

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400931

JOHN C. RIMA

CLAIMANT

**M & S FRAMERS, INC.
(UNINSURED)**

RESPONDENT EMPLOYER NO. 1

**ARNOLD MERRELL & LENORE MERRELL,
INDIVIDUALLY & D/B/A MERRELL & CO., P.A.,
MERRELL CONSTRUCTION CO., INC. & GOURMET
ENTERPRISES
(UNINSURED)**

RESPONDENT EMPLOYER NO. 2

ORDER AND OPINION FILED FEBRUARY 15, 2008

Pursuant to a hearing conducted October 15, 2007, before Administrative Law JUDGE Richard B. Calaway in Little Rock, Arkansas, submitted for a ruling on the record before Administrative Law JUDGE Linda K. Marshall.

Claimant represented by the HONORABLES HERBERT C. RULE, III, BROOK A. BREWER AND RYAN SOLOMON, Attorneys at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE KEVIN O'DWYER, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This was a hearing to consider the compensability issues of employment status and the application of Ark. Code Ann. §11-9-402, which permits the employee of an uninsured subcontractor to recover from the prime contractor.

At the prehearing conference and before the hearing, the parties agreed to the following stipulations:

1. The claimant suffered compensable injuries when he fell off a roof on December 18, 2003.

2. The claimant's average weekly wage is \$440.

The claimant contends that he was an employee of M & S Framers, Inc., and, thus, can recover from that entity directly and, also, under Ark. Code Ann. §11-9-402, from Respondent No. 2, as prime contractors on the job, part of which was subcontracted to the claimant's employer, the uninsured M & S Framers, Inc.

The claimant further contended that he should be awarded benefits, including temporary total disability benefits from December 18, 2003, through October 1, 2004; and reasonably necessary medical and related expenses. An attorney's fee for controversion was also requested. Other possible issues were reserved.

M & S Framers, Inc., contended that the claimant was not its employee, but merely a subcontractor or independent contractor and, further, that it was a subcontractor of Respondent No. 2.

Respondent No. 2 contended that they had no liability because the claimant was not an employee and, further, that they were not prime contractors, under the holding in *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), and Ark. Code Ann. §11-9-402.

They further contended that the claimant's injuries occurred on a residential structure, under construction, but not pursuant to a contract with a third-party property owner. They also contended that M & S Framers, Inc., was not a subcontractor within the meaning of the Act and that the claimant was an independent contractor or the employee of an independent contractor and was not otherwise an employee of Respondent No. 2 or of a subcontractor.

They also contended that the statute of limitations bars the claim against Arnold Merrell, Lenore Merrell, and Gourmet Enterprises, Inc., and that, alternatively, Respondent No. 2 has a notice defense under Ark. Code Ann. §11-9-701.

The record, which included documentary evidence and the testimony of the claimant, was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, on or about December 18, 2003, the claimant suffered otherwise compensable injuries when he fell from a roof on a job site where he was performing services pursuant to an agreement with M & S Framers, Inc., when his average weekly wage was \$440.

3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on December 18, 2003, and that he was an employee of M & S Framers, Respondent No. 1.

4. Respondent No. 1 is responsible for the reasonable and necessary medical treatment the claimant has received.

5. Claimant has proven that he remained in his healing period and did not return to work from December 19, 2003, through October 1, 2004. Respondent No. 1 is responsible for temporary total disability benefits awarded.

6. The preponderance of the evidence provides that Respondent No. 2 was not a direct employer or a prime contractor pursuant to Ark. Code Ann. §11-9-402. Respondent No. 2 has no liability in this workers' compensation claim.

7. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10. Respondent No. 1 is solely responsible for attorney's fees owed by the respondents.

DISCUSSION

On December 18, 2003, the claimant injured his left heel when he fell from the roof on a job site where he was performing services pursuant to an agreement with M & S Framers, Inc., an uninsured framing company.

Claimant was promptly taken to the UAMS emergency room by Mark Ensminger, the president of M & S Framers, Inc. There, his injury was diagnosed as a left calcaneus fracture and consulting physician, orthopedic surgeon Dr. Ruth Thomas, noted that at the request of the family he was to be seen by a specialist in Cincinnati.

Thus, in Cincinnati, on December 26, 2003, orthopedic surgeon Dr. Robert A. Raines, Jr., a friend of the claimant's family, performed surgery, an open reduction and internal fixation of the fracture, which included insertion of nine screws and a plate. Thereafter, the claimant returned to Little Rock where Dr. Thomas continued his follow-

up care, noting on January 7, 2004, that he was disabled temporarily and could not walk without the assistance of another person or a device, such as a brace, cane or crutch. In his May 21, 2007, deposition, Dr. Raines testified that in his practice people with such a severe injury get about 12 months from the date of injury to reach maximum medical improvement. The claimant was to continue to use a boot walker and, later, to have sutures removed. He indicated that he would be non-weight bearing for a full three months with progressive weight bearing thereafter.

Subsequently, on January 12, 2007, Dr. Raines performed additional surgery to remove one of the screws which had loosened. In his deposition, Dr. Raines stated that he would estimate that six months would be a reasonable period after such surgery for the claimant to reach maximum medical improvement. D., p. 15. In his deposition, Dr. Raines also reviewed his prior impairment rating of 25% to the lower extremity and testified that it should have been 23%, but that the restriction of motion in the claimant's subtalar joint, previously noted on November 26, 2006, does not customarily improve in time. He also mentioned restrictions against various work activity in order to prevent discomfort for the claimant and to reduce the wear and tear on the subtalar joint and the likelihood that the claimant rapidly would develop arthritis in the joint. D., p. 23. The parties do not question that the claimant's medical care was reasonably necessary for his compensable injury.

ADJUDICATION

Respondent No. 1, M & S Framers, Inc., contends that the claimant was not its employee, but merely a subcontractor or independent contractor and a subcontractor of Respondent No. 2. The claimant's employment status is, of course, a threshold issue

in this case. The term “independent contractor” is most commonly discussed when a determination is being made whether an employer can be considered a “statutory employer” for purposes of workers’ compensation coverage. See, *Franklin v. Ark. Kraft, Inc.*, 12 Ark. App. 66, 670 S.W.2d 815 (1984). The Court of Appeals in *Riddell Flying Service v. Callahan*, 90 Ark. App. 388, 206 S.W.2d 284 (2005), has set out numerous factors that may be considered in determining whether an injured person is an employee or an independent contractor for coverage purposes. Briefly, 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 of necessary tools, equipment, and material;
- (5) whether the claimant is engaged in a distinct occupation or business;
- (6) the skill required;
- (7) whether the employer is in business;
- (8) whether the work is an integral part of the employer’s regular business; and
- (9) the length of time for which the person is employed.

The ultimate question in determining whether a person or entity is an independent contractor is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control the work. See, *Ivan v. Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943); *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989).

Ark. Code Ann. §11-9-102(9)(A) defines employee as follows:

'Employee' means any 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, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

Ark. Code Ann. §11-9-102 (10) defines "Employer" as any individual, partnership, limited liability company, association, or corporation carrying on any employment, the receiver or trustee of same, or the legal representative of a deceased employer. Ark.

Code Ann. §11-9-102 (11) defines employment and it provides in pertinent part:

(B) Every employment in which two (2) or more employees are employed by any person engaged in building or building repair work;

(C) Every employment in which one (1) or more employees are employed by a contractor who subcontracts any part of his or her contract; and

(D) Every employment in which one (1) or more employees are employed by a subcontractor.

In the instant case, I find the claimant is an employee of M & S Framers and is not an independent contractor. The claimant was hired and paid as an hourly employee making \$11 per hour. He was told what time to be at work and when to leave. He was supervised by the owners of M & S Framers, either Mark or Sherry. M & S Framers could terminate the claimant without liability and exercised control over the performance of the work. The work the claimant performed was an integral part of the employer's regular business. M & S Framers did not hold out taxes and other withholdings; however, individual checks were paid to the claimant. M & S Framers

provided nail guns, saws, staplers, air compressors and other construction equipment for use.

I specifically find M & S Framers is the “statutory employer” and as such is responsible for workers’ compensation benefits to the claimant. M & S Framers also satisfies the definition of employer as defined by Ark. Code Ann. §11-9-102(11).

Since M & S Framers is uninsured, of primary concern to the parties is whether, pursuant to Ark. Code Ann. §11-9-402, the claimant can look to Respondent No. 2 for benefits because they were the putative prime contractors on a job where the claimant was injured as an employee of an uninsured subcontractor. The Arkansas Court of Appeals in *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), made it clear that, for this statutory provision to apply, it must first be established that there was a contractual obligation to a third person for work, part of which was subcontracted to the employer of the claimant. In that case, a banker and a farmer jointly purchased a tract of land, developed it into a subdivision, and sold all but two lots to other individuals. They decided to construct two speculative houses on the remaining lots to be sold. When the claimant was injured, the putative prime contractors were not contractually obligated to another for the work being done and the claimant was not entitled to recover from them. This case makes it clear that the prime contractor must be contractually obligated to another party to perform work, part of which is merely subcontracted, or farmed out, to the employer of the claimant.

Here, the third party, with whom respondents were contractually obligated to build a residential structure, simply does not exist. The covenant in the deed and the recitals in the loan documents do not amount to the requisite prime contract with the

third party and, indeed, are consistent with a speculative project much like that dealt with in *Bailey v. Simmons, supra*. The claimant's theory in this respect is novel but obviously not what was intended by the Court of Appeals and, apparently, by the Legislature at the time, since the statute remained virtually unchanged for some time following the 1982 opinion. Thus, Respondent No. 2 has not been shown to be a direct employer of the claimant or a prime contractor, pursuant to Ark. Code Ann. §11-9-402, and are without responsibility for the claimant's on-the-job injuries under the Workers' Compensation Act. There is no contract of the sort contemplated by the Legislature and the Court of Appeals.

It is not in dispute that claimant fell from the roof of a home under construction injuring his left foot. The claimant was initially treated at UAMS and subsequently underwent surgery on December 26, 2003, by Dr. Robert Raines in Cincinnati, Ohio, with a follow-up surgery on January 12, 2007. The claimant's injury and surgery was to repair a fracture requiring hardware. The claimant treated with Dr. Ruth Thomas upon returning to Arkansas. The medical evidence and the testimony provide sufficient information for me to find the care and treatment were reasonable and necessary. Respondent No. 1 is responsible for the reasonable and necessary medical treatment. See, Ark. Code Ann. §11-9-508.

The claimant next contends he is entitled to temporary total disability benefits from December 18, 2003 through October 1, 2004. In order to be entitled to temporary total disability benefits for a scheduled injury, the claimant must remain in his healing period and have not returned to work. See, Ark. Code Ann. §11-9-521(a); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Dr. Raines testified in his deposition that the claimant would not reach the end of his healing period until 12 months following the surgery. The records indicate that the claimant returned to work as a meat cutter in October 2004 and continued in that job until sometime in December 2004. After considering the claimant's testimony and the medical evidence, I find the preponderance of the evidence supports the claimant's contention that he remained in his healing period and had not returned to work from December 19, 2003 through October 1, 2004. Respondent No. 1 is liable for temporary total disability benefits awarded.

Respondent No. 2's issues of statute of limitations and notice are not addressed, since Respondent No. 2 was found to have no liability.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on December 18, 2003 and that he was an employee of M & S Framers, Respondent No. 1. Respondent No. 1 is responsible for the reasonable and necessary medical treatment the claimant has received. The claimant has proven that he remained in his healing period and did not return to work from December 19, 2003 through October 1, 2004. Respondent No. 1 is responsible for temporary total disability benefits awarded. The preponderance of the evidence provides that Respondent No. 2 was not a direct employer or a prime contractor pursuant to Ark. Code Ann. §11-9-402. Respondent No. 2 has no liability in this workers' compensation claim.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas

Workers' Compensation Rules and Regulations, Rule 10. Respondent No. 1 is solely responsible for attorney's fees owed by respondents.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**