

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark McCanna,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1764 C.D. 2010
	:	SUBMITTED: December 23, 2010
Workers' Compensation Appeal	:	
Board (Fourway Properties, LP),	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: March 11, 2011

Claimant Mark McCanna, acting *pro se*, petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) to deny his claim petition on the ground that he was an independent contractor and not an employee.¹ We affirm.

Claimant filed a claim petition in July 2008, alleging that he was an employee of Fourway Properties, L.P. (Fourway), and that he sustained an injury

¹ A review of the record indicates that Claimant was represented by counsel in all of the proceedings below. Claimant now appears before this Court *pro se*.

to his left ankle in the course of his employment as a clean-up person with Fourway on April 12, 2008. In its answer, Fourway denied all of the material allegations of Claimant's petition, demanded strict proof of the same and specifically averred that "at all times relevant hereto, Claimant was an independent contractor." Certified Record (C.R.), Item No. 2, Employer's August 6, 2008 Answer at p. 2.

In her decision, the WCJ noted that the only issue before her was Claimant's status as either an employee or as an independent contractor. After consideration of evidence relating to Claimant's proper classification, the WCJ concluded that he failed to establish that he was either an employee of Fourway or of its owner, Louis Pappan. In so determining, the WCJ found as follows:

I have been persuaded by the very credible testimony of Mr. Pappan and Mr. Chirgott as well as elements of the claimant's own testimony. It was clear from the documents submitted that the claimant was required to carry a certificate of liability insurance to perform work on Fourway Properties job sites. Clearly that would not have been necessary if he were an employee as he alleged. The claimant agreed that he had a business doing landscaping and greenhouse work. From the testimony and the invoices provided, it was clear [that] much of the work the claimant did for Fourway Properties involved landscaping. Further facts of importance are that the claimant submitted his hours for specific jobs and was paid when those jobs were completed. No taxes were taken from the amounts he submitted and he received 1099 forms from both Fourway Properties and Louis Pappan at the end of the year. Further review of the invoices reflect the claimant was billing Fourway Properties for multiple landscaping services from grass mowing and raking leaves to the installation of drywells and French drains to planting shrubs and flowers, mulching and cleaning flower beds. Some of the claimant's invoices reflect that he hired

additional laborers to work on a particular job and also obtain the plants and materials necessary to perform certain work and complete projects that he subsequently billed to Fourway Properties. These activities and this way of doing business clearly point to someone working as an independent contractor.

I found that Mr. Pappan gave particularly credible testimony that he was not on site daily directing the claimant's work. In listening to Mr. Pappan testify, it was clear that he enjoyed going to the work sites just to talk and to observe progress being made. Mr. Pappan very credibly explained his relationship to the claimant, having found him to be a qualified landscaper to whom he had a great deal of faith. I found it clear also from the testimony of Mr. Pappan that the function of Jason Szczygiel at the job site was primarily to insure that the subcontractors were performing the job they had been hired to do and to insure that the jobs were being completed as contracted for and that costs were being regulated. I did not find the claimant credible in the parts of his testimony when he was attempting to portray himself as an employee. It was clear that he primarily performed landscaping work for Mr. Pappan, a business he had long operated under McCanna's Greenhouses.

WCJ's Decision at p. 7, ¶¶ 2 and 3.

The Board affirmed the WCJ's decision, noting that control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status. *Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd. (Minteer)*, 563 Pa. 480, 762 A.2d 328 (2000). In that regard, the Board stated that the following findings supported the WCJ's conclusion that Claimant was an independent contractor:

Claimant was paid by the job and received a 1099 at the end of the year; had hired additional laborers to work on a particular job and also obtained plants that he subsequently billed to Fourway Properties; Claimant used his own pickup truck and often used his own

chainsaw, shovels, rakes, wheelbarrows, and garden hoses; and, Mr. Pappan's only concern was to have the jobs completed and his presence at the job sites was to observe the progress being made and not to supervise the work as he did not know how to do the jobs. . . . The fact that [Fourway] exercised very little control over Claimant's activities as a landscaper as well as the fact that Claimant was paid by the job and even used his own tools supports the conclusion that claimant was an independent contractor. . . .

Board's Decision at p. 6.

Noting that Claimant, acting *pro se*, and his counsel filed appeals from the WCJ's decision, the Board further stated:

We note that Claimant, *pro se*, argues that because [he] was not present during the deposition testimony of Mr. Pappan and Mr. Chirgott, because his attorney failed to subpoena the testimony of Jason Szczygiel, because his attorney failed to submit additional documents, and because the [WCJ] characterized all of Claimant's work as 'landscaping,' the proceeding was not fair. Since Claimant was represented by counsel and there is no support to his arguments that this additional evidence would have resulted in a different outcome, we must affirm the [WCJ's] decision denying his Claim Petition.

Id. Claimant's timely petition for review to this Court followed.

In claim petition proceedings, a claimant bears the burden of establishing his right to compensation and all of the elements necessary to support an award of benefits. *Rife v. Workers' Comp. Appeal Bd. (Whitetail Ski Co.)*, 812 A.2d 750 (Pa. Cmwlth. 2002). Where, as here, there is an issue as to a claimant's status as either an employee or an independent contractor, it is the claimant's burden to prove the existence of an employer/employee relationship. *Universal Am-Can*. The existence of such a relationship is a question of law, to be determined based on the unique facts of each case. *Id.*

In *Universal Am-Can*, our Supreme Court reiterated the factors relevant to an analysis of whether an employer/employee relationship exists:

“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.”

Id., 563 Pa. at 490, 762 A.2d at 333 [quoting *Hammermill Paper Co. v. Rust Eng’g Co.*, 430 Pa. 365, 370, 243 A.2d 389, 392 (1968) (citations omitted)]. The Court further noted that “[w]hether some or all of these factors exist in any given situation is not controlling.” *Universal Am-Can*, 563 Pa. at 490, 762 A.2d at 333 (citation omitted).

Claimant presents three issues for our review: 1) whether the Board erred in upholding the WCJ’s decision that he was an independent contractor; 2) whether the Board erred in upholding the WCJ’s determination that Mr. Pappan’s testimony was more credible; and 3) whether the Board erred in determining that the WCJ’s result would not have been different had Claimant’s attorney taken certain actions and had the WCJ not characterized all of Claimant’s work as “landscaping.” Noting that it is difficult to glean from Claimant’s brief the specific errors of law and issues being raised, Fourway contends that the only issue properly before us is Claimant’s status. It maintains that “[t]he remaining allegations of error appear to be bald allegations without basis in fact stemming from Claimant’s dissatisfaction with the results below.” Fourway’s Brief at p. 6.

We have reviewed Claimant's *pro se* petition for review and agree with Fourway that he preserved the essential issue concerning his status. In addition, we conclude that he also preserved a credibility challenge to the testimony of Fourway's witnesses.² Accordingly, we will address the first two issues.

Claimant argues that the WCJ erred in determining that he was not an employee, maintaining that the testimony and documents show that he worked under the direction of Fourway's supervisor. In response, Fourway emphasizes the WCJ's detailed findings in support of her decision that Claimant was an independent contractor. We agree that Claimant failed to meet his burden of establishing that he was an employee.

In brief summary, the WCJ found that Claimant was required to carry a certificate of liability insurance to do work for Fourway; he had his own landscaping and greenhouse business; he submitted hours for jobs and was paid upon completion; and Fourway provided him with 1099 tax forms and did not take any taxes from the amounts he submitted. Further, the WCJ found that any on-site

² In his petition, Claimant alleged that the Board was in error for the following reasons:

[The Board] [v]iolated all guidelines of direction and control of State Workers Insurance Fund. Evidence showed and testimony of Claimant working under control of Pappans supervisor-Pappans attorney witness show they held the right of control. Evidence and testimony shows Pappan supplied equipment [sic] and paid for all materials.

See attachment[.] I also feel the decision was very bias [sic]. Also testimony of defendant[?] witness shows perjury and coercion. . . .

Claimant's Petition for Review at p. 1.

supervision was for purposes of ensuring that the subcontractors were performing the jobs that they had been hired to do. These findings, supported by evidence in the record, establish that Claimant was an independent contractor.³ Hence, we agree that Claimant did not prove the existence of an employee/employer relationship.

Claimant next argues that the WCJ erred in finding Mr. Pappan's testimony to be more credible. In response, Fourway points out that the WCJ found credible Mr. Pappan's testimony that he relied on Claimant as a qualified landscaper, that he almost always agreed with Claimant's suggestions as to what to do on a project and that he was not on-site daily directing Claimant's work. Further, Employer emphasizes that the WCJ rejected Claimant's testimony to the contrary "when he was attempting to portray himself as an employee." WCJ's Decision at p. 7, ¶ 3.

We note that the WCJ as the ultimate arbiter of evidence was empowered to weigh the evidence and to determine the weight to be accorded thereto. *Roccuzzo v. Workers' Comp. Appeal Bd. (Sch. Dist. of Phila.)*, 721 A.2d 1171 (Pa. Cmwlth. 1998). To that end, the WCJ was free to credit the testimony of any witness and to accept or to reject, in whole or in part, the testimony of other witnesses. *Joy Global, Inc. v. Workers' Comp. Appeal Bd. (Hogue)*, 876 A.2d 1098 (Pa. Cmwlth. 2005). This Court may not reweigh the evidence or review the credibility of witnesses. Accordingly, we reject Claimant's challenge to the WCJ's credibility determinations.

³ We also note that all inferences drawn from the evidence must be taken in favor of Fourway as the party that prevailed before the WCJ. *Cerasaro v. Workers' Comp. Appeal Bd. (Pocono Mt. Med., Ltd.)*, 717 A.2d 1111 (Pa. Cmwlth. 1998).

For the above reasons, therefore, we affirm.⁴

BONNIE BRIGANCE LEADBETTER,
President Judge

⁴ Even if we were to consider Claimant’s third issue, we would still affirm. Claimant maintains that the proceeding was not fair in that the result would have been different had he been present at certain depositions, had his counsel subpoenaed the testimony of Jason Szczygiel, had his counsel submitted additional documents, and had the WCJ not characterized all of his work as “landscaping.” A counsel is presumed to be effective unless an appellant proves otherwise. *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (1990). In determining whether a counsel was effective, a key consideration is whether but for that counsel’s actions, there was a reasonable probability that the outcome would have been different. *Commonwealth v. Wharton*, 571 Pa. 85, 811 A.2d 978 (2002). Here, the Board determined that “there is no support to [Claimant’s] arguments that this additional evidence would have resulted in a different outcome.” Board’s Decision at p. 6. Having reviewed the record, we agree. In addition, as the WCJ stated, some of the evidence she relied upon consisted of Claimant’s own testimony and documentary evidence.

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 Board (Fourway Properties, LP), :
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ORDER

AND NOW, this 11th day of March, 2011, the order of the Workers' Compensation Appeal Board is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge