

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213331

JUAN GARCIA, EMPLOYEE

CLAIMANT

A & M ROOFING,
AN UNINSURED EMPLOYER

RESPONDENT

OPINION FILED FEBRUARY 5, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE ERIC BUCHANAN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was an employee of an uninsured subcontractor thereby finding that the respondent was liable for this claim as the prime contractor. Based upon our de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that he was an employee of an uninsured contractor, but the employee of an independent contractor. Therefore, the claimant is not entitled to any benefits from the respondent.

The claimant injured his left leg and wrist on April 12, 2002, when he fell off of a roof. The claimant was roofing the house of a Mr. Driggers at the time that he fell off of the roof and sustained these injuries. The claimant is seeking payment of medical expenses and temporary total disability benefits from April 12, 2002, through March 6, 2002. The claimant was working for Pablo Garcia at the time of the accident.

Harold Mills, who is the owner of A & M Roofing, Inc., testified that he obtains roofing jobs and farms out the labor to six different contractors. Mr. Mills estimates the costs of the materials and quotes the price to the customer. Mr. Mills testified that he does not supervise the roofing jobs.

Jesus (aka Jessie) Garcia is one of six contractors that Mr. Mills regularly uses to do the jobs that he obtains. Jesus Garcia gave the Driggers job to his brother Pablo Garcia because Pablo called Jesus and indicated that he needed money. Mr. Mills paid Jesus for the job and Jesus in turn paid Pablo. The claimant was working for Pablo at the time he sustained his injuries. The claimant now contends that he was an employee of the subcontractor, Pablo, of the prime contractor A & M Roofing.

A review of the evidence indicates that Pablo was an independent contractor. Therefore, there is no liability on the part of the respondent for the injuries sustained by the claimant.

The claimant must establish that an employment relationship existed prior to being entitled to benefits. According to the claimant, he was an employee of A & M Roofing on the date of the accident. The claimant testified that he had worked on other jobs in the past for Mr. Mills. However, the claimant admitted that Mr. Mills had never given him a check for any services or paid him cash for any services. In fact, Mr. Mills had never called the claimant to work on a job.

In support of the claimant's contention that he was an employee of the respondent, the claimant offered the testimony of Pedro Garcia, who is the claimant's nephew. According to Pedro, he worked for Mr. Mills a long time ago but he was not employed by Mr. Mills at the time of the claimant's accident. Pedro stated that he did not know what the relationship was between Mr. Mills and the claimant.

Mr. Mills is in the business of acquiring roofing jobs and then selling the jobs to independent contractors for completion. Mr. Mills testified that he hired

independent contractors to complete the roof work on the homes. Each of these six independent contractors as referred to earlier enter into an "Agreement of Independent Labor Contract." The only term of the contract that deviates over the years is the price per shingle that will be paid. The agreement provides that:

1. Independent contractor will supply his own tools.
2. Independent contractor will remove all debris and clean grounds.
3. Independent contractor accepts exclusive liability for all taxes and contributions to the federal social security act.
4. Independent contractor will carry workmen's compensation insurance or a workmen's compensation waiver.

The only items that were supplied by Mr. Mills to the various contractors were the roofing materials and the nails. The agreement is clear that the contractor was responsible for payment of all taxes including social security. The agreement was also crystal clear that the independent contractor was responsible for all workers' compensation insurance.

The testimony provided by the Garcias establishes that the independent contractor determined what hours they

were going to work and what time frame the work would be completed in. The independent contractors were paid with a check every Saturday. This check included work from many different jobs. A check given to Jesus Garcia for the Driggers' job included other jobs as well. Therefore, a determination of how much Jesus received for the work completed by Pablo could not be determined.

Mr. Mills testified that he does not visit the work site once the job has been sold. He does not supervise the work completed nor does he monitor the independent contractors or their employees in any way. Jesus confirmed that Mr. Mills never controlled the roofing job once he sold the contract to him as an independent contractor.

The evidence in the record indicated that Jesus Garcia signed the "Agreement of Independent Labor Contract" referenced previously. Jesus provided Mr. Mills with a Certificate of Non-coverage. Jesus in turn was contacted by his brother Pablo who was in need of money so Jesus turned the Driggers' job over to Pablo. Jesus checked with Pablo to make sure that he maintained a current Certificate of Non-coverage. This certificate was also introduced into the record. Mr. Mills had no knowledge that Jesus turned the job

over to his brother, Pablo. Jesus confirmed that Mr. Mills was not notified that Pablo would be completing the job.

Jesus testified that the claimant was not working for him at the time of the accident. The claimant was working for Pablo. Jesus testified that he cashed the check from Mr. Mills for the Driggers' job and turned the money over less \$100 to \$150 to Pablo. He assumed that Pablo paid the claimant.

The claimant testified that Mr. Mills appeared at the Drigger home the day the claimant fell from the roof. The claimant implied that Mr. Mills was present at the home to oversee the work being performed. However, Mr. Mills testified that he went to the home to assist the removal of a truck that was stuck in the front yard. Mr. Mills testified that Mr. Driggers had contacted him because he had a 4-wheel drive vehicle and he thought that Mr. Mills would be able to help remove the stuck truck from the yard.

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 440 (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 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.

It is clear from the record that Mr. Mills had no control over the actions of Jesus Garcia, Pablo Garcia or the claimant, Juan Garcia. This lack of control over the project is evidenced by the fact that Jesus passed the job onto Pablo without any knowledge on the part of Mr. Mills. Pablo hired the claimant to work on the Drigger home without Mr. Mills or Jesus's knowledge. Furthermore, Jesus paid

Pablo for the work completed. Neither Jesus nor Mr. Mills paid the claimant for the work he completed on the home.

Further evidence that the relationship was one of an independent contractor is the terms of the contract Jesus entered into with Mr. Mills that are set out herein above. There were no taxes or social security payments made on behalf of Jesus, Pablo or Juan. Further, Mr. Mills did not supply any tools to Jesus, Pablo, or to the claimant. The claimant testified that he used his brothers tools, but he never indicated which brother. Jesus testified that he passed the job off to Pablo and was unaware that the claimant was working at the job site. Therefore, it can be assumed that the claimant used his brother Pablo's tools and not Jesus's.

The method of payment is also indicative of the type of relationship that the Mills and the claimant had. The Mills paid Jesus by the job. Jesus was one of six independent contractors that Mr. Mills farmed out roofing jobs to. Mr. Mills never paid the claimant any monies what so ever. In fact, Mr. Mills was unaware that the claimant was working on the job site or that Pablo had been given the job by Jesus.

The record also contains the Certificates of Non-coverage for the claimant. The claimant in his brief on appeal has objected to the validity of the Certificate for Juan Garcia which was approved by the Commission on April 15, 1999, and expired on June 30, 2002. The claimant never contested the certificate's authenticity at the start of hearing. The claimant never denied he received a Certificate of Non-coverage. It is not the obligation of the respondent to establish more than a Certificate in the claimant's name. The claimant must establish that the Certificate was not his or overcome the presumption of no coverage. The Administrative Law Judge had made some statements in her opinion with respect to the fact that there was no social security number on the certificate of non-coverage. However, it is of note that the claimant is an illegal alien and therefore does not have a social security number.

Therefore, after we consider all of the evidence in the record, we find that the claimant was employed by an independent contractor. Therefore, the respondent is not liable for any benefits associated with the claimant's injuries. The respondents have argued much of the fact that the claimant is an illegal alien and therefore the workers'

compensation laws do not extend to him. Because we find that the claimant was the employee of an independent contractor, the issue of whether the claimant was illegal alien or not is rendered moot.

Accordingly, the decision of the Administrative Law Judge is reversed. This claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I concur with the majority's finding that at the time of his injury, claimant was an employee as that term has been defined for purposes of workers' compensation. There is no serious argument that can be made to support a contrary finding. However, the undisputed evidence is that respondent, A & M Roofing, was the prime contractor on the job. As the prime contractor, respondent is properly classified as claimant's statutory employer and is liable

for benefits. Accordingly, the opinion of the Administrative Law Judge should be affirmed.

In my opinion, this issue is not nearly as complicated as respondent tries to make it. It really is of no consequence that claimant might not have been an employee of A & M Roofing; that Jesus or Pablo might have been contractors rather than employees of A & M Roofing; that A & M Roofing was not aware that Jesus allowed Pablo to perform the job; or that claimant was hired by, and was an employee of, Pablo.

By far, the most important inquiry is whether A & M Roofing was a prime contractor. If A & M Roofing was a prime contractor, then Jesus and Pablo were subcontractors, although they may have also been independent contractors.

A prime contractor is one "contractually obligated to a third person for the work being performed by the independent contractor." Bailey v. Simmons, 6 Ark. App. 193, 639 S.W.2d 526 (1982). In recognizing that there is a considerable difference between a subcontractor and an independent contractor, the Court in Bailey set forth the following definitions of a subcontractor:

One who takes portion of a contract from principal contractor or another subcontractor. *** One who has entered into a contract, express or implied, for

the performance of an act with the person who has already contracted for its performance.

* * *

A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely "farming out" to others all or part of work contracted to be performed by the original contractor.

The Court in Hale v. Mansfield Lbr. Co., 237 Ark. 854, 376 S.W.2d 670 (1964) was faced with a situation similar to the present one. Mansfield was a prime contractor who "farmed out" to Hale part of its contract with the government. The Court stated that "[e]ven if it can be said that Hale was an independent contractor, he was an independent subcontractor, and Mansfield would be liable to his employees under the workmen's compensation law." See also Hollingsworth & Rockwood Ins. v. Evans, 255 Ark. 387, 500 S.W.2d 382 (1973).

Based on facts admitted by respondent, A & M Roofing was a prime contractor in the present case. Even the majority acknowledges that respondent "obtains roofing jobs and farms out the labor to six different contractors." (Emphasis added.) Further, respondent's attorney offered the

stipulation that A & M Roofing furnished the materials and "had the contract to do the job."

Since A & M Roofing was contractually obligated to a third party for the roofing job, it was the prime contractor, thereby making Jesus and Pablo subcontractors. Ark. Code Ann. § 11-9-402(a) (Repl. 2002) imposes liability on the prime contractor for compensation to employees of an uninsured subcontractor. As noted above, the Commission has found that claimant was an employee of Pablo, who was uninsured. Claimant sustained a work-related injury as an employee of an uninsured subcontractor. Therefore, A & M Roofing is liable for compensation benefits as the prime contractor on the job and claimant's statutory employer.

For the foregoing reasons, I concur in part and respectfully dissent in part. The opinion of the Administrative Law Judge imposing liability on A & M Roofing is correct and should be affirmed.

SHELBY W. TURNER, Commissioner