

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

A. INTRODUCTION 1

B. Marysville Taping Is A Nominal Party; The Real Party In Interest Was Ron Moen. 1

1. **The ALJ’s Findings of Fact** 1

2. **The Undisputed Facts Set Forth in the 4Transcript** 3

3. **Proof of Ownership.** 3

4. **Contract Performance** 3

5. **Mr. Gilbertson Stepped Up to Protect His Equity** 4

6. **MTC is barred by Statute and Administrative Regulations From Performing An Electrical Hook-up.** 4

7. **MTC is Not Vicariously Liable for Mr. Moen’s Actions.** 5

8. **Mr. Moen’s Actions Were Gratuitously Independent** 5

9. **Mr. Gilbertson Clearly Requested The Assistance of Mr. Moen** 5

10. **Mr. Moen Provided Clear Testimony** 6

11. **Mr. Moen is the Real Party In Interest, But His Exemption is Imputed to MTC** 6

C. Fact-Finding In This Case Is the Exclusive Providence of the ALJ. 7

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

State v. O'Connell, 83 Wn.2d 797, 825, 828-829, 523 P.2d 872, 1974 Wash. LEXIS 962, 77 A.L.R.3d 874 (Wash. 1974)

5

Statutes

RCW 19.2 8.2614 (6)

6

19.28 RCW

7

19.28 RCW

7

Administrative Codes

WAC 296-46B-995 (12)

7

WAC 296-46B-995 (13)

7

APPELLANT'S REPLY STATEMENT OF THE CASE

A. INTRODUCTION

Despite the Department's continuing stipulation to the Administrative Law Judge's Findings of Fact, it now attempts to misconstrue the ALJ's factual findings by falsely asserting that she perceived this as a case involving a contractor – subcontractor relationship in which the contractor was alleged to be building an investment house for resale.

The Department's motive in this case is transparent. It elected to cite Marysville Taping rather than Ron Moen because this enabled it to stack multiple statutory charges against a corporation. This would not have occurred if it had simply cited Ron Moen. Moreover, if it had cited Ron Moen, without citing Brook Gilbertson, its prejudice would have been obvious. Brook Gilbertson lived locally and he had called his old friend, Ron Moen, to assist him on the construction of his home, in eastern Washington.

The applicable statute requires the fact-finding to be performed by the ALJ, not the Electrical Board. As a consequence, her factual findings are given substantial weight upon appellant review.

B. MARYSVILLE TAPING IS A NOMINAL PARTY; THE REAL PARTY IN INTEREST WAS RON MOEN.

1. The ALJ's Findings of Fact

The ALJ's primary focus was on Mr. Moen's conduct, motivations, and thinking as they related to the heater hookup.

Although she mentioned Marysville Taping Company (“MTC”) she did so only to identify its contractual relationship as it related to the work performance at the jobsite. She noted that MTC is not an electrical contractor;¹ it never involves itself in electrical work,² when it installs sheet rock it requires heat,³ and its crew came from out of town to perform such work.⁴

Her factual analysis, as it related to the application of the relevant law, was based on her findings that Ron Moen was not a certified electrician,⁵ that Mr. Moen never involves himself in electrical work when performing sheet rock contracting⁶, that Mr. Moen did not offer to connect the heater to the power source⁷ that he did not want to do the hookup;⁸ that he had no expertise in electrical contracting,⁹ and that he reluctantly connected the heater to the heat source at the instruction and request of Mr. Gilbertson.¹⁰

2. The Undisputed Facts Set Forth in the Transcript

The transcript corroborates the ALJ’s findings of fact:

1. The inspector testified that Mr. Gilbertson told me that Ron Moen was the guy that did it¹¹
2. The inspector testified that there’s an exemption for homeowners.¹²
3. Mr. Moen acted completely under the direction of Mr. Gilbertson, the homeowner, who testified as follows:

¹ Finding of Fact (“FF”) #2, CP 3, page 104

² FF #18, CP 3, page 106

³ FF #15, CP 3, page 105

⁴ FF #16, CP 3, page 105

⁵ FF #2, CP 3, page 104

⁶ FF #18, CP 3, page 106

⁷ FF #18, CP 3, page 106

⁸ FF #18, CP 3, page 106

⁹ FF #18, CP 3, page 106

¹⁰ FF #19, CP 3, page 106

¹¹ CP3, page 130

¹² CP3, page 141

I was instructed by Mr. Gilbertson to do every single thing that was done, including the wire that he supplied. I asked him what he had for plans for heat. It's not my job or my responsibility, and he said, Oh, I got some wire. I'll bring it to you. So he brought a roll of wire over and delivered it to me. I don't know which is right or wrong, and I -- I just saw this roll of wire, and he left; and I called him back up on the phone and said, Well, I don't know what that's for; and he said, Well, just hook it up to the two hot leads being used on the temporary power. I only did what I was instructed to do with what I was given. I don't—there's no doubt what I did was wrong. I just -- I didn't know I wasn't allowed to do that. If someone had told me I wasn't allowed to do that, I wouldn't have done it. I hate electricity.

Q *So did Mr. Gilbertson instruct you specifically how to how to hook up the heater or what?*

A *Implicitly. He told me to hook up to the two hot leads that were hooked up on the temporary power, and I did just what I think Exhibit 4 Page 1 shows it, the two hot leads that were hooked up, and it shows in one of the exhibits where that was improper. Well, that's the leads that were on when I opened up the panel, so that's why I hooked it.*

Q *And so -- so in what context did he tell you to hook up the -- so he provided the cable, the wire?*

A *Yes, yes. He provided it and left, and I called him, and I didn't know what to do, and he said just hook it up to the heater and hook it up two the two hot leads being used on the temporary pole.¹³*

3. Proof of Ownership.

The record does not confirm ownership of the residential dwelling at 21805 Colt Road in Leavenworth, Washington where the work was performed. There was no testimony by the owner of the property. Mr. Moen believed it was owned by Mr. Gilbertson and that he was doing a personal favor for Mr. Gilbertson by traveling to Eastern Washington and performing work for his friend, at his residential dwelling.

In her Conclusions of Law, the ALJ concluded that Brooks Gilbertson was the owner of the property.¹⁴

4. Contract Performance

¹³ CP3-, pages 142-143.

¹⁴ CP3-page 13, Conclusion of Law #13.

Mr. Moen testified that MTC was not required to provide heat and that this activity was expressly excluded from its contract performance. In fact, Gilbertson Construction was contractually required to provide heat. Gilbertson Construction was technically in breach of contract for its failure to provide the heat. Of course, MTC would not bring a breach of contract action against Gilbertson Construction for its lack of performance because upon the completion of its scope of contract services, it would be paid whether Gilbertson Construction provided heat or failed to provide heat. Clearly the defined obligation to provide heat had nothing to do with the contracting parties' respective obligations. As soon as MTC performed its scope of work in a workmanlike manner, payment would be due it. The provision regarding the obligation to provide heat was inserted into the contract for two purposes, to wit: (1) to notify Gilbertson Construction that heat had to be provided in order to protect and preserve MTC's installed sheetrock and (2) to notify Gilbertson Construction that MTC would not provide the required heat and it had no contractual obligation to do so.

5. Mr. Gilbertson Stepped Up to Protect His Equity.

Essentially, Mr. Gilbertson recognized his company's failure to provide heat. He stepped into the gap of the company's lack of performance. He volunteered to provide personally to his friend, Ron Moen---the materials, know how, and direction for the heat connection. As the homeowner, he knew he had to provide heat to preserve and protect the value of the increased equity in his home, that is, that his home was more valuable with freshly installed drywall that was properly cured with heat than one that was allowed to cure, without heat.

6. MTC is barred by Statute and Administrative Regulations From Performing An Electrical Hook-up.

A Washington corporation is solely a creature of statute. A Washington corporation is only authorized to perform lawful activities. Clearly it could not authorize one of its agents to act unlawfully by making an unlawful electrical hook-up. MTC was not only barred from making the hook-up to provide heat, it expressly provided that it would not provide the heat and thus it would not make an electrical hook-up to provide the heat. Mr. Moen could not bind his corporation with his performance of an ultra vires act. The principles of estoppel, ratification or implied contract are not available to the Department, in this case. The doctrine of implied authority cannot be invoked to favor the Department. State v. O'Connell, 83 Wn.2d 797, 825, 828-829, 523 P.2d 872, 1974 Wash. LEXIS 962, 77 A.L.R.3d 874 (Wash. 1974)

7. MTC is Not Vicariously Liable for Mr. Moen's Actions.

The Department claims that MTC violated its statutes and regulations when Ron Moen hooked up the electrical heater. However, Mr. Moen was not acting in furtherance of his company's business and within the course and scope of his employment, when he made the electrical heater hookup, therefore his actions cannot be vicariously imputed to the company.

8. Mr. Moen's Actions Were Gratuitously Independent

Mr. Moen reluctantly made the electrical heater hookup on behalf of his friend, Brook Gilbertson. He was scared of electricity. MTC had not authorized him to do this. His company was not paying him to do this. His company never offered to do

this. His company was not receiving any payment from Mr. Gilbertson for the performance of this gratuitous act by Mr. Moen. Co.

9. Mr. Gilbertson Clearly Requested The Assistance Of Mr. Moen

Mr. Gilbertson, the householder, needed to hold on to and protect the value that had been added to his property by MTC's performance of its contract services. He knew that MTC had no contractual obligation to provide heat. Gilbertson Construction had not utilized the services of its own electrician to make the heat hook, up, therefore, he as the owner and householder of the property, elected to perform this activity himself, with the assistance of Mr. Moen. He provided all the equipment and expressly directed Mr. Moen to assist him by making the hook-up.

10. Mr. Moen Provided Clear Testimony.

The ALJ concluded that RCW 19.2 8.2614 (6) allows a householder to receive assistance from a friend or other person to make an electrical insulation provide the friend of person does not hold themselves out as engaged in trade or business of electrical installations.¹⁵

MTC was unrepresented by counsel. Mr. Moen could not represent MTC, only a lawyer could represent it.

Mr. Moen represented himself. His testimony was given with complete candor, humility and thoughtfulness.

A property owner is a householder, whether he occupies the property or not. Mr. Gilbertson was constructing his residence and the evidence is inconclusive, thus

¹⁵ CP3, page 107, Conclusion of Law #3.

susceptible to speculation, as to whether he occupied it at the time of the electrical hook-up.

Mr. Moen had acted on his own to assist a friend (who happened to be the householder) and therefore he was entitled to the electrical installation exemption.

11 Mr. Moen is the Real Party In Interest, But His Exemption is Imputed to MTC

The evidence is undisputed that the ALJ's focus of inquiry was solely devoted to the activities of Mr. Moen. The record is absolutely bare of any connection, authorization or joinder by concert between MTC and Mr. Moen when the hook-up was made.

Since Mr. Moen qualified individually for the exemption, his exempted activity, as the real party in interest, must be necessarily imputed to MTC.

When the ALJ found that the Department had not met its burden by the preponderance of the evidence, MTC was necessarily found (1) not to have performed the installation and (2) Mr. Moen's exempted hook-up activities did not impute to MTC.

C. Fact-Finding In This Case Is the Exclusive Providence of the ALJ.

Appellant first exercised its right of appeal from the department citations issued to it pursuant to WAC 296-46B-995 (12):

(12) Appeals of penalties issued by the department.

(a) A party may appeal a penalty issued by the department, pursuant to chapter 19.28 RCW and this chapter, to the board. The appeal shall be assigned to the office of administrative hearings.

A mandatory hearing was held pursuant to administrative procedure act and the Administrative Law Judge issued her proposed decision which held that all citations issued against Petitioner were dismissed and set aside.

The Department then appealed to the Electric Board. It claims that it may appeal the Administrative Law Judge's decision to the Board pursuant to WAC 296-46B-995

(13):

13) Appeals of proposed decisions issued by the office of administrative hearings.

(a) A party may appeal a proposed decision issued by the office of administrative hearings pursuant to chapter 19.28 RCW to the board.

Accordingly, fact-finding is done only by the ALJ and the Electric Board then reviews the proposed decision for a final order. No lawful authority exists in this case for the Electrical Board to conduct a fact-finding hearing.

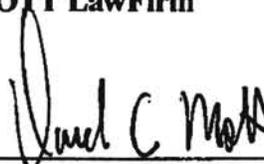
CONCLUSION

MTC did not connect and/or perform an electric heater hook-up. Ron Moen acted independently as a friend or other person who assisted the owner of the household in an electrical heater hook-up which activity is exempt from the Department's regulation. The Trial Judge's Decision to affirm the Electric Board's order should be reversed.

Respectfully submitted
this 19th day of November, 2013

The MOTT Law Firm

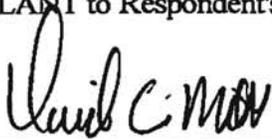
By



David C. Mott, WSBA# 20548 16821 Smokey
Point Blvd. #811 Arlington, WA 98223
(360)435-5656
Attorney for Appellant

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I emailed and mailed a true copy of this REPLY BRIEF OF APPELLANT to Respondent's counsel at the regular office or residence thereof.



DATED: 11 /19/2013, at Arlington, Washington
DAVID C. MOTT, WSBA #20548

RECEIVED
NOV 21 2013
11:39 AM