

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E607341

HOWELL PIPPIN, JR., EMPLOYEE	CLAIMANT
HOWELL PIPPIN, JR., EMPLOYER	RESPONDENT NO. 1
HOUSTON GENERAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
CASEY FLYING SERVICE, (UNINSURED)	RESPONDENT NO. 2

OPINION FILED NOVEMBER 18, 2003

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

Claimant represented by HONORABLE JOE M. ROGERS, Attorney at
Law, West Memphis, Arkansas.

Respondents represented by HONORABLE CAROL L. WORLEY,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The claimant appeals and Respondent No. 1 cross-appeals
from a decision of the Administrative Law Judge filed
December 9, 2002. The Administrative Law Judge entered the
following findings of fact and conclusions of law:

1. There was a crop dusting accident on April 4,
1996.
2. The compensation rate is \$337.

3. The claimant has proven by a preponderance of the evidence that the claim is not barred by the statute of limitations.
4. The preponderance of the evidence provides that the claimant is an independent contractor and not an employee of Respondent No. 2.
5. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment he has sought since July 1998 is reasonable and necessary and related to the compensable injury.
6. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from October 20, 1997 through July 27, 1998.
7. Respondent No. 1 is liable for the additional temporary total disability benefits.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission

on appeal. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I respectfully concur in part and dissent in part from the majority opinion, which in all respects affirms and adopts the decision of the Administrative Law Judge. Specifically, I concur in the majority's affirming and

adopting the Administrative Law Judge's determinations that the present claim is not barred by the statute of limitations; that the claimant is an independent contractor, and not an employee of Respondent #2, Casey Flying Service; and that the claimant is entitled to temporary total disability benefits from October 20, 1997 through July 27, 1998. However, I must respectfully dissent from the majority's affirming and adopting the Administrative Law Judge's determinations that the claimant is not entitled to any additional medical treatment for his compensable injury since July 1998; and that the claimant is not entitled to temporary total disability benefits from July 27, 1998 to a date yet to be determined.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has failed to prove by a preponderance of the evidence that the additional medical treatment that he has sought since July of 1998 is

reasonable and necessary and related to his compensable injury. However, I must dissent from the majority's finding that the claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from October 20, 1997, through July 27, 1998. Further, I dissent from the majority's opinion finding that the claimant was an independent contractor of Casey Flying Service. In my opinion, the claimant has failed to meet his burden of proof.

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). 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) citing §220 of the Restatement (Second) of Agency:

1. the extent of control which, 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, the work 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 the time or by the job;
8. whether or not the work is a 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
10. 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 my opinion, a review of the evidence indicates that the claimant was an employee of Casey Flying Service. The claimant testified as follows:

- Q. Was there any point in time when you were with Casey Flying Service that you did not consider yourself an employee?
- A. No. I considered myself an employee.
- Q. At all times you thought you were an employee; didn't you?
- A. Yes.
- Q. And you told me in your deposition and you've testified here today that you were hired by Warren Casey as an employee. Is that correct?
- A. Yes.
- Q. You flew their planes; is that right?
- A. Right.
- Q. You dusted crops that the negotiated?

A. Yes.

Q. You didn't do any of the negotiation with the farmers or anything like that?

A. That's true.

Q. Okay. I guess they got all the job contacts for you. The only thing you had to do was show up; is that correct?

A. Yes.

Q. Would you agree with me, Mr. Pippin, that they had absolute and complete control over everything you did at work as far as the jobs and everything?

A. Yes.

Q. I believe you've already testified that they provided the equipment and you were flying their planes; is that correct?

A. Yes.

Q. And you told me in your deposition that they did all the maintenance on the planes. You weren't required to do any of that?

A. Yes.

In addition, the claimant testified:

Q. Do certain farmers request certain pilots?

A. I never had that.

Q. You didn't have any regular farming customers that you flew for?

A. No.

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Q. In fact, you told me that when you first went to work with [Casey], they paid workers' compensation on you the first year. Isn't that correct?

A. Yes. At least they said they did.

Q. It wasn't until the second year that they actually asked you to get workers' comp on yourself; is that correct?

A. Yes.

The testimony also revealed that although Casey Flying Service asked Claimant to secure workers' compensation coverage for himself, they actually gave him the money to do so. (t.41) Additionally, Casey Flying Service contacted the insurance agent and set everything up; all the claimant had to do was walk in and sign the papers.

As for the way Claimant was paid, he explained:

Q. And you were paid a percentage of the profits. Was it 25% of what you - the crops that you dusted?

A. Yes.

Q. As far as Casey being your employer, it looks like you filed a complaint in Circuit Court

indicating that Casey Flying Service was your employer; is that correct?

A. Yes.

The Claimant reported to his doctors that he was an employee of Casey Flying Service. In my opinion, the evidence in this case clearly establishes that the claimant was not an independent contractor. Casey Flying Service had complete control over the details of the work farmers did not individually contact the claimant. He just showed up for work, and Casey took care of all the job contacts. Further, Casey provided the planes and the fuel, and they did all of the maintenance work on the planes. The claimant worked solely for Casey for a period of approximately one year. In fact, during the first year, Casey provided workers' compensation coverage for the claimant. When they later asked him to get his own insurance, they paid for it. Although there was testimony that Casey considered the money to be a loan, no evidence was presented that the money was ever repaid by the claimant, and the claimant never considered it to be a loan. Lastly, the claimant testified that he at all times considered himself to be an employee of Casey Flying Service. Therefore, it is my opinion, that the

claimant was an employee of Casey Flying Service and not an independent contractor.

With respect to the award of additional temporary total disability benefits, I find that the claimant has failed to prove by a preponderance of the evidence that he was entitled to any additional temporary total disability benefits after October 20, 1997. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. McWilliams, Parker, supra. In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he

suffered a total incapacity to earn wages (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The medical records do not support a finding of additional temporary total disability benefits after October 20, 1997. In a detailed letter to the Respondents dated July 27, 1998, Dr. Rodney Field, a neurosurgeon, who performed and independent medical evaluation on the claimant, made the following observations:

1. The diagnosis is as illustrated. I think the patient is taking excessive quantities of narcotics for a nonmalignant syndrome.
2. Prognosis. I suspect that he will continue to complain of pain and refuse to work. He seems fairly fixed. All of the studies are normal as you know. I am confused as to how Dr. Howser can make a diagnosis of a facet syndrome when the MRI photographs do not reveal any abnormality of his facets, in fact show a relatively normal lumbar spine at 50 years of age. In my opinion the prognosis is good for returning to work because I would have recommended that he return to work within 30 days following the accident.
3. Present treatment and planned future treatment. I don't think he needs any present treatment other than with medication that he can buy over the counter at the drug store. I do not think he needs any planned supervised medical treatment.
4. When was Mr. Pippin able to return to work? In my opinion he should have returned to work

within 30 days or even sooner following the wreck.

5. Are there any pre-existing injuries or medical problems? Not to my knowledge.
6. When did Mr. Pippin reach the end of his healing period? In my opinion within 30 days following the crash.
7. Current charges and anticipated future charges. I can't see the reason for any charges. In fact, I can't see the reason why this patient has been off for two years with entirely normal studies, being a negative CAT scan of his back, a negative MRI of his thoracic spine and lumbar spine, a normal EMG and a normal myelogram. He does have arthritis of his neck but that is consistent with his age. I do not see why this patient has been given narcotics in the form of Lorcet and Vicodin for nonmalignant pain this long. These are addicting. He also has been given Soma which is a semiaddicting medication, at least it is a street drug. There is no reason for this.

Therefore, when I consider all of the evidence, I cannot find that the claimant was entitled to any additional temporary total disability benefits after October 20, 1997. The claimant's medical testing was negative in all respects. Further, Dr. Field stated that he would have released the claimant to return to work after thirty days. Accordingly, I must dissent from the majority's opinion awarding temporary total disability benefits after October 27, 1997.

Therefore, for all the reasons set forth herein, I must respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner