Cite as 2009 Ark. App. 648

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-100

JOHN C. RIMA APPELLANT V. M & S FRAMERS, INC., ET AL. APPELLEES	Opinion Delivered October 7, 2009 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F400931] AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was injured in a fall while working as a roofer for appellee M&S Framers. He filed a claim for workers' compensation benefits alleging that he sustained a compensable injury, that M&S Framers was an uninsured subcontractor, and that appellee Arnold Merrell was liable as prime contractor pursuant to Ark. Code Ann. § 11-9-402. The Commission found that Merrell was not a prime contractor under the statute and therefore had no liability, and that M&S Framers was liable as appellant's employer for medical and disability benefits. Appellant argues on direct appeal that the Commission erred in finding that Merrell was not a prime contractor. Appellees argue on cross-appeal that the Commission erred in finding that M&S was an uninsured subcontractor. We affirm.

An employer is required to secure compensation for compensable injury to its employees. Ark. Code Ann. § 11-9-401(a)(1) (Repl. 2002). Where a subcontractor fails to

do so, the prime contractor is liable for compensation to the employees of the subcontractor. Ark. Code Ann. § 11-9-402(a) (Repl. 2002). The test for determining whether a party is a prime (or general) contractor is simply whether a duty to a third party exists and whether all or part of the performance of that duty is subcontracted to another entity or party. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). The singular requirement for one to be a subcontractor is to perform all or part of another's contractual obligation to a third party. *Id.* The question on appeal, then, is whether the Commission erred in finding that Merrell was not a prime contractor and was therefore not liable to appellant for compensation.

In determining the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence, i.e., evidence that a reasonable person might accept as adequate to support a conclusion. *Morales v. Martinez*, 88 Ark. App. 274, 198 S.W.3d 134 (2004). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Questions of weight and credibility are within the sole province of the Commission, which is not required to believe the testimony of the claimant or of any other witness, but may accept and translate into findings of fact only those portions of the testimony

it deems worthy of belief. *Strickland v. Primex Technologies*, 82 Ark. App. 570, 120 S.W.3d 166 (2003).

Viewing the evidence in light of this standard, we hold that the Commission did not err in finding that Merrell was not a prime contractor. Although Merrell was a licensed building contractor at the time of the hearing, there was evidence from which the Commission properly could find that Merrell had not yet begun work as a building contractor at the time of the injury and that the home he then was building, although ultimately sold to a third party, was originally intended for his own use. Appellant's arguments are critical of our holding in *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), but we need not rely on those portions of *Bailey* that discuss the effect of a contract to build a specific home for a specific party, as opposed to merely building a "spec" house, because there was substantial evidence to show that Merrell, in this instance, was simply building a home for his own use. Nor do we think that the clause in Merrell's deed requiring construction of a residential dwelling on the lot within three years is a "duty to a third party" that compels a finding that Merrell was a prime contractor. The deed makes reference to a mortgage securing a construction loan, and it is clear from a reading of both instruments that the intent of the parties was not to ensure that a residence was constructed for the use of the vendor, bank, or any specific third party, but was instead merely to provide security for the funds advanced to Merrell in the construction loan.

On cross-appeal, appellees argue that that the Commission erred in finding that M&S was an uninsured subcontractor. Because we hold that there is sufficient evidence to support the finding that Merrell was not a prime contractor, the issue of the insurance status of M&S is moot.

Affirmed.

KINARD and BROWN, JJ., agree.