

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

UNLIMITED CONSTRUCTION,)	
)	
Appellant,)	
)	
v.)	C.A. No. 02A-06-011-FSS
)	
GEORGE ALMOND,)	
)	
Appellee.)	

Submitted: November 7, 2002

Decided: February 27, 2003

ORDER

Upon Appeal from the Industrial Accident Board –

AFFIRMED

James W. Owen, Esquire, Brandywine Plaza, Suite 240-B, 2500 Grubb Road, Wilmington, Delaware 19810. Attorney for Appellant.

W. Christopher Componovo, Esquire, Law Offices of Joseph J. Rhodes, 1225 King Street, P.O. Box 874, Wilmington, Delaware 19801. Attorney for Appellee.

SILVERMAN, J.

This is an appeal from the Industrial Accident Board's finding that George Almond was Unlimited Construction's employee when he was injured on the job. The Board concluded that an employer/employee relationship existed. The Board awarded Almond total disability benefits as well as medical costs and attorney fees. Unlimited claims that Almond was hired as a subcontractor, rather than as an employee. Therefore, it is not financially responsible for Almond's injury. The question presented is whether the Board's finding that Almond was Unlimited's employee was supported by substantial evidence and correct as a matter of law.

I.

On December 27, 2000, George Almond, a glazier, was injured when he fell off a ladder while working on a window. Almond broke the heel of his left foot and subsequently underwent expensive medical treatment.

Paraphrasing, the Board basically found from the record that Almond's first contact with Unlimited was on December 19, 2000, after his brother told him that Unlimited was looking for glaziers to work on a project in Wilmington. Almond called Tom Bechtold, Unlimited's project manager. Bechtold asked Almond if he was in a union. Almond responded that he worked "outside the union." The two then discussed how much Almond wanted to be paid. Almond gave a price of \$ 18.00 per hour. Bechtold told Almond that the "office" had to be notified before that rate could be accepted. Later, Bechtold called Almond and told him the pay rate was acceptable

and asked him to begin work the next morning at 7:00a.m. There also was talk about the frequency of pay. But the record is not clear whether this was discussed during these initial conversations, or later.

Almond was at the construction site the following morning, December 20, 2000, at 7:00a.m. Bechtold suggested that Almond help unload a glass truck. After that, Bechtold met with Almond and walked him through the job site, explaining what was going on and asking for his opinion as to where he thought he could best be used. Almond eventually began working where he thought it was logical. Bechtold also told Almond that he would be around the site if Almond needed him. Bechtold told Almond to ask the other workers if he needed any tools or equipment. Since Almond always carries his own hand tools, he did not ask for any. But Almond did not supply caulk. Nor did he supply the ladder from which he fell.

Almond again showed up the next morning, December 21, 2000, at 7:00a.m. Bechtold was leaving the site but he introduced Almond to “Chris” and told Almond to ask Chris if he had any questions. Almond assumed that Chris worked for Unlimited, but later learned that Chris actually worked for another company. At this time, Almond gave Chris one of his business cards, which bore the words “George Almond Glass Co.” On the card, Almond wrote his social security number and the number of his dependants. Bechtold admits receiving this card with

the additional information. He did not question Almond because “it just did not register.”

Bechtold told Almond that he was to be paid every two weeks. There was no discussion whether Almond would need to submit either an invoice or time card. Almond never received either a 1099 or a W-2, because Almond was injured before he ever was paid.

There is conflicting testimony whether Bechtold asked Almond for a certificate of insurance. Almond testified that he had coverage for his company. Unlimited’s lawyer asked Bechtold, “Did Unlimited Construction have workman’s compensation insurance as of December 27, 2001?” Bechtold said he believed so. This date, however, is a year after the accident. Almond’s attorney then asked Bechtold “it is your testimony under oath that there is workman’s compensation insurance for Unlimited Construction as of before the time period of December 27, 2000?” Bechtold answered “Yes.” Had Unlimited obtained a certificate from Almond it would have had a bearing on whether Almond was an employee or independent contractor. Regardless, Almond certainly did not supply insurance information and Bechtold was unconcerned.

There also is conflicting testimony as to what was said after Almond fell off the ladder. Almond testified that while he lay on the ground, Bechtold commented, “We’ll have to make you an independent contractor, then.” Bechtold

denies that comment. In reviewing the Board's decision, the court is obliged to assume that the Board accepted Almond's version of what happened and to respect the Board's view of the witnesses.

Almond was taken to the Christiana Hospital for emergency treatment. Later, Almond requested, but did not receive, worker's compensation information from Unlimited.

In summary, there is evidence pointing toward Almond's having been an independent subcontractor, including the facts that Almond was a skilled laborer, he had some control over his work, he provided his own tools (but not materials) and he used a business card with a business name. It cannot be said, however, that Almond failed to present substantial evidence supporting the Board's conclusion that he was an employee. The evidence supported the finding that Unlimited, a business doing construction management, hired Almond, at an hourly rate. Unlimited told Almond where and when to report for work. And the first thing Almond did on the job was unload a glass shipment at Unlimited's direction. The evidence further showed that Unlimited had no written contract with Almond and it never obtained from him a certificate of insurance. Furthermore, Almond believed that he was hired as an employee and he testified that Unlimited's representative admitted that Almond was an employee.

II.

Almond contends, and the Board obviously agreed, that he was hired by Unlimited as an employee. Almond expected to be paid every two weeks on a time and material basis. Almond gave Chris, who he believed was an employee of Unlimited, his W-2 information. That supports his subjective belief that he was Unlimited's employee. Almond claims he was never told he needed to submit an invoice to be paid, nor was he told to produce a certificate of insurance. Almond concedes he used his own tools on the job, but claims that all glaziers use their own tools.

Unlimited argues that Almond was hired as an independent contractor. Bechtold told the Board he was very clear when he hired Almond: "The job was behind schedule and I was looking for subcontractor [sic] to come in and supplement the project." Bechtold backed up his claim by testifying he requested proof of insurance from Almond. Additionally, Bechtold testified Almond was to be paid on a time and material basis after Almond submitted an invoice. Bechtold denied that he gave Almond any instruction on how to perform the work and, in contrast, told Almond to begin working where Almond thought best. Bechtold said after the initial meeting the first day, he had little to no contact with Almond until the accident.

III.

The court's standard of review on appeal is limited.¹ As to questions of law, the court's review is plenary. But as to questions of fact, it does not reexamine evidence, much less make its own findings. The Board's decision stands if there are no legal errors and substantial evidence supports its factual findings.² Substantial evidence is adequate to a reasonable mind to support a conclusion.³ The reviewing court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁴ Simply put, the court does not sit as trier of fact, nor should the court replace its judgment for the Board's.⁵ The court determines if the evidence is legally adequate to support the agency's factual findings.⁶ In this case, the court is concerned whether the Board's conclusion that Almond was an employee of Unlimited is supported by the law and the record.

¹ *Del. Code Ann. tit. 29 § 10142, § 10161(a)(8)* (1997 & Supp. 2000).

² *General Motors Corp. v. Jarrell*, 493 A.2d 978 (Del. Super. Ct. 1985).

³ *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995).

⁵ *Id.*

⁶ *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

IV.

Nineteen *Del. C.* § 2301(9) of the Workers' Compensation Act states in pertinent part:

Employee means every person in service of any . . . firm or person, . . . under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration

The statute excludes from coverage “any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of his employer”⁷

The Restatement on Agency § 220⁸ offers 10 factors to be considered when deciding whether a worker is a servant or an independent contractor.⁹ Delaware focuses on four of these factors.¹⁰ Specifically, they are:

- (1) Who hired the worker;
- (2) who may discharge the worker;
- (3) who pays the worker's wages, and
- (4) who controls the worker's conduct?

⁷ *Del. Code Ann.* tit 19, § 2301(9) (1995).

⁸ RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

⁹ *Tucker v. Seacoast Speedway*, 1999 WL 743170 (Del. Super.).

¹⁰ *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 394-395 (Del.1964). *See also Fisher v. Townsends, Inc.*, 695 A.2d 53 (Del. 1997); *Porter v. Pathfinder Services, Inc.*, 683 A.2d 40 (Del. 1996); *White v. Gulf Oil Corp.*, 406 A.2d 48 (Del. 1979).

In making its determination, the Board should consider, at least, all four prongs.¹¹ No one test necessarily will distinguish an employee from an independent contractor.¹²

Unlimited challenges the Board's determinations. For instance, Unlimited states that, "A reading of the Board's decision shows that the evidence on the issue essentially resulted in a tie. The Board awarded the tie to Appellee. That was error." That, however, is not what the Board held. It said, "Reviewing the pertinent facts, it is clear that no single factor clearly establishes Claimant as either an employee or an independent contractor. However, weighing all the evidence, the Boards finds that, under the totality of the circumstances and the preponderance of the evidence, Claimant was an employee of UC and, therefore, entitled to coverage under the Workers' Compensation Act."

At the worst, it might be said that the Board did not address all the tests for distinguishing between employees and subcontractors, one-by-one. But as to that, the litigation before the Board focused squarely on the usual four factors, at least. And the Board's detailed decision clearly reflects the Board's findings, especially its credibility determinations, on the appropriate factors.

¹¹ *White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979).

¹² *Tucker v. Seacoast Speedway*, 1999 WL 743 170 (Del. Super.) citing *White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979).

V.

Factually, this was a close case with credibility a decisive factor. Both sides presented substantial evidence. After hearing all the testimony and weighing the facts and the credibility of the witnesses, the Board directly concluded that Almond was an Unlimited employee. This is not *de novo* review. The court will not attempt to weigh the evidence. That is the Board's role. It is enough to say here that if the Board, or the court, might have seen it otherwise, there is substantial evidence supporting the Board's finding. And the finding is consistent with the law.

VI.

For the foregoing reasons, the May 3, 2002 decision finding that Almond was an employee of Unlimited and, therefore, entitled to benefits is **AFFIRMED**.

IT IS SO ORDERED.

Judge

oc: Prothonotary