BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H005594

FRANCISCO BONILLA, Employee	CLAIMANT
JUAN CARLOS CALDERON, Employer	RESPONDENT NO. 1
LIBERTY MUTUAL GROUP, Insurance Carrier/TPA	RESPONDENT NO. 1
PICK-IT CONSTRUCTION, Employer	RESPONDENT NO. 2
EMPLOYERS MUTUAL CASUALTY, Insurance Carrier/TPA	RESPONDENT NO. 2

OPINION FILED MAY 7, 2024

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MATTHEW J. KETCHAM, Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by JASON RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 8, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 13, 2023, and a Pre-hearing Order was filed on November 14, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The respondents have controverted the claim in its entirety.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant was an employee of Respondent No. 1 or Respondent No. 2 on July 14, 2020.

2. Whether Claimant sustained a compensable injury to his lumbar spine and right shoulder on or about July 14, 2020.

3. Whether Claimant is entitled to medical treatment for his compensable lumbar spine and right shoulder injuries.

4. Whether Claimant is entitled to temporary total disability benefits from July 15, 2020, to a date yet to be determined.

5. Compensation rates.

6. Whether Claimant's attorney is entitled to an attorney fee.

7. Respondents No. 1 and Respondents No. 2 raise lack of notice as a defense.

8. Respondents No. 2 raise statute of limitations defense.

The claimant's contentions are as follows:

> "1. The above listed proposed stipulations.
>
> 2. The Claimant was injured on July 14, 2020 while he was working on a roof, which he slipped and fell ten (10) feet from, landing on concrete and fracturing the vertebrae within his back and his rights scapula. The Claimant continued working for four (4) more hours until his wife picked him up and took him to a hospital.
>
> The Claimant was seen the evening of July 14, 2020 in the emergency department of the Baptist Hospital Medical Center. During his time there, Claimant was examined, given medications, ordered an MRI, and given CT scans of his head and cervical spine. Following this, he was provided an arm sling and told to follow up for his scapula fracture. The medications administered includes an infusion of sodium chloride, morphine injection, iopamidol, ondansetron, a contrast agent for his MRI. He experienced substantial headache, pain to his right shoulder, pain in his back, nausea, and pain within his ribs. Claimant was found

to have been traumatically injured with fractures of his spine vertebras, L1-L4, and a fracture within his shoulder blade. He was prescribed diazepam and oxycodone-acetaminophen. He was advised to follow-up as soon as possible

On July 17, 2020, the Claimant was seen by Dr. Jeff Evans at Baptist Health Orthopedics Clinic in Fort Smtih. During this appointment, an x-ray was taken and further confirmed a scapular body fracture. It was stated for the Claimant to continue wearing a sling and follow-up in one week. Dr. Evans noted that more detailed evaluation of the CT scan taken prior would be conducted. He additionally stated that the Claimant may need an ORIF, open reduction and internal fixation surgery, to his right scapula in the future.

On July 24, 2020, the Claimant returned to Dr. Evans' office for a follow-up appointment regarding his right scapula. Dr. Evans' reading of the x-rays of the Claimant's injury showed no further displacement, and though Dr. Evans recommended surgery, Claimant preferred not to get surgery unless the fracture displaces. He was advised to continue wearing a sling and to follow-up again in ten (10) days.

On August 4, 2020, the Claimant returned to Dr. Evans' office for his follow-up appointment. X-rays showed that the fracture continued healing with no further displacement. Claimant was to continue wearing an arm sling and return again in two (2) weeks.

On August 6, 2020, the Claimant called to inquire about the status of his medication prescription order, which was approved.

On August 18, 2020, the Claimant returned to Baptist Health Orthopedics. His x-rays were ready by Dr. Evans and he noted the fracture that was continuing to heal. Follow-up in two (2) weeks.

On September 1, 2020, the Claimant was seen again by Dr. Evans, who reviewed his fracture and confirmed it was continuing to heal. Additionally, PROM exercises were conducted to improve Claimant's range of motion. Claimant was told to continue not working and to come back in four (4) weeks.

On October 1, 2020, the Claimant was seen by Dr. Evans where he stated that the Claimants fracture had healed and there was no further displacement. They continued ROM exercises, refilled his

prescription for Lortab 5 #28, and advised him to follow-up if symptoms worsen or discontinue improvement.

3. The Claimant reserves the right to amend and supplement his contentions after additional discovery has been completed."

Respondents No. 1 contentions are as follows:

"The claimant was allegedly injured on 7-14-20. A claim was not filed until 6-8-21. Claimant was not an employee of Juan Carlos Calderon."

Respondents No. 2 contentions are as follows:

"1. Respondents No. 2 contend that the statute of limitations should bar any claimant against Respondent No. 2 based on the Commission's prior actions in what was tanamount to a dismissal of Respondents No. 2 and the joinder of Respondents No. 1. In that regard, the Commission previously investigated the employer/employee relationship, determined that the Claimant was not an employee of Respondent No. 2 based on the Compliance Division's investigation, and allowed Respondent No. 2 to be dismissed as a party to the claim. Furthermore, the Claimant failed to properly prosecute the claim for benefits and failed to take any action against Respondents No. 2 in over three years since the injury alleged herein and after the Claimant was well aware that Respondents No. 2 had been dismissed as a party. Accordingly, it has been more than two years since the injury date and no benefits whatsoever have been paid by Respondents No. 2, any claim against Respondents No. 2 should be barred by the statute of limitations. Otherwise, Respondents No. 2 contend that no benefits should be due from Respondents No. 2 until they are joined as a party to litigation on or about November 1, 2023.

2. Respondents No. 2 contend that there was no direct employer/employee relationship or contractor/subcontractor relationship between the Claimant and Respondent No. 2. It appears that Respondent No. 2 had the general contract at the location of the incident and had a subcontract with Respondent No. 1, Mr. Calderon, to perform the roofing job.

3. Respondents No. 2 contend that Mr. Calderon (Respondent No. 1 Employer) was probably the direct employer of the Claimant, and Mr. Calderon had workers' compensation coverage and would therefore be liable for benefits.

> 4. Respondents No. 2 contend they would be entitled to an offset for any unemployment benefits paid to the Claimant should the Claimant have applied for and received said benefits.
>
> 5. Respondents No. 2 would reserve the right to amend and supplement their contentions after the discovery has been completed."

The claimant in this matter is a 61-year-old male who was employed as a roofer on July 14, 2020. On that day, the claimant was working on the roof of a home located at 1915 Cherry Hills Drive, Fayetteville, Arkansas. Respondent No. 2 in this matter was the prime contractor of the home located at 1915 Cherry Hills Drive, Fayetteville, Arkansas, on July 14, 2020. Respondent No. 2 engaged Respondent No. 1 as a subcontractor for the roof work at the 1915 Cherry Hills Drive home on July 14, 2020.

The claimant alleges that he suffered compensable injuries to his lumbar spine and right shoulder on July 14, 2020, when he fell from the roof at the 1915 Cherry Hills Drive home he was working on. Following is the claimant's direct examination testimony about the fall and the events shortly thereafter:

> Q What happened on July 14th of '20?
>
> A I fell off the house.
>
> Q Can you describe how that happened?
>
> (Witness responds in Spanish)
>
> THE INTERPRETER: Interpreter requests for him to repeat it one more time.
>
> THE WITNESS: Okay. I picked up a bundle. When I took a step, the paper ripped. I took a second step, the paper ripped there and then I fell back on the gutter and with the bundle and everything, I fell off the house.

Q [BY MR. KETCHAM]: and where did you land?

A On the concrete at the entry of the house.

Q Okay. And did you feel pain?

A At the moment I didn't feel. I felt dead.

Q Okay. Did you ultimately feel pain?

A I sat and I stayed seated. The ladies that do housekeeping gave me ice and they put ice on there where I fell.

Q The lady that does housekeeping at the house that you were roofing?

A Yes. Correct.

Q Okay. Did anyone eyewitness your fall?

A No.

Q Okay. How soon was it that someone else on the site had realized that you had fallen from the roof?

A Right at that moment because everyone was up above.

Q On the roof?

A On the roof, yes, above.

Q Okay. Was Mauricio Solis on-site that day?

A Of course he was at the place.

Q Okay. Did he speak with you after your fall?

A No.

Q Okay. did you speak with anyone after your fall?

A No. Just with Mauricio.

Q So you did speak with Mauricio?

A Yes, of course, after I fell.

Q Okay.

A He asked me if I was okay and I said, "I am not okay. I need to go to the hospital."

Q Okay.

The claimant testified on direct examination that he called his "ex", and she came and took him to the hospital. Medical records were introduced at Claimant's Exhibit 1, pages 1-7 from Baptist Health Medical Center Emergency Room dated July 14, 2020. These records indicate that the claimant was seen by Dr. James Russell. Following are portions of those emergency department provider notes:

> Chief Complaint
> Patient presents with fall.
>
> Francisco Bonilla is a 57 y.o. male complains of injury from a fall from a 10 foot roof. He states at 11:00 today he was at work on a roof and fell off backwards onto concrete injuring the back of his head right shoulder and his whole right side. He states initially did not feel too bad and his colleagues helped him get over into the shade of a tree. He had no loss of consciousness. His wife was contacted at noon but he felt that he would be okay. Then at 4:00 she called back and they advised that she come get him and she drove an hour to go get him and brought him here. He was able to initially ambulate but since her picking him up he states the pain is getting worse and worse. He is complaining of a substantial headache with associated nausea but no vomiting. He does have head pain, right rib pain and significant lower back pain. He denies any numbness or tingling. His wife is present with him to assist with translation as he speaks minimal English. The patient does go on to admit that he has taken some "Panadom" which is an El Salvadorian pain medication.
>
> ***
>
> Final diagnosis:
> Fall from roof, initial encounter
> Closed fracture of transverse process of lumbar vertebra, initial encounter (HCC).

> Closed nondisplaced fracture of body of right scapula, initial encounter.
> Muscle contusion.

On that same day the claimant underwent an MRI of his lumbar spine at Baptist Health. Following is a portion of that diagnostic report authored by Dr. Jeffrey Behar:

> Soft tissues: Marked edema and soft tissue hematoma is identified in the RIGHT paraspinous muscle bodies. Increased T2 signal is noted in the RIGHT psoas muscle consistent with psoas muscle strain or tear.
>
> IMPRESSION:
> 1. L3, L4 and L5 RIGHT transverse process fracture.
> 2. RIGHT paraspinous muscle body hematoma.
> 3. RIGHT psoas muscle hematoma or tear.
> 4. Degenerative disc disease at L4-L5 and L5-S1.

On July 17, 2020, the claimant was seen by Dr. Jeffrey Evans at Baptist Health Orthopedics Clinic. Following is a portion that medical report:

> Chief Complaint
> Patient presents with
> * Shoulder Pain
> Right Shoulder Pain
>
> 57 year old male with right posterior shoulder pain since falling off a roof and landing on his back 3 days ago. He was noted to have a comminuted right scapular body fracture, placed in a sling and referred.
>
> ***
>
> Assessment and Plan:
> 1. Pain of right scapula (Primary)
> - XR Scapula 2 Vw Bilateral
> 2. Closed traumatic minimally displaced fracture of body of right scapula, initial encounter
> Assessment & Plan
> Xrays today show comminuted right scapular body fracture which extends into glenoid.
> Continue Sling.
> Will get remainder of CT scan on disk to fully evaluate fracture.

May need ORIF right scapula soon.
Follow up one week.

On July 24, 2020, the claimant was again seen by Dr. Evans. Following is a portion of that medical report:

Chief Complaint
Patient presents with
* Follow-up
F/U Right Scapula FX

Follow up right ND scapular body fracture with extension into glenoid (transverse fracture pattern? Now 10 days out, doing better.

***

Assessment & Plan:
My personal reading of X-rays of right scapula show no further displacement.
He does not want surgery unless the fracture displaces.
Continue sling.
Follow up in 10 days with True AP right shoulder and Scap Y.

On August 14, 2020, the claimant was again seen by Dr. Evans. Following is a portion of that medical report:

Chief Complaint
Patient presents with
* Follow-up
F/U Right Scapula FX

Follow up right scapular body fracture with glenoid extension now 3 weeks out doing better.

***

Assessment and Plan:
1. Closed traumatic minimally displaced fracture of body of right scapula with routine healing (Primary)
Assessment & Plan
My personal reading of X-rays of right scapula show healing fracture and no further displacement.
Continue right arm sling.
Follow up in 2 weeks with right scapula series.

On October 1, 2020, the claimant was again seen by Dr. Evans. Following is a portion of that medical report:

> Chief Complaint
> Patient presents with
> * Follow-up
> F/U Right Scapula FX
>
> Follow up right scapular body fracture now 2 ½ months out doing better.
>
> ***
>
> Assessment and Plan:
> 1. Closed traumatic minimally displaced fracture of body of right scapula with routine healing (Primary)
> Assessment & Plan
> My personal reading of X-rays of right scapula show healed fracture and no further displacement.
> ROM exercises.
> Refill Lortab 5 #28.
> Follow up prn.

The claimant in this matter speaks limited English and used a Spanish interpreter during the hearing. The claimant testified about how he was hired to work on the roof of the home at 1915 Cherry Hills Drive and how he was paid as follows:

> Q Okay. On July 14th of 2020, were you roofing a house at 1915 Cherry Hills Drive in Fayetteville?
>
> A Correct.
>
> Q Okay. And how did you get that job?
>
> A Mauricio hired me because Chepe contracted him to.
>
> Q Who is Chepe?
>
> A Chepe Calderon.
>
> Q Is that Juan Calderon?

A Uh-huh.

Q Is that a "yes"?

A Yes. His name is Juan Jose Calderon.

Q What was your payment arrangement for roofing the house at 1915 Cherry Hills Drive in Fayetteville?

A Daily salary was 160.

Q Okay. And were you hired directly by Mauricio Solis?

A Correct.

Q Okay. Were you paid for that job?

A Yes. They paid me the two days I had done.

Q Okay. And by whom were you paid?

A Solis did it because Calderon would pay Solis.

Q And Solis would pay everybody?

A Of course. Yes.

Q Okay. Were you paid in check or cash?

A Me? Cash?

Q Did Solis pay you himself?

A Yes. Him personally.

The claimant originally filed an AR-C which was received by the Commission on August 11, 2020. That AR-C named Mauricio Penate Solis as the employer. That document is found at Respondent No. 2's Exhibit 1, page 2. This administrative law judge's office sent a letter to Mr. Solis informing him of the claim against him via certified and regular mail on October 30, 2020. That letter went without answer and is found at Respondent No. 2's Exhibit 1, page 7. On

December 3, 2020, this administrative law judge's office sent another letter and prehearing conference notice via certified and regular mail to Mr. Solis, which was again unanswered and is found at Respondent No. 2's Exhibit 1, pages 8-9. On March 10, 2021, this administrative law judge's office again sent a letter and prehearing conference notice to Mr. Solis by regular mail. That letter and notice is found at Respondent No. 2's Exhibit 1, pages 10-11. Again, that letter and notice went unanswered.

The claimant filed an amended AR-C in this matter naming Respondent No. 2 as the employer. That AR-C was filed on June 2, 2021, and is found at Respondent No. 2's Exhibit 1, page 13. A final AR-C was filed by the claimant on June 8, 2021, adding Respondent No. 1 as the employer.

The parties in this matter made on-the-record stipulations regarding the Commission's inability to communicate with Mr. Mauricio Solis and that Mauricio Solis did not have workers' compensation insurance coverage in the state of Arkansas. Following is that on-the-record discussion:

> THE COURT: In talks prior to going on the record, we had a discussion. There is an AR-C that is found in Respondent No. 2's Exhibit 1 and that is found at Pages 1 and 2 of Respondent 2's 1. That is an AR-C filed by the Claimant through his attorney, Mr. Ketcham. Regarding a Mauricio Solis.
>
> I am going to repeat a statement that we discussed earlier and asked all of the parties if they agree to stipulate to this and we will do so just by verbal acknowledgement on the record.
>
> Mr. Solis was noticed up originally by the Commission to begin the process of going to a hearing after the AR-C was filed. The Commission was unsuccessful in ever reaching or having any communication with Mr. Solis after having attempted to do so through my office and also engaging the help of one of the Commission's investigators to try to find Mr. Solis.

Do you agree with that, Mr. Ryburn, to that stipulation of those as facts?

MR. RYBURN: Yes, Your Honor.

THE COURT: Mr. Jones?

MR. JONES: Yes, Your Honor. For the record, of course, I worked for the Commission for years. That is what the Commission does as far as the investigators go, they try to find coverage. I am not testifying as an expert here, but as far as my knowledge internal with the Commission, that is what they do. Apparently Mr. Solis had no coverage no matter what at the end of the day, so we agree.

THE COURT: Well, let's go ahead and make that – and I meant to say that a second ago. As far as the Commission's records are concerned, a check was done on Mr. Solis and no workers' compensation coverage in the state of Arkansas was found.

Do you agree with that, Mr. Ryburn?

MR. RYBURN: I think for the name Mauricio Solis. I don't know if he has another business or anything else.

THE COURT: Right. For the individual named in the AR-C, no insurance coverage was found.

MR. RYBURN: Yes, I can agree to that.

MR. JONES: Respondent 2 can stipulate to that.

THE COURT: Mr. Ketcham, do you agree with all of those stipulations?

MR. KETCHAM: I do agree with those stipulations.

THE COURT: I am not going to write that in my Prehearing Order, but it is in the beginning of our record here today and I will use that as I move through the writing of the opinion process.

Okay. So I am going to admit Commission Exhibit 1 at this time, which is my Prehearing Order, if I hear no objection. It will be admitted.

Both Respondent No. 1, Juan Carlos Calderon, and Respondent No. 2, Pick-It Construction, had workers' compensation insurance coverage in place on July 14, 2020, when the claimant alleges to have sustained compensable injuries to his right shoulder and lumbar spine. Mr. Juan Calderon, Respondent No. 1, was represented by counsel at the hearing but did not attend the hearing in this matter. Respondent No. 2 was also represented by counsel and Nathan Ogden, the president/owner of Pick-It Construction, attended the hearing and was called as a witness.

Mr. Ogden was called as a witness by the claimant's attorney. Mr. Ogden was asked about the 1915 Cherry Hills Drive home and Pick-It Construction's relationship with Juan Carlos Calderon as follows:

> Q Good afternoon. My name is Matt Ketcham and I represent Mr. Bonilla. We were introduced right as we came in the door and I got Ogden. Can I have your full name.
>
> A Nathan Ogden, O-g-d-e-n.
>
> Q Nathan Ogden. Thank you, Mr. Ogden. And what is your position with Pick-It Construction?
>
> A President and owner of Pick-It Construction.
>
> Q Okay. And I am going to get right to the point, okay?
>
> On July 14th of 2020, did you all have a contract to roof the house of 1915 Cherry Hills Drive?
>
> A Yes, sir.
>
> Q You did. Okay. And I know from the background of the case, Pick-It Construction employees did not directly roof that house; is that correct?
>
> A That is correct.

Q Okay. And my understanding is Pick-It subcontracted the roof at 1915 Cherry Hills Drive in Fayetteville out to Juan Carlos Calderon?

A Yes, sir.

Q Okay. And is there a company name or trade name or do you simply hire Juan Carlos Calderon?

A We hire Juan Carlos Calderon.

Q Okay. May I assume that is not the first time you had hired Juan Carlos Calderon?

A That is correct.

Q Okay. to your knowledge and understanding, does Juan Carlos Calderon roof houses with his own employees or does he subcontract that out to other crews?

A I do not know.

Q You have no knowledge of that?

A No, sir.

Q Have you had any discussions with him about who does it?

A No, sir.

Q Okay. In your experience, is that an uncommon practice for the roofer you hire to have people under them that roof houses?

A I do not know. We make sure who we pay has insurance and a W-9.

Q Okay. So you made sure that Mr. Calderon had workers' comp insurance and a W-9?

A Yes, sir.

Q Who he hires, if anybody, to do that is unknown to you?

A That is correct.

***

Q Okay. But you did have the contract at 1915 Cherry Hills Drive?

A Yes, sir.

Q And you did subcontract that out to Juan Carlos Calderon?

A Subcontracted and paid.

Q And paid. And can I assume you all paid him by check?

A One hundred percent, yes.

Q Okay. So that job is bid, the entire amount is paid to Juan Carlos Calderon?

A Yes, sir.

Q And it is up to Juan Carlos Calderon to pay his employees or employees of others?

A That is correct.

Q Okay. And to your knowledge, on this job on 7/14/20 at 1915 Cherry Hills Drive, did Mr. Calderon have workers' comp coverage?

A Yes, sir.

In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630. The claimant in this matter is able to prove the existence of the right shoulder and lumbar spine injuries he alleges through objective

medical findings. Medical records from Baptist Health on July 14, 2020, the day the claimant alleges to have fallen from the roof, show a "closed nondisplaced fracture of the body of the right scapula", "muscle contusions", and "L3, L4 and L5 transverse process fractures."

The claimant gave what I find to be credible testimony in this matter. The credibility of witnesses and the weight to be given to their testimony are matters solely within the province of the Commission. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). It was the claimant's testimony that on July 14, 2020, he was working on the roof at the 1915 Cherry Hills Drive home when he fell back on the gutter and fell off the house, hitting concrete. The claimant's testimony is consistent with the medical records from his July 14, 2020, emergency department visit where he described a fall from the roof of a house onto concrete. The claimant's injuries described in the medical records also appear to be consistent with his testimony. The claimant's testimony that he was hired to work on the roof that day and did so until he fell off is also credible. The claimant is able to prove by a preponderance of the evidence that he sustained compensable injuries to his right shoulder and lumbar spine on July 14, 2020.

The Commission has been asked to determine whether the claimant was an employee of Respondent No. 1 or Respondent No. 2 on July 14, 2020. I will first consider the employee/employer relationship between the claimant and Respondent No. 2. Mr. Ogden, the president/owner of Respondent No. 2, testified that Respondent No. 2 did have a contract to roof the 1915 Cherry Hills Drive home on July 14, 2020. However, Respondent No. 2 subcontracted the roofing job to Respondent No. 1, Juan Carlos Calderon. Mr. Ogden further testified that a roof was placed on that house and that Respondent No. 1 was paid via check for that job. Mr. Ogden testified that the claimant was not an employee of Respondent No. 2. The claimant's own testimony agrees that he was not an employee of Respondent No. 2. I find that the claimant was

not an employee of Respondent No. 2 but was engaged in employment while working on the roof of the 1915 Cherry Hills Drive home which Respondent No. 2 subcontracted and paid Respondent No. 1 to complete.

As to the issue of whether the claimant is employee of Respondent No. 1, I find that the issue is moot as it relates to liability for any benefits awarded to due to the claimant for his compensable right shoulder and lumbar spine injuries under the Arkansas Workers' Compensation Act. The claimant testified that he was hired directly by Mauricio Solis to work on the roof at the 1915 Cherry Hills Drive home. He also testified that he was paid by Mr. Solis $160.00 per day for the two days that he had worked, in cash. Following is a portion of the claimant's direct examination testimony about his hiring and payment:

Q Okay. And how did you get that job?

A Mauricio hired me because Chepe contracted him to.

Q Who is Chepe?

A Chepe Calderon.

Q Is that Juan Calderon?

A Uh-huh.

Q Is that a "yes"?

A Yes. His name is Juan Jose Calderon.

Q What was your payment arrangement for roofing the house at 1915 Cherry Hills Drive in Fayetteville?

A Daily salary was 160.

Q Okay. And were you hired directly by Mauricio Solis?

A Correct.

Q Okay. Were you paid for that job?

A Yes. They paid me the two days I had done.

Q Okay. And by whom were you paid?

A Solis did it because Calderon would pay Solis.

Q And Solis would pay everybody?

A Of course. Yes.

Q Okay. Were you paid in check or cash?

A Me? Cash.

Q Did Solis pay you himself?

A Yes. Him personally.

Mr. Solis has not communicated nor participated with the Commission in this matter. Mr. Juan Carlos Calderon, while insured and represented by counsel, did not appear at the hearing in this matter. Given the limited information available, a determination of whether the claimant was an employee of Respondent No. 1 or an employee of a subcontractor of Respondent No. 1 is not possible. However, as previously stated, I believe that the issue is moot as it relates to liability for the claimant's compensable injuries. In that A.C.A. §11-9-402(a) states:

> Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.

In the present case we have a prime contractor, Respondent No. 2. We also have a subcontractor, Respondent No. 1. If the claimant was an employee of Respondent No. 1, Respondent No. 1 would be liable for payment of benefits to the claimant under the Arkansas Workers' Compensation Act. If, however, the claimant was not an employee of Respondent No.

1 but, instead, an employee of Mr. Solis, who was subcontracted by Respondent No. 1 to complete the roof, then Respondent No. 1 would still have liability for any benefits of the claimant under the Arkansas Workers' Compensation Act, in that the parties have stipulated that Mr. Solis did not have workers' compensation insurance coverage in Arkansas. Therefore, Respondent No. 1 would be an intermediate subcontractor under A.C.A. §11-9-402(a) and would still have liability for any benefits due to the claimant under the Workers' Compensation Act in that Respondent No. 1 was insured at that time.

The issue of the claimant's employment with either Respondent No. 1 or Mr. Solis is relevant under A.C.A. §11-9-402(b)(1). However, that issue is not currently before the Commission. It does not have an affect on benefits due to the claimant, instead it affects the rights between Respondent No. 1 and Mr. Solis.

Employers must promptly provide medical services which are reasonably necessary in connection with the compensable injuries, Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996). After a review of the medical records in this matter, I find that the records submitted into evidence are reasonable and necessary medical treatment for the claimant's compensable injuries and that the claimant is entitled to payment for that reasonable and necessary medical treatment including out-of-pocket expenses.

The claimant has asked the Commission to determine whether he is entitled to temporary

total disability benefits from July 15, 2020, to a date yet to be determined. In order to be entitled to temporary total disability benefits, the claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages as a result of his compensable injury. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). The claimant sustained significant injuries to his lumbar spine and right shoulder in his July 14, 2020, fall. The claimant's medical treatment and records are somewhat limited in this matter. It was the claimant's testimony that he was unable to afford medical treatment. A medical record dated September 1, 2020, and found at Claimant's Exhibit 1, pages 26-29, states in part:

> Assessment and Plan:
> 1. Closed traumatic minimally displaced fracture of body of right scapula with routine healing (Primary)
> Assessment & Plan:
> My personal reading of X-rays of right scapula show healing fracture with no further displacement.
> PROM exercises.
> Follow up 4 weeks.
> Continue off work.

This is the only reference I find in the medical records regarding the claimant's work status. That record references "x-rays of the right scapula showing a healing fracture" and continues the claimant off work. Given that the claimant's condition was earlier in the healing process prior to this September 1, 2020, medical visit, it is reasonable that the claimant was in his healing period since his July 14, 2020, fall and continued as of September 1, 2020, to be incapacitated from work. On October 1, 2020, the claimant was again seen by Dr. Evans, at which time the record states, "x-rays of right scapula show healed fracture." The claimant was directed to follow up prn at that time. It is on October 1, 2020, that I find the claimant's healing period to have ended. The claimant is able to prove by a preponderance of the evidence that he is entitled to temporary total

disability benefits from July 15, 2020, to October 1, 2020.

The Commission has been asked to determine the claimant's compensation rates. A.C.A. §11-9-518 controls the computation of the average weekly wage. In this particular case I find that exceptional circumstances exist, and that the claimant's average weekly wage should be computed under A.C.A. §11-9-518(c), which states:

> If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The claimant testified on direct examination that he had just begun work and was paid for two days at the rate of $160.00 per day. Neither Mauricio Solis nor Respondent No. 1, Juan Carlos Calderon appeared at the hearing, nor any of the wage records available for consideration by the Commission. The claimant was questioned by Respondent No. 1's attorney about his pay as follows:

> Q You testified that your rate of pay was 160 per day; is that correct?
>
> A No. 170.
>
> Q Okay. Regardless, was that ever written down on paper of any kind?
>
> A No, because they pay cash and didn't give me any application.
>
> Q Okay. Isn't it true that you have no documentation of what you were paid or when?
>
> A Because they paid me cash, just the documents from the hospital.
>
> Q So that would be a "no"?
>
> A Paid cash.

Q Okay. Again, I am asking if you have any documents and is that a "no"?

A No, because they paid cash.

Q Okay. Do you maintain a bank account?

A No.

Q What did you do with this cash when you received it?

A Well what would I do? Help my family. Pay my rent.

Q You would keep it in cash and you pay it out still in cash; is that right?

A Yes. Of course. I paid my rent and they would give me a receipt. And my light bill, my water.

Q Have you presented any of those receipts today? Are they in evidence?

A No, because I wasn't asked for them.

Q Okay. Do you understand it is your burden of proof as to your compensation rate?

A I have got receipts that I pay my rent.

Q Okay. Even if you have receipts that you paid your rent, that would not prove the rate of pay you negotiated with Mr. Solis; would it?

A That doesn't have anything to do with it. One pays their bills. One pays their expenses.

The claimant was also questioned by Respondent No. 1's attorney about the duration of his employment as follows:

Q Okay. Did you have a discussion with Mr. Solis as to the duration of your employment?

A My understanding was that the work was going to be steady all through the summer and I started work at the beginning of summer.

Q Okay. This is your first or second day on this particular house, though; wasn't it?

A Second day.

Q Okay. Were the houses previous to that also done with Mr. Solis?

A That house was done on behalf of Maricio.

Q Okay. I know that house, but what about the other houses you said that you did at the beginning of summer?

A Oh, the other houses Mauricio kept doing because I was in bed.

Q Okay. This injury occurred in July; did it not?

A Of course. Yes.

Q And you are counting that as the beginning of summer?

A Well, July is summer.

Q Okay. My question is the duration of your employment as you negotiated with Mr. Solis, which you have said was for the summer; is that right?

A Yes. It was going to last the rest of the summer.

Q Okay. As far as the summer is concerned, would that include July, August? Is that it, July and August, or would you include September?

A They always do houses, too, in the winter –

THE INTERPRETER: I'm sorry the interpreter misspoke.

THE WITNESS: In the cold

> Q [BY MR. RYBURN]: Okay. And that is not my question as to whether houses are roofed in the cold. My question is your specific agreement with Mr. Solis as to the duration of the alleged employment agreement, how long were you to work for Mr. Solis?
>
> A Oh, we didn't have that kind of agreement. It was always just as long as I was needed.
>
> Q So as far as you know, it might have been just one house?
>
> A It wasn't a house.
>
> Q How do you know that?
>
> A Because I knew that Calderon had contracted him because he had a lot of work.
>
> Q And you never talked to Mr. Calderon, is that correct?
>
> A No.
>
> Q In fact, on July 14, 2020, you had no idea whether Mr. Calderon was involved in this specific job that we are talking about today; is that right?
>
> A He was involved because he handed off the house to Mauricio.

On cross examination Respondent No. 1's attorney questioned Mr. Ogden, the president/owner of Respondent No. 2, about the duration of his agreement for Respondent No. 1 to do roofing work as a subcontractor for Respondent No. 2 as follows:

> Q Was the contract reflected in your exhibit for one house with Mr. Calderon?
>
> A No, sir. Basically, we get those subcontract agreements and renew them every year and update any annual pricing that we do with them. Then they have to give us a new W-9 and current insurance as it expires because you cannot work with us without insurance and a W-9.
>
> Q Per that agreement, was it for a specific house?

A It's for all of them. Any job they do with us for the duration of their relationship with us.

Q They would have a separate contract?

A No, sir. That is not how this world works. We would have a contract with the homeowner.

Q I am referring to Page 21 of your documentary exhibit. Pick-It Construction, Inc., General Conditions.

THE COURT: I will provide it.

Q [BY MR. RYBURN]: On that page there is a project name, project number, project address, indicating that this is for a specific address.

A There is none, so, no, it is not specific for an address.

Q Because it's blank?

A Correct. It's a blanket agreement for the duration of the relationship.

Q Okay. Sitting here do you know the duration?

A For this?

Q For this contract?

A Yes. As long as he is willing to work for us.

The only two witnesses to testify in this matter, the claimant and Mr. Ogden, clearly believed the work available to last for much longer than just the 1915 Cherry Hills Drive job. It is also notable that the claimant has since returned to working as a roofer after he recovered from his injuries. Given the direction of A.C.A. §11-9-518(c), I find the claimant to have an average weekly wage of $800.00. That number is based off of a five-day work week at $160.00 per day. As such, the claimant's temporary total disability rate is $533.00 and permanent partial disability rate is $400.00.

The Commission has been asked to consider Respondent No. 1 and Respondent No.2's lack of notice defense. Respondent No. 2's notice defense is moot as the claimant was not an employee of Respondent No. 2 nor subject to liability for the claimant's compensable injuries under A.C.A. §11-9-402. Respondent No. 1's notice defense fails in that if the claimant was an employee of Respondent No. 1, notice was given to Mr. Solis shortly after the fall. If the claimant is not an employee of Respondent No. 1 but, instead, an employee of Mr. Solis, who was an uninsured contractor of Respondent No. 1, liability will still exist regardless of notice of the injury to Respondent No. 1, as it was given to Mr. Solis.

Respondent No. 2 has asked the Commission to consider its statute of limitations defense. That defense is moot as Respondent No. 2 has no liability in this matter.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 13, 2023, and contained in a Pre-hearing Order filed on November 14, 2023, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he was an employee of Respondent No. 2 on July 14, 2020. The issue of whether the claimant was employee of Respondent No. 1 on July 14, 2020, is moot.

3. The claimant is able to prove by a preponderance of the evidence that he sustained compensable injuries to his lumbar spine and right shoulder on or about July 14, 2020.

4. The claimant is able to prove by a preponderance of the evidence that he is entitled to medical treatment for his compensable lumbar spine and right shoulder injuries.

5. The claimant is able to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 14, 2020, to October 1, 2020.

6. The claimant is able to prove by a preponderance of the evidence under A.C.A. §11-9-518(c) that he is entitled to an average weekly wage of $800.00 per week, which computes to a temporary total disability rate of $533.00 and a permanent partial disability rate of $400.00.

7. The claimant is able to prove by a preponderance of the evidence that his attorney is entitled to an attorney fee in this matter.

8. Respondent No. 1 has failed to prove their lack of notice defense. Respondent No. 2's lack of notice defense is moot.

9. Respondent No. 2's statute of limitations defense is moot.

10. Regardless of whether the claimant is the employee of Respondent No. 1 or an intermediate subcontractor under A.C.A. §11-9-402(a), Respondent No. 1 is still liable for benefits due to the claimant under the Arkansas Workers' Compensation Act for his compensable injuries to his right shoulder and lumbar spine he sustained on July 14, 2020, in the fall from the roof of the home located at 1915 Cherry Hills Drive, Fayetteville, Arkansas.

ORDER

Respondent No. 1 shall provide the claimant reasonable and necessary medical treatment for his compensable lumbar spine and right shoulder injuries. Respondent No. 1 shall pay the claimant temporary total disability benefits from July 15, 2020, to October 1, 2020. Respondent No. 1 shall pay the claimant for any out-of-pocket medical expenses.

Respondent No. 1 shall pay to the claimant's attorney the maximum statutory attorney's

fee on the benefits awarded herein, with one-half of said attorney's fee to be paid by the respondent in addition to such benefits and one-half of said attorney's fee to be withheld by the respondent from such benefits pursuant to Ark. Code Ann. §11-9-715.

All sums herein accrued are payable in a lump sum and without discount and shall earn interest at the legal rate until paid.

Respondent No. 2 is dismissed from this matter.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE