

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613552

ISAIAS REYNAGA (DEC'D), Employee	CLAIMANT
DRYWALL SYSTEMS, Employer	RESPONDENT #1
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 2, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not appearing at hearing.

STATEMENT OF THE CASE

On October 11, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 14, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant was fatally injured in an accident on October 6, 2006.
3. The deceased was survived by his spouse, Maria Isabella Reynaga, and a minor son, Isaias Reynaga Barron.

At the time of the hearing the parties agreed to stipulate that the claimant earned an average weekly wage of \$800.00.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. The employee/employer relationship.
2. Death benefits.
3. Medical expenses.
4. Attorney fee.

The claimant contends he worked for Rick Redfearn of Drywall Systems and that on October 6, 2006 claimant was covering a window on top of a ladder that was on top of a scaffold when he fell from the ladder and suffered head trauma. He was taken by ambulance to Bentonville Medical Center where he was transferred by helicopter to Northwest Medical Center in Springdale. The injuries were fatal and claimant passed away on the following Sunday. Claimant contends he is entitled to death benefits for his widow, Maria Reynaga, and her son, Isaias Reynaga, as well as medical expenses and an attorney fee.

Respondent #1 contends there was no employee/employer relationship between Isaias Reynaga and Drywall Systems, Inc.

From a review of the record as a whole, to include 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, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 14, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned an average weekly wage of \$800.00 is also hereby accepted as fact.
3. The claimant was not an employee of the respondent; therefore, respondent is

not liable for payment of workers' compensation benefits.

FACTUAL BACKGROUND

The claimant was fatally injured in an accident on October 6, 2006 when he fell off a ladder. This claim has been filed on claimant's behalf by Maria Isabella Reynaga, claimant's surviving spouse. She contends that the claimant was an employee of the respondent and requests payment of death benefits, medical expenses, and a controverted attorney fee.

ADJUDICATION

In order for the respondent to be liable for compensation benefits, it must first be established that the claimant was an employee of the respondent. The issue of whether an individual is an independent contractor or an employee is to be determined by the facts presented in each case. In making this determination, several factors may be considered.

These include:

- (1) The right to control the means and 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 measurement;
- (4) The furnishing, or the obligation to furnish, the necessary tool, 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.

See *Franklin v. Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W. 2d 815 (1984) and *Riddell Flying Service v. Callahan*, 90 Ark. App. 388, 206 S.W. 3d 284 (2005).

All of these factors may not be relevant in a particular case and it is not necessary for the Commission to consider all of the factors in some cases. The relative weight to be given to the various factors is to be determined by the Commission. *Franklin, supra*.

After reviewing the evidence presented in this case in light of the various factors to be considered, I find that the claimant was not an employee of the respondent but rather was an independent contractor.

Testifying on behalf of the claimant was Maria Isabella Reynaga, the claimant's widow. According to Reynaga the claimant prior to working for the respondent worked in the drywall business with his brothers. According to Reynaga the claimant received a paycheck every week and he worked nowhere else during the approximately eight months he worked for the respondent. Reynaga also acknowledged that the claimant provided his own tools to perform the drywall work and that she had no information regarding the contract or agreement between claimant and Rick Redfearn, the owner of respondent.

I believe that the testimony of Redfearn, which I find to be credible, establishes that claimant was an independent contractor, not an employee of the respondent. First, I believe the way claimant was paid is significant. The claimant was not paid an hourly wage for work he performed for the respondent. Instead, Redfearn would contract with a home builder to hang drywall in a particular house. Once Redfearn acquired that contract, he would contact various individuals and give them the opportunity to accept a portion of the job involving drywall. Redfearn testified that each job was separate and independent of other jobs. Redfearn testified that he would contact the claimant who would go to the home and in turn inform Redfearn of the pay he would need to perform the job. Redfearn testified that the claimant was paid anywhere from 9 to 14 cents per square foot for finishing drywall. In addition, claimant might be paid anywhere from one to two cents per

foot for spraying. The key point is that the claimant negotiated the amount to be paid on each and every home.

Redfearn specifically testified that he recalled a remodel job where the claimant wanted too much money to perform the work and Redfearn found another individual to perform that work.

The fact that each job was separate and independent and payment for the work performed varied subject to the claimant's request indicates that claimant was not an employee but rather an independent contractor. There are also other factors indicating that claimant was an independent contractor, not an employee. For instance, claimant supplied the tools necessary to perform his job. Redfearn only supplied mud and tape. Sheet rock was provided by the primary home builder. Redfearn also testified that the claimant was not obligated to only accept work for respondent, but instead was free to perform other jobs as well.

Redfearn also testified that if the claimant wanted help performing the job it was up to him to obtain that help. Redfearn did not pay any individuals other than the claimant for the work performed. Any employees obtained by the claimant to help perform the job were paid by the claimant.

Finally, it is also significant to note that Redfearn exercised very little control over the work performed by claimant. Other than asking that the job be done in a reasonable time, Redfearn did not exercise any control over the details of the claimant's work. Redfearn specifically testified that he did not tell the claimant how to perform his job, did not tell claimant when to show up to work, and did not dictate the number of hours claimant was to work each day.

In summary, after consideration of the various factors and evidence presented, I find that the claimant was not an employee of the respondent but rather was an independent contractor. The evidence of record indicates that each job claimant worked on for the

respondent was a separate and independent job with the amount to be paid negotiated between claimant and Redfearn. Claimant provided tools needed to perform his job with Redfearn supplying only mud and tape. Any additional help used by claimant on the job was obtained by the claimant and paid for by him, not the respondent. Finally, the evidence indicates that respondent exercised virtually no control over the claimant's work. Other than requesting that the job be done in a reasonable time manner, respondent did not control the aspects of how the job was performed, when work started, nor the number of hours worked by the claimant. Given these facts, I find that claimant was not an employee of the respondent at the time of his death on October 6, 2006. Therefore, respondent is not liable for payment of workers' compensation benefits.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he was an employee of the respondent on October 6, 2006. Instead, the evidence indicates that claimant was an independent contractor on that date. Therefore, respondent is not liable for payment of compensation benefits. This claim is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$356.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE