

IN THE COURT OF APPEALS 12/12/95
OF THE
STATE OF MISSISSIPPI
NO. 95-CC-00078 COA

JESSIE PALMER

APPELLANT

v.

WEYERHAEUSER COMPANY, SELF-INSURED

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HENRY ROSS

COURT FROM WHICH APPEALED: WEBSTER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

AL CHADICK

ATTORNEYS FOR APPELLEES:

H. SCOT SPRAGINS

DION J. SHANLEY

NATURE OF THE CASE: WORKERS COMPENSATION

TRIAL COURT DISPOSITION: TRIAL COURT AFFIRMED WORKERS' COMPENSATION
COMMISSION'S DENIAL OF COMPENSATION

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Jessie Palmer filed his petition to controvert with the Mississippi Workers' Compensation Commission claiming a compensable, accidental, on the job, injury while employed by Jimmy Hall Logging, a logger who contracted with Smallwood to haul some logs from a tract of land being "thinned" by Smallwood, who had a contract with Weyerhaeuser for this purpose. Smallwood's contract provided that the timber removed from the tract would be delivered to Weyerhaeuser plants in Mississippi. Neither Smallwood nor Hall had workers' compensation insurance at the time of Palmer's accident. Consequently, Palmer claimed that Hall and Smallwood were Weyerhaeuser subcontractors and therefore, he was entitled to workers' compensation benefits from Weyerhaeuser. The administrative judge held that Weyerhaeuser was not Palmer's employer, statutory or otherwise. The Mississippi Workers' Compensation Commission adopted the findings of the administrative judge and the commission's order was affirmed on appeal by the Circuit Court of Webster County. This appeal ensued. Based on the substantial evidence supporting the decision below, we affirm.

FACTS

Tony Smallwood [Smallwood] is an independent logger and owner of Tony Smallwood Logging. In 1991, Smallwood had a contract with Weyerhaeuser Company [Weyerhaeuser] to thin timber for Weyerhaeuser on a specific tract of land. Jimmy Hall [Hall] owns Jimmy Hall Logging. Jimmy Hall Logging frequently transported timber for Smallwood to Weyerhaeuser's plant in Columbus, Mississippi.

On January 17, 1991, Jessie Palmer inquired whether Smallwood had a vacant truck driving position. Smallwood responded that he did not, but he could employ Palmer in other capacities until a truck driving position became available. Palmer went to work for Smallwood the next day operating a skidder. At the end of the day, Smallwood told Palmer of a trucking position with Hall beginning the next day. Palmer contacted Hall and accepted a truck driving job.

On January 19, 1991, Palmer delivered one truck load of timber to the Weyerhaeuser in Columbus, and returned to the logging site where Hall's truck was again loaded with timber for delivery to Weyerhaeuser. En route to Columbus, Palmer lost control of the logging truck and the trailer overturned causing injuries to Palmer's lower back and knee.

On March 8, 1991, Palmer filed a petition to controvert alleging he was involved in a compensable motor vehicle accident. He alleged he was employed by Hall and Smallwood, who were subcontractors for Weyerhaeuser. Palmer relied on the simple principle enumerated in section 71-3-7 of the Mississippi Code that "[i]n the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment." Miss. Code Ann. § 71-3-7 (1972).

An administrative hearing was held on April 17, 1992. The only witnesses at the hearing were Palmer, Smallwood and John Tidwell, a private investigator, who testified only to the extent and effect of Palmer's injuries. At the hearing Smallwood produced a copy of his independent logging contract with Weyerhaeuser. The contract provided:

Contractor will, either personally or through employees agents or subcontractors, perform

this contract at contractor's own expense and by and according to Contractor's own means and methods, and free from any control or right of control of Weyerhaeuser as to the manner or method of performing this contract and shall not be required to render personal services, and neither contractor nor contractor's employees or agents or subcontractor's shall be required by Weyerhaeuser to render definite hours of work or labor in the performance of this contract, but, on the contrary, Contractor may perform this contract at Contractor's own pleasure as to the time and by whatever means and methods of performance Contractor determines, and Weyerhaeuser shall and may only look to the result of said work and require that it be in conformity with and completed within the period of this contract.

Smallwood testified that Weyerhaeuser had no input into the manner and means of his work performance, no control over his employees or who he hired or fired, no control over whether he subcontracted work out and no control over what Smallwood's employees were paid or how or when they worked. Further, Weyerhaeuser provided no equipment or financial assistance to Smallwood, his employees or his subcontractors.

At the hearing, Palmer testified that on the day of the accident he was driving a Hall truck; that Hall paid him for the work he did for Hall and Smallwood paid him for the work he did for Smallwood. Palmer admitted he never applied to or was hired by Weyerhaeuser, never received any direction from any Weyerhaeuser employee, or used any tools or equipment belonging to Weyerhaeuser.

The administrative judge made the following findings of fact and rendered the attendant order:

FINDINGS OF FACT

1. The evidence in this cause establishes that on January 19, 1991 claimant was working for Jimmy Hall and driving a truck belonging to Jimmy Hall;
2. The evidence establishes Jimmy Hall was working as an independent contractor for Tony Smallwood on January 19, 1991;
3. The evidence establishes there was no contractual relationship or employer/employee relationship between Jimmy Hall and Weyerhaeuser;
4. The evidence establishes Tony Smallwood was working as an independent contractor for Weyerhaeuser on January 19, 1991 and not a subcontractor or an employee of

Weyerhaeuser on January 19, 1991;

5. The evidence fails to establish that Jimmy Hall was subject to the provisions of the Mississippi Workers' Compensation Act.

ORDER

IT IS THEREFORE ORDERED AND ADJUDGED that on January 19, 1991 there existed no relationship between claimant and Weyerhaeuser or claimant and Tony Smallwood which would bring these parties within the provisions of the Mississippi Workers' compensation act.

The Workers' Compensation Commission adopted the findings of the administrative judge and the Webster County Circuit Court affirmed the decision of the Worker's Compensation Commission denying benefits to Palmer. Palmer appeals the commission's findings and order that he may not recover from Weyerhaeuser's workers' compensation coverage. Only Weyerhaeuser and Palmer are parties to this appeal.

DISCUSSION

WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE FINDING BY THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION THAT WEYERHAEUSER WAS NOT PALMER'S STATUTORY EMPLOYER.

The standard of review employed by this Court when considering appeals of decisions of the workers' compensation commission is well-settled: The findings and order of the workers' compensation commission are binding on this Court so long as they are "supported by substantial evidence." This is so, even though the evidence would convince this Court otherwise, were we the fact-finder. This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence.

Vance v. Twin River Homes, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Mitchell Buick v. Cash*, 592 So. 2d 978, 980 (Miss. 1991)).

Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. It is something more

than a "mere scintilla" of evidence, and does not rise to the level of a preponderance of the evidence.

Harris v. Canton Separate Pub. Sch. Bd. of Educ., 655 So. 2d 898, 902 (Miss. 1995)

(citations omitted).

The only issue on appeal is whether Palmer was a statutory Weyerhaeuser employee. Palmer was a statutory Weyerhaeuser employee if he was an employee of their subcontractor. Palmer was not a statutory Weyerhaeuser employee if he was employed by an independent contractor. Our well-known standard of review is limited: Is there substantial evidence to support the commission's finding that Hall, Palmer's employer at the time of the accident, was not a subcontractor to Weyerhaeuser.

Mississippi Code, section 71-3-3 defines "independent contractor" for purposes of the Workers' Compensation Act:

"Independent contractor" means any individual, firm, or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workmen independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.

Miss. Code Ann. § 71-3-3 (1972).

The Mississippi Supreme Court defined a subcontractor as "one who enters into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance, or who takes a portion of a contract from the principal or prime contractor." *Vance*, 641 So. 2d at 1182-83 (quoting *Amoco Prod. Co. v. Murphy*, 528 So. 2d 1123, 1123 (Miss. 1988)).

In *Georgia-Pacific Corp. v. Crosby*, 393 So. 2d 1348, 1349 (Miss. 1981), the Mississippi Supreme Court emphasized the control test as determinative of whether a business entity is a contractor or subcontractor. The court said:

Relevant characteristics or tests are usually listed, with all except the control test being considered merely indicia pointing one way or the other. No general rule can be stated as to the weight of these elements, over fifteen in number. Their significance varies according to the facts of each particular case. The weight to be given each of the factors pertaining to the employer-contractor question is ordinarily to be decided by the trier of facts. It is the ultimate right of control, not the overt exercise of that right, which is decisive.

Probably the four principal factors under the control test, are (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire.

Crosby, 393 So. 2d at 1348-49 (citations omitted).

The record reflects the following substantial evidence to support the Workers' Compensation Board's finding that Palmer was not the employee of Weyerhaeuser.

(1) Evidence of Direct Control

There is substantial evidence that Weyerhaeuser did not exercise or have the right to control either Smallwood's or Hall's business activities. Smallwood testified that Weyerhaeuser had no control or input into the manner and means of his work performance, no control over his employees or who he hired or fired, no control over whether he subcontracted work out and no control over what Smallwood's employees were paid or how or when they worked. Palmer introduced no evidence of control of Smallwood's or Hall's operation by Weyerhaeuser.

(2) Method of Payment

There is substantial evidence that Weyerhaeuser did not control the methods of payment of Smallwood or Hall. Smallwood testified that he was paid a fixed amount under his contract with Weyerhaeuser for hauling the logs to their processing plants. Smallwood contracted with Hall to haul some logs for him. Smallwood paid Hall for the hauling. Weyerhaeuser did not control how much Smallwood paid Hall, and Hall paid his employees without any interference from Weyerhaeuser or Smallwood.

(3) The Furnishing of Equipment

There is substantial evidence that Weyerhaeuser did not furnish any equipment to Smallwood or Hall. The testimony was uncontradicted; neither Weyerhaeuser nor Smallwood owned any of the equipment used by Hall. Weyerhaeuser did not own any equipment used by Smallwood.

(4) The Right to Fire

There is substantial evidence that Weyerhaeuser did not have the right to hire or fire any of Smallwood or Hall's Employees. Smallwood testified to this fact and produced his contract with Weyerhaeuser, which expressly precluded Weyerhaeuser from such interfering with Smallwood's operation or his right to hire or fire employees.

Substantial evidence supports the commission's findings and order under all four prongs of the control test. We therefore affirm the order of the trial court which affirmed the findings of the commission that Palmer was the employee of an independent contractor and not a Weyerhaeuser statutory employee.

THE JUDGMENT OF THE CIRCUIT COURT OF WEBSTER COUNTY AFFIRMING THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.