

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy Carbaugh,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal Board	:	
(Knight's Home Improvements and	:	
UEGF-ACS Claims Service),	:	No. 1915 C.D. 2009
Respondents	:	Submitted: March 12, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: April 13, 2010

Timothy Carbaugh (Claimant) seeks review of the August 31, 2009 order of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) denying his claim petition. Claimant presents one issue for this Court's review: whether the Board erred in affirming the decision and order of the WCJ wherein he determined that Claimant was an independent contractor and not an employee. For reasons that follow, we affirm the Board's order.

On May 11, 2007, Claimant suffered an injury while working as a laborer with Knight's Home Improvement (KHI). On August 28, 2007, Claimant filed a claim petition against KHI and the Uninsured Employer Guarantee Fund (UEGF). On July 22, 2008, the WCJ denied and dismissed Claimant's petition concluding that Claimant failed to meet his burden of proving that he was an

employee of KHI. Claimant appealed to the Board, and the Board affirmed the decision and order of the WCJ. Claimant appealed to this Court.¹

Claimant argues the WCJ and the Board erred in failing to apply the factors set forth in *Hammermill Paper Co. v. Rust Engineering Co.*, 430 Pa. 365, 243 A.2d 389 (1968), in determining whether an employee-employer relationship existed between Claimant and KHI. Specifically, Claimant argues the WCJ and the Board failed to consider the following elements: (1) the control of the manner in which work is to be done, (2) whether a person has responsibility for the result only, (3) the terms of agreement between the parties, (4) the nature of the work or occupation, (5) the skill required for performance, (6) whether the person employed is engaged in a distinct occupation or business, (7) which party supplies the tools, (8) whether payment is by time or by the job, (9) whether the work is part of the regular business of the employer, and (10) the right to terminate the employment at any time. *Hammermill*.

This Court recognizes that the above factors have come to serve as the guidelines in determining employee or independent contractor status. However:

Because each case is fact specific, all of these factors need not be present to determine the type of relationship which exists.

While all of these factors are important indicators, the key element is whether the alleged employer has the *right* to control the work to be done and the manner in which it was performed. If the alleged employer has this right, an employer-employee relationship likely exists.

¹ “This Court’s review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence.” *Bureau of Workers’ Comp. v. Workers’ Comp. Appeal Bd. (Consol. Freightways, Inc.)*, 876 A.2d 1069, 1071 n.1 (Pa. Cmwlth. 2005).

Johnson v. Workmen's Comp. Appeal Bd. (Dubois Courier Express), 631 A.2d 693, 696 (Pa. Cmwlth. 1993) (citations omitted). In determining whether an employer has a right to control, the courts utilize a right to control test.

[T]he test requires an evaluation of all circumstances, but the extent of the actual supervision exercised by a putative employer over the means and manner of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees.

Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd. (Minteer), 563 Pa. 480, 493-94, 762 A.2d 328, 335 (2000) (quotation marks omitted).

Several hearings took place before the WCJ wherein Claimant, Jason Knight (the owner of KHI), Jenny Scott (the person who hired KHI), Kevin Heuer (a sub-contractor hired by KHI to demo the job site), Craig Bethea, Jr. (a sub-contractor hired by KHI to do carpentry at the job site), and Michael Barber (a laborer hired by Heuer to work at the job site) testified. The WCJ specifically found:

The testimony of Jason Knight, Kevin Heuer, Jenny Scott, and Craig Bethea, Jr. credible and persuasive that the nature of Claimant's work was subcontracting employment for painting. Specifically, the testimony from these witnesses establishes that Claimant was not instructed on the job site as to manner of performance by Mr. Knight; was maintaining his own working schedule; and was, in fact, not instructed by Mr. Knight as to job performance. Furthermore, this Judge found persuasive from these witnesses that Claimant provided his own tools for the job.

This Judge finds both the testimony from Claimant and Michael Barber neither credible nor persuasive with regard to an employer-employee relationship with Mr. Knight or [KHI].

Reproduced Record (R.R.) at 181a. Notably, Claimant does not argue the credibility determinations, only the fact that the WCJ did not consider all of the *Hammermill* factors.

As stated above, all of the *Hammermill* factors need not be present, and the key factor is the right to control. The WCJ and the Board specifically found that KHI did not have a right to control, and that there was no actual supervision exercised by KHI. Notwithstanding, that finding does not establish that all of the factors were not considered. The WCJ discussed at length the factors used to make his determination and addressed most of the *Hammermill* factors. Specifically, the WCJ discussed (1) the control of the manner in which work was to be done, (2) the responsibility for result only, i.e., he was hired to paint, how he did it was up to him, (3) the terms of agreement between the parties, i.e., again he was hired to paint on this specific job site and negotiated an hourly wage as opposed to a set fee, (4) the nature of the work, (5) who supplied the tools, i.e., Claimant used his own tools, (6) whether payment was by time or job, i.e., again Claimant requested the hourly wage, KHI simply sought the lowest bidder, and (7) whether work was part of regular business, i.e., KHI is a contractor who subcontracted for demo, carpentry and painting. R.R. at 182a-183a. Further, “[i]t is a claimant’s burden to establish an employer[-]employee relationship in order to receive benefits.” *Universal Am-Can, Ltd.*, 563 Pa. at 485, 762 A.2d at 330. Clearly, Claimant did not meet his burden; thus, the WCJ committed no error in denying his claim petition.

For all of the above reasons, the order of the Board is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 13th day of April, 2010, the August 31, 2009
order of the Workers' Compensation Appeal Board is affirmed.

JOHNNY J. BUTLER, Judge