IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth Bungard, Petitioner	:	
v.	:	No. 805 C.D. 2008
	:	Submitted: September 5, 2008
Workers' Compensation Appeal Board (Mount Pleasant Windows and William Patrick Coffman), Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: November 25, 2008

Kenneth Bungard (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) denying his Claim Petitions. We affirm.

Claimant filed a Claim Petition alleging he sustained injuries in a motor vehicle accident on July 26, 2005 while in the course and scope of his employment with Mount Pleasant Windows (Mt. Pleasant Windows).[1] Claimant alleged he sustained fractured vertebra as well as head trauma as a result of the accident. He sought total disability from July 26, 2005 and ongoing. In the alternative, Claimant filed a Claim Petition against William Patrick Coffman naming this individual as his employer.

[1] Mt. Pleasant Windows is a business that sells and installs custom windows and siding.

Claimant testified that he began working for Mt. Pleasant Windows after he responded to an ad in the paper for employment. He filled out an application for employment and was interviewed by Mr. Coffman. The application was a standardized form and did not contain Mt. Pleasant Windows' name. According to Claimant, he was guaranteed $250.00 per week, $50.00 per demo lead, and a five percent commission on any sale. No deductions were taken from the pay he received. He explained that he was to generate leads for Mt. Pleasant Windows and was told where to report, what time to start work, and was required to get two set appointments and five leads per day. Claimant explained these instructions came from Mr. Coffman. He conceded he reported only to a general area and was given no further instruction concerning what houses to target or how to progress throughout the day. According to Claimant, Mt. Pleasant Windows provided him with clothing that he was required to wear pursuant to Mr. Coffman's instructions. The shirts had Quantum II written on them. He was also provided with a cell phone. Claimant explained that he wrote leads down on forms containing Mt. Pleasant Windows' name. He agreed, however, that he also wrote leads on forms containing the name P&C Replacement Windows, Inc. Claimant indicated Mr. Coffman told him how to canvass although he could not recall any specific details. He added he was not allowed to keep a notebook of his own to record the leads he generated to compare against what he received in pay.

Mt. Pleasant Windows presented the testimony of Richard Wrobleski, president, who testified Mr. Coffman was not one of his employees. Instead, he was an independent contractor who generated leads and would be paid a commission based on sales. Mr. Wrobleski said he never offered any training, tools, supplies, uniforms, or vehicles to Claimant or Mr. Coffman. He explained

his installers are given shirts and hats. He added that their trucks have decals that read Mt. Pleasant Windows. Gas for these vehicles is paid for by the company. Mr. Wrobleski indicated, however, that neither Claimant, nor Mr. Coffman were ever reimbursed for gas. Deductions are taken from employee paychecks. Claimant was never issued a payroll check. Mr. Wrobleski agreed that Claimant would get a draw in advance of his commission. That would ultimately be deducted from that commission. He stated that Claimant was never told the amount of hours he needed to work or the number of leads he had to generate in one day, nor did he state that Claimant or Mr. Coffman had to canvass in areas where installations were being performed.

Mt. Pleasant Windows further presented the testimony of Richard J. Wrobleski, Jr., vice president, who agreed that installers are told where to go in the mornings. He added they are provided with tools, shirts, and hats. No shirts, hats, or tools were ever provided to Claimant or Mr. Coffman. The younger Mr. Wrobleski denied training was ever provided to either of these individuals. He explained that the installers and office personnel must report their hours worked for the purposes of completing payroll. Neither Claimant, nor Mr. Coffman were required to report their time worked. They were not told where to work, the number of hours they needed to work, or required to generate a specific amount of leads in a given day. He explained Claimant was never guaranteed he would be paid $250.00 per week. He was paid draws against his commission. No payroll type checks were ever issued to him. Employees are paid once a month. Canvassers receive their commission checks weekly. The checks issued to Claimant indicated they were for work performed by a contractor. Mr. Wrobleski agreed that lead sheets were printed bearing the name Mt. Pleasant Windows.

These were given to Mr. Coffman but were also available to the general public in kiosks at the mall.

Mt. Pleasant Windows also presented the testimony of Wendy Lint, office manager, who explained that Mr. Coffman would call and inquire where installations were taking place on any given day. She was never told to direct Claimant or Mr. Coffman to canvass in a certain area.

Mr. Coffman testified and agreed he approached Mt. Pleasant Windows about doing canvassing work. He stated that prior to working as a lead generator for Mt. Pleasant Windows, he did the same thing for P&C Replacement Windows, Inc. He stated that initially he and Claimant utilized the lead forms he had remaining from that employer when canvassing for Mt. Pleasant Windows. Eventually, his supply of these forms ran out and Mr. Coffman prepared forms with Mt. Pleasant Windows name on it. He agreed he was not told when and where to canvass. He further agreed that he was paid a commission on any lead that turned into a sale.

According to Mr. Coffman, he wanted another canvasser to generate leads so he placed an ad in the paper. Claimant responded and Mr. Coffman interviewed him, told him it was a commission only job, and that he would set his own hours. Mr. Coffman agreed that he inquired where Mt. Pleasant Windows was doing installations. He explained that that would be the optimal location to try to get leads. He stated, however, that he did not have to canvass in these locations. Mr. Coffman utilized his own car to canvass. He acknowledged he provided Claimant with a cell phone to assist in generating leads. He further agreed he had Claimant fill out an employment application in order to obtain contact information. Mr. Coffman disagreed that he did not allow Claimant to keep separate records of

his leads. He did not give Claimant any clothes to wear while canvassing. Nonetheless, he acknowledged they received free shirts when they toured a window manufacturer that read Quantum II. Mr. Coffman told Claimant he should set goals for himself, such as, getting five leads per day. That was merely advice, however, as they were paid on a commission basis, and not a requirement.

In a decision dated September 14, 2007, the WCJ denied both of Claimant's Petitions. The WCJ reviewed the aforementioned testimony and concluded that Claimant was not an employee of Mt. Pleasant Windows. She determined that Mt. Pleasant Windows did not direct either Mr. Coffman or Claimant to canvass in areas where installations were taking place. Rather, she accepted Ms. Lint's testimony that Mr. Coffman requested these locations and Mr. Coffman's testimony that this information was beneficial in attempting to efficiently generate leads. The WCJ noted that the only direction Claimant testified to receiving was to canvass in areas where the installations were occurring. She indicated Claimant failed to explain what direction he was given when canvassing on days when no installations occurred, where to go if the area surrounding an installation failed to generate leads, or where to go if he completed canvassing in a given area. The WCJ further referenced that Claimant was not required to work a set number of hours. Claimant was paid commission for the leads he generated that turned into sales, not the time he worked canvassing.

The WCJ also relied on Mr. Coffman's statement that he advised Claimant to set goals for himself, but that there was no requirement that he obtain two set appointments and five leads per day. She rejected Claimant's testimony that he was not permitted to maintain records of his leads. The WCJ found that Claimant did not receive any money from payroll checks, that no deductions were

made from his commissions for tax purposes, that his checks were marked as being for canvassing work as a contractor, and that he was paid on a separate pay schedule than Mt. Pleasant Windows' employees. The WCJ further found that no training or uniforms were provided. Claimant was not provided a vehicle or reimbursed for his gas or mileage. The WCJ acknowledged lead forms containing Mt. Pleasant Windows' name were given to Claimant, but given the totality of the evidence, she did not believe this necessitated a finding that he was Mt. Pleasant Windows' employee. This was particularly true since these forms could be picked up by anyone at mall kiosks.

The WCJ further found that Mr. Coffman was not Claimant's employer. She reiterated that while he advised Claimant to set goals for himself, no set requirements were made regarding lead generation. She added that Mr. Coffman did not cut Claimant's checks, rather Mt. Pleasant Windows paid Claimant's commission. She acknowledged Claimant was given lead forms. Because, however, these forms were available to anyone, no employer-employee relationship was established. The WCJ did not find it conclusive that Claimant was an employee of Mr. Coffman because Mr. Coffman provided him with a cell phone.

The WCJ concluded that Claimant failed to meet his burden of establishing that he was an employee of either Mt. Pleasant Window or William Coffman. The Board affirmed in an order dated April 3, 2008. This appeal followed.[2]

[2] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Kane v. Workers' Compensation Appeal Board (Glenshaw Glass Co.), 940 A.2d 572 (Pa. Cmwlth. 2007).

Claimant argues on appeal that the WCJ utilized an improper standard to determine whether Claimant was an employee of either Mt. Pleasant Windows or Mr. Coffman. According to Claimant, the WCJ placed improper emphasis on the fact that Mt. Pleasant Windows did not deduct any taxes from his commission checks, that it did not use payroll checks to pay him, that it marked his checks with a notation that they were for commissions, and that it did not pay him on the same schedule it paid its other employees. Claimant asserts that the primary factor to be considered to determine whether he is an employee or an independent contractor is whether control is exerted over the manner work is performed and completed. In regard to Mr. Coffman, Claimant points out that this individual supplied him with a cell phone, a shirt to wear, and forms to document his leads. He further asserts that Mr. Coffman exerted control over the manner he went about obtaining leads.

In a claim petition, the burden of proving all necessary elements to support an award rests with the claimant. Sysco Food Servs. of Phila. v. Workers' Compensation Appeal Board (Sebastiano), 940 A.2d 1270 (Pa. Cmwlth. 2008). It is the claimant's burden to establish an employer/employee relationship. Gill v. Workmen's Compensation Appeal Board (Norton), 425 A.2d 1206 (Pa. Cmwlth. 1981). An independent contractor is not entitled to workers' compensation benefits because of the absence of the master/servant relationship. Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board (Minteer), 563 Pa. 480, 762 A.2d 328 (2000). A determination regarding the existence of an employer/employee relationship is a question of law that is determined on the unique facts of each case. Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995). The WCJ is the fact-finder.

Watson v. Workers' Compensation Appeal Board (Special People in Northeast), 949 A.2d 949, 953 (Pa. Cmwlth. 2008).

While no bright-line rule exists to determine whether a particular relationship is that of an employer-employee or owner-independent contractor, the following factors are required to be taken into consideration: (1) control of the manner in which work is to be done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) the nature of the work or occupation; (5) skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7) which party supplied the tools; (8) whether payment is by the time or by the job; (9) whether work is part of the regular business of the employer; and (10) the right to terminate the employment at any time. Minteer, 563 Pa. at 489-490, 762 A.2d at 333.

While all of these factors are important indicators, the key element is whether the alleged employer has the right to control the manner in which the work is to be done. Murdock, 667 A.2d at 266. If the alleged employer has this right, an employer-employee relationship likely exists. Johnson v. Workmen's Compensation Appeal Board (Dubois Courier Express), 631 A.2d 693, 696 (Pa. Cmwlth. 1993). The fact that an individual is described as an independent contractor in one of the parties' writings is not dispositive of the issue. Murdock, 667 A.2d at 267. It is only a factor to be considered. Id. Further, an employer/employee relationship can still be found when the claimant is responsible for the payment of his own withholding and other payroll taxes. Id. Moreover, "neither the workmen's compensation authorities nor the court should be solicitous to find contractorship rather than employment, and inferences favoring the claim need make only a slightly stronger appeal to reasons than those opposed." See

Southland Cable Co. v. Workmen's Compensation Appeal Board (Emmett), 598 A.2d 329 (Pa. Cmwlth. 1991)(citing Diehl v. Keystone Alloys Co., 398 Pa. 56, 156 A.2d 818 (1960)).

Upon review, we see no error in the WCJ's determinations. Consistent with Murdock, the key element to consider in evaluating an individual's status as an employee or an independent contractor is whether the alleged employer has the right to control the manner of the work to be done and the methods in which it is to be performed. While Claimant asserted that Mt. Pleasant Windows exhibited control over where he should go to generate leads, the time he was to begin, and the amount of set appointments and leads he was required to obtain, the remaining witnesses testified that no such control was exhibited. The WCJ, in her role as fact-finder, concluded Mt. Pleasant Windows exhibited no control over how Claimant went about conducting his work activities. Claimant was responsible, and paid, for the result only. Moreover, Mt. Pleasant supplied no tools. It did not provide Claimant with a vehicle or reimburse him for mileage or gas when canvassing. Further, Claimant was responsible for his own taxes. He did have a shirt that had Quantum II Windows on it but Mt. Pleasant Windows did not provide that shirt, it did not contain its name, and he obtained it while touring a factory owned by the window manufacturer. Given the factors established in Minteer as well as the holdings in Norton, Johnson, and Murdock, Claimant did not establish he was an employee of Mt. Pleasant Windows.[3]

[3] Because we find no error in the WCJ's determination that Claimant was not an employee of either Mt. Pleasant Windows or Mr. Coffman but rather acted as an independent contractor, he is precluded from obtaining workers' compensation benefits. Minteer. Consequently, we need not address Claimant's argument that his injury occurred while acting in the course and scope of his employment when he was involved in a motor vehicle accident in Kentucky.

Claimant's argument that the WCJ did not utilize the appropriate standard to determine whether Claimant was an employee or an independent contractor in relation to Mt. Pleasant Windows must be rejected. The WCJ considered the factors discussed in Minteer, specifically whether control was exerted over Claimant's manner and direction in generating leads. It is true that she considered additional factors such as the notations contained on Claimant's commission checks as well as the fact that no tax deductions were taken from his pay. Such considerations, while not conclusive, may, nonetheless, be taken. Murdock.[4]

The WCJ also determined that Mr. Coffman was not Claimant's employer. The WCJ concluded, based on her findings of fact, that Mr. Coffman did not control how Claimant went about performing his work. As noted, this is the most important factor to be considered. Murdock. It is true that Claimant was provided a cell phone. We point out, however, that in Johnson, a newspaper boy was provided with a newspaper bag, but was nonetheless found to be an

[4] The WCJ, in rejecting Claimant's statement that Claimant was not allowed to keep a record of the leads he generated, stated "[s]alesmen, based on this Workers' Compensation Judge's experience with salesmen during the litigation of various claims, maintain records of their leads, sales, and commissions to ensure that they receive all their commissions due to the lag time between initiating the lead and accomplishing a sale." Reproduced Record at 21a. Claimant argues the WCJ relied on evidence submitted in other cases and/or improperly took judicial notice of something that is beyond common knowledge in making this finding. It is unclear whether Claimant's argument may indirectly ask us to reweigh the credibility of Claimant, an action prohibited by Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). Nonetheless, we reiterate that it was Claimant who bore the burden of proof to establish that there was an employer/employee relationship. Norton. Even if Claimant was prohibited from maintaining his own records documenting his leads, we must acknowledge that his sole responsibility was to provide leads to Mt. Pleasant Windows in hopes of having some of those leads turn into sales. The WCJ found that Claimant was given no direction in how to obtain these leads and he was responsible for the result only. Consequently, we find no reversible error.

independent contractor because the claimant's work was not controlled in any detail. Thus, this factor is not conclusive. Moreover, Claimant, in the instant matter was given lead forms to utilize when obtaining leads. Nonetheless, as pointed out by the WCJ, these forms could be obtained by anyone from one of the mall kiosks. Further, Mr. Coffman did not provide the shirts depicting the Quantum II emblem. Rather this specific shirt was obtained by both Claimant and Mr. Coffman following their tour of a window factory. We find no error in the WCJ's determination that Claimant was not an employee of Mr. Coffman.

Claimant, in the argument section of his brief, argues that if neither Mt. Pleasant Windows, nor Mr. Coffman were his employers, Mt. Pleasant Windows was his statutory employer pursuant to Section 302(b) of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §462.[5] This argument is not raised in Claimant's Petition for Review or the Statement of Questions Involved section of his brief. Failure to properly raise an issue in the petition for review and in the Statement of Questions Involved as well as discuss that issue in the argument section of one's brief will render an issue waived. Muretic v. Workers' Compensation Appeal Board (Department of Labor & Indus.), 934 A.2d 752 (Pa. Cmwlth. 2007); AT&T v.

[5] Section 302(b) of the Act provides, in pertinent part:

> Any employer who permits entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employee or contractor, shall be liable for the payment of compensation to such laborer or assistant unless such hiring employee or contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act….

Workers' Compensation Appeal Board (Dinapoli), 816 A.2d 355 (Pa. Cmwlth. 2003); McKay v. Workmen's Compensation Appeal Board (Osmolinski), 688 A.2d 259 (Pa. Cmwlth. 1997). Consequently, Claimant has not preserved this issue and it is deemed waived.

After a review of the record, we conclude that the Board did not err in affirming the WCJ's order as all findings are supported by substantial evidence. Accordingly, the decision of the Board is affirmed.

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JIM FLAHERTY, Senior Judge

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Workers' Compensation Appeal Board (Mount Pleasant Windows and William Patrick Coffman), Respondents	:	

O R D E R

AND NOW, this 25th day of November, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge