

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407233

EDWARD WILLIAMS, EMPLOYEE	CLAIMANT
JOHNSON CUSTOM HOMES, EMPLOYER	RESPONDENT NO. 1
VIRGINIA SURETY COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
PAYSOURCE, INC., EMPLOYER	RESPONDENT NO. 2

OPINION FILED JUNE 21, 2006

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

Claimant represented by the HONORABLE FREDERICK S. SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by the HONORABLE BILL H.  
WALMSLEY, Attorney at Law, Batesville, Arkansas.

Respondent No. 2 represented by the HONORABLE JEREMY  
SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Decision of the administrative law judge: Affirmed in part,  
and reversed in part.

OPINION AND ORDER

Respondent #1 and respondent #2 appeal from an  
administrative law judge's opinion filed on October 7, 2005.  
The administrative law judge found, in pertinent part,  
"Respondent No. 2's objection to the admissibility of the

Cease and Desist Order on relevance grounds is overruled. The claimant is not estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company. The respondents' motion to dismiss is therefore denied. Because I have concluded that the claimant is entitled to the relief which he seeks, I find that the claimant's constitutional argument is moot."

After reviewing the entire record *de novo*, the Full Commission affirms in part, and reverses in part, the opinion of the administrative law judge. Specifically, the Full Commission finds that the Cease and Desist Order was properly admitted into evidence by the administrative law judge. Therefore, this finding is affirmed by the Full Commission. However, we find that the claimant is estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company. Therefore, the respondents' motion to dismiss is hereby granted. The Full

Commission further finds that the constitutional issues raised by the claimant are without merit.

I. History

The claimant, age 35 (7/01/71), began working for respondent #1 in March of 2002 as a crew leader of various building projects. Thereafter, respondent #1 and respondent #2 entered into an agreement wherein respondent #2 leased employees to respondent #1, which included the claimant. As a result, in January of 2004, respondent #1 presented documents to the claimant for his review and signature. These documents included a W-4 tax withholding form and a document designated as "Agreement to Select the State of Ohio as the State of Exclusive Remedy." Both of these documents designated respondent #2 as the claimant's employer and specified that any work-related injury would be brought under the exclusive jurisdiction of the Ohio Bureau of Workers' Compensation, a state funded system. The claimant signed and returned these documents to respondent #1 after being given ample time to review them. After this agreement had been entered into, the claimant received paychecks from respondent #2. Respondent #1 obtained a

workers' compensation policy with Virginia Surety which was effective beginning on April 7, 2004 for one year.

The claimant sustained a compensable fall on April 14, 2004, while working for respondent #1, when he fell from scaffolding. The claimant was instructed by respondent #1/management to seek emergency treatment at Baxter Regional Medical Center, and he did. The claimant was treated for complaints of wrist pain and left ankle pain. The claimant was placed in a short leg cast and discharged home. The claimant subsequently treated with Dr. Thomas Knox due to orthopaedic conditions relating to his compensable fall.

An application for workers' compensation benefits was filed on April 16, 2004 on behalf of the claimant with the Ohio Bureau of Workers' Compensation requesting the allowance of a claim for injuries due to a closed fracture navicular left wrist and a closed fracture left astragalus. The Ohio Bureau of Workers' Compensation accepted the claim as compensable and beginning on April 15, 2004, it paid the claimant biweekly temporary total disability compensation in the amount of \$798.00 for approximately 17 to 18 weeks.

On May 17, 2004, a motion was filed on behalf of the claimant for an additional allowance relating to his back due to a lumbar compression fracture. The Ohio Bureau requested additional evidence to support this motion, which the claimant provided by way of Dr. Knox. On June 8, 2004, a second motion was filed on behalf of the claimant for an additional allowance due to left knee pain. The Ohio Bureau again requested additional evidence to support this amended motion, and on June 16, 2004, it notified the claimant that the matter was being referred to the Industrial Commission of Ohio for a hearing on the claimant's motion for additional allowances. The claimant requested that he be allowed to appear via telephone conference for the hearing, but his request was denied.

After a hearing on July 15, 2004, the Industrial Commission of Ohio denied the claimant's motion for additional allowances. Specifically, the Ohio Commission ordered in pertinent part:

Therefore, the requested conditions of L-2 **COMPRESSION FRACTURE AND LEFT KNEE PAIN** are disallowed. X-rays revealed an old injury at L-2.

Even that was not a fracture. The "condition" of "pain" is not an actual diagnosis for Workers' Compensation purposes.

This order is based on the report of Dr. McGowen 06/16/04.

The Industrial Commission of Ohio also advised the claimant that he had 14 days to appeal this decision. Previously, on July 7, 2004, the claimant filed a claim in Arkansas with the Commission asserting his entitlement to benefits as a result of the April, 2004 accident. The claimant's attorney next filed a Motion to Dismiss with the Industrial Commission of the State of Ohio wherein he requested that it dismiss the pending claim for injuries sustained by the claimant in the April 14, 2004 accident, and allow the claim to proceed in Arkansas. It appears that no action has been taken on this motion. However, the Ohio Commission paid the claimant benefits for his compensable injuries through August of 2004.

On August 24, 2004, a Cease and Desist Order was filed by Mike Pickens, the Former Insurance Commissioner for the State of Arkansas, wherein he found that PaySource had engaged in "illegal activities." Specifically, Commissioner

Pickens found that PaySource was not licensed as a professional employer organization, in violation of Arkansas Code Ann. § 23-92-315(20) (repealed July 16, 2003) and Ark. Code Ann. §23-92-404(a) (effective July 16, 2003); that PaySource was in arrears in payment of unemployment taxes; and that for at least one of its Arkansas clients, PaySource had not obtained workers' compensation coverage from an insurance carrier licensed in Arkansas. Therefore, Former Commissioner Pickens determined it would be in the best interest of the people of the state of Arkansas for PaySource to desist the writing of new employee leasing activities in this state, and for it to cease and desist all marketing activities in the State of Arkansas.

A hearing was held in the matter on July 6, 2005. During the hearing, the claimant gave testimony. According to the claimant, at the end of January of 2004, he along with other employees were advised by Steve Johnson that the company would be obtaining the services of a new provider and new payroll company. The claimant testified he was given forms for this on a Tuesday afternoon with instructions to fill them out and return them by noon the

following day. According to the claimant, he did not find out that PaySource was more than just a payroll provider until the end of May (2004) or maybe the first of June (2004).

On cross-examination, the claimant admitted to having received biweekly compensation (in the amount of \$798.00) from the Ohio Workers' Compensation Board from April 14, 2004 until the third week in August of 2004.

The claimant admitted that a motion was filed on his behalf with the Ohio Workers' Compensation Board to include injuries to his back and left knee in addition to his hand and arm injuries. He also admitted he would have participated in the hearing held in Ohio had he been allowed to do so by telephone. The claimant admitted he was aware that he had a claim pending in Ohio. The claimant gave the following testimony concerning the agreement he received from respondent #1, which made PaySource his employer and Ohio the state of exclusive remedy:

Q. (continuing) I'll repeat the question for you, Mr. Williams. Did you have ample opportunity from Friday that you received those documents which you were provided all the way up until Wednesday to go over the documents you were provided, to read

through them thoroughly, and to ask any questions about them that you might have had to anyone, like for example, Steve Johnson or to anyone else there in a supervisory capacity?

A. Yes, I had time, but, I mean, we didn't. And even when she called, I had no reason to question that there was anything out of place. When you know, they said it was just the same W-4, not to worry, and just to have it filled out by morning. I mean, you're also supposed to trust your employer, so we had no reason to doubt him.

The claimant admitted that from January of 2004 up until his accident, he received checks from PaySource. He also admitted to receiving correspondence from the Ohio Board of Workers' Compensation, and to keeping track of what things had been approved or disapproved as far as his medical treatment. The claimant also admitted that Kristin was his contact person in Ohio for things pertaining to treatment.

The claimant admitted he did not make any effort to seek benefits in Arkansas until after he received notice of the hearing before the Ohio Commission in July of 2004. According to the claimant, he obtained the services of an attorney, about a month before the hearing. He also admitted that he has an Ohio attorney who stands ready to

pursue a claim there for him if Arkansas refuses jurisdiction in this matter.

Rick Stetka, a former coworker gave testimony on behalf of the claimant. Mr. Stetka testified that he was employed by respondent #1 for approximately 18 months. According to Mr. Stetka, he was still employed by respondent #1 when the claimant was injured. He also testified that the claimant was his crew leader.

On cross-examination, Mr. Stetka essentially testified that up until the time he quit working for respondent #1, he believed he was employed by respondent #1 rather than PaySource, although he received paychecks from PaySource.

A Prehearing Order was entered in this case on April 18, 2005. However, at that time, the parties were unable to agree to any stipulations. Therefore, during the hearing, the parties stipulated to the following:

1. The claimant sustained injuries on April 14, 2004, which would be compensable under the Arkansas Workers' Compensation Law.
2. Virginia Surety Company provided Johnson Custom Homes with workers' compensation coverage in the State of Arkansas from April 7, 2004 to September 23, 2004.

3. The Ohio Bureau of Workers' Compensation is a State-administered workers' compensation fund.

By agreement of the parties, the issue to be litigated was limited to the following:

Whether the respondents' pending Motion to Dismiss this claim should be granted on the basis that Ohio has jurisdiction of the claim, or on the basis that the claimant has elected his remedy by choosing to file his claim in Ohio by receipt of benefits based on the Ohio claim.

The claimant contended that the Arkansas Workers' Compensation Commission has proper jurisdiction of this claim. Johnson Custom Homes is licensed to do business in the State Arkansas and is required by law to carry workers' compensation insurance provided by a licensed insurance carrier in the State of Arkansas.

The claimant is entitled to all benefits mandated by the State of Arkansas Statutes and Codes.

The Arkansas Department of Insurance has filed a Cease and Desist Order against PaySource regarding illegal activities in the State of Arkansas clearly showing that Mr. Edwards was legally entitled and owed workers' compensation coverage by his employer through an Arkansas workers' compensation provider and not by an Ohio based company. The

respondent willfully chose to violate Arkansas law not caring that his decision was detrimental to Mr. Williams or his other employees.

The Ohio Workers' Compensation Commission does not have proper jurisdiction of the claimant's claim.

Respondent # 1 contended that Ohio has jurisdiction of this claim. Respondent's Motion to Dismiss should be granted because Ohio has jurisdiction of the claim, or because the claimant has elected to pursue his remedy in the State of Ohio. If Arkansas has jurisdiction, the respondent is entitled to credit for all benefits paid pursuant to the Ohio claim. If Arkansas has jurisdiction, the Court should determine what benefits the claimant is entitled to receive. If Arkansas has jurisdiction, the respondent has not controverted the claim.

Respondent #2 contended that Ohio has jurisdiction of this claim, and jurisdiction in Arkansas is not proper, given that the claimant actively initiated proceedings in Ohio and knowingly received benefits pursuant to Ohio Law. Respondent No. 2 reserves the right to supplement or amend this prehearing questionnaire at a later date.

After a hearing before the Commission, the administrative law judge found, "Respondent No. 2's objection to the admissibility of the Cease and Desist Order on relevance grounds is overruled. The claimant is not estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company. The respondents' motion to dismiss is therefore denied. Because I have concluded that the claimant is entitled to the relief which he seeks, I find that the claimant's constitutional argument is moot."

Respondents #1 and respondent #2 appeal to the Full Commission. Respondent No. 1 appeals contending that the claimant is estopped under the election of remedies doctrine from pursuing a workers' compensation claim under the Arkansas Workers' Compensation Law before the Arkansas Workers' Compensation Commission. In addition to this contention, respondent #2 appeals the admission of the August 24, 2004 Cease and Desist Order issued against them by Former Insurance Commissioner Mike Pickens.

## II. Adjudication

### A. Evidentiary Objection

Respondent #2 contends that the administrative law judge erred in admitting into evidence the August 24, 2004 Cease and Desist Order entered by Former Insurance Commissioner Mike Pickens. The Full Commission finds that the administrative law judge was correct in admitting into evidence the Cease and Desist Order. Therefore, we affirm this finding. However, we note that although the Cease and Desist Order was properly admitted into evidence, a finding by another State agency is not binding on our determination as to whether the claimant made an election of remedies to proceed under the laws of Ohio.

### B. Jurisdiction and Election of Remedies

The administrative law judge found, "The claimant is not estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company." The Full Commission reverses this finding. In Biddle v. Smith & Campbell, Inc., 28 Ark. App. 46, 773 S.W.2d 840 (1989), the

Arkansas Court of Appeals has indicated that the determination as to whether or not an election of remedies has been made regarding workers' compensation benefits depends upon whether the claimant actively initiated the proceedings or knowingly received benefits pursuant to the laws of another state. We find that the instant claimant made an election of remedies by knowingly receiving benefits pursuant to the workers' compensation laws of the State of Ohio. The claimant testified that he received benefit checks from the Ohio Bureau of Workers' Compensation from April 14, 2004 until the later part of August of 2004. He also testified that he received correspondence from the Ohio Board of Workers' Compensation, and kept track of what medical treatment had been approved or disapproved. According to the claimant, Kristin was his contact person in Ohio for things pertaining to treatment. He admitted to having assisted with the filing of the motions for the additional allowances. The claimant further admitted that he was aware that his claim was being handled as an Ohio claim. However, the claimant made no attempt whatsoever to remove the claim from the jurisdiction of Ohio, until after

he was notified that he could not appear for the July 15, 2005 hearing by way of telephone. The claimant did not file a claim in Arkansas until July 7, 2004. Considering that the claimant had been actively involved in procurement of benefits from Ohio, and because he knowingly received benefits pursuant to the laws of that state, we find that the claimant had already (prior to his unsuccessful attempt to remove his claim for the jurisdiction of the Ohio Bureau of Workers' Compensation) made a deliberate choice to pursue his claim in Ohio and was thereby bound by this election. Based on all of the foregoing, the Full Commission finds that the preponderance of the evidence shows that the claimant made an election of remedies and had knowingly been receiving workers' compensation benefits from the State of Ohio. We further find that there is no evidence that respondents improperly or in bad faith channeled the claim into Ohio. Therefore, the respondents' motion to dismiss is hereby granted.

### C. Constitutionality

In sum, the claimant contends that the entire Workers' Compensation Law as set forth at Ark. Code Ann. §11-9-101,

et. seq., is unconstitutional. The Full Commission finds that the claimant has not demonstrated that Act 796 of 1993 is unconstitutional. Hence, we have already refuted all of these alleged constitutional violations raised by the claimant's attorney in Long v. Wal-Mart Stores, Inc., Workers' Compensation Commission F309931 (Jan. 26, 2006), Plummer v. Wal-Mart Stores, Inc., Workers' Compensation Commission F209057 (Oct. 10, 2005), Edwards v. Galloway Sand & Gravel, Workers' Compensation Commission F109737 (Oct. 11, 2005), and Bland v. Baxter Regional Medical Center, Workers' Compensation Commission F204378 (Aug. 16, 2005).

### III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the Cease and Desist Order was properly admitted into evidence by the administrative law judge. Therefore, this finding is affirmed by the Full Commission. However, we find that the claimant is estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company. Therefore, the

respondents' motion to dismiss is hereby granted. The Full Commission further finds that the constitutional issues raised by the claimant are without merit. Accordingly, this claim is hereby denied and dismissed in its entirety.

\_\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents without opinion in part.

CONCURRING AND DISSENTING OPINION

\_\_\_\_\_I respectfully concur in part and dissent without opinion in part from the majority opinion. I concur with the majority's opinion affirming the admittance of the Cease and Desist Order into evidence by the Administrative Law Judge. I also concur with the majority's decision that the constitutional issues raised by the claimant are without merit.

\_\_\_\_\_I must respectfully dissent without opinion from the portion of the majority's opinion finding that the claimant is estopped under the election of remedies doctrine from pursuing a claim under the Workers' Compensation Law before the Arkansas Workers' Compensation Commission against Johnson Custom Homes and Virginia Surety Company.

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SHELBY W. TURNER, Commissioner