

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

December 8, 2005 Session

MICHAEL RODNEY SMITH v. BEAZER HOMES, CORP, ET AL.

**Direct Appeal from the Chancery Court for Shelby County
No. CH-02-0579-1 Walter L. Evans, Chancellor**

No. W2005-01114-SC-WCM-CV - Mailed May 5, 2006; Filed August 23, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Tennessee Supreme Court of findings of fact and conclusions of law. The trial court found the plaintiff was an independent contractor and dismissed his complaint. The trial court further denied the counter-complaint of Travelers Insurance Company and dismissed Travelers Insurance Company's third party complaint against Joey Helton a/k/a Joey Hilton. For the reasons discussed below, we reverse the judgment of the trial court, and we remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Chancery Court Reversed; Remanded

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE HOLDER, J., and ROBERT EWING CORLEW, SP. J., joined.

Stephen F. Libby, Memphis, Tennessee, for appellant, Michael Rodney Smith.

Sean A. Hunt, Memphis, Tennessee, for appellee Travelers Insurance Company.

MEMORANDUM OPINION

Facts

Michael Rodney Smith ("Plaintiff") was injured on August 28, 2001, when he fell from a scaffold and ladder at Lemoyne Owen College in Memphis, Tennessee. Lemoyne Owen College contracted with Beazer Homes, Inc. to install aluminum siding on several of its buildings on the College site. Beazer Homes, Inc., sub-contracted the work to Quality Homes, Inc., which maintained workers' compensation insurance through Travelers Insurance Company ("Defendant"). Quality Homes then sub-contracted its contractual obligations at Lemoyne Owen College to Ron

Mayhan, d/b/a Mayhan Siding, who also maintained workers' compensation insurance through Travelers Insurance Company. Ron Mayhan, d/b/a Mayhan Siding sub-contracted the siding labor to Joey Helton. Helton then hired a crew of workers to perform the actual work, including Plaintiff. Helton did not maintain any workers' compensation insurance on his workers. Quality Homes furnished all of the materials. Ron Mayhan required Plaintiff to execute form 1-18 of Tennessee Department of Labor, which read as follows:

I, Rodney Smith agree I am a sole proprietor/partner employing approximately _____ employees. I am acting in the capacity of sub-contractor, and do not elect coverage for myself under the General Contractor's Workers' Compensation coverage. This election of not coverage was not advised, counseled or encouraged by said general contractor, or anyone acting for the general contractor. I understand I cannot waive the rights of my employees and that if I do not have workers' compensation coverage the general contractor will be liable for my employees.

This form is for clarifications for audit purposes and does not relieve the general contractor from responsibility for the sub-contractor from responsibility for the sub-contractor's employees in the event the sub-contractor does not have coverage at the time of an accident.

Plaintiff worked for and was controlled by Helton.

Analysis

Appellate review is *de novo* upon the record of the trial court, with the presumption of correctness of the finding of fact, unless a preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). To determine where the evidence lies, the reviewing court is required to conduct an independent examination of the record. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of finding of fact by a trial court requires the Panel to weigh the factual findings and conclusions of the trial court in workers' compensation cases in greater depth. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

When the controlling facts are undisputed, the question of whether a worker is an employee or an independent contractor is one of law for the courts. *Stratton v. United Inter-Mountain Tel. Co.*, 695 S.W.2d 947, 963 (Tenn. 1985). The Tennessee Workers' Compensation Law covers only "employers." Therefore, once the existence of an employment relationship is established, the employer has the burden of proving the worker was an independent contractor rather than an employee. *Galloway*, 822 S.W.2d at 586.

There is no question in this case that an employment relationship existed and that Plaintiff fell and was injured in the scope of this employment. The Defendant, therefore, has the burden of proving that Plaintiff was an independent contractor.

We must, then, turn to the factors to be considered in determining whether an individual is an employee or an independent contractor. Tenn. Code Ann. § 50-6-102(10). The factors the court shall consider are: (a) the right of control of the worker; (b) the right of termination; (c) the method of payment; (d) the freedom to select and hire helpers; (e) the furnishing of tools and equipment; (f) self scheduling of hours; and (g) the freedom to offer services to other entities. No one factor is dispositive, but the right to control and the right to terminate are usually deemed to be strong evidence of an employer-employee relationship. *Starflight, Inc. v. Thoni*, 773 S.W.2d 908, 910 (Tenn. 1989).

The record in this case clearly establishes that Joey Helton, a sub-contractor of Ron Mayhan, was in complete control. Plaintiff was hired by Joey Helton; Joey Helton gave all orders as to where to work, when to work, and which employee worked where. Plaintiff was not allowed to make any independent decisions, did not supervise any other person, and worked exclusively under Helton's direction.

Defendant relies upon the execution of form 1-18, executed by Plaintiff. It is the duty of this court to determine if the worker is an employee or independent contractor, and the employer cannot use a contract to take that responsibility from the court. *Stratton*, 695 S.W.2d at 953. The Workers' Compensation Law similarly prohibits the use by an employer of any "contract or agreement written or implied, or rule regulation or other device" to evade its workers' compensation obligations. Tenn. Code Ann. § 50-6-114(a). The cited code section clearly establishes the public policy against the maker of any agreement which would reduce an employer's liability for benefits under the Law. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 416 (Tenn. Spec. Workers' Comp. Panel 1995). Accordingly, we conclude that the preponderance of the evidence establishes that Michael Rodney Smith was an employee on the date of the accident and not an independent contractor.

The trial court further found that the missing witness rule applied as to Joey Helton. The evidence reveals that the Plaintiff is married to Helton's cousin. The missing witness rule is to be applied with restraint and, when applied, permits, but does not require, inference by finder of fact that testimony of absent witness would have been unfavorable to the party having special access to testimony of the witness. *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208 (Tenn. Ct. App. 1991).

The ability to produce Helton must have been within Plaintiff's power. The only evidence argued by Defendant is the Plaintiff "sees Mr. Helton at family reunions," and by marriage is a relative. Such proof is not sufficient to establish that Plaintiff has it within his power to produce Helton. The trial court was in error in applying the missing witness rule to the facts submitted in this hearing.

Therefore, after careful review of the record, we reverse the holding of the trial court and remand for a complete hearing. The costs of this appeal are taxed to the appellee and its sureties, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**MICHAEL RODNEY SMITH v. BEAZER HOMES, CORP., QUALITY
HOMES, INC., AND TRAVELERS INSURANCE COMPANY**

Chancery Court for Shelby County
No. CH-02-0579-2 Walter Evans, Judge

No. W2005-01114-SC-WCM-CV - Filed August 23, 2006

JUDGMENT

This case is before the Court upon the motion for review filed by Travelers Insurance Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore overruled. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Travelers Insurance Company, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating