

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. E806348**

ORMOND MARSHALL, EMPLOYEE	CLAIMANT
CARSON EQUITIES, LLC., EMPLOYER	RESPONDENT #1
HOUSTON GENERAL INSURANCE COMPANY, INSURANCE CARRIER; CUNNINGHAM LINDSEY CLAIMS MANAGEMENT, TPA	RESPONDENT #1
SQUIRE COURT LIMITED PARTNERSHIP	RESPONDENT #2

OPINION FILED May 28, 2004

Submitted on the record before Chief Administrative Law Judge David Greenbaum.

Claimant represented by Lamar Porter, Attorney at Law, Little Rock, Arkansas.

Respondent #1 represented by John D. Davis, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by Mel Sayes, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case originally involved a negligence suit brought by Nigel Merez and Ormond Marshall against Squire Court Limited Partnership (hereinafter "Squire Court LP"), for injuries they sustained while working for Carson Equities, LLC, (hereinafter "Carson"), renovating an apartment building owned by Squire Court LP. The parties have stipulated that Nigel Merez and Ormond Marshall were employed by Carson.

Carson was hired in July 1997 to perform renovations on two apartment buildings owned by Squire Court LP. Squire Court LP is in the business of buying apartment complexes, having them renovated, and then leasing out the units. At the time, Squire Court

LP and Carson were businesses run by father, Henry Mann,¹ and son, Michael Mann, respectively. Squire Court LP's general partner was Squire Court Partners, Inc., of which Henry is president. Michael, along with his two sisters, was the owner and operator of Carson.

On May 28, 1998, Nigel Merez was carrying carpet up to the second floor of one of the apartment buildings when the stairway collapsed. Claimant, Ormond Marshall, was walking on the ground level when the stairway collapsed and a large chunk of concrete landed on his foot. As a result of their injuries, Merez and Marshall sued Squire Court LP, alleging, among other things, that it was negligent in failing to warn them of the danger presented by the stairs, in failing to reinforce the stairs, and in failing to exercise reasonable care for their safety. In addition, Merez and Marshall alleged that because of the control and supervision over the project exercised by Henry Mann, Squire Court LP was, in effect, the general contractor and therefore responsible for any negligence on the part of Carson. They alleged further that the control exercised by Squire Court LP over Carson turned the relationship from one of employer and independent contractor to one of master and servant.

Squire Court LP moved for summary judgment, contending that it did not owe any duty to Merez and Marshall because Carson was an independent contractor. Squire Court LP contended further that Merez and Marshall's remedy was a workers' compensation claim against Carson. The trial court granted summary judgment to Squire Court LP with no

¹Also known as Hank Mann and Harry Mann.

explanation, and Nigel Merez and Ormond Marshall appealed to the Arkansas Court of Appeals.

In an unpublished opinion, the court of appeals dismissed the appeal for lack of jurisdiction, holding that the exclusive, original jurisdiction of this case was in the Arkansas Workers' Compensation Commission. *See Merez v. Squire Court Ltd. Partnership*, CA 02-82 (Ark.App. October 2, 2002) (*Merez I*). The decision was based on the court of appeals' conclusion that Squire Court LP was the prime contractor on the renovation project.

Merez and Marshall subsequently filed a petition for rehearing, asserting that the Workers' Compensation Act did not apply in that Squire Court LP, as a prime contractor, was not liable for compensation benefits to Merez and Marshall, as they were employees of a subcontractor. Appellants relied on the Arkansas Supreme Court's holding in *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998), wherein the court held that Ark. Code Ann. § 11-9-105(a) (Repl. 1996) was unconstitutional insofar as it granted tort immunity to a prime contractor who is not a statutory employer pursuant to Ark. Code Ann. § 11-9-402 (Repl. 1996). Squire Court LP responded to the petition for rehearing by arguing that the court of appeals was correct in holding that under *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 970 S.W.2d 810 (1998), the Commission has exclusive, original jurisdiction to determine the facts to decide whether the Act applies.

In a second unpublished opinion, the court of appeals vacated its previous decision and issued a substituted opinion reversing and remanding the order of summary judgment on

the ground that there were material issues of fact yet to be determined. *See Merez v. Squire Court Ltd. Partnership*, CA 02-82 (Ark.App. December 18, 2002) (*Merez II*). Two judges dissented from that decision on the ground that the Commission has the exclusive authority to determine the facts bearing on the issue of where jurisdiction lies in this case. The dissent reasoned that Appellants' allegations, if true, raised the question of Squire Court LP's status as a possible joint venturer in the project with Carson, such that it would bring Squire Court LP within the Act's coverage.

Thereafter, Squire Court LP filed a petition for review in the Arkansas Supreme Court, which was granted on January 30, 2003. The supreme court concluded that the court of appeals made the right decision in the first appeal; therefore, the court reversed and remanded the court of appeals' holding in *Merez II* because the Commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction in this case in order to determine by whom Nigel Merez and Ormond Marshall were employed in order to determine whether their injuries are covered by the Arkansas Workers' Compensation Act. *See Merez v. Squire Court Limited Partnership*, 353 Ark. 174, 114 S.W.3d 184 (2003).

ISSUE

By agreement of the parties, the primary issue for determination is whether or not the Claimant, Ormond Marshall, was an employee of Squire Court Limited Partnership at the time of the accident.

Originally, a corollary issue was whether Squire Court Limited Partnership was a

general contractor and, therefore, a statutory employer under the Act, rather than a third party. However, all parties have now agreed that whether Squire Court Limited Partnership was or was not the general contractor over the renovation project is immaterial to the present proceedings; that issue is, therefore, moot.

Further, claimant had additionally raised a constitutional argument, specifically, whether the Commission had exclusive authority to determine the relationship of the parties rather than concurrent jurisdiction with the Circuit Court. However, in light of the Arkansas Supreme Court's holding in *Merez v. Squire Court Limited Partnership*, 353 Ark. 174, 114 S.W.3d 184 (2003), set out above, this issue has been resolved by the Supreme Court. Claimant's attorney simply raised the issue to preserve any appeals on constitutional grounds.

Accordingly, the sole issue addressed herein concerns whether Claimant was an employee of Squire Court Limited Partnership at the time of his injury.

STIPULATED RECORD

The parties, consisting of the Claimant and both respondents, stipulate that this matter may be decided by this Administrative Law Judge, without the necessity of an oral hearing, based on the following record:

a. Portions of the Arkansas Supreme Court/Court of Appeals transcript, Docket No. 02-1046, as filed on January 23, 2002, in the matter of *Nigel Merez, Ormond Marshall, and Houston General Insurance Company v. Squire Court Limited Partnership*. The agreed portions of the transcript are as follows:

- 1) Complaint and Demand for Jury Trial;
- 2) Plaintiff's Response to Defendant's Motion for Summary Judgement (which includes depositions of Harry Mann, Michael Mann, Colvin Yearwood, Nigel Merez, Ormond Marshall, Jerry Phillips, as well as interrogatory responses and documents attached thereto);
- 3) Deposition of Donna Murphrey.

b. Appellants' abstract and brief filed with the Arkansas Court of Appeals, CA 02-00082.

c. All forms and pleadings previously filed before the Commission in this matter.

d. Opinion of the Arkansas Supreme Court, delivered May 15, 2003, *Merez v. Squire Court Limited Partnership*, 353 Ark. 174, 114 S.W.3d 184 (2003).

STIPULATED FACTS

The parties have stipulated to the following facts:

a. The employee/employer/carrier relationship existed between Ormond Marshall and Nigel Merez, and Carson Equities, and Cunningham Lindsey U.S., Inc., on or about May 28, 1998.

b. That on or about May 28, 1998, Ormond Marshall and Nigel Merez sustained compensable injuries while employed by Carson Equities. The injuries were ultimately accepted as compensable and benefits have been paid.

c. At the time of his injury, Claimant, Ormond Marshall, and fellow employee, Nigel

Merez, were not covered by any policy of workers' compensation insurance issued to Respondent Squire Court Limited Partnership.

d. Squire Court Limited Partnership, or its insurance carrier has not paid any workers' compensation benefits to or on behalf of Ormond Marshall and Nigel Merez with reference to the May 28, 1998, injury.

CONTENTIONS

Claimant contends, in summary, that there was no employee/employer relationship between Ormond Marshall and Squire Court Limited Partnership and that, therefore, all other issues to be determined by and between these parties should be determined by the circuit court and/or a jury upon trial of the matter.

Respondents contend, in summary, that Squire Court Limited Partnership was the Claimant's dual employer, along with Carson Equities; and, therefore, Workers' Compensation is the exclusive remedy for this Claimant.

From a review of the stipulated record as a whole, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this matter.
2. On the date of injury, Ormond Marshall was jointly employed by both Carson Equities and Squire Court Limited Partnership.
3. Claimant was under contract with Carson Equities, from whom he received a

paycheck, to perform renovation work at two apartment complexes, Squire Court One and Squire Court Two, which were owned by Squire Court Limited Partnership.

4. Simultaneous with his employment with Carson Equities, Claimant was employed by Squire Court Limited Partnership to perform renovation work in a specific apartment in the Squire Court properties, for which he was remunerated by being allowed to live rent-free in that apartment.
5. Claimant was under simultaneous control of both Carson Equities and Squire Court Limited Partnership, and simultaneously performed duties for both employers, as the services for each employer were closely related one to another.

DISCUSSION

The facts as contained in the stipulated record support the conclusion that Claimant may be viewed as an employee of both Carson *and* Squire Court LP. All parties have agreed that whether Squire Court LP was or was not the *general contractor* over the renovation project is immaterial to the present proceedings; therefore, that issue will not be addressed. The sole issue is whether Ormond Marshall was an employee of Squire Court LP.

Arkansas Code Annotated § 11-9-102(9)(A) defines “employee,” in pertinent part as: “[A]ny 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, express or implied, . . .*” In some cases, liability may be imposed upon someone other than the primary employer on the theory that there is a “joint employment” or “dual employment.” The two

theories are distinguishable.

According to Larson's,

Joint employment occurs when a single employee, under contract with two employers, and under *simultaneous control* of both, *simultaneously performs services for both* employers, and when the service for each employer is *the same as, or closely related* to, that for the other.

* * *

Dual employment occurs when a single employee, under contract with two employers, and under the *separate control* of each, performs services for the most part for each employer *separately*, and when the service for each employer is *largely unrelated* to that for the other.

Larson, *Workers' Compensation Laws* § 68.01 (emphasis added). *See also Cook v. Recovery Corporation*, 322 Ark. 707, 911 S.W.2d 581 (1995). The Arkansas Supreme Court has held that if an employee is engaged in "joint employment," the liability for workers' compensation benefits is joint. *Id.*

In the instant case, the degree of control asserted over the renovation project by Squire Court LP, generally, and Henry Mann, specifically, was very high. In fact, as Claimant himself alleged in the appellate courts, there was an intimate relationship between Squire Court LP and Carson, such that the line between the two companies was impossible to distinguish.

Henry Mann testified in his deposition that he was an officer of Squire Partners and that Squire Partners was the general partner of Squire Court LP. He stated that he and his son, Michael, ran Squire Partners and were primarily responsible for operating Squire Court

LP. He stated that Carson acted as the general contractor for Squire Court LP's properties and that Merez and Marshall were employed by Carson, but not by Squire Court LP. He also stated that he was not a member of Carson and that he did not know the identity of any of Carson's partners. He stated further that he did not act on behalf of Carson, had nothing to do with Carson, and did not have any dealings with any employees of Carson. However, the answers to interrogatories filed by Squire Court LP indicate that Henry was a consultant for both Squire Court LP and Carson; that he provided advice on construction and management of apartments; and that he had authority to write checks on behalf of both Carson and Squire Court LP. Finally, Henry admitted in his deposition that he periodically went to the job site and viewed the quality of the work. He explained that although Michael ran Carson, Michael, unlike Henry, did not know anything about construction.

In Michael Mann's deposition, Michael was somewhat evasive as to the roles that he and his father played in the two companies. For example, he stated in his deposition that he did not know if he was an officer of Squire Partners or whether he was president of Carson at the time of the accident. In fact, he stated that he did not know what office he held or whether his father was an officer of Carson. He stated that he oversaw the daily operations of Carson, but that he did not receive any compensation from Carson for the renovations done on the Little Rock apartments. He stated that the day-to-day decisions, such as hiring and subcontracting, were his responsibility and that the job supervisors reported to him, not his father. He stated that he did not know if Carson kept personnel files on its employees,

but that Squire Court LP was probably the custodian of any such records, if they existed. He further stated that he did not know of any reports between Carson and Squire Court LP with regard to the budget, but that he probably was the person responsible for maintaining the budget for both companies.

Colvin Yearwood, a supervisory employee of Carson's for the jobs in question, stated that he was hired by Henry Mann. Yearwood believed that he worked for Squire Court LP and that Squire Court LP was a subsidiary of Carson. According to his deposition, Henry Mann was the owner of Carson. He was not sure what role Michael Mann actually played at Carson. He stated further that Henry was in charge of the renovations. He stated that he considered Henry to be his boss, and that he reported directly to Henry most of the time. He stated that Henry would walk around the property and inspect the premises during the work. In contrast, Michael did not ask for any reports of updates about the work, nor did he ever engage in conversation with Yearwood about the renovations. Finally, Yearwood stated that if it were necessary to hire subcontractors to perform work on the renovations at Squire Court II, the building where the accident occurred, it required Henry's approval.

Nigel Merez stated in his deposition that Henry came to the job site once a month. He stated that he did not know whether he was employed by Carson, but that he was paid by checks drawn on Carson's account. Merez stated further that when he went back to work after the accident, he spoke with Henry Mann, and Henry told him he could have his job back.

Claimant stated in his deposition that he was asked by Henry Mann to come here from

New York to work for Mann in Little Rock for Carson Equities. He stated that he was employed by Carson and paid by Carson. He stated that sometimes Henry Mann signed his paychecks, and sometimes Michael Mann signed them, but that the company name on the check was Caron Equities. He stated that he was given an apartment by Squire Court to live in rent-free in exchange for fixing it up, *i.e.*, painting, laying tile and carpet.

According to Henry Mann's deposition, Carolyn Hornbeck was at all pertinent times an employee of Squire Court LP and served as manager of both Squire Court apartment properties; she was never an employee of Carson Equities. Although she was not employed by Carson Equities, Carolyn Hornbeck would sometimes give work instructions to claimant, if there was something that she needed to be done, according to Claimant's deposition.

Based on this definition, claimant in this case was obviously jointly employed by both Carson and Squire Court LP. Henry Mann clearly exercised simultaneous control of the employees of both Squire Court LP and Carson. As stated above, although he stated in his deposition that he did not act on behalf of Carson, had nothing to do with Carson, and did not have any dealings with any employees of Carson, Henry Mann's answers to interrogatories filed by Squire Court LP indicate that Henry was a consultant for both Squire Court LP and Carson; that he provided advice on construction and management of apartments; and that he had authority to write checks on behalf of both Carson and Squire Court LP. Finally, Henry admitted in his deposition that he periodically went to the job site and viewed the quality of the work. He explained that although Michael ran Carson,

Michael, unlike Henry, did not know anything about construction. Clearly, Henry Mann was exercising control over Carson, as well as Squire Court LP.

The employees hired to work on the Carson renovation project of the Squire Court properties believed that Henry Mann was in charge; some even believed that Carson was a subsidiary of Squire Court LP. Even Henry Mann's own son, Michael, the "owner" of Carson, according to Henry, was unsure of both he and his father's status where these two companies were concerned.

Claimant performed simultaneous services for both employers, as he was hired and received paychecks from Carson for the renovation work on the properties, but was given a rent-free apartment by Squire Court LP in exchange for his agreement to "fix up" that apartment. Further, he took instruction from Carolyn Hornbeck, an employee of Squire Court LP and the manager of the Squire Court apartments, when she needed work done for Squire Court LP.

Finally, the services Claimant performed for each of Carson and Squire Court LP were the same as, or closely related to, that for the other. Claimant testified that he was the "floor guy" for Carson; his job was for carpet and tiles. His job in fixing up the apartment he was given by Squire Court LP was to paint, and lay carpet and tiles.

Further evidence of the simultaneous control exercised by and between these two companies is the lack of the existence of a contract between Squire Court LP and Carson or renovation plan or written progress reports. Michael Mann stated in his deposition that he

was not sure whether there actually was a written contract between Squire Court LP and Carson, and that if one exists, he does not know who might have custody of it.

The relationship between Squire Court LP and Carson is, indeed, intimate. In fact, it is so much so that the line between the two companies is difficult to distinguish, not unlike the “alter ego” theory addressed in *Richardson v. Rogers*, 266 Ark. 980, 588 S.W.2d 465 (Ct. App. 1979). There, the Commission found, and the court of appeals affirmed, that the appellant Charles Richardson was individually liable for workers’ compensation benefits, as his two businesses were interrelated to the extent that each qualified as an employer. In *Richardson*, however, it was undisputed that the appellant controlled and operated both businesses, that they were one in the same, that he commingled the funds of the two companies, and that neither had any material assets. The court also pointed out that one of the companies was not a corporation, and that there was no evidence that Mr. Richardson was acting within the scope of his employment with either company in the employment of the claimant or the direction of the work.

In contrast to the *Richardson* case, both Squire Court LP and Carson were separate business entities. They were legally and properly organized under State laws, and there has been no evidence of profit-sharing, commingling of assets, joint payment of taxes, or other activities that would indicate an “alter ego” situation. Still, the intimacy of the relationship and the control exercised by Henry Mann over both entities makes it difficult to determine what employment theory should apply.

As the definition of “joint employment” is most accurately applicable to the factual situation as contained in the stipulated record, it is this Commission’s conclusion that Claimant was an employee of Squire Court Limited Partnership, in addition to Carson Equities.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge