

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H201552**

CHARLES LEACH, Employee	CLAIMANT
O. A. K. CONSTRUCTION INC., Employer	RESPONDENT
LIBERTY MUTUAL GROUP, Carrier	RESPONDENT

OPINION FILED **DECEMBER 8, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by ZACHARY F. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 29, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 9, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #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.

After the prehearing order was entered, respondent submitted an amended prehearing questionnaire, with additional contentions/defenses. At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant addressed the amended contentions/defenses, and the parties agreed to litigate the following issues:

1. If there was an employee/employer relationship with respondent and claimant or was

claimant an employee of a subcontractor at the time of his injury.

2. Whether claimant sustained a compensable injury on March 24, 2020.
3. If compensable, whether claimant is entitled to medical benefits.

All other issues are reserved by the parties.

The respective contentions of the parties, following the amendments at the hearing, are as follows:

Claimant:

“1. The claimant, Charles Leach, sustained a compensable traumatic brain injury and spinal injury on March 24, 2022, while working for O.A.K. Homes or alternatively, working for Tom Leach, a subcontractor of O.A.K. Homes.

2. Despite objective evidence of injury, the respondents denied compensability of the claimant’s injury.

3. The claimant contends that he is owed medical benefits from March 24, 2020 to a date yet to be determined.

Respondent:

1. The claimant was not the employee of respondent.

2. The claimant was a subcontractor and subcontractors are not covered, only the employees of subcontractors as per A.C.A. §11-9-402.

3. A workers’ compensation policy existed at the time of the injury. The subcontractor (Tom Leach) had workers' compensation insurance that actively exempted the claimant from the policy. §11-9-402(a). The claimant was not covered under Arkansas workers’ compensation law regarding subcontractor coverage.

From a review of the record as a whole, including 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 a pre-hearing conference conducted on June 9, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has proven by a preponderance of the evidence that he was an employee of Tom Leach, an uninsured subcontractor of respondent O.A.K Construction, Inc. As such, respondent is responsible for payment of workers' compensation benefits.
3. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on March 24, 2020, and that he is entitled to medical benefits for said injury.

FACTUAL BACKGROUND

As claimant and his brother both have the surname Leach, for the sake of clarity the parties were allowed to refer to Mr. Tom Leach simply as "Tom" during the hearing. In this opinion, he will also be referred to by his first name on occasion.

At the hearing, claimant moved to withdraw his claim for temporary total disability benefits as well as attorney's fees, and requested those issues be reserved. That motion was granted, and this matter proceeded to trial on claimant's entitlement to medical benefits should his injury be deemed compensable.

The parties submitted post-hearing briefs, and those are blue backed to the record of this matter as Commission exhibits.

HEARING TESTIMONY

Claimant first called Mr. Oliver Anthony Kiesel, the owner-operator of respondent O.A.K. Construction Inc., as an adverse witness. Mr. Kiesel said he subcontracted with Tom Leach, the brother of claimant, to perform framing services at a home in Gravette, Arkansas in 2020. Mr. Kiesel testified that he had worked with Tom Leach on a couple of smaller jobs before subcontracting with him for the house in Gravette. Mr. Kiesel said he had no written contract with either Tom or claimant. Mr. Kiesel said that subcontractors are supposed to provide certificates of workmen's compensation to his secretary, but he had never seen any actual documentation regarding such coverage. He did say that Tom told him verbally that he had workers' compensation coverage. The invoices which were provided to O.A.K. Construction for payment were paid to Tom Leach, not claimant nor an entity called Leach Framing. Mr. Kiesel was clear that he had contracted with Tom to frame the residence in Gravette.

Tom was paid by submitting invoices weekly for the progression of the job he was contracted to do. The payment was based on what had been accomplished during that week.

Mr. Kiesel was asked about the manner in which his custom homes were built, and he stated he subcontracted all of his skilled craftsmen, including framing. He stated that O.A.K. Construction did not employ any construction workers or a foreman, and only had two employees. In March 2020, he had a foreman that could ask a subcontractor to redo work and operate in a safe manner. Mr. Kiesel agreed that he was "the captain of the ship" for a job site where an O.A.K. Construction home was being built. O.A.K. Construction supplied the materials such as lumber, nails, and anything material-wise that needed to be provided.

On cross-examination Mr. Kiesel said he dealt with Tom Leach in hiring him for the framing

job in question. He did not know claimant Charles Leach existed at the time of hiring Tom. While he didn't know claimant, he understood that Tom would be bringing people that would assist in the framing work. Mr. Kiesel did not know anything about Tom Leach's business, such as if he was in a partnership with other individuals. It was his understanding that it was Tom's business. He did not know of a business called "Leach Framing" at the time he contracted with Tom. Mr. Kiesel negotiated a price for square foot for the framing of the house. He did not know how much each person in Tom's crew would be paid. There was no specific date for completion of the project and Tom would be paid weekly as long as there was progress being made.

There were no unemployment benefits for either Tom Leach or his workers. Taxes were not withheld from the payments to Tom. Mr. Kiesel testified that his foreman would visit his job sites at least once or twice a week and at the time he believed he had between ten and fifteen houses started. The foreman would inspect the quality of the work, which is being done according to a blueprint.

Mr. Kiesel said it was a policy of O.A.K. Construction to require subcontractors to have a workers' compensation policy. He did not remember what documents were physically presented to him by Tom Leach, because his secretary handled all of that for the numerous subcontractors that he used.

On re-direct, Mr. Kiesel said that although they did not have a specific time for completion, he believed there was an industry standard for such; if a subcontractor was not performing his duties, he would look elsewhere for a contractor. O.A.K. Construction had the ability to hire and fire subcontractors. While Mr. Kiesel was not at the job site at the time, he did not deny that claimant injured himself at the house in Gravette. Regarding the certificate of non-coverage and/or workers' compensation insurance, Mr. Kiesel said he had a verbal agreement with Tom regarding workers' compensation insurance, and that Tom had worked for O.A.K Construction previously, so he knew

Tom had shown a certificate in the past. However, on the Gravette job where claimant was injured, Mr. Kiesel never saw the certificate of workers' compensation coverage.

Upon questioning by the Court, Mr. Kiesel explained that there were two jobs that Tom was doing at the time. There was a barn that was being constructed and when it was finished, Tom began framing the house where claimant was injured. Mr. Kiesel said that the certificate of workers' compensation coverage that Tom had shown him on a previous job was not the barn, but rather a boathouse and dock from a year and a half to two years before claimant's injury. Mr. Kiesel affirmed that he did not know if a certificate of worker's compensation coverage for the job in Gravette was given to his secretary, but he had not seen it.

Claimant was called as the second witness. He said that he had worked in construction for about twenty years, and framing houses was his primary task in construction. On the date he was injured, March 24, 2020, he does not have any memory of how he was injured but did remember that he was framing a house for O.A.K. Construction. He did not think he maintained a certificate of non-coverage for workers' compensation insurance and did not know if he had a personal workers' compensation policy of any type. Claimant said he was taken to the hospital after he fell, breaking his back, and crushing part of his skull. He was still under treatment with his doctors at the time of the hearing. Claimant did not know his current source of income.

On cross-examination, claimant testified he did not remember who was on the job site on the date he was injured but understood that his stepson John House was there.

Claimant next called Tom Leach, claimant's brother. Although he was not at the scene at the time of the injury, Tom was aware that when claimant fell off the roof, he had two pieces of pipe stuck in his head and his neck was broken in three places. Tom said claimant had not worked at all since the incident. Tom testified that he did not have a written agreement with O.A.K. Construction and

thought that he had worked for O.A.K. Construction one time prior to the job on which claimant was hurt. Tom agreed with Mr. Kiesel that he had been subcontracted with O.A.K. Construction to frame a house and that claimant worked for him. Tom said that he did not have an active certificate of non-coverage for workers' compensation insurance on March 24, 2020. He had no knowledge of claimant having an active certificate of non-coverage at that time. Tom said that at the time of the incident that he did not have any workers' compensation insurance that would cover claimant.

Tom stated he remembered seeing a superintendent on the job site where he was working and that while the house is being framed, O.A.K. Construction provided the supplies such as nails, wood and sawblades. If O.A.K. Construction was unsatisfied with the work, Tom could be asked to fix it. Tom's main contact at O.A.K. Construction was Mr. Kiesel. Tom did not believe that he had provided proof of insurance or proof of non-coverage to O.A.K. Construction, and to his knowledge, did not tell anyone at O.A.K. Construction that he had workers' compensation insurance that would cover claimant.

On cross-examination, Tom clarified that his full legal name is Robert Thomas Leach. Tom said he was hired for the job in Gravette after he spoke to Mr. Kiesel and looked at the blueprints. He said he would be paid on a "per square foot basis". Tom said that the four check stubs that were introduced into evidence were the ones he could find, but he believed that there were others involved with the Gravette job. Tom said he tried to figure out how many hours had been worked on the job in a particular week and would submit an invoice for that amount. Tom confirmed that he had no employee benefits with O.A.K. Construction, that he was paid on a per job basis, and no taxes were withheld from those payments.

When asked about a workers' compensation insurance policy with Liberty Mutual for a company called Leach Framing, Tom said that was "a business we had used in the past". Tom said

that it had been used on and off for twenty years and was not registered anywhere. When asked if that business consisted of the partners Robert Thomas Leach, Charles Leach, and John House, Tom answered “no, not necessarily. That there was just something we had to do so we would have insurance so we could work for another individual.” Tom was then shown a Liberty Mutual Workers’ Compensation Insurance Policy (R.X.1, page 46) which included language that indicated that Robert Leach, Charles Leach, and John House were doing business as Leach Framing. Tom explained that he was working for Mike Botson, another builder in northwest Arkansas, and Tom was told he needed to get a workers’ compensation policy. Mr. Botson’s wife went to the Professional Insurance Group to have the policy written. Ms. Botson paid for the policy and Tom had to pay the Botsons back from the next two draws. That policy was in effect at the time of claimant’s accident in March 2020. Mr. Kiesel was not the builder that required that particular workers’ compensation insurance. Tom said that Mr. Kiesel asked for Tom’s general liability policy but didn’t ask about the workers’ compensation policy until three or four months before the hearing.

Beginning on page 76 of the transcript, there was this exchange between respondents’ counsel and Tom Leach:

Question (by Mr. Zachary Ryburn). This policy outlines that you do, in fact, have a workers’ compensation policy; is that correct? And when I say you, I mean you, Charles Leach, John House, and this entity called Leach Framing; is that correct?

Answer (by Tom Leach) I am not understanding that, the way. I guess I am confused on how that works.

Q. That is fine. That you excluded yourself from this policy; is that correct?

A. Yes sir.

Q. And you excluded all the named members of Leach Framing including yourself, Charles Leach, and John House; is that correct?

A. I excluded myself, yes...

The Court. Which page are you looking at, Zach?

A. This is on page 81 of Respondent's non-medical exhibits.

Question (by Mr. Ryburn). It lists the partners as Robert Leach, Charles Leach, and John House and it says this is an exclusion endorsement and this policy does not cover bodily injury to any person described in the schedule. This is an exclusion. Do you understand that?

A. Yes sir.

Q. It excludes you and those named people from this workers' compensation policy. Do you understand that?

A. I excluded myself.

Q. Why did you exclude yourself and Charles Leach and John House?

A. Because to my knowledge and the way that it was explained to me whenever we were made to get it, it would not cover anybody anyhow. It wasn't any good and we had to pay – and I would have to cough up- I think in the state of Arkansas I think it is nine percent of all wages that you have to pay in every year and to be quite honest we don't make a lot of money framing houses. We are scraping as it is and I couldn't afford it.

Q. The exclusions were done to save money; is that correct?

A. Yes.

Q. And it lists Robert Leach, partner; Charles Leach, partner, and John House, partner. Do you understand that?

A. I do understand that, sir. (TR.77)

Tom again said that he did not believe the existence of workers' compensation coverage came up during his discussion with Mr. Kiesel. Tom said that the workers' compensation policy was purchased because he agreed to do so for a different builder so that he could keep working.

Upon questioning by the court, Tom explained again how the workers' compensation policy came to exist. He said that it was issued because he had to have it to work for someone other than O.A.K. Tom testified that it was suggested to him to name himself, claimant, and John House as partners of Leach Framing to save money. He said Leach Framing did not maintain a bank account of its own. Tom was paid personally on the job for O.A.K. Construction where claimant was injured.

On re-cross examination, Tom said that a check was written to him, after which he would take it to O.A.K.'s bank, cash the check and divide it up amongst the workers. Using page 6 of

Respondent's Exhibit 1 as an example, O.A.K. Construction wrote Tom a check for \$4,500.00. It was divided up by each person's hours that they had worked on the job and was not divided by a percentage. Tom said "I would cash a check. I would do the math on how much they made per hour and then what it came out to, I paid them that much." He said that he always considered claimant to be an employee there was this exchange with respondent's attorney:

Q. Why did you name him [referring to claimant] as a partner of this workers' compensation policy?

A. Because we couldn't afford to pay taxes, or, you know, the nine percent. There was just no way we could have done it.

Q. Could he only be excluded if he was named as a partner?

A. I assume so. I mean that's – I don't know. (TR. 86)

On re-direct, Tom was asked if he represented that Leach Framing was doing the job in Gravette for O.A.K. and Tom said that he did not.

On re-cross examination, Tom stated that he had used the name Leach Framing in the past to describe a business that he, claimant Charles Leach, and John House were a part of when he was doing houses for Mike Botson. He could not recall any other times that he had used the name, Leach Framing.

After claimant rested, respondent called claimant to testify again which went as follows:

Q. Charles are you aware that you were listed as a partner on a workers' compensation policy with Liberty Mutual that was effective during the time of this incident?

A. I don't remember.

Q. Okay if you don't remember you can tell me you don't remember.

A. I don't remember.

Q. Are you aware you were excluded from that policy?

A. ...I don't remember.

Q. Do you remember being a part of a company called Leach Framing or an entity called Leach Framing?

A. I don't remember all the wording and stuff.

Q. Again, if you don't remember, you can tell me you don't remember.

A. Sorry, I don't remember what the exact wording was.

It was apparent to me while seeing claimant testify that he had suffered a severe brain injury and that he was genuine when he could not provide an answer to a question because of damage to his memory. I found the other two witnesses, Mr. Oliver Kiesel and Mr. Tom Leach, both to be credible witnesses. The point of contention between the two was whether there was a conversation regarding the existence of a workers' compensation policy to cover Tom and his workers. Mr. Kiesel said that he had been told verbally that there was such a policy and Tom did not recall talking about workers' compensation insurance before beginning the Gravette job. I don't believe either man is being deceptive in telling what he remembered, but they simply remembered the conversation differently.

REVIEW OF THE EXHIBITS

Claimant provided ample records to demonstrate the severity of the injury that he sustained when he fell from a roof in Gravette, Arkansas on March 24, 2020. A detailed summary of those records is unnecessary, as the existence and extent of the injury is not contested.

As for claimant's non-medical records, these were largely covered during the review of the testimony above. Page five of those records were supplemental responses to interrogatories in which Mr. Oliver Kiesel stated that Tom Leach had subcontracted with him to frame a house, that claimant worked for Tom Leach, and that Mr. Kiesel did not know claimant.

Respondent's exhibits included checks which were issued to Tom Leach for framing, invoices from Tom Leach, and two workers' compensation policies issued by Liberty Mutual, the first of which was to O.A.K. and the second to Robert Leach, Charles Leach, and John House d/b/a Leach Framing. Page 81 of Respondent's Exhibits contains the partners, officers, and other exclusion endorsements which lists claimant as a partner of Leach Framing.

ADJUDICATION

As stated above, the basic facts of this matter as it relates to claimant's injury were not contested. There was no question that claimant sustained a severe injury to his head and neck on March 24, 2020, when he fell from a roof of a house he was framing. He thus established an injury on a specific date and time which occurred during the course of his employment, and that injury required medical treatment, which provided ample objective medical evidence of the injury.

While the existence of the injury is not in dispute, the parties strongly disagree on claimant's entitlement to workers' compensation benefits for it. Claimant set forth alternative theories for recovery in this case: That he was either (1) an employee of respondent O.A.K. Construction or (2) an employee of Tom Leach, a subcontractor for O.A.K., and because Tom Leach did not provide a certificate of non-coverage to O.A.K. Construction, O.A.K. Construction and its insurer are liable to claimant for workers' compensation coverage. Respondents defended this action by maintaining that claimant (1) was not an employee of O.A.K. Construction and (2) was either (A) a partner in Leach Framing or (B) was an employee of Leach Framing, which had an active policy of workers' compensation coverage at the time of the injury. As I find in claimant's favor on his second contention, I will discuss it first.

As stated above, I did not find any effort at deception on the part of either Mr. Kiesel or Mr. Tom Leach. Taking their testimony as truthful and harmonizing it, I find the following facts are established by a preponderance of the evidence:

1. Mr. Kiesel contracted with Tom Leach to do the framing on a house he was building in Gravette. These two men had worked together on at least one project before, and neither apparently saw the need to reduce their agreement to writing. Tom Leach was to submit

invoices each week to be paid based on the work that was done on O.A.K. Construction's house, and O.A.K. Construction paid those invoices with a check to Tom Leach. Tom then cashed the check and paid each of the workers on the project according to the hours that worker spent on the job.

2. Prior to working for O.A.K. Construction on the house where claimant was injured, Tom Leach had subcontracted with another builder in the Northwest Arkansas area, Mike Botson. Mr. Botson required Tom to have a workers' compensation policy in effect to work as a subcontractor for Mr. Botson. Tom could not afford the premiums for the policy, so Mrs. Botson contacted an insurance carrier and paid the premiums for Tom, withholding the amount of the premium from the next two draws Tom made on the Botson project.
3. In order to get the premium on that policy as cheaply as possible, it was suggested to Tom that he could name himself and two partners to be excluded from coverage under the policy. Tom designated his brother, claimant, and claimant's stepson John House as partners, using the name Leach Framing as the partnership name on the application for the insurance policy. Nothing was introduced into evidence that showed claimant agreed that he was a partner in Leach Framing, or that he was even aware that his brother had represented to Liberty Mutual that claimant was a partner in a business called Leach Framing.
4. Mr. Kiesel said he asked about the existence of a workers' compensation policy, and Tom does not remember that conversation. I think it is more likely that Mr. Kiesel did ask about insurance, either before the work on the barn or before the house where claimant was injured. However, apparently no certificate of coverage or non-coverage was submitted to Mr. Kiesel's secretary, as none was submitted into evidence. Tom Leach testified that he did not have that certificate, which would explain why Mr. Kiesel did not have it in his file.

5. Mr. Kiesel did not know about the existence of a business entity called Leach Framing. He believed he was dealing with Tom Leach as an individual. Tom said he could not recall using the name Leach Framing on any job other than the one for the Botsons. The “named partners” on the workers’ compensation policy for Leach Framing were working on the O.A.K. Construction house as hired laborers, being paid hourly rather than a percentage of the profits from the subcontract.
6. While claimant was called as a witness, he could add little of value to the discussion; his brain injury has affected his memory. I did not find any of his answers of “I don’t remember” to be evasive or self-serving.

Under these facts that I find have been established by a preponderance of the evidence, I conclude that claimant is correct that he is entitled to workers' compensation benefits as an injured employee of an uninsured subcontractor as per A.C.A §11-9-402(a) and (b):

- (a) 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.
- (b) (1) Any contractor or the contractor’s insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred.
- (2) The claim for the recovery shall constitute a lien against any moneys due or to become due to the subcontractor from the prime contractor.
- (3) A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his or her insurance carrier.

I find *Garvia v. A & M Roofing*, 89 Ark. App 251 (2005) dictates that claimant prevail in this case. In *Garvia*, the prime contractor did not have a certificate of non-coverage for the injured party. As it turned out, Mr. Garcia had a certificate of non-coverage for contracts where he was acting as a sole proprietor or partner, but on the job on which he was injured, Mr. Garcia was working as a laborer

for a third party. In the case at bar, respondent O.A.K. Construction did not have the certificate of non-coverage for claimant, and claimant was not working under the name Leach Framing as a partner, but rather for Tom Leach as a laborer. He is therefore entitled to benefits under respondent O.A.K. Construction's workers' compensation policy for his traumatic brain and spinal injuries.

Having found claimant was an employee of Tom Leach, an uninsured subcontractor for respondent O.A.K. Construction, it is unnecessary to decide whether claimant was an employee of O.A.K. Construction.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he was an employee of Tom Leach, an uninsured subcontractor for respondent O.A.K. Construction. As such respondent is responsible for payment of workers' compensation benefits. Claimant is entitled to medical benefits for his traumatic brain and spine injuries which were caused by a compensable injury on March 24, 2020.

Pursuant to A.C.A. § 11-9-715(a)(1)(B)(ii), attorneys fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." In this case, the claim for indemnity benefits was withdrawn at the time of the hearing. As all issues other than medical benefits were reserved, no attorney's fee can be awarded in this matter at this time. Claimant's attorney is free to voluntarily contract with medical providers pursuant to A.C.A. § 11-9-715(a)(4).

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$995.45.

IT IS SO ORDERED

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE