

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jim Bishop, d/b/a	:
Bishop Agri Business and	:
State Workers' Insurance Fund,	:
Petitioners	:
	:
v.	: No. 974 C.D. 2013
	: Submitted: September 20, 2013
Workers' Compensation Appeal Board	:
(Walters),	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: October 23, 2013

In this appeal, Jim Bishop, d/b/a Bishop Agri Business, and the State Workers' Insurance Fund (collectively, Employer), ask whether the Workers' Compensation Appeal Board (Board) erred in affirming a Workers' Compensation Judge's (WCJ) decision finding Employer liable for the work-related injury and death of its truck driver, Robert Walters (Decedent), under the Workers' Compensation Act (Act).¹ Employer contends the WCJ capriciously disregarded competent evidence and erred in finding an employer-employee relationship existed between Employer and Decedent. Discerning no error, we affirm.

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

I. Background & Procedural History

Decedent's widow, Candice Walters (Claimant) filed a claim petition and two fatal claim petitions against Employer. In the petitions, she alleged Decedent sustained an injury on June 11, 2009, while working as a truck driver for Employer, and died shortly thereafter from necrotizing fasciitis (flesh eating virus). Employer denied all material allegations.

The petitions were assigned to a WCJ. The WCJ bifurcated the case to decide the threshold issue of Decedent's employment status with Employer.

The parties entered stipulations, which the WCJ summarized as follows. Decedent began driving a truck for Employer in February 2008 and periodically worked through June 11, 2009. Decedent drove the truck for Employer both locally and long distance. Decedent did not own any of the trucks he operated for Employer. Rather, Employer owned the vehicles. Employer dispatched Claimant on trips. Employer paid for fuel and tolls. Although the number of deliveries Decedent made varied per week, Employer paid Decedent by check, weekly or bi-weekly. Employer paid Decedent a percentage of the freight for long-haul deliveries. No written, employment contract or independent contractor agreement existed between the parties. Decedent was making a local delivery for Employer on the date of the injury. WCJ's Op., 6/30/10, Findings of Fact (F.F.) Nos. 6(a)-(g).

In support of her petitions, Claimant testified her husband only worked for Employer. Decedent operated Employer's trucks, including a tractor

trailer and a dump trailer. Claimant stated her husband worked seasonally for Employer and during these times would make between three and five runs in a week, both interstate and local deliveries. Additionally, he would pick up company vehicles at Employer's property. Employer maintained the vehicles. F.F. Nos. 8-10.

She further testified Employer did not pay Decedent by the trip or by the job. Rather, he received either a weekly or bi-weekly paycheck calculated on the total trips made per timeframe. Employer paid Decedent a percentage of the value of the freight for interstate deliveries, and, an hourly rate for local deliveries. She testified Decedent was not self-employed from February 2008 to June 11, 2009, and did not work for any other employers during this time. F.F. Nos. 11-12.

Claimant confirmed that she and her husband filed joint tax returns listing his income from Employer under the category "Profit or Loss from Business." She acknowledged Employer issued 1099 forms to her husband. However, she also referenced a form W-4 signed by her husband on March 17, 2008, which she submitted into evidence. F.F. No. 13.

For its part, Employer offered the testimony of Jim Bishop, the owner of Bishop Agri Business (Owner). Owner testified he tried to hire Decedent as an employee, and had him sign forms to this effect, but Decedent later chose to be an independent contractor. With regard to payment, Owner testified Employer paid Decedent 25 percent of the value of an interstate load and \$50 a trip for local trips. He stated Claimant was not eligible for any company benefits, such as vacation

pay. Claimant provided his own cell phone and CB radio, and paid for his own meals while traveling. F.F. Nos. 14-15.

Owner acknowledged Decedent did not work for other companies on a steady basis. With regard to delivering loads, Decedent chose the route. Employer did not require Decedent to maintain the vehicles or to load or unload vehicles. In contrast, Employer required its regular employees to perform maintenance, to load and unload vehicles, and directed them as to the delivery routes. However, when directing Decedent to delivery destinations, Employer specified a delivery time. F.F. Nos. 16-17, 20.

Owner testified Employer provided a W-4 form to Decedent in February 2008, and Decedent signed the form. He acknowledged a W-4 form is a tax form typically provided to an employee. However, he testified he provided this and other forms to Decedent in an effort, initially, to hire Decedent as an employee, which Decedent himself later rejected by requesting independent-contractor status. Owner clarified the only benefits he provides to regular employees are workers' compensation and vacation benefits; Employer does not provide health insurance. In light of Decedent's request to be treated as an independent contractor, Employer did not deduct taxes from monies paid to Decedent. F.F. Nos. 18-19, 22.

Additionally, Employer presented Claimant and Decedent's joint tax returns and Decedent's 1099 tax forms for 2008 and 2009. Cover Ltr. to WCJ Op., 6/30/10, at 2; see F.F. No. 5 (referencing Employer's exhibits).

Based on the testimony and evidence presented, the WCJ made the following findings. The WCJ found the testimony of Claimant to be credible in part. The WCJ explained her testimony was consistent with Owner's testimony in many respects. To the extent there were inconsistencies, the WCJ credited her description of the manner in which her late husband worked for Employer. F.F. No. 24.

The WCJ partially credited Owner's testimony because his testimony, in most respects, was consistent with the testimony of Claimant. However, the WCJ found Owner's testimony regarding the payment arrangements for local deliveries vague. Specifically, Owner was not clear as to whether Decedent was paid by the trip or paid by the hour, and the rate of pay for local deliveries was not specified. Significantly, the WCJ rejected Owner's suggestion that Decedent was an independent contractor. The WCJ specifically credited the evidence of record showing Employer exercised control over the manner in which Decedent performed his work for Employer and had the right of control. F.F. Nos. 25-26.

The WCJ concluded Decedent was an employee of Employer on June 11, 2009. In reaching this conclusion, the WCJ cited the following factors: Employer owned the trucks and equipment; Employer directed trip destination and delivery times; Employer always dispatched Decedent; Employer paid Decedent an hourly rate for local trips; Employer paid Decedent in a weekly or bi-weekly manner, not by the job; no formal written agreement of any kind existed between the parties describing an independent-contractor relationship; and, Employer paid for all fuel, truck maintenance, tolls, and related miscellaneous expenses. The

WCJ determined the nature of the relationship overall clearly indicated Employer had the right to direct the work performance. Decedent did not exercise independent judgment, but rather, simply operated the company trucks from point A to point B and back again, on a schedule determined by Employer. WCJ Op., Concls. of Law Nos. 10-11.

By interim order, the WCJ ruled Decedent was an employee, not an independent contractor, for Employer. WCJ Op., 6/30/10, at 8. Thereafter, the WCJ conducted hearings relative to causation.

Following the close of evidence, the WCJ ultimately concluded Claimant established a causal connection between the work-related injury of June 11, 2009, and Decedent's subsequent illness, disability, amputation and untimely death. The WCJ fully incorporated his prior findings and conclusions on the nature of the relationship between Employer and Decedent. WCJ Op., 6/13/11, F.F. No. 5. By final order, the WCJ granted Claimant's petitions. WCJ Op., 6/13/11, at 12-13.

Employer appealed to the Board, which affirmed. This appeal followed.²

In this appeal, Employer challenges the WCJ's decision on the ground that Decedent was not an employee, but rather an independent contractor.

² This Court's review is limited to whether there was a violation of constitutional rights or error of law, and whether necessary findings of fact were supported by substantial evidence. Am. Rd. Lines v. Workers' Comp. Appeal Bd. (Royal), 39 A.3d 603 (Pa. Cmwlth. 2013).

Employer contends the WCJ capriciously disregarded evidence, specifically, Decedent's admission that he was an independent contractor on his tax filings. Employer does not challenge the WCJ's determination regarding the causal connection between Claimant's fatal injury and the work-related cause.

II. Discussion

In workers' compensation proceedings, the WCJ is the ultimate finder of fact. Westmoreland Cnty. v. Workers' Comp. Appeal Bd. (Fuller), 942 A.2d 213 (Pa. Cmwlth. 2008). As the fact-finder, matters of credibility and evidentiary weight are within the WCJ's exclusive province. Id. The WCJ is free to accept or reject the testimony of any witness, in whole or in part. Id. If the WCJ's findings are supported by substantial evidence, they are binding on appeal. Id. It is irrelevant whether there is evidence to support contrary findings; the relevant inquiry is whether substantial evidence supports the WCJ's necessary findings. Id.

A review for capricious disregard of material, competent evidence is an appropriate component of appellate review in any case in which the question is properly raised before a court. Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). A capricious disregard of evidence occurs where "the WCJ's findings reflect a deliberate disregard of competent evidence that logically could not have been avoided in reaching the decision" Pryor v. Workers' Comp. Appeal Bd. (Colin Serv. Sys.), 923 A.2d 1197, 1205 (Pa. Cmwlth. 2007). Where substantial evidence supports the findings, and those findings in turn support the conclusions, it should remain a rare instance where an appellate court disturbs an adjudication based on capricious disregard. Wintermyer.

The Act is the sole and exclusive means of recovery against employers for all injuries arising out of accidents occurring within the course of employment. Section 303 of the Act, 77 P.S. §481(a). The Act's exclusivity provision essentially "bars tort actions flowing from any work-related injury." Kline v. Arden H. Verner Co., 503 Pa. 251, 256, 469 A.2d 158, 160 (1983). Independent contractors cannot recover benefits under the Act. Cox v. Caeti, 444 Pa. 143, 279 A.2d 756 (1971). Therefore, employment status is a critical threshold determination for liability under the Act. Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd. (Minteer), 563 Pa. 480, 762 A.2d 328 (2000); Am. Rd. Lines v. Workers' Comp Appeal Bd. (Royal), 39 A.3d 603 (Pa. Cmwlth. 2012).

A claimant bears the burden of proving the existence of an employer-employee relationship in order to receive benefits. Am. Rd. Lines. The existence of an employer-employee relationship is a question of law based on the facts presented in each case. Id.

"While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration" Hammermill Paper Co. v. Rust Eng'g Co., 430 Pa. 365, 370, 243 A.2d 389, 392 (1968). Courts consider many factors including: (1) control of manner the work is done; (2) responsibility for result only; (3) terms of agreement between the parties; (4) nature of the work/occupation; (5) skill required for performance; (6) whether one is engaged in a distinct occupation or business; (7)

which party supplies the tools/equipment; (8) whether payment is by time or by the job; (9) whether work is part of the regular business of employer; and, (10) the right to terminate employment. Am. Rd. Lines (citing Hammermill).

Although no one factor is dispositive, control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status. Universal Am-Can; Am. Rd. Lines. Control exists where the alleged employer: “possesses the right to select the employee; the right and power to discharge the employee; the power to direct the manner of performance; and, the power to control the employee.” Am. Rd. Lines, 39 A.3d at 611 (citing 3D Trucking v. Workers’ Comp. Appeal Bd. (Fine & Anthony Holdings Int’l), 921 A.2d 1281 (Pa. Cmwlth. 2007)).

Payment of wages and payroll deductions are significant, as is provision of workers’ compensation coverage. Martin Trucking Co. v. Workmen’s Comp. Appeal Bd. (Andrushenko & Clark Searfoss), 373 A.2d 1168 (Pa. Cmwlth. 1977). However, payment is not determinative. See id. Additionally, a tax filing denoting self-employment, while a relevant factor, is not dispositive on the issue. See Guthrie v. Workers’ Comp. Appeal Bd. (The Travelers’ Club, Inc.), 854 A.2d 653 (Pa. Cmwlth. 2004); Nevin Trucking v. Workmen’s Comp. Appeal Bd. (Murdock), 667 A.2d 262 (Pa. Cmwlth. 1995).

Here, the WCJ found an employment relationship existed between Decedent and Employer. The WCJ found numerous factors indicative of an employer-employee relationship, including Employer’s right of control and actual

exercise of control over Decedent's work. F.F. No. 26. Specifically, the WCJ found Employer owned the trucks and equipment; directed Decedent's trip destination and delivery times; paid Decedent in a weekly or bi-weekly manner, not by the job; and, paid for all fuel, truck maintenance, tolls, and related miscellaneous expenses. F.F. No. 25. The parties stipulated and the WCJ found no formal written agreement of any kind existed between the parties describing an independent-contractor relationship. F.F. No. 6(c). The WCJ's findings are based on the credited testimony of Claimant as well as Owner.

Contrary to Employer's assertions, the WCJ did not capriciously disregard Decedent's tax filings. The WCJ considered Decedent's tax filings along with the other evidence presented. WCJ Op., 6/30/10, F.F. Nos. 5, 13, 18. The WCJ found Employer issued 1099 forms to Decedent, and Decedent and Claimant completed the "Profit or Loss from Business" form on their joint tax returns. F.F. No. 13. The WCJ also found Decedent signed a W-4 form for 2008. *Id.* Owner testified he provided the W-4 form to Decedent in February 2008. F.F. No. 18; WCJ's Hrg., Notes of Testimony (N.T.), 5/13/10, at 48; R.R. at 65a. He conceded a W-4 form is typically provided to an employee. F.F. No. 18; N.T. at 48; R.R. at 65a. Owner testified he provided this form to Decedent because he initially tried to hire him as an employee. F.F. No. 18; N.T. at 70-71; R.R. 87a-88a. Although Owner testified Decedent chose instead to be an independent contractor, the WCJ specifically rejected this testimony. F.F. No. 25.

Acting as fact-finder with the power to weigh evidence and accept or reject the testimony of any witness in whole or in part, the WCJ based his opinion

on the credited testimony of Claimant and Owner regarding the nature of Decedent's employment status. It is clear from the WCJ's opinion that Decedent's tax returns denoting self-employment did not outweigh the other evidence presented. See Nevin Trucking. In light of the numerous findings indicative of an employer-employee relationship, we cannot conclude the WCJ erred.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

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	:	
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(Walters),	:	
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ORDER

AND NOW, this 23rd day of October, 2013, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge