CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 780360
CLAIM NO. 524-176

T. BROOKS MIMS and
THE TRAVELERS INSURANCE COMPANY,

Appellants

v.

GEORGE McCOY,

Appellee

JOINT APPENDIX

M. Bruce Wallinger
Wharton, Aldhizer & Weaver
90 North Main Street
P. O. Box 809
Harrisonburg, Virginia 22801

Counsel for Appellants

F. Guthrie Gordon, III
Lowe and Gordon
409 Park Street
Charlottesville, Virginia 22901

Counsel for Appellee

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ase complete this report in Quadruplicate and send Four copies the following address so we can file Three copies with the Com-sion in your behalf.

Claim Department
THE TRAVELERS INSURANCE COMPANY
3610 West Broad Street, Richmond, Virginia 23230

aim No. _____

se of _____

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
RICHMOND

EMPLOYER'S FIRST REPORT OF ACCIDENT

(Every question must be answered)

ployer

1. Name of Employer T. Brooks Mims
2. Office address: No. and St. Rt. #1 City or Town Luray State Va.
3. Insured by: Name of Company The Travelers Insurance Company
4. Give nature of business (or article manufactured) Farming

e

5. (a) Location of plant or place where accident occurred Egypt Bend Estates, Page Co. (City or County)
Department State if employer's premises
(b) If injured in a mine, did accident occur on surface, underground, shaft, drift or mill
6. (a) Date of Injury 8-11-76 19 Day of week Wednesday Hour of day 9:30 A.M. P.M.
(b) Was injured paid in full for day he was injured? yes

e

7. Date incapacity began 8-11- 19 76 A.M. 9:30 P.M.
8. Was injured paid in full for day incapacity began? yes
9. When did you or foreman first know of injury? immediately - same day
10. Name of foreman T. Brooks Mims

red
on

11. Name of Injured George McCoy (First Name) (Middle Initial) (Last Name) (Social Security No.)
12. Address: No. and St. Rt. #2, Box 218 City or Town Stanley State VA.
13. Check (√) Married....., Single....., Widowed....., Widower X., Divorced.....; Male....., Female.....; White....., Colored.....
14. Nationality..... Speak English.....
15. Age 55 Did you have on file employment certificate or permit?
16. (a) Occupation when injured carpenter (b) Was this his or her regular occupation? yes
(If not state in what department or branch of work regularly employed)
17. (a) How long employed by you? XXXX 2wk(s) Piece or time worker..... (c) Wages per hour $ 5.50 X
18. (a) No. hours worked per day varies (b) Wages per day $
(c) No. days worked per week varies (d) Average weekly earnings $
(e) If board, lodging, fuel or other advantages were furnished in addition to wages, give estimated value per day, week or month

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19. Machine, tool or thing causing injury 20. Kind of power, (hand, foot, electrical, steam, etc.) 21. Part of machine on which accident occurred
22. (a) Was safety appliance or regulation provided? (b) Was it in use at time?
23. Was accident caused by injured's failure to use or observe safety appliance or regulation?
24. Describe fully how accident occurred, and state what employee was doing when injured
employee fell from scaffold at house construction site
25. Name and address of witness

re
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26. Nature and location of injury (describe fully exact location of amputation or fractures, right or left)
R fracture of right ankle
27. Probable length of disability 13 wks. 28. Has injured returned to work? no
If so, date and hour At what wage $
29. At what occupation?
30. (a) Name and address of physician Dr. Romulo Ancheta, 1 N. Broad St., Luray, Va.
(b) Name and address of hospital Page Memorial Hospital, P. O. Box 747, Luray, Va.

s

31. Has injured died? no If so, give date of death

of this report 11-16-76 Firm name T. BROOKS MINS
o. 3— Signed by [signature] Official Title [illegible]
2 REV. 8-62 PRINTED IN U.S.A.

RECEIVED
INS. TRAVELERS

LAW OFFICES
LOWE AND GORDON
LIMITED
409 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901

JOHN C. LOWE
F. GUTHRIE GORDON III
ANNIE LEE CONGDON

AREA CODE 804
296-8188

July 5, 1977

Industrial Commission of Virginia
Department of Workman's Compensation
P. O. Box 1794
Richmond, VA 23214

IN RE: George McCoy v. T. Brooks Mims

Dear Sir:

Please take notice that on behalf of the above named client, we are asserting a Workman's Compensation claim for work-related injuries.

We respectfully request a hearing to establish this claim, and we look forward to hearing from you in this regard.

Thank you for your attention to this matter.

Sincerely,

F. Guthrie Gordon, III

FGG/tk

T. Brooks Mims
RFD 1
Luray, Virginia

GEORGE McCoy, Claimant

v. Claim No. 524-176

T. BROOKS MIMS, Employer
TRAVELERS INSURANCE COMPANY, Insurer

F. Guthrie Gordon, III, Esq.
409 Park Street
Charlottesville, Virginia 22901
[for the Claimant]

M. Bruce Wallinger, Esq.
90 North Main Street
Harrisonburg, Virginia 22801

Hearing before Deputy Commissioner YATES at Front Royal, Virginia on August 18, 1977.

All witnesses having been duly sworn, the following testimony was taken:

DEPUTY COMMISSIONER YATES:

There is a stipulation there was a work-related injury on the date of this occurrence, August 11, 1976. The defense of Mr. Wallenger, however, is that Mr. McCoy was not an employee but was an independent contractor. At the time he was working on a house under construction according to the First Report and I granted leave to Mr. Wallenger for some wage information to come in either for this gentlemen, Mr. Wallenger, or for another employee of like pay scale and job description extending back over a longer period of time. The statute says you can do it that way, if you wish.

MR. WALLENGER:

There's no other like employee and really all I would be able to provide is what this claimant was actually paid for the period of time that he did work.

DEPUTY COMMISSIONER YATES:

All right, what reasonable time would you suggest is adequate?

MR. WALLENGER:

Two weeks.

DEPUTY COMMISSIONER YATES:

Two weeks, all right, good enough. You'll send Mr. Gordon a copy of it. Go right right ahead, Mr. Gordon.

GEORGE McCOY, CLAIMANT

BY MR. GORDON:

Q. Mr. McCoy would you please state your full name and address for the record?

A. My name is George McCoy and I live in Stanley, Virginia. I was born and raised in Paige County.

Q. What is your age, sir?

A. My age is 56 years old.

Q. What is your occupation?

A. Carpenter work.

Q. All right, are you familiar with Mr. Mims, who we allege is the employer in the matter?

A. Yes, sir, I know Mr. Mims.

Q. With respect to the work that you were doing at the time of the accident when did you first have any conversation or contact with Mr. Mims about that work?

A. I called Mr. Mims about some work which I was told about he wanted some work done and I called him and Mr. Mims said yes come on down and he would talk to me about it.

Q. When you say you heard he wanted some work done, what kind of work?

A. Carpentry work.

Q. What - on what kind of structure?

A. It was a wooden construction.

Q. Was it a house?

A. It was a cabin on this river.

Q. Do you know who the owner of the cabin is?

A. Mr. Mims told me that he owned the cabin.

Q. When did you have this conversation with him?

A. About two days before I started working for him.

Q. When was that?

A. I'd say it was in July, about the 23rd.

Q. Of what year?

A. Of 1976.

Q. Did you meet with Mr. Mims at the property?

Mr. McCoy, Claimant

A. Yes, sir, I did.

Q. Was any one else with you besides yourself and Mr. Mims?

A. Mr. Owen Walters was with me.

Q. Who is he?

A. He's another carpenter that I brought along to help me with the job.

Q. Can you tell the Commissioner what the discussion was?

A. A discussion we had - Mr. Mims wanted us to do this carpentry work and he said - he asked us to do it on contract. So I gave him a price on contract. Mr. Mims told me that I had asked too much money and I was allowing too much for labor and that he would rather pay me by the hour. So, we decided we would go to work by the hour for him. He furnished all the material for us to go to work with.

Q. When you say "we" what was his relationship with Mr. Walter?

A. That was Mr. Walters, yes, sir, he was a carpenter I brought along with me.

Q. Did you all have any relationship between you? Did you pay him?

A. No, sir, I did not pay him. Mr. Mims paid him. Mr. Mims also paid me.

Q. Did you begin work on the cabin?

A. Yes, sir, we begin work on the cabin.

Mr. McCoy, Claimant

Q. Can you tell the Commissioner what the rate of pay was and when you were paid?

A. We got paid each week. Mr. Mims paid us $5.50 an hour.

Q. How would you tell him how much you had worked? What was the mechanism for getting paid and explaining your hours?

A. Our hours was based on forty hours a week and I believe I drawed three pays from Mr. Mims each week I drawed a pay.

Q. How was the pay arranged? When would Mr. Mims arrive and when do you tell him what you've worked?

A. Mr. Mims would always come on Fridays and pay us on Fridays and he paid us by check.

Q. How would you tell him how much you had worked?

A. You mean how much money I'd made?

Q. Well, would you give him a slip of paper or did you just tell him orally, how would you tell him?

A. I would tell him - when Mr. Mims would come he'd say "How many hours have you got for this week?" We would tell him and Mr. Mims would figure it up and give us a check for the amount of money that he owed us for.

Q. When you say "give us a check" did he give you each an individual check?

A. Yes, sir, each one individual.

Q. Can you tell us something about the nature of the work that was being done at the cabin?

Mr. McCoy, Claimant

A. Well, we tore out some partitions and we did some painting for him and we fixed the roof for him, we - -

Q. Excuse me, if I might interrupt you just for a moment. When you first discussed the job what were you suppose - what was your understanding of what you were suppose to do when you first discussed the job?

A. When we first discussed the job he took us in the cabin and showed us what he wanted done. And we tore out some partitions like he wanted them and replaced the paneling that needed to be replaced and sheet rock overhead and did the painting and in fact we did almost everything in the line of remodeling except for the plumbing and electric work. We didn't do that.

Q. Did there come a time when he asked you to do something else beside what he had talked about originally?

A. Yes, sir, later on then he wanted this screen porch put on and we said we would do that.

Q. Can you tell us what things he did to tell you about the screen porch part of the job?

A. Well, he showed us how vig to make it and he told us to go ahead and do it and he furnished the material and everything and we worked it out by the hour, the same.

Q. Did he make any suggestions or contributions at all about the way in which it was done or anything about the design?

A. He showed us how he wanted it, yes, sir.

Mr. McCoy, Claimant

Q. When you first were working on the inside of the cabin did he ever appear on the jobsite and make any comment or participate or do anything with respect to the job?

A. Oh, yes, he was always coming by checking with us and see what we had to have and he would help us a little bit now and then.

Q. Did he make any suggestions or did he contribute in any way to the way in which you were doing the job or any of the things that you were doing on it?

A. Well, he would - heah, he made suggestions how he wanted it.

Q. Can you tell us very briefly how the accident happened?

A. I was working on the scaffold Mr. Walters had built - -

DEPUTY COMMISSIONER YATES: Pardon me, is there any contest but that it did happen, Mr. Wallenger?

MR. WALLENGER: No, sir.

DEPUTY COMMISSIONER YATES: Is there any reason?

MR. GORDON: No, just for the record at this time--

DEPUTY COMMISSIONER YATES: All right, he fell off the scaffold and broke his leg, both bones?

A. Yes, sir.

MR. GORDON: I think the record is also clear on the extent of the injury.

Mr. McCoy, Claimant

DEPUTY COMMISSIONER YATES: What is the disability time you are claiming?

MR. GORDON: Well, its - to the present day. He has been unable to work and the doctor continues to have him off. It's just a very difficult kind of injury to repair.

DEPUTY COMMISSIONER YATES: In other words he started August of last year, it's a year old he's still off?

MR. GORDON: That's correct.

DEPUTY COMMISSIONER YATES: All right.

MR. GORDON: With that understanding we have no other evidence at this time.

DEPUTY COMMISSIONER YATES: All right, Mr. Wallenger, go right ahead.

BY MR. WALLENGER:

Q. Mr. McCoy, you said that Mr. Mims paid you each Friday for however many hours you had worked that week. Who decided how many hours you would work in a particular week?

A. We did, we kept our time.

Q. You and Mr. Walters?

A. Yes, and we turned it in to Mr. Mims when he came by.

Q. What time were you suppose to show up for work?

A. We usually started around 7:30.

Mr. McCoy, Claimant

Q. Did Mr. Mims tell you to be there at 7:30?

A. He didn't set no time, what time to be there.

Q. Then did you and Mr. Walters decide yourselves what time to go to work and what time to quit?

A. Well, mostly, yes, we did.

Q. Did you furnish all of your own tools that you used in the work for Mr. Mims?

A. We did.

Q. With the exception of the addition after you had done some work of wanting to have a screen porch added was it your understanding from talking with Mr. Mims that you were hired to do a specific job and when that job was finished you would go on to work for somebody else?

A. No, Mr. Mims had told us to go ahead and screen the porch in and he was thinking about building another cabin some-underneath the hill on his other lot that he had and we was looking forward of doing that.

Q. Did you tell Mr. Mims when he asked you to do the screen porch that you couldn't spend but so much time at that job because you and Mr. Walters had another job waiting for you, you wanted to start on that?

A. No, I did not tell Mr. Mims that. I did not have another job in mind, myself.

Mr. McCoy, Claimant

Q. Who did you work for before you worked for Mr. Mims?

A. I built a house back in '75. I had - Mr. Mims was the only person I had worked for in '76.

Q. How did you find out Mr. Mims was looking for someone to work on his cabin?

A. Well, a friend of mine, Mack Cubbage, told me that Mr. Mims wanted some work done and if I wasn't doing anything that Mr. Mims would probably let me do his work.

Q. What is Mr. Cubbage's occupation?

A. He use to be a contractor.

Q. Did you work for Mr. Mims or have you worked for Mr. Mims on any occasion other than when you worked on this cabin?

A. No, sir, I haven't.

Q. And as a carpenter do you work at various jobs as they are available to you?

A. Yes, I do.

Q. Dod you do those at an hourly rate?

A. Yes, I do some of 'em.

Q. Did Mr. Mims withhold the money from your pay for taxes or Social Security?

A. No, sir.

Q. Did you pay those yourself?

A. Yes, sir.

Q. Were there any employees of Mr. Mims who were regularly say people who worked on his farm that worked on this job with you?

A. Mr. Mims' son helped us there for a while. I don't know if he worked on the farm or what he did but the other guys that worked there I think was hired by other contractors like Mr. Mims would see 'em and get 'em to come and do such things like the plumbing and electric work.

Q. Do you know what arrangements were made to pay those people?

A. No, sir, I do not.

Q. Did you have contractor's insurance at the time?

A. No, sir.

Q. Had you had contractor's insurance?

A. I use to have, yes, sir.

Q. Why did you not keep that in force and in effect?

A. Because for the simple reason but I went out of the business of contracting.

Q. Do you know what Mr. Mims' business is?

A. No, not specially, I guess he's a farmer as far as I know.

MR. WALLENGER: That's all the questions I have.

DEPUTY COMMISSIONER YATES: Do you have anyone else, Mr. Gordon?

MR. GORDON: No, sir.

DEPUTY COMMISSIONER YATES: All right, Mr. Wallenger?

MR. WALLENGER: I have Mr. Mims.

DEPUTY COMMISSIONER YATES: All right, go right ahead.

(Claimant stood aside)

Mr. McCoy, Claimant

BROOKS MIMS, WITNESS

BY MR. WALLENGER:

Q. State your name, please.

A. Brooks Mims.

Q. Where do you reside?

A. Luray. R.F.D., Luray, Virginia, north of Luray.

Q. What is your occupation, Mr. Mims?

A. Well, I'm a farmer and been a livestock dealer all my life.

Q. Do you own a piece of recreational property at Egypt Bens Estates, Paige County, Virginia?

A. Yes, sir, I do.

Q. Did you have occasion to hire Mr. McCoy to do some carpentry work on a cabin that's located on that property?

A. Yes, sir.

Q. What is the use of that property?

Q. Well, at the present time we use it as a recreational home for my family and friends, etc.

Q. Are you involved or at the time of this accident occurred were you involved in the construction business?

A. No, sir, never have been in the construction business.

Q. How did you go about hiring someone to do the carpentry work you wanted done on your cabin?

A. Well, I first contacted Mack Cubbage that had built a

recreational cabin for me the year before on a contract basis and asked him if he would remodel this cabin for me. He came down and looked at it and said he would if his men - that he was about through doing any construction work and if they were not going to the Washington metropolitan area to work why he would be glad to do it for me. So, he called me in a day or two and he said that "I'm sorry my men are going to the metropolitan area and I won't have anyone to do it but I'll send you someone". So he got in contact with Mr. McCoy and he called him and sent him down to see me.

Q. All right, did you subsequently hire Mr. McCoy to do the work?

A. Did I hire him to do the work?

Q. Yes, sir.

A. Yes, I employed him from the standpoint that he gave me a contract price to start with.

Q. Is that what you requested?

A. Yes, sir.

Q. All right, was the work done on a contract price?

A. No, sir, after he gave me the contract price I thought it was too much and I said "I don't believe I'm going to do it because I think the price is too hight" and he says "Well, let me do it on an hourly, time and material basis".

Q. At the time you contracted him to do the work on the time and material basis did you specify exactly what work was to be done?

A. I told him that I wanted the partitions out and wanted insulation in the ceiling and the cabin painted and some cabinets built in there.

Q. In other words you told Mr. McCoy what you wanted done?

A. Yeah, yes, sir.

Q. And was it your understanding when that work was done that your contract with him was completed?

A. Yeah, yes, sir.

Q. Did you undertake in any way to tell him how to do that work?

A. No, sir, I didn't because I didn't know how. I don't know how to do any carpentry work.

Q. Did you undertake to supervise him at all as he did the work?

A. No, sir. I would go by practically every day. I don't think I got there every day but most of 'em to see how they were getting along, to see if they needed anything or if they had any questions they wanted to ask me about the work.

Q. Did you have any persons who are regularly employed by you on your farm or otherwise that worked on this job along with Mr. McCoy?

Mr. Mims, Witness

A. No, sir. The only person that was out there other than the plumbers and an electrical contractor was my son went by some days that I couldn't be there and I think he carried them some cement or something out one day

MR. WALLENGER: I have no further questions.

DEPUTY COMMISSIONER YATES: Go ahead, Mr. Gordon.

BY MR. GORDON:

Q. Mr. Mims after a certain point in remodeling of the interior isn't it true that you decided to put on a screen porch?

A. Yes. After we got along with it, I said this porch was only I think six or eight feet wide it would be nice if we had ten feet added on to it.

Q. And you had not discussed that with Mr. McCoy when you first talked to him, isn't that correct?

A. No, we didn't have that in the first deal.

Q. So the agreement then was that you would continue to pay him the same hourly rate if he would continue to work on the screened in porch, is that correct?

A. Yes.

Q. Was there any discussion that you might have had other properties that if he had done a good job on this he might continue him with - -

A. While he was out there, I had owned another lot, vacant lot, below there and I asked him what it would cost to build a shell

cabin on it, to give me a contract price on it and he gave me the contract price on it at that time but I don't remember what it was. But I never did build it. I just dropped it.

Q. How did you go about describing the kind of addition you wanted to make to the porch?

A. Well, I just told him that I'd like to have this porch ten feet longer, I'd like to have it screened and the roof extended over it.

Q. And do I understand that you actually went and purchased the materials and provided them at the site, is that correct?

A. No. I would go out and if they needed something while they were working I might go to town and order something for them but he and Mr. Walters usually came by in the mornings and ordered what they wanted and had it sent, delivered to the site. Part of it was ordered from Bonds, the Luray Builders Supply and part from Dean Lumber Company.

MR. GORDON: I have no further questions.

BY DEPUTY COMMISSIONER YATES:

Q. Did you make the payments on the materials or charged to your account?

A. Actually some of it - when it originally started out the first bill was charged to Mr. Owen Walters at Dean Lumber Company, the first couple of bills and I went up and paid the bills and they

at the Luray Builders Supply it was better arrangements for them to go by and charge it to me and sign the ticket whether it was picked up by Owen Walters or whoever it was.

DEPUTY COMMISSIONER YATES: Do I have it all, gentlemen?

MR. WALLENGER: One more question.

BY MR. WALLENGER:

Q. Mr. Mims is there presently a negligence action pending against you by Mr. McCoy for the same accident?

A. Yes, sir.

Q. In the Circuit Court of Paige County?

A. Yes, sir.

MR. WALLENGER: That's all.

DEPUTY COMMISSIONER YATES: Okay.

[Witness stood asi

[CASE CONCLUDED]

WHARTON, ALDHIZER & WEAVER
ATTORNEYS AT LAW
90 NORTH MAIN STREET
HARRISONBURG, VIRGINIA
22801

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M. BRUCE WALLINGER
RONALD D. HODGES
WELBY C. SHOWALTER
L. QUINN KAYLOR

AREA CODE 703
TELEPHONE 434-0316
P. O. BOX 809

August 24, 1977

Honorable William R. Yates
Industrial Commission of Virginia
P. O. Box 1794
Richmond, VA 23214

Re: T. Brooks Mims
I.C. No. 524-176
Claimant: George McCoy

Dear Mr. Yates:

According to the employer's records, Mr. McCoy was paid for his carpentry work on three occasions as follows:

July 30, 1976	$281.00
August 6, 1976	$220.00
August 11, 1976	$104.50

We understand Mr. Gordon will be filing a memorandum of authority in support of his position, and we would like to have a few days to respond after his memorandum is filed.

With best regards,

Very truly yours,

M. Bruce Wallinger

M. Bruce Wallinger

MBW:cld

cc: F. Guthrie Gordon, III, Esquire

LAW OFFICES
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JOHN C. LOWE
F. GUTHRIE GORDON III
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AREA CODE 804
296-8188

August 22, 1977

The Honorable William Yates
Deputy Commissioner
Industrial Commission of Virginia
P. O. Box 1794
Richmond, Virginia 23214

IN RE: McCoy v. Mims
I.C. #524-176

Dear Mr. Yates:

Following up our hearing in the above case on Thursday, August 18, 1977, let me propose that the following evidence and authority supports the claimant's position that he is entitled to compensation for the accident he suffered:

1. There are substantial indicia of employment as opposed to independent contractor status so as to justify an award without looking further:

a) McCoy was hired by the hour, and not on the basis of the completed job. Michie's Jurisprudence, Vol. 21A, Workmen's Compensation, §7, 1976 Cumulative Supplement, p. 11. See Myers v. Workmen's Compensation Comm'r, 150 W.Va. 563, 148 S.E.2d 664 (1966). "Payment by the hour or by any such unit of time is very strong evidence of employment status as opposed to that of independent contractor." Although taken from a West Virginia case, Michie's indicates in its general section that the two states are close on that point.

b) The parties negotiated over whether McCoy would take an independent contractor's status, and resolved the question in favor of an hourly status instead.

c) Although originally hired just to do some remodeling inside the cabin in question, the scope of the job expanded beyond inside work to include an outside porch, where the claimant was injured. This expanded concept of the work fits more closely an employment situation than an independent contractor's situation.

d) Mims provided the materials for the job.

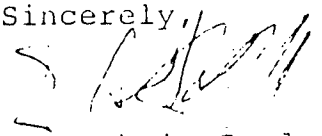
e) Although McCoy provided his own tools, there is no evidence that the carpentary work involved called for any special tools which only a contractor could provide.

f) Mims appeared on the job site frequently and obviously had the right to control and supervise the work to be done.

2. Even if your Honor is still torn about the status of McCoy, a close call should be resolved in favor of the workman. Michie's Jurisprudence, Vol. 21A, Workmen's Compensation, §7.

Giving the act a liberal construction, and resolving close calls in the favor of the workman, the claim should be accepted and the injury considered compensable.

Sincerely,



F. Guthrie Gordon, III

FGG/tk

cc Bruce Wallinger, Esq.

WHARTON, ALDHIZER & WEAVER
ATTORNEYS AT LAW
90 NORTH MAIN STREET
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L. QUINN KAYLOR

AREA CODE 703
TELEPHONE 434-0316
P. O. BOX 809

August 25, 1977

The Honorable William R. Yates
Deputy Commissioner
Industrial Commission of Virginia
P. O. Box 1794
Richmond, VA 23214

Re: George McCoy
v.
T. Brooks Mims
and
Travelers Insurance Company
I.C. No. 524-176

Dear Mr. Yates:

The defense relies on Section 65.1-4, which specifically excludes from employee status persons "whose employment is not in the usual course of the trade, business, occupation or profession of the employer." The evidence in this case is uncontroverted that the defendant is a farmer and livestock salesman and that the claimant is a carpenter who was hired to do a specific job involving carpentry work on a recreational home owned by the defendant. The fact that a single change was made in the work to be performed does not alter the fact that the claimant was hired to produce a specific result.

The arrangement to pay the claimant on an hourly basis was negotiated for the mutual convenience of the parties when they were unable to agree on a contract price. Social Security and Federal Withholding Taxes were not deducted from the claimant's wage. The Industrial Commission has ruled in Hogston v. Associated Transport, Inc., 53 O.I.C. 139 (1971), that payment on an hourly basis is not controlling.

Other factors which indicate that the claimant was hired as an independent contractor or that he furnished his own tools, set his own hours and worked other jobs as they

were available. More important, the defendant did not exercise, and, in fact, had no control as to the method or means by which the task was performed, did not supervise the claimant's work, and did not have any of his regular employees working on the job with the claimant.

We respectfully submit that under the language of Section 4 of the Act and the principles set out in Hogston v. Associated Transport, Inc., Supra, the evidence conclusively establishes that the claimant was an independent contractor.

Very truly yours,

M. Bruce Wallinger

M. Bruce Wallinger

MBW:cld

cc: F. Guthrie Gordon, III, Esquire
The Travelers

V I R G I N I A IN THE INDUSTRIAL COMMISSION

GEORGE McCOY, Claimant

v. Claim No. 524-176 OPINION BY YATES
Deputy Commissioner

T. BROOKS MIMS, Employer
TRAVELERS INSURANCE COMPANY, Insurer

AUG 31 1977

F. Guthrie Gordon, III, Esq.
409 Park Street
Charlottesville, Virginia 22901
for the Claimant

M. Bruce Wallinger, Esq.
90 North Main Street
Harrisonburg, Virginia 22801
for the Defendants

Hearing before Deputy Commissioner YATES, at Front Royal, Virginia on August 18, 1977.

This case is before us on application of the plaintiff, filed July 7, 1977, alleging an industrial accident for which he should be awarded general disability and medical benefits. It is stipulated the plaintiff fell from a scaffolding and broke his leg. The claimed disability is from August 11, 1976 continuing on uninterruptedly to the present time.

The sole question before us is as to the work status of this plaintiff--is he an employee or is he an independent contractor?

This question has been before this Commission and our Supreme Court repeatedly. In the case of Marvin Baker, Sr. v. Marval Poultry, 55 OIC 22 we restated the test that had been applied by our Supreme Court and this Commission as to the distinguishing characteristics. These characteristics are as follows:

1. Method of payment.
2. Furnishing of tools.
3. Formal relations between the party.
4. Power to furnish substitutes and assistance.
5. Nature of the work.
6. Power to terminate service and discharge the workmen.
7. Power of control as to the means and methods by which the desired result is accomplished.

In Phillips v. Brinkly, 194 Va. 62 72 S.E. (2d) 339 our Supreme Court stated that the most important single factor bearing on the issue is the power of control.

A review of the record before us reflects that the employer is a farmer and by his own testimony he knew nothing about carpentry and relied on the expertise of the people he hired to do the cabin remodeling to see to the technical details of the required carpentry. Admittedly, this employer appeared on the scene not infrequently to see to the work, supplies, and to pay the claimant his weekly hourly wage. The plaintiff testified that Mr. Mims would actually help them a little, but there is still no refutation of this employer's lack of technical carpentry knowledge. This employer gave directions as to what he wanted done in the remodeling and addition to the cabin, but the means were left to this plaintiff and another workman. As the brief of the defendant indicates, payment of wages by the hour is not in itself controlling. Hogston v. Associated Transport, Inc., 53 OIC 139. From the evidence before us this employer was clearly acting as his own general contractor in order to reach the required results, but this factor does not automatically confer to him the status of an employer in an employer/employee relationship.

It is our finding the plaintiff has failed to bear the requisite burden of proving a master/servant relationship so as to bring this case within the jurisdiction of The Virginia Workmen's Compensation Act. For this reason, this claim is denied, and the case is dismissed and stricken from the Commission Hearing Docket.

VIRGINIA:
IN THE INDUSTRIAL COMMISSION

GEORGE McCOY, Claimant

v. Claim No. 524-178

Opinion by JOYNER, Chairman

T. BROOKS MIMS, Employer
TRAVELERS INSURANCE COMPANY, Insurer

FEB 28 1978

F. Guthrie Gordon, III, Esq.
409 Park Street
Charlottesville, Virginia 22901
for the Claimant.

M. Bruce Wallinger, Esq.
90 North Main Street
Harrisonburg, Virginia 22801
for the Defendants.

REVIEW before the Full Commission at Richmond, Virginia, on December 6, 1977.

This claim is before the Full Commission for review of the opinion of August 31, 1977, denying compensation.

The claim came to be heard upon the application of the employee alleging injury by accident on November 11, 1976, while working for the named employer. The only issue presented is whether or not the claimant was an employee of the named employer as opposed to being an independent contractor.

The evidence established that the employer, Mims, whose primary business is farming, had a contractor construct one recreation cabin for him at some earlier unspecified date (T-13). Mims then decided to renovate a second cabin which he owned and called the same contractor, who was unable to undertake this project, but who recommended the claimant herein, McCoy, who is not a licensed contractor (T-11). McCoy and another carpenter,

Walters, discussed the work with Mims in an effort to arrive at a fixed contract price for the entire project. The parties were unable to agree on a contract for the work and Mims then agreed to hire McCoy and Walters on an hourly basis to do the work which he directed and that Mims would supply all materials, "...we (McCoy and Walters) decided we would go to work by the hour for him. He furnished all the material for us to go to work with..." (T-4). Mims met McCoy and Walters at the cabin to be renovated and pointed out the work to be done, which involved removing partitions, painting, installing panelling, sheet rock, insulation and cabinets. The employees, in summary, were to perform a general renovation project with the exception of plumbing and electrical work, which was performed by other workers (T-6 & 14), under the supervision of Mims.

After the project was underway, Mims also directed McCoy and Walters to add a screen porch. Mims or his son came by daily to check on the progress of the work and, on occasion, each assisted McCoy and Walters in the work which they were doing (T-7, 11 & 14). Mims furnished all materials which were used on the project and McCoy and Walters were authorized to purchase material for the project from local suppliers which was charged to Mims (T-16). For their work, the employees were paid $5.50 per hour. Definite work hours were not established but the employees usually started at 7:30 A.M. and attempted to work a forty-hour week each week. Neither employee had any other job during this time (T-9) and Mims was McCoy's only employer during the calendar year of 1976 (T-9). During construction of this

project there were preliminary discussions between Mims and McCoy and Walters regarding the construction of a third cabin (T-16). Neither McCoy nor Walters had any specified authority over the other. Both were hired and paid independently by Mims, who made no withholdings from their paychecks.

The hearing Commissioner determined upon this evidence that McCoy was an independent contractor. The Full Commission, upon review, does not concur with this finding of fact. While there are numerous criteria which may be considered in determining the status of employee or independent contractor, the element of control is the most important. Here Mims hired carpenters who were skilled in their trade and owned their own handtools, as is the custom in that trade. He pointed out to them, on the site, the work to be done, checked on its progress on a daily basis, occasionally assisted in the work, furnished all materials and gave the workmen authaority to purchase material on credit in his name. Clearly the status of an employee has been established and we so find.

McCoy was injured when scaffolding upon which he was standing broke causing him to fall a distance of some twenty feet to the ground, inflicting serious injuries to his leg which has rendered him disabled since the date of the accident. His average weekly wage is found to be $201.83.

A W A R D

An award is entered in favor of the claimant at the rate of $134.55 per week, beginning August 11, 1976, and continuing until further order of the Commission.

From compensation there shall be deducted and paid to F. Guthrie Gordon, III, Esquire, the sum of $1211.14 for legal assistance and expenses rendered the claimant.

VIRGINIA: IN THE INDUSTRIAL COMMISSION

GEORGE McCOY, Claimant	)	
v.	)	Claim No. 524-176
	)	NOTICE OF APPEAL
T. BROOKS MIMS, Employer	)	
TRAVELERS INSURANCE COMPANY, Insurer	)	

Pursuant to Rule 5:19 of the Rules of the Supreme Court of Virginia, please take notice that the Defendants intend to appeal the opinion and award of the Full Commission written by Commissioner Joyner on February 28, 1978, to the Supreme Court of Virginia within the time prescribed by law.

You are further advised that the Defendants challenge the sufficiency of the evidence to support the findings of the Industrial Commission of Virginia.

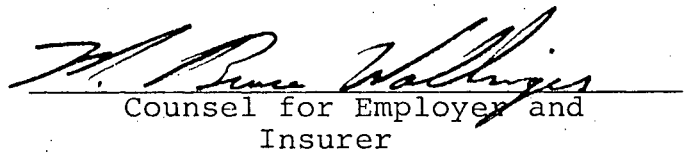
T. BROOKS MIMS
TRAVELERS INSURANCE COMPANY
By Counsel

M. Bruce Wallinger
of Wharton, Aldhizer & Weaver
90 North Main Street
Harrisonburg, Virginia 22801
Counsel for Employer and Insurer

ON, ALDHIZER
AND
WEAVER
RNEYS AT LAW

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to F. Guthrie Gordon, III, Esquire, of Lowe and Gordon, 409 Park Street, Charlottesville, Virginia, 22901, Counsel for Claimant, this 3rd day of March, 1978.



Counsel for Employer and Insurer