

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARGARITA GABRIELA JACOME
CHAPARRO, Surviving Spouse of
FERNANDO HERNANDEZ BAUTISTA,
Deceased Employee,

Claimant,

vs.

ROBERT S. STEEN AND R & S
ROOFING,

Employer,
Defendant.

File No. 5036021

ARBITRATION

DECISION

Head Note Nos.: 1402.10; 1504

STATEMENT OF THE CASE

Claimant, Margarita Gabriela Jacome Chaparro, surviving spouse of Fernando Bautista, filed a petition in arbitration seeking workers' compensation benefits from Robert S. Steen and R & S Roofing, as defendants.

At hearing, claimant objected to defendants' exhibit C and D. Exhibit C is a cashier's check, dated September 17, 2009 from R & S Roofing to Joaquin Sierra. Exhibit D is roofing construction form from R & S Roofing for a project at 5821 Blue Sage Road, Waterloo, Iowa. The record indicates that both exhibits were served approximately one day before hearing. Exhibits C and D are excluded from the record for violation of rule 876 IAC 4.19 (3)(d).

Defendants also objected to Exhibit 2, 3, 6, 7, 8, 9, 10, and 11. Exhibit 2 is the deposition of defendant, Robert Steen. I find use of the depositions of witnesses helpful in corroborating testimony, and determining credibility. I also find the exhibits to Exhibit 2 helpful in corroborating testimony. No good reason exists for exclusion of Exhibit 2. Claimant's objection to Exhibit 2 is denied.

Exhibit 3 are portions of an investigation file from the Occupational Safety and Health Bureau (OSHA) of the Iowa Division of Labor Services regarding the accident at issue. The OSHA file contains statements made by defendant Steen and others related to the accident. I find Exhibit 3 is helpful in understanding this case, and making determinations of credibility regarding the witness. For this reason, Exhibit 3 is admitted into the record.

Exhibit 6, 7, and 8 are claimant's responses to discovery in this case. Discovery responses are routinely admitted into evidence in contested case hearings before this agency. Exhibit 6, 7, and 8 are probative towards factual matters in this case. For this reason, Exhibit 6, 7, and 8 are admitted into the record.

Exhibit 9 is a copy of what is reported to be a Mexican marriage document. The document is in Spanish. No interpretation of the document was provided by claimant. Because of this, I am unsure of the accuracy and the reliability of the document. Because no translation of the document was provided, Exhibit 9 is excluded.

Exhibit 10 is an Iowa Death Certificate information form. Exhibit 10 contains relevant information regarding the death of the deceased. For that reason, I find it helpful in understanding this case. Exhibit 10 is admitted into the record.

Exhibit 11 is a listing of claimant's funeral expenses. Defendant's arguments at hearing and their post hearing brief indicate defendants object to the extent of claimant's entitlement to some of the potential expenses listed in Exhibit 11. Defendants do not object to Exhibit 11 in terms of admissibility, reliability or any other evidentiary grounds. For this reason, Exhibit 11 is admitted into the record.

The record in this case consists of Claimant's Exhibits 1 through 8, and 10 through 12, Defendant's Exhibit A, B, and E, and the testimony of Robert Steen.

ISSUES

1. Whether an employee-employer relationship existed at the time of the injury on September 15, 2009.
2. Whether claimant has standing to bring a claim for workers' compensation benefits.
3. Rate.
4. Whether the claim is barred under Iowa Code section 85.23 for failure of timely notice.
5. The extent of claimant's entitlement to burial benefits.

FINDINGS OF FACT

Defendant, Robert Steen (Steen) owns R & S Roofing (R & S). Steen went up to the 8th grade. He does not have a GED. He testified he is the sole owner of R & S. (Exhibit 2, Deposition page 11) There is some indication that R & S may have been a partnership at one time. (Ex. 2, p. 125)

Whether R & S is a sole proprietorship or a partnership is insignificant for the determination of issues in this case.

R & S is a roofing and siding contracting business. R & S also does some home improvements and remodeling.

Steen testified he has been in this business for approximately 18 years. He said that he bids and lines up jobs. He says that he then has subcontractors do larger jobs. Steen says that he does smaller jobs himself. He said that he has worked with four to five different subcontractors over the years. (Ex. 2, Dep. pp. 18-19)

Steen testified that in early spring of 2009, he met Joaquin Sierra (Joaquin) when buying materials. Steen said he used Joaquin as a subcontractor between April of 2009 and October 2009. (Ex. 2, Dep. pp. 53-54)

Steen said Joaquin worked with other contractors. Steen said Joaquin told him when he and his crew were available to perform work. (Ex. 2, Dep. p. 88) Steen said he had no idea how many workers were on Joaquin's work crew. He said he did not supervise the work Joaquin and his crew performed on jobs. He said he would inspect jobs that were completed and would have Joaquin's crew make corrections to work that was incomplete. (Ex. 2, Dep. pp. 59-60, 87)

The job site at issue was a residence at 5821 Blue Sage Road in Waterloo. Steen said he was contacted by the home owner and made a bid on the job. The job at issue involved removing old shingles and putting down new shingles. The job was to last for approximately two days. Steen said that he was paid half of the quoted price by the home owner when the contract for work was signed. He said he collected the other half of payment when the work was completed. (Ex. 2, Dep. p. 30)

Steen said he charged \$190.00 per square for the job. Each square consisted of three bundles of shingles. He said he paid Joaquin \$64.00 per square that was put on the roof. (Ex. 2, Dep. pp. 21, 35)

Steen said pitch forks were used to pull up old shingles. He said an air compressor, a nail gun, and hammers were used to lay shingles. He said Joaquin supplied all of the tools to his crew. He said Joaquin usually supplied a ladder. He said Joaquin's ladder was stolen, and he loaned Joaquin's crew an R & S ladder for the Blue Sage job. (Ex. 2, Dep. p. 37)

Steen said Joaquin supplied the workers for the Blue Sage job. Steen said he knew Joaquin's son. He said he did not know and could not identify any of the other workers at the Blue Sage job. (Ex. 2, Dep. pp. 56-58)

Steen testified he got materials for the Blue Sage job and left them at the job site. He also left an R & S truck at the job site, next to the house. This truck was for Joaquin's workers to dump old shingles. Steen said he took the old shingles to the dump. Steen said he paid the dumping fee. A picture of the truck at issue is found at Exhibit 2, pages 106-107. (Ex. 2, Dep. pp. 35-37)

Steen said that on the afternoon of September 15, 2009, Joaquin's son called him and said a worker had fallen and gotten hurt. Steen said he learned a ladder was set in the back of the truck. Steen said he learned the ladder had slipped and that Fernando Bautista (Bautista) fell from the ladder. Steen said he had never met Bautista. (Ex. 2, Dep. pp. 40-42)

Steen said that the day before the accident he had Joaquin sign a "sub-contractor agreement". The agreement indicates that Joaquin was a subcontractor and that Joaquin was not considered an employee of R & S Roofing or Steen. (Ex. 2, Dep. pp. 122-123)

An investigative report from the Iowa Division of Labor suggests that Joaquin signed his name with an "x", and that he did not sign the contract until after the accident occurred. The investigation also suggested that someone else signed Joaquin's name on the contract. (Ex. 2, pp. 114-116)

Steen said the agreement was drafted by his attorney. He said he had only used the agreement on the Blue Sage job.

Steen said he took the agreement to the job site. He said when he arrived Bautista was in the ambulance. He said he panicked and asked all the other workers to sign the agreement at the job site. (Ex. 2, Dep. pp. 43-44)

Steen said that he only spoke with Joaquin at the job site. He said he had no contact with Bautista. (Ex. 2, Dep. pp. 45-47)

Bautista died on September 16, 2009 from injuries sustained by the fall. (Ex. 6, p. 7, 9)

Steen said he paid Joaquin a cashier's check once the work at the Blue Sage job was completed. Steen said he did not know what the workers' on Joaquin's crew were paid or how they were paid.

After the accident, an investigation was performed by OSHA of the Iowa Division of Labor Services. The investigator spoke with Joaquin and Emmanuel Sierra. Emmanuel is Joaquin's son. The investigator also spoke with other workers on Joaquin's work crew who were at the Blue Sage job site. (Ex. 2, pp. 113-129)

The investigation indicated that Steen supplied Joaquin with the materials for doing the shingling at the job. It indicated Steen paid Joaquin and Joaquin paid his crew. The report indicated Steen was only at the job site to drop off materials and not at the job site when the crew was working. (Ex. 2, pp. 114-116) The report indicated Joaquin did not sign the subcontractor contract until the day of the accident, after Bautista had fallen. (Ex. 2, p. 116)

The report indicated Joaquin supplied the tools to do the work at the job site. Joaquin got the workers for the job. Joaquin also paid his crew in cash after the work was completed. Joaquin also directed the work. (Ex. 2, pp. 116-117)

The report found that "... an employer-employee relationship existed between R & S Roofing and his workers..." The report does not identify who the alleged R & S Roofing employees are. (Ex. 2, p. 127)

The investigation resulted in R & S Roofing being fined by the Iowa Division of Labor Services for failure to have guard rails or fall protection for employees. R & S was also fined for failure to properly train employees. (Ex. 3)

Steen testified he did not contest the fine. He said the inspector who performed the investigation told him it was easier to pay the fine than to challenge the fine.

Steen said that R & S Roofing carries contractor's insurance. R & S Roofing does not carry workers' compensation insurance as Steen believes R & S Roofing has no employees. (Ex. 2, Dep. pp. 16-18)

A 1099 form for 2009 indicates R & S Roofing paid Joaquin \$83,491.00 in non-employee compensation. (Ex. 12)

In answers to interrogatories, claimant indicated she was married to Bautista on September 15, 2009. Claimant indicates she and Bautista have three children. They were Isaac Jacome, Moises Jacome, and Merari Jacome. All three children were under 15 years of age on the date of the injury. (Ex. 7, p. 3)

Between June 12, 2009 and September 12, 2009, Bautista sent claimant \$3,423.00. He also paid \$334.86 in service charges to send those funds. (Ex. 8, p. 5)

Claimant alleges she incurred \$3,233.00 in funeral costs for Bautista. (Ex. 11)

CONCLUSIONS OF LAW

The first issue to be determined is whether an employee-employer relationship existed between Steen or R & S Roofing and Bautista at the time of the September 15, 2009 injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Section 85.61(11) provides in part:

"Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Where both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws, however. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union County, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

Factors used to determine whether an independent contractor relationship exists are:

1. The existence of a contract for the performance of a certain piece or kind of work at a fixed price;
2. Whether the worker has a separate business apart from the work he is performing for the employer;
3. Evidence that the worker has an independent business separate from his employment suggests an independent contractor relationship;
4. The employment of assistance and the right to supervise their activity;
5. The obligation of the worker to furnish necessary tools, supplies, and materials;
6. The right of the worker to control the progress of the work, except as to the final result;
7. The method of payment, whether by time or by job. When the worker is paid a set amount for a job, this suggests an independent contractor relationship;

8. The intentions of the parties to create a particular relationship.

Mallinger v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254 (1929).; Daggett v. Nebraska-Eastern Exp., Inc., 252 Iowa 341, 107 N.W.2d 102 (1961); Hassebroch v. Weaver Construction Co., 246 Iowa 622, 67 N.W.2d 549 (1954); Crane v. Meier, 332 N.W.2d 344 (Iowa App. 1982).

Claimant contends an employer-employee relationship existed between Bautista and Steen on September 15, 2009.

The record indicates Steen contacted Joaquin to do work at the Blue Sage job. Joaquin worked as a subcontractor for Steen and other contractors. Joaquin told Steen when his work crew was available to work. Joaquin decided when his crew would start and stop work each day. Joaquin supplied the work crew with all tools. Steen only supplied the work crew a ladder. This is only because Joaquin's ladder had been stolen.

Joaquin chose the workers' for the crew at the Blue Sage job. Steen did not tell Joaquin who to hire. Steen did not know any of Joaquin's workers except for Joaquin's son. Steen did not know Bautista. He did not know how Bautista was paid by Joaquin. He did not know what other jobs, if any, Bautista did for Joaquin.

Steen dropped off materials at the site. He left an R & S truck at the site to haul old shingles. Steen was not at the work site when the work was performed. Joaquin, and not Steen, directed how the work was performed.

When the work was completed on the Blue Sage job, Steen paid Joaquin with a cashier's check. The record indicates Joaquin took the money and paid his crew in cash. Joaquin was only paid when the job was completed. The money Joaquin received was determined by the number of bundles of shingles that were used on the house. At the end of the year, R & S gave Joaquin a 1099 form.

There is nothing in the record that Joaquin, or any of his other crew members considered themselves Steen or R & S employees. None of the crew members interviewed for the OSHA investigation identified themselves as Steen's employees, or that R & S was their employer. The OSHA report is helpful in that it is evidence of the intent of the parties regarding the absence of an employee-employer relationship between Steen, Joaquin, and his work crew. The report also corroborates testimony and records in the evidence regarding the relationship between Steen, Joaquin and the work crew. It is recognized that the report did find that R & S has employees and that R & S was fined regarding certain OSHA violations concerning employees. However, this finding is not binding on this decision.

The "sub-contractor agreement" allegedly between Steen and Joaquin is a non-factor in this case. The record indicates that neither Joaquin or any of the other workers signed the agreement until after Bautista fell. It may be true that Joaquin did not sign

the agreement until after Bautista fell. It is true that the other workers did not sign the agreement until after Bautista fell. The record suggests that none of the workers understood the nature of the agreement that they signed. However, none of these facts changes the relationship between Steen, Joaquin, and the work crew.

Steen paid Joaquin a fixed piece work price to lay shingles. He paid Joaquin by a 1099 form. Steen did not assemble Joaquin's work crew. Steen did not hire any of Joaquin's work crew. Steen did not know any of Joaquin's work crew except for Joaquin and his son. Steen did not know Bautista. Joaquin and his crew worked for other contractors. Steen did not supervise the work. With one minor exception, Steen did not supply the work crew with any tools. Joaquin controlled when his crew began a job, how long the crew worked, and when they stopped. Joaquin and his crew did not consider themselves employees of Steen or R & S. For these reasons, and the others detailed above, claimant has failed to carry her burden of proof to prove an employer-employee relationship existed between Steen and R & S, and Bautista on September 15, 2009.

As claimant has failed to prove an employer-employee relationship existed at the time of the injury, all other issues are moot.

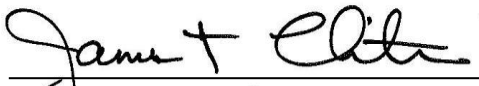
ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That each party shall pay their own costs.

Signed and filed this 14th day of June, 2012.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.