BEFORE THE ARKANSAS WORKERS’ COMPENSATION COMMISSION

CLAIM NO. F114016

DANIEL MORALES, EMPLOYEE	CLAIMANT
HECTOR MARTINEZ d/b/a MARTINEZ PACKING COMPANY UNINSURED EMPLOYER	RESPONDENT NO. 1
HOLDEN-CONNER SEED & GRAIN, EMPLOYER	RESPONDENT NO. 2
MILLERS MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2
GAB ROBINS, THIRD PARTY ADMINISTRATOR	RESPONDENT NO. 2

OPINION FILED OCTOBER 21, 2003

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JAY N. TOLLEY, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by HONORABLE THOMAS L. TRAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas

Decision of the Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals an Administrative Law Judge’s opinion filed April 24, 2003. The Administrative Law Judge

found that the claimant’s injury of September 1, 2001, was the result of horseplay and thus was not a compensable injury; that the agricultural farm labor exemption did not apply to either respondent; and that respondent no. 2 was liable as a “prime contractor” under Ark. Code Ann. § 11-9-402. After reviewing the entire record de novo, the Full Commission finds that the claimant was not performing employment services at the time of his accident; that his injury was caused by horseplay; and that he has thereby failed to prove by a preponderance of the evidence that he sustained a compensable injury. The Full Commission further finds that the agricultural farm labor exemption is applicable to respondent no. 1, that respondent no. 2 is not a “prime contractor” under Ark. Code Ann. § 11-9-402, and that respondent no. 2 was not a special employer of claimant. We therefore affirm, as modified, the opinion of the Administrative Law Judge.

I. HISTORY

Respondent no. 1, Hector Martinez, d/b/a Martinez Packing Company, obtained temporary visas from the Immigration & Naturalization Service to bring the claimant

and several other Mexican laborers into the country to work. The claimant and his co-workers picked and packed produce on farms in Texas and Arkansas. Martinez carried no workers' compensation coverage for these workers.

On September 1, 2001, Martinez dispatched a group of workers including the claimant to clean a warehouse owned by respondent no. 2, Holden-Conner Seed & Grain, where Martinez had stored the watermelons picked by his employees. Three employees of Holden-Conner assisted with the clean-up. Holden-Conner was contractually obligated to lease the warehouse to Riceland Foods as of September 1 for storage of other crops, but Riceland granted Holden-Conner an extension of time before occupying the warehouse.

Several forklifts were located in and about the warehouse. At least one of the forklifts was used to move wooden pallets and boxes full of unusable produce out of the warehouse to a nearby field to be burned. The fire grew out of control, and the three employees of Holden-Conner left the warehouse to attend to the fire.

The three employees of Holden-Conner, along with one of the immigrant laborers, testified that prior to the fire,

the forklifts had been operated solely by the three employees of Holden-Conner. They testified that the claimant had not operated a forklift at any time prior to the fire. The claimant, along with one of the immigrant laborers, testified that he had been operating the forklift throughout the morning prior to the fire.

While the three employees of Holden-Conner were dealing with the fire outside, the claimant got on the forklift, began driving it, and overturned it. The forklift landed on his leg, resulting in partial amputation of the extremity below the knee.

The claimant testified that he had been authorized by Martinez to operate the forklift, that he had been operating it all morning, and that at the time of his injury he had been engaged in legitimate work, moving boxes and pallets. He denied that he was engaged in horseplay at the time of the accident. Martinez, however, testified that he never authorized claimant to operate a forklift. The three employees of Holden-Conner and one of the immigrant laborers likewise testified that claimant was not authorized to use the forklift.

The only witnesses to the accident itself were the claimant’s fellow immigrant laborers, two of whom testified by deposition. Isaias Torres Dominguez was described as the group’s leader by the claimant, but Dominguez and Martinez denied that Dominguez was the leader. As to the accident itself, Dominguez testified:

> Q. Okay. I think my original question was, during the period of time he worked for Mr. Martinez, did he drive a forklift?
>
> A. That day?
>
> Q. No, the whole time.
>
> A. No, no. He wasn’t a forklift worker.
>
> Q. Did you ever tell him to drive a forklift?
>
> A. No.
>
> Q. On the day he was injured, he was on a forklift?
>
> A. On the forklift, yes.
>
> Q. And it fell over. Did you tell him to get on the forklift?
>
> A. No, I didn’t tell him that.
>
> Q. Why did he get on the forklift?
>
> A. Because he wanted to get up on it.
>
> Q. Why?

A. Nobody told him to. I just come in, I was just coming into the warehouse when he was parked and he started up the forklift, and he was going around like this. And in an instant, he fell over.

Q. When you say he was going around like this, are you saying in a circle?

A. Yes, but he started up the forklift. He was at one door and he came and I was coming in and I just saw that he has two people in front of him, and he pushed down the accelerator like a game and that's why the thing fell.

Q. Was he driving fast?

A. Yes, playing and very hard with his foot.

Q. Hard with what foot?

A. Pushing down hard on the gas with his foot. He was going around in the circle. There was nothing to lift up. He didn't have to do anything there.

Q. Daniel indicated you told him to pick up boxes and take them outside.

A. I never said that. Never. It's negative, I never told him.

Angel Torres, who is the brother of Isaias Torres Dominguez, likewise witnessed the accident and testified by deposition. His testimony is confusing and contradictory – at one point, in the midst of testifying how he saw the accident, he denied that he saw it – but in at least some respects it agrees with that of his brother:

Q. You indicated a minute ago that Daniel was turning, I think you said. What are you talking about?

A. Well, he was just wasting time.

Q. Wasting time doing what?

A. Let’s say playing.

Q. Playing with what?

A. Forklift.

Q. Was he driving the forklift?

A. Yes.

Q. Was he told to drive the forklift?

A. I don’t know.

Q. Did you ever hear anyone tell him to get on the forklift?

A. No.

...

Q. Was he doing anything to assist in cleaning out the warehouse at that time?

A. No. He was just going making turns.

Angel Torres did testify that the claimant had been on the forklift all morning, as the claimant testified.

After a hearing before the Commission, the Administrative Law Judge found that claimant’s injury of

September 1, 2001, was the result of horseplay and thus was not a compensable injury; that the agricultural farm labor exemption did not apply to either respondent; and that respondent no. 2 was contractually liable as a statutory employer because respondent no. 1 failed to secure workers' compensation coverage for his employees. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

The Administrative Law Judge found that claimant's injury of September 1, 2001, was the result of horseplay and thus was not a compensable injury. We find that the claimant was not performing employment services at the time of his accident; that his injury was caused by horseplay; and that he has thereby failed to prove by a preponderance of the evidence that he sustained a compensable injury. We therefore affirm, as modified, the opinion of the Administrative Law Judge.

An injury is compensable only if it arises out of and in the course of employment. Ark. Code Ann. § 11-9-102 (4)(A)(i). The term "compensable injury" does not encompass

injuries incurred at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102 (4)(B)(iii). Likewise, injuries caused by horseplay are not compensable injuries. Ark. Code Ann. § 11-9-102 (4)(B)(i). Claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995).

We note at the outset claimant's contention that the horseplay defense is an affirmative defense and that the burden rests with the respondents to prove it. The horseplay defense is analogous to the employment services defense contained in the same section of the statute, Ark. Code Ann. § 11-9-102 (4)(B). The Commission has previously ruled that the employment services defense is not an affirmative defense, and that a claimant has the burden of proving that his injury occurred while he was performing employment services. Clardy v. Medi Homes LTC Services, LLC, Workers' Compensation Commission E911499 (Oct. 27, 2000). Likewise, we find here that claimant has the burden of proving that his injury occurred while he was performing employment services and that he was not engaged in horseplay.

Claimant argues from his own testimony and that of one of his co-workers that claimant was impliedly authorized to use the forklift, and that he had been on the forklift throughout the morning of the accident. That same co-worker, however, testified that claimant was not doing any legitimate work on the forklift. Likewise, claimant’s testimony that he spent all morning on the forklift working was directly contradicted by three employees of respondent no. 2 and one of his immigrant co-workers. We find that a preponderance of the evidence shows that claimant was not authorized to use the forklift, and that he had not been performing legitimate work on the forklift that morning. Therefore, we must find that claimant’s injury is not compensable, as it did not arise during the course of his performing employment services, as he was not performing his employment duties when he took his unauthorized “joyride” on the forklift. The claimant’s actions neither directly nor indirectly advanced his employer’s interests. To the contrary, we find that the claimant deviated from his employment services when he got behind the wheel of a forklift he was neither authorized nor asked to use.

Yet even if claimant was authorized to use the forklift, and even if he had been using it all morning, the fact remains that two of his co-workers testified he was engaged in horseplay at the time of the accident. Dominguez said the claimant "pushed down on the accelerator like a game", and that the claimant was "playing and very hard with his foot", driving too fast. Likewise, Torres testified that the claimant was "playing" and "wasting time". Of the hearing witnesses who actually saw the accident, only claimant alleged that he was engaged in legitimate work at the time of his injury. The other two witnesses testified that claimant was playing – that he was engaged in horseplay.

A claimant's testimony is not considered to be uncontroverted, Arkansas Dep't of Health v. Williams, 43 Ark. App. 169, 863 S.W.2d 583 (1993), and in this case we find the claimant's credibility to be sorely lacking. We therefore find that the claimant was engaged in horseplay at the time of his injury. Under these facts, we cannot find that the claimant has met his burden of proving a compensable injury.

B. Agricultural Farm Labor Exemption

The Administrative Law Judge found that neither respondent was exempted by the agricultural farm labor exemption. We find that the Administrative Law Judge erred as a matter of law. The Full Commission therefore reverses the Administrative Law Judge on this issue as to respondent no. 1.

A work injury is not compensable if it arises out of and in the course of an employment that consists of "agricultural farm labor." Ark. Code Ann. § 11-9-102 (11)(A)(iii). In determining whether an employment is "agricultural farm labor", the courts have emphasized the nature and character of the employer's business as opposed to the tasks performed by the employee. Dockery v. Thomas, 226 Ark. 946, 295 S.W.2d 319 (1956). The question of whether an employment consists of agricultural farm labor is one of law. Griffith v. International Cattle Embryo, Inc., 23 Ark. App. 58, 742 S.W.2d 124 (1988). An injury incurred in the course of performing a non-farm work function is still exempt from compensation if the primary nature of the employer's business is agricultural. See, e.g., Gwin v. J.

W. Vestal & Son, 205 Ark. 742, 170 S.W.2d 598 (1943).

Respondent no. 1, Hector Martinez, testified that his business was to bring employees from Mexico for the purpose of picking produce from the field and packing it. Any other tasks appear to have been secondary to this central purpose. Martinez had a contract with Arkansas Watermelons, Inc. to pick and pack watermelons. At the time of claimant’s injury, Martinez’s employees were cleaning out the warehouse used to store the watermelons they had picked. We find that the primary function of the business of respondent no. 1 was picking and packing produce – an activity which is unquestionably agricultural farm labor. There is nothing in the record to suggest that respondent no. 1 ever provided contract labor for anything other than agricultural duties. We therefore find that respondent no. 1 is exempted from workers’ compensation coverage by the agricultural farm labor exemption.

Respondent no. 2 contended that it too is protected by the agricultural farm labor exemption, but there is no evidence in the record on which we can determine whether the nature and character of its business is primarily

agricultural. We therefore affirm the Administrative Law Judge’s finding that respondent no. 2 is not protected by the agricultural farm labor exemption.

C. Contractual Liability

The Administrative Law Judge found that respondent no. 2 was liable as a prime contractor to the employees of respondent no. 1, as it was undisputed that respondent no. 1 was uninsured. The Administrative Law Judge made no finding that respondent no. 2 was contractually obligated to a third person for the work being performed, and the record does not support such a finding. The Full Commission therefore reverses the Administrative Law Judge on this issue.

A prime contractor is liable for injuries incurred by employees of an uninsured subcontractor. Ark. Code Ann. § 11-9-402. A subcontractor is defined as “one who takes portion of a contract from principal contractor or another subcontractor.” Black’s Law Dictionary 1424 (6th ed. 1991), cited with approval in D & M Contr. Co. v. Archer, 14 Ark. App. 198, 686 S.W.2d 799 (1985). Before an entity can be found to be a subcontractor, it must be shown that the prime contractor was contractually obligated to a third person for

the work being performed. Bailey v. Simmons, 6 Ark. App. 193, 639 S.W.2d 526 (1982). Whether an entity is a subcontractor is a question of fact. Wright v. ABC Air, Inc., 44 Ark. App. 5, 864 S.W.2d 871 (1993). In the absence of a third party contractual obligation, no contractor/subcontractor relationship can exist and thus the statute would not apply.

Arkansas Watermelons, Inc., which is not a party to this case, was lessee of the warehouse where the claimant's accident occurred. Hector Martinez had a contract with Arkansas Watermelons to pick and pack watermelons, store them in the warehouse, and clean the warehouse at the end of the job. Arkansas Watermelons had no employees and thus no workers' compensation insurance.

Holden-Conner Seed & Grain was owner and lessor of the warehouse, and three of its employees participated in the clean-up effort with Martinez's employees. Riceland Foods, which is not a party to this case, had a contract with Holden-Conner to lease the warehouse upon the completion of Arkansas Watermelons' lease.

We note that there is no evidence in the record of any

contractual relationship between Martinez and Holden-Conner. Holden-Conner and Arkansas Watermelons do appear to share a common owner, John Conner, Jr., but there is insufficient evidence in the record to conclusively determine that relationship. This uncertainty ultimately has no bearing on our resolution of the contractual liability issue.

Hector Martinez could have been a subcontractor to Arkansas Watermelons only if Arkansas Watermelons was contractually obligated to a third party for the work being done by claimant and Martinez’s other employees. Yet there is no evidence in the record of any such third party contractual obligation on the part of Arkansas Watermelons. Without that third party, Martinez can in no way be defined as a subcontractor, and thus the provisions of Ark. Code Ann. § 11-9-402 cannot apply.

Claimant argues instead that Holden-Conner was the prime contractor, and that Riceland Foods was the third party to which Holden-Conner was contractually obligated. Claimant argues that the cleaning of the warehouse was necessary for Holden-Conner to fulfill its agreement to subsequently lease the warehouse to Riceland. Claimant’s

theory, while novel, fails to persuade.

We agree that Riceland benefitted from the clean-up work performed by Martinez's employees. Yet the lease agreement between Holden-Conner and Riceland was never offered into evidence, and there is nothing in the record to show that Holden-Conner was contractually obligated to Riceland to clean the warehouse. To find that Holden-Conner was contractually obligated to Riceland would require us to engage in speculation. Speculation and conjecture, no matter how plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

We also note the uncontradicted testimony of Hector Martinez and John Conner, Jr., that Martinez's contract with Arkansas Watermelons specifically required the cleaning of the warehouse at the end of the contract. The work being performed by claimant and his co-workers was in furtherance of a contractual obligation owed by Martinez to Arkansas Watermelons. There is no evidence in the record before us to show that the contractual obligation extended to any third party, thus we find that Martinez was not a subcontractor.

We therefore find that even if this injury were compensable, Holden-Conner would not be liable as a prime contractor under Ark. Code Ann. § 11-9-402.

D. Special Employee Status

Claimant argues in the alternative that he was a special employee of Holden-Conner. The Administrative Law Judge made no findings as to this issue. Because we have reversed the Administrative Law Judge's finding of contractual liability, it is incumbent on us to address claimant's alternative argument. We therefore find that claimant has failed to prove he was a special employee of Holden-Conner.

When one employer loans the services of an employee to a second employer, the second employer may be liable for a compensable injury suffered by the employee while in the second employer's service. The Supreme Court has adopted Professor Larson's three-prong test for assessing compensability in such cases, and each prong must be satisfied for the special employer to be liable:

> (a) The employee has made a contract for hire, express or implied, with the special employer;

> (b) The work being done is essentially that of the special employer; and
>
> (c) The special employer has the right to control the details of the work.

Sharp County Sheriff's Office v. Ozark Acres, 349 Ark. 20, 75 S.W.3d 690 (2002).

Martinez testified that Conner called and asked for the services of his employees to clean out the warehouse the day of the accident. Martinez did not accompany his employees to the warehouse, as he had to travel out of state to attend to a family emergency. Martinez also testified that Conner offered to pay the employees on an hourly basis. Conner, however, testified that cleaning the warehouse was part and parcel of Martinez's original contract with Arkansas Watermelons, and that no additional compensation was to have been provided. This testimony could support a conclusion that Conner, on behalf of Holden-Conner Seed & Grain, entered into a contract with the claimant, and that Holden-Conner controlled the details of the work in Martinez's absence, meeting the first and third prongs of the test.

However, both Martinez and Conner testified that Martinez was contractually obligated to Holden-Conner to

clean the warehouse. Nothing in the record contradicts their testimony as to this contractual obligation. The work being done by the claimant and his coworkers was essentially that of Martinez, because he was contractually obligated to clean the warehouse. Both employers had an interest in the cleaning of the warehouse, but Martinez's interest was far more substantial in that he was fulfilling a contractual obligation to Holden-Conner. As noted above, there is no evidence in the record to show that Holden-Conner was contractually obligated to Riceland Foods or any other third party to clean the warehouse.

We therefore find that the work being done by the claimant that morning was essentially that of Martinez, and thus even if this injury were compensable, respondent no. 2 would not be liable to claimant as a special employer.

III. CONCLUSION

Based on our de novo review of the entire record, the Full Commission finds that the agricultural farm labor exemption is applicable to respondent no. 1, that respondent no. 2 is not a "prime contractor" under Ark. Code Ann. § 11-9-402, and that respondent no. 2 was not a special employer

of claimant. However, we find that the claimant was not performing employment services at the time of his accident; that his injury was caused by horseplay; and that he has thereby failed to prove by a preponderance of the evidence that he sustained a compensable injury. We therefore affirm, as modified, the opinion of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.