

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F003440

LESLIE A. KEETER, EMPLOYEE	CLAIMANT
MICHAEL WHITLOCK d/b/a MICHAEL WHITLOCK TRUCKING CO., EMPLOYER	RESPONDENT NO. 1
CLARENDON NATIONAL INSURANCE, INSURANCE CARRIER	RESPONDENT NO. 1
AGGREGATE TRANSPORTATION SPECIALIST, LLC, EMPLOYER	RESPONDENT NO. 2
MISSOURI EMPLOYERS MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2
JOURNIGAN CONSTRUCTION CO., EMPLOYER	RESPONDENT NO. 3
BUILDERS ASSOCIATION OUTSTATES INSURANCE PLAN, BENCHMARK INS. CO.	RESPONDENT NO. 3
JONES BROS., INC., EMPLOYER	RESPONDENT NO. 4
LUMBERMAN'S UNDERWRITING ALLIANCE,	RESPONDENT NO. 4
DEATH & PERMANENT DISABILITY FUND	RESPONDENT NO. 5

OPINION FILED APRIL 12, 2004

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

Claimant represented by the HONORABLE JOSEPH H. PURVIS,
Attorney at Law, Little Rock, Arkansas.

Respondent, employer No. 1 not represented by counsel.

Respondent carrier No. 1 dismissed as a party.

Respondent employer No. 2 represented by the HONORABLE
CONSTANCE G. CLARK, Attorney at Law, Fayetteville,
Arkansas.

Respondent carrier No. 2 represented by the HONORABLE J.
C. BAKER, Attorney at Law, Little Rock, Arkansas.

Respondent employer No. 3 represented by the HONORABLE
WAYNE HARRIS, Attorney at Law, Fort Smith, Arkansas.

Respondent carrier No. 3 represented by the HONORABLE
FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondents No. 4 represented by the HONORABLE TERENCE
C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondent No. 5 not participating in hearing.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents No. 4 appeal and Respondents No. 3
cross appeal an opinion and order of the Administrative
Law Judge filed December 5, 2002. In said order, the
Administrative Law Judge made the following findings of
fact and conclusions of law:

1. That the Arkansas Workers' Compensation
Commission has jurisdiction of this claim.
2. That the stipulations agreed to by the
parties at the pre-hearing conference conducted
on April 30, 2002, and contained in a pre-
hearing order filed April 30, 2002, as well
as those at the hearing herein, are hereby
accepted as fact.
3. That the Claimant has proven by a
preponderance of the evidence that he sustained
compensable specific incident injuries on
September 13, 1999 in the form of a severe
closed head injury, fractured cervical spine

at the C-5 level, right pneumothorax, scalp laceration, and a right elbow fracture; specifically, Claimant has proven by a preponderance of the evidence that such injuries arose out of and in the course of his employment when he was involved in a motor vehicle accident on September 13, 1999, while engaged in carrying materials to the work site of the Highway 62-412 highway construction project contracted by RE4 with the Arkansas State Highway Department; that the motor vehicle accident of said date caused internal or external physical harm to the body which required medical services and resulted in disability; that there is a preponderance of the medical evidence in the record, supported by objective findings, as defined in A.C.A. § 11-9-102(16), establishing the injuries; and that there is proof by a preponderance of the evidence that the injuries were caused by a specific incident and are sufficiently identified by time and place of occurrence.

4. That the Claimant has proven by a preponderance of the medical evidence and the credible non-medical evidence that he is entitled to receive reasonably necessary medical treatment which is causally related to his compensable injury of September 13, 1999; specifically, I find that the treatment incurred by Claimant as reflected in Claimant's Exhibit 1, and summarized at page 75 thereof, is reasonably necessary, and causally related to Claimant's compensable injury, and that Claimant should be entitled to such additional medical treatment, if any, that is reasonably necessary and causally related to said compensable injury.

5. That the Claimant has proven by a preponderance of the evidence that he was entitled to receive temporary total disability benefits for the period from September 13, 1999 to May 25, 2000; specifically, Claimant has proven that he remained in his healing period and was totally incapacitated from earning wages on account of his compensable

injury during the period from September 13, 1999 to May 25, 2000.

6. That the Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled; specifically, the Claimant has proven that the opinion of Dr. Terry Winkler that Claimant is 100% totally and permanently disabled is entitled to great weight; that Claimant was a normally functioning adult, aged 22 years, when he experienced the multiple trauma of his compensable injury on September 13, 1999, sustaining permanent brain damage, and that said compensable injury is the major cause of his permanent disability and need for medical treatment.

7. That the Claimant has failed to prove by a preponderance of the evidence that he is entitled to any benefits pursuant to Ark. Code Ann. §11-9-505, but he is not barred pursuant to 11-9-526 from receiving permanent and total disability compensation.

8. That the Claimant has proven by a preponderance of the evidence that he was an employee of Respondent Employer #1 at the time he sustained his compensable injury, and that Respondent Employer #1 was an uninsured employer for purposes of having workers' compensation insurance coverage.

9. That the Claimant has proven by a preponderance of the evidence that Respondent Employer #4 had a direct contract with the Arkansas State Highway Commission involving the 62-412 highway expansion project west of Harrison, Arkansas at the time Claimant sustained his compensable injury; that Respondent Employer #4 entered into a written contract with Respondent Employer #3 where Respondent Employer #3 was a subcontractor; that in turn, Respondent Employer #3 orally contracted with Respondent Employer #2 to assist Respondent Employer #3 in carrying out the terms of its subcontract with Respondent Employer #4; that Respondent

Employer #2 engaged the services of Respondent Employer #1 to assist Respondent Employer #2; that Respondent Employer #3 controlled the means and methods by which Respondent Employer #2 was to perform, and likewise, and Respondent Employer #2 controlled the means and method by which Respondent Employer #1 was to perform; that Respondent Employer #3 had the right to terminate Respondent Employer #2 at will, as did Respondent Employer #2 of Respondent Employer #1; that Respondent Employer #3 paid Respondent Employer #2 based upon the number of truck loads hauled, and Respondent Employer #2 likewise paid Respondent Employer #1 based upon the number of truck loads hauled.

10. That the Claimant has proven by a preponderance of the evidence that Respondent Employer #1 was a sub-contractor of Respondent Employer #2 at the time and where Claimant's compensable injury occurred; that Respondent Employer #2 was a sub-contractor of Respondent Employer #3 at the time and where Claimant's compensable injury occurred; that Respondent Employer #3 was a sub-contractor of Respondent Employer #4 at the time and where Claimant's compensable injury occurred; that Respondent Employer #4, Jones Brothers, Inc., was the prime contractor on the 62-412 highway construction project west of Harrison, Arkansas, on September 13, 1999, when the Claimant sustained his compensable injury; and that Respondent Employer #4 is liable to Claimant as the "statutory employer" pursuant to Ark. Code Ann. § 11-9-402.

11. That pursuant to Ark. Code Ann. § 11-9-402, Respondent Employer #4 shall be entitled to a lien against monies due or to become due to Respondent Employer #3; that Respondent Employer #3 shall be entitled to a lien against monies due or to become due to Respondent Employer #2; and that Respondent Employer #2 shall be entitled to a lien against monies due or to become due to

Respondent Employer #1.

12. That the Claimant's attorney is entitled to the maximum statutory attorney's fee on all benefits awarded herein.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 5, 2002 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion 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 in part 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

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant was engaged in employment services at the time he sustained his injuries. In my opinion, the claimant has failed to meet his burden of proof. The evidence demonstrates that the claimant has no independent recollection of what specific job or construction project he may have been working on at the time of his accident. The claimant testified in part as follows:

Q: Do you remember the job you were working on when you had your accident?

A: No.

Q: Do you remember that you were hauling materials to some - or rock to some place in north Arkansas?

A: Yes.

Q: Where were you hauling whatever it was you were hauling?

A: I don't remember.

Q: Do you remember what you were hauling?

A: Rock.

Q: Do you remember where you would pick that rock up?

A: Harrison.

BECKY KEETER: Harrison.

A: Yeah.

Q: Do you remember where in Harrison you would pick the rock up?

A: No.

Q: And after you picked it up, where would you take the rock?

A: I forgot.

The claimant has no independent recollection of what specific job or construction project he may have been working on at the time of his accident.

Specifically, The claimant's testimony is completely void of any evidence or proof that the claimant was performing work in furtherance of the written subcontract agreement between RE4-Jones Brothers, Inc., and RE3-Journagan.

No party to the written contract testified that the claimant's injury occurred in furtherance of work contracted between RE4-Jones and RE3-Journagan. The only evidence offered by a party to the contract between RE4-Jones and RE3-Journagan was the testimony of James Holt. However, Mr. Holt did not testify that the claimant's injury arose in furtherance of the written contract between RE-Jones and RE3-Journagan.

In questioning by the claimant's attorney, Mr. Holt testified as follows:

Q: (By Mr. Purvis) the contract or the agreement that you signed with - with the folks at Jones Bros. Repairing the highways there and - and maintaining the highways in North Arkansas that - in the summer of - of '99 and - was that - or in the summer from '97 to '99, was that contract to extend for a number of years or at least until that project was finished?

A: Again, it's hard for me to answer without - we had more than one Contract.

Q: All right. I'm going to -

A: It's hard for me to just - I don't want to speculate."

Mr. Holt further testified as follows:

Q: So that trucks - let me back up. Did you also - or were you also doing contracts in the summer of 1999 in the state of Missouri?

A: Yes.

Q: Where were you doing contracts in - in the summer and fall of '99 in Missouri?

A: Too many locations for me to recall.

Mr. Holt acknowledged that RE3-Journagan had more than one contract in existence during the time period of the claimant's accident in Northern Arkansas. Mr. Holt unequivocally did not testify that the claimant's injury arose in furtherance of the specific contract between RE4-Jones and RE3-Journagan. Obviously, since, by RE3-Journagan's own admission that more than one contract existed during the time period of the claimant's accident in that RE3-Journagan was working on more than one project, it cannot be assumed or speculated that the claimant's injury was in furtherance of the particular contract between RE4-Jones and RE3-

Journagan for which the claimant has sought to establish liability.

Clearly, to establish whether the claimant was injured in furtherance of the written contract between RE4-Jones and RE3-Journagan, evidence must be offered by a contracting party or a qualified individual familiar with the contract that the claimant's injury occurred in furtherance of the written contract between RE4-Jones and RE3-Journagan. Although the claimant may have been working for RE3-Journagan in some capacity, it is clearly not established that the claimant's work was in furtherance of the specific written contract in evidence between RE4-Jones and RE3-Journagan.

Accordingly, I cannot conclude that the claimant established by a preponderance of the credible evidence that he was injured in furtherance of work specifically contracted between RE4-Jones and RE3-Journagan. To the contrary, the only proof offered by any witness familiar with the contract specifically testified that RE3-Journagan had more than one contract in Northern Arkansas at or near the time of the claimant's injury. Mr. Holt would not assume or speculate that the claimant's injury was a result of the specific contract between RE4-Jones and RE3-Journagan.

Accordingly, to assume that the claimant was injured in furtherance of the specific contract in evidence between RE4-Jones and RE3-Journagan would be nothing more than conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Even if I were to find that the claimant was engaged in employment services at the time he sustained his injuries, I find that the subrogation interest, as awarded by the majority, is incorrect. Finding No. 11 in the Administrative Law Judge's opinion contains language that could be construed to permit each subcontractor to recover any amounts paid in benefits in this case from the subcontractor immediately below it.

RE4-Jones and RC4-Lumberman argue that the Administrative Law Judge's Finding No. 11 should be reversed, and that RE4-Jones and RC4-Lumberman's should be given subrogation rights against the underlying subcontractors and their carriers. I agree

Ark. Code Ann. § 11-9-402(b)(I), states:

Any contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee or his or her subcontractor may recover from the subcontractor the amount of compensation paid or for which liability is incurred.

In my opinion, Ark. Code Ann. § 11-9-402(b)(2), creates a lien in favor of the prime contractor against any monies due or to become due to "the subcontractor" or the subcontractors carrier.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner