

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

AT KNOXVILLE  
(May 6, 1998 Session)

**FILED**  
**August 10, 1998**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

DONNA LEE STEPHENS, Individually, )  
and JESSICA NICOLE PROCTOR )  
(STEPHENS), ERIC JUSTIN )  
STEPHENS, and JOSEPH IAN )  
STEPHENS, b/n/f Donna Lee Stephens, ) HAMILTON CHANCERY  
)  
Plaintiffs-Appellants, ) Hon. Howell N. Peoples,  
) Chancellor.  
v. )  
) No. 03SO1-9707-CH-00091  
R. C. LEAMON and )  
CONDITIONAIRE COMPANY, INC., )  
)  
Defendants-Appellees. )

For Appellants:

John W. Johnson, III  
Hatcher, Johnson & Meaney  
Chattanooga, Tennessee

For Appellee, R. C. Leamon:

Glenn R. Copeland  
Copeland & Whittenburg  
Chattanooga, Tennessee

For Appellee, Conditionaire Company, Inc.:

William A. Lockett  
Cleary & Lockett  
Chattanooga, Tennessee

MEMORANDUM OPINION

Members of Panel:

Charles D. Susano, Jr., Special Justice, Supreme Court  
John K. Byers, Senior Judge  
Joe C. Loser, Jr., Special Judge

AFFIRMED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this claim for death benefits, the claimants contend the evidence preponderates against the trial court's findings that the decedent was an independent contractor and that the defendant, Leamon, was not a statutory employer.

At the conclusion of the trial, the chancellor made the following findings and conclusions:

"The issue in this case is whether Mr. Stephens, Mr. Raymond Stephens, was an employee or independent contractor. In resolving that issue, the Court has placed primary reliance upon the testimony of Kim Ray, Leon Evans and William Levon Stephens, because those are the witnesses who were most intimately involved in the work that was performed by Raymond Stephens.

"It's undisputed, based on the testimony of these witnesses that Mr. Raymond Stephens did perform services for Conditionaire Company. In particular, he installed duct work for heating and air systems. He would perform that work in accordance with plans and specifications that were provided by Conditionaire.

"He was not directly supervised in the performance of his work. There was no one on a daily basis, or even an hourly basis, who reviewed his work or the method in which he did his work. The work that he did was reviewed from time to time and, upon completion of the assigned work, was reviewed by Mr. Kim Ray and by Mr. Leon Evans on behalf of Conditionaire. The purpose of that review was to ensure that the work complied with the plans and specifications and with the applicable codes.

"Mr. Stephens was at times provided with time frames within which the work was to be done, but he was not given a specific time to report to work each day and a specific time to terminate work each day. He was not directed as to when he could eat or when he could take breaks. Primarily, he provided his own tools; however he did from time to time use ladders and a vacuum cleaner that were provided by

Conditionaire.

"He provided his own transportation to and from work that was to be performed. He did on at least one occasion take on work from another company. The testimony was that he went to see Mr. Ray and told Mr. Ray that he had an opportunity to perform another job for Southern Mechanical at the Cracker Barrel Restaurant, if Mr. Ray didn't have work for him to do at that time; and he in fact did take on that other job.

"It is apparent from the testimony of Mr. Ray that Mr. Stephens at all times wanted to maintain a good relationship with Conditionaire and he did not want to do anything that would jeopardize his ability to do work for Conditionaire.

"The evidence also establishes that Raymond Stephens from time to time employed others to assist him. One of those was his brother, William Levon Stephens. He also employed another man to assist him on at least one occasion.

"The Court is directed by statute and by case law to consider seven factors in determining whether or not there is an independent contractor relationship or an employee/employer relationship.

"The first factor is the right to control the conduct of the work. With regard to that factor it's pretty clear that Mr. Stephens had the right to control the conduct of the work. The only control exercised by Conditionaire was over the final product.

"The second factor is the right of termination. Conditionaire could terminate Mr. Stephens at any time because he was paid on a per run basis. He was not hired to perform a specific job to completion of that particular job. He billed by and was paid by the number of runs he completed.

"The third factor is the method of payment. And the Court noted he was not paid by the hour. He was paid by the run.

"The fourth factor is the freedom to select and hire helpers. In this regard Mr. Stephens was apparently free to select and hire helpers. The only control that Conditionaire had, as the Court has noted, was over the final product.

"The fifth factor is furnishing of tools and equipment. Primarily, Mr. Stephens furnished his own tools and equipment, but in two instances Conditionaire furnished equipment: the ladder and the vacuum cleaner. On one other occasion, Mr. Stephens did some fabrication work in the plant of Conditionaire in doing that work.

"The sixth factor is the self-scheduling of work hours. And here we see that Mr. Stephens, within certain parameters, was able to self-schedule his work hours.

"The seventh factor is being free to render services to other entities. And there is evidence that he was free to render service to other entities as long as it did not interfere with the completion of the work he had been assigned by Conditionaire, within the time parameters that were assigned.

"In the case of Lindsey vs. Smith and Johnson, found at 601 S.W.2d 923, the Supreme Court of Tennessee points out that merely checking the end results of the performance of work does not establish an employer/employee relationship.

"In this case there are evidentiary matters that would indicate at some points that Mr. Stephens was an employee. There are certainly elements of evidence that indicate on other factors that he was not an employee. The factors are given no particular weight, and the Court is to look at the factors in light of all the circumstances of any particular case.

"In this particular case, because of the lack of the right to control the conduct of the work and the scheduling of the work hours, and because Mr. Stephens did in fact exercise the freedom to select and hire helpers to help him, the Court concludes that he was in fact an independent contractor rather than an employee of Conditionaire Company, Incorporated.

"As to R. C. Leamon, evidence has been submitted that would arguably establish that he was a general contractor. Mr. Leamon was the owner of the property on which the work was being performed when Mr. Stephens was electrocuted.

"In the case of Brown vs. Canterbury Corporation, found at 844 S.W.2d 134, the Supreme Court points out that a property owner

can be also a principal contractor.

"In this particular case, the Court finds that Mr. Leamon, as the property owner, employed persons to perform services for him, such as the installation of the heat and air system, the installation and repair of the electrical system, the installation and repair of the plumbing system. Mr. Leamon employed persons to perform those services because he had no particular knowledge of how those services should be performed himself. He exercised no control over the entities which worked in those areas.

"The Court finds that he, unlike the Canterbury Corporation, did not exercise any real control over the persons who were employed to perform work at the premises and therefore he was not a principal or general contractor.

"In addition, the Court would point out that since Mr. Stephens was not an employee of Conditionaire or of any other subcontractor or contractor working on the premises, even if Mr. Leamon were considered a principal or general contractor, no liability would be imposed for the injuries sustained by Mr. Stephens in this case by virtue of the fact that T.C.A. 50-6-113(a) makes the general contractor or principal contractor liable only to the same extent as the immediate employer.

"In this case there was no immediate employer of Mr. Stephens. Accordingly, this case is also dismissed as to Mr. Leamon. Costs will be taxed against the plaintiff."

Appellate review of the trial court's findings of fact is de novo upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. section 50-6-225(e)(2). Where, as here, the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Jones v. Sterling Last Corp., 962 S.W.2d 469 (Tenn. 1998).

An independent contractor, or one who contracts to perform a service by his own methods and without control or direction by his employer

except as to the result to be achieved, is not, as a general rule, a covered employee. Among the tests for determining whether the work relationship is that of employer-employee or of independent contractor are (1) right to control conduct of work, (2) right of termination, (3) method of payment, (4) whether or not the worker furnishes his own helpers, (5) whether or not the worker furnishes his own tools, (6) self scheduling of working hours and (7) freedom to render services to other entities, but these tests are not absolute and must not be applied abstractly. Cromwell Gen Contractors, Inc. v. Lytle, 222 Tenn. 633, 439 S.W.2d 598 (1969). None of these tests, standing alone, is conclusive. Curtis v. Hamilton Block Co., 225 Tenn. 275, 466 S.W.2d 220 (1971). While the primary test for determining whether an injured worker is an employee or independent contractor is "right to control", it is not the sole test and each particular relationship should be carefully examined. Lindsey v. Smith & Johnson, Inc., 601 S.W.2d 923 (Tenn. 1980).

Principal - or general - contractors are liable in benefits for injuries to the employees of their subcontractors if, at the time of the injury, the employee is engaged upon the subject matter of the general contract and the injury occurs on, in, or about the premises under the control and management of the principal contractor. Tenn. Code Ann. section 50-6-113. A business enterprise which undertakes to act as its own general contractor and contracts directly with subcontractors for various phases of construction on its own premises is liable in benefits for injuries to employees of such contractors. Campbell v. Dick Broadcasting Co., Inc. of Tennessee, 883 S.W.2d 604 (Tenn. 1994).

The panel has carefully studied the record and finds that the evidence fails to preponderate against the findings of the chancellor with respect to both issues. We further find that the deceased was not an employee of a subcontractor. The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the plaintiffs-appellants.

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Joe C. Loser, Jr., Special Judge

CONCUR:

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Charles D. Susano, Jr., Special Justice

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John K. Byers, Senior Judge

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AT KNOXVILLE

DONNA LEE STEPHENS, Individually	)	HAMILTON CHANCERY
and JESSICA NICOLE PROCTOR	)	
(STEPHENS), ERIC JUSTIN	)	No. 9475231& 95-651
STEPHENS, and JOSEPH IAN	)	
STEPHENS, b/n/f Donna Lee Stephens.	)	
	)	
Plaintiff-Appellants,	)	
	)	No. 03S01-9707-CH-00091
v.	)	
	)	
	)	
	)	Hon. Howell N. Peoples
LEAMON and CONDITIONAIRE	)	Chancellor.
COMPANY, INC.,	)	
	)	
Defendants-Appellees.	)	

JUDGMENT ORDER

<p><b>FILED</b></p> <p><b>August 10, 1998</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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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 facts and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court. Costs on appeal are taxed to the plaintiffs-appellants, and surety, John W. Johnson, III for which execution may issue if necessary.

08/10/98