IN THE COURT OF APPEALS

STATE OF NEW MEXICO

JACKSON CONSTRUCTION, INC.,
a New Mexico Corporation, and **PAUL JACKSON,** Qualifying Party for Jackson Construction, Inc.,

Petitioner - Appellee,

Court of Appeals No. A-001-CA-2010-30454
V. District Court No. D-1215-CV2009- 00361

GLENN R. SMITH, in his capacity of **DIRECTOR, STATE OF NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION**,

Respondent-Appellant

APPEAL FROM THE DISTRICT COURT FOR THE TWELFTH JUDICIAL DISTRICT, THE HON. JERRY H. RITTER, PRESIDING

ANSWER BRIEF

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II TABLE OF AUTHORITIES

III. SUMMARY OF PROCEEDINGS

While a Summary of Proceedings need not be included in an Answer Brief, they may when deemed necessary. The Petitioner - Appellee deems the following supplementation to the Appellant's Brief in chief as necessary.

C. Disposition Below:

Robert Rambo, Esq., Appellate Mediator, extended the time within which Petitioner-Appellee may file its Answer Brief through **January 7, 2011**.

D. Summary of Facts:

1. Jackson Construction, Inc., incorporated December 30, 2005 (T.P. 15:35[1]), is a corporation organized under the laws of the State of New Mexico, and wholly owned by Paul Jackson since the death of his wife. (T.P. 0:37, 21:49, 26:30)

2. Paul Jackson is the only officer, President (T.P. 15:57), and the only member of the Board of Directors (T.P. 15:49).

4. Paul Jackson considers himself as the "executive employee" of Jackson Construction, Inc. (T.P. 15:10, 27.0)

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[1]From Record Proper, CD, Administrative Hearing of December 19, 2009, Judge Roibal-Bradley - elapsed time. Please note there are two hearing recorded, the first being a motion. A five minute break was taken. An administrative trial commenced. The elapsed time counter starts over at commencement of the administrative trial.

5. Paul Jackson has filed an *Executive Employee Affirmative Election Form* opting out of workers' compensation coverage. (T.P. 19:48, 25:55)

6. Jackson Construction, Inc., has no other employees and has never had any other employees. (T.P. 17:08, 22.0)

7. Jackson Construction, Inc., hires no laborers. (T.P. 18:0)

8. Paul Jackson is semi-retired but wants to retain his contractor's license. (T.P. 17:20).

9. Jackson Construction, Inc., has been issued license no. 92541 (T.P. 16:36) which is a GB-98 (T.P. 16:30) and the qualifying party is Paul Jackson (T.P. 16:0).

10. Traditionally, Jackson Construction, Inc., has built single family residential dwellings, approximately two per year, for sale and has engaged in light commercial construction. (T.P. 16:45)

11. Paul Jackson could build two residences per year as owner builder without a contractor's license. (T.P. 18:25)

11. During calendar 2008, Jackson Construction, Inc., built one single family residential dwelling and built none in 2009. (T.P. 18.0)

12. The only light commercial work engaged in by Jackson Construction, Inc., for a considerable period of time was: (T.P. 24:33)

A. The construction of a dental office that is owned by Paul Jackson and constitutes his own rental property; (27:37) and

B. The construction of rental storage units that are owned by Paul Jackson and constitutes his own rental property (27:46).

13. The only prospective light commercial construction that Jackson Construction, Inc., reasonably foresees performing is the construction of an office at the storage units owned by Paul Jackson which will also be owned by Paul Jackson. (T.P. 28.0)

14. All of the work performed by Jackson Construction, Inc., is performed by subcontractors who are independent contractors. (T.P. 17:34)

15. All subcontractors are licensed to perform the subcontract services they perform for Jackson Construction, Inc. (T.P. 22:30)

16. All subcontractors provide Jackson Construction, Inc., for effective periods of one year, letters from their carriers which is proof that the subcontractor carries workers' compensation insurance. (T.P. 23:13)

17. Paul Jackson hires approximately five subcontractors per year who average approximately two employees per subcontractor. (T.P. 25:33).

18. Paul Jackson does not manage the work of any subcontractor or any employee of a subcontractor. (T.P. 24:50).

IV. STANDARD OF REVIEW

The Court of Appeals has set forth a rule of law to aid in the construction of workers' compensation statutes. In *Howell v. Marto Electric*, 140 N.M. 737, 148 P.3d 823 (Ct. App. 2006), the Court set forth the following guidelines:

1. The interpretation of the Workers' Compensation Act and associated regulations is a question of law that is reviewed by the Court *de novo*; and

2. Although a court will generally defer to an agency's interpretation of an ambiguous statute or regulation that it is charged with administering, it is the function of this Court to interpret the law in a manner consistent with the legislative intent.

In addition, in *City of Rio Rancho v. Logan*, 143 N.M. 281, 175 P.3d 949 (Ct. Apps. 2007), the Court of Appeals freshly acknowledged a generally accepted and applied rule of law that a statute will be construed to avoid an absurd result:

> "When a peculiarity in the literal language of a statute leads to an absurd result, the court may construe the statute according to its purpose to avoid the absurdity. Where the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others." 143 N.M. 281, at p. 286.

See also *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913).

Finally, it is proper for this court to consider prior and subsequent statutes *in*

pari materia to determine legislative intent. *State v. Prince*, 52 N.M. 15, 189 P.2d 993 (1948) and *United Rentals, Inc. v. Yearout Mechanical, Inc.*, 148 N.M. 426, 237 P.3d 728 (2010). 237 P.3d 728, at p. 734.

V. ARGUMENT

The Trial Judge, the Hon. Jerry H. Ritter, Jr., issued a Memorandum Opinion and Order (Record Proper Pages 152-155). He held:

1. Jackson Construction, Inc., whose qualifying party is licensed contractor Paul Jackson, is not required, as a matter of law, to carry workers compensation insurance or to file a certificate of insurance under NMSA, §52-1-4; and

2. The conclusion of the Administrative Law Judge , on behalf of the Secretary of the Worker's Compensation Administration, that Jackson Construction, Inc., is subject to the Workers' Compensation Act and required to maintain workers' compensation insurance and file a certificate thereof, is not in accordance with law.

In rendering these conclusions of law, the Memorandum Opinion and Order necessarily also concludes:

1. There are essentially two instances under which an entity is required to obtain coverage under the Workers' Compensation Act:

A. Where the employer employs three or more employees; [2]or

B. Where the employer is engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act regardless of the specific number of employees.[3]

2. A statutory rejection of individual benefits is available to (1) sole proprietors, (2) corporate officers and (3) executive employees owning 10% or more of the corporate stock, all in accordance with NMSA 1978, §52-1-7.

3. The Workers Compensation Administration incorrectly, as a matter of law, applies §52-1-7, *supra.*, not just to the numerical test but also to the alternative provision for construction industry licensees to establish that there can never be a licensee who is not an employer under the Workers' Compensation Act, because §52-1-7(E) only relates to determining the number of employees and if the Workers' Compensation Administration was correct, there would be no need for the limiting language of §52-1-7(E).

4. In accordance with the provisions of §52-1-15, *supra*, the relevant definition of employer is one "employing workers."

5. In accordance with the provisions of §52-1-16, *supra,* a "worker" is

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[2]Citing NMSA 1978, §§52-1-2 and 52-1-6.

[3]Citing NMSA 1978, §52-1-6(A).

defined as a person who has "entered into employment of or works under contract of service or apprenticeship with an employer."

6. There being no workers, Jackson Construction, Inc., is not an employer and not subject to the requirements of the Workers Compensation Act.

7. A corporation with one executive officer owning all of the corporate stock, who has opted out of individual coverage, stands in the identical position to a sole proprietor. [4]

The Trial Judge was correct that NMSA 1978, §52-1-6(A) sets forth a two fold criteria for application of the provisions of the Workers' Compensation Act:

> "The provisions of the Workers' Compensation Act shall apply to **employers of three or more workers**; provided that act shall apply to **all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act** regardless of the number of employees. The provisions of the Workers' Compensation Act shall not apply to employers of private domestic servants and farm and ranch laborers." (Emphasis added).

§52-1-7, *supra,* sets forth additional criteria for application of the provisions of the Workers' Compensation Act by affirmatively limiting the provisions of §52-1-6(A), *supra,* with regard to "executive employees." §52-1-7(F)(1) defines

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[4] The purpose of the finding arises from the precedent of a cause of action in the Second Judicial District Court in which the Court held that §52-1-6 did not make a sole proprietorship with no employees subject to the Workers' Compensation Act. That decision was appealed in *Bjorn Jogi, dba Bjorn Construction v. State of New Mexico Workers' Compensation Administration*, Cause No. CV-02007-08948 but settled at mediation.

an "executive employee:"

> "(1) "executive employee" means the chairman of the board, president, vice president, secretary, treasurer or other executive officer, if he owns ten percent or more of the outstanding stock, of the professional or business corporation or a ten percent ownership interest in the limited liability company; ..."

Paul Jackson is an "executive employee" of Jackson Construction, Inc.

Pursuant to §52-1-7(A) & (B), *supra.*, an "executive employee" may opt out of the provisions of the Workers Compensation Act. That is done by filing an affirmative election in the office of the Director of the Workers' Compensation Administration. Paul Jackson has filed such election and has opted out of the provisions of the Workers' Compensation Act. While an "executive employee" who has filed an election is counted in determining the number of workers to determine who comes within the provisions of the act, it remains that Jackson Construction, Inc., has "no" workers as a matter of law to be covered by workers' compensation insurance.

Resolution of the review issues requires this Court to construe and interpret, in *pari materia*, §§ 52-1-6, 52-1-7, 52-1-15 and 52-1-16, *supra.* The Court of Appeals has set forth a rule of law to aid in the construction of workers' compensation statutes. In *Howell v. Marto Electric*, 140 N.M. 737, 148 P.3d 823

(Ct. App. 2006), the Court set forth the following guidelines:

1. The interpretation of the Workers' Compensation Act and associated regulations is a question of law that is reviewed by the Court *de novo*; and

2. Although a court will generally defer to an agency's interpretation of an ambiguous statute or regulation that it is charged with administering, it is the function of this Court to interpret the law in a manner consistent with the legislative intent.

§52-1-6, *supra.*, clearly only applies to "employers" engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act. The Workers' Compensation Act defines an "employer" in §52-1-15 as follows:

> "..."employer" includes any person or body of persons, corporate or incorporate, ... **employing workers** under the terms of the Workers' Compensation Act." (Emphasis added).

The Worker's Compensation Act defines a "worker" in §52-1-16, *supra.*, as follows:

> " ..."worker" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term "worker" shall include "employee" and shall include the singular and plural of both sexes... "

Jackson Construction, Inc., is not an "employer" as that term is defined because it does not employ "workers" as that term is defined. Consequently, Jackson Construction, Inc., is not an "employer" engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act. Jackson Construction, Inc., does not meet the statutory definition of an "employer." Not being an "employer," any requirement that it obtain workers compensation insurance because it is licensed by the Construction Industries Licensing Act does not apply to Jackson Construction, Inc. The conclusion of the Trial Judge, that there being no workers, Jackson Construction, Inc., is not an employer and not subject to the requirements of the Workers Compensation Act is a correct conclusion as a matter of law.

The Court has stated the purpose of the Workers' Compensation Act in its effort to determine legislative intent. From *Casias v. Zia Co.*, 93 N.M. 78, 596 P.2d 521 (Ct. App. 1979):

> "...the Court always having in mind that the Act itself expresses the intention and policy of this State that employees who suffer disablement as a result of injuries causally connected to their work, shall not become dependent upon the welfare programs of the State, Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct.App.1976), but shall receive some portion of the wages they would have earned, had it not been for the intervening disability, LaMont, supra ; and that the fundamental reason for its adoption was to protect the workman, Clark v. Electronic City, 90 N.M. 477, 565 P.2d 348 (Ct.App.1977) .... " 93 N.M. 78, at p. 80.

Requiring a corporation that does not meet the definition of an "employer" and which does not employ any "worker" that could be covered by insurance does nothing to advance the purpose of the Workers' Compensation Act which is to protect the workman. There are, quite simply, no workmen to protect! In the words of the Trial Judge in his Memorandum and Opinion:

> "Moreover, burdening the closely-held corporation like Jackson with the unnecessary cost of coverage does nothing to advance the purposes of the act."

To interpret the statue to require the insuring of "no workmen" would result in an absurdity. *In City of Rio Rancho v. Logan*, 143 N.M. 281, 175 P.3d 949 (Ct. Apps. 2007), the Court of Appeals freshly acknowledged a generally accepted and applied rule of law that a statute will be construed to avoid an absurd result:

> "When a peculiarity in the literal language of a statute leads to an absurd result, the court may construe the statute according to its purpose to avoid the absurdity. Where the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others." 143 N.M. 281, at p. 286.

The Court's interpretation of the Workers' Compensation Act must be consistent with legislative intent, and the construction must not render a statute's application absurd, unreasonable, or unjust. *Stanley v. Raton Bd. of Educ.*, 117 N.M. 717, 876

P.2d 232 (Ct. App. 1994). Statutes will be construed in the most beneficial way which their language will permit, to prevent absurdity, hardship, or injustice, to favor public convenience, and to oppose all prejudice to public interests. *State v. Southern Pac. Co.*, 34 N.M. 306, 281 P. 29 (1929). In *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913), our Supreme Court stated:

> "The fundamental rule in the construction of a statute is to ascertain and give effect to the intention of the Legislature. The intention, of course, must be the intention expressed in the statute, and where the meaning of the language employed is plain, it must be given effect. But where the language of a statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, absurdity, or contradictions, the duty devolves upon the court of ascertaining the true meaning. 36 Cyc. 1106. And it is a well-settled rule in the construction of a statute that the spirit or reason of a law will prevail over its letter, especially where the literal meaning is absurd (36 Cyc. 1108), and words may be rejected and others substituted. James v. United States Fidelity & Guarantee Co., 133 Ky. 313, 117 S. W. 411." 136 P. 47, at p. 49.

The Respondent-Appellant argues that Petitioner-Appellee should be required to purchase insurance because of the possibility it will be found to be a statutory employer if a subcontractor's employees are not covered by workers' compensation insurance carried by the subcontractor. That issue should be resolved by the uncontested facts listed as Nos. 16 through 18, *supra*:

> "16. All subcontractors provide Jackson Construction, Inc., for effective periods of one year, letters from their carriers which is proof that the subcontractor carries workers' compensation insurance. (T.P. 23:13)

17. Paul Jackson hires approximately five subcontractors per year who average approximately two employees per subcontractor. (T.P. 25:33).

18. Paul Jackson does not manage the work of any subcontractor or any employee of a subcontractor. (T.P. 24:50)."

In addition, the argument of the Workers' Compensation Administration ignores the fact that with regard to a statutory employee, the issues are much more complex than the single issue of the availability of workers' compensation insurance. Clearly, as a matter of law, a subcontractor and its employees are independent contractors for which the general contractor is not responsible. In order to be a statutory employee, the relationship of the general and the subcontractor's agents or employees must not survive a "right to control" test and a "relative nature of the work" test. *Romero v. Shumate Constructors, Inc.*, 119 N.M. 58, 888 P.2d 940 (NM App. 1994).

The "right to control" test and a "relative nature of the work" test and a requirement that a subcontractor have at commencement and continue throughout the contract to have workers' compensation insurance can be the subject of the contract between the general contractor and the subcontractor. The argument of the Workers' Compensation Administration that a general contractor can not protect itself from becoming a statutory employee in the limited construction engaged in by Jackson Construction, Inc., is without merit. Very simply, a general

contractor can by contract create a duty on the part of a subcontractor to establish continued workers' compensation coverage by a subcontractor as a condition precedent to getting paid by the general contractor!

There are significant portions of the Appellant's Brief in Chief that make bold statements of policy without citation to any authority and should therefore not be considered by the Court.

First, the Worker's Compensation Administration argues that Judge Ritter's ruling in this case will have a far reaching impact on the application of the mandatory insurance provisions of the Workers' Compensation Act. This case is narrowly tailored to the facts as they relate to Jackson Construction, Inc., and as they are stated herein and Paul Jackson, its qualifying licensee. The state has presented no citation or authority to establish the number of licensed contractors who stand in the same shoes as Paul Jackson and Jackson Construction, Inc., and it is therefore improper to make an assumption that the Judge Ritter's ruling will have a far reaching impact.

Second, the Workers' Compensation Administration makes bold statements about legislative intent, the inherent dangerousness of the construction industry and the frequency and severity of construction accidents, again without citation or authority.

If those issues are to have any impact on the application of the law to the facts in this case, and Appellee believes they should not, at least there should be citations and authority from which the facts and policy can be established.

VI. CONCLUSION

The Court should affirm the decision of the Trial Judge:

1. Jackson Construction, Inc., whose qualifying party is licensed contractor Paul Jackson, is not required, as a matter of law, to carry workers compensation insurance or to file a certificate of insurance under NMSA, §52-1-4; and

2. The conclusion of the Administrative Law Judge , on behalf of the Secretary of the Worker's Compensation Administration, that Jackson Construction, Inc., is subject to the Workers' Compensation Act and required to maintain workers' compensation insurance and file a certificate thereof, is not in accordance with law.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that a copy of the forgoing Answer Brief was served by US Mail on the 4th., day of January , 2011, to:

Roberta Y. Baca, Esq.
Workers' Compensation Administration
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P.O. Box 27198
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and by facsimile transmission to her at (505)841-6813.

Robert M. Doughty II

STATEMENT OF COMPLIANCE

The body of this Answer Brief does not exceed the thirty five (35) page limitation of NMRA 12-213(F), WordPerfect and Times New Roman font is used and the word count consists of 3,412 words, well within the limit of 11,000 words.

Robert M. Doughty II