

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612971

WENDY L. HENSLEY, EMPLOYEE

CLAIMANT

CUSTOM LANDSCAPING & NURSERY,  
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 17, 2008

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

Claimant represented by HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE William C. Frye, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 22, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier (sic) relationship existed on or about October 25, 2006, and at all other relevant times.

3. Claimant's average weekly wage is \$291.40; her compensation rate for temporary total disability is \$195.00.
4. This claim has been controverted in its entirety.
5. Mr. Jeb Leggett is the owner of the company (Custom Landscaping), and the incorporator and owner of Kendellwood, Incorporated.
6. The agriculture farm labor exemption of the Workers' Compensation Act set forth in Ark. Code Ann. §11-9-102(11)(a)(iii), is not unconstitutional.
7. The respondent-employer is exempted from workers' compensation coverage by the "agricultural farm labor" exemption.

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 Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. The respondent has asserted the agricultural exemption found in Ark. Code Ann. §11-9-102 (11) (A) (iii), which specifically excludes from coverage injuries that arise out of and in the course of an employment that consists of "agricultural farm labor." 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). 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 current rule regarding the agricultural farm labor exemption is found in Griffith v. International Cattle Embryo, Inc. 23 Ark. App. 58, 742 S.W. 2d 124 (1988), which states:

The exception of agricultural farm labor is broader than mere cultivation of soil; however, it does not cover farm when it is operated as mere sideline to commercial business.

In Gwin v. J. W. Vestal & Son, 205 Ark. 742, 170 S.W.2d 598 (1943), the Supreme Court held that the agricultural exemption is not limited to the grower of ordinary farm crops, specifically finding that the exemption applied to the business in question, which was, as in the instant case, a "nursery." The Court described the business in Gwin:

The firm is engaged in business described as florists, nursery and farming. It owns about 68 acres of rural land adjacent to the city of North Little Rock, or which about 6 acres are covered by greenhouses, and all of which, except about 20 acres, is used in connection with its greenhouses and its florist and nursery business. About 15 tons of hay are grown and cut from these lands annually for feed for livestock and for packing material. Three other

tracts of land are owned by appellee and all the usual kinds of outdoor crops are grown thereon, corn, cotton, hay, peas and beans.

However, I find that unlike the "nursery" in Gwin, here, the respondent has simply not proved that their business is primarily agricultural. In Vaughn v. Hutchins Greenhouse & Nursery, Inc. Claim No. E404915 (1997) the Full Commission found that the "nursery" business in question was not primarily agricultural, as a portion of the respondent's business involved that the wholesale purchase of plants already grown, for re-sale. Here, the respondent admitted that a portion of their business is re-sale of plants purchased from other nurseries. In fact, the respondent testified that it has employees specifically for the purpose of picking up plants, an indicator that a large part of its business involves retail, rather than agricultural activities. Furthermore, the testimony of Ms. Rhonda Rickenbacker indicates that a significant portion of the nurseries business involves re-sale of plants not grown by the respondent. Ms. Rickenbacker stated:

Q. The plants that you purchase from outside and bring in, are they plants or seedlings, or what are they that you purchase?

A. Both.

Q. When those come in, are they, I assume they're in some kind of soil or in a pot of some kind?

A. Uh-huh.

Q. Do they ever have weeds in them when they come in?

A. No.

Q. They don't?

A. Not really.

Q. Well you say not really. They never do, sometimes do?

A. No. They, sometimes they do. If we get a larger plant like a three gallon or above that comes in from say Louisiana or Tennessee, they may have some weeds in them. When we get little plugs to come in or trays of things, they generally do not have weeds in them. And we have some plants that come in bare root which don't have any dirt on them, they may be packed in sawdust, and they don't have weeds in them.

Based on Ms. Rickenbacker's testimony, I find that the respondent is most likely engaging in quite a bit more retail activity than the respondent owner, who obviously has an interest in testifying otherwise, would lead the Commission to believe. Furthermore, Ms. Rickenbacker testified that the respondent participated in a plant show

in Hot Springs in mid-October, which is clearly a retail, not an agricultural activity.

Furthermore, I find that the respondent, as the party claiming the exemption, who has the burden of proof on the issue, has not produced sufficient evidence to support a finding in its favor. The respondent has presented the self-serving testimony of the owner, an employee, a tax return, prepared under the direction of the respondent, and an insurance policy, again, prepared under the direction of the respondent. In my opinion, the respondent can call its business a "nursery" and argue all day long that "nurseries" fall under the agricultural exemption, but at the end of the day, the respondent has simply not proved that the primary business function of "Custom Landscaping & Nursery" is, contrary to its name, an agricultural operation entitled to an exemption under the Arkansas Workers' Compensation Act.

After a de novo review of the record, I find that the Full Commission can and should either order an investigation pursuant to Ark. Code Ann. §11-9-811, or, remand this claim to the Administrative Law Judge for the purpose of taking additional evidence pursuant to Ark. Code Ann. §11-9-704.

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For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner