

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307527

GILMAR VALLADARES,
EMPLOYEE

CLAIMANT

MUSSON CUSTOM BUILDING, INC.,
UNINSURED EMPLOYER

RESPONDENT NO. 1

JUAN GUERRERO d/b/a J&M ROOFING,
UNINSURED EMPLOYER

RESPONDENT NO. 2

EDGAR VILLANEUVA,
UNINSURED EMPLOYER

RESPONDENT NO. 3

OPINION FILED FEBRUARY 10, 2005

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

Claimant represented by the HONORABLE STEPHEN SHARUM,
Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by the HONORABLE JASON WATSON,
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE MARK FREEMAN,
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 3 did not appear.

Decision of administrative law judge: Reversed.

OPINION AND ORDER

Respondent No. 2 appeals an administrative law judge's
opinion filed August 9, 2004. The administrative law judge
found, among other things, that Respondent No. 2 and
Respondent No. 3 were jointly and severally liable for the

claimant's medical treatment and temporary total disability compensation. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that Respondent No. 1, Musson Custom Building, Inc., was the prime contractor pursuant to Ark. Code Ann. §11-9-402. We therefore find that Respondent No. 1 is liable for the claimant's medical treatment and temporary total disability compensation.

I. HISTORY

Respondent No. 2, Juan Guerrero, testified that he was a roofing contractor. Mr. Guerrero testified that he had "a business relationship" with Respondent No. 1, Musson Custom Building, Inc. "I did his roofing for him," Mr. Guerrero testified. It was stipulated that "Musson Custom Building, Inc. was the general contractor the house (sic) at 1517 Northeast Dysart Wood Lane and had subcontracted the roofing of the house to Juan Guerrero d/b/a J&M Roofing. Neither Musson Custom Building, Inc. nor Juan Guerrero were insured for workers' compensation purposes."

The claimant, Gilmar Valladares, testified:

Q. Tell the Judge why you were at that building site.

A. Where the accident occurred?

Q. Correct.

A. We were contracted by Juan in the group of Edgar Villaneuva.

Q. How many workers were on the job that day?

A. Three.

Q. And who were they?

A. Edgar Villaneuva, Saul, and yours truly.

Q. Had you met Juan Guerrero before that day?

A. Yes....When I was working for Rodrigo.

Q. How long had you worked on Mr. Guerrero's projects?

A. The first time, six weeks - I'm sorry - the first time, five weeks.

Q. And when was that?

A. Well, from December 9 to January 11.

Q. Was this a different location?

A. Yes.

Q. And it was for Mr. Guerrero?

A. Yes.

Q. Roofing job?

A. Yes.

Q. On the January 25th, 2003, date, who was telling you what to do?

A. Who?

Q. Who was directing what you were to do that day?

A. Edgar. He was the one that presented the house....

Q. Did Edgar have any tools or equipment?

A. No.

THE COURT: All right. Who furnished the tools and equipment for this job?

THE CLAIMANT: Who was that? For partly, Edgar Villaneuva, and another little part from Juan Guerrero.

THE COURT: Did you have your own tools?

THE CLAIMANT: No. At that time, I had a tool pouch, a knife and hammer.

Q. On the day of your injury, who was on the job with you that day?

A. Edgar Villaneuva; Saul Segura....

Q. Gilmar, who was directing what you should do that day? Who was telling you what to do?

A. Mr. Edgar.

Q. Mr. Edgar Villaneuva?

A. Yes....

Q. Was Edgar working for any other individual?

A. What I know is that we were working for Juan Guerrero.

Q. And how do you know that?

A. He himself took us to be contracted.

Q. Had you worked for Juan Guerrero before this day?

A. Yes, in a group, in Rodrigo's group....

Q. How were you paid for this job that you did, Gilmar?

A. In cash.

Q. Who did you receive the cash from?

A. In the group of Rodrigo and the group for Saul's group, it was Edgar.

Q. And where did Edgar and Rodrigo get their money, to your knowledge?

A. To him, they would pay in check, to Juan Guerrero.

Q. And do you know of your own knowledge that Juan Guerrero paid Edgar?

A. Yes.

Q. And how do you know that?

A. Well, because I would see when they were being paid by check.

It was stipulated that "On January 25, 2003, the claimant sustained injuries to his left leg, left knee, and face when he fell from the roof of a house being constructed at 1517 Northeast Dysart Wood Lane in Bentonville, Arkansas."

Juan Guerrero testified:

Q. Do you know Gilmar Valladares?

A. I mean we met on the day of the accident.... I got a phone call; it was on a Saturday. We got a phone call about I'd say 8:30 in the morning and it was from a carpenter; he said, "Your guy fell off the roof." I go, "Is it Edgar?" and he said, "I don't know." He didn't know who it was. So I was getting ready to go down there when I got another call and it was Edgar who called me at the time and he said - and I asked him, "Who fell off the roof?" because I thought it was him at the time. He said, "Well, it was some guy I hired that fell off the roof." And he asked me if I could go down to the hospital and interpret - and translate for him; he needed a translator. And that was the first time I met him....

Q. And Musson Custom Building, Inc. was the contractor on the job; is that correct?

A. Yes....

Q. Can you tell the Judge what your relationship was with Musson Custom Building, Inc.

A. We just had a business relationship. I did his roofing for him....

Q. Did you represent to Mr. Musson when you entered into this agreement that you had workers' compensation insurance coverage?

A. No.

Q. Did you have coverage?

A. No. I provided him with a certificate, a waiver certificate of noncoverage.

Q. And that applied to you, yourself?

A. Yes....

Q. Did you always consider Edgar to be a subcontractor of yours?

A. Yes.

Q. What kind of control did you have over - let's start with Edgar?

A. Well, I didn't have any control....

Q. And, again, you didn't even know that he had hired Gilmar before this accident; right?

A. No, I didn't.

Dr. Rodger C. Dickinson, Jr. reported on January 29, 2003, "This is a 32-year-old male who fell about 20 feet while working. He had a closed segmental fracture of the left femur. There was a subtrochanteric fracture and a mid shaft fracture, both closed injuries. He also had a minor laceration to the left eyelid which was repaired in the

emergency room. He was admitted to the hospital and taken to surgery that day where he had a intramedullary rodding of his left femur with a long gamma nail."

It was stipulated that the claimant's healing period ended on August 25, 2003. The claimant testified that none of his medical bills resulting from the injury had been paid.

A pre-hearing order was filed on January 29, 2004. The parties agreed to litigate the issues, "1. Whether the claimant was an actual or statutory employee of either or both of the respondents. 2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from January 26, 2003 through August 25, 2003, and attorney's fees."

A hearing before the Commission was held on March 29, 2004. Another hearing was held before the Commission on June 7, 2004, at which time the administrative law judge stated:

At the time of the last hearing, it was continued for the purpose of adding another respondent, a potential uninsured subcontractor, a gentleman by the name of Edgar Villaneuva. Apparently, attempts have been made to notify Mr. Villaneuva by certified mail that he has been joined.

Although he appeared at the last hearing, he is not present today and all attempts to provide him with notice has come back with an "Inaccurate Address." ...Mr. Villaneuva will be made a party to this action at the claimant's request. Even though he's not present and even though apparently has not received formal notice of this action, I'm going to proceed at least with the other respondents.

The claimant's attorney cross-examined Juan Guerrero at the June 7, 2004 hearing:

Q. And you had subcontractors to help you with the jobs that you did for the Musson Custom Building, Inc.?

A. Yes.

Q. Did Mr. Musson know that you were using subcontractors?

A. I don't think he did. Never discussed....

Q. In your direct testimony a few minutes ago, and I believe it was in the context of when you were asked about in the hospital, you talked about when Mr. Valladares was on the roof, and I take it you meant the roof of this particular location?

A. Yes, that particular location.

Q. And that was the job that you were doing for Mr. Musson?

A. Yes.

Q. Now, did you provide materials for each of these jobs?

A. No. Musson provided the materials.

Q. Did you have them delivered, the material delivered to the job?

A. No. They did.

Q. Who is "they"?

A. All the builders. Unless I asked - sometimes I'll do it, but the standard practice is for the builders provide the - the contractor provides all the material.

Q. On this particular job, the one done at 1517 Northeast Dysart Wood Lane, how was the material delivered to the job?

A. Delivered by the shingle company. And they bring out the material and load it on the roof.

Q. And who is responsible to pay for the material?

A. The builder.

Q. In this case, Mr. Musson?

A. Yes.

Q. Or his company. Who is responsible to make sure the material is there for your subcontractors?

A. The builder, the contractor. Musson in this case....

Q. Now, on this particular job, as I understand, you paid Edgar Villaneuva what you agreed to pay him for this project?

A. Uh-huh.

Q. And how was his compensation figured?

A. Piecework.

Q. Well, what do you mean?

A. I pay him by the square....

THE COURT: Did you get a certificate of noncoverage from any of these partners, Edgar, Rodrigo, Saul, the claimant, any of those?

THE WITNESS: I have them from Edgar.

THE COURT: You have a certificate of noncoverage from Edgar?

THE WITNESS: Yes. I don't have it with me today, though....

Q. (By Mr. Sharum) Were the certificates obtained before or after this incident?

A. I have an agreement before then, and Edgar, I believe it was after. Before we started the job, I asked him if he had a certificate and he said yes, he was waiting for it through the mail, and so he didn't present it to me at the time.

The administrative law judge (ALJ) filed an opinion on August 9, 2004. The ALJ found, among other things, that Edgar Villaneuva was "an uninsured subcontractor of Juan Guerrero" on the date of the claimant's accident, and that the claimant was "a statutory employee" of Juan Guerrero on the date of injury. The ALJ found that the claimant sustained compensable injuries on January 25, 2003, for

which the claimant was entitled to reasonably necessary medical treatment. The ALJ found that "the respondents Edgar Villaneuva and Juan Guerrero dba J&M Roofing are jointly and severely (sic) liable for the expense of these services, subject to the medical fee schedule established by this Commission. Any determination of the liability of Musson Custom Building, Inc. for these expenses must be reserved for future determination, if necessary." The ALJ ordered that Edgar and Juan would be "jointly and severely (sic) liable" for temporary total disability compensation from January 26, 2003 through August 25, 2003.

Respondent No. 2, Juan Guerrero, appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-402 provides:

(a) Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor.

In the present matter, the Full Commission finds that Respondent No. 2, Juan Guerrero, was an uninsured subcontractor for the job at 1517 Northeast Dysart Wood Lane in Bentonville, Ark. on January 25, 2003. Respondent No. 2

had subcontracted with Respondent No. 3, Edgar Villaneuva, another uninsured subcontractor. The claimant was employed with Respondent No. 3. The prime contractor for the job was Respondent No. 1, Musson Custom Building, Inc.

The Full Commission notes our previous decision in Garcia v. A&M Roofing, Workers' Compensation Commission F213331 (Feb. 5, 2004). In Garcia, the Full Commission found that "the claimant has failed to prove by a preponderance of the evidence that he was an employee of an uninsured subcontractor, but the employee of an independent contractor. Therefore, the claimant is not entitled to any benefits from the respondent." We note that the Arkansas Court of Appeals has reversed the Full Commission. See, Garcia v. A&M Roofing, CA04-530 (Ark. App. Feb. 2, 2005). The Court agreed with Garcia's contention "that he was an employee of an uninsured subcontractor of A&M and that appellant is entitled to recover workers' compensation benefits from A&M. The decision of the Commission is reversed, and the case is remanded for an award of benefits."

The Full Commission finds in the instant case that the prime contractor, Musson Custom Building, Inc., should be liable to the claimant, Gilmar Valladares, who was an employee of subcontractor Edgar Villaneuva, who in turn had subcontracted for Juan Guerrero. The Full Commission does not affirm the administrative law judge's finding No. 6 in the present matter that the record was "insufficient" to determine the relationship between Respondent No. 2 and Respondent No. 1. The parties stipulated that "Musson Custom Building, Inc. was the general contractor [for] the house ... and had subcontracted the roofing of the house to Juan Guerrero d/b/a J&M Roofing." The parties also stipulated that neither Respondent No. 2 nor Respondent No. 3 carried workers' compensation insurance. In addition, Juan Guerrero testified that he had "a business relationship" with Musson Custom Building. There is ample evidence of record to determine the relationship between Guerrero, Respondent 2, and Musson, Respondent 1.

The administrative law judge found that Edgar Villaneuva and Juan Guerrero were "jointly and severally liable" for the claimant's medical expenses and temporary

disability compensation. Since we cannot find a provision for "joint and several liability" in Ark. Code Ann. §11-9-402, the Full Commission does not affirm this finding.

The Commission notes the Court's key language in Garcia, supra, that "Because appellant was an employee of Pablo, an uninsured subcontractor of A&M, A&M was the prime contractor statutorily liable for worker's compensation benefits to appellant." The Court held that the fact that one may be an independent contractor for some purposes does not preclude a determination that he was also a subcontractor within the meaning of Ark. Code Ann. §11-9-402(a). The Court held that it was "clearly the public policy of this state that prime contractors are liable for workers' compensation benefits to the employees of uninsured subcontractors." The Court held that prime contractors are statutorily obligated to provide coverage to the employees of uninsured subcontractors.

In the present matter, the preponderance of evidence demonstrates that Respondent No. 1, Musson Custom Building, was the prime contractor at the time of the claimant's compensable injury on January 25, 2003. Respondent No. 1

had subcontracted with Respondent No. 2, who in turn had subcontracted with Respondent No. 3. None of the respondents were insured for workers' compensation purposes. The record indicates that the claimant was an employee of an uninsured subcontractor. Musson Custom Building was the prime contractor and was statutorily liable. Musson was contractually liable to a third party to build roofs. Musson hired Juan, who hired Edgar, who hired the claimant. The parties characterized Musson as a "general" contractor. The administrative law judge determined, "a 'general' contractor is not necessarily synonymous with a 'prime' contractor." The Arkansas Supreme Court implicitly found these terms synonymous in Chevron USA v. Murphy Exploration & Prod. Co., 03-612 (Ark. 3-4-2004).

Based on our *de novo* review of the entire matter, the Full Commission found that the claimant proved he was within his healing period and was totally incapacitated to earn wages from January 25, 2003 through August 25, 2003. The claimant therefore proved he was entitled to temporary total disability compensation from January 25, 2003 through August 25, 2003. Respondent No. 1, Musson Custom Building, Inc.,

was the prime contractor at the time of the claimant's January 25, 2003 compensable injury. Since subcontractors Respondent No. 2 and Respondent No. 3 failed to secure compensation, Respondent No. 1 shall be liable for the claimant's reasonably necessary medical treatment and temporary total disability compensation, pursuant to Ark. Code Ann. §11-9-402(a). The claimant's attorney is entitled to a fee for legal services, pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner