

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702039

D'ORSIE SMITH, EMPLOYEE	CLAIMANT
SILLA CONSTRUCTION, INC., EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 17, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on June 25, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Emily Paul, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Robert H. Montgomery, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 25, 2007, to determine whether the claimant was an employee of Silla Construction, Inc., at the time of his admitted accident and injury, entitling him to workers' compensation benefits.

A prehearing conference was conducted in this claim on June 6, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rate.

It was undisputed that the claimant sustained multiple injuries as the result of a specific incident identifiable in time and place of occurrence on February 15, 2007, when he fell from a ladder, injuring both arms, as well as sustaining some

dental injuries; and that the claim had been controverted in its entirety for purposes of attorney's fees. It was further agreed that the claimant's injury occurred at respondent's work site. At the hearing, the parties stipulated that the claimant's average weekly wage was \$600.00 which would yield a temporary total disability rate of \$400.00 per week.

By agreement of the parties, the primary issue presented for determination was whether the claimant was an employee or an independent contractor at the time of his admitted injuries. If overcome, claimant's entitlement to associated benefits must be determined.

Claimant contended, in summary, that he was an employee of Silla Construction, Inc., at the time he sustained his admitted injuries on February 15, 2007; that he was entitled to temporary total disability benefits for the period beginning February 16, 2007, and continuing through the present, maintaining that his healing period had not ended; that respondents should be held responsible for all outstanding medical treatment, together with continued reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. The claimant reserved the issue of permanent disability.

The respondents contended that the claimant was an independent contractor at the time of the injury and not an employee of Silla Construction, Inc.

In addition to the claimant, Larry Northrop was called as a corroborating witness. Sigtryggur Olafsson, the owner of Silla Construction, testified on behalf of

the respondent. The record is composed solely of the transcript of the June 25, 2007, hearing containing a joint medical exhibit consisting of twenty-three (23) pages.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. On February 15, 2007, the claimant was an employee of Silla Construction, Inc.
4. On February 15, 2007, the claimant sustained compensable injuries arising out of and during the course of his employment with Silla Construction, Inc., at which time his average weekly wage was \$600.00, entitling him to compensation rates of \$400.00 per week for temporary total disability and \$300.00 per week for permanent partial disability.
5. Respondents are responsible for all outstanding hospital, medical, and related expenses as the result of claimant's February 15, 2007, injury and

respondents remain responsible for continued, reasonably necessary medical treatment.

6. The claimant is entitled to temporary total disability benefits for the period beginning February 16, 2007, and continuing through a date yet to be determined.
7. The claimant's healing period had not ended as of the date of the within hearing.
8. Respondents have controverted this claim in its entirety.
9. Claimant's entitlement to permanent disability benefits, if any, has been specifically reserved.

#### 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). 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) citing §220 of the Restatement (Second) of Agency:

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;
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 400 (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 Arkansas 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*.

Sigtryggur Olafsson is the owner of Silla Construction, Inc. Mr. Olafsson has been in the construction business for approximately fifteen (15) years. He

described himself as a “one-man show.” His company primarily does commercial remodeling jobs. The majority of his work over the last several years has consisted of remodeling various Aaron’s Rental Centers. Mr. Olafsson would subcontract parts of the remodeling jobs such as heating and air, electrical, and plumbing to various contractors and would require either a workers’ compensation insurance policy or a waiver, also known as a Certificate of Non-Coverage from various subcontractors and independent contractors. The contractors were paid by the job rather than an hourly rate.

The record reflects that Mr. Olafsson also hired various hourly workers to perform other construction and remodeling activities such as framing, sheetrocking, and painting. The claimant, D’Orsie Smith, was one of several hourly workers hired to work on the remodel of an Aaron’s Rental Center in Jonesboro, Arkansas. The claimant was paid \$15.00 per hour. In addition, Mr. Olafsson provided a motel room within one block of the work site for the hourly workers. The claimant stated that Mr. Olafsson laid out the work assignment and that he and others performed the interior finish work such as framing, sheetrock, and painting. The claimant had some personal tools. Mr. Olafsson furnished all material, as well as tools and equipment. On February 15, 2007, the claimant was hanging sheetrock, at which time he fell off a scissor lift that was provided by Mr. Olafsson, sustaining multiple injuries.

A portion of the claimant’s testimony reflecting that he was an employee rather than an independent contractor is set out below:

Q Mr. Smith, you named several people that were at the worksite besides the heating and air, and what you described as subcontractors, electrical, heating and air. How many individuals were actually doing the sheetrocking?

A Mr. Olafsson, Larry Northrop, the employee, Dan, and myself.

Q Any of those individuals paid by you?

A No, sir.

Q Were they all sheetrock laborers performing the same duties?

A Yes, sir.

Q And Mr. Olafsson also did the work?

A Yes.

Q Same type of work you did?

A Yes, sir.

Q How long did this particular job last?

A The sheetrocking specifically?

Q Isn't that all you went to Jonesboro to do?

A No, sir.

Q You had also done other work there?

A Yes, sir.

Q Framing?

A Yes, sir.

Q Painting?

A We hadn't got to the painting phase yet, but we had discussed me doing the painting.

Q So you were going to – you'd completed some framing?

A We completed all interior framing.

Q How many days were you doing that?

A Three weeks or more.

Q Did you stay at the motel the entire three weeks?

A Yes, sir.

Q And that was paid for by Mr. Olafsson?

A Yes, sir.

Q Then you started the sheetrocking?

A Yes.

Q Your intention was when that was completed, you then do the painting?

A Well, we would do the taping down, texturing, and then we would paint.

Q Your injury occurred during the time you were hanging the sheetrock?

A That's correct.

Q In your opinion, could Mr. Olafsson have terminated your working on any part of this project without any liability? In other words, could he –

A He could terminate me at any given time without having to pay me any additional expense for work that was not finished.

Q You were paid strictly by the work you performed, is that right?

A That's correct.

Q And you described yourself earlier as having been a subcontractor when you bid on work. You did not bid on this, any part of this job, is that right?

A That is correct. I did not bid on any part of it.

Q Are you still under some doctor's care?

A Yes.

Q For the broken arms?

A Yes. I had surgery on the right arm.

Q What about the left?

A The left arm seems to be healed completely.

Q Was the only surgery you had on the right arm?

A Except the – yes, and the stitches in my –

Q Well, that doesn't keep you from working, right?

A No, sir.

Q Your dental doesn't keep you from working?

A No, sir.

Q The only thing that's preventing you from going back to work at this point is the right arm?

A That's correct.

Q Are you still under a doctor's care for that?

A Yes.

Q Not been released yet?

A No, sir.

Q Worked for any other employer since February 15 of '07?

A No, sir.

JUDGE GREENBAUM: That's all. Thank you.

Oh, one other question.

BY JUDGE GREENBAUM:

Q Did Mr. Olafsson ever request that you obtain a certificate of non-coverage?

A No, sir.

Q Have you ever obtained one of those on other jobs that you have been ether [sic] hired to work at or contracted to perform?

A Yes, sir.

Q You have?

A As a subcontractor, we were required to furnish all the insurance, or furnish proof of insurance, or sign a disclaimer. (Tr.22-25)

As previously pointed out, our Supreme Court has held that the right to control is the principle factor in determining whether one is an employee or an independent contractor. *See, also, Arkansas Transit Homes, Inc.* 341 Ark. at 322, 16 S.W.3d at 548 (citing *Dickens v. Farm Bureau Mutual Insurance Company*, 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 Company*, 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 worker's 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 employer herein exercised the control over the details of the work. He provided the supplies and the place for the work. The claimant was paid by the hour and did not bid on the job. His employment could be terminated at any time without any liability. The claimant was not in business. The respondent was in the construction business. Although the employer obtained workers' compensation insurance policies from subcontractors, as well as waivers of liability, he did not require this from the claimant. The employer had the right to control the work of the claimant and, in fact, exercised that control. Clearly, in the instant case, the relation of master and servant was created. The claimant was an employee and not an independent contractor as alleged by the respondents. Accordingly, I hereby make the following:

#### AWARD

Respondent, St. Paul Travelers Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of

\$400.00 per week beginning February 16, 2007, and continuing through, at least, June 25, 2007, and until a date yet to be determined.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay all outstanding hospital, medical, and related expenses pursuant to the medical cost containment guidelines established by Commission Rule 099.30, and respondents remain responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Ms. Emily Paul, is hereby awarded the maximum statutory attorney's fee pursuant to, and limited by, Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge