

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Joseph and Elizabeth Gallardo,	:	
Petitioners	:	
	:	
v.	:	No. 1619 C.D. 2010
	:	SUBMITTED: February 4, 2011
Workers' Compensation Appeal	:	
Board (Cesario),	:	
Respondent	:	

**BEFORE:**   **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge  
              **HONORABLE PATRICIA A. McCULLOUGH**, Judge  
              **HONORABLE JOHNNY J. BUTLER**, Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**  
**PRESIDENT JUDGE LEADBETTER**                      **FILED: April 14, 2011**

Joseph and Elizabeth Gallardo, husband and wife, petition for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) granting the claim petition of Nicholas Cesario (Claimant) and denying the Gallardos' petition to join Dale Wilson as an additional defendant. The Gallardos argue that they are not liable for Claimant's work injury because he was either an independent contractor or Wilson's employee or because he was merely a "casual" employee. The Gallardos also challenge the WCJ's calculation of Claimant's average weekly wage. For the reasons that follow, we affirm the order of the Board.

On December 3, 2007, Claimant filed a claim petition against the Gallardos, alleging that while working as a construction worker at the Gallardos' renovation project site on August 10, 2007, he sustained a hematoma and a nerve

damage to his left extremity when his left leg fell through a hole in the staircase. On December 27, 2007, Elizabeth Gallardo sent the Bureau of Workers' Compensation a letter, stating that she and her husband were not Claimant's employer. On January 28, 2008, Claimant filed another claim petition seeking benefits from the Uninsured Employers Guaranty Fund (Fund).<sup>1</sup> In the subsequently filed answers to the claim petitions, the Gallardos again denied that they were Claimant's employer. The Gallardos thereafter filed a petition to join Dale Wilson, who worked at their renovation sites, as an additional defendant. At hearings before the WCJ, Claimant and the Gallardos testified and presented the deposition testimony of witnesses and exhibits, which are summarized below.

Elizabeth Gallardo purchased eight properties in Lackawanna County before she was married to Joseph Gallardo. Joseph Gallardo renovated and rented those properties. He listed him as the contractor in the building permits and oversaw the renovation projects. Claimant began working as a general laborer at the renovation sites in May 2007. While working on the property located at 544 Hemlock Street in the City of Scranton on August 10, 2007, Claimant sustained an injury to his left leg, when he fell through a hole in the staircase, and was treated in the hospital emergency room. After the injury, Claimant returned to work for

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<sup>1</sup> The Fund was established by Section 1602(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, added by Section 7 of the Act of November 9, 2006, P.L. 1362, 77 P.S. § 2702(a), which became effective on January 8, 2007. The Fund is required to "maintain the fund for the exclusive purpose of paying to any claimant or his dependents workers' compensation benefits ... where the employer liable for the payments failed to insure or self-insure its workers' compensation liability ... at the time the injuries took place." Section 1602(c). The Fund must exhaust all remedies at law against the uninsured employer to collect the amount of benefits it paid. Section 1605(b) of the Act, added by Section 7 of the Act of November 9, 2006, P.L. 1362, 77 P.S. § 1605(b).

another employer, but he stopped working after three weeks due to the problems with his left knee.

Claimant's treating physician, Eugene J. Chiavacci, M.D., a board-certified orthopedic surgeon, performed surgeries on Claimant's left leg on August 13 and 15, 2007 to evacuate a large hematoma and alleviate compartment syndrome in his left lower extremity. Dr. Chiavacci opined that Claimant's complaints of pain in his left leg were causally related to the work injury and that he was restricted to light-duty work. Gregory W. Bormese, M.D., a plastic surgeon, who performed a skin graft to close the open wound in Claimant's left leg, also opined that Claimant's condition was caused by the work injury.

Claimant testified that Joseph Gallardo provided all materials for the renovation projects and assigned his work. Tools were also provided at the renovation sites. Claimant considered Dale Wilson to be his foreman. Claimant further testified that Joseph Gallardo paid him \$10 to \$12 an hour and \$500 a week in average in cash.

Joseph Gallardo admitted that he provided all the materials necessary for the renovation projects. He paid Claimant based on the number of hours Claimant worked by placing cash in an envelope with Claimant's name on it and distributing it at the job sites. Joseph Gallardo testified that his primary occupation was a financial advisor and that the renovation work was not his regular business. Elizabeth Gallardo testified that she paid the renovation costs with checks withdrawn from her bank account and that her husband acted as her agent in renovating the properties and received 10% of the collected rent. The Gallardos included the rent income in their joint tax returns. Dale Wilson testified that he was an electrician and a union member. He denied that he was the foreman at the

renovation sites or had any authority to discharge workers. He further testified that Joseph Gallardo told Claimant to work on the stairs on the date of Claimant's injury and that Joseph Gallardo paid the workers in cash by placing it in envelopes and distributing them at the job sites.

Accepting the testimony of Claimant, his treating physicians and Wilson as credible and rejecting the conflicting testimony of Joseph Gallardo, the WCJ concluded that Claimant met his burden of establishing that he sustained the injury on August 10, 2007 in the course of his employment with the Gallardos and had not fully recovered from the injury. The WCJ denied the Gallardos' petition to join Wilson as an additional defendant and granted the claim petition. The WCJ awarded Claimant weekly disability benefits of \$333.33 based on his average weekly wage of \$500, to be paid by the Gallardos or the Fund, and suspended his benefits for the three-week period when he returned to work for another employer after the work injury. The Board affirmed, concluding that the WCJ's decision is supported by substantial evidence. The Gallardos argue that they were not liable for Claimant's work injury because he was either an independent contractor or Wilson's employee.

In a claim petition proceeding, a claimant has the burden of proving all of the elements required for an award of workers' compensation benefits. *Inglis House v. Workmen's Comp. Appeal Bd. (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). To be eligible for benefits, the claimant must establish, *inter alia*, that an employment relationship existed at the time of the injury and that the injury was related to that employment. *Tri-Union Express v. Workers' Comp. Appeal Bd. (Hickle)*, 703 A.2d 558 (Pa. Cmwlth. 1997).

Although there is no hard and fast rule for determining whether the

claimant was an employee or an independent contractor, the following factors are relevant: (1) control over the manner in which work is to be completed; (2) responsibility for the result only; (3) terms of an agreement between the parties; (4) the nature of the work or occupation; (5) skill required for performance; (6) whether the claimant is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is made by the time or by the job; (9) whether work is part of the regular business of the alleged employer; and (10) the right to terminate the employment at any time. *Hammermill Paper Co. v. Rust Eng'g Co.*, 430 Pa. 365, 243 A.2d 389 (1968). The key and overriding factor, however, is the right to control the work to be completed and the manner in which it is to be performed. *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd. (Minteer)*, 563 Pa. 480, 762 A.2d 328 (2000); *JFC Temps, Inc. v. Workmen's Comp. Appeal Bd. (Lindsay)*, 545 Pa. 149, 680 A.2d 862 (1996). Whether the claimant was an independent contractor or an employee is a question of law to be determined on a case-by-case basis based on the facts found by the WCJ. *Nevin Trucking v. Workmen's Comp. Appeal Bd. (Murdock)*, 667 A.2d 262 (Pa. Cmwlth. 1995).

To support their argument that Claimant was an independent contractor or Wilson's employee, the Gallardos rely on Joseph Gallardo's testimony rejected by the WCJ. They maintain that "Claimant's testimony clearly lacks credibility." The Gallardos' Brief at 15. In a workers' compensation case, however, credibility determinations and the evaluation of evidentiary weight are the province of the WCJ. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150 (Pa. Cmwlth. 2007). The appellate role in a workers' compensation case is not to reweigh the evidence or review the credibility of the

witness, but to simply determine whether the WCJ's findings have the requisite measure of support in the record as a whole. *Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd. (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992). In addition, the Court must review the evidence in a light most favorable to the party who prevailed before the WCJ. *Shop Vac Corp. v. Workers' Comp. Appeal Bd. (Thomas)*, 929 A.2d 1236 (Pa. Cmwlth. 2007). It is irrelevant whether the record contains some evidence supporting findings other than those made by the WCJ. *Burrell v. Workers' Comp. Appeal Bd. (Philadelphia Gas Works & CompSrvs., Inc.)*, 849 A.2d 1282 (Pa. Cmwlth. 2004).

The testimony found by the WCJ to be credible establishes the following relevant facts. The Gallardos were in the business of purchasing, renovating and renting properties. Acting as the contractor, Joseph Gallardo renovated nine or ten properties owned by Elizabeth Gallardo in the last five years. Claimant did not engage in his own business and worked at the renovation projects as a general laborer. He did "plumbing, hooking up fixtures, tile work, sheetrock, siding, windows, whatever [Joseph Gallardo] said to do." August 20, 2008 Hearing, Notes of Testimony (N.T.) at 22.<sup>2</sup> Joseph Gallardo supplied all the

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<sup>2</sup> The Gallardos failed to number the pages of the reproduced record, as required by Pa. R.A.P. 2173. As a result, we are unable to refer to the transcripts and exhibits in the reproduced record cited by the parties. As this Court previously stated:

It is not the duty of the appellate courts to collate and number exhibits, nor to number the pages of a reproduced record. One of the purposes of the Rules of Appellate Procedure is to effectuate swift and efficient review of a party's allegations of error. Therefore, it is incumbent upon the appellants, not the Court, to specifically correlate the allegations of error to the record and the exhibits. It would be impossible for the Commonwealth's appellate courts to function if the Rules of Appellate Procedure,

**(Footnote continued on next page...)**

materials and tools, such as saws, nail-guns, compressors, and "whatever was needed for the job." *Id.* at 25. Claimant was paid by an hour, not by the job, and was not given a 1099 federal tax form for an independent contractor. Joseph Gallardo testified that he allowed independent contractors direct access to the properties being renovated, while Claimant was denied such access. Joseph Gallardo assigned Claimant's work and had the right to discharge him. Joseph Gallardo told the workers that if he was not at the job site, Wilson would be in charge and act as "the foreman." *Id.* at 58. These facts accepted by the WCJ amply support his conclusion that Claimant was the Gallardos' employee and was neither an independent contractor nor Wilson's employee.

Contrary to the Gallardos' assertion, Wilson did not admit that Claimant was his employee, due to his failure to file an answer to the joinder petition. Section 416 of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 821, provides in relevant part:

Every fact alleged *in a claim petition* not specifically denied by an answer so filed by an adverse party shall be deemed to be admitted by him. But the failure of any party or of all of them to deny a fact alleged *in any other petition* shall not preclude the [WCJ] ... from requiring, of his own motion, proof of such fact. [Emphasis added.]

Under Section 416, therefore, the failure to file an answer to a joinder petition does not result in automatic admission of the alleged facts. *Neidlinger v. Workers'*

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(continued...)

regarding brief and reproduced records, were not substantially complied with.

*Stefanovits v. Magrino*, 583 A.2d 841, 843 (Pa. Cmwlth. 1990). In *Stefanovits*, this Court quashed the appeal based solely on the appellants' failure to comply with Rule 2173. We once again emphasize the importance of compliance with Rule 2173.

*Comp. Appeal Bd. (Quaker Alloy/CMI Int'l)*, 798 A.2d 334 (Pa. Cmwlth. 2002). Further, only the factual allegations may be deemed admitted by the late answer; a conclusion of law, such as the claimant's status as an employee, is not admitted by the late answer. *Id.*

The Gallardos further argue that Claimant was a "casual" employee and is therefore ineligible to receive benefits. Section 104 of the Act, 77 P.S. § 22, defines the term "employee" to include "[a]ll 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* ...." (Emphasis added.)

Before the WCJ and the Board, the Gallardos argued only that Claimant was either an independent contractor or Wilson's employee. On appeal, they aver for the first time that Claimant was a casual employee. It is well established that an appellant waives any issue not raised in the lower tribunal. Pa. R.A.P. 302(a); *Ruiz v. Unemployment Comp. Bd. of Review*, 887 A.2d 804 (Pa. Cmwlth. 2005).

Even had the Gallardos properly preserved the issue, their argument must fail. An employment is casual in character where it is occasional, irregular or incidental in nature. *Brookhaven Baptist Church v. Workers' Comp. Appeal Bd. (Halvorson)*, 590 Pa. 282, 912 A.2d 770 (2006). The phrase "the regular course of the business of the employer" in Section 104 of the Act "refers to the normal operations which regularly constitute the business in question." *Indus. Valley Bank & Trust Co. v. Workmen's Comp. Appeal Bd.*, 332 A.2d 882, 885 (Pa. Cmwlth. 1975) [quoting *Callihan v. Montgomery*, 272 Pa. 56, 72, 115 A. 889, 895 (1922)]. Whether the employment is casual in character and not in the regular course of the



employer's business is a question of law. *Brookhaven Baptist Church*.

The Gallardos engaged in the business of buying, renovating and renting properties for many years. Claimant worked continuously at the Gallardos' renovation sites from May 2007 until he sustained the work injury on August 10, 2007. His employment was not sporadic, irregular or incidental. Where, as here, "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." *Cochrane v. William Penn Hotel*, 339 Pa. 549, 552, 16 A.2d 43, 45 (1940). In addition, the property renovations were not merely "incidental to the main function" of the Gallardos' business. *Indus. Valley Bank & Trust*, 332 A.2d at 884. Hence, the evidence does not support the Gallardos' argument that Claimant was a casual employee.

Finally, the Gallardos argue that the WCJ incorrectly calculated Claimant's average weekly wage. Section 309(d.2) of the Act, 77 P.S. § 582(d.2), provides that "[i]f the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment." The baseline figure from which benefits are calculated "should reasonably reflect the economic reality of a claimant's recent pre-injury earning experience, with some benefit of the doubt to be afforded to the claimant in the assessment." *Triangle Bldg. Ctr. v. Workers' Comp. Appeal Bd. (Linch)*, 560 Pa. 540, 548, 746 A.2d 1108, 1112 (2000). The determination of the claimant's average weekly wage is a question of law. *Port Auth. of Allegheny County v. Workers' Comp. Appeal Bd. (Cooley)*, 773 A.2d 224

(Pa. Cmwlth. 2001).

Joseph Gallardo prepared a summary of payments made to Claimant and Wilson (Exhibit 1 to Joseph Gallardo's deposition). Relying on that exhibit, the Gallardos claim that Claimant worked 351 hours and was paid \$3510 during the 10-week period ending August 10, 2007. The WCJ, however, rejected the Gallardos' exhibit and instead accepted Claimant's testimony that he was paid \$10 to \$12 an hour depending on the type of work, that he was paid \$12 an hour for the plumbing and tiling work and that he earned \$500 a week in average. The record thus supports the WCJ's determination that Claimant's average weekly wage was \$500.

Accordingly, the Board's order is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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v.	:	No. 1619 C.D. 2010
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Workers' Compensation Appeal	:	
Board (Cesario),	:	
Respondent	:	

**ORDER**

AND NOW, this 14th day of April, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge