SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 THE CIRCLE, SUITE 2
COURTHOUSE
GEORGETOWN, DE 19947

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RE: Osney Rocha v. Keka Construction, Inc.
C.A. No. 04A-07-002 ESB

Date Submitted: December 27, 2004
Date Decided: March 31, 2005

Dear Counsel:

This is my decision on Osney Rocha's appeal of the Industrial Accident Board's decision that he was an independent subcontractor and, as such, not entitled to workmen's compensation benefits. I have reversed and remanded the Board's decision for further proceedings consistent with this opinion.

STATEMENT OF THE CASE

Osney Rocha ("Mr. Rocha") is a construction worker. Keka Construction, Inc. ("Keka") is in the home construction business. Keka hired Mr. Rocha to repair homes that it had built. Mr. Rocha fell from a ladder and injured his knee at one of Keka's sites several months after he was hired. Mr. Rocha filed a petition with the Industrial Accident Board (the "Board") seeking workmen's compensation benefits, claiming that he was entitled to benefits as an employee.

Keka alleges that Mr. Rocha was an independent contractor and not eligible to receive those benefits. The Board held a hearing to determine whether Mr. Rocha was an employee or an independent contractor.

A. The Board Hearing

Five witnesses testified at the Board hearing: Mr. Rocha, his wife, Regina Rocha ("Mrs. Rocha"), Keller Camarco ("Mr. Camarco"), the owner and president of Keka, his wife, Alejandro Camarco ("Mrs. Camarco"), and Brian Smith ("Mr. Smith"), a subcontractor for Keka.

Mr. Rocha testified as follows: He was hired by Mr. Camarco as an employee, was paid $900 per week, and was to receive health insurance after two months of employment. However, he never received health insurance. His working hours were from 7:00 a.m. to 4:30 p.m. in the winter and from 7:00 a.m. to 5:30 p.m. in the summer. He only worked for Keka. When he finished a job he would report to Mr. Camarco and would be told what to do next. Mr. Camarco was not always at the site where Mr. Rocha was working because he also supervised other sites. A supervisor from Gemcraft, which hired Keka to build homes, would occasionally tell him what to repair. The ladder he fell off of and the tools he used, except for a belt, a hammer and a measuring tape, were Keka's. Mr Rocha, who has not worked since the accident, never quit and was not fired. He also did not contact Keka to say he would not be returning to work. He stated that Mr. Camarco was aware of the accident and there was no need to tell him he would not be returning to work.

Mr. Rocha was paid by checks made payable to "Marcello Silva" or to "Marcello B. DaSilva," but he does not know why. In one instance he cashed a check for $8,000, took his $900 in pay and the 2% check-cashing fee, and gave the rest of the cash to Mr. Camarco, who

was to distribute it to the other workers. He was able to cash these checks at the check cashing store even though they were not payable to him because the store always cashed Keka's checks. He did not know who "Silva" was and he did not give a social security card and certificate of insurance in "Silva's" name to Keka. Mrs. Rocha corroborated much of her husband's testimony, particularly the testimony regarding "Silva."

Brian Smith testified as follows: He worked for Keka during the time Mr. Rocha was there. Indeed, they worked together "punching out" and "setting windows" for a couple of days. He considered himself to be an independent contractor. He was not supervised, but was told what to do by a Keka supervisor. He used his own tools, except for a nail compressor, and he was paid in cash. He was hired by Mr. Camarco and when he found a better job he left Keka. All the workers used Keka's air compressors, but they had their own tools. Mr. Rocha had a tool bag, a saw, and an extension cord.

Mrs. Camarco testified as follows: She works at Keka as a secretary, handling the paperwork. Mr. Camarco supervises the construction sites. She receives orders from builders and then Keka sends out subcontractors to do the work. Keka only had subcontractors when Mr. Rocha was working for Keka. Keka did not fire its subcontractors, but if Keka was not satisfied with their performance, then Keka would not give them new jobs. Mr. Rocha was a subcontractor. Mr. Camarco would tell Mr. Rocha what to do and what job site to go to. Mr. Rocha gave her a social security card and certificate of insurance in "Silva's" name. Mr. Rocha refused to sign the subcontractor contract, and would not bring her an identification photograph even though she requested one several times. She made out Mr. Rocha's checks payable to

"Silva," even though she and her husband had known Mr. Rocha for many years and knew that his name was not "Silva." She knew that "Silva" and Mr. Rocha were the same person.

Mr. Camarco testified as follows: He hired Mr. Rocha after he got fired from another construction job. He offered to make him an employee, but Mr. Rocha refused, stating that he would not be able to survive on his pay after the payroll tax deductions. Instead, Mr. Rocha was hired as a subcontractor to do repair jobs. Although he told his subcontractors what jobs to do and the way they should be done, he had eleven sites to supervise and was not around to watch them all the time. Mr. Rocha had his own tools and cable saw, but he did use Keka's air gun. The ladder Mr. Rocha fell off of when he was injured was not Keka's.

The only material dispute between the parties over the facts, other than Mr. Rocha's status, was whether or not Mr. Rocha submitted a social security card and certificate of insurance in "Silva's" name to Keka.

B. The Board's Decision

The Board made the following findings of fact:

1. Mr. Rocha was not credible, but the Camarcos were credible.
2. Mr. Rocha and "Silva" were the same person.
3. Mr. Rocha gave the social security card and certificate of insurance in "Silva's" name to Keka.
4. Mr. Rocha owned most of his own tools, including the ladder that he fell off of when he was injured.
5. Mr. Rocha was offered a job as an employee, but did not want to be an employee because he did not want payroll taxes to be withheld from his pay.
6. Keka did not exercise a substantial amount of control over Mr. Rocha.
7. Mr. Camarco did not work with Mr. Rocha often and did not have to show him what to do often.
8. Mr. Rocha did not receive health insurance.
9. Mr. Rocha worked independently most of the time with little supervision.

10. Mr. Rocha refused to sign Keka's subcontractor agreement despite Mrs. Camarco's repeated requests that he do so.
11. Keka paid Mr. Rocha on an hourly basis instead of by the job.
12. Keka and Mr. Rocha did not negotiate his pay.
13. Mr. Rocha did not submit bids to Keka for the repair work.
14. The work that Mr. Rocha did was also Keka's regular work.
15. Keka hired Mr. Rocha to work regular hours for an indefinite period of time.
16. Keka assigned work to Mr. Rocha on a job-by-job basis.
17. Mr. Camarco only saw Mr. Rocha several times a week and he was on his own to complete his assignments.
18. Either Mr. Rocha or Keka could terminate the relationship.

The Board then weighed the facts, applied the applicable law, and concluded that Mr. Rocha was an independent contractor. While the Board considered many facts in reaching its decision, it is clear that certain facts were much more important than others to the Board. The Board, in concluding that Mr. Rocha was an independent contractor, relied heavily on its finding that Mr. Rocha and "Silva" were the same person, that Mr. Rocha gave a social security card and a certificate of insurance in "Silva's" name to Keka, that Mr. Rocha accepted checks in "Silva's" name and cashed them, that Mr. Rocha did not want to be an employee because he did not want payroll taxes withheld, that Mr. Rocha provided most of his own tools, and that Mr. Rocha worked independently with little supervision. The Board pointedly noted that there was no reason for Mr. Rocha to give a certificate of insurance to Keka if he was not an independent contractor.

DISCUSSION

A. Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is

to determine whether the agency's decision is supported by substantial evidence,[1] and to review questions of law de novo.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4]

B. The Board's findings are flawed as a matter of law and are not supported by substantial evidence

Mr. Rocha argues that there was not substantial evidence sufficient to support the Board's decision that he was not an employee. He claims that the Board, in making its decision, was overly influenced by the suspicious nature of the "Silva" scheme. Instead of basing its decision on the traditional factors, the Board was, according to Mr. Rocha, influenced by the parties' belief that they were setting up an independent contractor relationship in order to evade payroll taxes.

An employee must accept worker's compensation as an exclusive remedy for personal injury suffered on the job under 19 *Del. C.* § 2304 . "Employee" is defined as "every person in service of any corporation . . ., association, firm or person, excepting those employees excluded by this subchapter, under any contract of hire, express or implied, oral or written, or performing

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[1] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del.1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del.1960).

[2] *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct.1962).

[3] *Johnson v. Chrysler Corp.*, 312 A.2d at 66.

[4] 29 *Del. C.* § 10142(d).

services for valuable consideration . . . ."[5] "No contractor or subcontractor shall receive compensation under this chapter . . . ."[6]

There are four elements to consider when answering the question of whether Keka had an employment relationship with Mr. Rocha: "(1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages; and (4) who has the power to control."[7] The first two criteria are not helpful in cases, such as this one, where there is only one alleged employer.[8] Whether there is an independent contractor or an employer/ employee relationship is determined by the facts and circumstances of each case, and the factor given predominant consideration is the right to control.[9] The question of whether that control has actually been exercised, however, is inapposite.[10] Furthermore, "[t]he parties' belief as to the nature of the

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[5] 19 *Del. C.* § 2301(9).

[6] 19 *Del. C.* § 2311(a).

[7] *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 395 (Del. 1964).

[8] *See Horsey v. Contractual Carriers*, 1998 WL 4741, at * 1 (Del. Super. Ct.) (finding the first two prongs of the test are not applicable where there is only one alleged employer); *Patterson v. Blue Hen Lines, Inc.*, 1986 WL 2274, at * 1 (Del. Super. Ct.) (finding first two prongs inapplicable with only one employer and noting that the words "hired" and "discharge" presuppose an employment relationship and that Blue Hen would have the right to hire and fire if such a relationship is found to exist).

[9] *Gooden v. Mitchell*, 21 A.2d 197, 201 (Del. Super. Ct. 1941); *Lester C. Newton Trucking Co.*, 204 A.2d at 395.

[10] *White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979), *quoting*, *Lester C. Newton Trucking Co.*, 204 A.2d at 395.

relation is not determinative."[11] An employer may not avoid liability for workmen's compensation simply by classifying his employee as an independent contractor.[12]

Delaware Courts have defined an "independent contractor" as "one who is engaged to do work in an independent manner, accountable only as to the results obtained, and not subject to the control or supervision of the employer."[13] Several indicia of an independent contractor status are: 1) the obligation to furnish tools, supplies and materials used in the work, 2) the element of time of the employment - is it permanent or on a job-by-job basis, 3) the method of payment, i.e. hourly or by the job, 4) "whether the work is the regular business of the employer," and, 5) whether the employer has the right to terminate the employment at his convenience.[14]

1. Who Paid Mr. Rocha

The Board made no finding as to who actually paid Mr. Rocha. However, the Board did find that Mr. Rocha and "Silva" were the same person. This was obviously based on the Board's finding that Mr. Rocha gave a certificate of insurance and social security card in "Silva's" name to Keka, that Keka issued checks to Mr. Rocha in "Silva's" name, and that Mr. Rocha cashed those checks. The Board was also obviously influenced by Mrs. Camarco's testimony that she knew that Mr. Rocha and "Silva" were the same person. Thus, even though the Board did not explicitly find it, the only logical conclusion from the Board's findings is that Keka paid Mr.

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[11] *Bryson v. Kline*, 1987 WL 10538, at * 2 (Del. Super. Ct.), *aff'd*, 558 A.2d 297 (Table), 1989 WL 27733 (Del.)

[12] *Id.*

[13] *Gooden*, 21 A.2d at 200.

[14] *Gooden*, 21 A.2d at 200-201; *See also Bryson* at * 1-3 (Del. Super. Ct.); *Weiss v. Security Storage Co.*, 272 A.2d 111, 114 (Del. Super. Ct. 1970).

Rocha. This is important because it is a factor that helps to determine Mr. Rocha's status.[15] Independent contractors pay themselves, while employees are paid by their employers. There is no evidence that anyone other than Keka paid Mr. Rocha. Indeed, Mr. Rocha did not work for anyone but Keka. Since Keka actually paid Mr. Rocha, this supports a finding of an employer/ employee relationship.

It is obvious to me that the entire "Silva" matter was nothing more than a ruse created by Mr. Rocha, or Keka, or both of them, to avoid payroll taxes, which burden both the employer and the employee, thus giving both a motive to evade them. I say the ruse was obvious because Mr. Rocha, according to the evidence and the Board's findings, "decided" to become an independent contractor only after realizing how much his payroll taxes would be. There is no evidence at all in the record that he wanted to go into business for himself. An important part of this ruse was the certificate of insurance in "Silva's" name that the Board found was given by Mr. Rocha to Keka. The Board, in its decision, stated that there was no reason for Mr. Rocha to give a certificate of insurance to Keka unless he was an independent contractor. The Board's finding in this regard ignores the obvious ruse. A certificate of insurance would, in most instances, be persuasive evidence that the person was an independent contractor. However, in this case it was given solely to further the ruse, and for no other apparent purpose. As such, it does not support the Board's finding that Mr. Rocha was an independent contractor, and the Board's reliance on it is misplaced.

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[15] *Cf. Patterson* at *1 (noting that as to the third prong of the test, the Board determined that Patterson had paid his own wages).

I note that the Board, in finding that Mr. Rocha was not credible and that the Camarcos were credible, obviously did not look favorably on Mr. Rocha because of its belief that he created "Silva" in order to evade payroll taxes. In this regard, the Camarcos are just as culpable as Mr. Rocha and should be treated similarly. The Camarcos had known Mr. Rocha for many years, yet they issued checks payable to him in "Silva's" and "DaSilva's" name. Mrs. Camarco's explanation of why she gave Mr. Rocha checks that were payable to "Silva" is incomprehensible. The Camarcos, at the very least, aided and abetted the ruse. The Board's finding that they were more credible than Mr. Rocha ignores the Camarcos' role in furthering the ruse, which reflects poorly on their credibility.

2. Control

As the Court stated in *Horsey v. Contractual Carriers, Inc.*:[16]

> The test of independency consists of the amount of control retained or exercised by the owner, particularly with respect to the absolute right to direct the manner and method of proceeding with the work rather than with respect to the end result only. A requirement that the work be performed according to standards and specifications imposed by the owner is not sufficient to establish the degree of control necessary to make a presumably independent contractor the agent of the owner. But retention of the right not only to insure conformity with specifications but the retention or exercise of the right to direct the manner in or means by which the work shall be performed will destroy the independent status of the contractor.

The Board concluded that Keka did not exercise a substantial amount of control over Mr. Rocha. It noted that Mr. Camarco told Mr. Rocha where to work and what needed to be done, but that he was not often at the work sites with him. The Board seemed to focus exclusively on one statement Mr. Camarco gave during his testimony:

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[16] 1988 WL 4741, at * 1 (Del. Super. Ct.), *quoting*, *E. I. DuPont DeNemours & Co. v. I. D. Griffith, Inc.*, 130 A.2d 783, 784-85 (Del. 1957).

> MR. LOGULLO: Would you oversee the jobs that he does? Would you supervise them?
> KELLER CARMACO: I have to supervise all my subcontractors and in him I have to supervise him too.
> MR. LOGULLO: By supervise did you tell him how to do the jobs or did you just tell him to do the jobs?
> KELLER CARMACO: I tell him to do the job and I tell him the way it suppose to be done and most of my subs knows exactly what they got to do and he knows what he has to do and just do this job for me and he comes and do it.[17]

The Board, however, completely ignored other testimony given by Mr. Camarco tending to show he did exercise an extensive amount of control over Mr. Rocha:

> MR. LOGULLO: . . . Can you tell us how the job would have been different if [Mr. Rocha] was an employee as opposed to being a subcontractor?
> KELLER CARMACO: Well he is going to be just an employee. He is going to use all of my trucks and my van and for be a supervisor has to be know exactly what he is doing like a step the lines and I mean layout the house for me when they going to do some but it is not in his case.
> MR. LOGULLO: How is it different if you can explain that to me a little bit better? I am having trouble understanding.
> KELLER CARMACO: You will have to know what you are doing under construction and the framing. Everything this is why my I have a supervisor my old subcontractor because I am the person run every day, step the lines for them, layout the house. On the concrete, on the floor where they are going to set the walls and I do that let say for 30% of my subs and the other 70% like say they know everything and they do themselves.
> MR. LOGULLO: Where does he fall in to that percentage? Is he in the 30% where you have to tell him what to do, instruct him how to do it or is he in the 70% where he just does it on his own?
> KELLER CARMACO: He is going to be in the 30%.
> MR. LOGULLO: He is going to be in the 30%?
> KELLER CARMACO: Yeah.
> MR. LOGULLO: So you have to instruct him how to do it?
> KELLER CARMACO: Yeah.[18]

. . .

> MR. KARSNITZ (discussing the day of Rocha's injury): . . . How [sic] was on that job site besides Mr. Rocha that day?

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[17] Tr. Keller Camarco, IAB Hearing No. 1247306, at 81

[18] Tr. Keller Camarco, at 82-83.

KELLER CARMACO: Oh me I was there with him.
MR. KARSNITZ: You and he were working together in that job site?
KELLER CARMACO: I don't want to say together but we was there the same place but he was doing some stuff and I was on the other side.
MR. KARSNITZ: Who told him what to do?
KELLER CARMACO: I don't tell him to do this. I came, when I came into the garage I say this one is wrong, this one is wrong, this is wrong.
MR. KARSNITZ: You told him to fix them.
KELLER CARMACO: Then we come to fix and I was there.
MR. KARSNITZ: Okay did you tell Mr. Rocha what to fix?
KELLER CARMACO: Yes.[19]

. . .

MR. KARSNITZ: All right and you retain the right to control him as to what he was doing?
KELLER CARMACO: Not himself.
MR. KARSNITZ: You didn't retain that right to control him?
KELLER CARMACO: I have to control my all subcontractors. Like I say. I don't necessarily control if you have three guys working for you I cannot control your guys. They are going to talk with the boss.
MR. KARSNITZ: Right. I understand that. But with respect to Mr. Rocha there were not three guys that worked for him. The only person that did that work was Mr. Rocha, right?
KELLER CARMACO: Yes.
MR. KARSNITZ: And you retained the right to tell him what to do?
KELLER CARMACO: Yes.[20]

Even though the Board found that Keka was Mr. Rocha's only source of work, that Keka set Mr. Rocha's work hours, that Keka told Mr. Rocha where to work, that Keka told Mr. Rocha what work to do, and that Keka told Mr. Rocha how to do the work, it still concluded that Keka did not exercise substantial control over Mr. Rocha. This conclusion was based largely on the fact that Mr. Camarco did not often work at the same site as Mr. Rocha and that he purportedly did not have to tell him how to do the work very often. I cannot find substantial evidence to support the finding that Mr. Camarco did not often have to tell Rocha how to do the work.

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[19] Tr. Keller Camarco, at 86-87.

[20] Tr. Keller Camarco, at 89-90.

Indeed, Mr. Camarco's testimony indicates otherwise. He testified that Mr. Rocha fell into the 30% of his subcontractors who had to be more extensively supervised.

Moreover, the fact that Mr. Camarco was only able to visit each of his sites a couple of times a week does not by itself prove that he did not exercise control over Mr. Rocha. While this factor, combined with other aspects of the work environment, such as how much direction and instruction were given to Mr. Rocha, might show that Mr. Rocha had more control over the course of his work than Keka did, Mr. Camarco's absence is not dispositive in such a way that it would trump other evidence to the contrary. The Board's finding in this regard is simply not supported by substantial evidence in the record. Indeed, it is contradicted by Mr. Camarco's own testimony.

3. Ownership of Instrumentalities

There was conflicting evidence as to whether and to what extent Mr. Rocha provided his own tools. If a worker provides his own tools it is some evidence that he is not an employee.[21] The Board found that Mr. Rocha provided most of his own tools, including the ladder he fell off of. While there was testimony to support the Board's conclusion that Rocha provided some of his own tools,[22] it was improper for it to have found he provided the ladder.[23]

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[21] *See* Restatement (Second) of Agency § 220, cmt. k (1958).

[22] Mr. Rocha claimed that tools he used except for a belt, a hammer and a measuring tape belonged to Mr. Camarco. His wife first stated that he did not have his own tools, but later acknowledged that he did have tools in his truck. Both Mr. Camarco and Mr. Smith testified that Mr. Rocha provided many of his own tools. According to Smith, Rocha had a tool bag, a saw and an extension cord of his own, but that they all used Keka's air compressors. Mr. Camarco claimed that Mr. Rocha had his own tools and cable saw, but used Keka's air gun.

[23] Mr. Rocha testified that the ladder belonged to Mr. Camarco, but Mr. Camarco claimed the ladder did not belong to him. The ladder was located at the site where Mr. Rocha

The undisputed testimony was that Mr. Rocha provided only a hammer, a belt, a measuring tape, a saw and an extension cord. These are all relatively inexpensive tools that every construction worker would be expected to have regardless of his status as an employee or an independent contractor. It was Keka that provided the air gun and air compressor. These tools are obviously more expensive than simple hand tools, and they were available to all workers at the construction sites. Clearly, the type of tool provided is important.[24] Moreover, there was no evidence in the record that Mr. Rocha provided any supplies or materials. The Board's finding that Mr. Rocha was an independent contractor, in part, because of the few inexpensive hand tools that he did provide is simply not supported by substantial evidence in the record and ignores the fact that Mr. Rocha did not provide any supplies or materials.

4. Time of the Employment

Mr. Rocha's employment with Keka was neither limited in time nor by job. The Board pointed out that this arrangement supported a finding of an employer/ employee relationship. It stated, "[r]egarding the element of time of the employment, Claimant was hired to work regular hours for an indefinite time period and would be able to continue working as long as work was

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was working when he was injured and it is entirely possible that if the ladder belonged to neither of them, that it belonged to whoever owned the site or to someone else. There was no one who testified the ladder belonged to Mr. Rocha, however, and the Board could not have reached that conclusion based upon the evidence. Even Mr. Camarco acknowledged during his testimony that the ladder may not have been Mr. Rocha's. I only point this out because it seems to have been an important factor in the Board's decision.

[24] *See* Restatement (Second) of Agency § 220, cmt. k (1958) ("[I]f the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master.").

available; however, he was assigned to work on a job-by-job basis . . . ."[25] Indeed, employment for an indefinite period of time is indicative of an employer/ employee relationship. The Board seemed to try to minimize the significance of this finding, however, by stating that Mr. Rocha worked on a "job-by-job" basis. Such a finding is not supported by the facts and adds nothing to the analysis.

The pertinent question is whether Mr. Rocha was hired to work one job at a time as opposed to indefinitely, not whether he was given his assignments piecemeal, as the jobs came in. It is the nature of Keka's business that it receives work orders for construction jobs and then assigns all or a part of the job to its alleged subcontractors. Mr. Rocha's function was to do the repair work guaranteed under the warranties included with the jobs Keka had already completed. Logic dictates that the only way Mr. Rocha could have been assigned the work is on a "job-by-job basis," in the sense that he did not know what work he was assigned until a repair job was called in. This does not mean, however, that he was contracted to work job-by-job for Keka.

"Job-by-job," in the contracting sense of the word, implies that the contractor is hired or contracted independently as each job arises. As each job is completed the contractor is free to move on to another customer. The evidence presented in this case does not support the contention that Mr. Rocha worked on a job-by-job basis. The Board must, of course, always look to the sum of the factors. However, hiring a person for an indefinite period, whether or not he is given permanent, recurring assignments or given specific assignments as the work orders come in, tends to be more indicative of an employer/ employee relationship than a contracting

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[25] *Rocha v. Keka Constr. Inc.*, IAB Hearing No. 1247306 (July 6, 2004), at 9.

relationship. Here, the Board simply had no factual support for its conclusion that Mr. Rocha worked on a job-by-job basis.

5. Method of Payment

"[P]ayment on a time basis is a strong indication of the status of employment."[26] The Board concluded that this factor also supported a finding that Mr. Rocha was an employee of Keka. He was paid $900 weekly and worked a set number of hours.

6. Regular Business of the Employer

Keka's regular business was to build the frames of houses. As part of this business it guaranteed its work and it was sometimes called to repair its work that was still under warranty. Mr. Rocha's job was to do some of this repair work. The Board concluded that the work he performed was part of the regular business of Keka, and it noted that this was also a factor that weighed in favor of finding an employer/ employee relationship.

7. Right of Termination

The Board concluded that either Mr. Rocha or Keka could terminate the relationship at their convenience. It is not clear from its decision whether the Board felt this factor tipped the scales in favor of finding an employment relationship or a contractor relationship. The *Court in Bryson v. Kline*[27] noted that the right to fire exists whether there is an employment relationship or an independent contractor relationship. However, the key is that "'the absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under

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[26] *Bryson* at * 2.

[27] 1987 WL 10538, at *3, *quoting*, 1C Larson, *Workmen's Compensation Law* § 44.35(a) (1986).

which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract.'"[28] The Board's conclusion that either could terminate the relationship adds nothing to support its conclusion that Mr. Rocha was an independent contractor.

8. Belief of the Parties

Belief of the parties should not generally[29] play a part in determining the employer/ employee relationship for the purpose of workers' compensation benefits.[30] The Board focused a significant portion of its decision on the fact that Mr. Rocha refused to accept the job as an employee and then attempted to set up the "Silva" scheme. It stated:

> In this case, there are factors that weigh on each side. The Board finds that Claimant was not credible and believes that he and Marcelo Silva are one and the same person. The Board finds that Mr. and Mrs. Camarco were credible and believes that Claimant provided Keka with the social security card and certificate of liability insurance under the name Marcelo Silva. . . . The Board also believes that Keka offered Claimant a job as an employee of Keka, but Claimant declined the position because he wanted more money and to not pay taxes. The Board accepts Mrs. Camarco's testimony that Claimant failed to sign the subcontractor's agreement, despite her repeated attempts to have him sign it.[31]

At the end of its opinion the Board concluded:

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[28] *Id*.

[29] In *Weiss*, 272 A.2d at 115, the Court stated that in some cases, the parties' belief as to the existence of an employer/ employee relationship might be "indicative of an assumption of control." Although it determined that admissions of the employer that he had control over the Claimant's work in that case were not dispositive, they were nevertheless a factor that the Board had a right to consider along with the other relevant facts. *Id*.

[30] *See Bryson* at * 2.

[31] *Rocha v. Keka Constr. Inc.*, IAB Hearing No. 1247306 (July 6, 2004), at 8.

> Since there are elements on both sides of the employment issue, the Board weighed all of the elements and finds that Claimant was a subcontractor. There is no one single element that is determinative of the employment relationship. The Board finds that Claimant is the same person as Marcelo Silva, presented Keka with a certificate of liability insurance under the name of Marcelo Silva, accepted and cashed checks in the name of Marcelo Silva, declined the position as an employee with Keka because he did not want taxes withheld from his checks, did not receive medical benefits, worked independently most of the time with little supervision from Keka, and provided most of his own tools. There was no reason for Claimant to present Keka with the certificate of insurance if he was not a subcontractor.[32]

From this list of supporting factors, it appears that the Board was swayed by the fact that Mr. Rocha purposefully set up his relationship with Keka as that of a subcontractor. The Board erred in considering those facts for that purpose. Belief of the parties is not determinative. Furthermore, in *American Communications Installations, Ltd. v. DiNorscia*[33], the Court found that 19 *Del. C*. § 2305 prohibits the use of estoppel to defeat a workmen's compensation claim. In that case, the employer tried to advance an estoppel theory to bar the employee from asserting a workmen's compensation claim because of contract clauses and statements he had made that he was self-employed. The Court stated:

> Section 2305 clearly forbids an agreement to relieve an employer of liability for workmen's compensation. The basis of the estoppel argument is the statements of DiNorscia. There is no doubt that estoppel is asserted as a "legal device" to relieve ACI of liability for workmen's compensation. This is plainly prohibited by § 2305.[34]

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[32] *Rocha v. Keka Constr. Inc.*, IAB Hearing No. 1247306 (July 6, 2004), at 9 (citation omitted).

[33] 1985 WL 552196, at * 4 (Del. Super. Ct.)

[34] *Id*.

While estoppel was not asserted in this case, the Board should not have considered the fact that Mr. Rocha tried to set up a subcontracting relationship as a ruse in order to evidence that there was a subcontracting relationship. Similar to what the Court stated in *American Communications Installations, Inc.*, it is improper to use such evidence to relieve Keka of liability for workmen's compensation.

Moreover, the fact that Mr. Rocha did not sign the subcontract agreement is certainly not proof of an independent contracting relationship. Indeed, the absence of a signed subcontract agreement would instead seem to suggest an employer/ employee relationship. Even if Mr. Rocha had signed it, a contract is not conclusive of the nature of the relationship.[35] In addition, the weight the Board placed on the fact that Mr. Rocha allegedly presented Keka with a certificate of insurance was erroneous. Contrary to the Board's conclusion, there was another reason, of which the Board was well aware, why Mr. Rocha would have presented Keka with a certificate of insurance - to further the ruse that he was an independent contractor so that he could avoid payroll taxes.

Counsel for Keka points out that in *Unlimited Constr. v. Almond*,[36] the failure of the employer to obtain a certificate of insurance from Almond was seen as evidence in support of the Board's conclusion that he was an employee and not an independent contractor. That Court also

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[35] *American Communications Installations, Ltd.* at *2 ("The nature of the relationship between the parties is determined from the facts of the actual relationship and not the name given in a contract."). *But see Loden v. Getty Oil Co.*, 316 A.2d 214, 217 (Del. Super. Ct. 1974) ("While the formal contract between the parties may not indicate the relationship which existed in actual practice between the parties, . . . it should be examined and given its proper weight." (Citations omitted)).

[36] 2003 WL 558518, at * 2 (Del. Super. Ct.).

stated, "[h]ad Unlimited obtained a certificate from Almond it would have had a bearing on whether Almond was an employee or independent contractor."[37] While, the provision of a certificate of insurance might be a factor to consider in determining the nature of the relationship, I find that, as with a contract, it cannot be said to be conclusive of the issue.[38] This is even more true in cases like this one, in which the parties may have believed that the certificate was being provided in order to falsely create the appearance of an independent contracting relationship. The nature of the relationship is determined by the facts and not by the belief of the parties that they can get around the system simply by setting up the appearance of an independent contracting relationship.[39]

CONCLUSION

I find that, as a matter of law, the Board's analysis was seriously flawed. Although the Board never stated that it was relying on the belief of the parties in its decision, it considered their beliefs extensively and it appears that it may have inappropriately relied too much on those beliefs rather than looking only to the facts and circumstances of the relationship. The undisputed facts show that Mr. Rocha only worked for Keka, that he worked a fixed number of hours per week, that Keka determined his working hours, that Keka paid him a fixed sum on a weekly basis, that he did not submit bids for Keka's work, that he did not provide supplies and materials, that Keka told him what work to do, that Keka told him when to do the work, that

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[37] *Id*.

[38] *See* note 31, *supra*.

[39] *See Bryson* at * 2 ("The fact that the parties did not treat Mr. Bryson as an employee by including him on the company payroll or making the required deductions from his pay does not change the facts of the relationship.").

Keka told him where to do the work, and that Keka told him how to do the work. When you consider all of the undisputed facts and properly consider the "Silva" ruse for what it is worth, then the Board's finding that Mr. Rocha was an independent contractor is simply not a logical conclusion.[40]

The Board's decision cannot be saved simply by stripping away its errors. To do so would leave insufficient facts to support its decision. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[41] With all the flaws in the Board's analysis, I cannot find that there were adequate facts to support its conclusion. The Board's decision must be reversed and remanded so that the Board may reconsider the facts consistent with Delaware law.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB/tll

cc: Prothonotarys' Office
Industrial Accident Board

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[40] *Cf. Verdijo v. Skyline Painting*, 2000 WL 970676, at *4 (Del. Super. Ct.) (remanding the Industrial Accident Board's finding as to total impairment and noting that the foundation for the Board's decision must be clear and logical); *K/B Fund II v. New Castle County Dep't of Finance*, 1999 WL 459164, at * 6 (Del. Super. Ct.) (reversing a decision of the New Castle County Board of Assessment Review because it was not the product of an orderly and logical deductive process).

[41] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A .2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986).