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**UTAH LABOR COMMISSION**

**RYAN C. WILKERSON,**

**Petitioner,**

vs.

**AMERICA’S CHOICE GARAGE  
DOOR and/or UNINSURED  
EMPLOYERS FUND,**

**Respondent.**

**ORDER AFFIRMING  
ALJ’S DECISION**

**Case No. 06-0126**

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America’s Choice Garage Door (“America’s Choice”) and the Uninsured Employers Fund (“UEF”) ask the Utah Labor Commission to review Administrative Law Judge Holley’s award of benefits to Ryan C. Wilkerson under the Utah Workers’ Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers’ Compensation Act.

**BACKGROUND AND ISSUE PRESENTED**

Mr. Wilkerson claims workers’ compensation benefits from America’s Choice for a work accident that occurred on November 22, 2005, injuring his hands. America’s Choice declined to answer the claim or to defend against the claim at the hearing, although it did testify as a witness for UEF by phone. Based on the evidence, including testimony from Mr. Wilkerson, Judge Holley found Mr. Wilkerson was an employee of America’s Choice and therefore America’s Choice was liable for workers’ compensation benefits. Thus, she dismissed UEF as a party. Judge Holley awarded benefits, including temporary total disability compensation and medical expenses.

In its motion for review, America’s Choice contends that Mr. Wilkerson was not an employee but an independent contractor and therefore America’s Choice is not liable for his injury. It further argues that the Commission should open the record for potentially new evidence.<sup>1</sup>

**FINDINGS OF FACT**

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<sup>1</sup> UEF also filed a motion for review despite its dismissal, arguing that if America’s Choice later becomes insolvent, UEF would be liable for payments. However, as UEF’s later role in this matter is speculative, the Commission will not address the issues raised in its motion for review. However, if UEF later does become a party again to this matter, the Commission will permit UEF to renew its motion for review.

**ORDER AFFIRMING ALJ'S DECISION**  
**RYAN C. WILKERSON**  
**PAGE 2 OF 4**

The Commission adopts Judge Holley's findings of fact. The facts relevant to the issues in the motion for review can be summarized as follows:

In August of 2005, Mr. Wilkerson was hired by America's Choice to provide service calls to its Utah customers. Upon hiring, Mr. Wilkerson received a week of training from a company representative on how to perform service calls, how to complete proper paperwork, and other relevant job requirements. The representative offered to provide Mr. Wilkerson any of the tools he needed but Mr. Wilkerson declined because he already had tools. He was provided America's Choice business cards with his name and the company's number on the cards.

Mr. Wilkerson's work schedule was Monday through Saturday, 8 am to 6 pm. If he wanted time off he would need to call the company's call center to schedule time off. On a normal work day Mr. Wilkerson would call the call center for his daily appointments, which were scheduled by America's Choice. Mr. Wilkerson then reported to the client's house, representing himself as an employee of America's Choice dispatched to repair the client's garage door. He would inspect the garage door and determine the cause of the malfunction. Then, using America's Choice letterhead invoices and billing sheets, he would draft a proposed invoice for the work. If the client approved, he would then perform the service, using America's Choice parts for the repair work. The company's billing forms were completed and given to the client. The clients made payments to America's Choice. Mr. Wilkerson's wages were paid piece rate for each garage door fixed although he was guaranteed a minimum base weekly salary of \$400. Mr. Wilkerson claimed nine tax exemptions in order to avoid having taxes taken from his checks.

On November 22, 2005, Mr. Wilkerson was repairing a garage door opener for one of America's Choice's clients when a spring forcefully recoiled, catching his left thumb and dorsal right hand. Mr. Wilkerson suffered a near left thumb amputation and substantial right hand laceration and had immediate surgery. He was off work for one week and then returned to work up until April 21, 2006, when he was no longer able to work.

**DISCUSSION AND CONCLUSION OF LAW**

The primary issue before the Commission is whether Mr. Wilkerson was an employee of America's Choice and thus entitled to workers' compensation benefits. Under Section 34A-2-103(2) of the Utah Workers' Compensation Act, "each person . . . who regularly employs one or more workers or operatives in the same business . . . under any contract of hire . . . is considered an employer." America's Choice argues, however, that Mr. Wilkerson was hired as an independent contractor and was not an employee for workers' compensation purposes.

Section 34A-2-103(7)(a) provides "[i]f any person who is an employer procures any work to be done wholly or in part for the employer by a contractor over whose work the employer retains supervision or control, and this work is a part or process in the trade or business of the employer" the

**ORDER AFFIRMING ALJ'S DECISION**  
**RYAN C. WILKERSON**  
**PAGE 3 OF 4**

contractor is considered an employee of the original employer. In Bennett v. Industrial Commission of Utah, 726 P.2d 427, 432 (1986), the Utah Supreme Court held, "the term 'supervision or control' requires only that the general contractor retain ultimate control over the project." The court also observed:

The power to supervise or control the ultimate performance of subcontractors satisfies the requirement that the general contractor retain supervision or control over the subcontractor. Therefore, as long as a subcontractor's work is a part or process of the general contractor's business, an inference arises that the general contractor has retained supervision or control over the subcontractor. Id. at 432 (citations omitted).

The Commission finds that America's Choice retained sufficient control over Mr. Wilkerson's work and that the work Mr. Wilkerson did on behalf of the company was a part or process in the trade or business of America's Choice's. America's Choice handled the initial client calls and then scheduled Mr. Wilkerson to go out for appointments. Mr. Wilkerson was required to be available for those appointments certain times and days of the week, and if he wanted time off, he had to call and make arrangements with the company. Although, no one at the company checked over Mr. Wilkerson's work, as the company testified, he was a good repairman and his knowledge and experience in making the repairs does not diminish the ultimate control that America's Choice had over his work. Therefore the Commission finds that America's Choice was Mr. Wilkerson's employer as defined under the workers' compensation statute and is liable for paying Mr. Wilkerson's workers' compensation benefits.

The Commission notes America's Choice request to reopen the evidentiary record for new evidence. However, America's Choice provided no explanation for why the record should be reopened or what new evidence it allegedly has obtained that was not previously available at the hearing. Therefore the Commission declines to disturb the evidentiary record and denies the request.

**ORDER**

The Commission hereby affirms Judge Holley's decision. It is so ordered.

Dated this 30<sup>th</sup> day of June, 2009.

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Sherrie Hayashi  
Utah Labor Commissioner

**IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.**

**ORDER AFFIRMING ALJ'S DECISION**  
**RYAN C. WILKERSON**  
**PAGE 4 OF 4**

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

