

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H302395**

**TRINIDAD TORRES RIVERA,
EMPLOYEE**

CLAIMANT

**A.G. STONE,
EMPLOYER**

RESPONDENT

**UNINSURED/ARKANSAS WORKERS'
COMPENSATION COMMISSION,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED FEBRUARY 13, 2024

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on November 14, 2023, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Mark Alan Peoples, Peoples Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Terence C. Jensen, Jensen, Young & Butler, PLLC, Benton, Saline County, Arkansas.

INTRODUCTION

In the prehearing order filed September 21, 2023, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The claimant alleges an employment relationship existed between he and A. G. Stone on August 28, 2022; and that he allegedly injured his lower back/lumbar spine, and both his right and left legs within the course and scope of his alleged employment on that date.
3. The respondents have controverted this claim in its entirety.
4. The parties specifically reserve any and all other issues for future litigation and/or

determination.

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 6-8; 95-96). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether an employment relationship existed between the claimant and A. G. Stone on August 28, 2022, the date of the claimant's alleged injuries.
2. If the claimant is deemed to have been an "employee" on August 28, 2022, whether he sustained compensable injuries within the meaning of the Arkansas' Workers' Compensation Act (the Act) to his lower back/lumbar spine, and both his right and left legs on August 28, 2022.
3. If the claimant's alleged injuries are deemed compensable, the extent to which he is entitled to medical and indemnity benefits.
4. Whether the claimant's attorney is entitled to a controverted fee on these facts.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 7-8; 96).

The claimant contends he was an employee of the respondent-employer, A.G. Stone (Stone) on August 28, 2022. He contends he sustained a work injury to his lower back/lumbar spine, and both his left and right legs on or about August 28, 2022, during the course and scope of his employment with Stone. The claimant contends he is entitled to medical treatment related to his work injury at Stone's expense. The claimant further contends he is entitled to TTD benefits from August 28, 2022, the date of injury, through a date yet-to-be-determined. Finally, the claimant contends the respondent has controverted this claim in its entirety and, therefore, his attorney is entitled to maximum statutory attorney's fees. The claimant specifically reserves the right to

Trinidad Torres Rivera, AWCC No. H302395

amend his prehearing questionnaire response upon the completion of appropriate and necessary investigation and discovery. In addition, he specifically reserves any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 2; T. 96-97).

The respondents contend the claimant was not Stone's employee on or about August 28, 2022, and that he cannot meet his required burden of proof pursuant to the Act. The respondents further contend the claimant cannot meet his burden of proof in demonstrating he sustained any compensable injuries on August 28, 2022. The respondents reserve the right to file an amended response to the prehearing questionnaire and/or any and all other appropriate pleading(s), and to plead any further affirmative defense(s) that may be available to them upon the completion of necessary and appropriate discovery, which discovery is ongoing at this time. The respondents specifically reserve any and all other issues for future determination and/or litigation. (Comms'n Ex. 1 at 3; T. 97).

The record herein consists of the hearing transcript and any and all exhibits contained therein and attached thereto.

STATEMENT OF THE CASE

The claimant, Mr. Trinidad Torres Rivera (the claimant), 58 years old. He testified that as of the date of his alleged work-related injury, August 220, 2022, he had been working for Mr. Adolfo Gomez "A.G." (A.G.) (hereinafter, A.G. Stone, or Stone, will be deemed to apply to Mr. Gomez as an individual, and to the sole proprietorship, "A.G. Stone"), which is owned by Mr. Adolfo Gomez (thus the name of the business, "A.G." Stone), for, "more than two (2) years." (T. 25). Stone apparently acquires, cuts, polishes, and hauls marble, granite, and other similar products

to both build/finish-out and to remodel kitchens and bathrooms. The claimant testified he had similar job duties at Stone. He further testified that on August 22, 2022, he was lifting a piece of marble from a pallet over his head when two (2) pieces of the marble (he didn't know how much they weighed but described them as "heavy") fell and struck both his right and left lower legs, and he alleges the incident also caused him significant lower back/lumbar spine pain to the point he thought his back was, "broken." (T. 25-28).

In August 2022, Ms. Michaela Faith was working on a part-time basis as Stone's bookkeeper/administrator/secretary, and she was present at the time of the incident in question and saw it happen. She worked on a part-time basis at that time, as did the other four (4) people, including Stone, she described as working with Stone, since there was not enough work to keep her, and them, busy 40 hours a week. She said even Stone had more than one (1) job, working as a handyman for a couple of other companies so he could support his family. Ms. Faith adamantly testified that while the claimant was present on the A.G. Stone work premises from time to time, he was not there every day, and when he was present on the Stone premises he was not there to work with Stone, but was there to work "on his vehicles," which Stone allowed him to keep behind his shop. Specifically, Ms. Faith testified: "I just saw him working on the cars, kinda just piddling around in the back." She correctly surmised, as the claimant eventually testified under oath, that the cars belong to him. (T. 50-54; T.37-37).

When asked the question on direct examination, whether the claimant was an employee of A.G. Stone, she flatly and succinctly replied, "He was not." (T. 53). Ms. Faith also clearly and

adamantly testified the claimant had absolutely no reason to be in the area doing what he was doing at the time the marble fell on him. (T. 64-67; 69-87; 50-63).

Ms. Faith was only working two (2) days a week when she first started to work with Stone in 2022 May, and it was not until around January of 2023 when she started working four (4) days a week, and then five (5) days a week in July of 2023. She was a part-time worker because she was also working for another company since, again, Stone's quantity of business was such that his company could not keep her or the other people with whom she worked busy. (T. 51-52). Ms. Faith testified that as the bookkeeper she paid Stone, herself, and all the other people who worked with A.G. Stone as, "1099 employees", or "1099 subcontractors." (T. 56-63).

At the time of the claimant's August 20, 2022, incident, Ms. Faith was only working with Stone on a part-time basis, as were the other people associated with him, including Stone himself. Ms. Faith testified that she was the person whose job it was to make payroll, and that she paid the employees by check; and contrary to the claimant's sworn testimony that he was sometimes paid in cash and sometimes paid by cash he believed he had received, "Probably...more than 10..." and "Maybe" more than 20 checks from Stone. (T.44). He also testified under oath that Stone always withheld taxes from his checks; however, the claimant later admitted under cross-examination that he did not file a tax return for either the 2021 or 2022 tax years, and that he was not legally in the United States to work, and he admitted – as he apparently had in his deposition – that he had no "legal status" in the United States – which he also added was the same situation A.G. Stone was in. (T.45-48). [Concerning the claimant's legal/ United States citizenship status, the ALJ sustained the claimant's attorney's objection as to relevance/irrelevance concerning his

workers' compensation claim, but the ALJ did allow the respondents' attorney's request to proffer this testimony, as the ALJ did not consider it with respect to any issue relating to compensability, but believed it to be relevant – just as was the claimant's admission he did not file a tax return for either the 2021 or 2022 tax years – to his respect for the law and, more significantly, his credibility or lack thereof. (T. 45-48)].

Moreover, while the claimant estimated Stone had paid him some 20 times with checks, he could not and did not produce any documentary evidence – such as a cancelled check, bank records, etc. – proving Stone had in fact paid him as he alleged. (T. 45). Indeed, the claimant admitted he had no, “written proof of a single check that he received from A.G. Stone before [his] accident of August 28, 2022” when he responded he did not have any such proof, “at this moment in time.” (T. 45). This admission, even though he also admitted he knew he was coming to court on the day of the hearing. The claimant said he had “photos of them [the checks] but I don't have them with me right now.” (T. 45) (Bracketed material added).

After the subject August 20, 2022, incident, Ms. Faith called an ambulance and the claimant testified he was taken to a University of Arkansas for Medical Sciences (UAMS) facilities, was in the hospital for a couple of days. When the claimant returned to the hospital for follow up on 8/30/2022 – some eight (8) days after the incident at work, he underwent diagnostic testing after which his physician determined he had broken (a closed fracture) his the distal tibia in his lower right leg, a closed fracture of his left lower leg, and a, “Compression fracture of L1 vertebra,” which the physician described as. “sequalee” of the subject incident of eight (8) days prior. Medical records admitted into evidence that on August 31, 2022, some nine (9) days after

Trinidad Torres Rivera, AWCC No. H302395

the marble-lifting and falling incident, the claimant underwent an apparent out-patient surgical procedure to repair these conditions, his right leg was splinted, his left leg was wrapped, his left ankle was put in a boot., and was released from the hospital the same day and advised to come back in two (2) weeks for follow-up. (T. 24-24-50; Claimant's Exhibit 1 at 1-24).

The claimant's roommate, Mr. Serapio Guerrero, had known and been friends with the claimant for some 30 years, at which time they had known each other in Mexico. The two (2) had seen each other again in the United States some four (4) years after they had arrived here; and Mr. Guerrero had lived with the claimant approximately two (2) years before the subject August 20, 2022, incident, and continued to live with him thereafter until approximately May 5, 2023. Although he obviously had very little, if any significant, personal knowledge concerning whether and if so to what extent the claimant had an employment relationship with H.G. Stone, he had visited Stone's premises approximately three (3) times where he saw the claimant polishing kitchen floor marble. Mr. Guerrero testified he witnessed that after the August 20, 2022, injuries, he observed the claimant using a wheelchair to ambulate for a period of time, and saw him in pain, and unable to do some things he had been able to do before the work incident. Mr. Guerrero moved out in early May 2023. He did the return to visit or see the claimant a few times thereafter, and said the claimant still appeared to be in some pain. In August 2023 the claimant went to work with a friend as a transport/cross-country truck driver. (T. 13-24).

The claimant testified he worked on two (2) occasions after the 8/20/2022 incident, between Thanksgiving of 2022, and August 1, of 2023, he helped his roommate, who is a transporter, do some work. He testified he helped his roommate drive a truck from Arkansas to

Utah, and then from Arkansas to Pennsylvania. He said his roommate paid him for these jobs, which meant that the roommate's employer trucking company did not pay him as either an independent contractor or an employee. He further testified this work activity was difficult on him, and caused him pain. (T. 32-33). The claimant authenticated Claimant's Exhibit 2, which he identified as medical bills related to the August 22, 2022, incident wherein he injured his right lower extremity. (T. 34-35).

In August of 2023 the claimant returned to work driving a truck for Harper Construction, where he still is employed. While he said he still was experiencing pain after the claimant was released in mid-October 2022, according to witnesses – namely, Mr. Gomez, Ms. Faith, and Ms. Melissa Phelps – all testified they saw the claimant in October and November of 2022, and even thereafter between October 2022 and August 2023, and they witnessed no evidence the claimant was disabled in any way, had trouble performing physical activity, nor did he appear to be in any pain. Ms. Phelps testified she began working with A.G. Stone in mid-February of 2023, after the subject incident, and after the claimant had been released from medical treatment and to return to work. She said she saw the claimant come to the office some time in February 2023, about one (1) week after she had started work with Stone. She testified under oath the claimant came down to the warehouse and was walking around without a cast, walker, or a cane, and he was not limping and did not appear to be favoring either of his legs. In Ms. Phelps own words, he, the claimant, was, "Walking just fine." Ms. Phelps said he also did not complain of any pain or injuries. (T. 64-66). On cross-examination when she observed the claimant in 2023 February, "He seemed perfectly fine", and capable of performing construction work, heavy work, based on her personal

Trinidad Torres Rivera, AWCC No. H302395

observations of him. (T. 66). It was also Ms. Phelps understanding the claimant came down to the warehouse to work on the vehicles he kept there. (T. 67). In his testimony, the claimant had admitted he owned the four (4) cars that were on the Stone premises, and that he planned to repair them and to sell them. The claimant also admitted he had not requested any medical treatment since he had been released in 2022 October, and he had not presented himself for treatment to a doctor. (T. 35-48).

The claimant, who also happened to be Stone's next-door neighbor, was a friend, and was one (1) of the few folks who worked with Stone who had keys to the A.G. Stone premises and could access the property whenever he wanted to work on his cars. Stone described the claimant as a "handyman" who helped around the premises from time to time (although the record is unclear as to what exactly his job duties were), but denied he was a A.G. Stone "employee" (T. 73-74; 69).

Finally, the evidence revealed, as the claimant admitted, that after the claimant's injury Stone gave the claimant an amount of money equal to one-half (1/2) the amount Stone paid the claimant when he was performing work duties for A.G. Stone. Moreover, Stone gave the claimant at least \$600 to help him with his medical bills. (T. 35-48; 75-92).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2023 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits.

Trinidad Torres Rivera, AWCC No. H302395

Stone v. Patel, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). **Ark. Code Ann.** Section 11-9-704(c)(3) (2023 Lexis Repl.) states that the ALJ, the Commission, and the courts “shall strictly construe” the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. **Ark. Code Ann.** § 11-9-704(c)(4) (2023 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers’ compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep’t of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission’s exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant’s or any other witness’s testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission’s

Trinidad Torres Rivera, AWCC No. H302395

province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The claimant has failed to meet his threshold burden of proof in demonstrating he was an “employee” as defined by the applicable law of A.G. Stone on the date of the subject incident, August 28, 2022.

Of course, the primary, and indeed, the threshold issue to be decided in this claim before we even reach the issue of whether the claimant has met his burden of proof in demonstrating he sustained a “compensable injury” within the Act’s meaning On 8/22/2022, is whether the claimant was an “employee” – i.e., whether an employment relationship existed between the claimant and Stone pursuant to the applicable law on the day of the work incident, 8/22/2022. A total of five (5) witnesses including the claimant testified at the subject hearing. To say the least the various witnesses’ testimony was somewhat conflicting on both the relevant issues litigated at the hearing; that is whether an employment relationship existed between the claimant and Stone on 8/22/2022, and whether the claimant’s injury to his left lower leg – essentially, a closed fracture of his left tibia – constitutes a compensable injury within the Act’s meaning.

The evidence was most contradictory and confusing concerning whether the claimant was an employee of Stone on the day of the incident, 8/22/2022. And while both attorneys are highly knowledgeable, professional, and did an excellent job representing their client’s respective interests, since the claimant has the burden of proof with respect to both of the aforementioned issues, in light of the contradictory and confusing nature of the relevant testimony, as well as the total lack of any documentary evidence demonstrating the claimant was Stone’s employee, I am

Trinidad Torres Rivera, AWCC No. H302395

compelled to find the claimant has failed to meet his burden of proof on this threshold employment relationship issue.

In affirming the Full Commission's decision that the claimant was in fact an independent contractor and not an employee, in *Davis v. Ed Hickman, P.A.*, 2020 Ark. App. 188, 598 S.W.3d 70 (Ark. App. 2020), our court of appeals referred to another of its cases, *Curry v. Franklin Electric*, 32 Ark. App. 168, 172, 798 S.W.2d 130, 132 (Ark. App. 1990), for the proposition that, "[T]he Arkansas General Assembly and not the courts, declares the state's public policy, and it does so through its statutes." In so doing, the court of appeals cited an Arkansas Supreme Court case, *Medical Liability Mutual Ins. Co. v. Alan Curtis Enterprises, Inc.*, 373 Ark. 525, 529, 285 S.W.3d 233, 237 (2008), in support of this fundamental and long-standing tenet of the law.

With respect to how Arkansas employers, our courts, and state agencies are to determine an individual's employment status vis-à-vis an alleged employer, in 2019 the Arkansas General Assembly expressly declared the state's public policy with respect to this issue when it passed **Ark. Code Ann.** Section 11-1-201, *et seq.* (LexisNexis 2020), which is entitled the, "Empower Independent Contractors Act of 2019." **Ark. Code Ann.** Section 11-1-203 defines the term, "employment status" as meaning, "the status of an individual as an employee or independent contractor for employment purposes, including without limitation wages, taxation, and workers' compensation issues."

Ark. Code Ann. Section 11-1-204 states that a person's "employment status" shall be determined using the well-known "20-Factor Test" the Internal Revenue Service (IRS) set forth in I.R.S. Revenue Ruling 87-41, 1987-1 C.B. 296. **Ark. Code Ann.** Section 11-1-204(1)-(20)

Trinidad Torres Rivera, AWCC No. H302395

specifically enumerates the 20 factors to be used in determining whether a person is an “employee” or an “independent contractor.” In addition, in following this statutory guidance as applied to the facts of a specific case, one may logically come to the common-sense legal conclusion that application of the factors to an individual demonstrates the person in question is neither an “employee” or an “independent contractor” based on the facts of the situation. Based on the aforementioned applicable 20-Factor test, I am compelled to find the claimant has failed to meet his threshold burden of proof in demonstrating he is or was an “employee” of A.G. Stone.

First, I must note this is a rather unusual case. In reviewing the 20 factors set forth in the 20-Factor Test (the Test) codified at *Ark. Code Ann.* Section 11-1-204(1) - (20), and much of the precedent it has produced in light of Arkansas law, in general, and Act 796 and Arkansas workers’ compensation law in particular, the Test is rather difficult to apply in a case such as this one where the record is largely devoid of a number of the specific facts/factors that a fact-finder must directly compare to the Test in order to render a decision. Second, much of the workers’ compensation law precedent regarding this issue ultimately involves the Commission in effect deciding whether the Act’s exclusive remedy provision is invoked.

This case involves the owner of a start-up small business which, at the time of the subject accident – August 28, 2022 – was conducting so little business that it appears Stone had no full-time employees, only part-time ones. According to Ms. Michaela Faith, A.G. Stone’s part-time bookkeeper at the time, the business treated everyone as an independent contractor, including the owner himself. [It should be noted at this time that while, at various points in her testimony, Ms. Faith used the terms such as, “1099 employees” (somewhat of an oxymoron), “1099

subcontractors”, and “subcontractor employees” [?], the fact Ms. Faith may have been using confusing and/or inaccurate legal terms does not make the claimant an employee when the remainder of the record is otherwise devoid of sufficient evidence the claimant met the Test’s definition of an employee.

It is significant to note the record is in fact effectively devoid of any facts that would lead one to a finding that he was an employee of A.G. Stone. In fact, the record contains insufficient evidence as to exactly what the claimant’s job duties were; from whom he took his direction; who supplied his working orders, tools, or any of the other facts that demonstrate the claimant more likely than not was an employee. Indeed, the record leads a reasonable fact-finder to the contrary conclusion.

The claimant worked part-time. He was paid either by cash or check, he said, yet he could produce no evidence to corroborate that A.G. Stone paid him by check. The claimant appears to have operated his own business on the claimant’s premises, and did as he pleased most of the time. The A.G. Stone owner referred to the claimant as a “handyman”, which does not connote an employee but rather a person the owner called to assist with certain jobs when he had them and needed help. The record in fact connotes that the owner tried to help the claimant by allowing him to operate a business on his premises, and paid him money from time to time as opposed to a regular salary. The preponderance of the credible evidence of record reveals the claimant had not been instructed to help in any way – and did not even have any reason to be in the area where and when the subject incident happened. Even after the incident, the claimant asked Stone for money, and Stone paid him one-half (1/2) of the amount he usually paid him when he was performing

what appears to be intermittent work at best, and Stone even gave his “friend” and “neighbor” some \$600 to help pay his medical expenses.

On these sparse facts it would constitute sheer speculation and conjecture for me to find the claimant met the statutory 20-Factor Test in proving he was an employee of A.G. Stone and, of course, speculation and conjecture will not and cannot support a claim for benefits. Consequently, *if* the claimant has a legal remedy against Stone, it does not exist pursuant to the Act and the Commission.

Therefore, for the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the prehearing order filed September 21, 2023, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has failed to meet his burden of proof in demonstrating he was an “employee” of A.G. Stone – i.e., that an employment relationship existed between him and A.G. Stone – on the day of the subject incident, August 28, 2022. Quite simply, the record is devoid of sufficient facts to determine exactly what the claimant’s actual job duties were, and who controlled his work, etc., much less other facts that meet the applicable law’s 20-Factor test for determining who is and is not an employee.
3. Since the claimant was not an “employee” of A.G. Stone on August 28, 2022, the day of the incident in question, the issue of compensability is rendered moot.
4. The claimant’s attorney is not entitled to a fee on these facts.

WHEREFORE, this claim is denied and dismissed subject to the parties’ statutory appeal rights. If they have not already done so, the respondents shall pay the court reporter’s invoice within ten (10) days of their receipt of this hearing and order.

Trinidad Torres Rivera, AWCC No. H302395

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp