

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708840

JACKIE WASHINGTON, EMPLOYEE	CLAIMANT
WHEELER CONSTRUCTION CO., INC., EMPLOYER	RESPONDENT
CONTINENTAL CASUALTY COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 3, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE PATRICIA A. MACKEY, Attorney at Law, Conway, Arkansas.

The respondents were represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 16, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on August 5, 2008. The following stipulations were submitted by the parties either in the Prehearing Order or during the course of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine the facts which establish jurisdiction of this claim.
2. This claim for workers' compensation benefits has been controverted in its entirety.

3. If this claim is found compensable, the respondents are liable for the care provided by Dr. Schock and others engaged in treating the claimant's leg condition.
4. If this claim is found compensable, the claimant is entitled to benefits for temporary total disability through October 4, 2007.

By agreement of the parties at the start of the hearing, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant was an employee of Wheeler Construction Co., Inc., or, instead, a contractor.
2. The claimant's average weekly wage (i.e., whether the claimant would be paid \$16.00 per hour or \$20.00 per hour and the number of hours to be worked per week).
3. All other issues, including but not limited to the extent of the claimant's allegedly compensable physical injuries in addition to his leg condition, and temporary total disability after October 4, 2007, were reserved without objection at the start of the hearing on September 16, 2008.

The record consists of the three (3) volume September 16, 2008, hearing transcript and the exhibits contained therein. In addition, I have blue-backed to designate as part of the record (1) a 2007-2008 Workers' Compensation Audit Statement for Wheeler Construction Co., Inc. designated Claimant's Exh. No. 1, (2) my mathematical calculations of the weekly hours that Jackie Washington worked on the J. F. Wahl Elementary site and that Jackie Washington Jr. Washington worked at the Wilson Elementary school site designated Commission Exhs. No. 2 and 3 respectively, and (3) financial records from the J. F. Wahl Elementary site roofing project submitted into the record after the hearing designated Respondents' Exh. No. 1.

DISCUSSION

1. Evidentiary Objections

Mr. Newell objected to introduction of 2006-2007 and 2007-2008 Workers' Compensation Audit Statements for Wheeler Construction Company on the grounds that the documents are not relevant. The documents are not lengthy, do not contain any information which appears to be prejudicial to the respondents, have not been alleged to contain trade secrets, and do contain information regarding the employer-insurer relationship. The documents are accepted into evidence.

2. Was Jackie Washington an employee or a contractor when he fell at the Wilson Elementary School job site on June 21, 2007?

The respondent, Wheeler Construction Company, Incorporated, is a commercial roofing company and a licensed general contractor. (T. 189, Jt. Exh. 10 p. 8) The company uses crews to perform metal, slate, shingle and flat roofing. (T. 189) Patricia Wheeler is owner and President of Wheeler Construction Company. (T. 197, Jt. Exh 10 p.) Patricia Wheeler performs the company's accounting and bookkeeping, in addition to answering phones and performing secretarial work. (Jt. Exh. 10 p. 15) Patricia Wheeler's son, Jimmy Wheeler, is a vice-president and jobs supervisor. (T. 140, Jt. Exh. 10 p. 16) Jimmy Wheeler's daughter, Stacy, does the payroll. (T. 190)

The claimant, Jackie Washington, is a self-described master journeyman roofer. (T. 15) He holds no license as a roofer. (T. 14) He holds no licenses as a contractor. (T. 18)

Wheeler Construction Company engaged the roofing services of Jackie Washington and a crew of other individuals that Mr. Washington supervised in fulfillment of at least a portion of Wheeler Construction Company's roofing contracts at Morrilton High School, on approximately six

buildings on Helena's Main Street/Cherry Street, at J. F. Wahl Elementary School in Helena, and at Wilson Elementary School in Little Rock. This work occurred between 2004 and 2007 with various time gaps between the jobs.

At least for the Wheeler Construction Company work, Mr. Washington's forte was "four ply, mop with hot asphalt and gravel, torch downs, modifieds." (T. 189) Wheeler Construction Company also had other roofing crews. (T. 189) So, for example, on the Main Street job in Helena, Mr. Washington's crew roofed six buildings and another crew of Wheeler Construction's roofers worked on three or four other buildings. (T. 185)

Wheeler Construction Company listed what the company considered its employees on various documents in the record prepared for State and Federal purposes. Wheeler Construction Company also paid its employees overtime after forty hours per week. (T. 216) The names of Jackie Washington and the members of his crew were not listed as employees of Wheeler Construction Company on any of the State or Federal documents in the record. (Jt. Exh. 7)

Mr. Washington and the members of his crew kept track of the time they worked each week on the Wheeler jobs, and Mr. Washington turned those hours in each week to Wheeler

Construction until he was hurt. Wheeler Construction Company would issue one check each week in the name of Jackie Washington that would include money for all of the members of Jackie Washington's crew who worked that week. The crew members' payments were based on various hourly rates for different crew members. (T. 146) Mr. Washington would then pay his crew members in cash. (Jt. Exh. 8 p. 37) The hourly rates were generally not increased for work over eight hours per day because Wheeler Construction Company deemed Mr. Washington a subcontractor. (T. 162)

In addition, an annual sum of the payments to Jackie Washington for work performed by his crew was documented by Wheeler Construction Company on a yearly basis on a federal tax Form 1099-MISC. (Jt. Exh. 4) Jackie Washington did not prepare any income tax documents for any of the people on his crew. (Jt. Exh. 8 p. 37)

Jackie Washington sustained injuries when he fell through the roof while working at Wilson Elementary School on June 21, 2007. Mr. Washington contends that he was an employee of Wheeler Construction Company when the injury occurred, so he is entitled to workers' compensation benefits from Wheeler Construction Company and its insurance carrier, Continental Casualty Company. Wheeler Construction

Company contends that Mr. Washington was an independent contractor or a subcontractor and not an employee, so that Mr. Washington is not entitled to benefits for workers' compensation.

In this regard, Jimmy Wheeler testified at the hearing that he and Jackie Washington determined a set price per 100 square feet of roof (hereinafter "per square") on each job, and that the weekly payments to Mr. Washington and his crew at an hourly rate were simply draws which were deducted against the roofing contract between Wheeler Construction and Mr. Washington. (T. 196) Mr. Wheeler testified that Wheeler Construction Company would then write Mr. Washington a check for whatever money was left over on the contract at the end of the job. (T. 145) Mr. Wheeler testified at the hearing that the labor contracts with Mr. Washington were \$135 per square at Wilson Elementary School, \$110 per square at J. F. Wahl Elementary School in Helena, and \$95 per square on the Main Street Buildings in Helena. (T. 188) Mr. Wheeler testified that he did not recall the contract price on Morrilton High School. (T.188) Mr. Wheeler testified that any writing regarding the contracts would have been out at the job sites and that Mr. Washington "took most of that

material with him." (T. 166) Mr. Wheeler testified that he did not keep anything for his records. (T. 166)

In her deposition on July 21, 2008, Patricia Wheeler, the company's owner and bookkeeper, described working financially with independent contractors as follows:

Q. Okay. And whereas for an independent contractor, how does that work?

A. There's a set fee. He tells me that he'll do the job for a set amount, and you keep a running total of how much you pay and make sure that he doesn't go over that.

Q. Okay. So you said [sic] keep a running total, meaning he - are you calling this a draw?

A. Yes.

Q. You're calling this a draw?

A. Yes.

Q. So he would complete a certain amount on the job and receive pay?

A. Yes.

Q. And was there ever any overage after draw was performed, after a work site was finished?

A. No. No. But there was times that when he did get through, the job was finished and we owed him extra money because he brought the job in. And he got paid to make sure that he got what he said he would do the job for.

Q. So he got - if there was extra left over, you would give it to him?

A. Yes, ma'am.

Q. Okay. Do you recall which job that might have been, or jobs?

A. No.

Q. Was it possible that when he was in Helena on the Wald School - would that be one of them?

A. I would have to look. I don't remember. (Jt. Exh. 11 p. 15-16)

Ms. Wheeler testified at the hearing held on September 16, 2008, that Mr. Washington in fact never had any money left over in his contracts because he paid his crews too high a wage. (T. 206) Ms. Wheeler testified that she learned this information because her son, Jimmy Wheeler, told her that there was never any money left over after the draws. (T. 217) For his part, Jimmy Wheeler testified at the hearing on September 16, 2008, about alleged contract payments as follows:

Q. Is it your testimony that Mr. Washington never - did he ever have any overage at the end of the job?

A. I didn't think he did at Helena, but come to find out he had money left over on the Morrilton job.

Q. Did he get it?

A. Yes. (T. 183)

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas

Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982).

Ordinarily, no one feature of the relationship is determinative. Carter v. Ward Body Works, Inc., 245 Ark. 515, 439 S.W.2d 286 (1969). The right to control the method and manner of the work is the traditional test applied in Arkansas when considering whether an individual was an employee or an independent contractor. The ultimate question with the right to control test is whether the employer has the right to control, not whether the employer actually exercises control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). However, the courts have also considered the "relative nature of the work" test in addition to the right to control test. Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976); Sands v. Stombaugh, 11 Ark. App. 38, 665 S.W.2d 902 (1984); Franklin, supra; Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The main consideration of the relative nature of the work test is "the relationship between the claimant's own occupation and the regular business of the asserted employer." Salter, supra; Lambert, supra.

Consequently, the resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the employer's right to control and of factors related to the relationship of the

work to the asserted employer's business. In making a determination, the Commission must look at the factors outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999):

the extent of control which, by the agreement, the master may exercise over the details of the work;

whether or not the one employed is engaged in a distinct occupation or business;

the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

the skill required in the particular occupation;

whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

the length of time for which the person is employed;

the method of payment, whether by the time or by the job; whether or not the work is a part of the regular business of the employer;

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.

See also Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

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. Franklin, supra. However, the 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. Sanders, supra.

In the present case, the respondents contend that Jackie Washington and Wheeler Construction engaged in a series of contracts for essentially a fixed sum for a completed job, that the weekly payments to Mr. Washington and his crew were in the nature of a draw against the fixed sum of each contract, and that the fixed sum of each contract was based on the number of squares to be roofed at a set price per square. I note that the payment of a fixed sum for a completed job is generally characteristic of an independent contractor relationship rather than an employee relationship. See 3 Larson, *Workers' Compensation Law*, § 61.06[3] (2008).

I likewise note that in Garcia v. A&M Roofing, 89 Ark. App. 251, 202 S.W.3d 532, the Commission found from the evidence that A&M Roofing engaged contractors, not employees, to perform roofing contracts obtained by A & M Roofing. The evidence established that A & M Roofing and roofers signed an "Agreement of Independent Labor Contract" specifying a set price per layer of shingles, providing that

independent contractors provide their own tools, pay their own taxes and Social Security, and carry their own workers' compensation and liability insurance. The evidence also indicated that A & M furnished all of the roofing materials and that A & M's owner, Harold Mills, did not know who actually provided the labor to fulfill the labor contract. Mills did not tell the contractor, Jesse Garcia what hours to work. Mills paid Garcia every Saturday by the square for jobs performed during the week, and Garcia subcontracted the labor on at least one A & M contract to his brother.

By comparison, in the present case I do not find credible the Wheelers' testimony that Jimmy Wheeler and Jackie Washington engaged in a series of labor contracts, such that Wheeler Construction Company's weekly payments to Mr. Washington and his crew members were actually in the nature of a draw against Mr. Washington's end-of-contract payment. In this regard, I note that, unlike in Garcia, there were no written contracts between Mr. Washington and Wheeler Construction offered into evidence for either Mr. Washington's work at Morrilton High School, on the approximately six buildings on Helena's Main Street/Cherry Street, at J. F. Wahl Elementary School in Helena, or at Wilson Elementary School in Little Rock. (T. 168) Patricia Wheeler, who provided business records for the hearing,

likewise could produce no business records corroborating the Wheelers' testimony that Mr. Washington was to be paid by the square and that end-of-contract calculations were performed to determine what, if any money, was allegedly still owed to Mr. Washington for any job site. (T. 205) In fact, in their various hearing and deposition testimony quoted or cited above, the Wheelers were inconsistent as to which jobs, if any, for which Mr. Washington was purportedly entitled to an end-of-contract payment. I do not find persuasive Jimmy Wheeler's testimony that he provided all relevant written financial material and end-of-contract calculations to Mr. Washington and did not keep a copy for Wheeler Construction Company's records. (T. 166)

For his part, Mr. Wheeler also testified that payments switched from a per-square completion basis to a per-hour basis on the Main Street job in Helena. (T. 189) Mr. Wheeler testified that in order for Mr. Washington to keep a crew working, the crew needed to be paid regularly. (T. 145) Mr. Wheeler testified that he began paying for the Washington crew's draw each week at an hourly rate in Helena, as opposed to the per square method, because the tasks of tear off, re-roofing, and putting the roof "in the dry" did not lend themselves to easy weekly calculation for a per square payment on the type of roofing the crew

performed. (T. 145) Again, however, Wheeler Construction has offered no documentary evidence corroborating the alleged per square payments made at Morrilton or on Main Street in Helena before the alleged conversion to per hour payments. All of the financial records of Wheeler Construction regarding payments to Jackie Wheeler and individuals he worked with on roofing crews at the J. F. Wahl Elementary School and the Wilson Elementary School instead document payments for hours of work or days of work submitted each week by Washington or other crew members.

Mr. Washington testified that he was never paid by the square in 2004, 2005, or 2006. (T. 42) Mr. Washington testified that he was paid by the hour not by the square. (T. 50). Mr. Washington denied that he has ever worked as a subcontractor. (T. 17) The Wheeler Construction financial records submitted into evidence for the J. F. Wahl job site indicate that Jackie Washington was at the beginning of that job paid \$20 per hour for the hours he turned in each week. After several weeks, he began receiving from Wheeler Construction Company \$200 per day for each day that he worked. (R. Exh. 1) The Wheeler Construction financial records submitted into evidence for the Wilson Elementary job site indicate that Jackie Washington received \$16 per

hour for the hours that he actually worked in the two days that he worked. (Jt. Exh. 2 p.6)

In light of Wheeler Construction's inability to produce any written records of a Jackie Washington contract, any written records of a contract price, or any financial records verifying end-of-contract financial results establishing whether or not Jackie Washington would be entitled to end-of-contract payments, I find credible Mr. Washington's testimony that no such contract or contracts ever existed and that he and the crew he worked with were paid for their time, and not pursuant to a contract between Jackie Washington and Wheeler Construction for draws with final payment upon completion of the job, as alleged by the Wheelers.

Also with regard to the method of payment, I note that Wheeler Construction Company paid for Mr. Washington's crew members' hotel rooms and paid crew members \$10 per day for food when they worked outside of Little Rock. (T. 186) I do not find Wheeler Construction Company's hourly-based payments to Washington's crew, Wheeler's hotel payments, or Wheeler's payments for meals consistent with Wheeler's contention that Mr. Washington's crew members were employees of Washington rather than employees of Wheeler Construction Company.

With regard to the relative nature of the work of Wheeler Construction and Jackie Washington, I note that Mr. Washington is a roofer and Wheeler Construction is a roofing contractor. When Mr. Washington and his first crew began working for Wheeler Construction in approximately 2004, Wheeler had approximately five crews in all. (Jt. Exh. 10 p. 20) There is no dispute that the other crews were all made up of employees, as Jimmy Wheeler testified that he last used a subcontractor other than Mr. Washington in the early 1990's. (T. 170) As discussed above, Wheeler Construction used a separate crew of "regular hourly" employees to roof three or four of the Main Street buildings in Helena while Mr. Washington's crew roofed six additional buildings. (T. 185) When Mr. Washington became injured on the Wilson Elementary School job, Mr. Washington moved regular hourly employees (a foreman, journeyman roofers and laborers) to the Wilson job to finish it. (T. 183) I find under these circumstances that the roofing work that Mr. Washington performed for Wheeler Construction was an integral part of Wheeler Construction Company's core business of commercial roofing, and as such, is indicative of an employment relationship, and not a contractor relationship.

With regard to other factors cited in D.B. Griffen Warehouse, inc. v. Sanders, supra., I find that the skill

required in Mr. Washington's occupation as a journeyman roofer is obviously comparable to the skill required of Wheeler Construction Company's regular hourly journeyman roofers on Wheeler's hot roofing crew since, after Jackie Washington became injured, Wheeler Construction replaced Mr. Washington on the Wilson Elementary School job with some of Wheeler's regular hourly roofers, laborers and a foreman.

On the record before me, I also find that the nature of commercial roofing in the locales where Wheeler Construction contracts for work is such that the roofing work is usually done under the direction of an employer and not by a specialist without supervision. I base this conclusion on Jimmy Wheeler's description of Wheeler Construction having on staff various roofing crews consisting of regular hourly employees, and not having subcontracted a job since the early 1990's, except for the subcontracting that he allegedly engaged in with Mr. Washington at issue in this claim. (T. 170)

Likewise, with regard to the hours worked by Mr. Washington's crew, the tools brought to the site by Mr. Washington's crew, and the tools and materials furnished by Wheeler Construction, I note that neither party presented any comparison showing how Jackie Washington's crew operated

either similarly or differently from Wheeler Construction's roofing crews composed of regular hourly employees. I find under these circumstances that the evidence of the hours worked by Washington's crew, the tools brought to the work sites by Mr Washington's crew members, and the tools and materials supplied by Wheeler Construction are not instructive in resolving the employee versus independent contractor issue presented in this claim.

With regard to the right to control test, however, I find that Wheeler Construction's actions at the Wilson Elementary job site after Mr. Washington fell persuasively establish Wheeler Construction's right to control the work of both Wheeler's regular employees and the other individuals who Wheeler Construction allege were employees of Jackie Washington rather than Wheeler Construction at the site. In this regard, I again note Jimmy Wheeler's testimony that Wheeler Construction and Jackie Washington allegedly contracted for Jackie Washington and crew to perform the Wilson Elementary roofing job for \$135 per square. After Jackie Washington fell on or about his second day on the job on June 21, 2007, Wheeler Construction continued to pay the remaining crew members weekly with checks made out to Jackie Washington, and Wheeler

Construction ultimately sent Jackie Washington a Form 1099-MISC for 2007 for payments of \$42,747.51. (Jt. Exh. 4)

However, in taking that course of action, there is no dispute that Wheeler Construction never made any contact directly with Jackie Washington at any time after he fell on June 21, 2007. (T. 207 - 209) Therefore, Wheeler Construction never obtained Mr. Washington's permission after he fell to continue paying purported draws to crew members for Washington's alleged contract after Mr. Washington was no longer able to work himself. Wheeler Construction never confirmed that Jackie Washington received or endorsed the checks made payable to Jackie Washington but handed to his son. (T. 176) Wheeler Construction never provided Jackie Washington any documentation supporting the \$42,747.51 that Wheeler Construction purportedly paid as draws to Washington crew members for work on the Wilson site which occurred almost exclusively after Mr. Washington could no longer work himself. (Jt. Exh. 10 p. 51) Wheeler Construction also never performed any calculation to determine whether Mr. Washington would be entitled to any money under the alleged contract after completion of the Wilson Elementary roofing job. (T. 195) In addition, rather than contacting Mr. Washington when the Wilson Elementary job fell behind schedule, Wheeler Construction instead

transferred its own foreman, journeyman roofers and laborers to work on the Wilson Elementary job. (T. 155, 183) Then Wheeler Construction later transferred members of Washington's crew to another job site *before the Wilson job was even finished*. (T. 83)

I find under these circumstances that while Wheeler Construction contends that the Wilson Elementary job was Jackie Washington's contract to perform at a cost of \$135 per square payable by Wheeler Construction, in fact Wheeler Construction had the right to place its own regular hourly employees on site at will, and did so without consulting Jackie Washington. (T. 155, 183) Wheeler Construction also had the right to transfer or terminate members of the Washington crew before the Wilson project ended, and did so. (T. 83) Finally, Wheeler's course of action on the Wilson job site demonstrates that the working relationship between Wheeler Construction and Jackie Washington ended on June 21, 2007, with no contractual liability to either party for the unfinished work. I therefore find that in the present case, Wheeler Construction had the right to control the work at the Wilson Elementary School site and in fact exercised that right without consulting Jackie Washington at any time after June 21, 2007.

After considering the various factors associated with both the right to control test, and the relative nature of the work test, and for the reasons discussed herein, I find that the preponderance of the evidence establishes that Jackie Washington was an employee of Wheeler Construction and not an independent contractor when he fell at work at the Wilson Elementary School job site on June 21, 2007.

In reaching this conclusion I recognize that Patricia Wheeler made a photocopy of a Certificate of Non-coverage for Jackie Washington Roofing Inc. covering the period from October 22, 2004 through October 22, 2006. I also recognize that both a Certificate of Non-coverage and payments made without deductions and reported by Form 1099 can be persuasive evidence of a contractual relationship instead of an employment relationship. However, in the present case, I point out that the Certificate of Non-Coverage was expired for over six months *before* Mr. Washington began work on the Wilson Elementary job in June of 2007. With regard to the Form 1099 prepared form Jackie Wilson for 2007, I note that Mr. Washington received only approximately \$190 of the \$42,747.51 that Wheeler Construction placed on the Form 1099. The remainder, exceeding \$42,000, was paid by Wheeler Construction to other individuals working at the Wilson Elementary job site who, as discussed above, the

preponderance of the evidence establishes were under the control of Wheeler Construction. Under these circumstances, I do not find either the expired Certificate of Non-Coverage or the Form 1099 persuasive evidence that Jackie Washington was an independent contractor and not an employee of Wheeler Construction at the Wilson Elementary School job site on June 21, 2007.

3. What was Jackie Washington's average weekly wage calculated under the Arkansas Workers' Compensation Law when he was injured the second day on the job at the Wilson Elementary School job site?

Arkansas Code Annotated Section 11-9-518 provides:

(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) Where 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.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(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 just and fair to all parties concerned.

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40 hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993). The claimant has the burden of proving that he was bound by contract to work forty hours each week if the work was made available. A & C Servs., Inc. v. Sowell, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

The Arkansas Court of Appeals has concluded that the Commission did not err in basing a claimant's wage rate for seasonal work on a full forty hour work week under circumstances where the claimant's contract of hire was for forty hours per week or more whenever the work was available, and the claimant worked less than forty hours per week when her working hours were reduced because of the weather. Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). Likewise the Arkansas Court of Appeals has affirmed a Commission finding that a claimant

should not be penalized for missing work for legitimate leave time including personal health reasons and for company convenience when work was not available. Rheem Manufacturing Mfg., Inc. v. Bark, 97 Ark. App. 224, 245 S.W.3d 716 (2006).

In Sierra v. Griffin Gin, ___ Ark. ___, ___ S.W.3d ___ (07-1104 September 25, 2008), the Arkansas Supreme Court addressed an average weekly wage calculation where a seasonal employee contracted to work nine weeks per year. The Commission concluded that a temporary employment confined to nine weeks by contract is distinguishable from prior cases addressing unlimited periods of employment, renewable annual contracts and employment restricted by weather. The Arkansas Supreme Court affirmed the Commission's conclusion that seasonal contract employment presents exceptional circumstances, such that dividing the claimant's contracted nine weeks of earnings by 52 weeks represented a fair and just means of determining the seasonal workers' average weekly wage.

In the present case, since I find that Jackie Washington did not engage in a series of fixed temporary contracts as Wheeler Construction alleges, I find that this case does not present the same exceptional circumstances addressed in Sierra v. Griffin Gin, supra. Since other

members of Mr. Washington's crew were transferred to the Scott Hamilton job site before the Wilson Elementary roofing job was completed, I find instead that Jackie Washington and his crew members became employed for an indefinite period when he began working again for Wheeler Construction in June of 2007.

Nevertheless, the parties cannot agree to either the hourly rate of payment that Mr. Washington would receive when he went to work on or about June 20, 2007, or on a means of determining the number of hours that Mr. Washington would work each week on the site.

With regard to the hourly rate issue, I again note that before the Wilson Elementary School job, Jackie Washington was paid either \$20 per hour for the hours he turned in to Wheeler Construction or \$200 per day for the days he worked. Crew member Jackie Washington Jr. received \$15 per hour and crew member Antonio Allen \$18 per hour.

At the Wilson Elementary School job, Jackie Washington Jr. continued to receive \$15 per hour. Antonio Allen's rate decreased from the previous \$18 per hour to \$15 per hour. Jackie Washington's rate decreased from the previous \$20 per hour to \$16 per hour on the check covering the only two days he worked before he fell.

Jackie Washington testified that Jim Wheeler actually agreed to pay him the same \$20 per hour when Jackie Washington returned to work for Wheeler Construction. (T. 15, 16, 17) However, I find that a preponderance of the evidence establishes that Jackie Washington knew his rate would be reduced to \$16 per hour before he went to work on the Wilson Elementary School job. In this regard, I am persuaded by Jimmy Wheeler's testimony that he discussed labor cost overruns from the J. F. Wohl Elementary School job before the Wilson Elementary School job started, and that Jackie Washington proposed the lower hourly rates for the Wilson Elementary School job. (T. 155) Mr. Wheeler's testimony regarding lower hourly rates is consistent with Antonio Allen's testimony that he worked on the Wilson Elementary School job at \$15 per hour after he learned that he would receive less per hour than on the previous job sites. (T. 117) Mr. Wheeler's testimony regarding reduced hourly rates is also consistent with the figures identified on page 6 of Joint Exhibit 2.

With regard to the question of how many hours per week Jackie Washington would have worked had he not fallen on June 21, 2007, I find most credible of all the data and testimony available to me Jimmy Wheeler's testimony that Jackie Wheeler worked the hours that he wanted to and the

days that he wanted to. (Jt. Exh. 10 p. 52) I also find credible Jimmy Wheeler's testimony that had he not fallen, Mr. Washington would have worked 7 - 12 hours per day, with an average of maybe 9, and 5 or 6 days per week because he liked to work Saturdays. (T. 159) Based on Jimmy Wheeler's testimony of an average 9 hour day, and also averaging the days worked per week to 5 ½ days, Mr. Washington's average hours per week based on Jimmy Wheeler's testimony can be calculated as follows:

$$\begin{aligned} \text{Hours per week} &= 9 \text{ hours per day} \times 5.5 \text{ days per week} \\ &= 49.5 \text{ hours per week} \end{aligned}$$

Since Mr. Washington and his crew members were almost never paid an overtime rate by Wheeler Construction, and since Mr. Washington would not have received compensation for meals or hotel while working on the Little Rock sites, Mr. Washington's average weekly wage would be:

$$\begin{aligned} \text{Average weekly wage} &= \$16 \text{ per hour} \times 49.5 \text{ hours per week} \\ &= \$792 \text{ per week} \end{aligned}$$

I note that an average weekly wage of \$792 would entitle Jackie Washington to the maximum weekly compensation rate of \$504 for a 2007 injury under Commission Advisory 2000-1, Revised September 10, 2008, since 66 2/3% of \$792 exceeds \$504. See generally

http://www.awcc.state.ar.us/adv_new/adv2000_1.pdf.

In relying on Jimmy Wheeler's hearing estimate of Jackie Washington's anticipated work schedule on the Wilson job had Jackie Washington not become hurt, I have considered and note that based on my calculations using the financial data in the record, Jackie Washington Junior, the claimant's son, only worked an average of 27.6 hours per week on the Wilson Elementary School job between the pay days of June 22, 2007, and March 21, 2008. (Comm. Exh. 3)

In relying on Jimmy Wheeler's hearing estimate of Jackie Washington's anticipated work schedule on the Wilson job had Jackie Washington not become hurt, I have also considered and note that, based on my calculations using the financial data in the record, Jackie Washington only worked an average of 35.1 hours per week on the J . F. Wahl job between the pay days of March 17, 2006, and September 15, 2006. (Comm. Exh. 2) I recognize that my calculated 27.6 average hours per week that Jackie Washington Junior turned in on the Wilson job and the 35.1 average hours per week that Jackie Washington turned in on the J. F. Wahl job are both significantly lower than the 49.5 hour average work week that I have calculated using Jimmy Wheeler's estimate that Mr. Washington would have averaged nine hours per day five or six days per week.

I nevertheless find Jimmy Wheeler's estimation more credible than my own calculations for the following reasons. First, Jimmy Wheeler is the jobs manager for Wheeler Construction, and Mr. Wheeler's estimation is therefore based not only on Mr. Wheeler's perception of Mr. Washington's propensity to work over eight hours per pay and some Saturdays, but also on Mr. Wheeler's expectations for Mr. Washington and his crew completing the Wilson job in a timely manner. I further note that Mr. Wheeler's work estimate also appears reasonably consistent with Jackie Washington's testimony that Mr. Washington advised Mr. Wheeler that the Wilson job's time deadline would require the crew to work ten or more hours per day so long as the days were long enough. (T. 63)

Second, I perceive no motivation for Mr. Wheeler to inflate his estimation of Mr. Washington's expected hours on the Wilson job site.

Third, I note that the Wilson job site was a different job with a completely different pay method for Jackie Washington than existed at the earlier J. F. Wahl job site. As discussed previously, for most weeks worked at the J. F. Wahl job, Mr. Washington received \$200 per day that he worked, regardless of the hours per day he turned in to Wheeler Construction Company. By comparison, at the Wilson

job site he was expected to work at a much lower rate of payment at \$16 per hour. In light of the change in compensation rate for the new job, and therefore the significantly greater number of hours each week that Mr. Washington would need to work at the Wilson site in order to make comparable weekly earnings to what he made at the previous J. F. Wahl site, I find Mr. Wheeler's estimation of Mr. Washington's anticipated work hours more persuasive than Mr. Washington's actual hours turned in at the previous J. F. Wahl site in 2006, which ended some eight months earlier.

I also find Mr. Wheeler's estimation more persuasive than the actual hours that Jackie Washington Junior turned in on the Wilson job site because I have not found any evidence in the record to persuade me that Jimmy Wheeler was in error, and that Jackie Washington Junior worked essentially the same number of hours per day and per week that Jackie Washington Senior would have worked had he not been hurt and remained the foreman.

Specifically, I note that Jackie Washington was the crew foreman, and there was no hearing testimony or documentary evidence presented at the hearing indicating that the remaining crew members at the Wilson site worked the same hours without a foreman, or under a different foreman, as they would have worked had Jackie Washington not

gotten hurt and remained the foreman. There is also no evidence indicating that the remaining crew members, or their new foreman, had the same propensity as Jackie Washington to schedule work Saturdays, as described by Mr. wheeler.

For all of the reasons discussed herein, I find that the claimant has established by a preponderance of the evidence that he is entitled to the maximum benefit rates for a 2007 injury of \$504 per week for total disability and \$378 per week for permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine the facts which establish jurisdiction of this claim.
2. This claim for workers' compensation benefits has been controverted in its entirety.
3. Jackie Washington was an employee of Wheeler Construction Co., Inc., when he fell an sustained injuries on June 21, 2007, at the Wilson Elementary School job site.
4. The claimant's average weekly wage is sufficient to entitle him to the maximum benefit rates for a 2007 injury of \$504.00 per week for total

disability and \$378.00 per week for permanent partial disability.

5. The respondents are liable for the care provided by Dr. Schock and others engaged in treating the claimant's leg condition.
6. The claimant is entitled to benefits for temporary total disability through October 4, 2007.
7. All other issues, including but not limited to the extent of the claimant's allegedly compensable physical injuries in addition to his leg condition, and temporary total disability after October 4, 2007, are reserved.

AWARD

The respondents are directed to pay benefits in accordance with the findings set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of

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which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge