

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dellaria & Associates,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Camac),	:	No. 1741 C.D. 2010
	:	
Respondent	:	Submitted: December 23, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: February 1, 2011

Dellaria & Associates (Dellaria) petitions this Court for review of the August 9, 2010 order of the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) order deeming Teresa Camac (Claimant) an employee of Dellaria. Dellaria essentially presents one issue for this Court's review: whether the WCJ's order was based on substantial evidence. For the reasons that follow, we reverse the Board's order and remand for further proceedings as deemed appropriate by the Board.

Having been advised that Dellaria had a job opening, Claimant sent a headshot and resume to Mr. Dellaria. In return, she received an agreement identified as an independent contractor agreement and a W-9 tax form to work as a brand ambassador for Curel. Dellaria provided Claimant with the job duties and sent her a

work schedule. Claimant was advised that she would be paid for travel time. On December 7, 2006, while leaving a work assignment at a Philadelphia Wal-Mart, and travelling to a second work assignment at a Quakertown Wal-Mart, Claimant was involved in a motor vehicle accident causing her facial lacerations and injuries to her neck, back and left shoulder.

On December 28, 2006, Claimant filed a claim petition naming Dellaria as her employer. In addition, Claimant filed a penalty petition alleging Dellaria violated the Workers' Compensation Act¹ by not filing any Workers' Compensation documents regarding her December 7, 2006 injury. Dellaria filed an answer averring that Claimant was not an employee of Dellaria, and that she had signed an independent contractor agreement. On January 10, 2007, Dellaria issued a Notice of Workers' Compensation Denial. A hearing was held before the WCJ on January 18, 2007, wherein the matter was bifurcated to determine first, whether an employer/employee relationship existed between Dellaria and Claimant. A second hearing was held on March 23, 2007, after which Claimant filed a second claim and penalty petition, this time naming Marketing Partners (MP) as her employer.² MP filed an answer averring that Claimant was not its employee. A third hearing was held on May 11, 2007, at which time all of the claim and penalty petitions were consolidated.

On April 7, 2008, the WCJ entered an interim/interlocutory order deeming Dellaria Claimant's employer. On September 30, 2009, the interim/interlocutory order was rendered final in a decision and order adopting a stipulation of facts entered into between Dellaria and Claimant with respect to

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

² After reviewing the record it appears that MP was running the Curel promotion at which Claimant was working on December 7, 2006.

Claimant's claim and penalty petitions. Dellaria appealed to the Board, and on August 9, 2010, the Board affirmed the WCJ's order. Dellaria appealed to this Court.³

Dellaria argues that the Board erred in affirming the WCJ's order deeming Dellaria Claimant's employer. Specifically, Dellaria contends that the Board's decision was not supported by substantial evidence and ignored competent evidence that MP was Claimant's employer, i.e., the applicable training manual and the independent contractor agreement. We agree.

It is well established that the WCJ, as fact finder, has exclusive province over questions of credibility and evidentiary weight, and the WCJ's findings will not be disturbed when they are supported by substantial, competent evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The WCJ is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. It is not the function of this Court to reweigh evidence and to substitute its judgment for that of the WCJ.

Supervalu, Inc. v. Workers' Comp. Appeal Bd. (Bowser), 755 A.2d 715, 720 (Pa. Cmwlth. 2000) (citations omitted). However, the WCJ cannot capriciously disregard competent, relevant evidence. "Capricious disregard is found when the fact-finder ignores relevant, competent evidence." *Armitage v. Workers' Comp. Appeal Bd. (Gurtler Chem.)* 842 A.2d 516, 519 n.4 (Pa. Cmwlth. 2004).

Determining whether an employer/employee relationship exists is a question of law determined on a case by case basis. *Guthrie v. Workers' Comp.*

³ This Court's review is limited to determining whether an error of law was committed, whether the findings of fact are supported by substantial evidence and whether there was a violation of constitutional rights. *Sysco Food Servs. of Phila. v. Workers' Comp. Appeal Bd. (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

Appeal Bd. (The Travelers' Club, Inc.) 854 A.2d 653 (Pa. Cmwlth. 2004). It is the Claimant's burden to prove that the relationship exists. *Id.* The two primary factors used in this determination are control over the work and manner in which it is completed. *Id.*

Here, although Claimant testified that she was unaware that MP was her employer and she did not work directly with MP, the record reveals that Claimant signed an agreement stating that she was an independent contractor for Dellaria. Reproduced Record (R.R.) at 299a. However, Claimant received a work schedule which had MP's name on it, not Dellaria's. Further, James Dellaria testified that MP set up the schedule and provided the products for the promotion, and MP directed Claimant as to how to do her job. R.R. at 220a, 221a, 228a. Moreover, the training manual specifically states: "you are a freelancer employed by [MP], the Curel brand marketing agency. Report directly to [MP] . . . and carry out the assignments given to you." R.R. at 288a.

The WCJ in this case specifically found as a fact that the training manual stated, inter alia, "all staff were employees of [MP]," and the independent contractor agreement stated, inter alia, "[i]t is expressly understood and clarified that the undersigned is not an employee of [Dellaria]." R.R. at 148a. Further, the WCJ specifically found James Dellaria credible.⁴ R.R. at 149a. Thus, we hold that the competent, relevant evidence establishes that MP was Claimant's employer, and that Claimant had not met her burden of proving otherwise.

⁴ The WCJ added, however, that "to the extent [James Dellaria's] testimony was offered for the inference that Claimant was not an employee of Dellaria on December 6, 2006, it is not accepted as fact given the following analysis." R.R. at 149a.

For all of the above reasons, the order of the Board is reversed. The matter is remanded to the Board for further proceedings as deemed appropriate by the Board for resolution of Claimant's claim against MP.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 1st day of February, 2011, the August 9, 2010 order of the Workers' Compensation Appeal Board is reversed. This matter is hereby remanded to the Board for further proceedings as deemed appropriate by the Board for resolution of Claimant's claim against Marketing Partners.

Jurisdiction relinquished.

JOHNNY J. BUTLER, Judge