

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G904875

DALE MYERS, Employee

CLAIMANT

HAVE TOOLS WILL TRAVEL, Employer
UNINSURED

RESPONDENT

OPINION FILED JANUARY 4, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondent represented by MARIA MCSPERITT, Attorney at Law, Huntsville, Arkansas.

STATEMENT OF THE CASE

On October 6, 2020, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 8, 2020, and a Pre-hearing Order was filed on that date. 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.

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

1. Employee/Employer relationship.

2. Whether claimant sustained a compensable injury to his pelvis on June 13, 2019.

3. Whether claimant is entitled to medical treatment.

4. Whether claimant is entitled to temporary total disability from June 14, 2019 until October 29, 2019.

5. Compensation rates.

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

Claimant's contentions are:

“On 6/13/2019, claimant was putting a roof on a house in the scope and course of employment, when he fell off the roof. Claimant fractured his pelvis. Claimant contends that he sustained a compensable injury in the scope and course of employment and is entitled to medical benefits, TTD, and that his attorney is entitled to an attorney fee. All other issues are reserved.”

Respondent’s contentions are:

“A drug screen was requested by Have Tools Will Travel. Dale Myers failed/refused to provide proof of a drug screen being taken.”

The claimant in this matter is a 41-year-old male who alleges to have sustained a compensable pelvis injury on June 13, 2019 while employed by the respondent. The respondent asserts that the claimant was not an employee but was instead an independent contractor or a “day laborer.” The claimant is a high school graduate and testified that between 2000 and 2002 he engaged in secondary education taking classes in telecommunication. Since that time, the claimant has worked in highway and steel building construction, along with “odd-and-end jobs.” The claimant testified that he has never owned his own business.

On direct examination the claimant testified that he began to work for the respondent four days before he had the accident which he alleges to have caused a compensable pelvis injury. The claimant testified that he had a friend named Destiny DeShields, who also goes by the name of Destiny Mitchell, who was an employee of the respondent. She informed the claimant about the job. The claimant was then able to talk with the respondent company’s owner, Clifford McSperitt. Following is a portion of the claimant’s direct examination testimony about his understanding of his working relationship with the respondent:

Q Okay. So she referred you for this job. And who did you talk to about the job?

A I met up with Mr. McSperitt the next day when he would come to pick them up and he had said that he was looking for some extra help to do this job.

Q Okay. And did he hire you for the job?

A Yes.

Q And what was your agreement as to how much he was going to pay you?

A It was nine dollars an hour, I believe.

Q Okay. What was your job position?

A Laborer.

Q Okay. And what were your job duties?

A We had a couple of little jobs to do there. We tore off a little roof over a wellhouse and redid the roof on it. And then to redo the roof on the existing house.

Q Okay. And was this all on one property?

A Yes.

Q Okay. Now, how did you get to this job each day?

A He picked me up and I rode in with him.

Q Okay. So the arrangement was that he would pick you up?

A Yes.

Q And he would drive you to work?

A Yes.

Q And who would take you home?

A He did at the end of the day.

Q Okay. And did you even know where you were going each day?

A Yes.

Q How would you know that?

A Well, he told us where the job was at.

Q Okay. So you would get in the car with him and he would tell you where it was at?

A Yes.

Q Okay. Now, tell me about -- you mentioned the main house. Was this an individual's home that you were working on?

A Yes.

Q And what were you doing to the individual's home?

A We were laying tin on the existing roof.

Q Okay. Who did you consider your supervisor to be on that job?

A Mr. McSperitt.

Q And was he on location with you?

A Yes.

Q Okay. Did you bring your own tools?

A No. He furnished the tools.

Q Okay. When you would arrive at this location each day, did you know exactly what needed to be done or did you wait for him to tell you?

A Well, we waited for him to give us the instructions, but I still knew what needed to be done.

Q Okay. So you would have to wait for his instruction, though?

A Yes.

Q And he provided the tools?

A Yes.

Q And then you would go do what he instructed you to do?

A Yes.

Q Okay. So you were at that location and you had -- there was another -- strike that. If you were at this location and he didn't want you on the roof, he wanted you somewhere else, would he tell you he wanted you somewhere else?

A Yes.

Q Okay. And you would have to follow his direction; is that correct?

A Yes.

Q Okay. What time in the morning would he pick you up?

A Around 7 o'clock.

Q And what time would he take you home?

A As soon as we got done at the end of day which could have been 4:30, 5:00, 6 o'clock.

On direct examination, Mr. McSperitt was asked about his working relationship with the claimant as follows:

Q Okay. And are you familiar with Mr. Myers?

A Yes.

Q And you own Have Tools, Will Travel; correct?

A Yes.

Q Okay. And when you hire an employee, what is the steps you go through to hire an employee?

A If I hire an employee, they have to fill out a W-4.

Q Okay. So do you take out taxes and pay by check for employees?

A Yes.

Q Do you ever hire independent contractors or day laborers?

A Yes.

Q Okay. And what is your process for hiring a day labor?

A They show up when I need them.

Q Okay. And did you hire Mr. Myers as a day laborer or an independent contractor?

A He was supposed to help on that one job.

Q Okay. And did you tell him what he had to do out on that job?

A He was supposed to clean up and help hand up metal.

Q Okay. Did you give him specific instructions on what he was supposed to do throughout the day?

A No.

Q Okay. Did you have any intention of having him fill out W-2 or W-4 paperwork?

A No.

Q Okay. Mr. Myers testified that he rode to the job site with you. Why was that?

A He didn't have a ride.

Q Okay. Do you require that employees ride to the job site with you?

A No.

Q He could have taken his own transportation?

A Yes.

Q Okay. Did you tell him what time he had to be at the job site?

A I told him what time we would start.

Q Okay.

A And what time I was leaving.

Q Okay. But did you tell him what time he had to be there?

A No.

Q Okay. Did you tell him what time he had to leave?

A I told him what time I was leaving.

Q Okay. Can you explain to this Court a little bit about your business. When you get a job and you go out to a job site, what do you take with you?

A I take tools and anybody that's riding with me.

Q Okay. And are the tools for specific employees?

A It is for my employees.

Q For your employees. Had you given Mr. Myers the okay to utilize your tools?

A Yes. He could use them, but . . .

Q Did you tell him that he needed to use your tools?

A No.

Q Did you have any tools specifically for him?

A No.

Q Okay. Did you have any intention of using him after that job?

A No, not as long as I had employees.

Q Okay. So you were not considering this job to be ongoing with Mr. Myers?

A No.

Q Okay. Is cleaning up a job site a key aspect of your business?

A Yes.

Q Okay. Is it something that you could have hired somebody to do?

A Yes.

Q Okay. Were you intending to hire Mr. Myers for that aspect of your job?

A No.

Q Did you give him any employee benefits?

A No.

Q Okay. Did you ever have a discussion with him about paying him nine dollars an hour?

A Yes.

Q Okay. Was that considered his wage or was that a number that you two agreed upon so you could figure out by the job?

A I wasn't sure how long the job was going to last.

Q Okay.

A You know, three days, seven days. I wasn't sure.

Q Okay.

A It was supposed to be throughout that job.

On re-cross examination, Mr. McSperitt was asked, “By your own testimony, you hired him to perform work.” Mr. McSperitt responded, “Yes, I did.” On re-direct examination, Mr. McSperitt was asked, “Okay, let’s clarify the hiring. Did you hire him as an employee, or did you hire him as an independent contractor/day laborer?” Mr. McSperitt responded, “I thought it was a day laborer.”

This Administrative Law Judge also briefly questioned Mr. McSperitt about his working relationship with the claimant as follows:

THE COURT: I have a question. I understand you discussed paperwork in your testimony and having someone fill out a W-4 form, but you used this word day laborer several times. I would like for you to tell me what you mean by a day laborer.

THE WITNESS: Just somebody helping for the day or for the job or --

THE COURT: Helping do what?

THE WITNESS: Whatever. Like with Dale, he was supposed to keep the house or outside where we was working cleaned up and help hand up metal.

THE COURT: And earlier I think you gave some testimony about he was paid by the hour, but you were unsure how long this job would last.

THE WITNESS: Yes.

THE COURT: So he might have been there multiple days or one day or?

THE WITNESS: I assumed the job was going to be between seven and ten days. And that was a guess. It wasn't --

THE COURT: But you were paying him by the number of hours that he was there doing work versus saying I am going to pay you "X" amount of money to keep this placed cleaned up?

THE WITNESS: Yes.

Arkansas Code Annotated §11-9-102(9)(A) defines “employee” as any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding

one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

As the Court stated in *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983), the determination of whether, at the time of injury, a person is an employee, or an independent contractor is a factual one for the Commission. A test to help determine whether an individual is an independent contractor, or an employee is set out by the Court of Appeals in *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982). The Court set forth nine factors which may be considered in determining whether an injured person is an employee or an independent contractor for workers' compensation coverage:

- (1) The right to control the means and the method by which the work is done;
- (2) The right to terminate the employment without liability;
- (3) The method of payment, whether by time, job, piece or other measurement;
- (4) The furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
- (5) Whether the person employed is engaged in a distinct occupation or business;
- (6) The skill required in a particular occupation;
- (7) Whether the employer is in business;
- (8) Whether the work is an integral part of the regular business of the employer; and
- (9) The length of time for which the person is employed.

After considering the claimant's and Mr. McSperitt's testimony, it is clear that the claimant was an employee and not an independent contractor working for the respondent. The claimant had no tools of his own. Mr. McSperitt testified that the claimant was to keep the job site clean and on direct examination confirmed that cleaning up a job site was a key aspect of his business. The claimant followed the direction of Mr. McSperitt; he was paid by the hour for the work he performed; and Mr. McSperitt set up the time that work began and ended. While it appears that Mr. McSperitt only intended to employ the claimant for this one job, he was certainly an employee during the four days prior to and on the day that he was

injured. Mr. McSperitt has himself and through counsel invoked the word "day laborer." I find no place in Arkansas Workers' Compensation law that sets that as a type or category of employment. Instead, the claimant was an employee who worked for an hourly wage at the will and direction of the respondent.

There appears to be no dispute regarding the claimant's injury that occurred on June 13, 2019.

Following is direct examination testimony from the claimant about his accident:

Q Okay. Now, tell me what happened on June 13, 2019.

A When we got to the job, there was another man there taking a satellite dish off of the roof. Mr. McSperitt said wait until he got off, done off the roof before we got on the roof. As soon as that man was done, I set up the ladder and I started carrying tools up to the roof up to the top and when I got to the top, I reached down and I set the tools down. When I stood up and turned around, my foot stepped onto the existing tin that we had put on prior and I slipped and went down.

Q Okay. Now, when you slipped and fell, about how far did you land or how far did you fall?

A It was roughly 20, 22 feet from the -- even with the house where I went off.

Q When you fell, how did you land?

A On my feet.

Q Okay. And did you fall to the ground after you landed on your feet?

A Yes, ma'am.

Q Were the injuries mostly to your pelvis?

A Yes, ma'am.

Q Okay. Tell me what happened upon impact.

A I had hollered out that I had fell and the man that put the satellite dish -- that was taking the satellite dish off the roof come around the corner and seen me and he went around and got everybody.

Q Okay. And did your boss come to where you were on the ground?

A Yes.

Q And your boss, I am referring to Mr. McSperitt; is that correct?

A Yes.

Q Okay. Did he say anything to you while you were on the ground?

A He had asked me how it happened.

Q What did you tell him?

A I told him when I set the tools on the roof and I stood up and turned around, I stepped on the tin and slipped.

Q Okay. Did he say anything else to you?

A No, ma'am.

Q Okay. What happened next?

A They had called an ambulance and when the ambulance showed up, they was putting me onto the backboard and I was feeling a lot of popping and cracking going on in my waist area, and then they got scared. They did not want to move me in the ambulance due to, you know, could be a spinal injury, so they called Air Evac. And then when they got there, they transferred me from the ambulance to the helicopter.

Q Okay. And you were taken to the hospital; is that correct?

A Yes, ma'am.

Q Okay. Now, when the ambulance arrived, was your boss there?

A Yes.

Q And were you privy to any conversation between your boss and the ambulance?

A I asked Mr. McSperitt if he had workers' comp insurance and he said he did. And I said, okay, let's get this turned in to workers' comp because I didn't want to see him get in trouble or anything, so that was all that was said.

Q Okay. Did he ask you for a drug screen at that time?

A No, ma'am.

The claimant was transported to Washington Regional Medical Center where he was treated for bilateral superior and inferior pubic ramus fractures and a left type one sacral fracture. The claimant remained hospitalized for five days and was discharged on June 18, 2019. The claimant then began

treatment at Ozark Orthopedics with Dr. Jeffery Johnson who eventually released the claimant from care on October 29, 2019. The claimant has proven that the employee/employer relationship existed between himself and the respondent on June 13, 2019. He must also prove that he sustained a compensable pelvis injury as alleged. The x-rays and other diagnostic reports found in medical records prove the existence of objective medical findings of pelvis injury. The claimant's description of the accident correlates with the medical records in evidence and I believe the claimant to be a credible witness. The claimant is able to prove a causal relationship between the accident he alleges and the objective medical findings of pelvis injury. The claimant did suffer a compensable injury to his pelvis on June 13, 2019. The medical evidence submitted into the record all appears to be reasonable and necessary medical treatment for the claimant's compensable pelvis injury.

The claimant has asked the Commission to determine whether he is entitled to temporary total disability benefits from June 14, 2019 until October 29, 2019. During the period of requested temporary total disability, the claimant was in his healing period up until the time Dr. Johnson released him on October 29, 2019. It should be noted that the respondent did not offer the claimant any light duty work during this time frame nor did the claimant engage in other employment. Therefore, I find that claimant is entitled to the requested period of temporary total disability.

Both the claimant and the respondent have testified that it was agreed that the claimant would receive \$9.00 per hour for the work performed. The claimant testified that Mr. McSperitt would pick him up at 7:00 a.m. and they would arrive on the job site about 7:30 a.m. The claimant further testified that he would be taken home by Mr. McSperitt at the end of the workday which differed. Sometimes it was 4:30 p.m., 5:00 p.m. or 6:00 p.m. according to the claimant's testimony. In review of both the claimant's testimony and Mr. McSperitt's, it appears the claimant would work generally an 8 hour workday at the rate of \$9.00 per hour. I find the claimant's average weekly wage to be \$360.00 which would entitle him to temporary total disability benefits at the rate of \$240.00 per week.

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 July 8, 2020 and contained in a Pre-hearing Order filed that same date are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that the employee/employer relationship existed between himself and the respondent on June 13, 2019.

3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his pelvis on June 13, 2019.

4. The claimant has proven that he is entitled to reasonable and necessary medical treatment for his compensable pelvis injury. The treatment records provided into evidence in this matter are all reasonable and necessary medical treatment for the claimant's compensable injury.

5. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 14, 2019 to October 29, 2019.

6. The claimant has proven by a preponderance of the evidence that he was earning an average weekly wage of \$360.00 which would entitle him to temporary total disability at the rate of \$240.00 per week.

7. The claimant has proven by a preponderance of the evidence that his attorney is entitled to an attorney's fee in this matter.

ORDER

Respondent shall pay for the reasonable and necessary medical treatment associated with the claimant's compensable pelvis injury on June 13, 2019. Respondent shall also pay to the claimant temporary total disability benefits from June 14, 2019 until October 29, 2019 at the rates set by the average weekly wage of \$360.00 which calculates to a temporary total disability rate of \$240.00 per week.

Respondent 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 Arkansas Code Annotated §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE