

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508019

JOHN A. BRITT, EMPLOYEE	CLAIMANT
THE SIDING GUYS, UNINSURED EMPLOYER	RESPONDENT NO. 1
BURKE HENRY HOMES, EMPLOYER	RESPONDENT NO. 2
UNION STANDARD INS. CO., INSURANCE CARRIER/TPA	RESPONDENT NO. 2

OPINION FILED NOVEMBER 7, 2008

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

Claimant represented by the HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent No. 2 represented by the HONORABLE MICHAEL LEE WRIGHT, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed June 30, 2008. In said order, the Administrative Law Judge made the following 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. Respondent No. 1 had the requisite number of employees on May 13, 2005, to be considered an "employer" under the Arkansas Workers' Compensation Act.
4. Due to Respondent No. 1 being found an uninsured employer, this claim is being referred to the Compliance Division of the Arkansas Workers' Compensation Commission to investigate.
5. The claimant was an employee and not an independent contractor for Respondent No. 1 on May 13, 2005.
6. The claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his pelvis and right lower extremity by specific incident on May 13, 2005.
7. Respondent No. 1, the Siding Guys, were an uninsured subcontractor for Burke Henry Homes, Respondent No. 2. I find Respondent No. 2 to be the prime contractor and statutory employer of the claimant; and therefore, liable for all compensation benefits awarded to the claimant herein pursuant to A.C.A. §11-9-402(a).
8. Respondent No. 2, Burke Henry Homes, and their carrier, Union Standard Insurance Co., shall be given a statutory lien against Respondent No. 1 for any compensation paid on behalf of the claimant pursuant to A.C.A. §11-9-402(b)(1).
9. The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date and contained in the record regarding his compensable pelvic and right lower extremity injuries was reasonable, necessary, and related to

the claimant's compensable injuries and therefore the responsibility of the prime contractor, Respondent No. 2.

10. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injuries from May 13, 2005, through June 1, 2006.
11. The claimant is entitled to the maximum attorney's fees allowed by Arkansas law consistent with the findings herein.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the June 30, 2008, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law

Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant was an employee of Respondent No. 1. Based upon my de novo review of the

entire record, without giving the benefit of the doubt to either party, I find that the claimant failed to prove by a preponderance of the evidence that he was an employee of Respondent no. 1 and not an independent contractor.

The claimant, age 58, testified that he has worked in the siding and home repair business for the last 25 years. During this period of time the claimant has worked as an independent contractor and has even hired employees of his own. In early 2005, the claimant was working in Michigan when he decided he wanted to move back to Arkansas. After reviewing a want ad for respondent no. 1 on the internet, the claimant called the owner and was advised that there was plenty of work in the siding business to keep the claimant busy. In this regard, the claimant explained that Randy Smith, the owner of respondent no. 1 advised the claimant, that if Smith could not keep him busy, his entire family was also in the siding business and between them all they could keep the claimant working.

With regard to working arrangement with respondent no. 1, the claimant testified that he considered himself a tradesman and that he was paid by the running foot of siding installed. The claimant was paid by the job and was issued a 1099 form at the end of

the year. As respondent no. 1 had many jobs to do, the claimant would simply be told which house to work on and he would pick up his supplies and take care of the job. Claimant had been using a hammer to install siding, but as the finished product was not acceptable, he was told that he needed to go back and paint the nail heads to finish the job. Mr. Smith then told the claimant that a nail gun would do a better job. Respondent no. 1 provided the claimant with a nail gun and air compressor since he did not have one of his own. In addition, respondent no. 1 initially provided the claimant with a break tool until he purchased his own. Later, Randy Smith advised the claimant that it did not look good to have only one person on a job site and that he needed to hire a helper. The claimant asked Mr. Smith to help him get an assistant since he did not know anybody in the area. Mr. Smith complied with this request and told the claimant about helpers that earn \$12, \$14, or \$15 an hour. With regard to the helper's pay, Mr. Smith would pay the helper out of the total job money earned by the claimant, before settling the job with the claimant.

The circumstances surrounding the claimant's injury are not in dispute. The claimant fell approximately 25 feet when he was using an unsecured scaffold for balance and it flip on the claimant. The

claimant sustained injuries to his lower extremity and to his pelvis. The claimant required surgery for his lower extremity, but conservative treatment for the fractured pelvis. The claimant was in a wheelchair and crutches for a period of time, until he returned to work in June of 2006.

The major issue in dispute is whether the claimant was an employee or independent contractor at the time of his injury. An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work.

Arkansas Transit Homes v. Aetna Life & Cas., 341 Ark. 317, 16 S.W.3d 545 (2000). The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. On the issue of control, the Court has stated:

The 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.

Massey v. Poteau Trucking Co., 221 Ark. 589, 592, 254 S.W.2d 959, 961 (1953). The ultimate question is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control. Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be based on the particular facts of each case. Ark. Transit Homes, supra. Although no one factor of the relationship is determinative, see Wright, supra, the "right of control" is the principal factor in determining whether the relationship is one of agency or independent contractor. See, Aloha Pools & Spas v. Employer's Ins. of Wausau, 342 Ark. 398, 39 S.W.3d 440 (2000).

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, supra.

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, as previously discussed, 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. Wright, supra; Sanders, supra; Aloha, supra. The factors pertaining to the nature of the worker's occupation and whether it is a part of the regular business of the employer comprise the "relative nature of the work" test. Ark. Transit Homes, supra.

Moreover, in Sandy v. Salter, 260 Ark. 486, 541 S.W.2d 929 (1976), our Supreme Court adopted Professor Larson's test for examining the relationship between the worker's occupation and the regular business of the employer. 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. Id. The more the worker's occupation resembles the business of the employer, the more likely the worker is an employee. Id.

The evidence reflects that at the time of the claimant's injury, the claimant supplied all of his own tools except for a nail gun. In this regard, the claimant testified that he was using his own scaffolding, break, and hand tools on the job when he was injured. After using the respondent's nail gun, the claimant determined that it provided a more professional finish and that it was much quicker and easier to use than his old style hammer and nail. It is also clear from the evidence that the parties intended to create an independent contractor relationship as the claimant was paid by the job, without any taxes taken out of his settlement checks. The claimant was a skilled tradesman who has worked for years as an independent contractor. And finally, when the claimant agreed to move back to Arkansas and begin working for respondent no. 1 he did so with the understanding that he would be able to work for others (particularly Mr. Smith's family) should work with the respondents slow down.

With regard to the right of control, the evidence reveals that Mr. Smith maintained the right to approve the results of the work. The claimant was free to perform the work according to his own means and manner. The claimant chose what time of day to start or to stop. The claimant was given the assignment, and he

would then "take care of it." Although, Mr. Smith had the claimant redo a job, this evidences Mr. Smith's right to approve or disapprove of the final work performed. The claimant was told to paint nail heads from his use of a hammer. In order to eliminate this extra step, Mr. Smith advised the claimant that a nail gun would provide a better finish. On this advice, the claimant tried the respondents' nail gun and agree that it was a much better tool. Thus, Mr. Smith did not control the manner of the work, but rather the outcome of the final product and offered advice along the way on how to produce an acceptable final product.

With regard to the helper, when Mr. Smith suggested the need for a helper, the claimant asked Mr. Smith to help him get a helper since he did not know anyone in the area. Moreover, the record is silent with regard to just who had control over the helper. To find that the respondent and not the claimant exercised control over the helper would require speculation and conjecture. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Furthermore, there is no evidence which would indicate that the use of a helper in any way extended respondent's right of control over the claimant. As a skilled tradesman, the claimant did not require supervision or direction and there is no evidence that the helper altered this fact.

Accordingly, when I weigh all the factors, I find that no one factor outweighs the others with regard to the claimant's employment status. The claimant was engaged in a distinct occupation which required the use of specific tools and acquired skills. Siding applicators routinely hold themselves out to be independent contractors as evidenced by the claimant's testimony that he has worked as an independent contractor in the past and is currently working as an independent contractor now. The claimant and respondent no. 1 agreed to a method of payment indicative of an independent contractor relationship further evidencing the intent not to create a master-servant relationship. Finally, although it appears that respondent no. 1 may have exercised control by giving the claimant a nail gun and a helper, these actions were done with the agreement or acquiescence of the claimant as a way to control the result of the work, not to control the claimant.

I find that the overwhelming weight of the evidence reveals that the parties did not create a master-servant relationship. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he was an employee and not an independent contractor at the time of his injury. Accordingly, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner