

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey Pearce,	:
	:
Petitioner	:
	:
v.	: No. 2075 C.D. 2011
	: Submitted: August 3, 2012
Workers' Compensation Appeal	:
Board (Kidd and Uninsured	:
Employer Guaranty Fund),	:
	:
Respondents	:

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: August 24, 2012

Jeffrey Pearce (Claimant) petitions for review of the October 5, 2011 order of the Workers' Compensation Appeal Board (Board) that affirmed the May 21, 2010 decision and order of the Workers' Compensation Judge (WCJ) that dismissed Claimant's Claim Petitions filed against Respondents Ricky Kidd (Kidd) and the Uninsured Employer Guaranty Fund under the Pennsylvania Workers' Compensation Act (Act).¹ On appeal, Claimant raises two issues for our review: 1) whether the WCJ erred as a matter of law in concluding that Claimant

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

was not an employee of Kidd; and 2) whether the WCJ erred by making arbitrary and capricious credibility determinations and failing to issue a reasoned decision.²

For over fifteen years, Claimant and Kidd have been friends, at times roommates, and have worked together on and off, including a period when the two were partners in a roofing business. (WCJ's Opinion and Order, Finding of Facts (F.F.) ¶¶1, 2, 3.) Kidd is engaged to Claimant's sister. (*Id.*) At the time of the accident giving rise to the petitions at issue here, Kidd was doing home repairs to supplement income he received from his primary business, car detailing. (F.F. ¶3.) Claimant was employed doing odd jobs, some initiated by Kidd, some on his own without Kidd, and some where he asked Kidd to work with him. (F.F. ¶¶2, 3.) Kidd was contacted by a friend of a friend who had recently purchased a house and needed some repair work done on the roof. (F.F. ¶3.) Claimant and Kidd drove to the house to examine the roof, but Claimant waited in the car when Kidd spoke with the homeowner about the cost of the repairs. (F.F. ¶¶3, 5.)

Once the work on the roof began, Kidd would drive Claimant to the job site each day, because Claimant did not have his own transportation. (F.F. ¶¶2, 3, 6(c).) Claimant supplied some of the tools used on the roof repairs, including a twenty-eight foot ladder that he borrowed from his father-in-law, eight roof jacks that he borrowed from his brother, and various hand tools that fit into his tool belt;

² This Court's review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights have been violated. *American Road Lines v. Workers' Compensation Appeal Bd. (Royal)*, 39 A.3d 603, 610 n.6 (Pa. Cmwlth. 2012). Where an appeal presents a question of law, our scope of review is plenary. *Id.* This Court may not, however, disturb a WCJ's factual findings when they are supported by substantial evidence; substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Tri-Union v. Workers' Compensation Appeal Bd. (Hickle)*, 703 A.2d 558, 561 (Pa. Cmwlth. 1997).

Kidd provided the majority of the tools. (F.F. ¶¶1, 3, 6(d).) Kidd purchased the materials used for the job at Ambridge Lumber, where he had a discount. (F.F. ¶3.) Kidd and Claimant agreed where they would start on the roof, what tasks they would each do, and Kidd did not direct Claimant while they were working, as Claimant had more experience roofing. (F.F. ¶3, 6(a) and (e).) Kidd did not pay Claimant an hourly wage or give him a W-2 or 1099 tax form. (F.F. ¶6(a).)

On May 8, 2009, Kidd was on one side of the roof working when Claimant crossed over from the other side to inform Kidd they were running out of shingles and stepped on a wooden plank that was no longer secured with a roof jack. (F.F. ¶1, 3.) Claimant fell off the roof and fractured his wrist, skull, pelvis, tailbone, and left hip. (F.F. ¶1.) Claimant was hospitalized for four days at Allegheny General Hospital. (F.F. ¶1.) Kidd did not have workers' compensation insurance. (F.F. ¶3.)

Claimant contends that he was an employee and not an independent contractor. Claimant argues that although the WCJ found Claimant was not paid hourly, it is significant that the WCJ did not make a finding as to how Claimant was paid. (Claimant's Brief at 12.) Similarly, Claimant notes that while Kidd did not direct him in the course of making the repairs, Kidd controlled when and where the work would take place, as well as the contracts with homeowners. (*Id.* at 13, 15.) Claimant further places emphasis on the fact that Kidd provided the majority of the tools used, purchased the materials, and by virtue of his transporting Claimant, controlled the start and stop time of the workday. (*Id.* at 14.)

The Act excludes independent contractors from the category of claimants entitled to compensation benefits, due to the absence of a master-servant relationship between an employer and an independent contractor. 77 P.S. §§ 21-

22; *Universal Am-Cam, Ltd. v. Workers' Compensation Appeal Bd. (Minteer)*, 563 Pa. 480, 485, 762 A.2d 328, 330 (2000). As a result, a claimant bears the threshold burden of demonstrating that an employer-employee relationship exists. *Universal Am-Cam*, 563 Pa. at 485, 762 at 330. Whether an employer-employee relationship does exist is a question of law that is determined on the unique facts of each case. *Id.* at 486, at 330. In determining whether a claimant is an employee or an independent contractor, the following factors serve to guide our analysis:

[1] control of manner 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 employed is engaged in a distinct occupation or business; [7] which party supplies 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 also [10] the right to terminate the employment at any time.

Hammermill Paper Co. v. Rust Engineering Co., 430 Pa. 365, 370, 243 A.2d 389, 392 (1968). Although each of these factors may or may not be relevant in a particular case, the existence of the right to control, “over the work to be completed and the manner in which it is to be performed,” have become the primary factors in determining the existence of an employer-employee relationship, regardless of whether the control is actually exercised. *Universal Am-Cam*, 563 Pa. at 490, 762 A.2d at 333; *Guthrie v. Workers' Compensation Appeal Bd. (The Travelers' Club, Inc.)*, 854 A.2d 653, 662 n.14 (Pa. Cmwlth. 2004).

Here, Claimant has failed to demonstrate that an employer-employee relationship exists. The WCJ found that Kidd did not control the type of work Claimant performed, the manner in which it was performed, and, saving the fact that Claimant did not own his own vehicle, any aspect of Claimant's schedule. Claimant was an experienced roofer who worked alongside Kidd. Both Claimant

and Kidd brought tools to the job. No evidence was presented of any specific agreement between the two, nor of work rules, a regular payment schedule, or of a W-2 or 1099 form provided by Kidd.

Similarly, the WCJ did not find credible Claimant's assertion that he was paid by the hour. Claimant argues that significance should be placed on the fact that the WCJ did not specify how he was paid, but such a conclusion is immaterial. The burden here is born by Claimant and it is enough for the WCJ to find that, based on the evidence of record, Claimant did not meet his burden of demonstrating that his manner of payment was a factor in support of his claim to be an employee. Moreover, the WCJ found Kidd credible and the WCJ's factual findings clearly recount Kidd's testimony that on this particular job, Claimant was paid a lump sum per day.

Claimant has failed to prove a single factor that supports his contention that he should be classified as an employee of Kidd and the record as a whole makes clear that the relationship between the two was casual and not that of an employer and an employee. The WCJ did not err in concluding that Claimant was an independent contractor.

The WCJ is the ultimate finder of fact and the exclusive arbiter of credibility and evidentiary weight; he or she is free to accept or reject the testimony of any witness in whole or in part. *Thompson v. Workers' Compensation Appeal Bd. (USF &G Co. and Craig Welding & Equipment Rental)*, 566 Pa. 420, 427, 781 A.2d 1146, 1150 (2001); *Anderson v. Workers' Compensation Appeal Bd. (Penn Center for Rehab)*, 15 A.3d 944, 949 (Pa. Cmwlth. 2010). Where supported by substantial evidence, the WCJ's findings are conclusive on appeal. *Thompson*,

566 Pa. at 427, 781 A.2d at 1146. Section 422(a)³ of the Act requires a WCJ to issue a “reasoned decision” or a decision that allows for adequate review by the Board without need for further analysis and explanation, as well as adequate review by appellate courts under the applicable standards of review. *Visteon Systems v. Workers’ Compensation Appeal Bd. (Steglik)*, 938 A.2d 547, 553 (Pa. Cmwlth. 2007); *O’Donnell v. Workers’ Compensation Appeal Bd. (United Parcel Service)*, 831 A.2d 784, 790 (Pa. Cmwlth. 2003).

In *Daniels v. Workers’ Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 76, 78, 828 A.2d 1043, 1052, 1053 (2003), our Supreme Court examined the statutory directive of Section 422(a) and recognized that for the purpose of effective appellate review, what constitutes a reasoned opinion may differ based on whether the WCJ’s credibility determinations are based on a review of deposition testimony or tied to the inherently subjective assessment of live

³ Section 422(a) of the Act provides:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason: the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

testimony. The Court explained that where, “the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately ‘reasoned’.” *Id.* at 77, 828 A.2d at 1052-53.

Here, the WCJ was presented with conflicting testimony from the Claimant and Kidd concerning their employment relationship. An additional lay witness, Wayne Barber, also offered testimony, but no expert testimony was presented. All three of the lay witnesses testified live; no deposition testimony was offered or admitted into the record. The WCJ thoroughly reviewed the conflicting testimony in the findings of facts and made specific credibility determinations, identifying exactly which part of Kidd’s testimony was material and credited and which part of Claimant’s testimony was not credible. (F.F. ¶6 (a)-(e).) The WCJ’s decision was reasoned and not in error. Moreover, the WCJ did not capriciously disregard competent evidence.

Capricious disregard is “a deliberate disregard of competent evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.” *Acme Markets, Inc. v. Workers’ Compensation Appeal Bd. (Brown)*, 890 A.2d 21, 26 (Pa. Cmwlth 2006). Such disregard is not present here. Instead, the evidence Claimant contends has been avoided consists of Claimant’s own testimony, which the WCJ found not credible, and selective portions of Kidd’s testimony taken out of context. To find as Claimant argues we should, would require this Court to intrude upon the WCJ’s fact-finding role and make credibility determinations of our own, which is neither an appropriate exercise of appellate review nor within our authority. *Id.*

We discern no error on the part of the WCJ and for the reasons discussed, the Board's order is affirmed.

JAMES GARDNER COLINS, Senior Judge

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Board (Kidd and Uninsured	:
Employer Guaranty Fund),	:
	:
Respondents	:

ORDER

AND NOW, this 24th day of August, 2012, the October 5, 2011, order of the Workers' Compensation Appeal Board in the above captioned matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge