

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE**

Scott Lewis Phillips v. Tennessee Home Improvements, Inc.

Direct Appeal from the Jackson County Circuit Court
No. 1178-0-199, Clara Willis Byrd, Judge

No. M1999-01477-WC-R3-CV - Mailed - September 7, 2000

Filed - October 11, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The appellant, a vinyl siding company, contends the trial court erred in finding a siding installer to be an employee rather than an independent contractor. The panel has concluded that the judgment of the trial court finding the installer to be an employee should be affirmed.

Tenn. Code Ann. §50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

Frank G. Clement, Jr., Sp.J., delivered the opinion of the court, in which Frank F. Drowota, III, J., and John A. Turnbull, Sp.J., joined.

Sean A. Hunt, Spicer, Flynn & Rudstrom, PLLC, Nashville, TN, for the appellant Tennessee Home Improvements, Inc.

Craig P. Fickling and William A. Cameron, Ronald Thurman & Associates, Cookeville, TN, for the appellee Scottie Lewis Phillips.

Tennessee Home Improvement, Inc. ("THI"), appellant, is in the business of selling and installing vinyl siding. It is a small company with one shareholder, Mrs. Olean Grisham. THI enters into home improvement contracts with homeowners and engages (or employs) two-man "siding crews" to install the siding specified in the home improvement contracts. Scottie Lewis Phillips ("Phillips"), appellee, and his brother Terry Phillips work together as a "siding crew" installing vinyl siding for THI. Since January of 1995, the Phillips brothers have worked exclusively for THI.

This claim arose when Phillips was injured on September 15, 1995, when he fell approximately fifteen feet off a scaffold while installing vinyl siding for a THI customer.

He sustained injuries to both feet. The trial judge found Phillips was an employee of THI (not an independent contractor) and awarded coverage under the workers' compensation law.

THI conducts its business in the following manner. THI enters into a home improvement contract with the homeowner. The THI contract with a homeowner provides for the sale and installation of vinyl siding¹. In consideration for the contract price with the homeowner, THI provides the vinyl siding and a two-man “siding crew” to install the siding. The homeowners has no involvement in the selection of the installers, fees paid for installation, or the specific work schedule. For more that twelve years, THI has used three two-man “siding crews.” Since 1995, the Phillips brothers were one of the three crews who installed siding for THI.

In January 1995, THI entered into an oral agreement with the Phillips brothers, the purpose of which was to install siding when and where THI directed. The Phillips brothers were “hired” by THI when the Robertson brothers retired.² Neither the Robertsons nor the Phillips had written agreements with THI.

Pursuant to their oral agreement with THI, Scottie Phillips and his brother Terry were to install siding as a two man crew. The agreement provided in pertinent part that THI would pay \$40.00 for each 100 square feet of vinyl siding put on a house and \$1.25 per square foot of soffit installed. The Phillips were required to keep records of the amount of siding installed, along with any other incidentals for which they may be entitled to be reimbursed, and to submit informal documentation to THI for payment at job’s end. They receive payment for their services upon a job’s completion. The pay for each job was divided equally between the Phillips brothers, each brother received separate payment for their work. No social security or withholdings were taken out of their compensation, nor was an IRS form 1099 prepared or provided to the Phillips or the IRS as is required when compensating independent contractors.

The THI agreement with Phillips also provided that Phillips would furnish the necessary tools, however, Phillips could request additional equipment or tools which they believed were needed for a THI job, and if approved by THI, such equipment and tools would be paid for by THI. Phillips could determine when he stopped for lunch, whether he would work a full or half day, whether he would work in inclement weather, and whether he would work on Saturdays. However, if Phillips wanted to take the day off he had to get THI’s permission in advance.

Phillips agreement with THI gave THI important aspects of control including when Phillips was to be at work every day and which jobs he was to work on. Moreover, if Phillips wanted to take a sick or vacation day, he had to obtain THI’s approval. Furthermore, Phillips’ services were subject to being terminated by THI at anytime without limitation.

The standard of review in workers’ compensation cases is de novo upon the record, accompanied by a presumption of the correctness of the trial court’s findings of fact, unless the preponderance of the evidence is otherwise. Galloway v. Memphis Drum Service, 822 S.W.2d 584,

¹And soffits and occasionally other miscellaneous items.

²The Robertson brothers are uncles of the Phillips brothers. The Robertsons had worked for THI as one of its three “siding crews” for twelve years.

586 (Tenn. 1991). Because workers' compensation law must be rationally but liberally construed to promote and adhere to the Act's purpose of securing benefits to those workers who fall within its coverage, doubts will be resolved in favor of finding that a worker is an employee rather than an independent contractor. Id.

The factors to be considered in determining whether an individual is an employee or an independent contractor are: 1) the right to control the conduct of work, 2) the right of termination, 3) the method of payment, 4) the freedom to select and hire helpers, 5) the furnishing of tools and equipment, 6) self-scheduling of work hours, and 7) the freedom to offer services to other entities. Tenn. Ann. Code 50-6-102(10). While all the factors are important, the "right to control" is the primary test. Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982). However, none of these tests, standing alone, is conclusive. Id. Each particular relationship must be examined and the circumstances weighed. Lindsey v. Johnson, 601 S.W.2d 923, 925 (Tenn. 1980).

The trial judge found that Phillips was an employee, and though it is a close issue, several facts support the trial judge's finding that Phillips was an employee. First, THI's right to terminate Phillips was unrestricted for THI had the right to terminate Phillips services at any time. The power to terminate is a significant indicator of an employer-employee relationship because such a right is incompatible with an independent contractor's full control of the work. Galloway, 822 S.W.2d at 587; Owens v. Turner, 362 S.W.2d 793, 794 (Tenn. 1962). Second, THI mandated the time at which Phillips was to begin work. Third, THI determined which jobs Phillips would work on, and specifically, whether Phillips would go to a different job to help another THI "siding crew" stay on schedule.

Other "control" factors are present which also support the trial judge's finding. Specifically, Phillips had to notify THI if he was sick or wanted to not work. Further, when THI had work for Phillips, he was expected to work every day, including Saturdays. Additionally, it was not uncommon for the Phillips to "assist" other THI siding crews who were working to complete other THI projects. When Phillips assisted other crews on other projects, they were paid by the hour, not by the "contract" amount of \$40 per hundred square feet of siding. While the opportunity never arose for Phillips to work for another when THI had no jobs, because they started a new assignment for THI upon completion of each THI job, THI in effect prohibited Phillips from rendering his services to others. Furthermore, though the evidence was contradicted, there was evidence that Mrs. Grisham told the Phillips they were not permitted to accept work from any other employer.

The evidence also showed that Mrs. Grisham explained to the Phillips when they were hired that she expected everything to be done her way, that once a job was completed she expected the site to be cleaned, that she expected that all of her "employees" miss as little work as possible, and that she expected them to be on a job site by 8:30 each morning.

One of the more intriguing factors is that Scottie Phillips' brother, Terry, signed a "Notice of Employee to Employer of Election Not to Accept the Provisions of Workers' Compensation Act of Tennessee" in January 1995, the top line states that THI "employed" Terry. This is intriguing for the Phillips brothers were a two-man crew, they were paid the same and they are clearly both either

employees or independent contractors. Mrs. Grisham testified that Phillips signed such a form although it is not in the record. Grisham testified that she was unable to find it. Nevertheless, the intrigue resulting from this remains for the Phillips brothers both worked for THI under one indivisible agreement; yet THI appears to claim that the appellee, Scottie Phillips, was an independent contractor, while the records of THI suggest his brother Terry Phillips was an employee. THI failed to satisfactorily explain why it would have one of the Phillips brothers sign a form that waived his rights to benefits he was not entitled to receive if he were an independent contractor, as THI now claims.

The record demonstrates that the decision rendered by the trial court is supported by the evidence and the trial court made specific findings of fact and conclusions of law, citing the appropriate criteria set forth in T.C.A. 50-6-102(a)(9). Although there is evidence that supports THI's assertion that Phillips was an independent contractor, we find that the evidence does not preponderate against the trial court's finding that Scottie Phillips was an employee.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Tennessee Home Improvements, Inc.

FRANK G. CLEMENT, JR., SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the appellant, Tennessee Home Improvements, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM