.40; her compensation rate for temporary total disability is \$195.00.
4. This claim has been controverted in its entirety.
5. Mr. Jeb Leggett is the owner of the company (Custom Landscaping), and the incorporator and owner of Kendellwood, Incorporated.
6. The agriculture farm labor exemption of the Workers'

Compensation Act set forth in Ark. Code Ann.  
§11-9-102 (11) (a) (iii), is not unconstitutional.

7. The respondent-employer is exempted from workers' compensation coverage by the "agricultural farm labor" exemption.

**ORDER**

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**CHANDRA HICKS**  
**Administrative Law Judge**

**CH/ml**