

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wendy Gallagher (Claimant)	:	
Clyde Gallagher (Deceased),	:	No. 1087 C.D. 2014
Petitioner	:	Submitted: December 19, 2014
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Trib Total Media, Inc.),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: February 17, 2015

Wendy Gallagher (Claimant) petitions for review of the May 30, 2014, order of the Workers' Compensation Appeal Board (WCAB) affirming the decision of a workers' compensation judge (WCJ) to deny the fatal claim petition filed by Claimant on behalf of her deceased husband, Clyde Gallagher (Decedent). We affirm.

On August 6, 2012, Claimant filed a fatal claim petition under section 301(c)(1) of the Workers' Compensation Act (Act)<sup>1</sup> alleging that Decedent died in a

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<sup>1</sup> Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §411(1).

motor vehicle accident during the course and scope of his employment with Trib Total Media, Inc. (Tribune) on April 3, 2012. At a hearing before the WCJ on September 11, 2012, the parties agreed to hear the issue of Decedent's employment status before presenting evidence in support of Claimant's claim that Decedent died during the course and scope of his employment. (WCJ's Findings of Fact, Nos. 1-3.)

At a second hearing before the WCJ on November 13, 2012, Claimant testified that she was the surviving spouse of Decedent. Claimant also testified that she and Decedent were both newspaper carriers for Tribune. Claimant became a carrier in January 2012, and Decedent started in February 2012. They both performed the same position, but on different routes. (*Id.*, No. 4.)

Claimant also testified that carriers are required to deliver the newspapers by 6:00 a.m. Monday through Saturday and by 7:30 a.m. on Sundays. There is no specific time for starting the delivery. Claimant testified that carriers go to Tribune's depot in Youngwood to pick up and, if necessary, bag the newspapers. Bagging is required if it is a wet or snowy day. Some customers have the newspapers delivered to a tube, whereas other customers have them delivered to their porch. If a new customer wants a newspaper delivered, he or she makes the arrangements with Tribune rather than the carrier. Claimant also testified that she and Decedent used their own personal vehicles to deliver the newspapers; no other tools or equipment were required. Both Claimant and Decedent had other jobs besides delivering newspapers. (*Id.*)

At the hearing on November 13, 2012, Tribune presented the testimony of Kimberly Horn, a district sales manager for Tribune. Horn is responsible for the sales, service, and delivery of Tribune's newspapers in a defined area. Horn presented the Independent Contractor/Home Delivery/Buy-Sell Agreement (Agreement) that Decedent had entered into at the time he became a carrier. Horn testified that this is the standard agreement that Tribune has with all of its carriers. Under the terms of the Agreement, Tribune sells the newspapers to the carriers at a wholesale price, and then the carriers sell the newspapers to the customers at a resale price. Carriers are not guaranteed a salary or wages, nor do they receive benefits. Tribune did not deduct taxes or make any other type of employment-related deductions from its payments to Decedent. (*Id.*, No. 5.)

Additionally, Horn testified that carriers are not required to follow any specific route in delivering the newspapers. Horn stated that carriers are required to deliver the newspapers by 6:00 a.m. Monday through Saturday and by 7:30 a.m. on Sundays. No one from Tribune follows the carriers to make certain that they are completing the work properly. Tribune also permits carriers to deliver competing newspapers along their route. Carriers must find a substitute if they cannot deliver the newspapers. Horn testified that Tribune does not have to approve the substitute. Tribune does not reimburse carriers for mileage, parking, or hours spent on their route. (*Id.*)

In response to Claimant's petition, Tribune presented the following items: (1) the Agreement entered into by Tribune and Decedent; (2) the accident insurance application signed by Decedent; (3) the claim form for coverage under the

independent contractor accident insurance policy signed by Claimant; (4) information required to process the death benefit under the accident policy; and (5) a printout of payments from Tribune to Decedent. (*Id.*, No. 6.)<sup>2</sup>

The WCJ credited Horn's testimony and Claimant's testimony to the extent that it was consistent with Horn's. The WCJ found that Tribune did not control Decedent's work or the manner in which it was completed. Therefore, the WCJ determined that Decedent was not an employee of Tribune at the time of his death and denied Claimant's fatal claim petition. Claimant appealed to the WCAB, which affirmed. (*Id.*, No. 7.) Claimant now petitions for review of that decision.<sup>3</sup>

On appeal, Claimant argues that the WCJ erred in determining that Decedent was not an employee of Tribune at the time of his death. Specifically, Claimant argues that the WCJ erred because Tribune controlled Decedent's work and the manner in which he completed it and because Decedent's work was a regular part of Tribune's business. We disagree.

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<sup>2</sup> These items were admitted into evidence at the September 11, 2012, hearing. (N.T., 9/11/12, at 9-12.)

<sup>3</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, and whether the necessary factual findings are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

The claimant bears the burden of proving an employer-employee relationship in order to receive benefits.<sup>4</sup> *Guthrie v. Workers' Compensation Appeal Board (Travelers' Club, Inc.)*, 854 A.2d 653, 661 (Pa. Cmwlth. 2004). The WCJ is the final arbiter of witness credibility and evidentiary weight. *Nevin Trucking v. Workmen's Compensation Appeal Board (Murdock)*, 667 A.2d 262, 267 (Pa. Cmwlth. 1995). A WCJ's findings of fact can be reversed only if they are not supported by substantial, competent evidence or if they are arbitrary and capricious. *B&T Trucking v. Workers' Compensation Appeal Board (Paull)*, 815 A.2d 1167, 1170 (Pa. Cmwlth. 2003).

In *Universal Am-Can, Limited v. Workers' Compensation Appeal Board (Minter)*, 762 A.2d 328, 333 (Pa. 2000), the Pennsylvania Supreme Court reiterated that the following factors are relevant in determining whether one is an employee or an independent contractor: (1) the level of control over the manner of work to be done; (2) whether one is responsible for the result only; (3) the terms of the agreement between the parties; (4) the nature of the work performed; (5) the level of skill required for performance; (6) whether one employed is engaged in a distinct occupation/business; (7) which party provides the tools; (8) whether payment is by the time or by the job; (9) whether the work is part of the regular business of the employer; and (10) the right to terminate the relationship at any time. No one factor need be present to determine whether an employer-employee relationship exists; however, the most important factors are control over the work and the manner in

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<sup>4</sup> Whether an employer-employee relationship exists is a question of law based on the findings of fact in each case. *Southland Cable Company v. Workmen's Compensation Appeal Board (Emmett)*, 598 A.2d 329, 330 (Pa. Cmwlth. 1991).

which it is to be completed. *Id.* “[I]t is the existence of the *right* to control that is significant, irrespective of whether the control is actually exercised.” *Id.*

Although whether one is an employee or an independent contractor is determined on a case-by-case basis, we believe our analysis in *Johnson v. Workmen’s Compensation Appeal Board (Dubois Courier Express)*, 631 A.2d 693 (Pa. Cmwlth. 1993) (*en banc*), is instructive here.<sup>5</sup> In *Johnson*, we determined that the Dubois Courier Express (Express) did not have the necessary level of control over a carrier’s work and the manner in which he performed it to establish an employer-employee relationship. *Id.* at 698. We noted that two facts in particular indicated this lack of control. First, Express did not prohibit the carrier from delivering competing newspapers while delivering Express’s newspapers. *Id.* at 697-98. We stated that this showed that Express was only controlling the *result* of the carrier’s work, not the manner in which he performed it. *Id.* at 698. Second, the carrier could enlist a substitute without prior notice to or permission from Express. *Id.* We stated that this, too, demonstrated a lack of control because employees are not typically permitted to hire other personnel. *Id.*

Here, Tribune’s policies indicate a similar lack of control. The WCJ credited Horn’s testimony that Tribune did not prohibit Decedent from delivering competing newspapers while delivering Tribune’s newspapers. Claimant argues that there is no time to deliver other newspapers due to Tribune’s delivery deadlines; however, we are bound by the WCJ’s credibility determinations. Moreover, it is only

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<sup>5</sup> Although Claimant relies on *Southland Cable Company*, the facts in this case are more akin to those in *Johnson*.

relevant that Tribune did not prohibit Decedent from delivering competing newspapers, not whether Decedent had an ideal amount of time in which to do so. Decedent was also permitted to substitute another person to carry out his deliveries without Tribune's permission or prior approval. Although Claimant argues that Tribune once denied her selection of a substitute, the WCJ credited Horn's testimony that Tribune has no restrictions on carrier substitution. Furthermore, Decedent was not required to follow a specific route so long as he delivered his newspapers by a specific time.<sup>6</sup>

Claimant nevertheless argues that Tribune controlled Decedent's work and the manner in which he performed it in ways that distinguish the present case from *Johnson*. Claimant notes that, unlike Express in *Johnson*, Tribune requires carriers to pick up their newspapers at Tribune's depot and bag them during inclement weather. Claimant also notes that Tribune tells carriers whether customers prefer delivery to a tube or their porch, whereas in *Johnson* the customers told the carriers directly. Although the WCJ noted these policies, his ultimate determination as to Decedent's employment status shows that he did not accord them significant weight. This court cannot re-weigh the significance of these policies on appeal.

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<sup>6</sup> We also note that, in addition to finding that Tribune lacked control, the WCJ credited Horn's testimony that Tribune did not provide Decedent with supplies and paid Decedent by the number of papers sold. (WCJ's Findings of Fact, No. 7.)

Here, substantial evidence supports the WCJ's finding that because Tribune did not control Decedent's work or the manner in which he completed it, Decedent was not an employee of Tribune at the time of his death.<sup>7</sup>

Accordingly, we affirm.<sup>8</sup>

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>7</sup> We also reject Claimant's argument that the WCJ erred in failing to address whether Decedent's work was a regular part of Tribune's business. Although this factor is relevant, no one factor is required to determine employment status. *Universal Am-Can*, 762 A.2d at 333. Furthermore, the WCJ analyzed the two most important factors in making this determination: control over the work and the manner in which the work is completed.

<sup>8</sup> Tribune argues that Claimant's counsel knowingly filed a frivolous appeal with this court and requests that we assess costs and fees related to this appeal against Claimant's counsel. An appeal is frivolous "if there is a complete lack of points present that might arguably support an appeal." *Wright v. Workers' Compensation Appeal Board (US Air, Inc.)*, 717 A.2d 596, 598 (Pa. Cmwlth. 1998). Claimant's appeal does not meet this definition. Whether an employer-employee relationship exists is determined on a case-by-case basis, and the mere fact that Claimant did not prevail before the WCJ and WCAB does not mean she did not have an arguable claim on appeal. Therefore, we deny Tribune's request.

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Respondent		
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## ORDER

AND NOW, this 17<sup>th</sup> day of February, 2015, we hereby affirm the May 30, 2014, order of the Workers' Compensation Appeal Board and deny Trib Total Media, Inc.'s request to assess fees and costs related to this appeal against counsel for Wendy Gallagher.

ROCHELLE S. FRIEDMAN, Senior Judge