

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gettysburg Construction,	:
Petitioner	:
	:
v.	:
	:
Workers' Compensation Appeal	:
Board (Weaver),	: No. 34 C.D. 2008
Respondent	:
	:
Joseph Weaver,	:
Petitioner	:
	:
v.	:
	:
Workers' Compensation Appeal	:
Board (Gettysburg Construction),	: No. 74 C.D. 2008
Respondent	: Submitted: August 1, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE BUTLER**

FILED: October 9, 2008

I. Nature of the Petition for Review

These are cross-petitions for review, filed by Joseph Weaver (Weaver/Claimant) and Gettysburg Construction (Gettysburg), from a Decision

and Order of the Workers' Compensation Appeal Board (WCAB), affirming the dismissal and denial of Weaver's claim petitions against Gettysburg and Kirk Smith (Smith). The Workers' Compensation Judge (WCJ) held that Claimant failed to establish an employee relationship with either Gettysburg or Smith. The WCJ also held that Claimant was not an employee of Smith within the meaning of the Workers' Compensation Act (Act).¹

II. Procedural History

On March 17, 2006, Claimant filed a claim petition alleging that he sustained work injuries in the nature of severe injuries to his head, brain trauma, neck injury, and scarring, while in the course and scope of his employment with Gettysburg. On April 6, 2006, Gettysburg filed an answer to the claim petition, denying all of Claimant's allegations. On April 21, 2006, Claimant filed another claim petition. In the second petition, he alleged that at the time of the injury in question, he was in the course and scope of his employment with Smith.

On May 16, 2006, Smith filed an answer to the claim petition, admitting that an injury occurred, but denying that there was an employment relationship between Claimant and Smith.

On March 13, 2007, the WCJ issued a Decision and Order denying and dismissing the two claim petitions. The Decision and Order of the WCJ was appealed to the WCAB. By Order dated December 20, 2007, the Decision and Order of the WCJ was affirmed by the WCAB. Weaver and Gettysburg filed cross-petitions for review with this Court. For the reasons set-out below, we affirm the Order of the WCAB.

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

III. Factual Summary

Claimant was a carpenter's helper for Gettysburg. On July 29, 2007, after working his shift at Gettysburg – and while working at the home of Smith, a co-worker at Gettysburg, Weaver fell off the roof of Smith's house, to the ground three stories below. As result of this accident, Claimant sustained the injuries that are the subject matter of his claim petitions in this case. At the time of his accident, Weaver was being paid \$12.00 per hour by Smith. Weaver did not perform any other side jobs, outside of his work with Gettysburg Construction. He did not sign any tax papers, and Smith did not provide any employment benefits. Weaver used his own tool belt, but Smith provided the nails, ladders and lumber. Smith also told Weaver what to do.

Weaver and several other workers from Gettysburg worked on Smith's house whenever they wanted to. Weaver worked two Saturdays, and on one Thursday (the day of the accident). During the work on his house, Smith told the men what work had to be done. They knew how to do the work. The men usually had their own tools. There were no ramifications if the men did not show up to work on Smith's house, but Smith could tell them not to come back if he did not like their work. No paperwork was completed. The men told Smith how many hours they had worked, and he then paid them either by cash or by personal check. Smith did not issue 1099 forms. And he did not have workers' compensation insurance coverage.

Smith, the lead carpenter, and Claimant Weaver were regular full-time employees of Gettysburg Construction. On July 29, 2004, Weaver worked for

Gettysburg Construction at the Hilton Garden Inn site on Route 30, and Milton Kuharske was the project manager -- and Weaver's supervisor, Wayne David Hill, the president of Gettysburg Construction, indicated that he did not know that Weaver was also helping Smith build his house. Hill indicated further that Gettysburg Construction had nothing to do with the house; and that Gettysburg had no relationship with Weaver while he worked on Smith's house. Furthermore, according to Hill, Gettysburg did not supervise Weaver at Smith's house, nor pay him for that work; and Gettysburg Construction received no economic benefit from the construction of Smith's house.

IV. Analysis of Issues / Discussion of Arguments²

In his Petition for Review, Weaver argues that he was within the scope of employment with Gettysburg Construction when he was injured. He argues further that the WCJ misapplied the law to the facts of this case. Cross-Petitioner Gettysburg alleges that "the WCJ did not commit legal error in denying claimant's claim petitions where claimant was not in the course and scope of his employment with Gettysburg Construction at the time of the injury." Gettysburg's Brief at 8. So the issue before this Court is whether or not Weaver proved,³ within the meaning of the Act, the existence at the time of the injury of an employee relationship with either Gettysburg or Smith.

² Appellate review in workers' compensation proceedings is limited to determining whether constitutional rights have been violated, an error of law has been committed, and whether necessary findings of fact are supported by substantial evidence. *Universal Am-Can v. Workers' Compensation Appeal Board (Minteer)*, 563 Pa. 480, 762 A.2d 328 (2000).

³ Of course, it is a claimant's burden to prove the existence of an employee/employer relationship. *Universal Am-Can*.

In related arguments, Cross-Petitioner Gettysburg and Smith⁴ also make allegations related to the actual meaning and legal significance of the WCJ's Finding of Fact No. 17. The exact language thereof is set out below:

This Judge notes, however, that although Mr. Hill [the president of Gettysburg Construction] did not know that the claimant was working on Mr. Smith's house, this does not mean that Mr. Smith did not have apparent authority and supervisory capacity over the claimant at work at Gettysburg Construction, to the extent that claimant felt that he had to work at Mr. Smith's house to keep his job at Gettysburg Construction.

WCJ Finding of Fact No. 17, R.R. 36a (emphasis added). Both Gettysburg and Smith assert that the later referenced Finding of Fact is not supported by substantial evidence.

In that regard, Gettysburg alleges: "Significantly, there is no evidence of conduct on the part of Gettysburg to support the WCJ's finding that Defendant Smith had apparent authority for Gettysburg, to the extent that Claimant felt compelled to work for Defendant Smith in order to keep his job with Gettysburg Construction." Gettysburg's Brief at 7 (emphasis added). On the other hand, Smith alleges: "The Worker's Compensation Judge did not find that Mr. Smith had apparent authority and Claimant failed to establish apparent authority." Smith's Brief at 4 (emphasis added). So, within the context of Finding of Fact No. 17, the issue before this Court is whether the WCJ made a finding of fact that Smith had "apparent authority and supervisory capacity over the claimant at work at Gettysburg Construction"; and whether such a finding equates to a finding that Claimant was an employee of either Gettysburg or Smith at the time of the accident and injury.

⁴ Smith did not petition for review, but filed a brief with the Court as amicus curiae.

A. The Employment Relationship

It is hornbook law that if an injury is to be compensable within the meaning of the Workers' Compensation Act the claimant must have an employment relationship; the claimant must have been functioning within the scope of that employment relationship at the time of the accident and injury; and the claimant must have been engaged in the furtherance of the employer's business. The language of the Act is clear in that regard.

The terms "injury" and "personal injury," as used in this act shall be construed to mean an injury to an employe, regardless of his previous physical condition, arising in the course of his employment and related thereto. . . . The term "injury arising in the course of his employment," as used in this article . . . shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer. . . .

Section 301(c) of the Act, 77 P.S. §411(1).

The determination of the existence of an employment relationship requires the analysis of four key elements of the common law master-servant relationship. Sections 103 and 104 of the Act, 77 P.S. §§21, 22. Those four elements are as follows: the right to select the employee; the right and power to remove the employee; the power to direct the manner of performance; and the potential power of the employer to control the employee. *See, generally*, P. Weber *et al.*, *Pennsylvania Workers' Compensation Practice & Procedure* 45 (2008). The primary element though is the power to direct the manner of performance, *i.e.*, "the right to control either the work to be done or the manner in which the work is to be accomplished[.]" *Universal Am-Can*, 563 Pa. at 485, 762 A.2d at 330 (emphasis added).

The findings of the WCJ are quite clear regarding Claimant's failure to establish an employment relationship with Gettysburg within the context of his accident and injury at Smith's house. Wayne Hill, the president of Gettysburg, provided credible testimony regarding Weaver's employment. Hill did not know that Claimant was helping Smith build his house, and Gettysburg had nothing to do with the project. Gettysburg had no relationship with Claimant while he worked on Smith's house. Gettysburg Construction did not supervise Claimant at Smith's house, nor pay him for that work. And Gettysburg received no economic benefit from the construction of the house.

Obviously, Gettysburg did not have the right to control either the work to be done by Claimant at Smith's house or the manner in which Claimant's work was to be accomplished. Moreover, Claimant was not within the scope and course of his employment with Gettysburg at the time of his accident and injury. And most significantly, Claimant was not engaged in the furtherance of the business of Gettysburg at the time of the accident and injury.

Likewise, the findings of the WCJ are quite clear regarding Claimant's failure to establish an employment relationship with Smith within the context of Claimant's accident and injury at Smith's house. The WCJ found as a fact that "the claimant was not an employee of Smith at the time of his injury." WCJ Finding of Fact No. 19, R.R. at 36a. There was also the conclusion of law by the WCJ that "Claimant was not an employee of Smith within the meaning of the Workers' Compensation Act." Conclusion of Law No. 2, R.R. at 37a. Implicit in that conclusion is the WCJ's determination that Smith did not have the right to control both the work to be done by Claimant at Smith's house and the manner in which the Claimant's work was to be accomplished. The evidence of record

suggests the existence of an independent contractor relationship which does not constitute an employment relationship between Claimant and Smith within the meaning of the Act.

It is the view of this Court that there is substantial evidence of record to support the findings of fact and conclusions of law that there was not an employment relationship within the meaning of the Act between either Claimant and Gettysburg, or Claimant and Smith, within the context of the injury in question, which occurred while Claimant was working on Smith's house. Claimant failed to prove the existence of the requisite employment relationships.

B. Finding of Fact No. 17

The analysis by the WCAB of the WCJ's Finding of Fact No. 17 is quite sound and thorough. As such, the analysis and conclusion of the WCAB, in that regard, is adopted by this Court. That analysis and decision by the WCAB is set-out below:

Defendant Gettysburg . . . aver[s] that the WCJ erred in finding that just because Defendant did not know that Claimant was working on Defendant Smith's house "this does not mean that Mr. Smith did not have apparent authority and supervisory capacity over the claimant at work at Gettysburg Construction, to the extent that the claimant felt that he had to work at Mr. Smith's house to keep his job at Gettysburg Construction." (Finding 17).

The WCJ credited the testimony of Claimant that Defendant Smith asked Claimant "to work on his house, and the claimant felt pressure to agree since Mr. Smith was higher than him at Gettysburg Construction." (Finding 13). Even though Claimant believed that he was pressured to work on Defendant Smith's house because of the work relationship between he and Defendant Smith while they are working for Defendant Gettysburg, this

does not equate to Claimant being an employee of either Defendant Gettysburg or Defendant Smith while Claimant was performing a side job at Defendant Smith's residence. The contentions of both defendants regarding the testimony are more in the nature of arguing the weight of the evidence, and the credibility, to be considered by the WCJ as the finder of fact, rather than any proper objection to the legal competency of such testimony.

WCAB Decision and Order at 7, R.R. at 46a, 47a (emphasis added).

So as a practical matter, there was no finding that Claimant was an employee of either Gettysburg or Smith while performing a side job at Smith's residence. Therefore, Gettysburg and Smith have no basis for appeal.

Though not addressed by the WCJ or the WCAB, the WCJ's finding that Smith conceivably had apparent authority for Gettysburg is insufficient as a matter of law to establish that he actually had apparent authority. The general rule governing the creation of apparent authority is found in Section 3.03 of the *Restatement (Third) of Agency*, § 3.03 (2006).

Apparent authority . . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

See also, Simon v. H.K. Porter Co., 407 Pa. 359, 180 A.2d 227 (1962) (discussing creation of apparent authority). Thus, absent a finding that Gettysburg made some manifestation of Smith's authority to require Claimant to work at his home, there could be no establishment of apparent authority. Gettysburg and Smith are not aggrieved by Finding of Fact No. 17.

Discerning no error in the Board's decision as it relates to the employment relationship or as it relates to Finding of Fact No. 17, we affirm.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 9th day of October, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

Further, the petition for review filed by Gettysburg Construction at No. 34 C.D. 2008 is hereby quashed as Gettysburg Construction is not an "aggrieved party." Pa. R.A.P. 501.

JOHNNY J. BUTLER, Judge