

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Apr. 28, 2016

EDWIN GIRON PALMA v. ESCOBAR ROOFING COMPANY, INC.
LIBERTY MUTUAL INSURANCE CORPORATION, Insurance Carrier
LIBERTY MUTUAL INSURANCE CORPORATION, Claim Administrator
STONE HILL CONSTRUCTION, INC., Additional Employer
BRICKSTREET MUTUAL INSURANCE COMPANY, Additional Insurance Carrier
Jurisdiction Claim No. VA00000936672
Claim Administrator File No. 324A57217
Date of Injury: June 9, 2014

Geoffrey R. McDonald, Esquire
For the Claimant.

Christopher R. Costabile, Esquire
For Escobar Roofing Company, Inc., and
Liberty Mutual Insurance Corporation.

Lisa M. Frisina, Esquire
For Stone Hill Construction, Inc., and
Brickstreet Mutual Insurance Company.

REVIEW on the record by Commissioner Williams, Commissioner Marshall, and Commissioner Newman at Richmond, Virginia.

Stone Hill Construction, Inc., and Brickstreet Mutual Insurance Company request review of the Deputy Commissioner's December 11, 2015 Opinion finding them responsible for medical and indemnity benefits. We AFFIRM.

I. Material Proceedings

On September 9, 2014, the claimant filed a claim alleging having sustained injuries to his brain, head, back, spinal cord, arms, wrists, and legs in a June 9, 2014 workplace accident. He sought an award of medical and temporary total disability benefits. The parties stipulated to the

claimant's average weekly wage, the compensability of his injuries, and the period of disability claimed. However, both Stone Hill Construction, Inc./Brickstreet Mutual Insurance Company ("Stone Hill") and Escobar Roofing Company, Inc./Liberty Mutual Insurance Corporation ("Escobar Roofing") denied an employer-employee relationship at the time of the accident.

An evidentiary hearing was conducted on August 25, 2015, and testimony was taken from the claimant and from representatives of both Stone Hill and Escobar Roofing. The Deputy Commissioner made the following findings of fact and rulings of law:

We find in the present case that although Escobar Roofing was the claimant's original employer and paid the claimant, Stone Hill Construction controlled not only the result to be attained as the result of the claimant's work but also controlled the means and methods by which that result was to be accomplished. We find it significant that the claimant was not performing the normal roofing duties he performed for Escobar Roofing at the time of his injury but rather was performing carpentry work while installing trusses, an activity he had never performed for Escobar Roofing. We also find it significant that the foreman for Stone Hill Construction made the determination that the claimant would be installing trusses. We therefore find the claimant was performing the work of the borrowing employer and not the work of his original employer. We also find that Stone Hill was responsible for furnishing the work tools and the working conditions. We find it significant that Manuel Escobar was not present at the work site and provided no direction with regard to how the work was to be performed, and provided no safety instructions or safety equipment. Therefore, we find Stone Hill Construction controlled the means and methods by which the claimant performed his work as a loaned employee. . . .

(Op. 7-8.)

Stone Hill filed a timely request for review by the full Commission. They argue the Deputy Commissioner erred by determining the claimant was a borrowed employee at the time of the accident and finding them liable for benefits under the Virginia Workers' Compensation Act. Specifically, Stone Hill contends they did not exercise sufficient control over the claimant

to establish such a relationship, in part because their foreman had to communicate with the claimant through a translator.

II. Findings of Fact and Rulings of Law

The parties are largely in agreement regarding the facts of this case. What remains in dispute is if the Deputy Commissioner correctly found the claimant was a borrowed employee at the time of his injury. The “borrowed employee” doctrine is a rule taken “from the common law relating to master-servant relationships to resolve dual employer situations in the workers’ compensation context. . . .” Va. Polytechnic & State Univ. v. Frye, 6 Va. App. 589, 592, 371 S.E.2d 34, 36 (1988). It is “used to determine which of two employers is liable for compensation benefits to an injured employee. . . .” Id. Under this doctrine, a borrowed or loaned employee “must look to his or her special employer for indemnity for injuries suffered while performing the special employer’s work.” Id. at 593, 371 S.E.2d at 36 (citing Ideal Steam Laundry v. Williams, 153 Va. 176, 181, 149 S.E. 479, 481 (1929)).

When an employment relationship is analyzed to determine if the “borrowed employee” doctrine applies, “control over the employee is the most important factor in consideration . . . although it alone may not be dispositive.” Metro Mach. Corp. v. Mizenko, 244 Va. 78, 83, 419 S.E.2d 632, 635 (1992) (citations omitted). Other factors to be examined include: (1) whether the work performed was the borrowing employer’s; (2) whether there was an agreement between the loaning and borrowing employers; (3) the claimant’s acquiescence to the new work situation; (4) whether the loaning employer terminated the claimant; (5) who was responsible for the workplace conditions; (6) the length of the employment; (7) who had the right of discharge; and (8) who paid the claimant. Id.

Stone Hill argues that it is “difficult to understand how an individual who was unable to communicate directly with an employee could have exerted control over said employee unless he went through, in this case, the translator (Victor Escobar), . . .” (Stone Hill W.S. 10.) However, we are not persuaded that providing translation services qualifies the translator as a supervisor. On the facts of this case, translation services were not equivalent to supervision or management. Furthermore, there is no evidence that Victor Escobar was involved with planning or managing the work the claimant engaged in on the day he was injured. The record instead demonstrates that Titus Rhodes, foreman and long-term employee of Stone Hill, was responsible for both his regular employees and the “sub crew” borrowed from Escobar Roofing. (Tr. 60.) The Deputy Commissioner correctly found Stone Hill controlled both the results of the claimant’s work, as well as the means and methods used to accomplish it.

The Deputy Commissioner’s conclusion that the claimant was a borrowed employee finds further support in the other factors cited in Metro Machine. Although the claimant’s employment relationship with Escobar Roofing was ongoing and he was paid by them, he agreed to perform services for Stone Hill under the direction of Stone Hill’s foreman. Stone Hill performed a more specialized form of construction than Escobar Roofing — specifically that of agricultural structures. The claimant was involved in setting barn trusses for Stone Hill at the time he sustained his injuries, which was work he had not performed for Escobar Roofing. In addition, Stone Hill was responsible for the working conditions at the construction site, including providing safety information and the majority of the tools, supplies, and equipment.

Considering the control exerted by Stone Hill, along with the other relevant factors enumerated above, we agree with the Deputy Commissioner’s findings.

III. Conclusion

The Opinion below is AFFIRMED.

Interest is payable on the award pursuant to Va. Code § 65.2-707.

From accrued compensation, a total attorney's fee of \$5,500, which includes the \$5,000 fee awarded by the Deputy Commissioner below, as well as \$8,087.21 in costs, shall be deducted and paid directly to Geoffrey R. McDonald, Esquire, for legal services rendered the claimant.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.