

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F211484

GARY FALKENBERG, EMPLOYEE

CLAIMANT

CARPET MASTER,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 19, 2003

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Mountain Home, Baxter County, Arkansas.

The claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by Mike Ryburn, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

A hearing was held in this matter on May 21, 2003. A prehearing conference was conducted on March 3, 2003, and a prehearing order was filed on March 24, 2003. A copy of the prehearing order has been marked as Commission Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following stipulations:

1. The respondent has controverted this claim.

During the prehearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following:

1. Whether the claimant was an employee of the respondent.

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From a review of the record as a whole, to include the testimony of the claimant, witnesses J. C. Marler and Marvin Massey, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim;
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact;
3. The claimant failed to prove by a preponderance of the evidence that he was an employee of the uninsured respondent;
4. The respondent controverted this claim in its entirety.

DISCUSSION

The determination of whether, at the time of an injury, an individual was an independent contractor or an employee depends on the facts of the case. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982). Ordinarily, no one feature of the relationship is determinative. Carter v. Ward Body Works, Inc., 245 Ark. 515, 439 S.W.2d 286 (1969). The right to control the method and manner of the work is the traditional test applied in Arkansas when considering whether an individual was an employee or an independent

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contractor. The ultimate question with the right to control test is whether the employer has the right to control, not whether the employer actually exercises control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). However, the courts have also considered the “relative nature of the work” test in addition to the right to control test. Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976); Sands v. Stombaugh, 11 Ark. App. 38, 665 S.W.2d 902 (1984); Franklin, Supra; Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The main consideration of the relative nature of the work test is “the relationship between the claimant’s own occupation and the regular business of the asserted employer.” Salter, Supra; Lambert, Supra.

Consequently, the resolution of whether an individual is an independent contractor or an employee requires an analysis of the factors related to the employer’s right to control and of factors related to the relationship of the work to the asserted employer’s business. In making a determination, the Commission must look at the factors outlined in D. B. Griffen Warehouse, Inc. v. Sanders, 336 Ark. 456, 986 S.W.2d 836 (1999):

1. the extent of control which, by the agreement, the master may exercise over the details of the work;
2. whether or not the one employed is engaged in a distinct occupation or business;

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3. the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. the skill required in the particular occupation;
5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. the length of time for which the person is employed;
7. the method of payment, whether by the time or by the job;
8. whether or not the work is a part of the regular business of the employer;
9. whether or not the parties believe they are creating the relation of master and servant; and
10. whether the principal is or is not in business.

See also Aloha Pools & Spas, Inc. v. Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

These are not all of the factors which may conceivably be relevant in a given case, and it may not be necessary for the Commission to consider all of these factors in some cases. The relative weight to be given to the various factors must be determined by the Commission. Franklin, supra. However, the Supreme Court has stated that the “right of control” is the principal factor in determining whether the relationship is one of agency or independent contractor. Sanders, supra. Applying these factors to the present claim, I find

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the preponderance of the evidence establishes that the claimant was an independent contractor and not an employee.

In the present claim, the respondent's business includes the performance of restoration services for structures that have been damaged by water, fire, and smoke, and the claimant was performing carpentry work for the company. The testimony of Mr. Massey, a co-owner of the company with his wife, indicates that the skilled workers needed for the jobs obtained by the company were acquired on a job-by-job basis. He also testified that carpenters such as the claimant had been needed on a job for the company only twice during the fourteen years that they had been in business. The testimony of the claimant as well as Mr. Massey indicates that the claimant's services had been acquired only for the particular job on which he was injured, although there had been some discussion of the claimant also participating in other projects which Mr. Massey was acquiring.

The claimant's testimony indicates that he is a carpenter by trade and that he typically works on a job-by-job basis. Although he was paid an hourly rate for the work performed by the respondent, there is no indication that there was any agreement or understanding that he would continue to provide services after the job he was working on was completed. Nothing was withheld from the claimant's pay, and the claimant testified that he expected to

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receive a federal tax from 1099. Although the claimant had his own tools, he also testified that Mr. Massey also had tools that he made available. The claimant testified that Mr. Massey exercised considerable control over the manner in which the job was completed. However, Mr. Massey denied that testimony.

In short, I find that a preponderance of the evidence establishes that the respondent is in the business of restoring structures that have been damaged by water, fire, and smoke. I further find that a preponderance of the evidence establishes that the respondent contracts for the work to be done on each project on a job-by-job basis, based on the nature of each individual job. Moreover, after considering all of the evidence in the record, I find that the claimant contracted with the respondent as an independent contractor. Accordingly, I find that the claimant failed to prove by a preponderance of the evidence that he was an employee of the respondent.

ORDER

Accordingly, based on my review of the entire record and for the reasons discussed herein, I find that this claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

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C. Michael White
Administrative Law Judge