

TIMOTHY T. BLOMBERG, Employee/Appellant, v. S&T, INC./O'DONNELL BODY & PAINT, UNINSURED, Employer, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 17, 1999

No. [REDACTED SSN]

HEADNOTES

EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR. Where not all of the criteria for determining whether an artisan was an independent contractor under Minn. R. 5224.0020, subp. 2 were met, the compensation judge erred by failing to consider the general criteria under Minn. R. 5224.0330 and Minn. R. 5224.0340.

Reversed and remanded.

Determined by: Hefte, J., Johnson, J., and Pederson, J.
Compensation Judge: Janice M. Culnane

OPINION

RICHARD C. HEFTE, Judge

The petitioner appeals the compensation judge's finding that the employee was an independent contractor at the time of his injury. We reverse and remand.

BACKGROUND

On or about November 3, 1997, Timothy T. Blomberg (petitioner) was hired by Steven O'Donnell, owner of S & T, Inc., doing business as O'Donnell Body and Paint (uninsured employer). The employer required the petitioner to work 40 hours per week, for which he guaranteed the employee \$500.00 per week. The petitioner was also paid 40% of revenues generated by his work over that amount. The petitioner was originally hired to do body work on vehicles, then he was switched to painting vehicles. The employer provided uniforms for the petitioner, and withheld \$6.00 per weekly paycheck for the uniforms. The employer originally withheld taxes and social security from the petitioner's paychecks, but stopped doing so, apparently at the petitioner's request, in February 1998. The employer provided group health insurance for the petitioner. The employer initially had workers' compensation insurance, which lapsed due to lack of payment.

The petitioner provided his own toolbox, and sometime after starting work, purchased his own spray guns to use on the employer's premises. The petitioner occasionally worked on his own vehicles or his own clients on the employer's premises, and paid the employer

for the paint used and rent for the use of the paint booth. The petitioner's father and brother occasionally assisted the petitioner with some work, and were not paid by the employer.

On April 6, 1998, the petitioner claims that he was injured at work when a large aluminum sign he was working with fell. The employer claims that the petitioner was not injured in this incident, but had hurt himself at home while moving. On May 7, 1998, the employer terminated the petitioner's employment for poor quality work and after asking the employer to falsely inform a creditor about how long the petitioner had worked for the employer.

On June 17, 1998, the employee filed a claim petition alleging a work-related injury while working for the employer. The employer initially admitted that the petitioner was an employee, then later amended its answer to allege that the petitioner was an independent contractor. A hearing was held on October 2, 1998, and continued to October 19, 1998. The compensation judge found that the petitioner was an independent contractor and denied his claim for workers' compensation benefits. The petitioner appeals.

STANDARD OF REVIEW

"[T]he determination of employment status is, ultimately, a legal one." Hunter v. Crawford Door Sales, 501 N.W.2d 623, 624, 48 W.C.D. 637, 639 (Minn. 1993). A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993). This court has clarified that in a case "with facts which might fit a particular work situation into more than one of the criteria, or where a criterion is partially met, the compensation judge must weigh those facts and the credibility of the witnesses to make the final determination." Stacken v. Peace Villa Apartments, 52 W.C.D. 201, 211 (W.C.C.A. 1994) (citing Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984)), summarily aff'd, (Minn. Jan. 27, 1995). "In such a case, the compensation judge's determination must be given the deference reserved for factfinders under this court's standard of review." Id.

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1998). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as

a whole." Id.

DECISION

The petitioner argues that the compensation judge's finding that he was an independent contractor rather than an employee is not supported by substantial evidence. First, the petitioner argues that the employer admitted that he was an employee at the time he was hired and that the change in withholding is not sufficient to change that status. Whether the parties intended the petitioner to be an employee or an independent contractor is not determinative. Generally, the nature of the relationship is to be ascertained, not from the label given to it by the parties themselves, but from the consequences which the law attached to their arrangements and to their conduct." Hunter v. Crawford Door Sales, 501 N.W.2d 623, 624, 48 W.C.D. 637, 639 (Minn. 1993) (quoting Edelston v. Builders & Remodelers, Inc., 304 Minn. 550, 551, 229 N.W.2d 24, 25, 27 W.C.D. 909, 910 (1975)).

The criteria for determining whether a worker is an employee or an independent contractor are contained in Minn. R. Chap. 5224. The rules contain a number of "safe harbor" criteria for specific occupations. Each category contains identifying criteria for both independent contractors and employees in those occupations. Minn. R. 5224.0020 to 5224.0312. In this case, the compensation judge determined that the employee should be categorized as a painter and therefore was an artisan, whose work relationship should be considered under the criteria outlined in Minn. R. 5224.0020. An "artisan" is defined by the rule as "a person who has been trained in a mechanical art or trade," where "[t]he particular skill necessary in the work is acquired by attending a vocational school, serving an apprenticeship, or by working as a handyman or helper and learning the trade informally." Minn. R. 5224.0020, subp. 1. "Artisans include bricklayers, blocklayers, cable installers, carpenters, electricians, roofers, siders, painters, plasterers, paper hangers, tapers, joiners, plumbers, and steamfitters." Id.

The compensation judge then reviewed the eight characteristics of an independent contractor set forth in subpart 2 of the rule, finding that these criteria were substantially met, and the seven characteristics of an employee provided in subpart 3, finding that these criteria were not met. Minn. R. 5224.0020, subp. 2 provides:

Subp. 2. Independent contractor. An artisan is an independent contractor and not an employee if all of the following criteria are substantially met.

- A. The artisan is responsible for the final result, is free to choose the means and methods for accomplishing the result, and is not required to conform to fixed hours.
- B. The artisan is free to select others to assist in performing the job.
- C. The artisan has the opportunity of making a profit or suffering a loss and is not guaranteed a minimum income.

- D. The artisan has business expenses beyond the furnishings of tools, such as scaffolding, ladders, trucks, equipment, and advertising.
- E. The artisan has a substantial investment in facilities or equipment.
- F. The artisan holds himself or herself out to the public as being available to perform services for others.
- G. Payment for the work is on a job basis for a complete job rather than a time basis.
- H. The artisan agrees to provide lien waivers upon completion of the job.

Minn. R. 5224.0020, subp. 3 provides:

Subp. 3. Employee. An artisan is an employee if all of the following criteria are substantially met.

- A. The artisan is hired to do the work personally and any helpers are hired, paid, and subject to control by the purchaser of the artisan's services.
- B. Work is during fixed hours established by the purchaser and on a full-time basis.
- C. The artisan is paid on an hourly, weekly, or similar rate that is independent of the amount of work completed.
- D. The artisan has no substantial investment in facilities or equipment for doing the work.
- E. Materials and equipment other than hand tools are supplied by the purchaser of the artisan's services.
- F. The artisan will not incur a loss or realize a profit by exercising independent judgment in hiring helpers, selecting the materials used, determining methods of work, or similar matters.
- G. If the artisan does not complete the job, the artisan is not responsible for damages for noncompliance or for obtaining a replacement to complete the job.

The compensation judge found that the petitioner was not required to conform to fixed hours. The petitioner was required to put in 40 hours, but was able to set his own hours. Also, the petitioner was able to have assistants who were not compensated by the employer, and while it apparently happened infrequently, the petitioner's brother and father did assist him at times without compensation from the employer. The compensation judge found that the business expense criteria was partially met by the petitioner's purchase of the spray guns, since there was little equipment needed for the job other than the employee's facility. The compensation judge also found that the criteria of being held out to the public as being available to perform services for others was substantially met since the petitioner arranged for some customers on his own. For these customers, the petitioner paid the employer for supplies used and paid rent for the use of the

employer's paint booth. The lien waiver criteria was not addressed by the parties. The compensation judge concluded that the petitioner was an independent contractor under these rules.

While the compensation judge's findings regarding each of the criteria discussed above may be supported by substantial evidence, Minn. R. 5224.0020, subp. 2 requires that all of the criteria be substantially met in order for the petitioner to be considered an independent contractor under these rules. The compensation judge acknowledged that the petitioner did not have the opportunity of making a profit or suffering a loss. Under Minn. R. 5224.0020, subp. 2.C., the petitioner must have the opportunity of making a profit or suffering a loss and not be guaranteed a minimum income. In this case, the petitioner was guaranteed a minimum income of \$500 per week and 40% of revenues generated by his work over that amount. Therefore, all of the criteria under Minn. R. 5224.0020, subp. 2 were not met. Where a specific occupation is not defined in the rule or where some but not all of the "safe harbor" criteria are substantially met, reference is to be made to the general criteria set out in rules 5224.0330 and 5224.0340. Minn. R. 5224.0010; Minn. R. 5224.0320. The compensation judge erred by not considering the general criteria in this case since all of the "safe harbor" criteria were not met. "Where some but not all of the safe harbor criteria are substantially met, those criteria which are substantially met shall be considered evidence of that status, and shall control where a conflicting result for that criterion is indicated by parts 5224.0330 to 5224.0340." Minn. R. 5224.0320. Therefore, we reverse and remand for a finding on whether the petitioner was an employee or an independent contractor considering the general criteria.

We note that in cases which use the general criteria, the question of whether a worker is an independent contractor or an employee is not to be determined "by merely counting up the number of factors 'on both sides of the equation.'" Heitz v. Mesabi Daily News, 57 W.C.D. 39, 45 (W.C.C.A. 1997), summarily aff'd, (Minn. July 18, 1997). "The relative importance of each factor in the individual case and the manner and extent to which each factor is met or unmet might, conceivably, elevate a few, or even a single control factor, to determinative significance." Id.