

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F608199

MARTY KILGORE (DEC'D.), Employee	CLAIMANT
KILGORE CONSTRUCTION, Employer	RESPONDENT #1
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JANUARY 9, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 5, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 6, 2007, and a pre-hearing order was filed on June 7, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

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

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

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether the deceased was an employee of respondent.
2. Compensability.
3. Medical expenses.
4. Funeral expenses.
5. Dependency benefits.

6. Average weekly wage.
7. Attorney fee.

The claimant's beneficiaries contend the claimant was an employee as defined by the Act at the time of the accident on July 24, 2006. The claimant contends his contract for hire was \$20.00 per hour which results in the maximum total disability rate. Claimant's family has incurred funeral expenses in excess of the \$6,000.00 limit and has incurred medical expenses. Further, the claimant was survived by a dependent spouse and four minor dependent children. Respondents have controverted this claim in its entirety.

Respondent #1 contends that the claimant was not an employee at the time of his injury. Instead, he was an independent contractor to assist Dean Kilgore Construction on a job.

The Death & Permanent Total Disability Trust Fund contends that the oldest child, Kaylee Kilgore, is only eligible for dependent benefits during the time that she was a full-time student after she turned 18 and before she was married. It should be noted that claimant's attorney agreed with this contention.

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:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At the time of his death on July 24, 2006, the claimant was an employee of the respondent.
2. The claimant suffered a compensable injury which resulted in his death while employed by respondent on July 24, 2006.
3. Respondent #1 is liable for payment of all reasonable and necessary medical

expenses provided in connection with claimant's compensable death.

4. Pursuant to A.C.A. §11-9-527(a), respondent #1 is liable for funeral expenses up to the statutory maximum of \$6,000.00.

5. Kimberly Kilgore Cruikshank, Kaylee Kilgore, Alyssia Kilgore, Whitney Kilgore, and Levi Kilgore were wholly and actually dependent upon the claimant. Accordingly, these individuals are entitled to dependent benefits pursuant to A.C.A. §11-9-527. Benefits payable to Kimberly Kilgore Cruikshank terminated as of the date of her remarriage at which time she became entitled to 104 weeks of benefits pursuant to A.C.A. §11-9-527(d)(1). Kaylee Kilgore was a full-time student and is entitled to dependent benefits from the date of claimant's death until the date of her marriage in May 2007.

6. Claimant earned an average weekly wage of \$800.00 per week while employed by the respondent; therefore, he would be entitled to compensation at the maximum rate of \$488.00 per week.

7. Respondent #1 has controverted claimant's entitlement to all unpaid dependent benefits.

FACTUAL BACKGROUND

The basis facts in this case are not in dispute. On July 24, 2006, the claimant was married to Kimberly K. Kilgore. They were married in February 1986 and had four children: Kaylee, 20; Alyssia, 17; Whitney, 14; and Levi, 10.

The Kilgores primarily earned their living as farmers, raising chickens and dairy cows. In addition to the farming claimant also performed some construction work primarily building metal roofs and shop buildings. For tax purposes, this entity was known as Marty Kilgore Construction. In addition, claimant also occasionally performed some work for his father, Dean Kilgore. Dean Kilgore operated the respondent construction company and performed various construction business such as metal buildings and metal roofs. Dean

Kilgore testified that he would occasionally call and ask claimant to help him perform work for which claimant was usually paid \$20.00 an hour. The amount of work claimant performed for Dean Kilgore varied from year to year, and the exact amount of work is uncertain due to a lack of sufficient records.

On July 20, 2006, Dean Kilgore entered into a contract to remove and replace a roof on a building for a company operating a business known as Fast Trax. The contract provided for the respondent to be paid a total of \$12,125.00, with an advance of \$6,000.00 for materials.

Dean Kilgore testified that in July 2006 he was "sick from the heat" and asked claimant to perform the Fast Trax job for him. Claimant agreed and he along with other employees of the respondent began working on July 23, 2006. On July 24, 2006, the claimant fell from the roof of the Fast Trax building, striking his head. Claimant was taken to Washington Regional Medical Center but did not survive.

Claimant's widow, Kimberly Kilgore Cruikshank, has filed this claim contending that she and their children are entitled to compensation benefits as a result of the claimant's death. She also seeks payment of medical expenses, funeral expenses, and a controverted attorney fee.

ADJUDICATION

The initial issue for consideration is whether or not the claimant was an employee of the respondent on July 24, 2006. The working relationship between claimant and his father, the owner of the respondent, was somewhat unusual. As previously noted, claimant's primary occupation was farming. In addition, he also performed some construction work as Marty Kilgore Construction installing metal roofs and building shop buildings. In addition, claimant also periodically performed work for his father if his father needed help and claimant was available. Such an instance occurred in this case. Dean

Kilgore signed a contract with the owners of Fast Trax to tear off and rebuild a roof on a store. Dean Kilgore testified that because of the heat he did not want to perform the work so he hired claimant to perform the job for him. While performing that job the claimant suffered his fatal accident.

In determining whether an individual is an employee or an independent contractor for workers' compensation purposes several factors must be considered. 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 job, time, 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.

Ridell Flying Service v. Calahan, 90 Ark. App. 388, 206 S.W. 3d 284 (2005).

These are not all of the facts which may conceivably be relevant in a particular case and it may not be necessary for the Commission to consider all factors in some cases. The relative weight to be given to various factors is to be determined by the Commission. *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W. 2d 286 (1982).

Even though there are various factors which may be considered in determining whether an individual is an employee or an independent contractor, the Courts have

indicated that the ultimate question in making that determination is whether or not the employer has the right to control the work performed. It is not necessary for the employer to actually exercise control over the performance of the work, but rather the right to control the work itself which is determinative. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, ___ S.W. 3d ____ (2007); *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W. 2d 110 (1989).

In this particular case, there are various factors which would support a finding that claimant was an independent contractor and there are also factors which would support a finding that claimant was an employee. However, I find that the most important factors indicate that the claimant was an employee, not an independent contractor. Specifically, I find that Dean Kilgore had the right to control the work that was performed on the Fast Trax job. While Dean Kilgore chose not to exercise his right to control due to the claimant's experience and ability to perform the work, he nevertheless retained the right to control the work. It was Dean Kilgore that bid the job on the Fast Trax building, paid the bills, and had any dealings with the owner of the building. Dean Kilgore also provided the material which was used on the job. Finally, I believe it is also important to note that in addition to the claimant there were other employees of the respondent present and working on the Fast Trax job. These were not employees that claimant used in his construction business, but rather were employees which had been hired by Dean Kilgore to perform his construction work.

In summary, the Courts have indicated that the ultimate question in determining whether a person is an independent contractor is whether the employer exercises the right to control the work even if that control is not actually exercised. I find based upon the evidence presented that Dean Kilgore did have the right to control the work which was performed on the Fast Trax building. While Dean Kilgore may not have actually exercised that control, he nevertheless retained that right. This factor coupled with the remaining

evidence including the fact that claimant did not bid the job, did not pay the bills, did not provide the material, and did not provide the other employees present on the job leads me to conclude that claimant was an employee of the respondent at the time of his fatal injury on July 24, 2006.

In reaching this decision, I note that there was some evidence produced at the hearing regarding other individuals' relationship to the claimant and whether they would be considered an employee of claimant's construction business or his farming operation. However, those individuals were not present on the Fast Trax job and performed no work for claimant on that job site. Whether or not those individuals might be considered employees for workers' compensation purposes should they suffer an accident is not at issue in this case. Here, the only issue is whether or not the claimant was an employee of the respondent on July 24, 2006.

It should also be noted that respondent cites in support of its contention the case of *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W. 2d 526 (1982). In that particular case, the Court of Appeals defined a subcontractor as one who "takes portion of a contract from principal contractor or another subcontractor." The Court also noted that the definition of subcontracting was essentially the "farming out" to others all or part of work which was to be performed by the original contractor. Respondent contends that in this particular case Dean Kilgore "farmed out" his work to the claimant; therefore, he was a subcontractor. First, I note that even though Dean Kilgore admitted on cross-examination that he in effect "farmed out" his work to the claimant, I do not believe from a review of the totality of Dean Kilgore's testimony that he was using that term in the legal sense. Instead, the totality of his testimony is that claimant simply performed the physical and managerial work for his father. Dean Kilgore still retained the right to control the work and provided the materials and the other employees which were used on the job. Dean Kilgore also paid the other employees which were present on the job. Claimant did not use any of his employees on

the Fast Trax job. Thus, this is not a situation where claimant essentially took over a contract of the respondent. In short, I do not find that claimant was a “subcontractor”, but rather find based upon the facts presented that claimant was an employee of the respondent.

The next issue for consideration involves compensability. This claim is for an injury caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant suffered a compensable injury which resulted in his death while working for respondent on July 24, 2006. The evidence in this case in the form of the testimony of Kimberly Kilgore Cruikshank, Dean Kilgore, the owner of the respondent, as well as the medical evidence indicates that on July 24, 2006 the claimant was working for the respondent when he fell off a roof and fell to the ground striking his head. Claimant was taken to Washington Regional Medical Center and did not survive. Based upon this evidence, I find that claimant suffered a compensable injury which

resulted in his death while employed by respondent on July 24, 2006.

Having found that claimant suffered a compensable injury, respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with the compensable injury.

Pursuant to A.C.A. §11-9-527(a), respondent #1 is liable for funeral expenses up to a maximum of \$6,000.00.

A.C.A. §11-9-527(c) provides compensation benefits resulting from the death of an employee to persons who were wholly and actually dependent upon the deceased employee. Here, Kimberly Kilgore Cruikshank testified that as of the date of claimant's death on July 24, 2006, she and the claimant had been married for 20 years. As a result of that marriage they had four children. She further testified that she and the children were dependent upon the claimant for financial support and income. I find Kimberly Kilgore Cruikshank's testimony to be credible and entitled to great weight. Accordingly, I find that she along with the four children are all entitled to benefits pursuant to A.C.A. §11-9-527. Since the time of claimant's death Kimberly Kilgore has remarried on July 26, 2007. Accordingly, she is entitled to compensation benefits from the date of claimant's death through the date of her remarriage, and she is also entitled to a lump sum payment equal to 104 weeks pursuant to A.C.A. §11-9-527(d)(1).

On July 24, 2006, Kaylee Kilgore had reached the age of 18. However, pursuant to A.C.A. §11-9-527(d)(2), benefits to a dependent child will not terminate at the age of 18 if the child is a full-time student and is not married. Documentary evidence from Northwest Arkansas Community College indicates that claimant was a full-time student and she remained a full-time student until the date of her marriage in May 2007. Accordingly, Kaylee Kilgore is entitled to dependent benefits from the date of claimant's death until the date of her marriage in May 2007. Finally, I also find that Alyssia, Whitney, and Levi are entitled to appropriate compensation benefits as dependents of the claimant.

The final issue for consideration involves claimant's average weekly wage. Testimony from Kimberly Kilgore and Dean Kilgore at the hearing indicated that claimant was normally paid \$20.00 per hour to work for the respondent. Dean Kilgore testified that in this particular case he agreed to pay claimant a flat sum of \$3,000.00 for approximately two weeks of work. Testimony from these individuals also indicated that claimant would work for the respondent some 8 to 10 hours per day. While Dean Kilgore testified that in this particular case he agreed to pay the claimant a flat sum of \$3,000.00, the evidence indicates that claimant had not been paid this way for past work. Instead, claimant had been paid at the rate of \$20.00 per hour. Kimberly Kilgore testified that in her opinion she was offered \$3,000.00 after this incident in part due to the circumstances of claimant's death. Based upon the evidence presented, I find that claimant's average weekly wage should be calculated at the rate of \$20.00 per hour. I find that claimant's average weekly wage should be calculated based upon an eight-hour day at \$20.00 per hour for 40 hours per week. This results in an average weekly wage of \$800.00 per week which calculates to the maximum compensation rate of \$488.00. Even if I were to accept evidence that claimant was to be paid \$3,000.00 as a flat fee for his work for the respondent, this would result in the maximum compensation rate since claimant was expected to work for approximately two weeks.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

The claimant was an employee of the respondent at the time of his fatal injury on July 24, 2006. Claimant suffered a compensable injury which resulted in his death on that date. Respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. In addition, respondent #1 is liable for funeral expenses up to the statutory maximum of \$6,000.00. Kimberly Kilgore, Kaylee Kilgore, Alyssia Kilgore, Whitney Kilgore, and Levi Kilgore were all wholly and actually dependent on the deceased employee and are entitled to appropriate benefits pursuant to A.C.A. §11-9-527. Kimberly Kilgore is entitled to payment of weekly benefits through the date of her marriage and to the 104-week lump sum payment as set forth at A.C.A. §11-9-527(d)(1). Kaylee Kilgore is entitled to benefits from the date of injury through the date of her marriage in May 2007. Payments are to be made based upon a compensation rate of \$488.00 per week.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$572.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE