STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL ROTATORI	)	
	)	
VS.	)	W.C.C. 99-02544
	)	
CUTTING EDGE LANDSCAPING	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came on to be heard before the Appellate Division on cross appeals of the employee and the employer from the decision and decree of the trial judge entered on February 21, 2001. After careful review of the record and consideration of the arguments of counsel, we grant the employer's appeal in part and deny it in part. In addition, we grant the employee's appeal and remand the matter for further hearing at the trial level.

The employee filed an Original Petition alleging that he had suffered an injury while working for Cutting Edge Landscaping on March 15, 1999. At the pretrial conference, the petition was denied and the employee filed a timely claim for trial. At trial, both parties agreed to a bifurcated hearing on the evidence because there was a preliminary question as to the existence of an employer-employee relationship. After only a partial hearing of the evidence, the trial judge issued a decision in which he found that the petitioner was a seasonal employee

of Cutting Edge Landscaping at the time of his injury and would therefore be entitled to workers' compensation benefits. However, he noted that there was no evidence presented as to the employee's average weekly wage during the winter and so he could not award weekly benefits. The trial judge did order the employer to pay the cost of medical treatment and attorney's fees. Both parties appealed from this decision.

It is undisputed by the parties that the petitioner sustained an injury to his left hand on March 15, 1999. However, the preliminary issue before the court was whether the petitioner was an independent contractor or an employee.

The petitioner testified that in 1998 he was employed as a landscaper by the respondent, Cutting Edge Landscaping. He worked approximately twenty-five (25) hours a week at Six and 50/100 ($6.50) Dollars an hour. He stated that the respondent gave him the option of being paid "on the books or in cash." He chose to be paid in cash and testified that he understood this to mean that no taxes would be withheld. In addition, the petitioner stated that it was the respondent who "kept the hours" and determined how much to pay him at the end of each week.

The employee explained that he also worked several days doing snow removal for the respondent between January 1999 and March 15, 1999. He stated that he normally used a shovel and a snow blower, owned and provided by the respondent, for the snow removal. However, his work in this capacity was restricted to only the "snowy days." The petitioner testified that when it snowed

he would meet the respondent at the respondent's home or garage. From there, he would take one of the respondent's pick-up trucks with the snow removal equipment and go to the addresses provided by the respondent. The petitioner's testimony also revealed that his pay period during the snow removal season was from "the time he showed up to the end of the day." He testified that the respondent still kept track of these days and hours.

The respondent presented two (2) defenses regarding the petitioner's status as an employee. The first defense was that the petitioner was an independent contractor and the second defense was that if the court found an employer-employee relationship, the petitioner was a casual employee and not subject to the Workers' Compensation Act. The respondent testified that he offered the petitioner the option of employee status or "payment under the table" for his services. He stated that the petitioner opted for the cash payments and that he did not issue the petitioner a form 1099 for 1998 but did issue him one for 1999.

The respondent asserted that the petitioner would use his own vehicle to transport the equipment to and from the sites for snow removal, contrary to the petitioner's testimony. The respondent stated that he only provided the petitioner with the addresses for the sites that needed to be completed. However, he agreed that on the day the petitioner was injured, the petitioner drove the respondent's pickup truck to the site. The respondent's testimony also

revealed that he had about twenty (20) accounts in January 1999 for which he did snow removal.

At trial, the court defined "casual employee" as one who is employed otherwise than for the purpose of an employer's trade or business. The trial judge determined that it was clear from the evidence that the respondent was engaged in the business of snow removal and that the petitioner was engaged for the purpose of the employer's trade at the time of his accident. As to the petitioner's status, the trial judge found that he was a seasonal employee of the respondent. As a result, the trial judge awarded the petitioner the cost of his medical treatment and his attorneys' fees.

The respondent raises two (2) main issues on appeal. First, the evidence at trial established that the petitioner was an independent contractor and not an employee within the meaning of the Workers' Compensation Act at the time of his injury and second, the trial justice exceeded the scope of his authority by proceeding to order the respondent to pay for the petitioner's medical bills and expenses.

The petitioner has one (1) main issue on appeal. He contends that the only issue before the court was whether or not the petitioner was an employee of the respondent. Therefore, the trial judge exceeded the scope of authority by holding that there was insufficient evidence from which the court could determine the employee's average weekly wage when the parties had agreed with the judge to bifurcate the hearing.

The first issue before the appellate panel is whether the trial judge erred in holding that the petitioner was an employee of the respondent and not an independent contractor. The respondent argues that the petitioner failed to meet his burden of proof that he was an employee within the meaning of the Worker's Compensation Act (hereinafter the Act). Therefore, the trial judge erred in finding that he was a seasonal employee of Cutting Edge Landscaping at the time he was injured.

Pursuant to R.I.G.L. § 28-35-28(b), the findings of fact made by a trial judge are final unless found to be clearly erroneous. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division cannot undertake a *de novo* review of the record and independently weigh the evidence without first concluding that the trial judge overlooked or misconceived material evidence in arriving at his factual findings. Grimes Box Co., Inc. v. Miguel, 509 A.2d 1002, 1004 (R.I. 1986). After careful review of the record in this matter, we find evidence to support the trial judge's conclusion. Therefore, we deny and dismiss the respondent's appeal on this issue.

The determination of whether an employer-employee relationship exists is a mixed question of fact and law. DiOrio v. R.L. Platter, Inc., 100 R.I. 117, 122, 211 A.2d 642, 645 (1965). In DiRaimo v. DiRaimo, 117 R.I. 703, 370 A.2d 1284 (1977), the Rhode Island Supreme Court held that R.I.G.L § 28-29-2(b) (now § 28-29-2(4)) provides the definitive test for determining the status of an employee

for purposes the Act. Id., at 708, 370 A.2d at 1286. The Act defines an employee as follows:

> " 'Employee' means any person who has entered into the employment of or works under contract of service or apprenticeship with any employer . . .
>
> * * * *
>
> "It does not include any partner, sole proprietor, independent contractor, or a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business. . . ." R.I.G.L. § 28-29-2(4).

However, it has been frequently stated that:

> ". . . it is impossible to determine the relationship of employer and employee by any hard and fast rule. Ordinarily no single phase of the evidence is determinative of the question and all features thereof must be considered together. In other words, the answer to such question depends in each case upon its particular facts taken as a whole." Sormanti v. Marsor Jewelry, Co., 83 R.I. 438, 441, 118 A.2d 339, 340-341 (1955).

In DiOrio v. R.L. Platter, Inc., *supra*, the court was faced with the same question regarding the petitioner's status at the time of his injury. The factors the court examined in order to make their determination included whether the worker provided his own transportation to the job site, whether the worker used his or her own tools, whether the worker ordered the supplies, whether the worker had taxes withheld from his pay, whether the worker was paid by the job or by the week, and whether the worker was listed on the books as an employee. DiOrio, 100 R.I. at 120-122, 211 A.2d at 643-645. More recently, in Laliberte v. Salum,

503 A.2d 510 (R.I. 1986), the Rhode Island Supreme Court held that "[t]he factual and legal determination of whether an individual falls within the statutory definition of employee must be made in light of the criteria set forth in DiOrio, *supra*." Id. at 513. The court also reinforced its holding that there is no hard and fast rule to govern these cases and the outcome in a given case depends upon the particular facts taken together. Id.

In the present case, the trial judge clearly weighed the DiOrio factors in making his determination. There is testimony in the record that the respondent provided all of the equipment utilized by the petitioner and transportation to the job site. The respondent directed him in performing his job duties and paid him in cash weekly based upon the number of hours worked. Despite the fact that the petitioner was not paid by check with taxes withheld, the trial judge concluded that the weight of the other factors supported a finding that the petitioner was an employee at the time of his injury. Such a determination must be afforded great deference by the appellate panel. After carefully reviewing the record and testimony in this matter, it is clear that the trial judge had before him a series of probative facts that when taken as a whole, could clearly establish that the petitioner was an employee and not an independent contractor. Therefore, we cannot say that his factual finding on this issue was clearly erroneous.

The second issue before this Panel was raised by both the respondent and the petitioner in their respective appeals. Both the petitioner and respondent argue that the trial judge erred because he exceeded his authority in addressing

the payment of medical benefits and weekly benefits when the only issue before the court was whether the petitioner was an employee or independent contractor. After a careful review of the record, we find that the trial judge clearly intended to bifurcate the issues at trial.

On January 10, 2000, the first day of trial, the transcript reflects that the parties conferred with the judge and it was agreed that the preliminary question of whether there was an employer-employee relationship would be decided first before presenting evidence as to disability, average weekly wage and medical treatment. (Tr. p. 3) The trial judge stated that he would decide whether the petitioner was an employee first and then proceed with the rest of the evidence if necessary. This agreement as to procedure was reiterated at the end of the hearing on this issue as well. (Tr. p. 107-108)

It is also clear from the record that both parties only presented evidence relating to the petitioner's status as an employee with the understanding that they could put in evidence regarding injury, incapacity, and average weekly wage later. (Tr. p. 20 & 47, 48-49) Therefore, we find clear error on the part of the trial judge in rendering a determination on issues which were not yet finalized before the court. Consequently, the respective appeals of the petitioner and the respondent are granted in part with regard to this issue and remand this matter to the trial level for further proceedings on the remaining issues.

The trial judge in this matter retired from service shortly after the decision in this matter was rendered. The case will be referred to the chief judge for

assignment to another trial judge to conduct hearings, take evidence, and render a decision regarding any remaining issues. The determination that the petitioner is an employee of the respondent under the Workers' Compensation Act is final.

In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the petitioner is a seasonal employee of the respondent.

2. That the parties agreed that the issue of whether there was an employer-employee relationship between the parties would be preliminarily decided by the trial judge before proceeding to the remaining issues in the case.

3. That the parties were precluded from presenting evidence on the remaining issues in the case when the trial judge prematurely issued a decision and decree in the matter.

It is, therefore, ordered:

1. That the matter is remanded to the trial level for further proceedings on the remaining issues of the case.

2. That due to the retirement of the trial judge originally assigned to this case, the matter is referred to the chief judge for assignment to another trial judge who will conduct hearings, take evidence, and render a decision regarding the remaining issues of the case.

3. That the fees and costs previously awarded by the trial judge in this matter shall be incorporated into the decree entered after the trial is completed.

4. That the respondent shall pay a counsel fee in the amount of Seven Hundred Fifty and 00/100 ($750.00) Dollars to Anthony L. DiCenso, Esq., for his success in prosecuting this appeal and defending against the employer's appeal, and shall reimburse attorney DiCenso the sum of Four Hundred Seventy-five and 00/100 ($475.00) Dollars for the cost of filing this appeal and the transcript.

We have prepared and submit herewith a new decree in accordance with our decision. The parties may appear on

to show cause, if any they have, why said decree shall not be entered.

Bertness and Salem, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Salem, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL ROTATORI	)	
	)	
VS.	)	W.C.C. 99-02544
	)	
CUTTING EDGE LANDSCAPING	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeals of both the petitioner/employee and the respondent/employer from a decree entered on February 21, 2001.

Upon consideration thereof, the appeal of the petitioner/employee is granted and the appeal of the respondent/employer is granted in part and denied in part, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner is a seasonal employee of the respondent.

2. That the parties agreed that the issue of whether there was an employer-employee relationship between the parties would be preliminarily decided by the trial judge before proceeding to the remaining issues in the case.

3. That the parties were precluded from presenting evidence on the remaining issues in the case when the trial judge prematurely issued a decision and decree in the matter.

It is, therefore, ordered:

1. That the matter is remanded to the trial level for further proceedings on the remaining issues of the case.

2. That due to the retirement of the trial judge originally assigned to this case, the matter is referred to the chief judge for assignment to another trial judge who will conduct hearings, take evidence, and render a decision regarding the remaining issues of the case.

3. That the fees and costs previously awarded by the trial judge in this matter shall be incorporated into the decree entered after the trial is completed.

4. That the respondent shall pay a counsel fee in the amount of Seven Hundred Fifty and 00/100 ($750.00) Dollars to Anthony L. DiCenso, Esq., for his success in prosecuting this appeal and defending against the employer's appeal, and shall reimburse attorney DiCenso the sum of Four Hundred Seventy-five and 00/100 ($475.00) Dollars for the cost filing this appeal and the transcript.

Entered as the final decree of this Court this day of

BY ORDER:

_____

ENTER:

_____
Olsson, J.

_____
Bertness, J.

_____
Salem, J.

I hereby certify that copies were mailed to Anthony L. DiCenso, Esq., and Christopher O'Connor, Esq., on _____