

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE MAY 1996 SESSION

FILED

October 30, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

HARLEY R. RUCKER,	)	ROANE CHANCERY
)	
Plaintiff/Appellant	)	NO. 03S01-9511--CH-00127
)	
v.	)	HON. FRANK V. WILLIAMS,
	)	CHANCELLOR
ROCKWOOD ELECTRIC UTILITIES,)	
et al,)	
)	
Defendants/Appellees)	

For the Appellant:

James L. Milligan, Jr.
607 Market St., 10th Flr.
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For the Appellee:

John T. Batson, Jr.
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MEMORANDUM OPINION

Members of Panel:

Justice Penny J. White
Senior Judge John K. Byers
Special Judge Joseph C. Loser, Jr.

REVERSED and REMANDED.

BYERS, Senior Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Plaintiff was injured when he fell and hit his arm on a buzz saw while cutting trees along utility lines as an employee of Woodland Tree Service, which had a contract to cut the trees for Rockwood Electric Utilities.

The trial judge dismissed plaintiff's complaint, finding that Rockwood Electric Utilities was not plaintiff's statutory employer under TENN. CODE ANN. § 50-6-113. However, he found plaintiff to have sustained a 45% permanent partial disability to his right hand.

We reverse the judgment and remand the case to the trial court.

Plaintiff was hired by Woodland Tree Service to help fulfill Woodland's contract with Rockwood Electric Utilities. The agreement between Woodland Tree Service and Rockwood Electric Utilities was in the form of a written contract which was introduced at trial.

Plaintiff reported every morning to Rockwood Electric Utilities where he met with Don White, a supervisor at Rockwood, to learn whether he should continue working on the present job or if he needed to work on some emergency project. He would also pick up a "bucket truck" owned by Rockwood to be used in cutting trees. Woodland provided all of the other equipment used by its employees. Occasionally, Rockwood supervisors would come to the site where Woodland employees were working to check on the progress of the work, occasionally telling the employees to hurry up or moving them elsewhere to a "hot spot." Woodland had absolute authority to hire and fire its own employees.

Under the contract between the parties, Rockwood reserved the right to provide equipment and materials at a lower cost if those provided by Woodland were too high. Woodland paid its employees directly but according to a schedule of wages set by Rockwood. Woodland was required to notify Rockwood of changes in wage rates. Under their contract, Rockwood reserved the right to inspect Woodland's work and audit its books. The contract also provided that Woodland employees could not enter the area where power lines were located unless

Rockwood had obtained the legal right to enter the property. Woodland was to provide workers' compensation insurance to cover its employees and liability insurance.

Rockwood's assistant manager testified that it was the responsibility of Rockwood to provide electric service, which responsibility included keeping the power lines cleared of dangerous limbs and trees.

Our review of findings of fact by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2).

TENN. CODE ANN. § 50-6-113 provides:

Liability of principal, intermediate contractor, or subcontractor. - (a) A principal, or intermediate contractor, or subcontractor, shall be liable for compensation to any employee injured while in the employ of any of his subcontractors and engaged upon the subject matter of the contract to the same extent as the immediate employer. (b) Any principal, or intermediate contractor, or subcontractor who shall pay compensation under the foregoing provisions may recover the amount paid, from any person who, independently of this section, would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

(b) Any principal, or intermediate contractor, or subcontractor who shall pay compensation under the foregoing provisions may recover the amount paid, from any person who, independently of this section, would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

© Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal or intermediate contractor, provided that the collection of full compensation from one (1) employer shall bar recovery by the employee against any others, nor shall he collect from all a total compensation in excess of the amount for which any of said contractors is liable.

(d) This section shall apply only in cases where the injury occurred on, in, or about the premises, on which the principal contractor has undertaken to execute work or which are otherwise under his control or management.

The intent of the statute is to insure as far as possible to all workers payment of benefits when they are injured in the course of their employment. *Billings v. Dugger*, 362 S.W.2d 49 (Tenn. 1962); *Clendening v. London Assurance Co.*, 336 S.W.2d 535 (Tenn. 1960); *Posey v. Union Carbide Corp.*, 510 F.Supp. 1143

(M.D.Tenn. 1981). The section passes coverage from employers who might not have coverage to intermediate or principal contractors who do have coverage. This prevents employers from contracting out normal work simply to avoid liability for worker's compensation. *Stratton v. United Inter-Mountain Telephone*, 695 S.W.2d 947 (Tenn. 1985).

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 General Contractors v. Lytle, 439 S.W.2d 598 (Tenn. 1969); *Bargery v. Obion Grain Co.*, 785 S.W.2d 118 (Tenn. 1990).

None of these tests, standing alone, is conclusive. TENN. CODE ANN. § 50-6-102(a)(9). 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. Once it is established that an employment relationship exists, the burden is on the employer to prove the worker was an independent contractor rather than an employee. *Galloway v. Memphis Drum Service*, 822 S.W.2d 584 (Tenn. 1991).

The facts in this case indicate that Rucker was an employee of Woodland Tree Service and not an independent contractor. Woodland Tree Service exercised hiring and firing authority over its employees, controlled their work, paid them and furnished the tools.

We now turn to the issue of whether Rockwood Electric Utilities was a principal contractor acting as its own general contractor and therefore a statutory employer under TENN. CODE ANN. § 50-6-113.

Tennessee imposes workers' compensation liability on "statutory employers," i.e., those who get part of their regular work done by the employees of a subcontractor and are held responsible for work-related injuries sustained by those employees, if the subcontractor is uninsured. The principal purpose of such a statutory scheme is "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation for their workers." *Brown v. Canterbury Corp.*, 844 S.W.2d 134 (Tenn. 1992). Where a business enterprise undertakes to act as its own general contractor and contracts directly with subcontractors for various phases of construction on its own premises, such business enterprise is subject to the liability imposed by the workers' compensation law upon general contractors. *Fugunt v. TVA*, 545 F.Supp. 977 (E.D. Tenn. 1982). An owner who acts as the general contractor on his own project and does not immediately control the work of the subcontractor's employees is a principal contractor under this section. *Posey, Id.*

The facts of this case are similar to those in *Stratton*. There, the injured worker was employed by a subcontractor of United Intermountain Telephone Company to string telephone wire over hazardous areas. The court in that case was impressed by the fact that the subcontractor was performing work that the primary contractor's own employees performed. The Supreme Court held that plaintiff's exclusive remedy was under the provisions of the Workers' Compensation Act. Therefore, he could recover from his employer or, if the employer did not have workers' compensation insurance coverage, from the principal contractor and statutory employer, United Intermountain Telephone Company.

In this case, although there is evidence that Rockwood's employees did not perform this type of work, Rockwood's assistant manager admitted that keeping the lines clear of dangerous limbs and fallen trees is a function of Rockwood's principal business. We find that plaintiff, like the plaintiff in *Stratton*, is entitled to coverage under the Workers' Compensation Act from his employer, Woodland Tree Service, and because Woodland Tree Service has no workers' compensation insurance, from the general contractor, Rockwood Electric Utilities.

We reverse the judgment of the trial court that Rockwood Electric Utilities was not the statutory employer of the plaintiff. We find that plaintiff is entitled to 45% permanent partial disability benefits and remand the case to the trial court for an order consistent with this opinion. Costs are assessed to the appellee.

John K. Byers, Senior Judge

CONCUR:

Penny J. White, Justice

Joe C. Loser, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

HARLEY R. RUCKER,	)	ROANE CHANCERY
	)	No. 12, 291
Plaintiff/Appellee)	
	)	Hon. Frank V. Williams
v.	)	Chancellor
)	
ROCKWOOD ELECTRIC UTILITIES,	)	S. Ct. No. 03-S-01-9511-CH-00127
ET AL.,)	
)	
Defendants/Appellees	)	Reversed and remanded

JUDGMENT ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference.

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be, and is, hereby, denied.

Cost will be paid by Defendant-Appellee, Rockwood Electric Utilities, for which execution may issue if necessary.

It is so ordered this 30 day of Oct.,
1996.

PER CURIAM

Reid, J., not participating

