

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F711767

MICHAEL PETERSON, EMPLOYEE

CLAIMANT

**SCM CONSTRUCTION MANAGEMENT, INC.
UNION INSURANCE COMPANY,
EMPLOYER/INSURANCE CARRIER**

RESPONDENT NO. 1

**ROBERT M. FAGAN D/B/A M&M EXCAVATING,
UNINSURED EMPLOYER**

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 23, 2008

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

Claimant was represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Mr. David C. Jones, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was unrepresented and appeared Pro Se.

STATEMENT OF THE CASE

The above captioned claim came on for a hearing in Little Rock, Arkansas, on June 26, 2008. A prehearing conference was conducted on May 1, 2008, and a Prehearing Order was filed on that 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 at the full hearing.

At the full hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

MICHAEL PETERSON - F711767

- 2) The claimant sustained an amputation of his left lower extremity on or about March 27, 2007.
- 3) Respondent No. 1 and Respondent No. 2 have controverted this claim in its entirety.
- 4) Respondent No. 1 stipulate to being the prime contractor with regard to this claim.

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

- 1) Whether the claimant was an independent contractor or an employee for Respondent No. 2, Robert M. Fagan d/b/a M&M Excavating.
- 2) Whether claimant sustained a compensable injury to his left lower extremity.
- 3) Intoxication defense.
- 4) If compensability is overcome, whether claimant is entitled to temporary total disability, permanent partial disability, and medical treatment.
- 5) Average weekly wage and compensation rates.
- 6) If Respondent No. 1 is found to be liable for benefits to the claimant, whether Respondent No. 1's statutory lien will attach against Respondent No. 2 pursuant to A.C.A. § 11-9-402, for benefits paid to/or on behalf of claimant.

At the full hearing, the claimant contended that he sustained compensable injuries on March 27, 2007, and has been unable to work since that time. The claimant contends he would be entitled to temporary total disability benefits from the date of injury to a date yet to be determined, and that he is entitled to permanent

MICHAEL PETERSON - F711767

partial disability benefits, medical benefits, and all attorney's fees. The claimant contended that he is entitled to 100% loss of his left leg and the impairment benefits associated. The claimant contends he is entitled to all outstanding medical expenses and attorney's fees. The claimant reserves the right to pursue other benefits to which the claimant may be entitled in the future. The claimant contended that he was an employee of Respondent No. 2 on March 27, 2007. The claimant contends the intoxication statute is unconstitutional because it presents fault into a no fault system. That the intoxication defense should not be heard because no report or expert medical report is present. The claimant contends that his average weekly wage was \$300.00 per week.

Respondent No. 1 contended at the full hearing that it was not the claimant's employer on March 27, 2007, and therefore should not be held liable for benefits. Respondent No. 1 contended that if it is held liable for benefits to the claimant, it would have a statutory subrogation interest against Respondent No. 2 for any and all benefits paid to/or on behalf of the claimant pursuant to A.C.A. § 11-9-402. Respondent No. 1 contends that claimant was intoxicated at the time of the incident in question, and that his benefits should be barred pursuant to A.C.A. § 11-9-102(B)(iv) (a). Respondent No. 1 contends that if claimant was an independent contractor that he would not be entitled to benefits. Respondent No. 1 contends that if the claim is

MICHAEL PETERSON - F711767

found to be compensable and the claimant is found to be an employee of Respondent No. 2, that the claimant's average weekly wage would be \$60.00 per week.

Respondent No. 2 contended at the full hearing that the claimant would not be entitled to benefits because he was an independent contractor for Respondent No. 2 on March 27, 2007.

DISCUSSION

On March 27, 2007, the claimant was operating a chainsaw at the direction of Respondent No. 2. The claimant was provided the chainsaw by Respondent No. 2. The claimant testified that on March 27, 2007, he was to be paid \$60.00 for the day to help clear a "lot" for Robert M. Fagan d/b/a M&M Excavating.

The claimant credibly testified that on the day of the incident he arrived in the A.M. at Robert Fagan's home and was then transported by another worker for Robert Fagan d/b/a M&M Excavating by the name of Preston Vandiver in a company work truck to the work site. The claimant testified that there were three people working on the job site, one being Robert Fagan's son, Taylor Fagan, the other Preston Vandiver, and the claimant. The claimant testified that he was operating the chainsaw and that Mr. Preston Vandiver was operating a track hoe. At some point, the evidence shows that while operating his chainsaw the claimant was struck in the back of the head by the track hoe and the track hoe then climbed up his leg causing his left leg to be

MICHAEL PETERSON - F711767

amputated. All the testimony in the record indicates that the operator of the track hoe, Mr. Preston Vandiver, had his back to the claimant while the claimant was operating the chainsaw, and that also the claimant had his back to the track hoe while operating the chainsaw.

After being struck with the track hoe, the claimant testified that Mr. Vandiver rushed to his aid, apologized, and took him to the emergency room. As a result of the incident, the claimant's left leg was amputated above the knee. As a result of this incident, the claimant contends that he is entitled to temporary total disability benefits from the date of injury to a date yet to be determined, permanent partial disability benefits for the total loss of his left leg, all associated medical treatment, an average weekly wage finding of \$300.00 per week, and attorney's fees due to his compensable left leg injury of March 27, 2007.

ADJUDICATION

The first issue for determination is whether the claimant was an independent contractor or an employee for Respondent No. 2 on March 27, 2007. When determining whether the claimant was an employee or independent contractor on March 27, 2007, several factors must be addressed. As set forth in Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000), some of the following factors are relevant to be considered when making such a determination:

MICHAEL PETERSON - F711767

- 1) The extent and control, by the agreement, the master may exercise over the details of the work;
- 2) Whether or not the one employed is engaged in a distinct occupation, or business;
- 3) The kind of occupation, with reference to whether in the locality is usually done under the direction of the employer or by a specialist without supervision;
- 4) The skill required in the particular occupation;
- 5) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- 6) The length of time for which the person is employed;
- 7) The method of payment, whether by time or by the job;
- 8) Whether or not the work is part of the regular business of the employer;
- 9) Whether or not the parties believe they are creating the relation of master and servant, and whether the principal is or is not, in business.

The Commission in Callahan v. Riddell Flying Service, Inc., Full Commission

Opinion filed March 12, 2004 (Claim No. E702846), stated:

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

MICHAEL PETERSON - F711767

principal factor in determining whether the relationship is one of agency or independent contractor.

In the instant case, several facts are undisputed. First, the chainsaw that the claimant was operating was owned by Respondent No. 2. Second, the track hoe that was being used to clear the lot was leased by Respondent No. 2. Third, the claimant was operating at the direction of Respondent No. 2 and/or his other employees. After taking into consideration the factors outlined in Aloha Pools and considering the testimony of the witnesses, I find the overwhelming evidence shows that the claimant was an employee of Respondent No. 2. The evidence shows that Respondent No. 2 had three employees at the work site on March 27, 2007, and was an employer under the Arkansas Workers' Compensation Commission Act. Therefore, I find there is proof by a preponderance of the evidence that the claimant was an employee for Respondent No. 2 on March 27, 2007, at the time of his left leg injury.

The claimant has contended that he sustained a compensable left leg injury on March 27, 2007. To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence:

- 1) That an injury occurred arising out of and in the scope of employment;
- 2) That the injury caused internal or external harm to the body

MICHAEL PETERSON - F711767

which required medical services or resulted in disability or death;

- 3) That the injury is established by medical evidence supported by objective findings as defined in A.C.A. § 11-9-102(16); and,
- 4) That the injury was caused by a specific incident and is identifiable by time and place of occurrence.

Mickel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

It is clear to this examiner that the claimant has proven by a preponderance of the evidence all elements outlined above regarding compensability of the left leg injury on March 27, 2007. Therefore, I find, that by a preponderance of the evidence that claimant has proven a compensable left leg injury on March 27, 2007.

Respondent No. 1 has stipulated that it was the prime contractor in relation to Respondent No. 2 and therefore on the risk for all benefits awarded herein, as Respondent No. 2 was an uninsured employer of the claimant on March 27, 2007. Respondent No. 1 however shall be given a statutory lien against Respondent No. 2 for any compensation paid to/or on behalf of the claimant pursuant to A.C.A. § 11-9-402(b)(1). Since Respondent No. 2 did not have adequate workers' compensation insurance at the time of the claimant's injury, this claim is referred to the Compliance Division within the Arkansas Workers' Compensation Commission to investigate possible sanctions to be employed against Respondent No. 2 for its failure to secure coverage for its employees pursuant to the laws of the State of Arkansas.

MICHAEL PETERSON - F711767

Respondents have raised the intoxication defense. A.C.A. § 11-9-102(4)(B)

states in part:

“Compensable injury” does not include:

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.

(b) The presence of alcohol, illegal drugs, or prescriptions drugs used in contravention of a physician’s orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician’s orders.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs used in contravention of the physician’s orders did not substantially occasion the injury or accident.

Respondents have argued that circumstantial evidence can invoke the presumption raised in A.C.A. § 11-9-102(4)(B)(iv)(b). The word “presence” in A.C.A. § 11-9-102(4)(B)(iv)(b), Respondent No. 1 argues was proven by the claimant’s admission that he had smoked marijuana within a few days prior to the compensable injury. Respondents cite Ester v. Nat’l Home Ctrs., Inc., 335 Ark. 356, 981 S.W.2d 91 (1998) and Continental Express v. Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998) in their brief found at Respondent No. 1’s Exhibit No. 2. However, in both of those cases there was a test for blood alcohol or drugs. Respondent No. 1 makes a strong argument that it would not be speculation or conjecture to assume the presence of illegal drugs in the claimant’s system since he

MICHAEL PETERSON - F711767

admitted to smoking several marijuana joints within mere days of his compensable event. Even though it is a strong argument, I am not inclined to accept the claimant's admission as "presence" of illegal drugs in the claimant's body at the time of the compensable event.

I will go one step further; however, and state that should it later be determined that the claimant did have the presence of illegal drugs in his system at the time of his compensable injury (a finding I do not make), I specifically find that such marijuana did not substantially occasion the claimant's compensable injury. I reach this finding based on the evidence in the record that was undisputed regarding the timing of the injury. At the time the claimant was struck with the track hoe, the claimant and the track hoe operator had their backs to each other and both were operating loud pieces of machinery. It is highly doubtful that the claimant or the back hoe operator heard each other. If any fault could be attributed in this incident it would be to the operator of the track hoe. I specifically find that should the presumption be met that the claimant had presence of illegal drugs in his system at the time of his compensable injury; that such presumption was rebutted by a preponderance of the evidence and that such evidence of illegal drugs did not substantially occasion the claimant's compensable injury.

The next issue to be determined is the claimant's average weekly wage at the

MICHAEL PETERSON - F711767

time of his compensable event. It is undisputed that the claimant had not worked for the respondent in several months, but had worked for the respondent in the past. There was conflicting testimony on the extent of days that claimant had worked for Respondent No. 2 in the past. However, it was clear that on the date of the compensable injury it was the first day the claimant had worked for Respondent No. 2 in over six months. The claimant testified that he had been unemployed for about a week or two before agreeing to work for Respondent No. 2 clearing a lot for \$60.00 a day. The claimant testified that prior to agreeing to work for Respondent No. 2 for the \$60.00 on March 27, 2007, he had worked for a paint store about one or two weeks prior. The claimant testified that he had worked "quite a bit" for Respondent No. 2 in the summer of 2006; however, Respondent No. 2 testified that the claimant had only worked for him on four previous days.

The claimant testified that he did not have any type of guarantee in his work hours or a contract to work:

Q Okay. And, in fact, you did not have any type of guaranteed work hours, did you?

A No, sir.

Q Okay. In other words, you didn't have a contract when you went out there that Tuesday to work four days, seven days, or anything like that, did you?

A No, sir.

MICHAEL PETERSON - F711767

Q Okay. In fact, in the past you might have worked for him one day here and maybe not work for him for months at a time; is that correct?

A Yes, sir.

Q Okay. And, in fact, when he called you you just went out on the job and were going to be paid for that one day; is that correct?

A Yeah. Yes, sir.

Q Okay. And he was just going to pay you \$60 cash at the end of the day; is that – is that correct?

A Yes, sir.

(T. pg. 46-47 lines 10-25 & 1-2).

The claimant testified that it was just one “lot” that he was to help clear on March 27, 2007. The claimant clarified that he was not asked to help clear “lots” as reflected in his testimony. (T. pp. 62-63, lines 25 & 1-2). The determination of the average weekly wage is controlled by A.C.A. § 11-9-518 which provides in part:

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Whether the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is

MICHAEL PETERSON - F711767

just and fair to all parties concerned.

In this instance, A.C.A. § 11-9-518(a)(1) does not apply because there was not a contract of hire in force at the time of the accident. A.C.A. § 11-9-518(a)(2) did not apply because the employee was not working on a piece basis. Instead, I find that A.C.A. § 11-9-518(c) applies. In my analysis, I find that the claimant could be characterized as either a temporary or periodic worker. In that light, I find the cases of Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1999) and Travelers Insurance Co. v. Perry, 262 Ark. 398, 557 S.W.2d 200 (1997) should be looked at when determining claimant's average weekly wage. Based upon the facts in this case, the applicable case law, and A.C.A. § 11-9-518, I find that claimant's average weekly wage is \$60.00. Therefore, I find that claimant's temporary total disability rate and permanent partial disability rate to be \$40.00 per week.

Claimant has contended entitlement to temporary total disability benefits, permanent partial disability benefits, medical expenses and attorney's fees. I have found that the claimant sustained a compensable left leg injury that resulted in the amputation of his left lower extremity. As a result, claimant is entitled to permanent disability benefits with regard to the total loss of his left leg at the rate of \$40.00 a week for 184 weeks. Said payment was controverted and is now due and owing in lump sum plus the maximum statutory attorney's fees.

MICHAEL PETERSON - F711767

An employer shall promptly provide for an injured employee such medical treatment as may be reasonable and necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). I find that claimant has proven by a preponderance of the evidence that he is entitled to all medical treatment contained in the record herein, including but not limited to the leg prosthesis and all costs associated therein. I find that all medical treatment contained in the record was reasonable, necessary, and related to the claimant's compensable left leg injury. Respondent No. 1 is directed and ordered to make such payment forthwith pursuant to Commission Rule 30.

The claimant has also requested temporary total disability benefits from the date of injury to a date yet to be determined. An employee that suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period of until they return to work whichever occurs first. Wheeler Const. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). It must be noted that at the full hearing that claimant appeared without his prosthetic device. The claimant testified that his prosthetic device was not fitting properly and that he could not get Medicaid to pay for the socket to get it fixed. (T. pg. 27, lines 18-25).

When determining one's healing period, the end becomes when the claimant is

MICHAEL PETERSON - F711767

as good as he is going to get. I find that in a situation where a prosthetic device is needed to allow the claimant to be mobile, that one's healing period could not end until a prosthesis is supplied. In this case, the claimant has been approved for Social Security and Medicaid evidently has paid for some treatment; however, the claimant credibly testified he was having trouble getting the prosthetic device properly attached. The respondents have controverted this claim in its entirety and have not paid any benefits associated with the claimant's medical treatment. As a result, I find that the respondents have in effect prolonged the claimant's healing period by not providing the claimant with reasonable and necessary medical treatment. I find that the repairs needed for the claimant's prosthesis is inherent to the claimant's healing period. It is also uncontroverted that claimant has not returned to any type of work since his compensable event on March 27, 2007. Therefore, I find that the claimant has proven by a preponderance of the evidence that he remains in his healing period and has not returned to work. Therefore, the claimant is entitled to temporary total disability benefits from the date of injury, March 27, 2007, to a date yet to be determined; plus the maximum statutory attorney's fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to

MICHAEL PETERSON - F711767

hear the testimony of the witnesses and to observe their demeanor, 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 parties' stipulations are reasonable and hereby accepted as fact.
- 3) I find by a preponderance of the evidence that the claimant was an employee of Respondent No. 2 on March 27, 2007.
- 4) Respondent No. 2 was an uninsured subcontractor for Respondent No. 1. Respondent No. 1 was the prime contractor on March 27, 2007, for Respondent No. 2 and the statutory employer of the claimant. Therefore, Respondent No. 1 is liable for all compensation benefits awarded to the claimant herein pursuant to A.C.A. § 11-9-402(a).
- 5) Respondent No. 1 and its carrier shall be given a statutory lien against Respondent No. 2 for any compensation paid to/or on behalf of the claimant pursuant to A.C.A. § 11-9-402(b)(1)(2).
- 6) Respondent No. 2 was an uninsured employer at the time of the claimant's compensable injury, and this file is hereby transferred to the Compliance Division within the Arkansas Workers' Compensation Commission to investigate Respondent No. 2 for noncompliance.
- 7) I do not find that the claimant had the presence of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders in the claimant's body at the time of his compensable injury. Therefore, the rebuttable presumption as outlined in A.C.A. § 11-9-102(4)(B)(iv)(b) was not created. However, should it ever be determined that the claimant had the presence of

MICHAEL PETERSON - F711767

illegal drugs in his system at the time of the compensable injury, I specifically find that the presumption that the claimant's injury was substantially occasioned by the use of the illegal drugs was rebutted by the claimant. I specifically find that in the hypothetical event it should be determined that claimant had the presence of illegal drugs in his system at the time of the accident, that claimant proved by a preponderance of the evidence that the illegal drugs did not substantially occasion the claimant's compensable injury.

- 8) The claimant has proven by a preponderance of the evidence that he remained within his healing period and unable to return to work from the date of his injury to a date yet to be determined. Therefore, I find that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 27, 2007, through a date yet to be determined, plus the maximum statutory attorney's fees.
- 9) The claimant is entitled to the permanent and total loss of his left leg and Respondent No. 1 is responsible for the permanent benefits outlined in A.C.A. § 11-9-521(a)(3) at the temporary total disability rate for 184 weeks, plus the maximum statutory attorney's fees.
- 10) I find that claimant's average weekly wage was \$60.00 per week entitling the claimant to compensation rates of \$40.00 per week for both temporary total disability and permanent partial disability.
- 11) Claimant has proven by a preponderance of the evidence that all medical treatment contained in the record herein was reasonable, necessary, and related to the claimant's compensable left leg injury and therefore Respondent No. 1's responsibility. Further, Respondent No. 1 is responsible for the claimant's prosthesis, all necessary repairs to the prosthesis, and additional pain management.
- 12) Respondent No. 1 was the prime contractor in relation to

MICHAEL PETERSON - F711767

Respondent No. 2 and therefore Respondent No. 1 was also the statutory employer of the claimant; therefore, Respondent No. 1 is liable for all benefits awarded herein to be paid forthwith.

AWARD

Respondent No. 1 is directed and ordered to pay all benefits awarded pursuant to the findings of fact and conclusions of law outlined herein. Further, Respondent No. 1 is ordered to pay said sums accrued in lump sum without discount.

Maximum attorney's fees are herein awarded to the claimant's attorney, the Honorable Gary Davis, 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