CASE NO. 6057 CRB-8-15-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 800183203

FERNAND VEILLEUX
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 26, 2016

DEHM DRYWALL, LLC
EMPLOYER

and

CENTRAL MUTUAL INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Mark E. Blakeman, Esq., Michelson, Kane, Royster & Barger, PC, 10 Columbus Boulevard, Hartford, CT 06106.

The respondents were represented by James M. Hyland, Esq., Mulvey, Oliver, Gould & Crotta, 2911 Dixwell Avenue, Hamden, CT 06518.

This Petition for Review from the November 18, 2015 Finding and Dismissal of Peter C. Mlynarczyk, the Commissioner acting for the Eighth District, was heard June 17, 2016 before a Compensation Review Board panel consisting of Commissioners Ernie R. Walker, Nancy E. Salerno and Michelle D. Truglia.

OPINION

ERNIE R. WALKER, COMMISSIONER. The claimant has appealed from a November 18, 2015 Finding and Dismissal issued by Commissioner Peter Mlynarczyk who determined the claimant was not an employee of the respondent at the time he was injured. The claimant argues that the Finding and Dismissal was not consistent with the facts on the record and as the respondent allegedly had "the right of general control" over the claimant an employer-employee relationship existed. We note that it is the claimant's burden to establish the jurisdictional fact of an employer-employee relationship in order to receive benefits under Chapter 568. After reviewing the evidence cited by the trial commissioner in reaching his decision, we are satisfied that he reasonably could have determined the claimant failed to reach this threshold burden regarding jurisdiction. Therefore, we affirm the Finding and Dismissal.

Commissioner Mlynarczyk reached the following factual findings which are pertinent to our consideration of this appeal. He considered the testimony of Fernand Veilleux, the claimant; Ryan Dauphin, a co-worker of the claimant; Chris Manganello, a co-worker of the claimant and son-in-law; and Neil Dehm, the principal of the respondent. The claimant testified that he had hung drywall for 44 years and first began working for the respondent on a single job in 2005, worked for them again in 2007 and said after about 2011 he was working almost all of the time for the respondent. He needed to provide the respondent with liability and workers' compensation insurance policies, although he was not personally covered on these policies. Neil Dehm would either call the claimant or text Chris Manganello to advise where the next job would be. The claimant said Mr. Dehm wanted the drywall hung a certain way and he would come

"all the time" to the job, explain how he wanted it done, and when it needed to be finished. When the respondent did not have work available for him the claimant said he was free to work for other firms. On the job where he was injured Mr. Dehm had told him that the top of the walls needed to be done first because the insulation and drop ceiling needed to be installed by others. The claimant said he was paid at the end of each week by the number of pieces installed, or the number of hours or days spent on the job, depending on the payment arrangement. He also said he would bring his own personal tools to the jobsites, such as a screw gun, but Dehm Drywall would provide scaffolding.

On September 9, 2013, the day of his injury, the claimant said he was supposed to finish the top piece of a wall so that someone else could install the track for a drop ceiling. He was also supposed to do a firewall on the second floor of the building. He put the scaffold up near the wall. There had previously been a big ladder at the site, but it wasn't there that day. He climbed the scaffolding and tried to jump onto the second floor, but it was too high, so he put his stepladder on top of the wall, tried to grab a stud and missed, and then fell down. The accident happened at about 9:15 or 9:20 in the morning. On the day he was injured, he brought wheels for the scaffolding to the job site, as well as hand tools, a screw gun, as well as a stepladder. He also owns his own hammer and welder. The claimant also said that on the day he was injured Mr. Dehm was not present at the job site. At the time of the accident, he was working by himself and using his own stepladder on the scaffolding and had also put his own wheels on the scaffolding that he had brought in from his truck.

The claimant also offered testimony as to his business relationship with the respondent and other drywall firms. He said that since 2007 he worked for at least six

drywall companies and he was known as an experienced drywall installer. He said he was not taught by Mr. Dehm on how to install drywall. The claimant pays his income tax based on his earnings as a self-employed drywall installer. The Schedule C attached to his 2013 income tax return indicates that his gross income was $50,614 and he deducted $9,196 for the cost of goods sold. The deductions were for things such as tools and sometimes nails or sheetrock that he would need for a job. He also deducted $2,000 for uniforms and safety boots. In 2013 he said he worked for Dehm Drywall for almost nine months. He was paid $27,697 and received a Form 1099 from Dehm Drywall. The claimant also said that his applications for workers' compensation insurance indicated that he did business as a sole proprietor and he had tendered insurance certifications both to the respondent as well as Monty's Drywall, Friendly Drywall, and Ray's Drywall. When he worked for Dehm Drywall he brought his own tools and provided his own transportation. He didn't have to punch a clock or keep a time sheet. He was never a salaried employee of Dehm Drywall. He did not receive vacation time or holiday time. He also did not have any benefits, such as medical or dental insurance, or a 401k plan.

Commissioner Mlynarczyk also considered testimony from two of the claimant's co-workers, Ryan Dauphin and Chris Manganello. Mr. Dauphin testified he worked alongside the claimant and was present at the job site at the time of the incident where the claimant was injured. He said on that job it was up to him, the claimant and Mr. Manganello to decide what tools to bring to the job site, including hand tools, ladders, wheels, etc. They did not have to punch a clock or submit time sheets. Mr. Dehm did not tell them what time to report or how long to stay on-site each day. It was up to them to decide when to take breaks and eat lunch, and when to leave for the day. Mr. Dauphin

also said Mr. Dehm did not tell him which tools to use or provide any instruction on how to actually hang drywall. He also did not instruct anyone on how to set up the scaffolding. Mr. Dauphin also said he was never paid on an hourly basis by the respondent and was paid by the job or by the sheet of drywall installed, and that arrangement with Dehm Drywall is that the three of them (Dauphin, Manganello and Veilleux) would negotiate a price with Neil Dehm and they would generate an invoice afterward. Mr. Manganello confirmed Mr. Dauphin's testimony that Mr. Dehm paid the work crew based on a per job or per sheet basis. He also confirmed Dr. Dauphin's testimony that they weren't told when to take lunch or other breaks. Mr. Manganello also testified that he was issued a Form 1099 from the respondent, was not provided any benefits by the respondent, and did work in 2013 for other drywall contractors when the respondent wasn't busy. He said he filed his taxes as an independent contractor. He also testified Neil Dehm told him the respondent required him to provide his own liability and workers' compensation insurance.

The principal of the respondent, Neil Dehm, also testified. He testified that his firm did not have any employees and the claimant never filled out a job application, nor was the claimant provided a W-2 or W-4 form, medical, dental or retirement benefits, or holiday pay, vacation pay, or overtime pay. Mr. Veilleux started providing services to Dehm Drywall, LLC in 2007 doing some framing, but mainly drywall installation and each year Dehm Drywall, LLC would send Mr. Veilleux a Form 1099 for payments made to him. Mr. Veilleux and others who did work for the respondent were required to produce certificates of coverage for liability insurance and workers' compensation insurance. During 2013 in general, Mr. Dehm said Mr. Veilleux would usually work

with Mr. Manganello and Mr. Dauphin. They were all independent contractors and provided their own certificates of insurance. They would negotiate a price for each job and once the job was complete they would submit an invoice directing how the payment for the work was to be split between them. The work times on each job were set by town ordinance or by the people whom they were working for and the work crew would come and go as they pleased during the work day. Mr. Dehm said that on the day the claimant was injured, September 9, 2013, he arrived at the job site at about 6:45 a.m. and left at approximately 7:30 a.m. Mr. Veilleux, Mr. Manganello, and Mr. Dauphin arrived at about 6:45 a.m. or 7:00 a.m. When he was there, the staging was disassembled. He did not direct the others as to what tools or equipment they needed to use. Mr. Dehm also said Mr. Veilleux represented himself as an experienced drywall installer who could work independently and without direction or supervision.

Based on this testimony the trial commissioner concluded the claimant represented himself as a self-employed drywall installer during the period that he provided services to Dehm Drywall, LLC. Commissioner Mlynarczyk noted the claimant received a Form 1099 from the respondent and the claimant filed his taxes as based on profit and loss from a business. The claimant was paid a gross amount with no tax deductions, did not receive any benefits and did not receive a "pink slip" when work from Dehm Drywall was unavailable. While the claimant may have considered the respondent a priority due to the amount of work they provided, he did work for other contractors when work from the respondent was unavailable. While Mr. Dehm directed the claimant and his co-workers as to the location and scope of each job and provided a schedule for completion, the claimant, Mr. Dauphin, and Mr. Manganello otherwise completed each

job autonomously. The trial commissioner finally concluded while the respondent had a preferred way to have drywall installed, the claimant and his colleagues relied on their own experience and training in completing the actual installation of sheetrock. Commissioner Mlynarczyk therefore determined the claimant was an independent contractor as of September 9, 2013 and dismissed his claim for workers' compensation benefits.

The claimant did not file a Motion to Correct from the trial commissioner's decision. He has appealed and argued that the facts on the record do not support the trial commissioner's finding that he was a general contractor. He also argues that Dehm Drywall had the "right of general control" over his work and therefore, an employer-employee relationship existed, making the injury compensable under Chapter 568.

We note that in the absence of a Motion to Correct, we must give the factual findings of the trial commissioner conclusive effect and that this board is limited to reviewing how the commissioner applied the law. See Admin. Reg. § 31-301-4 and Crochiere v. Board of Education, 227 Conn. 333, 347 (1993). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). However, we also point out

that it is the claimant's burden to establish the jurisdictional fact of an employer-employee relationship before benefits can be awarded. See Castro v. Viera, 207 Conn. 420 (1988) and Bugryn v. State, 97 Conn. App. 324, 331-332 (2006).

The claimant argues that the trial commissioner misapplied the legal standard for determining whether an employer-employee relationship existed in this case. He focuses on the testimony of Neil Dehm which he believes establishes that he had the "right to control" the work performed by the claimant; in particular Mr. Dehm's visits to work sites and directions as to how he would like work performed. See Claimant's Brief, pp. 17-18. He also cites corroboration on these points from the other witnesses at the hearing. Id., pp. 15-17. The claimant acknowledges that there is a "totality of factors" test that is applied when considering whether a worker is an employee or an independent contractor under Connecticut law, citing Hanson v. Transportation General, Inc., 245 Conn. 613, 625 (1998). He focused in his brief on an Internal Revenue Service revenue ruling citing twenty factors, of which the claimant argues he met eighteen factors consistent with employment status. Claimant's Brief, pp. 12-13.[1]

We note that this tribunal is not bound by standards of federal tax law in determining whether or not a claimant, as a matter of law, has established the jurisdictional fact of an employee-employer relationship. We have long standing and well litigated precedent since Hanson which has applied the "totality of factors" test to

[1] We note that a number of the factors which the claimant claims to have "met" involve conclusions not reached by the trial commissioner. We note, specifically, that whether the worker uses his own tools or the employer's tools is an important factor in determining employment status. The claimant says in his brief he was using the employer's tools. The trial commissioner was presented with testimony from the witnesses on the job site the claimant was using his own stepladder on the scaffold he fell from and had put his own wheels on the scaffold.

disputes such as this one, and extended significant deference to the findings of a trial commissioner. See Maskowsky v. Fed Ex Ground, 5200 CRB-3-07-2 (July 28, 2008).

> Therefore, under the Hanson precedent a trial commissioner must weigh *all* the factors relevant to employment status prior to reaching a decision. This decision will be driven by the specific facts of each case presented. Our ability as an appellate panel to reverse such a determination on appeal is limited in scope as the inferences and conclusions reached by a trial commissioner must be accorded deference on appeal. As "[n]o reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the [commissioner] is factually questionable." Daubert v. Naugatuck, 267 Conn. 583, 590 (2004), citing Fair [v. People's Savings Bank, 207 Conn. 535, 539 (1988).]

Maskowsky, supra.

We note that one factor which has weighed heavily in favor of finding that a worker is an independent contractor is when he or she is being paid without tax withholding and receives a 1099 tax form from the entity that retained his or her services. See Dupree v. Masters, 13 Conn. Workers' Comp. Rev. Op. 316, 1791 CRB-7-93-7 (April 25, 1995), *aff'd.*, 39 Conn. App. 929 (1995)(per curiam) and Bonner v. Liberty Home Care Agency, 4945 CRB-6-05-5 (May 12, 2006), where we pointed that "the decisive factor was the claimant's tax filings. '[T]he claimant considered himself self employed for tax purposes, paying his own income taxes and social security taxes at self employment rates.'" Bonner, supra.

In the present case the claimant never had any pay withheld for taxes, received a 1099 form from the respondent, and filed taxes with the Internal Revenue Service as an independent contractor. Therefore, a finding of independent contractor status in this case is consistent with the precedent in Dupree and Bonner. Moreover, the tax filings of the

claimant indicate that he was working for a number of other firms during 2013. We note that was a dispositive issue in finding independent contractor status in Altieri v. R & M Builders, 3647 CRB-5-97-7 (December 18, 1998). The tax filing status and solicitation of outside work present in this case were also factors which supported a finding of independent contractor status in Rodriguez v. E.D. Construction, Inc., 126 Conn. App. 717 (2011), *cert. denied*, 301 Conn. 904 (2011).

In Rodriguez the claimant was injured while working as a roofer. The respondent defended the claim on the grounds the claimant was an independent contractor and pointed to the claimant using his own tools at the job site, not having taxes withheld by the respondent, not being supervised by the respondent at the time of the injury, and engaging in his own business working for other firms. Id., 720. The respondent introduced evidence of the claimant working for others as an independent contractor. Id., 721-722. The trial commissioner concluded the claimant failed to prove there was an employer-employee relationship and this board affirmed that decision. Id., 725. See Rodriguez v. ED Construction a/k/a E.D. Construction, Inc., 5316 CRB-7-08-1 (May 11, 2009)*, aff'd,* 126 Conn. App. 717 (2011), *cert. denied*, 301 Conn. 904 (2011). The Appellate Court affirmed this decision, ". . . we cannot conclude that the commissioner incorrectly applied the right to control test when he determined that the plaintiff was not an employee of the defendant at the time of the accident." Id., 727. This decision rested on the factors cited by the trial commissioner evidencing independent contractor status such as the claimant performing work for others, working in an autonomous manner, obtaining his own insurance, and receiving a 1099 form regarding tax liability. Id., 730.

We note that the factual circumstances herein are difficult to distinguish in any substantive manner from Rodriguez. In both cases the claimant was using his own tools and was working in an autonomous manner when he was injured. In both cases the claimant obtained his own insurance and did not have taxes withheld by the respondent. The claimant in both cases obtained work from other firms during the time period he was working for the respondent. The precedent in Rodriguez supports the result in this case. We also note that the factual circumstances in this case are congruent to other decisions where we have affirmed independent contractor status for a tradesman working autonomously at a work site at the time of injury. See Jordan v. Reindeau & Sons Logging, LLC, 5388 CRB 2-08-10 (December 18, 2009), Schleidt v. Eldredge Carpentry, LLC, 5373 CRB-8-08-8 (July 14, 2009) and Yurevich v. Dimitri Logvinski, 5013 CRB-7-05-10 (September 22, 2006). The result herein is consistent with the outcome in each of those cases.

The claimant argues that the trial commissioner failed to credit evidence supportive of finding the respondent had the right of "general control." We infer that Commissioner Mlynarczyk found the claimant's ability to arrive and leave the work site at a time of his own choosing and use his own equipment on the job, i.e., work in an autonomous manner, were weightier factors than the evidence presented regarding Mr. Dehm's direction as to which job the claimant was to work at on a given day and when it needed to be completed. It is apparent the level of supervision over the claimant in this case was far less intrusive than contested cases where we have found an employee-employer relationship was present, see Covey v. Home Medical Associates, LLC, 5770 CRB-4-12-7 (July 25, 2013) and Reid v. Sheri A. Speer d/b/a Speer Enterprises, LLC,

5818 CRB-2-13-1 (January 28, 2014), *appeal pending*, AC 36663. We affirmed the trial commissioner's factual determination in Covey and Reid that an employer-employee relationship existed; the trial commissioner in this case reached a different conclusion and as the factual circumstances were materially different, we believe he was entitled to reach that conclusion.[2]

The claimant in this matter was working in an autonomous manner when he was injured. He received a Form 1099 and did not have taxes withheld from his pay. He was using his own ladder on the job at the time of his injury. These facts are all relevant to the "totality of factors" considered in determining the existence of an employer-employee relationship. Our inquiry thus must center on whether the subordinate facts reasonably support the legal conclusion herein. Tovish v. Gerber Electronics, 32 Conn. App. 595, 602 (1993). We conclude that they do support the commissioner's conclusion.

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[2] We note that in Reid v. Sheri A. Speer d/b/a Speer Enterprises, LLC, 5818 CRB-2-13-1 (January 28, 2014), *appeal pending*, AC 36663, the respondent was found to have closely monitored the claimant's daily work schedule.

> In the present case the trial commissioner determined that after considering the testimony of the various witnesses that an employer-employee relationship existed between the claimant and the respondent at the time of his alleged injury. We find that for the purposes of the precedent on this issue the respondent's decision to install time clocks and enforce strict policies as to the time, place and manner that work on her properties was to be performed could clearly demonstrate that she asserted the right to control the claimant's work, and he was no longer acting in an autonomous manner. We find that Findings, ¶¶ 52, 53 reflect that in September 2009 the respondent instituted a more stringent attendance policy for her workers, including daily logs of their activities. Findings, ¶ 56. The respondent also specifically directed at least one worker as to what type of work he was able to perform. Findings, ¶ 58. The respondent further increased the level of control over her workers in October 2009 by installing time clocks. Findings, ¶ 63. The respondent began requiring notification of tardiness and to call in upon arriving at a worksite. Findings, ¶¶ 64-65. The respondent also limited the ability of her workers to work outside jobs, Findings, ¶ 70, and required prior requests to schedule helpers on jobs. Findings, ¶ 71.

Id.

Commissioner Mlynarczyk could reasonably have found, in this case, the respondent did not exercise this level of control over the claimant's work activities.

Since "[e]mployment status is patently a factual issue, . . ., and is subject to a significant level of deference on review," Hanson v. Transportation General, Inc. d/b/a Metro Taxi, 16 Conn. Workers' Comp. Rev. Op. 57, 3001 CRB-3-95-2 (October 18, 1996), *aff'd*, 45 Conn. App. 441 (1997), *aff'd*, 245 Conn. 613 (1998); we must defer to the judgment of the trial commissioner.

We affirm the Finding and Dismissal of the trial commissioner.

Commissioners Nancy E. Salerno and Michelle D. Truglia concur in this opinion.