

Jim's Perspective...

Roof Construction Accident

The Nebraska Supreme Court recently issued an opinion that deals with the issue of whether a worker is an employee or an independent contractor.¹ I know many of you deal with this question everyday, and there is no black and white answer to this question.

It involves a factual analysis of each workplace relationship. The Supreme Court looks at a list of ten factors to determine whether someone is an independent contractor or an employee. The ten factors considered by the Court are as follows:

1. The extent of control the employer may exercise over the details of the work.
2. Whether the one employed is engaged in a distinct occupation or business.
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
4. The skill required in the particular occupation.
5. Whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the one employed is engaged.
7. The method of payment, whether by the time or by the job.
8. Whether the work is part of the regular business of the employer.
9. Whether the parties believe they are creating an agency relationship.
10. Whether the employer is or is not in business.²

The recent case before the court involves Hometown Roofing, Inc. which entered into a contract with a homeowner to put a new roof on the house. Hometown Roofing subcontracted the job to LFA. LFA then arranged for Ismael Huerta to recruit a crew to build the roof. It was the practice of LFA to use a roofing crew that could vary in the skill level and number of people used on a job-by-job basis and that each person on the crew was an independent contractor and not an employee.

One member of Huerta's crew was Cesar Aboytes-Mosqueda. On June 13, 2018 Aboytes-Mosqueda fell from the roof and was injured. Aboytes-Mosqueda brought a claim in the Workers' Compensation Court against Huerta and LFA. This case ultimately ended up before the Nebraska Supreme Court which held that Aboytes-Mosqueda was an independent contractor and not an employee of Huerta or LFA. The Court discussed a number of factual issues which led to its holding that Aboytes-Mosqueda was an independent contractor all of which I thought might be of some interest to you as you deal with this issue with your clients.

Huerta testified that he works with several different roofing companies and works on approximately seven to nine houses a year with LFA. He said that he is not a general contractor and he works as a member of "the crew" alongside everyone else. He also said that Aboytes-

¹Cesar Aboytes-Mosqueda v. LFA Inc. and Ismael Huerta, 306 Neb. 277 (2020).

²Omaha World Herald v. Dernier, 253 Neb. 215, 570 N.W.2d 508 (1997).

Mosqueda worked with him on approximately two or three houses in 2018 and did not work with him at all in 2017. Huerta said that the customary method for calculating pay was based on the number of plywood squares that cover the roof, or the rough square footage of the roof. His share of what the general contractor pays for the roofing job was always the same as the other roofers who worked with him. At the job where Aboytes-Mosqueda was injured, there were five men working on the roofing crew, including Huerta. The money received from LFA was split evenly between each person on the crew.

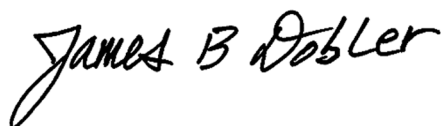
It looks like the method and amount of payment for each member of the crew would suggest independent contractor status of the crew members.

The evidence at trial showed that Aboytes-Mosqueda brought his own tool belt, hammer and knife. At the time that he fell, Aboytes-Mosqueda was working alone, by himself, on a part of the roof. It appears that Aboytes-Mosqueda supplied at least part of the roofing tools himself, and he seems to have been working without supervision. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.³ Aboytes-Mosqueda worked by himself and the facts showed no particular control over how he worked on the roof.

In reaching its decision, the Supreme Court also noted that Aboytes-Mosqueda was free to work with other roofing contractors. The evidence also showed that Huerta regularly worked jobs without Aboytes-Mosqueda and that Aboytes-Mosqueda was free to decline jobs whenever Huerta called and offered work. The Court said Aboytes-Mosqueda's ability to accept or decline work on a job-by-job basis is also indicative of an independent contractor status.

The compensation court found that Aboytes-Mosqueda was free to work or stop working at will, and that the amount of time spent on a job was the result of consensus by the entire crew. Huerta also testified that he did not consider himself to be operating a business, but instead, he was just one member of a crew.

My impression is that the facts tended to show that Huerta did not control what Aboytes-Mosqueda did on the job, and that Aboytes-Mosqueda was free to work or not work with Huerta at any time. There was also no prescribed formal method of payment to Aboytes-Mosqueda and the crew split the money received on an equal basis and there was no "withholding" of money for tax purposes. The entire roofing project was just very informal.



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Questions or Comments? Please email jbdobler@outlook.com

³Hemmerling v. Happy Cab Company, 247 Neb. 919, 530 N.W.2d 916 (1995).