

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1422
STATE OF WISCONSIN

Cir. Ct. No. 00-CV-16

**IN COURT OF APPEALS
DISTRICT III**

**B & P DRYWALL AND HERITAGE MUTUAL INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
STANLEY R. JAMES,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Menominee County: EARL W. SCHMIDT, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. B & P Drywall and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission that determined Stanley James was an employee, not an independent contractor, at the

time he fractured his heels, and that his compensation should be based on his average weekly wage of \$700. B & P argues that James met the nine-part test for independent contractors set out in WIS. STAT. § 102.07(8)(b) (1999-2000)¹ as a matter of law, and that James's compensation should be based on "the usual going earnings in James's field" rather than his actual average earnings. We reject these arguments and affirm the judgment.

¶2 The parties disagree on the standard of review that this court must apply to the commission's decision. Whether James was an independent contractor is a mixed question of fact and law. The commission's findings of fact may not be set aside if they are supported by substantial evidence. See *Jarrett v. LIRC*, 2001 WI App 46, ¶11, 233 Wis. 2d 174, 607 N.W.2d 326. As in *Jarrett*, we need not determine the level of deference that we must accord the commission's legal conclusions or its application of the facts to the law because the result would be the same. James does not meet the test for independent contractors.

¶3 Without reviewing all parts of the test, we conclude that James fails to meet the first, seventh, eighth and ninth conditions set out in WIS. STAT. § 102.07(8)(b):

- (1) Maintains a separate business with his or her own office, equipment, materials and other facilities;
- (7) May realize a profit or suffer a loss under contracts to perform work or service;
- (8) Has continuing or recurring business liabilities or obligations;

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

- (9) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

¶4 James worked as a drywall installer. He did not have an office or home office, did not set aside any space for his business purposes, did not have a business phone line, business cards or any kind of contact list. He had no office equipment such as a fax machine or computer and no regular business expenses such as utilities or lease expenses. The only thing he did was keep some tools and drywall nails in a bucket in his basement. The only records he maintained were for income tax purposes. While it is true that a formal office is not always necessary, the record contains no evidence that James maintained a separate business.

¶5 The record also conclusively demonstrates that James did not meet the seventh, eighth and ninth parts of the test. B & P argues that James had continuing or recurring business liabilities or obligations that could have resulted in suffering a loss under the contracts and that the success or failure of his business depends on the relationship of business receipts to expenditures. James had no overhead. At the time of his injury he had discontinued liability insurance. He had no regular employees or assistants that he would have to pay even if he had no work. His tools consisted of hammers, T-squares, a drywall knife, power cords, a tape measure and a screw gun. The record does not reflect that these items needed frequent maintenance or replacement. Because the ninth part of the test refers to the "success or failure" of the business, the commission reasonably determined that minor or trivial expenses could not result in the failure of James's business. Because his "business" consisted of providing services for pay with virtually no overhead, he did not have recurring expenses that could cause him to take a loss on any individual project.

¶6 The commission appropriately utilized WIS. STAT. § 102.11(1)(a) rather than subsection (c) when it determined James's average weekly wage. The purpose of the statute is to base compensation on normal income that one derives from employment. *See State DHSS v. LIRC*, 159 Wis. 2d 300, 311, 464 N.W.2d 74 (Ct. App. 1990). Subsection (c) is designed to be utilized when the calculation of average weekly earnings under subsection (a) is not possible. James was compensated by the foot, not by the hour. That fact alone does not mean that subsection (a) cannot be utilized. His average weekly earnings can be calculated by converting the average number of feet he installs in one week. Subsection (c) should only be utilized when there is no basis for computing the worker's actual average earnings.

¶7 B & P presented no evidence regarding James's average weekly earnings. The commission accepted the lower end of James's estimate. James's testimony provides sufficient evidence to support the commission's finding.

¶8 Finally, James argues that this appeal is frivolous and requests additional costs under WIS. STAT. RULE 809.25(3). While we reject B & P's arguments, we cannot conclude that they were without any reasonable basis in law or equity and could not be supported by a good-faith argument for extension, modification or reversal of existing law. *See* WIS. STAT. § 809.25(3)(c)2. Therefore, the court will only tax the ordinary costs against the appellant, B & P Drywall, as provided in RULE 809.25(1)(b).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

