

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G403930

SACRAMENTO ROSALES, Employee	CLAIMANT
ELITE MASONRY, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 21, 2015

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

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

Respondents represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 18, 2014, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 10, 2014, and a pre-hearing order was filed on that same date. 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 there were no stipulations agreed to by the parties.

At the time of the hearing the parties agreed to stipulate that in the event claimant is classified as an employee and he suffered a compensable injury, that he earned an average weekly wage of \$513.00 which would entitle him to compensation at the rates of \$342.00 for total disability benefits and \$257.00 for permanent partial disability benefits.

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

1. Jurisdiction of the Arkansas Workers' Compensation Commission.
2. Employment relationship.
3. Compensability.
4. Medical.

5. Temporary total disability benefits from May 7, 2014 through a date yet to be determined.

6. Attorney fee.

Prior to the hearing the claimant also added as an issue reimbursement for the cost of the deposition of Chris Pullin.

The claimant contends he sustained an injury while under the supervision of respondent on or about May 7, 2014. At that time, claimant fell from a sky jack, injuring his right hand, right fingers, and left wrist. He contends he is entitled to the payment of medical expenses, temporary total disability benefits, and an attorney's fee.

The respondents contend that the Arkansas Workers' Compensation Commission does not have jurisdiction in this matter. The claimant was not an employee of Elite Masonry. There is no employment relationship between the parties in question. The claimant did not suffer a compensable injury under the Arkansas Workers' Compensation Act. The claimant had a valid certificate of non-coverage with the Arkansas Workers' Compensation Commission excluding him from the requirement of having workers' compensation insurance.

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. The parties' stipulation that claimant earned an average weekly wage of \$513.00 which would entitle him to compensation at the rates of \$342.00 for total disability benefits and \$257.00 for permanent partial disability benefits is hereby accepted as fact.

2. Respondent had the requisite number of employees to invoke the jurisdiction

of the Arkansas Workers' Compensation Commission pursuant to A.C.A. §11-9-102(11).

3. On May 7, 2014, claimant was an employee of the respondent, not an independent contractor.

4. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right hand while working for respondent on May 7, 2014.

5. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right hand injury.

6. Claimant is entitled to temporary total disability benefits beginning May 7, 2014, and continuing through a date yet to be determined.

7. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

8. Respondent is not liable for the cost of the deposition of Chris Pullin. The deposition was taken at the request of claimant for evidentiary purposes; therefore, claimant is liable for the cost of that deposition.

FACTUAL BACKGROUND

_____The claimant is a 48-year-old man who has primarily performed brick mason work since coming to the United States in 1988. Claimant testified that he worked for the respondent as a brick mason on two occasions, with the first time beginning in 2005 and the second time beginning in 2013.

Claimant testified that he suffered a compensable injury to his right hand while working for respondent on May 7, 2014. Claimant testified that on that date he was working on a home in Centerton and that he and other employees spent most of the day attaching window sills and performing other minor details. At the time of his injury claimant was in the process of cleaning a window on the back of the house which was elevated from

the ground. Because the scaffolding had already been removed from around the home, a laborer named Keith attached a platform to a front end loader in order to lift claimant up high enough to clean the window. Unfortunately, the platform was not properly attached and as a result claimant fell off the platform and his right hand was caught between the platform and the ground. This resulted in a partial amputation of the claimant's index finger and his middle finger. Medical records indicate that claimant underwent surgery to amputate a portion of the index finger and repair the near amputation of his middle finger.

Claimant has filed this claim contending that he was working for the respondent as an employee on the date of the injury when he suffered a compensable injury. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____The first issue for consideration involves jurisdiction by the Arkansas Workers' Compensation Commission. A.C.A. §11-9-102(11)(A) states that employment means every employment in the state in which three or more employees are regularly employed by the same employer in the course of business. In this particular case, the respondent had at least three employees in 2014. The owner of the respondent is Chris Pullin and he testified by deposition and at the hearing. In his deposition, Pullin testified that in 2014 he would have listed four individuals - Gary, Brandon, John, and Tony - as employees. He testified that he did not cover himself under workers' compensation insurance. Nevertheless, even though Pullin chose not to cover himself under his workers' compensation policy, he would nevertheless count as an employee for purposes of determining jurisdiction. Based upon the testimony of Pullin indicating that he had four employees not counting himself in 2014, I find that respondent had the requisite number of employees in 2014 to invoke jurisdiction of the Arkansas Workers' Compensation Commission.

The next issue for consideration involves whether claimant was an employee or an independent contractor. An independent contractor is an individual who contracts to do a job according to his own method and without being subject to the control of another party, except as to the result of the work. *Arkansas Transit Homes, Inc. v. Aetna Life & Casualty*, 341 Ark. 317, 16 S.W. 3d 545 (2000). The issue of whether an individual is an employee or an independent contractor is analyzed under two separate tests. The first test is the control test and the second is the relative nature of the work test. The Courts have held that if control of the work reserved by the employer is control not only of the result, but also of the means and the manner of the performance, then the relationship of employee/employer is applicable. However, if the control of the means is lacking and the employer does not undertake to direct the manner in which the employee discharges his duties, then the relationship of independent contractor exists. *Massey v. Poteau Trucking Company*, 221 Ark. 589, 254 S.W. 2d 959 (1953). The question is not whether the employer actually exercises control of the doing of the work, but whether it has the right to control. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W. 2d 110 (1989).

The Courts have recognized that there is no fixed formula for determining whether a person is an employee or an independent contractor, but rather this determination must be based upon the particular facts in each case. The Court has also noted that there are numerous factors which may be considered in determining whether one is an employee or an independent contractor. These factors include:

_____ (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

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

(c) 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;

(d) the skill required in the particular occupation;

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

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Cloverleaf Express v. Fouts, 91 Ark. App. 4, 207 S.W. 3d 576 (2005); *Aloha Pools and Spas, Inc. v. Employers Insurance of Wausau*, 342 Ark. 398, 39 S.W. 3d 440 (2000).

Factors pertaining to the nature of an individual's occupation and whether it is a part of the regular business of the employer compromise the "relative nature of the work" test. *Arkansas Transit Homes, supra*. The Court in *Sandy v. Salter*, 260 Ark. 486, 541 S.W. 2d 929 (1976) adopted a test for examining the relationship between the worker's occupation and the regular business of the employer. That test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. *Id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. *Id.*

In this particular case, when examining the control factors, there is evidence which would support findings that claimant is an independent contractor as well as evidence which would support a finding that he was an employee.

In support of its contention that claimant was an independent contractor, not an employee, respondent points out that claimant signed a Certificate of Non-Coverage. Respondent also notes that claimant was free to work on other jobs and was not limited to work with the respondent. Respondent also notes that claimant provided his own hand

tools and most importantly, respondent points out that it did not control the details of claimant's work but only informed claimant of the deadlines for when work needed to be completed and the pattern which the homeowner or builder had chosen for the brick work.

On the other hand, claimant relies upon various factors which would support a finding that he was an employee. While claimant did provide his own hand tools, there was testimony indicating that hand tools were provided by brick masons whether they were an employee or an independent contractor. Furthermore, the evidence indicates that all other materials and tools were provided by the respondent. This included all masonry materials such as the brick, mortar, and angle iron. Respondent also provided scaffolding, labor, shovels, wheel barrows, mixing machines, and cutting machines. There was also testimony presented indicating that respondent had a foreman present on each job site to make sure that the job is done properly. This includes insuring that the detail is proper on the house and that the work is performed up to quality. The foreman are also responsible for making sure that the job stays on schedule so that it is completed in time. Significantly, the claimant was not paid by the job but instead was paid an hourly rate based upon production. There was testimony presented at the hearing that the claimant and other brick masons would turn in their hours worked to the foreman who would in turn give those hours to Pullin. Claimant and the other masons were then paid according to those hours worked.

A significant factor in this case is the fact that respondent provided the laborers at the job site. Laborers were paid by the respondent and were not hired or paid by the claimant or other brick masons. The laborers were responsible for setting up the scaffolding, mixing mortar, and bringing brick and mortar to each individual brick mason.

Perhaps the most important factor in this case is the relative nature of the work test. As previously noted, that test requires consideration of two factors. The first factor is whether and how much the worker's occupation is a separate calling or profession and,

two, the relationship it bears to the regular business of the employer. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. Here, the claimant's occupation as a brick mason is a calling or profession. In this particular case, it bears a significant relationship to the regular business of the employer. The respondent is in the business of masonry work and the laying of brick or performing other projects involving masonry work to builders and homeowners. Without brick masons, the respondent's regular business cannot occur. Therefore, in this particular case, the claimant's occupation very much resembled the business of the respondent; therefore, it is more likely that the claimant was an employee.

The fact that claimant was essentially performing the work of an employee as opposed to an independent contractor is supported by testimony of Pullin indicating that claimant could have been an employee had he chosen to do so.

Q. Did you ever give him the option of being an employee versus an independent contractor?

A. He can. A lot of people don't like to do the employee deal because they lose a lot of income.

Based upon that testimony, it would appear that claimant could have been an employee and had taxes withheld had he chosen to do so. However, the nature of claimant's work would not have changed, simply the fact that he would have had taxes withheld from his weekly paychecks. The fact that claimant did not choose to have taxes withheld from his weekly paycheck is a factor, but is not the determining factor.

After consideration of all the relevant factors in this case, I find that claimant was an employee, not an independent contractor, on May 7, 2014. This finding is based primarily upon the relative nature of the work test. While claimant's occupation as a brick mason is a separate calling or profession, that occupation bears a significant resemblance to the business of the respondent. As previously noted, the respondent is a masonry company and it cannot perform its work without brick masons. As the Court recognized in *Sandy v.*

Salter, supra, the more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. Given the facts in this case, claimant's occupation as a brick mason exactly resembles the business of the respondent. Accordingly, based on the evidence presented, I find that claimant was an employee of respondent on May 7, 2014.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right hand while employed by respondent on May 7, 2014. Claimant contends that he suffered a compensable injury to his right hand as a result of falling from a platform which resulted in the amputation of one finger and the partial amputation of another finger on that date. Claimant's claim is for a specific injury identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

_____After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof. Specifically, I find that claimant has proven by a preponderance of the evidence that his injury to the right hand arose out of and in the course of his employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence. Here, claimant suffered an amputation of one finger and the near amputation of another finger when he fell while cleaning a window on a home on May 7, 2014.

I also find that claimant has proven by a preponderance of the evidence that the

injury caused internal or external physical harm to his body which required medical services or resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. Here, claimant's injury resulted in the amputation of his index finger and the near amputation of his right middle finger. Claimant was taken from the job site to the emergency room and underwent surgery on his right hand. The medical evidence and photographs establish that claimant has satisfied the remaining requirements of compensability.

Accordingly, I find based upon the evidence presented, that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right hand on May 7, 2014.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

The next issue for consideration involves claimant's contention that he is entitled to temporary total disability benefits. The injury to claimant's right hand is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first, regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). The last medical report from Dr. Taylor is dated July 14, 2014. In that report, Dr. Taylor indicates that claimant still lacks passive range of motion in his finger. Dr. Taylor indicated that he would see claimant on a return visit and at some point in the future would make a determination as to whether an additional procedure would be performed or whether claimant's hand would remain as it is. It is clear from a review of Dr. Taylor's medical records that claimant has not reached the end of his healing period for his compensable injury. In addition, claimant has not returned to work for the respondent or any other employer. Based upon this evidence, I find that claimant is entitled to temporary

total disability benefits beginning May 7, 2014, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

The final issue for consideration involves payment of the deposition of Chris Pullin. Claimant has requested reimbursement for the cost of the deposition of Pullin. Claimant contends that discovery was not fully answered and as a result it was necessary to take Pullin's deposition "for evidentiary purposes." Commission Rule 099.20 places the cost of depositions on the respondent after a case has been controverted when the deposition is to be made a part of the record. The rationale is that respondents are responsible for the costs of the transcripts and a deposition taken in lieu of a witness' appearance at the hearing should be the respondent's responsibility. The deposition of Pullin was taken not because Pullin would not be present at the hearing, but for evidentiary purposes as needed by claimant's attorney. While the deposition of Pullin was admitted into evidence, it was done so only as a convenience and not because Pullin would not be present. Pullin was in fact present at the hearing and as a result his deposition testimony was not needed in lieu of his testimony at the hearing. Given the fact that the purpose of the deposition was for evidentiary purposes as opposed to its submission at the hearing based upon Pullin's unavailability as a witness, I find that respondent is not liable for payment of Pullin's deposition. Therefore, claimant's request for reimbursement of the deposition cost is denied.

AWARD

The Arkansas Workers' Compensation Commission has jurisdiction of this claim. On May 7, 2014, the claimant was an employee of the respondent, not an independent contractor. Claimant suffered a compensable injury to his right hand while working for respondent on May 7, 2014. Respondent is liable for payment of all reasonable and

necessary medical treatment provided in connection with his compensable injury. Claimant is also entitled to temporary total disability benefits beginning May 7, 2014, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits. Finally, respondent is not liable to claimant for reimbursement of the cost of Chris Pullin's deposition.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$512.25.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE