

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F605213

ROYCE M. BREEDING, EMPLOYEE

CLAIMANT

**ROSSI ELECTRIC, INC.,
EMPLOYER**

RESPONDENT

**FIRSTCOMP INSURANCE COMPANY,
CARRIER/TPA**

RESPONDENT

OPINION FILED APRIL 23, 2007

Hearing before Administrative Law Judge O. Milton Fine II on February 13, 2007, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 13, 2007, the above-captioned claim was heard in Little Rock, Arkansas. A prehearing conference took place on September 25, 2006 before Administrative Law Judge Mark Churchwell. A Prehearing Order entered by Judge Churchwell on September 28, 2006 pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

The parties did not stipulate to anything.

Issues

At the hearing, the parties discussed the issue set forth in Commission Exhibit 1.

The following was litigated:

1. Employment relationship between Royce Breeding and Rossi Electric, Inc.

Contentions

Claimant. Claimant contends that he was an employee of Respondent Rossi Electric on January 6, 2006.

Respondents. Respondents contend the following: (1) Claimant contends that he suffered an injury on January 6, 2006. (2) The Claimant was driving a truck owned by Rossi Electric when he was involved in an accident. (3) However, Respondents contend that the Claimant was a contract laborer for Rossi Electric and not an employee at the time of the injury. (4) Respondents contend that the Claimant had borrowed the truck owned by Rossi Electric because his truck was in non-working condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. Claimant has proven by a preponderance of the evidence that he was an employee of, and not an independent contractor for, Respondent Rossi Electric, Inc.

CASE IN CHIEF

Summary of Evidence

Claimant testified on his own behalf regarding his vehicle accident on January 6, 2006 and his employment arrangement with Respondent Rossi. Respondents called Donna Hallum, the Office Manager for Respondent Rossi, who testified that Claimant was a contract laborer for Respondent Rossi on January 6, 2006.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit No. 1, consisting of one (1) page, an instruction sheet for prospective employees of Rossi Electric, signed by Claimant on January 23, 2006; Respondents' Exhibit No. 1, consisting of one (1) page, the Hospital Patient Information Sheet for Claimant at St. Anthony's Healthcare Center on January 6, 2006; Respondents' Exhibit No. 2, consisting of two (2) pages, progress notes for Claimant from Morrilton Medical Clinic on January 13, 2006; Respondents' Exhibit No. 3, consisting of one (1) page, a Rossi Electric General Journal Transaction sheet for Claimant dated January 6, 2006; Respondents' Exhibit No. 4, consisting of two (2) pages, Claimant's employment application with Right Focus Management, Inc., dated January 23, 2006; and Respondents' Exhibit No. 5, consisting of one (1) page, a duplicate of Respondents' Exhibit No. 3.

Testimony

Claimant. He testified on direct examination that his full name is Royce M. Breeding. He is a resident of Morrilton, Arkansas and is 41 years old. He attended some junior college. In addition to other occupations, Claimant has been a service technician in the past for heating and air. He testified that he worked for Respondent Rossi—the official name of which he stated was Rossi Heating and Air and Electrical (hereinafter “Rossi”). Claimant first went to work for Rossi in December 2005.

Claimant stated that Randy Bishop, who along with his brother Steve had purchased the business from Pete Rossi, contacted him. Randy stated that he had a job opening, and that he had heard from someone else that Claimant was looking for a job. Randy, according to Claimant, asked Claimant if he would like to come and work for them. Randy told Claimant that he might want to phase him in and see how he did. He was told that he would come in as a subcontractor with Rossi and, if the other service technician with the company did not work out, he would take over for him as an employee.

Claimant’s testimony was that from 40 to 50 percent of Rossi’s business was heating and air. When he came aboard the company, Claimant was paid \$15.00 per hour, and was paid on Fridays. On one occasion, at the beginning of his work there, Claimant was paid \$17.00 per hour to help on a job at night at the Wal-Mart in Morrilton. He stated that employees received \$2.00 extra per hour at night. There was a clipboard on the wall that contained a time sheet, and Claimant had to fill it out. Claimant testified that he specifically remembered filling out a time sheet before his January 6, 2006 accident. He worked from 40 to 45 hours each week, and tried to put in at least 8 hours a day. He

stated that he believed that taxes were withheld from his check. He also testified that he was never paid by the job or by the piece.

In his capacity as a service tech, he serviced and repaired heating and air conditioning units. At times he also removed pumps from water wells and brought them back to Rossi's shop to be repaired. He also performed some electrical work. He testified that he went on eight or nine service calls before the accident.

In addition to the off-site jobs discussed above, Claimant stated that he also worked on-site at Rossi to unload delivery trucks with a forklift. He also cleaned the shop and performed repairs there at times. There were tools in the shop for Claimant's use.

As for his own tools, Claimant testified that he lost his hand tools and gauges in a November 2005 tornado. Those included his screwdrivers, his electric meter, his amp probe, and his pressure gauges. He was trying to replace these, but was using Rossi's tools instead at the time of the January 6, 2006 accident. In addition, there are tools and supplies that an employer of a service technician typically provides, such as capacitors and compressors.

When Claimant went to work for Rossi, according to his testimony, he used his own truck to go out on service calls. He testified that he was told that there would be a service truck for his use, once his predecessor returned it. Claimant's truck broke down, and Hallum gave him permission to use the company truck, which was returned by the technician who did not work out. It was his understanding that Rossi would let him use the truck as long as he was a service technician. The truck was a pickup that had a service camper on the back of it and the wording "Rossi Heating and Air" on the side. It had everything he needed to perform the service tech job, including capacitors and

replacement parts for units he would be servicing. Having these things meant that he would not have to drive somewhere to obtain a replacement part. Rossi provided him with gas money, and he was required to bring in receipts.

Claimant testified that each time he went out on a job, he had to fill out where he had gone, what tasks he performed, and how much time he had spent there. This paperwork was returned to Hallum. According to Claimant, Hallum was the secretary, record keeper and dispatcher for Rossi and "the one that told me everything to do." Hallum would send him to a job and then, when he was finished and checked in with her, she would tell him where next to go, whether to another call or back to the shop.

He testified that not only Hallum supervised him, but Randy and Steve Bishop did as well. Claimant stated that Rossi had 12 or 13 employees. He was the only service technician; the rest were electricians. According to Claimant, if he had decided that he did not want to work for Rossi anymore, he could have simply quit without penalty.

Claimant stated that on the date of the alleged accident, Pete Rossi had told him to go pull a pump out of a well and bring it back to the shop for Rossi to repair. While driving back with the pump in the company truck, Claimant lost control of the vehicle and crashed. He testified that he was waving to a customer when the accident occurred, but that he does not remember much about the accident. He was taken by ambulance to the hospital, where he stayed for three days. He stated that he did not indicate on the hospital form that he was self-employed, that someone else must have done so because he was unconscious.

On January 23, 2006, Claimant returned to work at Rossi. He was required to fill out an employment application. While he felt that it was strange to do that at the point, Claimant testified that he filled it out and said nothing.

On cross-examination, Claimant testified that he is familiar with subcontracting work, that he had done such work in the past. He thought that it was strange that he was required to fill out an employment application upon his return to work after the wreck. It was at this time that he also filled out a W-4 form and out forms generally completed by a new employee.

Claimant stated that it was his fiancé who gave the hospital in Morrilton the information concerning his employment status at Rossi that is reflected on Respondents' Exhibit 1. The record states that Claimant is self-employed. He testified that he has no idea why the record reflects this. He does not remember whether he told them that he worked for Rossi. Claimant testified that Respondents' Exhibit 2, which are Progress Notes for his visit to Morrilton Medical Clinic on January 13, 2006, are accurate regarding his medical history. Under "social history," the record states that Claimant is "self-employed, heating and air contractor for Rossi Electric." Claimant stated that this is incorrect, the only incorrect information in the exhibit. He did not know where the physician would have gotten this information other than from Claimant or his fiance.

Claimant testified that when he went to work for Rossi, he understood that he was subcontracting some of their work. He stated that he understood the difference between being an employee and being a subcontractor. Claimant testified that subcontractors charge by the job, but then admitted that heating and air customers are charged by the hour. He changed his testimony regarding his rate of pay to state that the Wal-Mart job

was the only time Rossi paid him \$17.00 per hour, that if he “got call out in the middle—you know, in the middle of the night, I got paid the same amount of money.” Claimant stated that he got paid regardless of whether Rossi’s customers paid for the work he performed, and whether he was en route to or at a service call or in the shop. Sometimes he would call in the morning, and Hallum permitted him to go directly to the service call. Often, this was the case when calls were not finished the previous day. But Claimant testified that mostly he would go straight to the shop, arriving at 7:30 or 8:00 a.m. His time sheets were provided to Hallum so that she could bill the customers.

Regarding his tools that were lost, Claimant testified that he was purchasing those through Rossi. While there were tools of Rossi’s he used that otherwise he should have owned, others like gas meters and amp probes are expected to be provided by the company. As for the company truck, it was provided to him after he called Hallum to tell her that he would not be able to work until his own truck was fixed. He testified that the company would not have let him drive the truck unless he had been an employee, because of the insurance coverage issue; but he stated that he did not inquire regarding his employment status, either at this time or upon his return.

Claimant stated that he never saw many of the electricians employed by Rossi, with the exception of the night he worked at the Wal-Mart. He only worked 10 or 11 days for Rossi before the accident, and did not recall getting anything from the company showing that taxes had been withheld from his check. Claimant agreed that in his prior experience as a subcontractor, taxes were not withheld from his check; and that when he had been an employee, there had been withholding.

When questioned by the undersigned, Claimant testified that he was the only heating and air technician at Rossi. The rest of the personnel were electricians. Whether he was driving his own truck or the company truck, Rossi supplied him with gas. Hallum gave him money to purchase fuel and had to return with a receipt. But he only got the company truck two or three days before the accident. He never bought any parts himself. He either returned to the shop to obtain them or purchased them on Rossi's account. When he returned to Rossi after the accident, he went back to using his own truck again.

Claimant stated that when he went to the hospital after the accident, he did not speak with anyone. He was unconscious. His fiance, Karen Long, was with him. As for his visit to Morrilton Medical Clinic, he testified that both Long helped supply his history, and that it was done in Claimant's presence

He could not remember if there was withholding taken from his check prior to the accident. Claimant did not sign anything with the company when he first went to work there. He filled out time sheets on a daily basis that told what he had done and how long it had taken him to do it. If he was at Rossi, according to Claimant, he put it on his time sheet.

Donna Hallum. Called by Claimant, Hallum testified that at the time of the hearing, she had worked for Rossi for almost 11 years as the office manager. She is solely responsible for the paperwork there, including notes pertaining to service calls and service technicians.

Since January 1, 2006, Right Focus Management, a professional employer organization, has handled the payroll for Rossi. Prior to that, Strategic Outsourcing

handled this, along with the workers' compensation. Right Focus Management was the entity that handled Claimant's employment application upon his return after the accident.

Rossi had no employment records for Claimant prior to January 23, 2006 because, according to Hallum, he was not on the payroll. For that reason, even his time sheets were only with the files of the customers for which he worked and who were billed. Rossi does not keep records on its independent contractors. In January 2006, Rossi had eight full and part-time employees. Hallum testified that she directs the service technicians where they are to go and what time they are to be there.

Claimant performed the job at the Morrilton Wal-Mart on December 30, 2005—this was his first job for Rossi. She confirmed that Claimant not only performed service tech jobs, but performed tasks back at the Rossi shop at the direction of people from the company, although this was not on a regular basis. Claimant was sent both a W-2 and a Form 1099. She stated that Claimant was free to quit any time, and that he could have been fired from Rossi without recourse. At the time of the wreck, Claimant was driving the Rossi truck that bore its logo and held its tools.

She denied that Rossi took steps after the wreck to make it appear that he was not an employee at the time of the wreck. According to Hallum, because of the distance to a service call, it was more fair to all concerned to pay by the hour than by the job. When Claimant returned from the wreck, he indicated that he wanted to work for Rossi and he was hired as an employee out of pity. Prior to this, as the sole heating and air technician, he was their only subcontractor. Claimant was always paid by the hour and never by the job. When he returned to work as an employee, his rate of pay remained the same—\$15.00 per hour.

On cross-examination, Hallum testified that taxes were not withheld from Claimant's check for the period he worked prior to the accident, and that he received a Form 1099 for that period. Once Claimant's status at Rossi changed from independent contractor to employee, he was then expected to start work at 8:00, where before he kept his own hours based on the service calls.

During the period that Claimant was an independent contractor, he was not being paid unless he was working, or en route to or from a job. He was paid by the hour because that is how customers were being charged for his work. Hallum testified that Claimant was loaned the Rossi truck only because Claimant had stated that he was not able to perform any service calls. The anticipation was that he would get his own truck fixed over the weekend and go back to driving his own vehicle on service calls. As for Pete Rossi's continued role in the company, Hallum testified that although he had sold the business, he still lived next door. Because of his large amount of experience, he would come and perform consulting work and help out when Hallum was really busy in the shop. He was "considered part time," in her words.

On re-direct, she testified that once Claimant's predecessor departed, it was anticipated that his truck would be converted into an electrical service truck. But she confirmed that nothing much changed regarding Claimant once he returned after the wreck: he was still making \$15.00 per hour and being paid on Fridays, still being directed by Hallum, still using company tools and company equipment (except for a company vehicle, since one was no longer available), and still able to quit and to be fired. In response to the question as to why, even after Claimant was hired as an employee, that his pay sheet still contained the notation "Contract Labor," Hallum answered that this was

an error. She testified that while she did not make Claimant sign the employment application, he was not going to be allowed to come back to work if he did not do so.

When questioned by the undersigned, Hallum testified that at the time Claimant went to work for Rossi, he was the only person who had the status of independent contractor. Even his predecessor, who was from the Russellville area, was an employee.

Respondents called no witnesses.

Documents

Claimant's Exhibit 1. This document is the first page of Claimant's employment application with Right Focus Management, Inc. It sets his compensation at \$15.00 per hour.

Respondent's Exhibit 1. As discussed above, Claimant's Hospital Patient Information Sheet from St. Anthony's Healthcare Center in Morrilton and dated January 6, 2006, lists Claimant's employer as "SELF EMPLOYED."

Respondent's Exhibit 2. Claimant's Progress Notes from his January 13, 2006 visit to Morrilton Medical Clinic states under the social history section of the form that "Patient is self-employed, heating and air contractor for Rossi Electric."

Respondent's Exhibit 3. A General Journal Transaction dated January 6, 2006 reflects that Claimant was paid \$532.50 from an account entitled, "Contract Labor."

Respondent's Exhibit 4. Claimant's employment application with Right Focus Management, Inc., dated January 23, 2006 reflects, inter alia, that listed his required earnings as \$15.00 per hour.

Respondent's Exhibit 5. This document is identical to Respondents' Exhibit 3.

ADJUDICATION

Standard. Whether, at the time of an injury, a claimant was an independent contractor or an employee at the time he was injured is a question of fact. *Moore v. Long Bell Lumber Co.*, 228 Ark. 345, 307 S.W.2d 533 (1957); *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982). It turns on a number of 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. These have been set out 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;
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; and
9. whether or not the parties believe they are creating the relation of master and servant; and whether the principal is or is not in business.

(citing Restatement (Second) of Agency § 220). See *Dickens v. Farm Bureau Mutual Ins. Co.*, 315 Ark. 514, 868 S.W.2d 476 (1994). This list is not exhaustive; there may be other factors worthy of consideration. Furthermore, some of the factors set out above may not be relevant in a given case. It falls to the Commission to accord weight to the factors to arrive at a determination. *Franklin, supra*. However, the Supreme Court has stated that the "right of control" is the primary factor in determining whether the relationship is one of agency or independent contractor. *Griffen, supra*. See *Garcia v. A&M Roofing*, 2004 AWCC 23, Claim No. F213331 (Full Commission Opinion filed February 5, 2004).

Application of factors. In light of the evidence at the hearing, it is clear that Rossi exercised control over the details of Claimant's work. Hallum acted as his dispatcher, telling him where to go and when. The Bishops, as owners of Rossi, supervised him as well. At the time of the accident, when Claimant's status is crucial, he was acting on the orders of Pete Rossi, whom Hallum testified continued to work part time at Rossi by helping her out and by consulting. Hence, the first factor points more toward his status as an employee.

As for Factors 2-4, Claimant did not have his own business. It was a distinct and skilled occupation, one that could be done by either an employee or by an independent contractor. Claimant testified that he had worked in both capacities. In this case, what is noteworthy is that Claimant's predecessor was an employee, not an independent contractor, of Rossi—as both Hallum and Claimant testified. He stated that Rossi had 12 or 13 employees. He was the only service tech; the rest were electricians. According to both Claimant and Hallum, if he had decided that he did not want to work for Rossi anymore, he could have simply quit without penalty.

In reference to the fifth factor, Rossi supplied Claimant's tools. However, Claimant admitted that some of these were supplied merely because he had lost his, and was using their account to replace his and having the cost deducted from his check. When he was not working at a customer's place, Claimant's place of work was at the Rossi shop. He testified that he was told that if his predecessor did not work out, he would have use of his company truck. In fact, he did gain use of the truck, and it was this vehicle that was involved in the accident that led to Claimant's claim. But both Claimant and Hallum testified that the vehicle was given to Claimant because his own truck needed fixing. Hallum stated that arrangement was not to be permanent, that there were plans to convert the truck for the use of an electrician. And Claimant was not provided with a company truck upon his return after the wreck. But Hallum testified that one would have been given to him if one had been available.

Regarding Factors 6-7, while Claimant had only been at Rossi for less than two weeks, even by the most generous estimate, his term of employment was indefinite. He was not paid by the job, but rather by the hour. Worthy of note is that upon his return to Rossi, when he was unquestionably an employee, his pay had not changed: he was still earning \$15 per hour. As the exhibits and the testimony showed, Respondent during the period at issue was paid as an independent contractor rather than an employee. There apparently was no withholding taken from his paycheck, he was provided a Form 1099 rather than a W-2, and he was paid from a Rossi account entitled "Contract Labor." But this is only one factor; in *Callahan v. Riddell Flying Service*, 2004 AWCC 49, Claim No. E702846 (Full Commission Opinion filed March 12, 2004), the Commission stated that whether the claimant received a 1099 or a W-2 was only one factor and not dispositive of

the issue. And as brought out at the hearing, Rossi continued to pay Claimant out of the “Contract Labor” account even after he returned to work following his filling out of the employment application.

Under the eighth factor, heating and air was obviously part of the regular business of Rossi. While Claimant may have been the only Rossi worker fixing heating and air units at the time of the accident, he was not their first heating and air technician. Claimant’s testimony was that 40 to 50 percent of Rossi’s business was heating and air. This is questionable based on (1) Claimant’s short tenure at Rossi, (2) his admitted lack of familiarity with their electrical business, and (3) the fact that the large majority of personnel were electricians, despite the fact that this testimony was unrebutted.

As for the final factor, the evidence as to the parties’ understanding of their relationship does not point only to one side. On one hand, Claimant’s medical records, contained in Respondents’ Exhibits 1 and 2, reflect an understanding that he was an independent contractor. Irrespective of who told St. Anthony’s Medical Center on the date of his accident what his employment status was, it is apparent that he told or was aware that his fiance told Morrilton Medical Center on January 13, 2006, that he was self-employed. Apart from this, the evidence indicates that both Claimant and Rossi were acting as if they were in an employer/employee relationship. Hallum and Claimant testified that he was free to leave Rossi, and that Rossi was free to terminate him. And even after Claimant filled out an employment application, there was virtually no difference in the Rossi/Claimant relationship before and after this point, as Hallum admitted.

The balance of the factors, particularly the principal one—control—clearly favors the finding that Claimant was an employee.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that he had the status of employee at the time of his January 6, 2006 accident. He has met that burden.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge