

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305579

LUTRICIA COKER, EMPLOYEE

CLAIMANT

SCOOTERS, AN UNINSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 18, 2004

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

Claimant, LUTRICIA COKER, is not represented by counsel, but appears pro se.

Respondent, SCOOTERS, AN UNINSURED EMPLOYER, is not represented by counsel, but appears pro se by its representative, Beverly McKennon.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 7, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

The claimant fails to meet her burden of proving by a preponderance of the evidence of record that she sustained an injury arising out of and during the course and scope of her employment on May 27, 2003.

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ The majority has failed to address the sole issue raised by the parties before the Commission, which was whether Claimant was an employee or independent contractor at the time of the injury. The parties stipulated to compensability. Despite that stipulation, the majority finds that Claimant's injury is not compensable because no medical records were submitted into evidence. In effect, the majority opinion penalizes Claimant for not submitting records that are totally irrelevant to the question presented.

In so reasoning, the majority has ignored the parties stipulations and did not address the only issue presented by the parties to the Commission. The majority's failure to address the sole issue raised by the parties is contrary to the Court of Appeals recent decision in Judy Michael v. Keep & Teach, Inc., Ark. Ct. App. CA 03-978 (June 16, 2004), in which the Court remanded the case to the Commission "[d]ue to the Commission's failure to render findings and draw a conclusion on the issue presented and litigated." I, therefore, dissent from the majority opinion.

The Prehearing Order states that the parties stipulated to compensability and that Respondent's only contention was that Claimant was not an employee at the time of the injury. The majority has not made a finding regarding Claimant's employment status as either an employee or independent contractor at the time of the injury. I find that Claimant was an employee of Respondent at the time of the injury and, accordingly, is entitled to compensation.

The record reveals that Claimant was a friend of Renee Young who was the manager of the Respondent restaurant, Scooters. It is undisputed that Young asked Claimant to work as a waitress and in the kitchen of the restaurant on several occasions. On May 27, 2003, Claimant was injured when a metal shelf fell and hit her neck and left shoulder while she was working in the restaurant. Claimant described her work arrangement prior to injury as follows:

A: When I originally started, Renee would call me and I would go in and help out in the kitchen. I filled in a couple of days through lunch and waitressed. Then she called, and I came in and worked -

Judge: Let me back up just a minute. When she would call you and you would do that, would you work like maybe an hour or two?

A: No. Some days I worked eight hours. I'd go in in the morning and work until close, and sometimes I'd go in at 11:00 and work until close.

Claimant testified that Young paid her in cash the first time that she worked and that Scooter's co-owner, Beverly McKennon, also paid her with a company check on several occasions. Claimant's Exhibit 1 includes a copy of a Scooters check dated May 16, 2003, made payable to "Trish" and signed by "BA McKennon." Also included in Exhibit 1 are two check stubs dated "5/28", for 21 hours of work, and "5/21/03" for 17 hours of work.

Beverly McKennon, co-owner of Scooters, corroborated Claimant's testimony regarding Claimant's work arrangement at Scooters through Renee Young:

As Ms. Coker stated, she was a friend of Ms. Young's and she did come in and work periodically when Ms. Young called her. Ms. Young did pay her cash. The reason that I wrote her a check was just like if I wrote somebody a check to check my dishwasher or to mow my yard. Ms. Young said she didn't have the cash to pay her one day and asked me if I would write a

check, and I said, 'Sure.' ... She was not an employee of ours; we did not employ Ms. Coker. Ms. Coker only came when she was called in for a couple hours a day. I never remember Ms. Coker ever working eight hours straight...

Judge: All right. Ms. McKennon, to couch this in terms of a contention for somebody up above me that may take a look at this, your contention is that Ms. Coker was not an employee?

The Respondent: Was not an employee.

Judge: But rather would have filled in from time to time for somebody else. And the check that you gave, you would have treated that as contract labor for workers' compensation purposes?

The Respondent: Yes.

The Prehearing Order states that the parties stipulated to compensability regarding Claimant's injury on May 27, 2003, at Respondent's restaurant: "Respondent stipulates that the claimant sustained an injury when a piece of shelving fell and struck her on the neck and shoulder on May 27, 2003."

The Order further defines the parties' contentions as follows:

Claimant: Claimant contends that she was an employee for the respondent on May 27, 2003, and sustained an injury arising out of and during the course and scope of her employment. The claimant contends she made \$5.00 an hour plus tips. The claimant contends that she worked approximately three weeks as a regular part-time employee prior to her injury. The claimant contends she is entitled to temporary total disability benefits from May 27, 2003 through June 23, 2003, as well as attendant medical benefits.

Respondent: Respondent contends that the claimant was not an employee on May 27, 2003, and controvert the claim in its entirety.

We have recognized that there are nine factors to be considered when determining employment status: (1) the right to control the means and the method by which the work is done; (2) the right to terminate the employment without liability; (3) the method of payment, whether by time, job, piece or other unit of measurement; (4) the furnishing, or the obligation to furnish, the necessary tools, equipment and materials; (5) whether the person employed is engaged in a distinct occupation or business; (6) the skill required in a particular occupation; (7) whether the employer is in business; (8) whether the work is an integral part of the

regular business of the employer; and(9) the length of time for which the person is employed. Marlar v. Stevens, Full Commission Opinion June 26, 2003 (F205323); Wright v. Tyson Foods, 28 Ark. App. 261, 773 S.W.2d 110 (1989). I find that the reasoning in Marlar is controlling here and that each of these factors, when applied to the facts of this case, weighs in favor of Claimant's classification as an employee rather than as an independent contractor.

As for Factor (1), I find that Respondent, through its manager, controlled the means and methods of Claimant's work as kitchen help and a waitress. Claimant, who worked as a waitress and as kitchen help in Respondent's restaurant, worked at the direction of, and under the supervision of, Respondent's manager. This factor weighs in favor of Claimant.

As for Factor (2), the right to terminate without liability, there is no evidence of a contract between Claimant and Respondent. Instead, the weight of the evidence shows that Claimant worked "at will" and could have been terminated at any time.

As for Factor (3), the method of payment, the record shows that Claimant was paid per hour for her work. The check stubs submitted as Exhibit 1 show that Claimant was paid an hourly rate for her work and Claimant likewise gave undisputed testimony that she was paid an hourly rate.

As for Factor (4), the furnishing or obligation to furnish necessary tools, equipment and materials, there is no evidence that Claimant furnished any tools or materials while working as a waitress and in the kitchen of Respondent's restaurant.

As for Factor (5), whether Claimant is employed in a distinct occupation or business when performing the relevant work, the preponderance of the evidence shows that Claimant worked as a general restaurant laborer.

As for Factor (6), whether Claimant's work required any special skill, there is no indication that Claimant's job as a waitress and "kitchen help" was a skilled occupation. Instead, it appears that these are unskilled labor positions in a local restaurant.

As for Factor (7), whether the employer is in business, the Respondent admits that, for all times relevant

hereto, it was in the restaurant business and that the manager had requested that Claimant work in furtherance of that business.

As for Factor (8), whether the work is an integral part of the employer's regular business, Claimant's work in the kitchen and as a waitress clearly is an integral part of Respondent's restaurant business.

As for Factor (9), the length of time for which the person is employed, the record shows that Claimant worked on an "as needed" basis for several days at a time. At the hearing, Respondent described that the period of time in question was during the first three weeks of the restaurant's opening. The Full Commission has recognized that similar work on an "as needed" basis that was necessary to an employer's business was employment within the course of the respondent employer's business. Comer v. Concord Boat Corp., July 10, 1995 (E408167).

Under the analysis of these nine factors, I find that Claimant was an employee rather than an independent contractor when she was injured while working in Respondent's restaurant.

Based on my de novo review of the record, I find that the only issue before the Commission was whether Claimant was an employee at the time of the injury and that the majority has erred in failing to make a finding on that issue. I further find that Claimant was an employee of Respondent at the time of her injury and, therefore, is entitled to reasonably necessary medical treatment and temporary total disability benefits for any period within the healing period in which she suffered a total incapacity to earn wages. For these reasons, I dissent from the majority opinion.

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SHELBY W. TURNER, Commissioner