

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303156

JOHN SORRELS,
EMPLOYEE

CLAIMANT

SCOTT BOONE,
EMPLOYER

RESPONDENT NO. 1

TRAVELERS INSURANCE COMPANY,
CARRIER

RESPONDENT NO. 2

OPINION FILED OCTOBER 13, 2005

Hearing before Administrative Law Judge Mark Churchwell on July 13, 2005 in Russellville, Pope County, Arkansas

Claimant was represented by Honorable Laura McKinnon, Attorney at Law, Fayetteville Arkansas.

Respondent No. 1 was represented by Honorable Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Honorable John Cherry, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 13, 2005 in Russellville, Arkansas. A Prehearing Order was entered in this case on March 25, 2005. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations were submitted by the parties either in the Prehearing Order or during the course of the hearing and are hereby accepted:

1. The claimant sustained an injury on or about 3/18/2003.

2. This case has been controverted by Travelers Insurance Company in its entirety.

3. The claimant's current primary treating physician is Dr. Honghiran.

4. The jurisdiction of the Commission.

5. There was a Certificate of Non-Coverage for Mr. Sorrels that had not expired on the date of the injury.

By agreement of the parties, after reservation of certain issues, the issues to be litigated and resolved at the present time were identified as follows during the course of the hearing:

Claimant:

1. Compensability of work-related condition or injury.
2. Reasonable and necessary medical benefits.
3. Controversion.
4. Employment relationship.
5. Estoppel (originally considered Respondent No. 1's issue but apparently abandoned by Respondent No. 1's attorney).

Respondent No. 1:

1. Whether the claimant was an independent contractor, a subcontractor, or an employee.

2. Attorney's fees.

Respondent No. 2:

1. Whether the claimant was an independent contractor, a subcontractor, or an employee of Scott Boone on 3/18/03, at the time of the injury to his arm.

2. Whether the Travelers Insurance policy issued to Scott Boone provided coverage for the accidental injury sustained by Mr. Sorrels on 3/18/03.

The record consists of the July 13, 2005 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record the post-hearing briefs filed by the parties. I have also "blue-backed" to designate as part of the record Mr. Ryburn's July 19, 2005 cover letter and the two-page Builders' Risk Insurance Policy issued by Farm Bureau Mutual Insurance Company of Arkansas to Scott Boone.

DISCUSSION

John Sorrels fell off a scaffolding while installing a window in a new home being constructed by Scott Boone. Mr. Sorrel's arm fracture is established by objective medical findings. The threshold issue in this case is clearly

whether Mr. Sorrels was an employee of Scott Boone, or instead an independent contractor, when Mr. Sorrels became injured on March 18, 2003.

The Supreme Court of Arkansas "has long held that an independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work." Arkansas Transit Homes, Inc. v. AETNA Life & Casualty, 341 Ark. 317, 321, 16 S.W.3d 545, 547 (2000) (citing Johnson Timber Corp. v. Sturdivant, 295 Ark. 622, 752 S.W.2d 241 (1988); Moore and Chicago Mill & Lbr. Co. v. Phillips, 197 Ark. 131, 120 S.W.2d 722 (1938); W. H. Moore Lumber Co. v. Starrett, 170 Ark. 92, 279 S.W.4 (1926).

The determination of whether a person is an employee or an independent contractor must be made on a case by case basis. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 267, 635 S.W.2d 286, 288 (1982). "There are numerous factors which may be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage." Id. at 269, 635 S.W.2d at 289. These factors include:

- (1) the right to control the means and the method by which the work is done.
- (2) the right to terminate the employment without liability.

- (3) the method of payment, whether by time, job, piece, or other unit of measurement.
- (4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
- (5) whether the person employed is engaged in a distinct occupation or business;
- (6) the skill required in a particular occupation;
- (7) whether the employer is in business;
- (8) whether the work is an integral part of the regular business of the employer; and
- (9) the length of time for which the person is employed.

Id. 5 Ark. App. at 269-70, 635 S.W.2d at 289.

"[T]he right to control is the principle factor in determining whether one is an employee or an independent contractor." Arkansas Transit Homes, Inc., 341 Ark. at 322, 16 S.W.3d at 548 (citing Dickens v. Farm Bureau Mut. Ins. Co., 315 Ark. 514, 517, 868 S.W.2d 476, 477-78 (1994) (internal citations omitted)). With regard to control, "[t]he governing distinction is that if control of the work reserved by the employer is control not only of the result, but also of the means and manner of the performance, then the relation of master and servant necessarily follows. But if control of the means be lacking, and the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relation of independent contractor exists." Id. (quoting Massey v.

Poteau Trucking Co., 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953) (internal citations omitted)).

Additionally, the factors that pertain to the correlation between the claimant's occupation and the regular business of the "employer" comprise the "relative nature of the work" test. Arkansas Transit Homes, Inc., 341 Ark. at 322, 16 S.W.3d at 548 (citing Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976)). "This test requires consideration of two factors: (1) whether and how much the workers' occupation is a separate calling or profession, and (2) what relationship it bears to the regular business of the employer. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee." Id.

The Arkansas courts have not recently addressed the arrangements under which a carpenter may or may not be considered an employee versus an independent contractor in building construction. However, I note that the Full Commission has issued published decisions on this topic several times in recent years.

For example, in Simpson v. Wayne Moore Construction Company, Full Workers' Compensation Commission, Opinion filed February 23, 2004 (F207890), the Commission considered the issue as to whether or not a framing carpenter was an

independent contractor or instead an employee of a business primarily engaged in home building and remodeling doing business as Wayne Moore Construction Company. The Full Commission found that the framing carpenter was an employee, and not an independent contractor, under circumstances where Mr. Simpson was paid by the hour; either party could terminate the employment relationship at any time without liability; Mr. Simpson did not work for anyone else during the period of time that he worked on the job for Wayne Moore Construction Company; Wayne Moore Construction Company provided the vast majority of the tools and equipment needed to perform the work; Wayne Moore Construction Company would direct Mr. Simpson where he needed to work each day and essentially controlled all aspects of the work; Mr. Simpson never owned his own business; Mr. Simpson believed that he was an employee of Wayne Moore Construction Company. The Commission reached this result even though Mr. Simpson had signed and presented a Certificate of Non-Coverage to Wayne Moore Construction Company, and Mr. Simpson filled out tax forms identifying himself as a "non-employee."

In Harold Gray (Dec'd) v. B. R. Skipper Construction, Inc., Full Workers' Compensation Commission, Opinion filed April 21, 2003 (F010523), a majority of the Full Commission likewise found that Mr. Gray, a journeyman carpenter, was an

employee of B. R. Skipper Construction, Inc., a building contractor, and not a subcontractor or an employee of the home builders at the site where B. R. Skipper Construction was the contractor of record. The Commission found Mr. Gray to be an employee of B. R. Skipper Construction, Inc. under circumstances where a written construction contract called for B. R. Skipper to construct a custom home; B. R. Skipper Construction had the right to control Mr. Gray's work, but did not exercise actual control; there were five carpenters on the site; the carpenters had no right to control the means and method of roof building, as their daily work was governed by blue prints subject to revision by others; the work schedule was determined for the carpenters; the carpenters could be terminated without liability or quit without liability at any time; the carpenters were paid by the hour, not by the job or by the square-foot; the carpenters only furnished their own apron and hammer; and the property owner provided all major tools; and carpentry was integral to the construction contract and carpenters consider themselves employees. The Commission reached this conclusion notwithstanding the fact that Mr. Gray was a journeyman carpenter; that B. R. Skipper was seldom present at the work site and did not maintain day-to-day control of

the construction; no taxes were withheld from Mr. Gray's checks; and B. R. Skipper did not furnish tools.

In Richard Wesson v. Shawn Gaddy D/B/A Rat A Tat Tat Construction, Full Workers' Compensation Commission, Opinion filed December 3, 2002 (F011031), Mr. Wesson was a framing carpenter and a lead man for the construction performed by Shawn Gaddy's business. A majority of the Full Commission found Mr. Wesson to be an employee and not an independent contractor under circumstances where Mr. Wesson was paid \$15/hour weekly; Shawn Gaddy supplied equipment but not tools; Shawn Gaddy, the framing subcontractor, was paid \$3.25 per square foot to frame the house; Shawn Gaddy controlled the work hours and performance; and Shawn Gaddy had the right to control the means by which the work was done. The Full Commission reached this conclusion notwithstanding that Mr. Wesson paid his own Social Security and taxes; he had been a carpenter for ten years before the job; he used his own tool belt, saw, level, cords, and hoses; as head man, Mr. Wesson instructed other carpenters as per Shawn Gaddy's orders; Mr. Wesson had a Certificate of Non-Coverage that was never delivered; and Mr. Wesson had been hired in a leadership capacity to exercise leadership over his other workers.

In Moore v. MDH Builders, Inc., Full Workers' Compensation Commission, Opinion filed August 3, 2003 (E901863), Mr. Moore, a carpenter, was held to be an employee and not an independent contractor under circumstances where Mr. Moore bid carpentry jobs on other sites but worked hourly at the current job; the employer had the right to control the work, although the employer exercised little control; Mr. Moore could be terminated without liability; the employer supplied all tools except a pouch, skill saws, and a nail gun; and construction was an integral part of Mr. Moore's employer's business.

In the present case, I likewise find that a preponderance of the evidence establishes that Mr. Sorrels was an employee of Scott Boone, and not an independent contractor in Scott Boone's endeavor to build himself a new residential home. In this regard, as in the Commission opinions cited above, I note that although Scott Boone exercised very little control over the day-to-day operations during the building of his home, there is no doubt on this record that Scott Boone had the right to control the means and the method by which all work was done. As with the Full Commission opinions discussed above, it is equally clear that Mr. Boone had the right to terminate the employment relationship with Mr. Sorrels without any apparent

liability, and Mr. Sorrels could likewise have quit at any time without incurring any liability. While the depositions and the hearing testimony in this case are not entirely consistent, a preponderance of the evidence persuades me that Mr. Sorrels only provided his own tool belt and hammer, and that Mr. Boone paid for the construction materials and paid for rental of any equipment which was necessary on the job site. Furthermore, Mr. Sorrels' skill as a carpenter to perform residential construction appears to me to be essentially the same skill at issue where the Commission found the carpenters to be employees and not the contractors in Simpson, Gray, Wesson, and Moore. I further note that Mr. Sorrels and Mr. Boone both considered Mr. Sorrels to be an employee of Mr. Boone, and Mr. Boone purchased workers' compensation insurance accordingly.

To the extent that Travelers Insurance appears to try to accord some significance to Mr. Sorrels' Certificate of Non-Coverage obtained from the Commission, I note that the Certificate of Non-Coverage was obtained when an insurance issue arose on a prior construction job, and I note that Mr. Sorrels never gave a copy of the Certificate of Non-Coverage to Scott Boone. Pursuant to the Arkansas Workers' Compensation Law, delivery of a Certificate of Non-Coverage to an employer is a prerequisite for an employer to rely on

the Certificate of Non-Coverage. See Wesson, supra. To the extent that Travelers Insurance appears to place some significance on the fact that Mr. Boone did not withhold Social Security or taxes from the wages paid to Mr. Sorrels, I note that this same set of circumstances appears to have existed in each of the Full Commission opinions discussed above, and based on Mr. Sorrels' testimony, I likewise find that this course of action is standard practice in the carpentry and construction industry.

What appears to somewhat distinguish the facts in the present case from the facts in the previous carpenter cases decided by the Full Commission discussed above, is that in the present case, Mr. Boone, for whatever reason, chose not to hire a general contractor but instead chose to build his home without a construction contract. While some aspects of the construction were performed on a bid basis, with bids submitted to or approved by Mr. Boone, the framing and carpentry work was performed by carpenters who were paid on an hourly (not a square foot) basis. The two highest paid carpenters, Mr. Sorrels and Mr. Carroll, were each paid \$18 per hour. In addition, Mr. Boone and Mr. Sorrels orally agreed that Mr. Boone would pay an end-of-construction bonus for Mr. Sorrels' assistance in locating subcontractors and in helping Mr. Boone complete the project. However, when

Mr. Sorrels became injured, he did not receive any bonus from Mr. Boone.

Travelers Insurance seems to suggest that a landowner building on his own property cannot be an employer of a carpenter on that project since the future homeowner is not in the business of building homes, and since carpentry in this case is not an integral part of Mr. Boone's regular business as a pharmaceutical representative. However, I note that in Gray, supra, once the Full Commission determined that the claimant, a journeyman carpenter, otherwise met the definition of an employee, not an independent contractor, the Full Commission addressed the question as to whether the carpenter employee was employed by the couple building their future home or instead employed by the general contractor whom the couple had hired. Ultimately, the Full Commission did not find the homeowners liable as the employer of the carpenter employee since the building contractor, although not normally present at the site during work, was nevertheless the contractor of record when Mr. Gray's injuries occurred.

Moreover, I note that in James A. Stokes v. ETA Transportation, Inc., Full Workers' Compensation Commission, Opinion filed June 23, 1999 (E715213), a majority of the Full Commission found a property owner liable as an employer

during the course of building construction which occurred on ETA Transportation's property. In that case, Stokes was an iron worker who was paid on an hourly basis, and not per piece or by separate bid on the iron work, to construct a building addition on ETA Transportation's property. Rather than hire a general contractor, ETA Transportation hired a project manager to oversee the project. Although some types of work were performed on a bid basis, the Full Commission noted that iron workers were paid instead by the hour. Although the iron workers signed an "independent contractor agreement," the Full Commission did not find this agreement persuasive, and found the iron workers to be employees, not contractors, under circumstances where the employer determined the number of hours worked per week; there was no ramification if iron workers took off, but would be asked not to come back to work if, for example, the worker showed up only one day per week; ETA Transportation provided or rented the necessary tools except personal tools for iron workers (tool belt, hard hat, spud wrench, tape measure); ETA Transportation had the right to control the work; iron workers could be terminated without liability; ETA Transportation paid iron workers by the hour; ETA Transportation furnished all of the construction material, the expendable materials, and the majority of the equipment

and tools; there were no bids placed for the iron work; and ETA Transportation provided the design. The Full Commission noted that, although iron work and warehouse expansion are not part of ETA's regular business, the expanded warehouse clearly would be a part of ETA's regular business. The Commission noted that ETA could require iron workers to redo any work that did not meet their approval. The claimant considered himself to be an at-will employee and his income was reported on a Form 1099 and not a W-2. As discussed, the Commission found the iron workers to be employees and not independent contractors notwithstanding their having signed an independent contractor agreement and notwithstanding that the warehouse expansion was a one-time job.

The present case is certainly similar to Stokes in that carpentry was not a regular portion of Mr. Boone's business as a pharmaceutical representative. However, that factor is clearly not determinative. In the present case, as in Stokes, the property owner chose to engage in construction without a general contractor and without a construction contract. I see no significant distinction between the status of iron workers as employees in Stokes and carpenters being employees in the present case. Therefore, when considered in light of the Commission's prior analysis in

Simpson, Gray, Wesson, Moore, and Stokes, the claimant has satisfied me by a preponderance of the evidence that he was an employee of Scott Boone, and performing a carpenter's employment services, when he became injured installing a window on March 18, 2003.

The respondents are liable for all appropriate benefits for the claimant's compensable injury, including but not limited to, reasonably necessary medical expense as provided for under Commission Rule 30. I note, however, that Blue Cross Blue Shield has paid for at least a portion of Mr. Sorrels' third surgery, and Blue Cross Blue Shield appears to be a group carrier within the meaning of Ark. Code Ann. § 11-9-411. The respondents are therefore directed to hold in reserve for a period of five years a sum equal to the potential subrogation claims for any benefits described in Ark. Code Ann. § 11-9-411(a). The respondents are entitled to a dollar-for-dollar offset on those benefits described in Ark. Code Ann. §11-9-411(a).

All other issues not specifically decided herein are reserved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant sustained an injury on or about 3/18/2003.

2. This case has been controverted by Travelers Insurance Company in its entirety.

3. The claimant's current primary treating physician is Dr. Honghiran.

4. The jurisdiction of the Commission.

5. There was a Certificate of Non-Coverage for Mr. Sorrels that had not expired on the date of the injury.

6. A preponderance of the evidence establishes that John Sorrels was an employee of Scott Boone, and not an independent contractor or subcontractor, when Mr. Sorrels became injured at work on March 18, 2003.

7. Because I find that Mr. Sorrels was an employee of Scott Boone when he became injured in this case, I find that any issue of estoppel regarding Travelers Insurance Company denying liability for a worker's injury at Scott Boone's construction site is moot.

ORDER

The respondents are directed to pay benefits consistent with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of the findings herein, one-half of said fee to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. §

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11-9-715 and Death & Permanent Total Disability Trust Fund
v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge