

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513705

YERI GARCIA, DECEASED	CLAIMANT
COAST TO COAST CARPORTS, INC.	RESPONDENT
AIG CLAIM SERVICES, CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION AND ORDER FILED MARCH 30, 2009

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed in part, reversed in part.

OPINION AND ORDER

This matter is currently before the Full Workers' Compensation Commission on a Petition for Clarification and Reconsideration (Petition) filed by the Death & Permanent Total Disability Trust Fund, Respondent No. 2, on March 2, 2009. In its Petition, Respondent No. 2 requests the Commission to clarify and reconsider certain portions of our February 25, 2009, Opinion making the following findings:

1. The claimant's average weekly wage is speculative at best and the only evidence of the average weekly wage is the testimony from "two completely unreliable witnesses" (claimant's mother and Mr. Vazquez). Claimant's mother did not offer any documentation to show what the claimant gave her every month and she "...has a vested interest in getting all the money that she can..." The claimant's average weekly wage cannot be determined and therefore, it is the minimum \$20.00 per week. "...we find that the claimant's average weekly wage should be the minimum of \$20.00 per week..."
2. Hiliario Vazquez is an independent contractor who is an uninsured subcontractor of Coast to Coast Carports, Inc. and, pursuant to Ark. Code Ann. §11-9-402, it is responsible for the payment of compensation on account of the claimant's death.
3. The claimant's mother and minor siblings were partially dependent upon the claimant at the time of his death and are entitled to partial dependency benefits. Respondent no. 2's argument the claimant did not have legal duty to support his mother and younger brothers is "simply irrelevant" and is a "moot point". Respondent no. 2 shall pay benefits to the mother and minor siblings pursuant to Ark. Code Ann. §11-9-527(i)(2).

Respondent No. 2 stated in its petition that the issue of partial dependency was not properly before the Commission and should not have been used as the basis for an award of benefits. Respondent no. 1 filed a response to Respondent No. 2's Petition on March 16, 2009, agreeing with the arguments set forth in the Petition. On March 18, 2009, Respondent No. 1 filed a supplemental response requesting that the Commission vacate its opinion and order.

After conducting a de novo review of the record and after considering the Petition of Respondent No. 2 and all the responses thereto, the Full Commission finds that our opinion and order filed in this case on February 25, 2009, should be and is hereby vacated. The Full Commission makes the following findings of fact and conclusions of law:

1. The claimant was an employee of Hilario Vazquez at the time of his death.
2. Mr. Vazquez was an uninsured subcontractor for Coast to Coast Carports, Inc.
3. The claimants average weekly wage was unascertainable based upon the evidence of the record.
4. The claimant was entitled to the minimum compensation rate of \$20.00 for benefits.

5. The claimant's mother, sister and minor siblings have failed to prove by a preponderance of the evidence that they were wholly and actually dependent on the claimant for support.
6. The issue of partial dependency was not properly before the Full Commission on appeal.

The claimant appeals and Respondent No. 1 and Respondent No. 2 cross appeals a decision of the Administrative Law Judge making the following findings and conclusions:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The respondents have paid funeral expenses.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury resulting in death while working for the respondent on December 9, 2005.
4. The claimant has proven by a preponderance of the evidence that he was an employee of the respondent at the time of his death.
5. The claimant's mother, sister and minor siblings have failed to prove a preponderance of the evidence

that they were wholly and actually dependent on the claimant at the time of his death.

Specifically, the claimant appeals the finding denying dependancy benefits for his mother and siblings. Respondent No. 1 appeals the finding that the claimant was an employee of Coast to Coast Carports, Inc. (Coast to Coast) and that the claimant's average weekly wage was \$600.00. Respondent No. 2 appeals the finding that the claimant's average weekly wage was \$600.00.

After conducting a de novo review of the record, the Full Commission finds that the claimant was an employee of Mr. Hilario Vasquez who was an uninsured subcontractor of Coast to Coast; that the claimant's mother and minor siblings were not wholly and actually dependent on the claimant at the time of his death; and that the claimant's average weekly wage cannot be determined therefore, he is entitled to the minimum amount of temporary total disability. Therefore, we affirm in part and reverse in part the decision of the Administrative Law Judge.

The claimant built carports when on December 9, 2005, the claimant sustained a fatal gunshot wound while

working in Arizona. The claimant's mother, Rosa Becerra Garcia and his sister, Maria Garcia, contend they were dependent upon the claimant at the time of his death, and are entitled to workers' compensation benefits arising from his death. Respondent No. 1 contends that they initially accepted this claim as compensable and paid funeral benefits. Respondent No. 1 has controverted the claims of Rosa Becerra Garcia and Maria Garcia. Respondent No. 2 has controverted this claim, contending that the claimant was not an employee of Coast to Coast Carports, was not an employee of an uninsured subcontractor but that the claimant was an independent contractor. Respondent No. 2 contended Rosa Becerra Garcia and Maria Garcia are not entitled to survivor's benefits, the Death & Permanent Total Disability Trust Fund does not have liability in this case. Yeri (Jerry) Garcia was not an employee of either Hilario Vazquez or Coast to Coast Carports and, therefore they are not entitled to survivor's benefits; claimants cannot prove a "contract for hire" between Yeri (Jerry) Garcia and either Hilario Vazquez or Coast to Coast Carports. Alternatively, if Yeri (Jerry) Garcia was an employee of Hilario Vazquez,

an average weekly wage cannot be established to any degree of specificity and, therefore, are not entitled to weekly benefits; or, alternatively, should be limited to a statutory percentage of the minimum \$20.00 per week as provided in Ark. Code Ann. §11-9-501(b) and Ark. Code Ann. §11-9-518(c); cannot prove that they were "wholly" dependent upon Yeri (Jerry) Garcia at the time of his death; cannot prove that they were "actually" dependent upon Yeri (Jerry) Garcia at the time of his death.

Rosa Becerra De Garcia, the claimant's mother, testified that her son Yeri signed the lease on the house in which they lived because he knew everything about the house. Ms. Garcia explained the reason she had a fourteen or fifteen-year-old boy sign her house lease was because she did not have another male that she could get to do it. Ms. Garcia testified that she and her family had been living at this particular house for the past six years and at the time the lease was signed she was not working and her husband had already returned to Mexico. Ms. Garcia stated that at the time they moved into their house the claimant

was providing all the income for gas, rent, lights, the claimant's truck payment, and food.

Ms. Garcia testified that she has one other son, Guadalupe Ceballos, who's father is Abel Ceballos, the owner of the house where she lives and that she is Mr. Ceballos' girlfriend but pays him rent to live in the house. She stated that Mr. Ceballos does not provide for any of her children but does provide for their son Guadalupe.

Ms. Garcia additionally testified that when the claimant died on December 9, 2005, he was working for "Carports, Carports, Hilario Vazquez, how do you say?" She stated that the claimant began working for Coast to Coast for three years before his death.

Ms. Garcia testified that eventually she obtained her residency documentation and went to work for Tyson on October 13, 2005, earning \$7.85 per hour but currently is earning \$9.85 per hour. According to Ms. Garcia, the claimant continued giving her \$180 per week for her personal needs and he would also hand her money for the things that she and the claimant's siblings needed. Ms. Garcia testified that currently her daughter Maria is helping her a little

bit financially, but her husband does not provide any income to the family. The last money she received from him was March 31, 2001, in the amount of \$100.

Ms. Garcia was questioned about and shown a wage statement from Tyson which demonstrated that as of December 10, 2005, she had earned \$14,665.22. The witness was asked if it was possible she began working for Tyson in April or May 2005 and she responded, "No."

Ms. Garcia testified that the claimant paid the utilities which we note are in Mr. Ceballos's name, in cash and she had to go with him to pay Mr. Ceballos the rent. At the time of his death, the claimant was buying a truck and Ms. Garcia was still paying for it. She indicated that part of the money the claimant gave her was used to make the truck payment. Ms. Garcia agreed that her daughter Maria went to work in the middle of 2006 and that currently she is helping with the rent. There have been times when she would sell tamales and sweet potato hot pockets to supplement their income.

Currently, Ms. Garcia has five children in school, the oldest being Cesar who is seventeen and in the tenth

grade. The claimant was born December 14, 1986, and she remembers that he finished the sixth grade in school, but the claimant went to school as long as Cesar had gone to school. Her testimony regarding the claimant's schooling was contradictory and confusing. After her son's death, Ms. Garcia went to Coast to Coast's office to get the insurance number. However, she never saw anyone from Coast to Coast pay the claimant for working but she did see Mr. Vazquez pay the claimant when they would return from work on the weekends.

Ms. Garcia was asked about the hand writing on some of the documents in evidence and if the hand writing was hers. She testified that she does not know how to write so the writing could not be hers. As to why the claimant was working prior to getting his residency card, Ms. Garcia responded that Coast to Coast hired people without papers and paid them in cash.

Regarding the amount of money the claimant made, Ms. Garcia testified that the claimant would sometimes make more than \$500.00 per week and this was always paid to him in cash. According to her, the claimant worked for Coast to

Coast three years. When asked if the claimant worked for anyone else other than the Coast to Coast in the year 2005 and Ms. Garcia responded, "No." Ms. Garcia was asked if the claimant worked for anyone other than Coast to Coast in the year 2004 and she responded that he worked in tools. When questioned about when the claimant worked for Greenville Tubing, she responded that she did not remember but that he worked more in the carports.

Ms. Maria Garcia, the claimant's sister, testified by deposition that she is not married but has had two children with Hector Flores. Ms. Garcia testified that the child's father gives her \$40 per week for child support. Mr. Flores did not provide support while her son Alexis was alive but he is helping with Ashley. She currently works at Tyson, which is her first job, and earns \$293 per week and has been working at this job for the past eleven months. Ms. Garcia testified that she did not know how much money the claimant earned but that he would give her \$80 each week when he would come home. Ms. Garcia testified that the claimant gave her this money beginning in 2002 and that he paid the bills and the rent as well as giving her clothes

for herself and her kids. He continued to do this until the time of his death. Ms. Garcia testified that she was born in Mexico but she has residency papers.

Ms. Garcia testified that she currently helps her mother with expenses. Ms. Garcia testified that in the year 2003, 2004, and 2005 the claimant continued with this support and that he did so up to the time of his death.

Hilario Vazquez testified by deposition that he considers himself to be an employee of Coast to Coast. Coast to Coast would give the crews directions as to where to put up the aluminum structures and that he got all of the orders and all the business from Coast to Coast. Accordingly to Mr. Vazquez, he does not have a business of his own, but that someone from Coast to Coast's office would call each day and tell him where to go. He used his own vehicle but he would use materials furnished by Coast to Coast which were loaded onto his truck. Coast to Coast has material shops scattered around the country so when they are not working in Arkansas they were still able to get supplies. Most of their work was done in Arkansas but occasionally they would go out of state. Mr. Vazquez testified that when they put up a

carport they receive payment at that time from the customer and he then would give the check to Coast to Coast. He received a percentage for each carport put up. Coast to Coast would pay him by check and he would pay the claimant in cash. No taxes were withheld from the claimant's pay. Mr. Vazquez stated that he did not remember when the claimant began working for Coast to Coast in 2005, but that no tax statement was sent to the claimant to aid him in paying taxes. The claimant only worked for Coast to Coast a few months but had worked for Coast to Coast at other times. Mr. Vazquez estimated that the claimant earned about \$500 to \$600 a week. When asked, Mr. Vazquez estimated that the highest the claimant earned in a week was \$800 and the lowest was approximately \$400.

Mr. Vazquez testified that his crew consisted of four people and all of these could fit into his truck. He had a trailer which hauled the materials. Mr. Vazquez testified that he took tools with him and that he directed the crew as to when to start work as well as when the day was over. The claimant would pay for his own expenses and help his mom. Mr. Vazquez stated that the claimant never

told him what he did with his money. He did testify that the claimant had a bank account at the West Fargo Bank in Idaho and that the claimant was working with another crew when the account was set up. Mr. Vazquez testified that one time he wrote a check to Abel Ceballos, in lieu of paying the claimant. It was his understanding that Mr. Ceballos was in need of money and the claimant had told him that he would send money but instead of using a money gram or Western Union he had agreed to help the claimant out by writing Mr. Ceballos a check. Mr. Vazquez testified that he does not have any documentation of this transaction nor does he recall when it happened.

Mr. Vazquez indicated that George Zavala, the owner of Coast to Coast, told him that Coast to Coast had workers' compensation for every worker and that it was his understanding that whatever happened on the job they were going to be covered. Mr. Vazquez was asked if anyone at Coast to Coast's business had ever asked or advised him to obtain a certificate of non coverage through the Workers' Compensation Commission and Mr. Vazquez responded, "No."

The first issue to be determined is whether the claimant was an employee of Coast to Coast or if Mr. Vazquez was an independent contractor. An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. Arkansas Transit Homes v. Aetna Life & Cas., 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, the Court has stated:

The governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists.

Massey v. Poteau Trucking Co., 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953). The ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. Wright v.

Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be based on the particular facts of each case. Ark. Transit Homes, supra. Although no one factor of the relationship is determinative, see Wright, supra, the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. See, Aloha Pools & Spas v. Employer's Ins. of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

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, supra.

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, as previously discussed, 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. Wright, supra; Sanders, supra; Aloha, supra. The factors pertaining to the nature of the worker's occupation and whether it is a part of the regular business of the employer comprise the "relative nature of the work" test. Ark. Transit Homes, supra.

Moreover, in Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976), our Supreme Court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the

employer. This test requires consideration of two factors: (1) whether and how much the worker's occupation is a separate calling or profession; and (2) what relationship it bears to the regular business of the employer. *Id.* The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. *Id.*

A review of the evidence demonstrates that Mr. Vazquez was an independent contractor and therefore a subcontractor of Coast to Coast Carports, Inc. The evidence demonstrates that Mr. Vazquez was paid by a percentage. His testimony is enlightening in this matter:

Q. How would you be paid for putting up a carport?

A. The percentage -- I get a percentage for each carport.

Q. Okay. Let's say you put up a carport for me. Would I pay you, or would I pay Coast to Coast?

A. Well, I receive the check, and I return the check to Coast to Coast.

Q. Okay. So you have me make out a check --

A. Yes.

Q. -- to Coast -- but it's made out to Coast to Coast?

- A. Yes.
- Q. And I give it to you?
- A. Yes.
- Q. And you give it to Coast to Coast?
- A. Yes.
- Q. And then they -- do they write you a check for your percentage?
- A. Yes.
- Q. And what was your percentage?
- A. It was -- that time it was a 15% here in Arkansas and it was a 16% in Arizona.
- Q. Okay. And then who would pay Yeri?
- A. I would.

Mr. Vazquez would then turn around and pay his crew with cash. Again, this payments were based on a percentage.

- Q. Was he always paid 3%?
- A. Sometimes it was -- it was 2.5%.
- Q. Was he ever paid more than 3%?
- A. No. I was just -

Q. How did you determine whether he was paid 2.5 or 3?

THE INTERPRETER: No. I don't know.

Q. So some jobs he made 2.5%?

A. That's when -- when -- whenever more workers go.

Q. Okay.

A. But with just three -- just two and me, that would be -- it would be -- it was just sometimes there or sometimes two.

Q. Okay. So --

A. Well, no, 2.5 -- 2.5. And whenever we're four it was 2%.

Q. Okay. So when you had four people working --

A. With me? It would be 2%.

Q. With 2%.

A. Yes.

Q. When you had only three people working, it would be --

A. Two, point, five.

Q. Two, point, five?

A. And whenever just one and me go, that would be 3%.

Q. Three percent? Okay.

A. Or 3.5.

Further, Mr. Vazquez also provided the tools and the vehicle in which the crew traveled. Simply put, we cannot find that the claimant was an employee of Coast to Coast Carports, Inc. However, because Mr. Vazquez is uninsured and he is a subcontractor of Coast to Coast Carports, Inc., pursuant to the statutory provisions of Ark. Code Ann. §11-9-402, Coast to Coast Carports, Inc., would be responsible for the payment of compensation on account of the claimant's death. It is of note that the only time that Mr. Vazquez was given a 1099 was in the year 2005 when the claimant was injured. There was nothing in the record to show that Mr. Vazquez was given a 1099 any other year.

The next issue that must be addressed is whether or not the claimant's mother and sister are entitled to dependancy benefits. We find that the claimant's relatives have failed to prove by a preponderance of the evidence that they were wholly and actually dependent upon him at the time of his death.

Ark. Code Ann. §11-9-527 provides:

(c) Beneficiaries - Amounts. Subject to the limitations as set out in §§ 11-9-501 - 11-9-506, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:

* * *

- (4) To the parents, twenty-five percent (25%) each;
- (5) To brothers, sisters, grandchildren, and grandparents, fifteen percent (15%) each.

* * *

(h) Determination of Dependency. All questions of dependency shall be determined as of the time of the injury.

Ms. Garcia, the claimant's mother, testified that she began working for Tyson in October 2005, however her payment sheet from Tyson indicates that she had earned for the year of 2005 \$14,665.22. The Tyson payroll records indicate that she was earning \$8.70 an hour in 2005 and worked a forty-hour week which would entitle her to a gross wage of \$348 per week. Based on this gross wage divided into the amount of money she earned in 2005 would indicate that

she had worked 42.14 weeks for Tyson. It is also noted that the expenses which she testified that she paid each month or that the claimant paid each month for their living expenses came to a total of \$3,318.30 to include the \$80 per week which the claimant's sister testified that he gave her for the care of herself and her children. It is clear that the claimant did not earn enough to totally support his mother and his siblings. It also does not seem likely that a woman and her family would be living in a house with her boyfriend who she had a child by and he would not contribute something to her and her children's upkeep. We do not doubt that the claimant did help his mother and sister at times but we do not find that they were wholly and actually dependant upon him at the time of his death. See, Payne v. Superior Industries, Full Commission opinion 5-30-96, Claim No. E415136. Accordingly, we hereby affirm the decision of the Administrative Law Judge finding that the claimant's mother and sibling was not wholly and actually dependant upon the claimant at the time of his death.

The last issue that must be addressed is the computation of the claimant's average weekly wage. The

testimony regarding the claimant's average weekly wage is speculative, at best. 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The only evidence of the average weekly wage is the testimony of two completely unreliable witnesses. The first being the claimant's mother who, in our opinion, is not a credible witness, regarding the amount of money the claimant gave her. The claimant's mother could not remember if the claimant graduated from high school or not, and could not remember when the claimant went to work for Mr. Vazquez. She testified that the claimant had been installing carpports for three or four years. However, there was evidence introduced at the hearing that the claimant had been working for a company in Greenville, Pennsylvania, as late as April of 2005. Furthermore, the claimant's mother testified that they lived in the house that was owned by Mr. Ceballos, but he did not provide any support at all for the children other

than her illegitimate son Guadalupe, who was fathered by Mr. Ceballos. Mr. Ceballos owned and lived in the house yet, Ms. Garcia testified that he charged her, the mother of his son, and her family rent. Moreover, all the utilities were in Mr. Ceballos's name. Again, Mrs. Garcia testified that the claimant paid these utility bills. Mr. Ceballos would have been the best source for testimony regarding the lease and utility payments, yet Mr. Ceballos's testimony was not elicited either at the hearing or through deposition.

The only evidence offered with regard to the claimant's average weekly wage was that of the claimant's mother and Mr. Vazquez. In our opinion, it is conjecture and speculation to determine from this record that the claimant's average weekly wage was anywhere from \$400 to a \$1000 a week. Further, it is also conjecture and speculation to come up with a number based upon the testimony of his mother, that he gave her a \$180 a week as this testimony is not reliable and at times it was confusing and contradictory. Moreover, there were no records introduced from Mr. Vazquez noting how much the claimant made or was paid. Mr. Vazquez or Coast to Coast should have had

documentation of the jobs Mr. Vazquez performed and the amount of income earned from these jobs, yet the claimant did not subpoena this information. Ms. Garcia, the claimant's mother, did not offer any documentation to show what the claimant gave her every month. All we have is the testimony of two completely unreliable witnesses, one of which has a vested interest in getting all the money that she can. Uncorroborated testimony of an interested party is always considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Ins. Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. *Id.* Furthermore, a witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of bias so as to treat the witness's testimony as disputed, see Sykes v. Carmack, 211 Ark. 828, 202 S.W.2d 761 (1947), and the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989).

Therefore, because the claimant's average weekly wage cannot be determined, we find that the claimant's compensation rate should be the minimum of \$20 per week. Pursuant to Ark. Code Ann. §11-9-518(c) exceptional circumstances indicate that the average weekly wage cannot be fairly and justly determined by using any other formulas set forth in that statutory provision and the Commission can determine the average weekly wage by a method that is just and fair to all parties concerned. All parties concerned in this case have been unable to prove there was a contract for hire in force at the time of the accident or that the claimant was working on a cash basis because we have no documentation showing what monies the claimant earned.

11-9-501 (b) provides:

Compensation payable to an injured employee for disability, other than permanent partial disability as specified in subsection (d) of this section, and compensation payable to surviving dependents of a deceased employee, the total disability rate shall not exceed sixty-six and two-thirds percent (662/3%) of the employee's average weekly wage with a twenty dollar (\$20.00) per week minimum....

Therefore, we find that the claimant's total disability rate to be the minimum of \$20 per week. Accordingly, the decision of the Administrative Law Judge finding that the claimant's average weekly wage was \$600.00 is hereby reversed.

Therefore, after considering Respondent No. 2's Petition for Clarification and Reconsideration, we hereby vacate our previous Opinion and Order dated February 25, 2009. After conducting a de novo review of the record, we make the following findings. (1) The claimant was an employee of Hilario Vazquez. (2) Mr. Vazquez was an uninsured subcontractor for Coast to Coast Carports, Inc. (3) The claimant's compensation rate was \$20 per week. (4) The claimant's mother, sister and minor siblings have failed to prove by a preponderance of the evidence that they were wholly and actually dependent on the claimant for support. (5) The issue of partial dependency was not properly before the Full Commission on appeal. Therefore, the decision of the Administrative Law Judge is hereby affirmed in part and reversed in part.

IT IS SO ORDERED.

Garcia - F513705

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A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I specifically dissent from the majority's finding that the claimant's mother and younger brothers are not entitled to dependency benefits. I concur in the finding that the claimant's sister was not entitled to dependency benefits. I find, based on a de novo review of the record, that a preponderance of the evidence shows that the claimant's mother, Rose Beccarra, is entitled to dependency benefits pursuant to Ark. Code Ann. §11-9-527 (c) and Ark. Code Ann. §11-9-527 (i), not subject to termination. I find that the claimant's younger brothers, Cesar Garcia, Yoni Garcia, Yobani Garcia and Eliasor Garcia are entitled to dependency benefits under Ark. Code Ann. §11-9-527 (c) and Ark. Code Ann. §11-9-527 (i), subject to termination under Ark. Code Ann. §11-9-527 (d) (2). Furthermore, I do not agree with the majority's conclusion that the claimant's average weekly wage is unascertainable and must be set at \$20. Therefore, I must respectfully dissent from the majority on these issues.

Arkansas Code Annotated §11-9-527(c) states:

BENEFICIARIES-AMOUNTS. Subject to the limitations as set out in §§11-9-501-11-9-506, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:

(4) To the parents, twenty-five percent (25%) each;

(5) To brothers, sisters, grandchildren, and grandparents, fifteen percent (15%) each.

Arkansas Code Annotated §11-9-527 (h) states that all questions of dependency shall be determined as of the time of the injury. Arkansas Code Annotated §11-9-527(c) authorizes dependency benefits where a dependent was "wholly and actually" dependent upon the claimant. However, Arkansas Code Annotated §11-9-527 (i) states:

PARTIAL DEPENDENCY. If the employee leaves dependents who are only partially dependent upon his or her earnings for support at the time of injury the compensation payable for partial dependency shall be in the proportion that the partial dependency bears to total dependency.

Factors to be considered in making a determination of partial dependency for workers' compensation purposes

include whether support was given at the time of the injury and the reasonable expectation of future support. Williams v. Cypress Creek Drainage, 5 Ark. App. 256, 635 S.W.2d 282 (1982). If a parent is claiming dependency benefits, it is also appropriate to consider the amount of any contribution the claimant made to a parent in light of any contribution the parent made to the claimant. Id. The fact that a claimant is not the sole source of support is not dispositive, because partial dependency benefits are calculated in proportion that the partial dependency bears to the total dependency. Ark. Code Ann. §11-9-527(i); Pinecrest Memorial Park v. Miller, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

Here, the majority, without explanation, states that the issue of partial dependency was not properly before the Commission. I disagree, and find that it is error for the majority to decline to consider partial dependency as required by Ark. Code Ann. §11-9-527 (i). However, as the majority has found that the issue was not properly before the Commission, and declined to apply the correct legal

standard, the issue can certainly be addressed in a new hearing before the Administrative Law Judge.

When the correct legal standard is applied, the evidence clearly preponderates in favor of dependency benefits for the claimant's mother and younger brothers. The evidence of record shows that at the time of his death, the claimant was paying his and his mother's rent directly to their landlord, based on a lease signed by the claimant, from monies earned by the claimant. The evidence also clearly shows that at the time of his death the claimant had been giving not only his mother money to provide for herself and for his younger siblings, but also his sister money to care for herself and her children. Neither Respondent No. 1 nor Respondent No. 2 introduced any evidence to the contrary.

Furthermore, any "exchange" as per the factors set out in Williams, supra, made between the claimant and his mother, does not apply to the claimant's younger brothers. The claimant's younger brothers did not have anything to "exchange" with their brother, and their claims for

dependency benefits should have been considered apart from the claims of the claimant's mother and adult sister.

_____Ark. Code Ann. §11-9-527 specifically allows mothers and siblings to receive workers' compensation benefits based on a claimant's untimely death. The Arkansas legislature has seen fit to recognize that some people, like the claimant in this case, although not legally required to do so, honor a moral duty to support their families. Here, the claimant's mother and siblings were fortunate enough to have such an honorable son and brother. Although the majority may disagree with the claimant's decision to begin supporting his family after his father abandoned the family, the preponderance of the evidence shows that the claimant's mother and younger brothers were partially dependent upon the claimant at the time of his death. Based on the evidence of record, and by applying the correct legal standard, as set out in Ark. Code Ann. §11-9-527 (i) and relevant case law, the majority's denial of dependency benefits to the claimant's mother and younger brothers is clearly erroneous.

As for the issue of the claimant's average weekly wage, I find the majority has erred in setting it at \$20.

Mr. Hilario Vasquez, the man who actually paid the claimant his wages, albeit in cash, is not, as found by the majority, an unreliable witness. There is simply no evidence to support the majority's conclusion. Mr. Vasquez testified:

Q: Okay. Now, how much would he earn in a week- in an average week?

A: About- I would say about- about six hundred or five, somewhere in there.

Q: Five or six hundred dollars a week?

A: Five or six hundred, yes.

Q: Yet, did he have really good weeks where he earned more than-

A: Yes.

Q: Five or six hundred?

A: Yes.

Q: What's the most you recall he ever earned?

A: The more?

Q: What's the most amount in a week? Did he ever earn as much as \$1,000.00 a week?

A: No. About \$800.

Q: Eight hundred?

A: Eight hundred.

Q: ...

Q: Would you have weeks were he only earned three or four hundred dollars?

A: Yes.

Based on the above uncontradicted testimony, an average weekly wage of \$550 ($\$800 + \$300 = \$1100/2 = \550) reduced to the maximum rates for 2005 (\$446 TTD) is easily ascertained. As such, the majority's finding that the claimant's average weekly wage cannot be ascertained is simply not supported by the evidence of record. The average weekly wage can be ascertained through Mr. Vasquez' credible testimony. I would also note that as an interested party at risk of being ordered to pay benefits based on the claimant's average weekly wage, it would actually have been in Mr. Vasquez interest to testify that the claimant earned far less than he did, a fact which certainly adds, not detracts from Mr. Vasquez credibility.

Here, the majority's setting the average weekly wage at \$20 is simply not supported by either the evidence of record or by statute. However, as the majority's action is predicated on an alleged lack of evidence in this record

rendering the average weekly wage "unascertainable", the issue can certainly be addressed with further evidence in the new hearing on partial dependency benefits before the Administrative Law Judge.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner