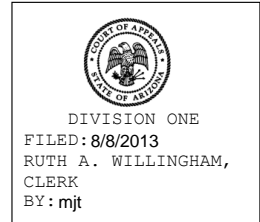


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VBS CONSTRUCTION,) No. 1 CA-IC 12-0062
)
Petitioner Employer,) DEPARTMENT E
)
SECURA INSURANCE,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
DAVID MARQUEZ,)
)
Respondent Employee,)
)
BG ROOFING,)
)
Respondent Uninsured)
Employer,)
)
SPECIAL FUND DIVISION/NO INSURANCE)
SECTION,)
)
Respondent Party in Interest.)
)

Special Action - Industrial Commission

ICA Claim No. 20110-960381

Carrier Claim No. W0022046

Administrative Law Judge Robert F. Retzer

AWARD AFFIRMED

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G E M M I L L, Judge

¶1 VBS Construction ("VBS") and Secura Insurance ("Secura") seek special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a compensable claim. One issue is presented on appeal: whether the administrative law judge ("ALJ") erred by finding that David Marquez ("Claimant") was an employee of BG Roofing and a statutory employee of VBS at the time of his January 14, 2011 injury. Because the record reasonably supports the ALJ's finding that Claimant was an employee of both BG Roofing and VBS at the time of his injury, we affirm the award.¹

¹ Neither BG Roofing nor the ICA Special Fund/No Insurance Section appealed the ALJ's decision.

PROCEDURAL AND FACTUAL HISTORY

¶12 On January 14, 2011, Claimant fell off the roof of a house on Rose Lane in Scottsdale and sustained injuries to his head, ribs, and right hand. He filed a workers' compensation claim against the petitioner employer, VBS. The petitioner carrier, Secura, denied the claim for benefits, stating the "claimant is not an employee of our insured, VBS Construction." Claimant timely protested and requested an ICA hearing. The ICA received testimony from Claimant, a coworker, the Rose Lane homeowner, two VBS employees, and two individuals associated with BG Roofing.

¶13 Claimant testified that he and Oscar Sanchez Torres had been friends since their youth in Mexico. They helped each other obtain work and also worked together on occasion. On January 8, 2011, Sanchez Torres was driving around looking for work when he saw the BG Roofing crew working. He stopped and asked a man who called himself Alfonso Gonzalez if he had any work available. Gonzalez called Sanchez Torres a day or two later and told him that he had a job for him removing roofing shingles.

¶14 Claimant testified that on January 13, 2011, he, Sanchez Torres, and two friends, Jesus Valencia, and Rafael Verdugo, met Gonzalez at a home near Shea Boulevard and 107th

Street. Sanchez Torres and Gonzalez agreed that the four friends would be paid \$600 in cash for tearing the roofing shingles off that house. Claimant and Sanchez Torres had their own tools and equipment for the job. They previously had torn off four or five other roofs so they also knew how to perform the work.

¶15 Claimant further testified that both Gonzalez's truck and trailer displayed VBS signs, so he assumed that they were working for VBS when Gonzalez hired them to tear off the old roof. Gonzalez left a VBS trailer with them for the old roofing shingles and trash. He returned to the job site later that day to check on their work. According to Sanchez Torres, Gonzalez told them how he wanted the work done, he could hire and fire them, and they would only be paid if they completed the job. Because Gonzalez was satisfied with their work on January 13th, he offered them another job at another house for January 14th.

¶16 On January 14, 2011, Claimant arrived at the Rose Lane house with Valencia and Verdugo. Claimant testified that he put up a ladder and went up onto the roof to see how many layers of old shingles there were. He stated that additional layers were harder to tear off and affected the price for tearing off the roof. Claimant fell from the roof before any work was performed. Gonzalez paid them for their January 13th work, but

not for January 14th, and never offered them any additional work.

¶17 Shon Scism testified that he worked for VBS from November 2010 through May 2011. Following an October 5, 2010 hail storm, VBS received many inquiries for roof repairs. For that reason, it formed a roofing division and utilized subcontractors to perform the work. One of the subcontractors that VBS hired was Bertoldo Gonzalez dba BG Roofing. Before hiring BG Roofing, Scism obtained a copy of Gonzalez's employer identification number, driver's license, social security card, general liability and workers' compensation insurance certificate, and Texas business license. Based on the insurance certificate provided, Scism testified that he thought BG Roofing carried both general liability and workers' compensation insurance.²

¶18 Scism testified that he assigned the Rose Lane job to BG Roofing. BG Roofing had all of its own roofing equipment. VBS paid BG Roofing by check and by the job. Scism stated that he tried to inspect the completed roofs, and if there was a customer complaint, he would inspect the roof and would call the subcontractor back to correct any problems. Scism testified

² The insurance certificate was placed in evidence. It was dated January 13, 2011, and listed "Oscar's Roofing" as the insured. "BG Roofing" was hand-written in next to the printed insured information.

that he had the power to fire BG Roofing. He acknowledged that VBS sometimes posted yard signs at the property where they were working. Finally, he testified that VBS hired BG Roofing to do all of the roofing work, and he did not expect BG Roofing to hire anyone else to tear off the old roofs.

¶9 Gene Weinstein, VBS's controller, testified that VBS is a restoration company and its business is to repair damage caused by fire, flood, hail, etc. The roofing division was created after a hail storm to respond to numerous calls for roofing repairs. He confirmed that all of the roofing work was subcontracted out (1) to make it cost effective and (2) because VBS did not have the manpower to perform the additional work. Scism was responsible for vetting all the roofing subcontractors that VBS hired, and all subcontractors were supposed to be licensed, bonded, and insured. Weinstein confirmed that VBS paid BG Roofing by check for all of its jobs. Finally, he testified that he only became aware of Claimant's injury claim when he was contacted by Secura.

¶10 Bertoldo Gonzalez testified that he owned BG Roofing. He had a contractor's license, and his business had been registered in Texas since 2008. Gonzalez stated that he came to Arizona with a roofing crew from Texas to work for VBS, but not as employees of BG Roofing. The crew was in Arizona for four

months, and it worked exclusively for VBS tearing off and replacing roofs. Gonzalez testified that although people approached him looking for work, he never hired anyone, he did not know Claimant, and he was not aware of the injury. Gonzalez denied displaying VBS signs on BG Roofing's trucks or trailer. He did acknowledge that VBS made the roofing crew's paychecks out to BG Roofing.

¶11 Danny Sanchez, a member of Gonzalez's crew from Texas, also testified that he had never met Claimant, did not know him, and was unaware of his injury. Sanchez was not aware of Gonzalez hiring anyone in Arizona to tear off roofs for their crew. He stated that the crew tore off and replaced roofs, and they never worked on a house where the roof had already been torn off.

¶12 To rebut the testimony from Gonzalez and Sanchez, Claimant was recalled. He testified that he recognized both Gonzales and Sanchez from the January 13, 2011 jobsite where he worked tearing off the roof. Claimant stated that by the time he arrived at the Rose Lane house on January 14th, Gonzalez had already left the VBS trailer for them to use while tearing off the roof. Finally, he testified that Gonzalez is the individual that his friend, Sanchez Torres, spoke to when he was looking for work.

¶13 Following the hearings, the ALJ entered a detailed award finding that Claimant was an employee of the uninsured respondent employer, BG Roofing, and a statutory employee of VBS. The ALJ also found that Alfonso Gonzalez and Bertoldo Gonzalez were the same individual. VBS timely requested administrative review, and the ALJ supplemented and affirmed his award. The ALJ added a finding that "Bertoldo Gonzalez aka Alfonso Gonzalez's testimony was not credible."

¶14 VBS timely appeals. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10 (2009).

ANALYSIS

¶15 We consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). In reviewing findings and awards of the ICA, we deferentially review the ALJ's factual findings, *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003), but review the ALJ's ruling concerning Claimant's employment status de novo as an issue of law. *Vance Int'l v. Indus. Comm'n*, 191 Ariz. 98, 100, ¶ 6, 952 P.2d 336, 338 (App. 1998).

Employee of BG Roofing

¶16 VBS asserts that Claimant was working as an independent contractor when he was injured on January 14, 2011, and was therefore neither an employee of BG Roofing nor a statutory employee of VBS. Whether a worker is an employee or an independent contractor is governed by A.R.S. § 23-902 (2012), which provides in pertinent part:

B. When an employer procures work to be done for the employer by a contractor over whose work the employer retains supervision or control, and the work is a part or process in the trade or business of the employer, then the contractors and the contractor's employees, and any subcontractor and the subcontractor's employees, are, within the meaning of this section, employees of the original employer. For the purposes of this subsection, "part or process in the trade or business of the employer" means a particular work activity that in the context of an ongoing and integral business process is regular, ordinary or routine in the operation of the business or is routinely done through the business' own employees.

C. A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor.

¶17 In determining whether a particular claimant falls within the statutory definition of an employee, courts look to the totality of the circumstances of the work and examine various indicia of control. See *Reed v. Indus. Comm'n*, 23 Ariz. App. 591, 593-94, 534 P.2d 1090, 1092-93 (1975). These indicia of control include "the duration of the employment; the method of payment; who furnishes necessary equipment; the right to hire and fire; who bears responsibility for workman's compensation insurance; the extent to which the employer may exercise control over the details of the work, and whether the work was performed in the usual and regular course of the employer's business." *Home Ins. Co. v. Indus. Comm'n*, 123 Ariz. 348, 350, 599 P.2d 801, 803 (1979).

¶18 In their workers' compensation treatise, Professors Larson noted that it is the ultimate right of control, under the agreement with the employee, not the overt exercise of that right, that is decisive. 3 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 61.02 at 61-3 (Supp. 2012). "[A] worker who is regularly employed in the business of an employer is an 'employee' for the purposes of workers' compensation unless the worker is not subject to the employer's control, is hired only to perform a definite job, and is subordinate solely in effecting a desired result." *Central*

Mgmt. Co. v. Indus. Comm'n, 162 Ariz. 187, 190, 781 P.2d 1374, 1377 (App. 1989). Because of the remedial nature of the Arizona Workers' Compensation Act, the definition of an employee is liberally construed. *Hughes v. Indus. Comm'n*, 113 Ariz. 517, 519, 558 P.2d 11, 13 (1976).

¶19 In this case, conflicting testimony was presented at the ICA hearings regarding the various indicia of control. In regard to Claimant's relationship with BG Roofing, the ALJ found Claimant's testimony to be more credible than that of Gonzalez. We defer to this finding as the ALJ is the sole judge of witness credibility, and it is his duty to resolve all evidentiary conflicts and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

¶20 Claimant testified that Gonzalez had hired him and his friends on January 13, 2011, to remove roofing shingles. He further testified that if he had not been injured on January 14, 2011, he believed that his crew would have continued to work for Gonzalez tearing off roofs because Gonzalez had told him there were several more houses they needed help with. Although Claimant furnished his own roofing tools, Gonzales provided a trailer with VBS signs on the sides for Claimant and his co-workers to use in discarding the roofing materials. Further, Claimant stated that Gonzalez paid the crew in cash by the job

and he had the right to dictate the details of how their work was performed. Sanchez Torres also testified that Gonzalez monitored their performance by checking in on them periodically. Gonzalez also had the right to fire Claimant as evidenced by his refusal of additional work after Claimant's injury.

¶21 Moreover, tearing off roofs was in the usual and regular course of BG Roofing's business because in order to reroof a house, the old roof had to be removed. In that regard, the facts in this case are similar to those in *Anton v. Indus. Comm'n*, 141 Ariz. 566, 688 P.2d 192 (App. 1984). In *Anton*, a pulpwood contractor entered into an agreement with a lumber company to harvest trees and deliver the lumber. 141 Ariz. at 568, 688 P.2d at 194. The contractor then hired woodcutters to actually perform the work cutting the trees. *Id.* The contractor's sole involvement was to pick up the cut wood from the woodcutters, check to make sure the lumber was cut properly, and deliver it to the timber company. *Id.* When one of the woodcutters was injured, he filed a workers' compensation claim against the contractor. *See id.* This court held that the claimant was an employee for purposes of workers' compensation because the contractor "did not attempt to contract for a particular well-defined incidental activity which is ancillary to the central concerns of his business[,]" but hired Claimant to

perform the "basic employment activity" itself. *Id.* at 573, 688 P.2d at 199.

¶122 We disagree with VBS that *Anton* is distinguishable here. In this case, VBS hired BG Roofing to replace roofs. BG Roofing in turn hired Claimant and his friends to tear off the roofs of the houses VBS assigned to BG Roofing. Like the woodcutter in *Anton*, Claimant's role in removing the roofs was more than a "well-defined incidental activity which is ancillary" to the business of roofing, but was rather a significant and indispensable part of the "basic employment activity" that VBS hired BG Roofing to perform. *See id.*

¶123 VBS also argues that, although Claimant had performed work for BG Roofing the day before the injury, Claimant was not an employee of BG Roofing on January 14, 2011, because they had not yet settled on a price for that job. While Claimant acknowledged that the price for the January 14th job was undetermined, the ALJ did not find this issue to be dispositive of whether Claimant had been hired for that day. Sanchez Torres testified at the hearing that on January 13, 2011, Gonzalez "gave [them] the job for the following day." He further testified that the price for the January 13th job was not negotiated, but rather given to them by Gonzalez. Claimant testified that the price of the roof was based on the size of

the roof and number of layers of shingles. Both of these factors could not be determined until the parties looked at the roof. Also, Claimant testified that he and the rest of his work crew arrived at the Rose Lane house on the morning of the 14th with their tools and that, although Gonzalez was not there, he had left the trailer for the roofing debris. Taken together, this testimony is sufficient to indicate that it was understood by BG Roofing and Claimant that Claimant and his crew had been hired to remove the roof of the Rose Lane house that day, and this evidence supports the ALJ's findings.

¶24 To summarize, based on the totality of the circumstances and the ALJ's resolution of the evidentiary conflicts, we conclude there is reasonable evidence to support the finding that Claimant was an employee of BG Roofing at the time of his injury.

Statutory Employee of VBS

¶25 The ALJ also found VBS to be Claimant's statutory employer. In order to be a statutory employer, two conditions must be met:

- (1) the employer procuring the work to be done for him by a subcontractor must retain supervision or control over the work; and
- (2) the work entrusted to the subcontractor must be a part of a process in the employer's regular trade or business.

Hunt Bldg. Corp. v. Indus. Comm'n, 148 Ariz. 102, 105, 713 P.2d 303, 306 (1986); see also A.R.S. § 23-902(B). In determining whether a statutory employment relationship exists, courts have applied the traditional right to control test used in determining whether an individual is an employee or an independent contractor. *Id.* at 106, 713 P.2d at 307.

¶126 With regard to the relationship between BG Roofing and VBS, the ALJ found:

After a careful review of all the evidence, the undersigned finds VBS was in the roofing business according to Mr. Shon Scism, who was the roofing manager for VBS, BG Roofing was their subcontractor and Bertaldo Gonzalez was BG Roofing. He [Scism] believed BG Roofing had workers' compensation insurance and he gave BG Roofing the job on Rose Lane (where the applicant was hurt). Even though he did not supervise BG employees, he would check on the job after it was done and if there was a problem he would call Bertaldo Gonzalez to come and fix it. He also testified he could fire BG Roofing.

We conclude that these findings are supported by the record and, therefore, so is the court's ultimate conclusion that Claimant is a statutory employee of VBS.

¶127 The testimony showed that VBS formed a roofing division in late 2010, and it provided roofing services exclusively through subcontractors hired expressly for that purpose. BG Roofing was one of these subcontractors. VBS hired

BG Roofing on an ongoing basis, and it paid BG Roofing with VBS company checks. VBS had the right to direct BG Roofing's work performance, as evidenced by its inspection of finished roofs and its ability to require correction of deficiencies. According to Shon Scism, VBS also had the right to fire BG Roofing. Although BG Roofing provided its own vehicles and equipment, the vehicles and trailer displayed VBS signs. Further, BG Roofing's work was performed in the usual and regular course of VBS's business, a significant part of which was roofing (during the relevant period of time).

¶128 Viewing the evidence in a light most favorable to sustaining the ICA's award and in light of the statutory guidance found in A.R.S. § 23-902, we conclude there is sufficient evidence in the record to support the ALJ's conclusion that VBS retained supervision or control over BG Roofing's work. Therefore, because Claimant was an employee of BG Roofing, VBS was Claimant's statutory employer under A.R.S. § 23-902(B).

CONCLUSION

¶29 For the foregoing reasons, we affirm the ALJ's award.

/s/

JOHN C. GEMMILL, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

MICHAEL J. BROWN, Judge