

1989

Jess Aylett Construction v. Board of Review of the Industrial Commission and Allen G. White : Brief of Respondent/ Applicant Allen G. White

Utah Court of Appeals

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Sherlynn White Fentstermaker; Attorney for Respondent/Applicant.

Jess Aylett; Pro Se.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JESS AYLETT CONSTRUCTION,

Petitioner-Defendant,

Case No. 890189-CA

vs.

BOARD OF REVIEW OF THE
INDUSTRIAL COMMISSION and
ALLEN G. WHITE,

(Case Priority No. 6)

Respondent-Applicant,

BRIEF OF RESPONDENT/APPLICANT ALLEN G. WHITE

RESPONSE TO PETITION FOR REVIEW OF THE INDUSTRIAL
COMMISSION'S ORDER GRANTING BENEFITS TO ALLEN G. WHITE

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FILED

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COURT OF APPEALS

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Respondent-Applicant,

BRIEF OF RESPONDENT/APPLICANT ALLEN G. WHITE

JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. §35-1-86 (Supp. 1988).

ISSUE ON APPEAL

Was the Industrial Commission's decision arbitrary and capricious that Alan White was an employee of Jess Aylett Construction?

NATURE OF PROCEEDINGS

Benefits were awarded to Allen G. White by the Industrial Commission of Utah. Petitioner Jess Aylett Construction filed a Petition for Writ of Review to this Court on or about March 30, 1989.

DETERMINATIVE STATUTE

Procedurally, the case is controlled by Utah Code Annotated, §35-1-84 (Addendum 1) and §35-1-85 (Addendum 2) as they existed as of the filing of the case (December 2, 1986). Substantively, the case is governed by Utah Code Annotated §35-1-42(2) (as it read in March, 1986) (See attached Addendum 3) and the Utah Supreme Court case, Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986) (See Addendum 4).

STATEMENT OF THE CASE

A. Nature of the Case:

Allen G. White (Allen White) claimed that he was an employee of Jess Aylett Construction and Drywall (Aylett) for purposes of receiving an award of workers compensation benefits. Benefits were awarded by the Administrative Law Judge and affirmed by the Industrial Commission.

B. Course of Proceedings and Disposition in the Court Below:

1. Allen White was injured on March 17, 1986. (R. 2)
2. On December 23, 1986, Allen White filed an Application for Hearing because Defendants had denied responsibility for medical treatment, payment of temporary total disability compensation and permanent partial disability compensation. (R. 4)
3. Aylett responded to the Application for Hearing denying

that he was responsible for the injuries sustained by Allen White. (R. 3-6)

4. A hearing was held on April 9, 1987, before Richard G. Sumsion, the Administrative Law Judge. Evidence was presented by Allen White, Steve White and Aylett. (R. 34-175)

5. Following the hearing Defendant Aylett was given through April 15 to arrange an independent medical examination with another doctor. (R. 205)

6. The parties were also allowed to provide additional documentary evidence to the Judge. The matter was then taken under advisement. (R. 206)

7. On September 9, 1987, the Administrative Law Judge prepared Findings of Fact, Conclusions of Law and Order determining that Allen White was an employee of Jess Aylett dba Jess Aylett Construction and Drywall at the time of his injury. (R. 285-292) (Addendum 5)

8. On September 15, 1987, a copy of the independent medical examination performed at the request of Defendant Aylett was submitted to the Administrative Law Judge. (R. 293-298)

9. Jess Aylett, individually, *pro se*, filed a Motion for Review on September 24, 1987. (R. 299-300) Aylett's counsel filed a Motion for Review concerning both the appropriate impairment rating and the employment relationship between the parties on October 8, 1987. (R. 304-329)

10. The Administrative Law Judge then entered "Supplemental Findings of Fact, Conclusions of Law and Order" modifying the portions of his original Order dealing with the impairment rating and the appropriate amount of compensation to be paid. No modifications were made concerning the original Findings of Fact that Aylett was the employer of Allen White for workers compensation purposes and as such was responsible for payment of benefits to White. (R. 330-334).

11. Another Motion for Review was filed by Aylett's counsel which concerned only the impairment rating. The matter was then referred by the Administrative Law Judge to an independent medical examiner. (R. 340-341). The examiner's report was furnished to the parties (R. 342-345).

12. The Administrative Law Judge then issued an Amended Supplemental Order which made no changes from his prior Order. (R. 348-350).

13. A Motion for Review of that Order was filed by Jess Aylett, *pro se*. (R. 351).

14. The Industrial Commission considered the case and adopted the Administrative Law Judge's Findings of Fact concerning the employment relationship between Allen White and Aylett. The Commission found Aylett liable for White's workers compensation benefits. (R. 355-357). (Addendum 6)

15. Aylett filed the pending Petition for Writ of Review from the Commission's Order. (R. 359)

C. Statement of Facts:

1. Jess Aylett, doing business as Jess Aylett Construction and Drywall began working as a drywall contractor in 1985 (R. at 165).

2. In late January, 1986, Allen White and his brother Steve White began working for Aylett. (R.49) While working for Aylett, Allen and Steve White worked as a team and split their wages 50/50. (R. 49)

3. Aylett did not have any discussion with either Allen or Steve White regarding workers compensation or other insurance, nor did Aylett tell them he would not assume responsibility for any accident. Aylett probably stated he would not withhold taxes (R. 167).

4. In testimony at the Industrial Commission, Aylett claimed to have no "employees" but from January to March of 1986 had at least four people doing hanging, taping and finishing for him as "subcontractors." (R. 165).

5. Aylett told Allen and Steve White where to work, (R. 52,64,75,132,193) gave them a completion date and furnished tape, mud, corner bead, nails and scaffolding when they needed it. (R. 60,87,132). Allen and Steve White furnished their own hand tools and some taping equipment. (R. 60,132)

6. Aylett was at the job site every day or every other day. He checked on their performance and completion and told them where to go when that house was done. (R. 75,132)

7. Allen and Steve were paid on a "per foot" rate. Aylett calculated the number of feet completed and paid them accordingly. (R. 70) They worked approximately eight hours per day and often Saturday and Sunday for Aylett (R. 148)

8. The first four checks were made out to Allen White individually. The next check was made out to Steve White. (R. 181-184).

9. On March 17, 1986, (the day of the injury) Aylett called Allen White at home at approximately 6:00 a.m. and wanted them to tape a garage for another "taper" who did not show up. Aylett wanted them to be at work at 8:00 a.m. (R. 53)

10. Allen White was injured when the stilts on which he was standing to tape the 10 foot garage ceiling collapsed. (R. 54).

11. He sustained a severe fracture with dislocation at his left elbow. The injury required surgery. Allen White missed fourteen and half weeks of work. (R. 54, 285-292) He also sustained a permanent impairment of 31% of the left upper extremity. (R. 330-335) (Addendum 5)

SUMMARY OF ARGUMENT

The findings of the Industrial Commission are supported by substantial evidence. Jess Aylett dba Jess Aylett Construction and Drywall had the right to control Allen White's work and exercised that right. He told White when to work, gave him a time table for completion of the work, furnished materials and some equipment, inspected the job site and calculated the amount he was to be paid based on the amount completed on a weekly basis.

The Administrative Law Judge, heard evidence presented by the injured worker, Allen White, his brother, Steve White, a co-worker and Aylett. The Judge concluded that because the work done by White was "part or process" of the business of Aylett, and involved the same trade or business of Aylett Construction and Drywall (emphasis added), White was an employee within the meaning of §35-1-42(2) Utah Code Ann. and when injured was entitled to workers compensation benefits.

Appellant attempts, in his brief, to shift responsibility for benefits owed to White to the alleged general contractor on the job, George Hobbs Construction. Hobbs was not a party to the preceding below and it is improper to attempt to adjudicate his rights herein.

ARGUMENT

POINT I

THE INDUSTRIAL COMMISSION'S FINDINGS MUST BE AFFIRMED BECAUSE THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Application for Hearing in the matter was filed on September 24, 1986. As this was prior to the effective date of the Utah Administrative Procedures Act (See section 63-46b-22(2) (1989) the matter is controlled by the law in effect at the time of the filing. Section 35-1-84 (1974) (repealed 1987, repeal effective January 1, 1988) provides, in part:

"Upon such review the Court may affirm or set aside such awards, but only upon the following grounds: (1) that the commission acted without or in excess of its powers; (2) that the Findings of Fact do not support the award."

Section 35-1-84 should be read together with §35-1-85 (1974) (repealed 1987, effective January 1, 1988) which states:

"The Findings and Conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the Findings and Conclusions of the Commission...."

The Commission's Findings of Fact are awarded great deference and the Findings are not to be disturbed unless they are "arbitrary and capricious." Utah Department of Administrative Servs. vs. Public Service Commission, 658 P.2d

601 (Utah 1983). "The Commission's Findings of Fact should be sustained if there is evidence of any substance whatsoever which can reasonably be regarded as supporting the determination made." Kennecott Corporation Employees vs. Department of Employment Security, 13 Ut. 2d 362, 372 P.2d 987, 989 (1962). The Administrative Law Judge and Industrial Commission's decision that Allen White was an employee of Aylett should be affirmed.

Further support for the decision is the long standing principal that the Workers Compensation Act is to be liberally construed and doubts as to compensation should be resolved in favor of the Applicant. McPhie vs. Industrial Commission, 567 P.2d 153 (Utah 1977) and State Tax Commission vs. Industrial Commission, 685 P.2d 1051 (Utah 1984).

Applying these standards, since there is substantial evidence in the record that Aylett exercised control over the work of Allen White, and they were involved in the same trade or business, the benefits awarded to White should be affirmed.

POINT II

JESS AYLETT CONSTRUCTION AND DRYWALL WAS AN EMPLOYER OF ALLEN G. WHITE FOR WORKERS COMPENSATION PURPOSES.

Jess Aylett dba Jess Aylett Construction and Drywall contracted with various parties to install and finish drywall on projects. From January to the time Allen White was injured

Aylett had no less than four different persons performing drywall installation and finishing at his request and on these projects. (R. 165) Aylett considered these drywall installers subcontractors. However, they were "part or process" of his business. Section 35-1-42(2) provides:

"...where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor...shall be deemed, within the meaning of this section, employees of such original employer." (1985)
(Addendum 1)

That section has been interpreted by the Utah Supreme Court to hold that work is "part or process in the trade or business of the employer" if it relates to the successful performance of the enterprise of the employer. Bennett v. Industrial Commission of Utah, 726 P.2d 427 (Utah 1986). Aylett Construction and Drywall (emphasis added) was in the business of installing and finishing drywall. That was the integral part of Aylett's business and without employees such as Allen White, the business would not have continued.

Bennett, *supra*, extensively quoted by Aylett, concerns essentially two different employment relationships. The first is the relationship between Bennett (the injured worker) and Johnson Brothers (a subcontractor). The second is the relationship between Bennett and C. L. Mathews Construction (the

general contractor). In deciding that Bennett was an employee of Johnson Brothers, the Court held that if an "employer" has the right to control the work of the injured worker, the worker is an employee for workers compensation purposes." Bennett, *supra* at 429-430.

Numerous examples of the control exercised by Aylett are contained in the record: he told White where to work each day; gave him completion date or time for each home; and furnished such equipment as tape, mud, bead and scaffolding. Aylett also calculated the amount of work which had been completed each week and White was paid based on Aylett's calculations. On the day of the accident, White was even asked to be at work at a certain time. (R. 53) Such control is sufficient to evidence the employment relationship.

POINT III

THE ATTEMPT TO SHIFT RESPONSIBILITY TO HOBBS IS IMPROPER.

Aylett's brief does not argue that Aylett is not responsible. The principle focus is that Hobbs Construction should be required to provide benefits. Hobbs Construction was never made a party to these proceedings. At the time of the hearing in this case, Aylett testified that the general contractor on the job was George Hobbs or George Hobbs Homes.

(R. 197) Hobbs was not joined by Defendant. Applicant also did not seek to have Hobbs made a party as he was also uninsured.¹

Aylett cannot escape liability by attempting to shift responsibility to George Hobbs Construction. As the Court determined in Bennett, *supra*, responsibility of the employer, such as Aylett, and the statutory employer, such as Hobbs, are concurrent. A finding that George Hobbs or another entity was the general contractor in this particular job would not relieve Aylett of liability.

Aylett's attempt to pass responsibility on to George Hobbs Construction is inappropriate. That is especially the case when Hobbs is also uninsured.

CONCLUSION

The Administrative Law Judge and Industrial Commission correctly concluded that Allen White was an employee of Jess Aylett Construction and Drywall for workers compensation purposes. At the time of White's injury, he was performing work for and at the request of Aylett. Aylett had the right to and was exercising control over the work and the work was a "part or process" of the business of Aylett.

The decision awarding benefits is supported by the evidence

¹ At the time of the hearing, White's attorney checked with the policy department of the Industrial Commission. No policy was in effect for George Hobbs or George Hobbs Homes.

in the case and is not arbitrary and capricious. For the foregoing reasons, it should be affirmed.

RESPECTFULLY submitted this 23rd day of October, 1989.



SHERLYNN WHITE FENSTERMAKER

CERTIFICATE OF MAILING

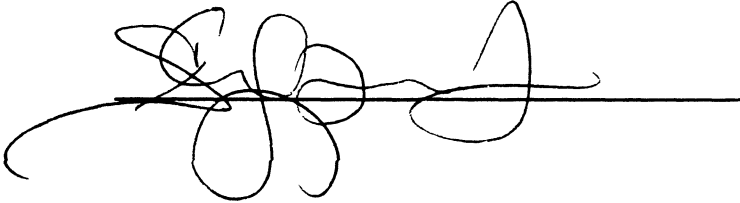
I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent/Applicant Allen G. White, postage prepaid, addressed as follows:

Jess K. Aylett
11613 South High Mt. Drive
Sandy, UT 84092

Industrial Commission of Utah
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P. O. Box 510250
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DATED AND SIGNED this 23rd day of October, 1989.

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ADDENDUM

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ADDENDUM 1

ADDENDUM 1

Utah Code Annotated §35-1-84 (1985) (repealed effective January 1, 1988)

**FURNISHINGS AND CERTIFYING PROCEEDINGS AND TRANSCRIPT
TO SUPREME COURT - POWER OF COURT TO AFFIRM OR
SET ASIDE AWARD - GROUNDS FOR SETTING ASIDE.**

Upon the filing of the action for review the court shall direct the commission to furnish and certify to the Supreme Court, within twenty days, all proceedings and the transcript of evidence taken in the case, and the matter shall be determined upon the record of the commission as certified by it. Upon such review the court may affirm or set aside such award, but only upon the following grounds:

- (1) That the commission acted without or in excess of its powers;
- (2) That the findings of fact do not support the award.

ADDENDUM 2

ADDENDUM 2

Utah Code Annotated §35-1-85 (1965) (repealed effective January 1, 1988)

DUTY OF COMMISSION TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW - FILING - CONCLUSIVENESS ON QUESTIONS OF FACT - REVIEW - COURT JUDGMENT

After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusion of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusion of the commission. The commission and every party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the court shall enter judgment either affirming or setting aside the award.

ADDENDUM 3

ADDENDUM 3

Utah Code Annotated §35-1-42(2) (1985)

EMPLOYERS ENUMERATED AND DEFINED - REGULARLY EMPLOYED - INDEPENDENT CONTRACTORS

Every person, firm and private corporation, including every public utility, having in service on or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural employers who meet any one of the following conditions: (a) whose employees are all members of the immediate family of the employer, which employer has a proprietary interest in the farm; provided that the inclusion of any immediate family member under the provisions of this title is at the option of the employer or (b) who employ five or fewer persons other than immediate family members for 40 hours or more per week per each employee for 13 consecutive weeks during any part of the preceding 12 months; and except domestic employers who do not employ one employee or more than one employee at least 40 hours per week; provided, that employers of agriculture laborers and domestic servants, shall have the right to come under the terms of this title by complying with the provisions thereof and the rules and regulations of the commission.

The term "regularly" as herein used shall include all employments in the usual course of the trade, business,

profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule of control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

ADDENDUM 4

dissenting); *see also* *Moody v. Moody*, 715 P.2d 507, 510 (Utah 1985) (Zimmerman, J., concurring in result) (very high standard for reopening custodial orders); *Hirsch v. Hirsch*, 725 P.2d 1320, 1322 (1986) (Zimmerman, J., concurring separately) (custody changes governed by strict standards, different from those applicable to initial custody awards). To state the applicable standard carelessly is to invite confusion in an area in which courts have exceptional powers over the lives of children of divorced parents, an area where the eradication of such confusion should be an important goal. *Hirsch v. Hirsch*, 725 P.2d at 1322 (Zimmerman, J., concurring separately).

DURHAM, J., concurs in the concurring opinion of ZIMMERMAN, J.



Robert N. BENNETT, Plaintiff,

v.

INDUSTRIAL COMMISSION OF UTAH,
Johnson Brothers Construction and
C.L. Matthews Construction, Defendants.

No. 20705.

Supreme Court of Utah.

Sept. 30, 1986.

Injured worker sought reversal of Industrial Commission order which denied him worker's compensation benefits. The Supreme Court, Stewart, J., held that: (1) Commission erred, as matter of law, in holding that injured worker was not employee of construction contractors, and (2) subcontractor's employee is deemed employee of general contractor if general contractor retains some supervision or control over subcontractor's work and work done

by subcontractor is "part of process in trade or business of the employer."

Reversed and remanded.

Howe, J., concurred in result.

1. Workers' Compensation ⇄1935

In reviewing Industrial Commission orders, Supreme Court defers to Commission's findings of fact unless it makes findings not supported by substantial evidence; Court does not defer to Commission when construing statutory terms or when applying statutory terms to facts unless construction of statutory language or application of law to facts should be subject to Commission's expertise gleaned from its accumulated practical, firsthand experience with subject matter.

2. Workers' Compensation ⇄1935

Whether worker is employee within meaning of workmen's compensation law requires application of statutory standard to facts, and resolution of issues which are not benefited by Commission's expertise or experience; thus, court does not defer to Commission's ruling in such instances.

3. Workers' Compensation ⇄1939.11(3)

Since evidence in workmen's compensation case was essentially uncontradicted, court needed only to determine whether, as matter of law, Industrial Commission erred in ruling that injured worker was not an employee of contractor.

4. Workers' Compensation ⇄235

If evidence shows that "employer" retains right to control work of claimant, claimant is usually considered an "employee" for workmen's compensation purposes.

5. Workers' Compensation ⇄235

Concept of right to control in workmen's compensation cases should not be rigidly and narrowly defined; rather, it is proper to resolve doubt as to whether worker was employee in favor of employee.

6. Workers' Compensation ⇄235

Factors included in determining whether employer has right to control employee's

work includes actual supervision of worker, extent of supervision, method of payment, furnishing of equipment for worker, and right to terminate worker's employment.

7. Workers' Compensation \S 235

Industrial Commission erred, as matter of law, in holding that injured worker was not employee of construction contractor where contractor retained and exercised right to control worker's job conduct, contractor hired coemployees, and worker performed same job as he had previously performed during prior employment with contractor.

8. Workers' Compensation \S 351

Under statute, subcontractor's employee is deemed employee of general contractor if general contractor retains some supervision or control over subcontractor's work and work done by subcontractor is part or process in trade or business of employer. U.C.A.1953, 35-1-42(2).

9. Workers' Compensation \S 351

Term "supervision or control" in workmen's compensation statute requires only that general contractor retain ultimate control over project in order to retain "supervision or control" so as to make general contractor a "statutory employer." U.C.A. 1953, 35-1-42(2).

10. Workers' Compensation \S 355

As long as subcontractor's work is part or process of general contractor's business, an inference arises that general contractor has retained supervision or control over subcontractor sufficient to meet requirement of worker's compensation statute. U.C.A.1953, 35-1-42(2).

George K. Fadel, Bountiful, for plaintiff.
Carvel R. Shaffer, Bountiful, Erik M. Ward, Ogden, for defendants.

STEWART, Justice:

Plaintiff Robert N. Bennett seeks reversal of an Industrial Commission order

which denied him workers' compensation benefits. At issue is whether Bennett was an employee of Johnson Brothers Construction and a "statutory employee" of C.L. Matthews Construction Co. We reverse the Commission's order.

The facts are as follows: Bennett, a trained cement finisher, was regularly employed by Johnson Brothers Construction from May, 1983, until November, 1983, when he was terminated due to a reduction in work force. After termination, Bennett collected unemployment benefits. During his unemployment, he established a checking account in the name of Bob Bennett Construction and informed Johnson Brothers that he intended to obtain a contractor's license, although he never did. During December, 1983, Bennett performed several small jobs for Johnson Brothers. On each job, he was paid cash in a lump sum without any deductions from the payments.

In February, 1984, C.L. Matthews Construction contracted to do remodeling work, including replacing the concrete driveway, at the Kimball Condominium in Salt Lake City. Matthews let a subcontract to Johnson Brothers to remove and replace the driveway. Johnson Brothers and Matthews agreed that payment for the job would be approximately \$400 and that Matthews would furnish the concrete and rental equipment, including a jackhammer and a compressor, for the project. Matthews testified that he "went through all the details with Chris [Johnson], and then left the job for him to complete." Johnson Brothers then contacted Bennett and another former employee, Don Russell,¹ and, as the Commission stated, "asked them if they would like to do the job for a set sum." The job would take about two days. Bennett and Russell agreed.

On the first day, they removed all the concrete and completed the subgrading. On the second day, according to the Commission, "Johnson Brothers appeared at the site twice to see how the work was coming

1. The former employee is referred to in the transcript as "Don Crummit." His affidavit,

however, is signed "Don Russell." We refer to him as Don Russell.

Cite as 726 P.2d 427 (Utah 1986)

along and to check the specifications." During that day, Russell struck a nail which flipped into Bennett's eye. The injury resulted in surgery and the possibility that Bennett may need a lens transplant to fully regain his vision.

After Bennett was injured, one of the Johnsons stepped in to help Russell complete the job. Johnson Brothers tendered Bennett a check for \$150 made payable to "Bob Bennett Construction" for his work on the job. Bennett refused to cash the check and returned it to Johnson Brothers with a note stating that he did not have a contractor's license. He requested that Johnson Brothers reissue the check payable to him personally.

The Commission held that Bennett was not entitled to workers' compensation benefits because he was an independent contractor. Its ruling was based on the findings that Bennett had intended to become an independent contractor, had established a bank account for a contracting business, and had been paid in a lump sum with no deductions. The Commission also found that Johnson Brothers "did not exercise a demonstrable amount of control over the work project. They only made two inspection visits to the site to determine if the specifications were being met." Because the Commission ruled that Bennett was not an employee of Johnson Brothers, it did not address the nature of the legal relationship between Matthews and Johnson Brothers.

I.

[1] In reviewing Industrial Commission orders, we defer to the Commission's findings of fact unless it makes findings not supported by substantial evidence. *Pinter Construction Co. v. Frisby*, 678 P.2d 305, 307 (Utah 1984). We do not defer to the Commission when construing statutory terms or when applying statutory terms to the facts unless the construction of the statutory language or the application of the law to the facts should be subject to the Commission's expertise gleaned from its accumulated practical, first-hand experience with the subject matter. *See general-*

ly, Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 611 (Utah 1983).

[2, 3] Whether a worker is an employee within the meaning of the workmen's compensation laws requires the application of a statutory standard to the facts. Since resolution of the issue is not benefitted by Commission expertise or experience, we do not defer to the Commission's ruling. *Board of Education v. Olsen*, 684 P.2d 49, 51 (Utah 1984). *See also Christean v. Industrial Commission*, 113 Utah 451, 455, 196 P.2d 502, 504 (1948); *Stover Bedding Co. v. Industrial Commission*, 99 Utah 423, 424-25, 107 P.2d 1027, 1027 (1940). Since the evidence is essentially uncontradicted, we need to determine only whether, as a matter of law, the Commission erred in ruling that Bennett was not an employee. *See Rustler Lodge v. Industrial Commission*, 562 P.2d 227, 228 (Utah 1977); *Sommerville v. Industrial Commission*, 113 Utah 504, 506, 196 P.2d 718, 719 (1948); *Intermountain Speedways, Inc., v. Industrial Commission*, 101 Utah 573, 577-78, 126 P.2d 22, 24 (1942); *Stover Bedding Co. v. Industrial Commission*, 99 Utah at 425, 107 P.2d at 1028; *Stricker v. Industrial Commission*, 55 Utah 603, 607-08, 188 P. 849, 851 (1920).

II.

[4, 5] On the merits, we first address the issue of whether the Commission erred in ruling that Bennett was not an employee of Johnson Brothers. Section 35-1-43(1)(b) defines "employee" as every person "in the service of" an employer as defined in § 35-1-42(2). What constitutes being "in the service of" has often been determined by reference to common law master-servant principles, although in *Rustler Lodge*, we indicated a broadening of the term pursuant to Restatement (Second) of Agency § 220. *Rustler Lodge*, 562 P.2d at 228. However, it will almost always follow that if the evidence shows that an "employer" retains the right to control the work of the claimant, the claimant is the employer's employee for workmen's compensation pur-

poses. *E.g.*, *Bambrough v. Bethers*, 552 P.2d 1286, 1291 (Utah 1976); *Auerbach Co. v. Industrial Commission*, 113 Utah 347, 195 P.2d 245 (1948). Certainly, the concept of right to control is not to be rigidly and narrowly defined.² Rather, it should be defined to give full effect to the remedial purposes of the Workmen's Compensation Act. See *Hinds Co. v. Industrial Commission*, 20 Utah 2d 322, 437 P.2d 451 (1968), which held that it was proper to resolve doubt as to whether a worker was an employee in favor of the employee.

[6] Many factors have been applied in determining the right to control. Among those factors are actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker. *Harry L. Young & Sons, Inc. v. Ashton*, 538 P.2d 316, 318 (Utah 1975). Although these factors are not inclusive, they are relevant in many cases, including this case.

[7] The uncontested evidence indicates that Johnson Brothers retained and exercised the right to control Bennett's job conduct. Johnson Brothers dealt with Bennett as an employee. Bennett was simply told how much he would be paid. During the two days Bennett was on the job, someone from Johnson Brothers appeared twice to oversee Bennett's performance. When Ben-

nett was injured, Johnson Brothers provided the labor to fill in for Bennett. They hired both Bennett and Don Russell to do the job. It was not Bennett who hired Russell, as would have been the case if Bennett were an independent contractor. Bennett was hired to do a short, one-time project. Thus, although Bennett was paid in a lump sum, rather than by the hour, the pay tendered was reduced, apparently because of his time off the job due to the accident. Even though he had no deductions withheld from his pay, that is of no significance since the amount paid was so small and the job of such short duration.

Although Bennett had been an employee of Johnson Brothers and although he had been terminated because of a reduction in work force, his recall for a short time was consistent with the manner in which he had performed during his previous tenure with Johnson Brothers. He performed exactly the same type of work he had performed while officially on Johnson Brothers' payroll. Finally, it was Matthews who furnished both the concrete and the heavy equipment that Bennett and Russell used on the job.³ Nothing in Bennett's relationship to Johnson changed, except for Johnson Brothers' not withholding payroll deductions from the amounts paid Bennett.

On somewhat similar facts, a claimant in *Maryland Casualty Co. v. Industrial Commission*, 12 Utah 2d 223, 364 P.2d 1020 (1961), was held to be an employee.

2. Professor Larson strongly suggests that right of control is an inappropriate test for determining employee status for workers' compensation purposes. 1C A. Larson, *Workmen's Compensation Law*, § 43.42 (1986). The control test was borrowed from agency law. The purpose of agency law, to define the limits of a master's vicarious liability for a servant's misdeeds, is entirely different from the remedial purpose of the workmen's compensation acts, which is to spread the burden of industrial accidents across the population. *Id.*; see *Pinter Construction Co. v. Frisby*, 678 P.2d 305, 308 (Utah 1985); *Stover Bedding Co. v. Industrial Commission*, 99 Utah 423, 429-31, 107 P.2d 1027, 1029-30 (1940) (Wolfe, J., dissenting). Therefore, Larson suggests, more emphasis should be placed on the nature of the work performed. Larson, *supra*,

§ 43.50. If a worker is integrally or continuously involved in an employer's business, and the worker's own operations are not such that they could readily channel the costs of an industrial accident to the general population, the worker should be considered an employee for workmen's compensation purposes. *Id.*

3. Professor Larson states that the furnishing of valuable equipment to a worker indicates an employer-employee relationship. The furnishing-of-valuable-equipment rule should only apply to valuable equipment. An employer would have a much greater interest in controlling the actions of a worker using the employer's \$10,000 truck than in controlling a worker using the employer's \$5 hammer. Larson, *supra*, § 44.34.

There, the worker was hired to furnish and operate a drilling rig for one specific drilling project. He was not listed as an employee on the employer's books, nor were deductions withheld from his pay. However, he was paid by the shift and a supervisor was present most of the time he worked.

Bennett's intention to become an independent contractor at some indefinite time in the future was irrelevant. Although he had opened a bank account in the name of "Bob Bennett Construction," and had apparently obtained the papers to apply for a contractor's license, he never actually filed them. What Bennett might have intended to do later was not indicative of his status at the time of the accident.

In sum, we hold that the Commission erred, as a matter of law, in holding that Bennett was not an employee of Johnson Brothers.

III.

Bennett also alleged that Matthews was liable for his workers' compensation coverage pursuant to the "statutory employer" portion of § 35-1-42(2), which states:

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and this work is a part or process in the trade or business of the employer, such contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

According to Professor Larson, statutes of this kind were passed "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 protection for their work-

ers." Larson, *supra*, § 49.14. A secondary purpose of these statutes was "to forestall evasion of [workmen's compensation acts] by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers ..." *Id.* § 49.15.

[8] Under § 35-1-42(2), a *subcontractor's employee* is deemed an employee of the *general contractor* if (1) the general contractor retains some supervision or control over the subcontractor's work, and (2) the work done by the subcontractor is a "part or process in the trade or business of the employer." *E.g.*, *Pinter Construction Co. v. Frisby*, 678 P.2d at 307 (Utah 1984); *Rustler Lodge v. Industrial Commission*, 562 P.2d at 228-29; *Harry L. Young & Sons, Inc. v. Ashton*, 538 P.2d at 318 (1975).

A subcontractor's work is "part or process in the trade or business of the employer," if it is part of the operations which directly relate to the successful performance of the general contractor's commercial enterprise. *Pinter Construction Co. v. Frisby*, 678 P.2d at 309; *Lee v. Chevron Oil Co.*, 565 P.2d 1128, 1131 (Utah 1977); *King v. Palmer*, 129 Conn. 636, 640-41, 30 A.2d 549, 552 (1943). The trade or business of a general contractor in the construction business is construction, *Smith v. Alfred Brown Co.*, 27 Utah 2d 155, 158, 493 P.2d 994, 996 (1972); *Adamson v. Okland Construction Co.*, 29 Utah 2d 286, 289, 508 P.2d 805, 807 (1973); Annot., 150 A.L.R. 1214, 1223 (1944), and any portion of the general contractor's construction project which is subcontracted out will ordinarily be considered "part or process in the trade or business of" the general contractor.

[9] The requirement in § 35-1-42(2) that the general contractor, as a "statutory employer," retain "supervision or control" over the work of the subcontractor who hired the "statutory employee" cannot, by

definition, be equated with the common law standard for determining whether a person is an employee or an independent contractor. In dealing with "statutory" employees, the statute begins with the proposition that the claimant qualifies as an employee of the subcontractor. But the statutory requirement that the general contractor have "supervision or control" over the work of the subcontractor cannot mean that the subcontractor must also qualify as an employee of the general contractor. That would be at least highly improbable and perhaps impossible by definition. Rather, the term "supervision or control" requires only that the general contractor retain ultimate control over the project. *Pinter Construction Co. v. Frisby*, 678 P.2d at 309. As stated in *Nochta v. Industrial Commission*, 7 Ariz.App. 166, 436 P.2d 944 (1968),

The evidence is clear in the instant case that the respondent construction company exercised that degree of control over the job to be performed by the petitioner sufficient to bring petitioner within the meaning of § 23-902, subsec. B. They provided the material that he was to use; the job superintendent together with the architect made inspections of the job and there were consultations; but the final and exclusive control of the job was vested in the job superintendent. The fact that petitioner was knowledgeable and trusted in his field does not lessen the ultimate control over the job by the job superintendent.

Id. at 169-70, 436 P.2d at 947-48. In *Smith v. Alfred Brown Co.*, 27 Utah 2d 155, 493 P.2d 994, this Court found that the general contractor held on a major construction project at Brigham Young University, by virtue of its ultimate supervisory control over the entire project, had sufficient control over the masonry subcontractor on the project to warrant holding the general contractor to be the statutory employer of one of the masonry subcontractor's employees. *Id.* at 158-59, 493 P.2d at 996.

[10] Although the construction process requires the general contractor to delegate to a greater or lesser degree to subcontractors, the general contractor remains responsible for successful completion of the entire project and of necessity retains the right to require that subcontractors perform according to specifications. The power to supervise or control the ultimate performance of subcontractors satisfies the requirement that the general contractor retain supervision or control over the subcontractor. See *Pinter Construction Co. v. Frisby*, *supra*, 678 P.2d at 309. See generally *Tanner Companies v. Superior Court*, 144 Ariz. 141, 146, 696 P.2d 693, 698 (1985) (Feldman, J., dissenting). Therefore, as long as a subcontractor's work is a part or process of the general contractor's business, an inference arises that the general contractor has retained supervision or control over the subcontractor sufficient to meet the requirement of § 35-1-42(2). See *Parkinson v. Industrial Commission*, 110 Utah 309, 316, 172 P.2d 136, 140 (1946).

Finally, we note that the remedial purpose of the Workmen's Compensation Act supports the conclusion that § 35-1-42(2) should be construed in favor of protecting the employee. *E.g.*, *Pinter Construction*, 678 P.2d at 307; *Maryland Casualty Co. v. Industrial Commission*, 12 Utah 2d at 225, 364 P.2d at 1022 (1961); *Spencer v. Industrial Commission*, 4 Utah 2d 185, 187-88, 290 P.2d 692, 693-94 (1955). The Arizona Supreme Court, in construing an almost identical statutory provision, has stated that it "is a legislatively created scheme by which conceded nonemployees are deliberately brought within the coverage of the [Workmen's Compensation] Act." *Young v. Environmental Air Products, Inc.*, 136 Ariz. 158, 161, 665 P.2d 40, 43 (1983). Accord *Larson*, *supra*, § 49.00. Wisconsin has also recognized the broad scope of its similar statute:

The entire statutory scheme indicates a desire on the part of the legislature to extend the protection of these laws to those who might not be deemed employ-

Cite as 726 P.2d 427 (Utah 1986)

ees under the legal concepts governing the liability of a master for the tortious acts of his servant.

Price County Telephone Co. v. Lord, 47 Wis.2d 704, 715-16, 177 N.W.2d 904, 910 (1970) (footnote omitted).

The Industrial Commission did not address whether Bennett was a statutory employee of Matthews. We therefore remand this case to the Commission for appropriate findings on that issue in light of the principles discussed above.

Reversed as to Johnson Brothers and remanded for further proceedings as to Matthews.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

HOWE, J., concurs in the result.



ADDENDUM 5

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* * * * *

AND ORDER

ADDENDUM 5-1

ALLEN G. WHITE
FINDINGS AND ORDER
PAGE TWO

2. The applicant's average weekly wage at the time of his injury.
3. The time during which the applicant was temporarily totally disabled following his industrial accident.
4. The extent of permanent partial impairment resulting from the applicant's industrial accident.

There are no medical issues in this case requiring an impartial evaluation by a medical panel. The period of temporary total disability is relatively short. The treating physician has provided an impairment rating. Leave was given to the defendant to obtain an independent medical examination. Arrangements for such were made, but subsequently cancelled and there is no conflicting evidence before the Industrial Commission relative to the medical issues.

FINDINGS OF FACT:

1. The time and manner in which the applicant's industrial accident occurred, and the resulting injuries, are not in dispute. The evidence shows that on March 17, 1986, the applicant sustained a serious injury to his left elbow while taping a garage. The garage ceiling was ten feet high and the applicant was working on three foot stilts in order to reach the ceiling. The stilts collapsed, causing the applicant to fall on the cement floor and he sustained a fracture dislocation of the elbow joint.

2. Surgery was necessary and he was treated with open reduction and internal fixation. Now that his condition has stabilized, he has a range of motion of 30 to 90 degrees of flexion of his elbow and forty-five degrees of pronation and supination. He has tenderness in the ulnar groove and about the medial and lateral epicondyles of the elbow. He also has numbness in the distribution of his ulnar nerve involving one-half of the ring and little fingers of his hand. He has weakness of the intrinsic muscles, indicative of tardy ulnar palsy of the left side. His impairment of function and restriction of motion has been rated by his treating physician as a 39% permanent partial impairment of the left upper extremity.

3. The applicant and his brother, Steve White, commonly worked together as drywall applicators. At times, Steve White did business and bid on jobs in the name of White Drywall. White Drywall has a business license,

but the applicant does not. It was also the custom and practice of the applicant and his brother, Steve, to split their earnings from jobs in which they worked together.

4. The evidence is clear that the jobs worked on by the applicant and his brother during the first quarter of 1986, were jobs contracted for by Jess Aylett Construction. Mr. Aylett contacted Steve White in December of 1985, to see if he would be interested in working for him. He was then engaged in another job and was not immediately interested, but did make arrangements shortly thereafter to work for Mr. Aylett. In fairness to Mr. Aylett, the reference to "working for him" is not intended to mean as an employee. The applicant and his brother negotiated the price they were to be paid on work done for Aylett Construction. They were offered 9¢ a foot, but this was unacceptable and they finally agreed to work for 10¢ a foot. The evidence is quite clear that the White brothers considered themselves employees of Jess Aylett. On the other hand, Jess Aylett considered them as independent contractors. There was not much said to clarify the relationship between them. The applicant and his brother testified that they requested separate checks be issued to them in payment for their services. Separate checks were periodically issued to them, but a recap of the checks shows that this did not constitute an equal division of earnings and accomplished little more than an accommodation to the White brothers. On their prior job, the White brothers had payroll taxes deducted from their gross earnings. On jobs done for Jess Aylett, they were paid the gross amount with no deductions. The White brothers were experienced drywall applicators requiring no direction or supervision in the performance of their work. They furnished their own tools, including some specialized rental equipment, and for all intents and purposes performed their work for Aylett Construction on a contract basis. In essence, the White brothers were working for wages on a piece basis, but their relationship to Jess Aylett would more accurately be described as that of a subcontractor.

5. The applicant's entitlement to workers' compensation benefits, and Jess Aylett's liability for payment of the same, does not depend on the applicant being an independent contractor or an employee, but rather on whether or not his work was that of a subcontractor engaged in the same trade or business as Jess Aylett Construction. This is in conformity with the holding in the recent case of Bennett v. Industrial Commission, filed September 30, 1986. In Bennett, the Supreme Court dealt with coverage under Section 35-1-42(2), which provides:

"Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such

ALLEN G. WHITE
FINDINGS AND ORDER
PAGE FOUR

contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this Section, employees of such original employer."

The court stated that:

The requirement in Section 35-1-42(2) that the general contractor as a 'statutory employer' retain 'supervision or control' over the work of the subcontractor who hired the 'statutory employee' cannot, by definition, be equated with the common law standard for determining whether a person is an employee or an independent contractor. In dealing with 'statutory employees' the statute begins with the proposition that the claimant qualifies as an employee of the subcontractor. But the statutory requirement that the general contractor have 'supervision or control' over the work of the subcontractor cannot mean that the subcontractor must also qualify as an employee of the general contractor. That would be at least highly improbable and perhaps impossible by definition. Rather, the general 'supervision or control' requires only that the general contractor retain ultimate control over the project. . . . The power to supervise or control the ultimate performance of subcontractors satisfies the requirement that the general contractor retain supervision or control over the subcontractor. . . . Therefore, as long as the subcontractor's work is a part or process of the general contractor's business, an inference arises that the general contractor has retained supervision or control over the subcontractor sufficient to meet the requirement of Section 35-1-42(2)."

The court also explained that:

"A subcontractor's work is 'part or process in the trade or business of the employer,' if it is part of the operations which directly relate to the successful performance of the general contractor's commercial enterprise. The trade or business of a general contractor in the construction business is construction, and any portion of the general contractor's construction project which is subcontracted out will ordinarily be considered 'part or process in the trade or business of' the general contractor." (Citations omitted)

6. On many construction projects, there is a tier or several layers of contractors and subcontractors. A question logically arises as to how far up the ladder liability might extend in fixing liability on a statutory employer. It appears this question was answered by the recent decision of the Utah Court of Appeals in the case of Dennis Jacobsen v. Industrial Commission, filed June 15, 1987, in which the court referred to Arthur Larsen's Treatise on Workmens' Compensation and added additional commentary. The court stated:

"[I]n the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon subcontractors, if an employee of the lowest subcontractor on the totem pole is injured, there is no practical reason for reaching up the hierarchy any further than the first insured contractor." 1C A. Larson, Workmen's Compensation Law, Section 49.14 (1986).

Ring (the direct employer) has no means to pay benefits to Pugh (the injured worker), but Jacobsen, (the first contractor) the party secondarily liable, has insurance coverage. If Jacobsen did not have sufficient funds or coverage, then "every" employer of Pugh would be unable to cover the liabilities for Pugh's benefits, as contemplated in Section 35-1-107(1) (1986). At that point, and not until that point, the Uninsured Employers' Fund would come into operation for the benefit of Pugh. In this case, it is not necessary for the Fund to pay benefits since Jacobsen and his insurer, the Workers Compensation Fund of Utah, are required to pay because Ring cannot.

7. In the instant case, Jess Aylett argues that Steve White is liable to his brother, Allen, before any liability rests upon Aylett Construction. This argument is on the theory that Aylett Construction engaged Steve White, doing business as White Drywall, to do various jobs and that Allen White was employed by Steve White. Thus, Allen White is claimed to be an employee of Steve White and Aylett has no liability unless Steve White cannot pay. Under certain circumstances, this argument would be plausible. [Under the facts of this case, however, the argument is not plausible. Steve and Allen White were working together. As between them, this was a joint venture. They were both receiving the same amount of compensation for their labor and neither were bidding on the various jobs, as would be expected of a true contract. Allen White was not being paid by Steve White. Each were receiving checks in their own name from time to time and it was their agreement that the earnings would be divided equally. Under these circumstances, the Administrative Law Judge cannot find an employee-employer relationship between Allen White and his brother Steve.]

8. It is difficult to compute the applicant's average weekly wage from the evidence submitted. Counsel for the defendant calculated the Whites' gross receipts during the period January 1, 1986, to March 21, 1986, at \$9,218.65. This differs only a few dollars from the amount calculated by the Administrative Law Judge and is therefore an acceptable statement of gross receipts. Counsel for the defendant calculates a period of eighty days from January 1, 1986, to March 21, 1986. The Administrative Law Judge believes that January 1 and March 21 should be excluded from the calculation and that a period of seventy-eight days, or 11.14 weeks should be used in calculating the average weekly wage.

9. Counsel for the defendants also argues that the gross receipts should be reduced by 20% to approximate the cost of tools and rental equipment used by the Whites. There is no evidence before the Industrial Commission reflecting the actual amount of such expense, but the applicant did indicate such expenses were incurred. Twenty percent seems unusually high. Without documented information as to the costs involved, the Administrative Law Judge will not allow a deduction of more than 5% for purposes of calculating the average weekly wage. If actual records or better estimates can be obtained reflecting a more accurate cost figure, the Administrative Law Judge will reserve the right to amend the award entered herein. A 5% reduction reduces the gross receipts to \$8,757.72. Assuming half of this, or \$4,378.86, was earned by the applicant, the calculated average weekly wage over this period of time amounts to \$393.07. Based on this figure, the rate of compensation for temporary total disability is \$262.00 per week, plus a \$15.00 dependency allowance, or \$277.00 per week. The rate of compensation for permanent partial impairment is the statutory maximum of \$215.00 per week.

10. The applicant testified he returned to work for a very few hours in June of 1986, and then was not able to work again until sometime in July. The statement of money earned, identified as Exhibit "A-3", shows the applicant did receive compensation for June in the amount of \$247.28 and he received several checks for jobs done during the month of July. Without more specific information relative to an actual return to work date, the Administrative Law Judge finds July 1, 1986, to be the approximate date on which the applicant returned to work, ending the period of temporary total disability.

CONCLUSIONS OF LAW:

Applicant is entitled to workers' compensation benefits as a result of his industrial accident of March 21, 1986, in accordance with the foregoing Findings of Fact.

ALLEN G. WHITE
FINDINGS AND ORDER
PAGE SEVEN

ORDER:

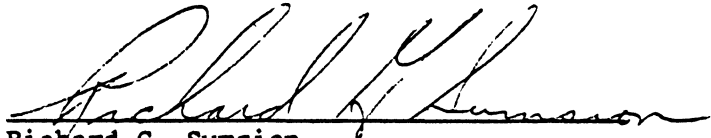
IT IS THEREFORE ORDERED that Jess Aylett, dba Jess Aylett Construction & Drywall, pay applicant compensation at the rate of \$277.00 per week for 14.57 weeks, or a total of \$4,035.89, this amount, plus interest at 8% per annum from the date each payment would otherwise have been due and payable, shall be paid in a lump sum, less attorney's fees.

IT IS FURTHER ORDERED that defendants pay all medical expenses incurred as the result of this accident; said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of the Industrial Commission of the State of Utah.

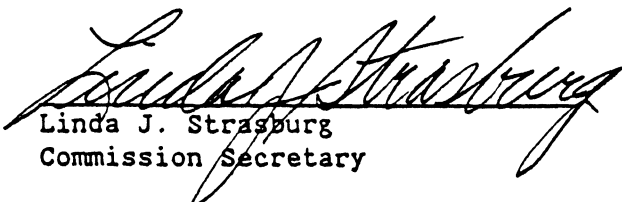
IT IS FURTHER ORDERED that the defendant, Jess Aylett, dba Jess Aylett Construction & Drywall, pay applicant compensation at the rate of \$215.00 per week for 72.93 weeks, or a total of \$15,679.95 for 39% permanent partial impairment of the applicant's left upper extremity. Interest on the award shall be payable at the rate of 8% per annum. These benefits are due and payable commencing July 1, 1986.

IT IS FURTHER ORDERED that Sherlynn W. Fenstermaker, attorney for the applicant, be paid the sum of \$\$3,700.00, the same to be deducted from the aforesaid award.

IT IS FURTHER ORDERED that any Motion for review of the foregoing shall be filed in writing within fifteen (15) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.


Richard G. Sumsion
Administrative Law Judge

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
9th day of September, 1987.
ATTEST:


Linda J. Strasburg
Commission Secretary

CERTIFICATE OF MAILING

I certify that on September 9, 1987, a copy of the attached Findings of Fact, Conclusions of Law and Order was mailed to the following persons at the following addresses, postage paid:

Allen G. White
12665 South Martinez Way
Riverton, UT 84065

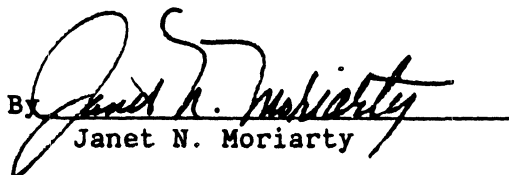
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Jess Aylett Construction & Drywall
11613 South High Mountain Drive
Sandy, UT 84092

Randall S. Feil
Mark Ward
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P. O. Box 45450
Salt Lake City, UT 84145

Suzan Pixton, Administrator
Uninsured Employers Fund

INDUSTRIAL COMMISSION OF UTAH

By 
Janet N. Moriarty

ADDENDUM 6

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 86001236

ALLEN G. WHITE,

Applicant,

vs.

JESS AYLETT CONSTRUCTION &
DRYWALL
(UNINSURED)

Defendant.

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ORDER DENYING

MOTION FOR REVIEW

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On September 9, 1987, an Administrative Law Judge of the Industrial Commission issued Findings of Fact, Conclusions of Law and Order in the above-captioned case followed by a Supplemental Order on December 9, 1987, and an Amended Supplemental Order on July 15, 1988. The three orders together awarded the applicant temporary total compensation, medical expenses and permanent partial impairment benefits (based on a medical panel rating of 30% whole person) for a work injury which occurred on March 17, 1986. The Order concluded that the defendant, Jess Aylett Construction & Drywall, was the statutory employer of the applicant and thus was liable to pay the applicant the benefits awarded. The Administrative Law Judge based his conclusion that Jess Aylett Construction and Drywall was the applicant's statutory employer on U. C. A. 35-1-42 (as it read in 1986) and on the Utah Supreme Court case, Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986).

On August 19, 1988, pursuant to U. C. A. 35-1-82.53, the defendant, Jess Aylett Construction and Drywall, filed a pro se Motion for Review renewing an earlier Motion for Review filed on October 8, 1987, by counsel for Jess Aylett Construction and Drywall. That earlier filed Motion for Review addressed some issues that were later resolved by the Administrative Law Judge's December 9, 1987 Supplemental Order and the July 15, 1988 Amended Supplemental Order. However, the Administrative Law Judge maintained consistently throughout the three orders that Jess Aylett Construction and Drywall was the applicant's statutory employer and thus was liable for the benefits awarded, and Jess Aylett Construction and Drywall renews its objections to that finding in the most recent Motion for Review.

The renewed Motion for Review contains a long list of objections which the Commission finds can be consolidated into two main issues. The defendant first argues that Jess Aylett Construction and Drywall cannot be a statutory employer based on the Bennett rationale, because the Bennett case dealt with a general contractor's liability as a statutory employer and Jess

ALLEN G. WHITE
ORDER DENYING
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PAGE TWO

Aylett Construction and Drywall is not a general contractor, but rather only a subcontractor. This exact argument was not directly addressed in any of the Administrative Law Judge's three orders, but the Administrative Law Judge does comment on this argument in his Summary of Testimony. The Administrative Law Judge states:

"I think to interpret Bennett as setting forth two standards relative to a determination of statutory employment is almost absurd. It would make no sense at all to deny coverage to those working under a subcontractor, but award claims to those working under a subcontractor and a general contractor."

The defendant's second main argument is that the primarily liable individual in this case is Steve White dba White Drywall. The defendant argues that the facts show that the applicant actually was working for his brother, Steve White, and thus, Steve White should be found to be the applicant's common law employer and primarily liable for the applicant's workers compensation claim. On this argument, the Administrative Law Judge states in his September 9, 1987 Order:

"Under the facts of this case, however, the argument is not plausible. Steve and Allen White were working together. As between them, this was a joint venture. They were both receiving the same amount of compensation for their labor and neither were bidding on the various jobs, as would be expected of a true contract. Allen White was not being paid by Steve White. Each were receiving checks in their own name from time to time and it was their agreement that the earnings would be divided equally. Under these circumstances, the Administrative Law Judge cannot find an employee-employer relationship between Allen White and his brother, Steve."

The Commission finds that the two issues discussed above are the issues to be resolved on review. The Commission adopts the Findings of Fact as stated by the Administrative Law Judge in his September 9, 1987 Order. With respect to the defendant's first main argument, the Commission agrees with the Administrative Law Judge's interpretation of the holding in the Bennett case. Although in the Bennett case, the facts involved an injured employee attempting to recover benefits from the general contractor who subcontracted out to his employer, the Court in Bennett is interpreting the scope of the "statutory employer clause" in U. C. A. 35-1-42. That statute does not speak in terms of general contractors and subcontractors, but simply refers to those procuring work to be done by a contractor. Also, as the Administrative Law Judge points out, there is no logical reason to find that only those workers who can find a "general contractor" in the contract chain

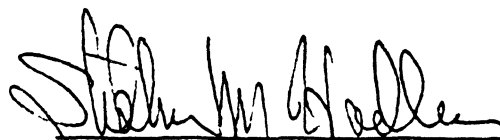
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are protected. Therefore, the Commission finds that the Bennett rationale (i. e. limited control is sufficient in order to find statutory employment) is applicable to any contractual relationship which would include the contractual relationship between the applicant and the defendant, Jess Aylett Construction and Drywall.


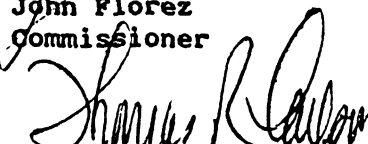
With respect to the defendant's second argument regarding the applicant actually being employed by his brother, the Commission also agrees with the Administrative Law Judge's conclusion. The applicant was paid by Jess Aylett Construction and Drywall and not by his brother and the applicant shared the cost of renting equipment with his brother as opposed to his brother providing the tools. The facts show a partnership or joint venture and not employment. As such, the applicant had no common law employer which results in the statutory employer being liable for the benefits awarded. Based on the foregoing analysis, the Commission finds that the Administrative Law Judge correctly found Jess Aylett Construction and Drywall to be liable for the applicant's workers compensation benefits.

ORDER:

IT IS THEREFORE ORDERED that the defendant's August 19, 1988 Motion for Review is denied and the Administrative Law Judge's September 9, 1987, December 9, 1987, and September 15, 1988 Orders are hereby affirmed and final with appeal to the Court of Appeals within thirty (30) days of the final agency action as specified in U. C. A. 63-46b-12 through U. C. A. 63-46b-14 and U. C. A. 35-1-86.



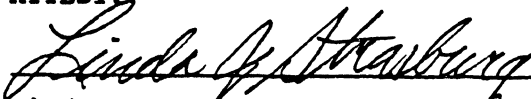
Stephen M. Hadley
Chairman


John Florez
Commissioner

Thomas R. Carlson
Commissioner

Passed by the Industrial Commission
of Utah, Salt Lake City, Utah, this
28th day of February, 1989.

ATTEST:


Linda J. Strasburg
Commission/Secretary