

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H201552

CHARLES LEACH, EMPLOYEE	CLAIMANT
O.A.K. CONSTRUCTION, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL GROUP, CARRIER	RESPONDENT

OPINION FILED JUNE 7, 2023

Upon review before the Full Commission, Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE JARID M. KINDER, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE ZACHARY F. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the Opinion filed December 8, 2022 by the administrative law judge ("ALJ") finding, among other things, the following:

1. Claimant has proven by a preponderance of the evidence that he was an employee of Tom Leach, an uninsured subcontractor of respondent OAK Construction, Inc. As such, respondent is responsible for payment of workers' compensation benefits.
2. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on March 24, 2020, and that he is entitled to medical benefits for said injury.

For the reasons set out below, the ALJ's Opinion filed December 8, 2022 is reversed.

I. HISTORY

The testimony in this matter was provided in large part by two interested parties, Oliver Kiesel and Robert Thomas Leach (Tom), the claimant's brother. Due to the nature of the claimant's injuries, he was unable to provide coherent testimony and as such we are left to rely on the testimony of other individuals. Due to the shared last name of Charles and Tom Leach, we will be referring to Tom Leach as simply "Tom," throughout this opinion.

Oliver Kiesel is the owner-operator of OAK Construction, Inc. (OAK). OAK contracted with Robert Thomas Leach (Tom) to complete the framing of a residential home in Gravette, Arkansas in 2020. OAK had worked with Tom on smaller jobs before subcontracting with him for the house in Gravette. OAK is in the business of building custom residential homes and Mr. Kiesel testified that "basically everybody that works for OAK" is a subcontractor. While there was conflicting testimony about whether Tom presented proof of workers' compensation coverage to OAK, OAK did not present any records of those documents at the September 29, 2022 hearing.

Tom Leach is a partner in the business Leach Framing, which he testified has been in operation for approximately 20 years. Leach Framing,

made up of Robert Leach, Charles Leach, and John House obtained a workers' compensation policy from Liberty Mutual on April 10, 2019 with a policy period from April 3, 2019 to April 3, 2020. The named insured was Robert Leach & Charles Leach and John House DBA Leach Framing. Tom testified that Ms. Tish Botson went to Professional Insurance Group (PIG) in Bentonville and obtained the policy on Leach Framing's behalf when the company owned by her husband, Mike Botson, required that a policy be in place for a job. The Liberty Mutual policy specifically excluded the named partners, Tom Leach, Charles Leach, and John House, from coverage. The partners excluded themselves from the policy to save money.

During his testimony, Tom Leach referred to himself and the claimant as "we" regarding business decision making, demonstrating that the two made decisions jointly, explaining at one point that, "[W]e do all kinds of things. We side houses. We frame houses. We build decks. I mean we build fence (sic)." Tom later testified he understood the workers' compensation policy at issue "doesn't cover anything for us anyway. It only covers our employees or people working for us."

Tom Leach, Charles Leach, and John House were working together at the home in Gravette. Tom would submit an invoice on a weekly basis to OAK reflecting the square footage that he, Charles Leach, and John house had framed. Leach Framing did not have a bank account, so OAK made out checks to Tom personally, and Tom would divide the money. Tom and the

claimant made more than any employee. No benefits or taxes were taken out of this pay. Leach Framing was made up of the three parties present at the house in Gravette during the time of the claimant's injury: Tom Leach, Charles Leach, and John House.

In an opinion filed December 8, 2022, the ALJ determined that the claimant was an employee of an uninsured subcontractor, Tom Leach. The ALJ was incorrect in this finding. If the claimant was an employee of Leach Framing, he was covered by the Liberty Mutual policy in effect at the time of the accident. However, the preponderance of the evidence presented shows the claimant was a partner in Leach Framing and was excluded from coverage. Under either scenario, the claimant was not an employee of an uninsured subcontractor and OAK is not responsible for any benefits since OAK did not contract with an insured subcontractor.

II. ADJUDICATION

The threshold question is whether the claimant was a partner in Leach Framing and therefore covered by the Liberty Mutual policy. This question falls outside the scope of the Act and the legal fact that the claimant was a partner in Leach Framing was not investigated by the ALJ in his December 8, 2022 opinion. The existence of Leach Framing and who, or what, the Liberty Mutual policy covered in March 2020 is the key to this case, as pursuant to our Rules, “[w]hen a sole proprietorship or partnership fails to elect to cover the sole proprietor or partners under [the Code], the

prime contractor is not liable under this chapter for injuries sustained by the sole proprietor or partners if the sole proprietor or partners are not employees of the prime contractor.” Ark. Code Ann. § 11-9-402(c)(1)(A). There was no proof presented at the hearing that the claimant was an employee of OAK.

Leach Framing was acting as a subcontractor for OAK on March 24, 2020 whether or not the parties were operating under the name. Although what we call a partnership may not always be defined with exact precision, the test for determining the existence of a partnership is well established. “The association of two (2) or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.” Ark. Code Ann. § 4-46-202. The business association that is known as a partnership is not one that can be defined with precision. To the contrary, a partnership is a contractual relationship that may vary, in form and substance, in an almost infinite variety of ways. *Zajac v. Harris*, 241 Ark. 737, 410 S.W.2d 593 (1967). “[E]xcept in certain specific instances a partnership is not an entity separate and apart from its members and remains no more than the aggregate of the individuals forming it.” *Pate v. Martin*, 13 Ark. App. 182, 681 S.W.2d 410 (1985).

It is clear from the record that the claimant, Tom Leach, and John House formed the partnership Leach Framing and operated under the name Leach Framing off and on for a period of twenty (20) years. Even

when they were not using the name Leach Framing they were acting as a partnership, because a partnership is no more than the sum of its individual members. The three members of Leach Framing worked together on jobs and shared the income. Although checks were made out by OAK to Tom Leach individually, Tom would cash those checks and pay his partners and any employees based on their hourly rate, and Tom Leach did not retain any portion of those checks beyond his hourly earnings. Tom and Charles earned more than anyone else and only one other person earned as much as John House.

Tom Leach made it clear that he considered his business with the claimant to be a partnership. Tom Leach repeatedly referred to himself and the claimant as “we” regarding business decision making throughout his testimony and, acknowledged at the hearing that he understood that the Liberty Mutual Policy did not cover Tom Leach, Charles Leach, or John House showing a full understanding that they were owners and partners in Leach Framing. He went so far as to state that the workers’ compensation policy at issue “doesn’t cover anything on us anyway. It only covers our employees or people working for us.” These parties held out Leach Framing as a partnership in obtaining a workers’ compensation policy and named Robert Leach, Charles Leach, and John House as the partners of Leach Framing and specifically excluded themselves from coverage.

Finally, the clearest indicator that the claimant was a partner of Leach Framing and that Leach Framing was operating as an insured subcontractor on March 24, 2020 is the existence of the Liberty Mutual workers' compensation policy itself. Although Tom asserts that Tish Botson went to Professional Insurance Group ("PIG") in Bentonville and had the policy "wrote up the way that it is written up," this defies reason. Tom Leach is an interested party and it is the within the sole discretion of the Commission to determine the credibility of a witness' testimony; however, "[w]here there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts." *Templeton v. Dollar General Store*, 2014 Ark. App. 248, 434 S.W.3d 417 (2014). Testimony of an interested party is taken as disputed as a matter of law. *Ester v. National Home Ctrs. Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998); *Flynn v. J. B. Hunt Transp.*, 2012 Ark. App. 111, 389 S.W.3d 67 (2012) ("[T]he uncorroborated testimony of an interested party is never to be considered uncontradicted."). The Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007). It does not stand to reason that a person or entity could send a third party to an insurance agent to enter into a contract on their behalf with little to no information about the insured. Tom's testimony on

this point is entirely self-serving. It is obvious that if Ms. Botson did in fact obtain coverage on Leach Framing's behalf, Tom advised Ms. Botson that he was a partner in Leach Framing along with Charles Leach and John House and agreed the three partners would be excluded from coverage. He admitted this was done to save money. There is no way Ms. Botson came up with this information on her own, it could only have been supplied to her by Tom Leach.

Even if PIG were willing to insure Leach Framing on the word of Tish Botson alone, Leach Framing was bound to Ms. Botson's actions, as "our supreme court has declared on a number of occasions that a principal is bound not only by the acts of an agent done under the principal's express authority, but also by those acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not, and even if they are contrary to express direction. The principal in such a case is not only bound by the authority actually given to the general agent, but by the authority which the third person dealing with him has the right to believe has been given to him." *Landmark Sav. Bank, F.S.B. v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987) (citing *Southern Electrical Corp. v. Ashley-Chicot Electric Co-op, Inc.*, 220 Ark. 940, 251 S.W.2d 813 (1952)). "A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership,

except in the case of a fraud on the partnership committed by or with the consent of that partner.” Ark. Code Ann. § 4-46-102. If Tom’s testimony is to be believed, Ms. Botson was granted the express authority to obtain workers’ compensation coverage for Leach Framing and Leach Framing is therefore bound by her actions.

All of this boils down to a simple conclusion under our laws. Charles Leach, Tom Leach, and John House over a period of approximately twenty (20) years held themselves out as a partnership known as Leach Framing. Because a partnership is no more than a sum of its individuals, Charles Leach, Tom Leach, and John House in fact formed Leach Framing whether they operated under the name at a given time or not. For this reason, Leach Framing was the subcontractor for OAK at the house in Gravette on March 24, 2020. Because Leach Framing, a partnership, was insured by the Liberty Mutual policy on that date, OAK is not responsible for any benefits for injuries sustained by the claimant pursuant to Ark. Code Ann. § 11-9-402(c)(1)(A).

Even if we were to construe that the claimant was in fact an employee of Leach Framing rather than a partner, it has been clearly established, *supra*, that Leach Framing is an existing partnership with an active workers’ compensation policy on March 24, 2020 and the claimant would be covered by the Liberty Mutual policy. As a result, the claimant was not employed by an uninsured subcontractor.

Finally, the claimant was not an employee of OAK at the time of his injury and OAK is not responsible for the payment of his claim. There was absolutely no proof presented to support this allegation.

Simply put, the owner-operator of OAK, Oliver Kiesel, did not hire the claimant and did not know the claimant. Oliver Kiesel hired a subcontractor, of which the claimant was either a partner or employee, that was insured for workers' compensation by Liberty Mutual on the date of this accident. So the claimant was either excluded from coverage as a partner or covered as an employee under the Liberty Mutual Policy. Regardless, OAK is not responsible for any benefits.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my de novo review of the record in this claim, I dissent from the majority opinion finding that O.A.K. Construction, Inc. (hereinafter, referred to as, "O.A.K.") is not responsible for the payment of benefits on this claim.

A. There was no true partnership between the claimant, Tom Leach, and John House.

“Partnership’ means an association of two (2) or more persons to carry on as co-owners a business for profit formed under §4-46-202, predecessor law, or comparable law of another jurisdiction.” Ark. Code Ann. §4-46-101(6). A partnership is a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some of all of them, in a lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them. *Bice v. Green*, 64 Ark. App. 203, 981 S.W.2d 105 (1998) (citing *Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961)). The primary test to determine whether there is a partnership between parties is their actual intent to form and operate a partnership. *Id.* (citing *Boeckmann v. Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995), and *Culley v. Edwards*, 44 Ark. 423 (1884)). In determining whether the parties formed a partnership, the issue turns on what the parties have agreed to do, not on what they have agreed to call themselves. *Id.* (citing *Central States Life Ins. Co. v. Barrow*, 190 Ark. 141, 77 S.W.2d 801 (1935)).

The evidence preponderates that Leach Framing was not a true partnership but instead, was an affiliation conceived out of convenience for the purpose of obtaining workers’ compensation insurance. Tom Leach (hereinafter, referred to as, “Tom”) testified that Leach Framing “was just

something we had to do so we would have insurance so we could work for another individual”. Tom explained that he, the claimant, John House, and two other individuals were doing a job for Mike Botson that required them to have a workers’ compensation insurance policy. When asked whether he held himself out as a partner of Leach Framing, Tom testified, “... I did nothing. I just agreed with a different builder so that I could keep working so that I could make a check”.

Additionally, regarding how profits from the job with respondent-employer were shared, Tom testified as follows:

Q So how did you distribute that money that was paid to Tom Leach to other members of your crew?

...

[A] I would take it to his bank, cash the check. I would divvy it up and pay everybody what they had coming.

Q Tell me how you divvied it up.

A In cash.

Q And is there a certain method to this madness?

A Uh-huh.

THE COURT: Is that a “yes”?

THE WITNESS: Yes, sir. I am sorry, sir.

THE COURT: That’s okay.

Q Okay. Tell me how you divvied it up.
For example, you on Page 6 were wrote [sic]

a 4,500-dollar check that we discussed earlier. How did you divvy that up?

A It was hourly.

Q Each person's hours?

A Yes. I don't understand the question, sir.

Q Did you divvy it up by a percentage? Did you say out of this \$4,500 I get a percent, Charles gets a percent, John gets a percent, and these other two employees get a percent?

A No, sir.

Q Okay. How was it? How was it divvied up?

A I would cash a check. I would do the math on how much they made per hour and then what it come out to, I paid them that much.

Q Who made a – who was paid hourly?

A Everybody.

Q Yourself included?

A Yes, sir.

Q Did you make more than everyone else?

A Yes, sir.

Q Did you make more tha[n] Charles?

A Yes, sir.

Q Did Charles make more than everyone beside you?

A Yes, probably. Yes, in fact, he did.

Q Did John make more than the other two employees that were not listed?

A Actually, him and one other made the same.

Q And then the other one made less; is that correct?

A Yes, sir.

Clearly, there was not a proportional sharing of profits between the claimant, Tom and John House. Each individual was paid based on their respective hourly wages and the number of hours that he worked, just as most traditional employees are.

Therefore, based on the aforementioned, I find that there was not a true partnership between the claimant, Tom Leach, and John House.

B. The contract to frame the house on Bethel Road was between Tom Leach and O.A.K.

The Arkansas Court of Appeals defined a subcontractor as follows:

A subcontractor is one who enters into a contract with a person for the performance of work which another has already contracted to perform. In other words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor.

Garcia v. A&M Roofing, 89 Ark. App. 251, 202 S.W.3d 532 (2005) (quoting *Baily v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982)).

Oliver Kiesel testified that he was a residential contractor who is the owner-operator of O.A.K. Construction, Inc. Kiesel testified further that O.A.K. builds custom homes. According to Kiesel, he entered into a verbal agreement with Tom to frame a house that O.A.K. was constructing on Bethel Road in Gravette, Arkansas. Kiesel admitted that when he hired the Leaches he only dealt with Tom; that he did not know Charles Leach; and that he did not know about Leach Framing.

In addition, it is clear from the testimony that Tom had the expertise and decision-making authority to enter into the contract and that the other laborers working with Tom were employees. This is evidenced by the fact that it was Tom who received the payments from O.A.K., determined how much others were paid, and actually made those payments.

Therefore, I find that Leach Framing was not a party to the contract to frame the Bethel Road house and that the contract was between Tom Leach and O.A.K. I also find that the workers' compensation insurance policy covering Leach Framing did not provide coverage for Tom on the job he worked for O.A.K.; thus, Tom was an uninsured subcontractor of O.A.K.

C. The claimant was an employee of Tom Leach.

Ark. Code Ann. §11-9-402 reads, in pertinent part:

(a) Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.

The evidence also preponderates that the claimant was an employee of Tom. Tom testified that he was a subcontractor of O.A.K. and was paid by check. The four check stubs contained within the record were made payable to Tom Leach. Tom testified further that he paid the claimant separately from payments he received from O.A.K.

Tom admitted that at the time of the claimant's work accident he did not have an active certificate of non-coverage. Tom also admitted that at the time of the claimant's work accident he did not have any workers' compensation insurance on himself as an individual nor did he have any insurance that would cover the claimant.

A copy of a Liberty Mutual workers' compensation insurance policy insuring "Robert Leach & Charles Leach and John House DBA Leach Framing" was contained within the record. The policy specifically excluded, the claimant, Tom and John House from coverage.

Tom testified that he did not hold Leach Framing out to be the entity doing the job at Bethel Road. Regarding the entity, Leach Framing, Tom testified as follows:

Q Now, you listed that workers' compensation insurance policy is I guess attributable to Robert Leach, Charles Leach and John House doing business as Leach Framing. What is Leach Framing?

A It's just a business that we used in the past.

Q And when you say a business that you used in the past, how long have you been using the name Leach Framing?

A On and off for, I don't know, 20 years.

Q And is it registered anywhere?

A No.

...

Q So does that business, does that consist of the partners, Robert Leach, Charles Leach, and John House?

A No, not necessarily. That there was just something we had to do so we would have insurance so we could work for another individual.

...

Q Now, you took out a workers' compensation policy on a business called Leach Framing and listed Robert Leach and Charles Leach and John House as the members taking out that workers' compensation policy; is that correct?

A I think so.

...

Q Well did you take out a policy?

A Yes, kind of. I mean I don't – that is why I would like to explain my answer.

Q What do you mean by kind of?

A We were doing a job for Mr. Mike Botson (phonetic) and his wife Trish Botson and

he told me that I needed to get a policy like this. So Ms. Trish went to PIG In [sic] Bentonville, Professional Insurance Group. She had the policy wrote up. She had it wrote up the way that it is written up. She paid for the policy and then I had to pay them back the next two weeks out of the check, out of my draw. I paid them what I owed them back at that time so that we had the insurance so that we could work.

Q Okay. And this is the same policy that was active during the incident that occurred with Charles at the Bethel home that you did renew for a second year; is that correct?

A That they canceled. I tried to renew and then they canceled it, if you will notice.

...

Q And you used this policy – let me step away from you here. And you used this policy when working with Oliver as workers' compensation insurance; is that correct? What I mean by that is Oliver required workers' compensation insurance to work for him; is that correct?

A No, sir. He never asked me for my insurance. He asked me for my general liability and I told him that I could get him [a] copy down at Randy's. And then he asked about the workmen's comp, that policy, only I want to say three or four months ago.

Tom also testified that he always considered the claimant an employee and only named the claimant as a partner in Leach Framing for

the purposes of the workers' compensation insurance policy “because he couldn't afford to pay taxes or, you know, the nine percent”.

Based on the aforementioned, I find that the claimant was an employee of Tom Leach. I also find that Tom Leach was an uninsured subcontractor of the prime contractor, O.A.K. Thus, pursuant to Ark. Code Ann. §11-9-402(a), O.A.K. is responsible for paying workers' compensation benefits in this matter.

For the foregoing reasons, I dissent from the majority opinion.

M. Scott Willhite, Commissioner