

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-WC-00835-COA

CONCERT SYSTEMS USA (Employer)

APPELLANT

VERSUS

JOHN WEAVER (Claimant)

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, JOHN WEAVER

(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

John Weaver (Claimant)

Appellee

James K. Wetzel

with the law firm of James K. Wetzel & Associates

Counsel for Appellee

Concert Systems USA, Inc. (Employer)

Appellant

Donald P. Moore, with the law firm of
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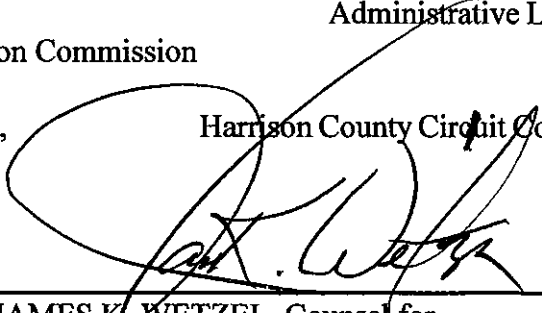
Counsel for Appellant

Honorable Mark Henry,
Mississippi Workers' Compensation Commission

Administrative Law Judge

Honorable Lawrence P. Bourgeois, Jr.,

Harrison County Circuit Court Judge



JAMES K. WETZEL, Counsel for
John Weaver, Claimant/Appellee

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STATEMENT OF THE ISSUES

- I. WHETHER OR NOT THE FULL COMMISSION AND CIRCUIT COURT ERRED IN FINDING THAT CLAIMANT WAS AN EMPLOYEE AND NOT AN INDEPENDENT CONTRACTOR.**

- II. WHETHER OR NOT THE FULL COMMISSION AND THE CIRCUIT COURT ERRED IN FINDING THAT CONCERT SYSTEMS HAD SIX EMPLOYEES, THUS, SUBJECTING IT TO THE WORKERS' COMPENSATION STATUTE.**

STATEMENT OF THE FACTS

This matter was held before the administrative law judge on August 8, 2007, for a hearing to address the issues of (1) whether claimant was an independent contractor or an employee of Concert Systems; (2) whether on the date of claimant's motor vehicle accident of July 15, 2006, Concert Systems had five or more employees subjecting it to the Workers' Compensation Act; and (3) the reasonableness and necessity of certain medical treatment. The Administrative Law Judge, the Honorable Mark Henry, in his Decision and Order dated November 15, 2007 (R.E.1), found that Claimant was an employee of Concert Systems USA, Inc. and that Concert Systems USA, Inc., regularly had at least six employees and therefore, subject to the Workers' Compensation Act. Following the appeal to the Commission by the non-insured employer, the Full Commission in its decision of June 23, 2008 (R.E.2), affirmed the order of the administrative law judge. The non-insured employer filed its appeal of said order to the Circuit Court.

The Circuit Court Judge, the Honorable Larry Bourgeois, Jr., in his order dated April 22, 2009 (R.E.3), affirmed the findings and decisions of the administrative law judge and the Full Commission.

The non-insured employer filed an appeal of the decision of the Circuit Court judge with this Honorable Supreme Court on May 21, 2009.

SUMMARY OF THE ARGUMENT

The non-insured Employer, Concert Systems USA, Inc., is requesting this Honorable Court to re-weigh the evidence which has previously been weighed by the Circuit Court Judge, the Workers' Compensation Commission and its administrative law judge. The Circuit Court entered its order dated April 22, 2009, affirming the decision of the Commission dated June 23, 2008, and the administrative law judge's order of November 15, 2007, which factually and legally support the decision that this non-insured Employer, on July 15, 2006, had six employees which made this company subject to the Mississippi Workers' Compensation statutes and claimant "was an employee" injured while in the course and scope of his employment for Concert Systems USA, Inc.

FACTS

It is quite apparent that this non-insured Employer, Concert Systems USA, Inc., did not have workers' compensation coverage to cover Claimant, John Weave, who was injured while working for this employer on July 15, 2006. Mr. Weaver was on his way back to Gulfport, MS from Tampa, FL when he was involved in a serious motor vehicle accident wherein John Weaver was rear-ended by an 18-wheeler tanker truck. At the time of the workers' compensation hearing in this matter, John Weaver had not reached maximum medical improvement and the hearing was limited to addressing the issues of (1) whether John Weaver was an employee of Concert Systems USA, Inc., or was an independent contractor; and (2) whether on the date of the Claimant's motor vehicle accident, July 15, 2006, Concert Systems USA, Inc., a non-insured employer, had five (5) or more employees subjecting it to the Workers' Compensation Act.

On November 15, 2007, Administrative Law Judge Mark Henry issued his decision and order finding that the Clamant was an employee of Concert Systems USA, Inc., and also finding that Concert Systems USA, Inc., regularly had six (6) employees on the date of the injury of the Claimant and therefore, subject to the Mississippi Workers' Compensation Act.

It is clear from the testimony of Randy Frierson, President/CEO, who was the sole stockholder of this corporation, and his wife Candy Frierson, who was the Vice President of Concert Systems USA, Inc., that they made every attempt during the hearing of this case to deceive and thwart the efforts of counsel for the Claimant in trying to allege they did not have six employees at the time this incident occurred in July 2006. Through the testimony of Candy Frierson, she totally

admitted that on July 15, 2006, four employees were working for Concert Systems. Those employees were identified as Christian Garoutte, John Beavgez, Ben Frierson and Amy Gideon. (MWCC Tr.77-81,84-88). There is no contest by Candy or her husband that these four individuals were full time employees working for this non-insured employer on the date in question. The issue then became whether or not Mrs. Frierson and her husband, Randy Frierson, should be considered employees of this Mississippi corporation. In a very detailed decision by Administrative Law Judge Mark Henry, he found that these two individuals, Candy Frierson who was held out as vice president of the company as well as John Randy Frierson who was president of the company, were in fact corporate employees.

In the most recent treatise in Mississippi Workers' Compensation, the following is stated in Section 2.12, *Corporate Officers Employee*:

In the case a business uses a corporation for its organizational form, a business owner may be covered mandatorily by statute as an employee by virtue of being an "executive officer" or by having a contract of power with the corporate entity. This same statute for mandatory coverage allows an "executive officer" to reject coverage by giving written notice to the carrier. One effect of this limited opt-off rule is that an owner-executive officer can avoid paying a premium in respect of the person's own salary. However, an employee is not automatically an "executive officer" by title alone. When the person whose job function shows that she is subject to the supervision characteristic of an employee instead of having an "executive officer" role, the opt-out provision is not available. One person may own all the stock of a corporation, thus being the sole owner of the business. If the person is an "executive officer", that person is mandatorily covered unless the person elects to reject coverage as allowed in Section 71-3-79 or unless employer and owner employee reject coverages allowed in the small business exemption of 71-3-5.

In this particular case, Mr. Frierson admits that he had four employees carrying out the operation of this business. By the corporate organizational form, he as the sole stockholder also worked in the business as an officer of the corporation in two categories: (1) he was president of the

corporation; and (2) he was the chief executive officer by his own admission. The owner who works in the business is likely to be under some type of "contract of hire", which John Frierson was in this case, meaning the threshold of five or more making mandatory coverage is readily reached in this case by his working as president of the company and as chief executive officer. Furthermore, by his own admission, he admits that he appointed his wife, Candy Frierson, as vice president of the company. Also by her own admission, she was designated the CFO or chief financial officer of the corporation as reflected by Claimant's Exhibit No. 2 (R.E.4) admitted into evidence in this case. If you consider Candy Frierson, who testified that she was primarily responsible for all the payroll and paying of the bills for the company, it is very clear that she was an executive officer and an "employee" of the company. Both Mr. and Mrs. Frierson testified that in July 2006, Mr. Frierson's company paid his house note and even paid his car note as an employee of the company.

Even if we assume *arguendo* that Mr. and Mrs. Frierson were not employees under the Act, the addition of John Weaver as an employee on the date in question would have provided five (5) employees making the company responsible for Mississippi mandated workers' compensation coverage.

The remainder of the argument by this non-insured Employer was that on July 15, 2006, John Weaver was not an employee of Concert Systems USA, Inc., but was an independent contractor. The Employer has failed to show any facts other than those cited by the administrative law judge which clearly indicated that John Weaver was doing work which was an integral part of the regular business of this Employer and that John Weaver did not furnish an "independent business or professional service" in the type of work that he was performing. There was substantial evidence to support the Commission and the administrative law judge in this decision. John Weaver met his

burden of proof in showing that he was performing a task which was an integral part of the regular business of the Employer; that the Employer had control over the operation of the vehicle that it had leased for Mr. Weaver; that they had paid for not only the vehicle but paid his salary for the services that he provided and also paid for his food and lodging. There was no testimony whatsoever from the non-insured Employer that the contract or engagement that Mr. Weaver was performing was for a definite time or a specific piece of work. Concert Systems undoubtedly also had the right to fire Mr. Weaver. Concert Systems USA, Inc., is in the business of putting on concerts by furnishing band equipment, sound equipment and technicians as are necessary for the artists to play their particular musical scores at a specific location. Concert Systems puts on concerts in more than one location and by some means moves that equipment from storage to the concert venue and back which is exactly what Concert Systems had John Weaver doing on the date that he was injured in this matter. Concert Systems chose to move that equipment from Gulfport, MS to Tampa, FL by providing a truck and hiring a driver. Mr. Weaver's responsibilities were "a regular part of the employer's regular work." Therefore, the preponderance of the evidence preponderated in favor of Mr. Weaver that he was an employee rather than an independent contractor and as such, covered under the Mississippi Workers' Compensation Act.

CONCLUSION

Claimant requests this Honorable Court to affirm The Full Commission and administrative law judge were correct factually and as a matter of law in determining that on the stipulated facts by the parties that on July 15, 2006, Mr. Weaver sustained a work related injury while employed by Concert Systems USA, Inc.; that Concert Systems was subject to the Mississippi Workers' Compensation Act on that date and Mr. Weaver is entitled to workers' compensation benefits as an employee of this non-insured company.

Respectfully submitted, this the 1st day of ~~September~~ ^{October}, 2009.

JOHN WEAVER, Appellee/Claimant

BY: 

JAMES K. WETZEL, ESQUIRE

CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee/Claimant to: Donald P. Moore, Esquire, with the law firm of Franke & Salloum, at their usual mailing address of P. O. Drawer 460, Gulfport, MS 39502; to the Honorable Mark Henry, Administrative Law Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296-5300; and to the Honorable Lawrence P. Bourgeois, Jr., Harrison County Circuit Court Judge, P. O. Drawer 1461, Gulfport, MS 39502.

DATED this the 1st day of ~~September~~ ^{October}, 2009.



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