IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edward Michael Caulkins, d/b/a Caulkins Construction, Petitioner	:	
v.	:	No. 1169 C.D. 2007
	:	Submitted: August 6, 2010
Workers' Compensation Appeal Board (Benson), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: September 1, 2010

Edward Michael Caulkins, d/b/a/ Caulkins Construction (Employer), petitions for review of a Workers' Compensation Appeal Board's (Board) order affirming the order of the Workers' Compensation Judge (WCJ) granting Aaron Benson's (Claimant) claim petition because he met the definition of an employee under Section 104 of the Workers' Compensation Act (Act).[1] Finding no error in the Board's decision, we affirm.

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §22. That section provides, in pertinent part:

> The term "employe," as used in this act is declared to be synonymous with servant, and includes—

(Footnote continued on next page…)

Claimant worked for Employer from September 1 through September 28, 2004. While on work-release from the McKean County jail and on the last day of his employment, he fell approximately 12 feet from a ladder while cutting a tin roof, landing on concrete and suffering multiple factures to the heel of his foot. Claimant filed a claim petition on February 28, 2005, seeking lost wages and full disability from September 28, 2004, to the present. Employer did not carry workers' compensation insurance and filed an answer denying the claim because Claimant was not an employee but was working as an independent contractor.

Before the WCJ, Claimant testified that prior to 2004, he worked in the construction business for approximately eight or nine years, at times for other employers and at times for himself. In September 2004, Employer agreed to hire him to do construction work and signed a "work release employment verification" form for Claimant to be eligible for McKean County's work-release program. The form indicated that Claimant would work five to six days per week at a rate of $6 per hour, and that Mr. Caulkins was to be his "employer." Claimant testified that he would be paid $12 per hour; however, he only reported $6 per hour on the official employment form because the McKean County jail took 20% of Claimant's pay as a requirement of being in the work-release program. He

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(continued…)

> All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer. . . .

testified that he was paid weekly with no withholdings and without regard to whether a specific project was completed, and that Employer never told him he would be working as an independent contractor. Claimant admitted that he informed Employer that he had liability insurance but that Employer did not tell him until after his injury that Employer did not carry workers' compensation insurance.

As to the manner in which the work was carried out, Claimant testified that Employer acted as the foreman or supervisor on each job, and that Employer told him where the job was, what work was to be done each day, and that he controlled Claimant's work hours. Claimant admitted that he had his own pick-up truck at the time with a trailer that read "Aaron Benson General Contractor," but that he only drove his own truck on several occasions and never pulled his trailer to any jobs with Employer. Most days, he used Employer's vehicle for transportation to and from the job sites. Claimant admitted that he brought his own hammer, tape measure and square to work with him, but Employer supplied most of the tools and equipment he used, including ladders, saws, cords, planks, jacks and a van.

As for his injuries, Claimant testified that he suffered multiple heel fractures and his heel was broken into approximately 14 or 15 pieces. Bradley F. Giannotti, M.D. (Dr. Giannotti), an orthopedic surgeon, performed surgery on his foot on October 7, 2004, at which time he inserted a steel plate and 12 screws into Claimant's heel and ankle. At the time of the hearing, Claimant indicated that he only had front and back function with his right foot and ankle, that he could not

move it from side to side, that it was very tender and sensitive, that he suffered shooting pain, and that he was unable to walk on uneven ground. He testified that he could not return to work full-time in the construction industry doing the type of work he previously did because it was too physically demanding, he was unable to stand on a ladder or balance on his right leg, and it would cause him too much pain.

By stipulated report dated November 1, 2005, Dr. Giannotti stated that Claimant sustained a calcaneus fracture and underwent open reduction internal fixation of the calcaneus on October 4, 2007. While he indicated that the surgery went well and without any complications, it was a very serious fracture as it went through a joint and this could cause Claimant significant future pain and limitations. Dr. Giannotti stated that his prognosis was guarded, that he did not expect Claimant to improve dramatically, and that Claimant could develop more extensive arthritis in the subtalar joint in the future. He believed that Claimant had a partial disability to the extent that he was unable to tolerate any lengthy periods of weightbearing and that while he could be employed, it would have to be at an occupation which did not involve more than three hours of weightbearing on his right leg. Dr. Giannotti believed that Claimant would never be able to return to his previous occupation of construction, "at least not in the capacity that he was performing those duties." (Reproduced Record (R.R.) at 9a.)

In opposition, Employer testified that he was on "a friendly basis" with Claimant and that prior to his impending incarceration, Claimant approached him about working in his construction business so that he would be eligible for the

work-release program. In response, he told Claimant that he could only hire him if he was a subcontractor that had insurance and that Claimant knew he was an independent contractor from the start. Employer claimed that he had to pay Claimant by the hour because that was the only work arrangement the McKean County jail would accept. Employer admitted that he lied on the employment verification form regarding Claimant's hourly rate of pay. After Claimant was injured, Employer testified that Claimant never asked him to file a report, never asked him about workers' compensation, and that he was unaware of this case until he received a copy of the claim petition.

Regarding workers' compensation insurance, Employer testified that he carried insurance for several years but dropped it approximately two months before hiring Claimant when he downsized his company. When he did carry workers' compensation insurance, he testified that he deducted taxes and costs of programs from his employees' pay, but now he simply cut checks to the workers without taking out any taxes or deductions. Employer testified that after he dropped his workers' compensation insurance, he had the individuals working for him sign work agreements stating they were independent contractors, but he admitted that he never had Claimant sign such an agreement.

The WCJ accepted Employer's testimony that he intended to designate Claimant as an independent contractor for purposes of not retaining workers' compensation insurance. However, he also found credible Claimant's testimony that Employer advised him when and where to work, what was to be done on a particular day, and that Employer had the right to fire Claimant at any

time. In addition, the WCJ found that Employer provided the majority of tools utilized as well as transportation to and from the job site on most occasions; that Claimant was paid by the hour on a weekly basis, without regard to the status or completion of the job; and that Claimant performed construction work, which was part of Employer's normal and regular business. The WCJ also found persuasive the fact that the only written documentation regarding Claimant's status was Employer's acknowledgement to the McKean County jail that he was, in fact, Claimant's "employer." Given the balance of these factors, the WCJ found that Claimant sustained his burden of proof that he was an employee and not an independent contractor and awarded benefits, based on Dr. Giannotti's report, from September 28, 2004 onward. After Employer's appeal to the Board was denied, this appeal followed.[2]

The core issue in this appeal is whether the Board erred in finding that Claimant was an employee rather than an independent contractor. An independent contractor is not entitled to benefits because of the absence of a master/servant relationship. 77 P.S. §21;[3] 77 P.S. §22; *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board (Minteer)*, 563 Pa. 480, 485, 762 A.2d 328, 330

[2] Our scope of review is limited to determining whether the necessary findings of fact are support by substantial evidence, whether constitutional rights have been violated or whether an error of law has been committed. *Ward v. Workers' Compensation Appeal Board (City of Philadelphia)*, 966 A.2d 1159 (Pa. Cmwlth. 2009).

[3] Section 103 provides, "The term 'employer,' as used in this act, is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it." 77 P.S. §21.

(2000). Whether Claimant has met his burden of establishing an employer/employee relationship necessary to receive benefits is a question of law that is determined on the unique facts of each case. *Minteer*, 563 Pa. at 486, 762 A.2d at 331. Our Supreme Court has held that the following factors should be used in making that determination:

> Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer; and also the right to terminate the employment at any time.

Zimmerman v. Public School Employes' Retirement Board, 513 Pa 560, 563, 522 A.2d 43, 45 (1987) (citing *Hammermill Paper Co. v. Rust Engineering Co.*, 430 Pa. 365, 243 A.2d 389 (1968)). *See also Universal Am-Can.*[4]

Employer argues that Claimant did not qualify as an employee under the Act because he did not meet the statutory definition of employee which does *not* include "persons whose employment is casual in character and not in the regular course of the business of the employer." 77 P.S. §22. According to Employer, Claimant's employment situation came about for the express purpose of

[4] Employer contends that those factors do not comport with the statutory definition of "employe" as set forth in 77 P.S. §22. While that argument ignores that our Supreme Court was addressing the interplay between that provision and 77 P.S. §21, even if we were inclined to do so, and we are not, we are bound to follow the Supreme Court's direction on how that determination is to be made.

his being released from jail under a work-release program. His situation was a fortuitous request made in a casual setting, no specific duration was stated, and there was no actual need on the part of the Employer. Therefore, Employer argues that his employment was purely casual in nature.

The term "casual" is not defined by the Court but we have offered the following guidance in this area:

> Involved in [the term] are the ideas of fortuitous happening and irregularity of occurrence; it denotes what is occasional, incidental, temporary, haphazard, unplanned. . . . [I]t may be said in general that if a person is employed only occasionally, at comparatively long and irregular intervals, for limited and temporary purposes, the hiring in each instance being a matter of special engagement, such employment is casual in character. . . . If the work is not of an emergency or incidental nature but represents a planned project, and the tenure of the service necessary to complete it and for which the employment is to continue is of fairly long duration, the employment is not casual.

Gill v. Workmen's Compensation Appeal Board, 425 A.2d 1206, 1208 (Pa. Cmwlth. 1981) (citing *Cochrane v. William Penn Hotel*, 339 Pa. 549, 16 A.2d 43 (1940)).

While the employment arrangement in this case may have come about due to Claimant's incarceration and his wish to enter the work-release program, his employment was not casual in nature. He worked up to 12 hours per day, six days per week, for approximately four to five weeks. The record indicates that the

employment relationship would have continued as such, indefinitely, but for Claimant's injury. Claimant's work was not occasional or irregular, but continuous. It was not done on an emergency basis, but rather planned by both parties. Claimant worked on planned projects which constituted the very core of Employer's business – his work was not incidental. Along these same lines, Employer's argument that Claimant's employment was not in the regular course of his business is completely unavailing. Employer operated a construction business. His primary income-producing activity was construction, and he admits that Claimant worked solely on construction projects while in his employ.

Moreover, the evidence overwhelmingly supports the Board's determination that Claimant was an employee. Employer controlled the manner in which work was to be done as he decided what jobs to take and told Claimant where to report and what to do every day. Employer set the work hours, supplied most of the tools, and provided transportation to and from job sites on most occasions. Claimant was paid by the hour on a weekly basis rather than upon completion of a particular job, and he performed construction work that was part of Employer's regular course of business. Finally, Employer retained the ability to terminate Claimant's employment at any time. All of those findings support the Board's conclusion that an employee, not an independent contractor, status exists.

Employer also argues that the record does not contain sufficient medical evidence to sustain a finding of total disability for a defined time period. However, the only medical evidence submitted in this case is the report of Dr. Giannotti. This report indicated that Claimant's injury was very serious in nature

as it involved a fracture of a joint and could cause significant future pain and limitations. Dr. Giannotti's prognosis for Claimant was guarded and he specifically stated "I don't expect him to improve dramatically." (R.R. at 9a.) He indicated that Claimant could develop more extensive arthritis and might require future surgery. Dr. Giannotti's unrefuted opinion, which was accepted as credible, was that Claimant was disabled, that he was unable to tolerate any lengthy periods of weightbearing, and that he would never be able to return to his previous occupation of construction. Because Claimant proved that he was unable to perform the same type of work he was engaged in at the time of his injury, and Employer did not offer any evidence that other work was available to him that he was capable of performing, the Board properly determined that Claimant was entitled to total disability benefits. *See Barrett v. Otis Elevator Co.*, 431 Pa. 446, 246 A.2d 668 (1968).

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 1st day of September, 2010, the May 23, 2007 order of the Workers' Compensation Appeal Board at No. A06-1073 is affirmed.

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DAN PELLEGRINI, JUDGE