

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

WORKERS' COMPENSATION COURT OF APPEALS
MAY 23, 2000

No. [REDACTED SSN]

HEADNOTES

EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR. Substantial evidence did not support the compensation judge's finding that the petitioner was an independent contractor, and where the only factor changed from the time that the parties agreed that the petitioner was an employee was the petitioner's tax withholding status, the compensation judge's determination that the petitioner's employment status changed as a result of that request was erroneous.

Reversed and remanded.

Determined by: Rykken, J., Wilson, J., and Pederson, J.
Compensation Judge: Janice Culnane

OPINION

MIRIAM P. RYKKEN, Judge

The petitioner appeals the compensation judge's finding on remand that the petitioner 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 petitioner \$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 from most of his weekly paychecks for cleaning the uniforms. The employer originally withheld federal, state and social security taxes from the petitioner's paychecks, but stopped doing so at the petitioner's request, in February 1998. Throughout the petitioner's employment, the employer provided group health insurance for the petitioner. After February 1998, the employer continued to provide group health insurance for the petitioner, deducting premium payments for dependent coverage from the petitioner's paychecks. (T. 131, 167.) The employer initially carried workers' compensation insurance, which lapsed in April 1997 due to lack of payment. (Pet. Exh. R.)

The petitioner provided his own toolbox and sometime after commencing work for the employer, purchased his own spray guns to use on the employer's premises. The petitioner

occasionally worked on his own vehicles or his own clients' vehicles on the employer's premises, and paid the employer for the paint used and paid rent for the use of the paint booth. The employer's owner, Mr. O'Donnell, testified that during the time the petitioner worked for the employer, he painted one vehicle for his brother, painted two motorcycles for outside customers, and worked on his own vehicles. (T. 171.) The petitioner's father and brother occasionally assisted the petitioner with some work, but were not paid by the employer.

On April 6, 1998, the petitioner claims that he injured his low back and right knee at work when a large aluminum sign he was working with fell. He claims to have grabbed the sign, was unable to support it, and fell forward. At the time of his claimed injury, the petitioner was 35 years old. The employer claims that the petitioner was not injured in this incident, but instead had hurt himself at home while moving. On May 7, 1998, the employer terminated the petitioner's employment for poor quality work and for asking the employer to falsely inform a creditor about how long the petitioner had worked for the employer.

On June 17, 1998, the petitioner filed a claim petition alleging a work-related injury while working for the employer. In its answer to the claim petition, the employer initially admitted that the petitioner was an employee, then later amended its answer to allege that the petitioner was an independent contractor. The employer also denied primary liability for the injury alleging that the injury did not occur while the petitioner was working, but instead had occurred at home. 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 compensation judge made no findings as to whether the petitioner's injury arose out of and in the course and scope of employment.

The petitioner appealed to the Workers' Compensation Court of Appeals, which reversed the compensation judge's finding that the petitioner was an independent contractor based upon the safe harbor criteria for an artisan under Minn. R. 5224.0020, and remanded for reconsideration of the independent contractor issue using the general criteria of Minn. R. 5224.0330 and 5224.0340. Blomberg v. S & T, Inc., slip op. (W.C.C.A. June 17, 1999). No additional testimony was taken. A Findings and Order on Remand was served and filed on October 8, 1999. The compensation judge found that the petitioner was an independent contractor after considering the general criteria. 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

On remand, the compensation judge found that the petitioner was an independent contractor after considering the general criteria under Minn. R. 5224.0330 and Minn. R. 5224.0340, which provide interpretive guidance where the safe harbor criteria for that occupation are not all substantially met. Minn. R. 5224.0320. As stated in Minn. R. 5224.0330, subp. 1:

The most important factor in determining whether a person is an independent contractor is the degree of control which the purported employer exerts over the manner and method of performing the work contracted. The more control there is the more likely the person is an employee and not an independent contractor. Subparts 2 to 14 describe criteria for determining if there is control over the method of performing or executing services. The total circumstances, including the practices and the customs of the industry, must be considered to determine if control is present.

The criteria to determine the degree of control of method and manner of performance are authority over an individual's assistants, compliance with instructions, oral or written reports, place of work, personal performance, existence of continuing relationship, set hours of work, training, amount of time, simultaneous contracts, tools and materials, expense reimbursement, and satisfying requirements of regulatory and licensing agencies. Minn. R. 5224.0330, subps. 2-14. Other factors to be considered are the right to discharge, availability to the public, compensation on job basis,

realization of profit or loss, termination, substantial investment, responsibility, and services fundamental to business. Minn. R. 5224.0340.

The petitioner argues that he was an employee of the employer in view of various factors present in his employment relationship with the employer, including that the employer hired and fired the petitioner, that the employer provided health insurance and uniforms, the employer guaranteed the petitioner a minimum of \$500 per week plus a 40% commission, and required the petitioner to be at his work location 40 hours per week, the employer provided certain equipment, and that the employer inspected the petitioner's work and controlled the quality of the work. The employer and the Special Compensation Fund, however, argue that the employer did not have the level of control over the petitioner's work and work-product which rises to the level of an employee-employer relationship.

The compensation judge agreed with the Special Compensation Fund's arguments, and found that the employer did not exercise control over the manner or method of performance of petitioner's painting duties and that while the employer required acceptable standards of work performance, no detailed instructions were given on performing the painting work. The compensation judge found that additional factors, as set forth in the general criteria of Minn. R. 5224.0330 and 5224.0340, demonstrated the petitioner's independent contractor status, including that the employer exercised no control over the hiring or use of assistants; that there was no evidence that the services had to be personally rendered; that the petitioner was not required to submit oral or written reports to the employer; that the work site was the location of the work because of the need for paint booths; that the petitioner had flexible hours established by the petitioner and he was not required to work full time at the employer's work since he could do other work; that there was no required training; that the petitioner provided many of his own tools; that the petitioner was not reimbursed for business expenses; that the petitioner made his painting services available to others beyond the employer; and that the petitioner was able to earn a profit and loss.

However, the compensation judge also analyzed additional factors which could typically indicate an employee-employer relationship: that there was a continuing relationship between the employer and the petitioner; that there was no showing of other work or contracts the petitioner was involved in; that the petitioner was paid on a commissioned basis; and that the painting services were fundamental to the employer's business. The compensation judge also found that there was insufficient evidence to demonstrate substantial investments or lack thereof or to determine who bore responsibility for any negligence, personal behavior, or work actions. In spite of these additional factors which could indicate employee status, based upon her entire findings the compensation judge concluded that the petitioner was an independent contractor as defined by the rules and was therefore not covered under the workers' compensation act, and denied the petitioner's claim for benefits.

The compensation judge also analyzed the effect of the petitioner's request in February 1998 that the employer stop withholding taxes from his paycheck. The employer and Special Compensation Fund argue that this request by the employee constituted a change in his

employment relationship and converted his status to that of an independent contractor. Although between November 3, 1997, and February 1998, the employer withheld standard federal and state taxes, including social security taxes, the employer discontinued withholding any taxes in February 1998. The compensation judge stated in her memorandum:

The facts of this case are complicated by the fact that Mr. Blomberg's employment status changed in February of 1998. As a result, the question of . . . independent contractor or employee status and the issues of control will be analyzed as they existed on April 6, 1998. Because his employment status had changed just prior to the work-related injury, some of the factors which could otherwise be evaluated if one had a long period to analyze an employment relationship, cannot be reviewed in this case; however, there are sufficient facts to analyze the independent contractor or employee status and analyze the issue of control.

(Memo. at 4.)

The compensation judge and the Special Compensation Fund emphasize the petitioner's request for the employer to stop withholding taxes from his paycheck in February 1998. At the hearing, Mr. O'Donnell, the employer's owner, agreed that the petitioner was an employee at least until February 1998. (T. 185-87.) At oral argument, counsel for the Special Compensation Fund admitted that the petitioner was an employee until that time. The compensation judge concluded that the petitioner's job status was changed by the petitioner's actions in February 1998 when he requested that the employer no longer withhold standard federal or state taxes, and the employer complied. The compensation judge concluded that this situation indicated a high level of control by the petitioner, and that "this factor is very convincing in demonstrating Mr. Blomberg was not an employee and was an independent contractor," when considered with the other factors outlined in the compensation judge's findings. (Memo. at 6.) The employer's owner testified that when he changed the withholding, he intended to treat the petitioner as an independent contractor or a subcontractor. (T. 185, 212.) The petitioner testified that he understood that he was an employee. (T. 58-60.) The compensation judge found that the petitioner was not credible, stating in her memorandum that the petitioner's testimony concerning his understanding of "his relationship to be that of an employee, . . . is unconvincing in light of other testimony from the [petitioner] which was judged to be not credible." However, 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)).

Considering the other factors analyzed by the compensation judge, the evidence does not support the compensation judge's conclusion that the petitioner was an independent

contractor. The petitioner's use of assistants consisted of his father and brother assisting him a few times, his brother to work on his own vehicle. The nature of the work did not require oral or written reports; the employer simply inspected the petitioner's work. While the petitioner had flexible hours and could work on other vehicles when not busy with the employer's work, the employer required the petitioner to be at the employer's work site for 40 hours per week. The petitioner provided only small tools and spray guns; the employer provided the rest of the equipment. The small amount of work that the petitioner performed for others is simply not sufficient to transform the nature of the petitioner's relationship with the employer.

It appears that the factor considered most determinative to the compensation judge was the petitioner's request for a change in his tax withholding status in February 1998, as the compensation judge determined that "[t]his shows a high level of control on the part of [the petitioner]." (Memo. at 5.) Whether or not an employer withholds taxes "is not a controlling event for determining whether an individual is an independent contractor rather than an employee." Berhow v. Midwest Freight, 39 W.C.D. 505, 508 (W.C.C.A. 1986), summarily aff'd, (Minn. Mar. 3, 1987); Tentis v. Kenneth Schumacher, slip op. (W.C.C.A. Oct. 2, 1989). The petitioner's request to change his withholding status was the only factor which changed in February 1998; there is no evidence in the record that any of the other factors considered by the compensation judge changed after that date.

Based upon our review of the factors present in the petitioner's employment with the employer and the criteria set forth in Minn. R. 5224.0330 and 5224.0340, we conclude as a matter of law that the petitioner was an employee and not an independent contractor on April 6, 1998. The compensation judge's determination that the petitioner's employment status changed as a result of tax withholding request is erroneous. Accordingly, we reverse the compensation judge's finding that the petitioner was an independent contractor at the time of his injury in April 1998.

The compensation judge has not addressed the other issue presented at the hearing, whether the employee's injury arose out of and in the course and scope of his employment, since she found that no employment relationship existed. Therefore, we remand the matter to the compensation judge for consideration of the remaining issue.