STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

VINCENT NOTARANGELO	)	
	)	
VS.	)	W.C.C. 06-00577
	)	
CULLEN ENTERPRISES	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the appellate division on an appeal by the petitioner from the trial court's decision and decree denying his original petition for workers' compensation benefits because the petitioner was not an "employee" within the meaning of the Workers' Compensation Act. After a careful review of the record in this matter and consideration of the parties' respective arguments, we affirm the decision of the trial judge and deny and dismiss the appeal.

Vincent Notarangelo, the petitioner, was injured on July 15, 2005 when he fell from a crane while painting the exterior of a house on Gibbs Road in Newport for the respondents, David Cullen and Cullen Enterprises. As a result of that fall, Mr. Notarangelo fractured and dislocated his left elbow and injured his left leg. His injuries are undisputed in this case. Mr. Notarangelo filed an original petition for benefits against David Cullen as an individual and the painting company owned by Mr. Cullen, Cullen Enterprises.

At the pretrial conference, an order granting benefits to the petitioner was entered because no appearance was made by Mr. Cullen or counsel on behalf of either Mr. Cullen or

Cullen Enterprises. No claim for trial was filed within the requisite time period, but the court later received a motion for relief from the pretrial order from Mr. Cullen and Cullen Enterprises. The trial judge determined that no notice of the pretrial conference was received by the respondent because notice was sent to the incorrect address. He also found that the representations made by counsel during the motion hearing weighed in favor of the respondent. Therefore, he granted the motion for relief from the pretrial order, vacated the initial pretrial order and rescheduled the matter for an additional pretrial conference. At the subsequent pretrial conference, the trial judge entered an order denying the petitioner's original petition, and a timely claim for trial was filed by the petitioner.

At trial, four (4) witnesses testified: Mr. Notarangelo, the petitioner; Mr. Cullen, the respondent; Duncan Macomber, the general contractor for whom the painting was being done at the Gibbs Avenue site; and Stephen Lepre, Jr., a painter who had done work for Cullen Enterprises with Mr. Notarangelo. The essential facts discussed by each witness provided similar accounts of the operations of Cullen Enterprises and the nature of the relationship between Mr. Notarangelo and Cullen Enterprises, and there were no material inconsistencies in the facts presented by the four (4) witnesses.

Mr. Cullen started his painting business, Cullen Enterprises, in 2004. Mr. Notarangelo began doing work for Cullen Enterprises in approximately November 2004, and he worked on several jobs for Cullen Enterprises before he was injured in July 2005. Mr. Notarangelo and the other painters did not fill out employment applications or sign contracts with Cullen Enterprises. Mr. Cullen negotiated with general contractors or individual homeowners to paint, typically, residential properties. Mr. Cullen then drafted contracts between Cullen Enterprises and the customers specifying the price and the scope of the work to be completed.

Mr. Cullen assigned painters, including Mr. Notarangelo, to complete the work at the specified property and set a deadline for completion of the project. Mr. Cullen's presence at the job sites was sporadic. Mr. Cullen visited the work sites periodically and sometimes joined the other painters in completing the work, but he allowed each painter to determine his work hours each day and did not require the painters to notify him if they would not be painting at a particular site on a given day. Mr. Cullen provided the painters with consumable supplies such as paint and any painting tools that the painters needed but did not personally own, but the painters also supplied many of their own tools. Mr. Cullen also furnished larger items such as scaffolding. In particular, Mr. Cullen rented the crane that Mr. Notarangelo was using when he was injured.

The painters, including Mr. Notarangelo, were responsible for keeping track of their own hours and reporting those hours to Mr. Cullen for payment. The painters' hours were reported either in writing or orally. There was no specific form required for submitting time, and writing on a scrap of cardboard was a sufficient method of reporting. Mr. Cullen collected payment from the contractor or homeowner for the work completed, and he paid the painters from those funds. He initially paid the painters in cash but later paid them by business checks issued by Cullen Enterprises. Cullen Enterprises never utilized a payroll service. Payment was based on an agreed upon hourly wage. The painters provided their own transportation to job sites and were not required to wear uniforms.

Mr. Cullen did not withhold income taxes, temporary disability insurance, unemployment taxes, or child support payments from the painters' pay, nor did he provide the painters with 1099 tax forms. Mr. Cullen purchased general liability insurance policies for several painters, including Mr. Notarangelo, but he did not purchase workers' compensation insurance. Mr.

Cullen did not file an independent contractor form with the Department of Labor and Training for Mr. Notarangelo or any other painter until after Mr. Notarangelo was injured. These practices were in place while Mr. Notarangelo and other painters sent by Cullen Enterprises were painting at Gibbs Avenue in Newport and had been adhered to previously during the period in which Mr. Notarangelo performed work for Cullen Enterprises until the time when Mr. Notarangelo was injured.

At the close of the trial, the judge issued a bench decision finding that Mr. Notarangelo was ineligible to collect benefits because he was an independent contractor and not an employee for the purposes of the Workers' Compensation Act. The petitioner then filed the instant appeal.

When the appellate division reviews a case on an appeal from a trial judge's decision, the trial judge's decision will stand unless the appellate panel concludes that the findings of fact upon which it is based are clearly erroneous. *See* R.I.G.L. § 28-35-28(b); Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Furthermore, the appellate division will not conduct a *de novo* review of the case unless an initial finding is made that the trial judge was clearly wrong. Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). After careful scrutiny of the record and the bench decision in this matter, we find that the trial judge's findings of fact were not clearly erroneous, nor was he clearly wrong in his conclusion. Therefore, we affirm his decision.

The petitioner's central argument in his reasons of appeal is that the trial judge applied inappropriate factors in reaching his decision and should have based his decision upon whether Mr. Cullen had the power to control Mr. Notarangelo's activities. Whether an individual is an employee or an independent contractor for the purposes of the Workers' Compensation Act is a mixed question of law and fact. Laliberte v. Salum, 503 A.2d 510, 512-13 (R.I. 1986); Davies v.

Stillman White Foundry Co., Inc., 91 R.I. 337, 341, 163 A.2d 44, 46 (1960). The Workers' Compensation Act provides that, "'[e]mployee' means any person who has entered into the employment of or works under contract of service or apprenticeship with any employer. . . ." and "[t]he term 'employee' also does not include a sole proprietor, independent contractor, or a person whose employment is of a casual nature. . . ." R.I.G.L. § 28-29-2(4).

An individual's status as either an employee or independent contractor depends upon the facts presented in each case, and the determination will be made viewing all of the facts taken together as a whole. Sormanti v. Marsor Jewelry Co., Inc., 83 R.I. 438, 441, 118 A.2d 339, 340-41 (1955). No single factor will be conclusive. Id.; Laliberte, 503 A.2d at 513. In Henry v. Mondillo, 49 R.I. 261, 142 A. 230 (1928), the Rhode Island Supreme Court explained that,

> [t]he test is to be found in the fact that the employer has or has not retained power of control or superintendence of the contractor or employee. The truth is that the surrounding facts are so variable in this class of cases that it is difficult, if not absolutely impossible, to find any two that are on all fours. Many cases are plainly on one side of the equation, and may be readily classified as showing the relation of master and servant; others are just as plainly to be deemed cases of independent contract; while the middle ground is traversed by still other cases that pass by imperceptible stages from one side to the other. In this situation the principle of stare decisis is of doubtful value. . . . The final test is not the actual exercise of the power to control, but the right of the employer to exercise power of control.

Henry, 49 R.I. at 261, 142 A. at 232 (emphasis added); *see also* Croce v. Whiting Milk Co., 102 R.I. 89, 91-92, 228 A.2d 574, 576 (1967); Sormanti, 83 R.I. at 441, 118 A.2d at 340 (citing Henry).

The power to control, though it is an important factor in determining whether there was an employer-employee relationship, is not the only test. Davies, 91 R.I. at 341, 163 A.2d at 46. Again, "each case depends upon its peculiar facts taken as a whole." DiOrio v. R. L. Platter,

Inc., 100 R.I. 117, 122, 211 A.2d 642, 645 (1965); *see also* Laliberte, 503 A.2d at 513 (quoting DiOrio). Other factors that are relevant to this determination are the duration, predictability, and regularity of recurrence of the work, as well as whether the services are necessary to the business of the employer. DiRaimo v. DiRaimo, 117 R.I. 703, 708, 370 A.2d 1284, 1287 (1977). Although the law is well settled on the issue, application of this standard to any given set of facts is often difficult, especially when the evidence is open to interpretation and could support a finding that a person was either an employee or an independent contractor. Sormanti, 83 R.I. at 441, 118 A.2d at 341.

Mr. Notarangelo's status as either employee or independent contractor presents one of those cases traversing the middle ground between employee and independent contractor as described by the Henry court. *See* Henry, 49 R.I. at 261, 142 A. at 232. Many facts could support a finding that he was an independent contractor, while still others could support a finding that he was an employee. In recognizing this difficulty, our deferential standard of review for trial decisions is even more pertinent. *See supra* R.I.G.L. § 28-35-28(b); Vaz v. Diocese of Providence, 679 A.2d 879, 881 (R.I. (1996). In his bench decision, the trial judge addressed the testimony of each witness and categorized each piece of evidence offered as weighing on the side of employee or independent contractor. There are sufficient facts in the record supporting the court's finding that Mr. Notarangelo was an independent contractor, and the trial judge applied the correct legal standard in accordance with the applicable case law discussed above. We will not disrupt the decision of the trial judge simply because facts existed that could support an opposite finding. Therefore, we affirm the decision of the trial judge because he was not "clearly erroneous" in his determination.

Although the petitioner contends in his reasons of appeal that the power to control is the

test to be applied in this case, as we have already explained, the power to control is an important factor among the factors to be considered, but will not itself determine the outcome. *See* Davies, 91 R.I. at 341, 163 A.2d at 46. We therefore will not disturb the trial judge's finding on that issue. The fact that Mr. Notarangelo was free to set his own hours, report his own hours for payment, and was not required to provide notification when he would not be on the job site strongly suggests that Mr. Cullen lacked the power to control Mr. Notarangelo. The Rhode Island Supreme Court has previously found that an individual was an independent contractor and not an employee when he provided his own transportation to work, used his own tools, had no taxes or other benefits withheld from his pay, maintained a record of his own work, reported his own hours, and was paid weekly on an hourly basis. *See* DiOrio, 100 R.I. at 119-20, 211 A.2d at 643. These same facts can also be attributed to Mr. Notarangelo, which strongly supports the trial judge's finding that Mr. Cullen lacked the power to control Mr. Notarangelo.

The petitioner asserts that Mr. Cullen had the power to control Mr. Notarangelo because he arranged the particulars of the job by setting the price and entering into contracts for the work with contractors and homeowners. This fact was considered by the trial judge within the totality of the circumstances and does not require an opposite finding as a matter of law. In addition to urging that the power to control should determine the outcome of the petitioner's case, the petitioner also argues that the trial judge failed to apply other appropriate factors. We again disagree, as we have found that the trial judge applied the law consistent with our reading of the relevant cases.

The other factors that the trial judge considered, such as the duration, predictability, and regularity of recurrence of the work, also suggest that Mr. Notarangelo was an independent contractor. *See* DiRaimo, 117 R.I. at 708, 370 A.2d at 1287. Although Mr. Notarangelo worked

regularly for Mr. Cullen, the fact that he was free to come and go as he pleased and had no requirement to account for his absence to Mr. Cullen indicates that his work was unpredictable, and he was therefore an independent contractor. There was testimony that Mr. Notarangelo arrived at and departed from the job site at varying times, which also demonstrates irregularity in his employment. Further, there was testimony that there were gaps in time when Mr. Notarangelo was not working for Mr. Cullen. These gaps speak to the limited duration of his work for Mr. Cullen and the lack of regularity of recurrence of his work. Essentially, he worked when work was available, which suggests that he was an independent contractor rather than an employee. *See* id. at 705, 370 A.2d at 1285. Certainly, Mr. Notarangelo's painting work was essential to the nature of Mr. Cullen's painting business, so on this point there is a suggestion that Mr. Notarangelo was more like an employee. *See* id. However, this one fact among the many others need not change the trial judge's decision so long as it was considered, as it was by the trial judge in this case.

The financial withholding evidence that has been given great emphasis by the petitioner was also afforded the appropriate consideration by the trial judge, and we find no merit to the petitioner's reasoning that Mr. Cullen's failure to withhold taxes or file a form 1099 left Mr. Notarangelo at a disadvantage with the taxing authorities. The issue of an individual's relationship with a taxing authority is not a relevant consideration in this context, and it in no way indicates an error on the part of the trial judge. The circumstances of Mr. Notarangelo's compensation for painting were considered by the trial judge, and we agree with the degree of significance that he placed on those facts.

In some respects, Mr. Cullen's failure to withhold taxes and other benefits from Mr. Notarangelo's pay would suggest that Mr. Notarangelo was not an employee because he was not

paid in a traditional manner. However, it would be inappropriate to determine that someone was not an employee simply because his employer did not withhold taxes and other benefits. Payment of wages in this manner could then be used by employers to circumvent the workers' compensation system and save on the cost of workers' compensation insurance coverage, as suggested by the petitioner. However, this form of payment may, in some circumstances, be preferable to a worker because it could be advantageous for a particular worker to receive tax-free cash payments in order to have more immediate income. Particularly in light of the many possible motivations for such an arrangement, these facts will simply be another part of the facts taken as a whole. The trial judge adequately considered these facts, including Mr. Cullen's admission of financial savings from not paying for workers' compensation insurance, in his decision in this case.

Similarly, whether an employer filed an independent contractor form with the Director of the Department of Labor and Training will not entirely settle the issue of whether a worker is an employee or an independent contractor. The petitioner has argued in his reasons of appeal that failure to file an independent contractor form with the Department of Labor and Training provides an absolute bar to a finding by the court that a worker is an independent contractor. In his reasons of appeal, the petitioner has quoted the statutory language, "'(a) A person will not be considered an 'independent contractor' unless that person filed a notice of designation with the director . . . that the person is an 'independent contractor'.'" R.I.G.L. § 28-29-17.1(a). His argument is without merit, as the legislature has expressly stated in the very next sentence of the same statute, that, "[t]he filing of the notice of designation shall be a presumption of 'independent contractor' status but shall not preclude a finding of independent contractor status by the court when the notice is not filed with the director." R.I.G.L. § 28-29-17.1(a) (emphasis

added). Under the Workers' Compensation Act, filing an independent contractor form merely creates a presumption that the worker is an independent contractor. It does not conclude the issue when the form is filed, so it only follows that failure to file the form will not conclude the issue of whether a worker is an employee or an independent contractor. Filing or failing to file the form is additional evidence that is part of the totality of the circumstances considered, and the trial judge considered this fact in his analysis, so we will not disrupt his ruling on this ground.

In his very meticulous bench decision, the trial judge provided a detailed discussion of all of the evidence brought into the record by each witness and categorized it as favoring a finding of either independent contractor or employee status. He correctly applied the legal standard to the facts before him, and he reached a decision that was supported by the evidence in the record and consistent with the ample jurisprudence on this issue. We therefore deny and dismiss the petitioner's appeal and affirm the decision of the trial judge.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Connor and Hardman, J. concur.

ENTER:

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Olsson, J.

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Connor, J.

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Hardman, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on February 16, 2007 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to John M. Harnett, Esq., and Fred L. Mason, Esq., on

_____