

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. CA09-884

CHRIS SCROGGINS (Deceased)  
APPELLANT

V.

GLEN ROBERTS EXCAVATION,  
FIRSTCOMP INSURANCE CO., and  
DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND  
APPELLEES

**Opinion Delivered** JANUARY 27, 2010

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[F609906]

REVERSED

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**RITA W. GRUBER, Judge**

Chris Scroggins appeals the June 8, 2009 decision of the Workers' Compensation Commission that the Commission had jurisdiction of this case. In the 2-1 decision, affirming and adopting the decision of the administrative law judge, the Commission found that appellant was performing employment services for appellee Glen Roberts Excavation company at the time of his accident and death. Appellant asserts that he was not an employee at the time of the accident and contends that the Commission erred in finding that it had jurisdiction. We agree, and we reverse the Commission's decision.

The incident giving rise to this matter was an accident that occurred on September 1, 2006, when a tree being felled at appellee's excavation site landed on appellant. At a hearing

before the administrative law judge in February 2009, the parties stipulated that the accident caused appellant's death; that the administrator of his estate filed a lawsuit in circuit court in March 2007; that an October 2007 motion to dismiss, filed in the circuit court, stated that a determination of the Workers' Compensation Commission's jurisdiction had to be made; and that an order dismissing the circuit court case was filed in November 2007.

The sole issue litigated before the law judge was jurisdiction. Appellant contended that the Commission lacked jurisdiction because he was not an employee of appellee and was not performing employment services. The Commission's decision characterized the "central question" before it as whether appellant was an employee or an independent contractor. After considering the testimony of appellee's owner Glen Roberts, the only witness at the hearing, the Commission concluded that appellant was an employee of appellee and that the Commission therefore had jurisdiction of the case. The Commission wrote the following:

[Mr. Roberts] testified that he planned to hire the claimant and he, not the claimant, would have controlled the way the work was done; he had control over the details of the work; he would have supplied the tools and equipment the claimant would have used on the job; he would have paid him \$10 per hour for time worked; and he could have fired him at any time. The claimant would have been hired to perform assignments in Mr. Roberts' excavating business of moving dirt and clearing land. I find the claimant was an employee of the respondent and not an independent contractor. The respondent employer maintained the right to control all aspects of the claimant's work assignments.

In this case, the claimant's fatal injury occurred when he was hit by a tree that was being felled by the owner on the day of his interview and what would have been his first day on the job. The claimant was carrying the employer's chain saw onto the land being cleared by the respondent employer. The claimant was carrying out employment-related duties for the respondent employer.

We agree with appellant that the Commission wrongly focused upon an examination of employee versus independent contractor. Instead, the proper inquiry is whether appellant was an employee at the time of the accident.

A person who is “lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied” is an employee for purposes of workers’ compensation. Ark. Code Ann. § 11-9-102(9)(A) (Supp. 2009). *See also* Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2009) (excluding from the definition of “compensable injury” an injury inflicted before the employee was hired). An employee is typically one who renders labor or services to another for salary or wages, and there must be employment before a person qualifies for workers’ compensation. *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (2005).

Mr. Roberts testified that appellant had inquired about a job and that on the day of the accident, Roberts drove him in a truck to job sites, “kind of on a job interview,” while deciding whether to hire him. Roberts stated that at the second site, which was being cleared and cleaned for foundation work, he decided to use machinery to fell a tree and wanted no help because it was “just a one-man thing.” He testified that he directed appellant to stay out of the way by the truck, but that the tree fell on appellant and killed him when, unbeknownst to Roberts, appellant had returned to the lot. Roberts stated that appellant was holding one of Roberts’s chain saws at the time: Roberts had planned to use it to cut trees and had told appellant he could get it from the tool box in the back of the truck. Finally, Roberts testified

Cite as 2010 Ark. App. 84

that he would have hired appellant had the accident not happened, had indeed decided to hire him, had discussed hourly wages with him, but did not have his signature on any pre-employment forms.

It made no difference whether appellant “would have been” an employee or independent contractor after the fatal accident occurred. As noted by the dissenting commissioner and by appellant, there was no contract of hire. Because appellant was not an employee at the time the accident, the Commission lacked jurisdiction over this claim.

Reversed.

GLOVER and BROWN, JJ., agree.