2022 IL App (1st) 211433WC-U

Workers' Compensation
Commission Division
Order Filed: October 7, 2022

No. 1-21-1433WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROUTINE MAINTENANCE,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	
	)	No. 20L50535
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*,	)	
	)	
	)	
(Richard Muniz, Appellee).	)	
	)	Honorable
	)	John J. Curry, Jr.,
	)	Judge, Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order confirming the Commission's decision is affirmed where the Commission found the existence of an employer/employee relationship when the employer controlled the manner in which claimant performed the work, dictated claimant's schedule, supervised claimant at the job site, provided transportation and

equipment, and hired claimant and others to perform maintenance duties consistent with the nature of their business so as to establish an employer/employee relationship. The Commission's decision was not against the manifest weight of the evidence.

¶ 2 On October 12, 2010, the appellee, Richard Muniz (the claimant), filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2012)), seeking benefits from appellant, Routine Maintenance. After a hearing, the arbitrator awarded claimant benefits. On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision with some modifications on the awarded benefits. Upon judicial review of the Commission's decision in the circuit court of Cook County, the court confirmed the Commission's decision.

¶ 3 Routine Maintenance appeals, arguing the Commission erred by finding the existence of an employer/employee relationship. It contends the Commission stopped short of considering *all* of the evidence in relation to the applicable deciding factors, resulting in a decision that was against the manifest weight of the evidence.

¶ 4 I. BACKGROUND

¶ 5 The following recitation of the facts relevant to a disposition of this appeal is taken from the transcript of the arbitration hearing held on June 18, 2019, the evidence adduced at the hearing, and the decisions that followed. Our review of the evidence is summarized as follows.

¶ 6 A. Testimony of Andrew Majernik (Called by Claimant)

¶ 7 Claimant called the owner of Routine Maintenance, Andrew Majernik, as its witness. Majernik appeared *pro se*. He testified he could not recall how long he had owned the company at the time of claimant's accident on November 30, 2007. He thought "[l]ess than ten years," maybe "a couple years." He could not specifically recall whether Routine Maintenance was hired to perform a job at Arrow Apartment Complex, but he assumed that was "probably the

job in question." The following exchange occurred:

"Q. Okay. Let me ask you this question. As the owner of Routine Maintenance, did you readily perform the labor, or did you own the company and hire the crew or the laborers?

A. I was the owner of the company, but our company was a marketing company, and we secured jobs for contractors, and then they would do the work and give us a commission, and we did not have any laborers so to speak.

Q. Did you have any employees as foreman or supervisors?

A. No.

Q. Who would—

A. Well, I mean not in the field. Like we'd have office help if that's what you're asking.

* * *

Q. Okay. So what would be the formality of [claimant] being hired to perform labor for Routine Maintenance?

A. Our company would secure jobs for like an Angie's List, so we were basically a marketing company that secured jobs for contractors, and then we would give them the job, and they were responsible for completing it, getting payment and giving us a commission."

¶ 8 Majernik testified he had no "foremen in the field of any labor jobs." Nor, was he on the job site at Arrow Apartment so, he was not "in a position to give an opinion or testimony regarding the control or the manner in which the work was performed." Majernik testified a man named "Carlos" was the office manager, an employee of Routine Maintenance, and was the person

who "apparently hired—not hired, but acquired" claimant. Carlos oversaw the office and dispatched laborers. When asked if Carlos ever went to a job site, Majernik said: "He could but not to do any work." If he was on a job site, it was not to oversee the work but to "secure work with a customer[—]he might make like a sales call so to speak." Majernik said the "contractor" would oversee the job site. Majernik believed the crew was responsible for their own transportation, but he had "no opinions, no knowledge, no information as to how the laborers would be brought to the job site." Majernik further testified the contractor, not Carlos, would provide their own equipment such as a ladder.

¶ 9 Claimant's counsel produced a document entitled "Routine Maintenance & Services, Incorporated, Independent Contractor Agreement." In this document, claimant was identified as the "contractor" on one page and as the "contractee" on another, with Carlos identified as the "contractor."

¶ 10 The following exchange occurred on cross-examination by an attorney representing the Illinois State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund (The Fund) (who is not a party to this appeal):

> "Q. Could you explain at least how you would get jobs or how you would transfer them to—
>
> A. Yes. Essentially it was mainly telemarketing. There would be some newspaper, other forms of advertising, fliers or—some referral business; but essentially we would make marketing calls to secure work for residential and small business customers; and then we would give that job to an independent contractor to do the work in exchange for a commission."

¶ 11 Majernik testified that, at or around November 2007, the "independent contractors"

were not on Routine Maintenance's payroll and did not have uniforms. When asked how the jobs were scheduled, Majernik said Routine Maintenance would get a date from the customer and "then find a contractor that could do the work at that time." He said Routine Maintenance did not provide transportation or equipment for the contractors. And only the contractor "controlled the manner of how the job was completed," not Routine Maintenance. The contractors were paid directly by the customer and, in that vein, Routine Maintenance never issued W-2s to contractors.

¶ 12 Majernik explained Routine Maintenance sought out home-service jobs such as window washing, gutter cleaning, carpet cleaning, air duct cleaning, and pressure washing. He believed they had less than 10 "actual employees" in their 1200 square foot office.

¶ 13 Majernik testified they never supplied workers' compensation insurance for the contractors and, although he was not certain, "apparently not" for employees either.

¶ 14 On redirect examination, Majernik clarified he had no independent recollection of (1) hiring claimant, (2) the job performed on November 30, 2007, at Arrow Apartments, (3) the manner in which the labor was performed there, (4) how claimant was hired for the job, (5) how the laborers were transported to that job site, (6) how or if tools were provided to the laborers, (7) Carlos's specific role at that job site, and (8) how claimant was paid for the job.

¶ 15 On recross-examination, Majernik testified that, despite his lack of recollection of the above things, Routine Maintenance, at or around November 30, 2007, never provided transportation or equipment for contractors or, not that he was aware of.

¶ 16 On examination by the arbitrator, Majernik testified he either found contractors through referrals, a newspaper posting, or acquired them from the previous owner of the business. However, he could not recall when he acquired the business.

¶ 17 B. Testimony of Claimant

¶ 18 Next, claimant testified that, as of November 30, 2007, he was employed by Routine Maintenance. He answered a newspaper advertisement seeking a "gutter cleaner" and spoke to Carlos, who hired him at the office. His understanding was that he was being hired to clean gutters on residential and "building complex." He would provide his own vehicle and use his own ladder on "small homes," but anything higher than the reach of his ladder, Routine Maintenance would provide the ladder.

¶ 19 Claimant testified he began working for Routine Maintenance on November 27, 2007. He could not recall what documents he signed, but he knew if he did not sign, he would not be allowed to work. He considered the documents he signed to be part of the application process. He was a union bricklayer by trade and had never been hired as a gutter cleaner. He did not own a gutter-cleaning business. Claimant had been laid off as a bricklayer and "needed to make some money for the holidays, and [he] took the opportunity to make some extra money." He said Routine Maintenance would "set the rate per job, and then what they would do is pay us after the job was done." Claimant said he only got one paycheck from Routine Maintenance in the amount of $600 for three days of work before he was injured.

¶ 20 Claimant testified that, on November 30, 2007, he reported to work, meeting at Routine Maintenance's office as instructed by Carlos. He, other workers, and Carlos "loaded up in the company truck and picked—and rented two ladders from the hardware store." The truck, driven by Carlos, belonged to Routine Maintenance. Claimant said Carlos, who was the officer and field manager, "was going to tell [them] what to do on the job once we picked up the ladders."

¶ 21 Once they arrived at the job site, Carlos directed claimant and three other workers to "open a ladder, go up, climb up a three-story building and begin cleaning the gutters and downspouts." Carlos decided in which sequence the multiple buildings would be done.

¶ 22 As claimant was descending, the wind caught his ladder. He fell approximately 30 feet, landing on his feet. He fractured his pelvis, back, hip, and collar bone.

¶ 23 On cross-examination by counsel for The Fund, claimant was shown the agreement and acknowledged his signature. He said the agreement was part of the application process. He knew he had to sign it but he did not read it. Counsel noted the agreement indicated claimant's relationship to Routine Maintenance was one of "customer to independent contractor, not one of employer or employee." Claimant said: "That's what it says, but that's not what happens." Claimant said he was to be paid "by the company" once a week, between $15 to $30 per job. He did not have a copy of the check and said he was not given a W-2.

¶ 24 To clarify, claimant testified on the other jobs he had performed for Routine Maintenance, he had used his own ladder.

¶ 25 On cross-examination by Majernik, claimant testified, before the day of the hearing, he had never met Majernik. Claimant said he knew the truck they used was owned by Routine Maintenance because "Carlos's exact words were, [']we're going to use the truck, the company truck to pick up the ladders and go to the job.[']" Claimant acknowledged the truck did not have Routine Maintenance's name on it. He said Carlos did not perform any labor; he was "supervising." Claimant believed he did not receive a W-2 because he did not make enough money. The following exchange occurred:

> "Q. Did your—did you operate as a sole proprietor, or did you have your own company?
>
> A. I worked for you."

¶ 26 C. Testimony of Andrew Majernik (called by The Fund)

¶ 27 Next, counsel for The Fund called Majernik as a witness. Majernik said he "[did

not] know exactly" how long Routine Maintenance was in business. He said Carlos's job did not entail providing transportation, providing equipment, or telling the contractors how to perform the work. To the best of Majernik's knowledge, Routine Maintenance did not have a company truck.

¶ 28 D. The Agreement

¶ 29 Claimant introduced the agreement he signed on November 26, 2007. This "Independent Contractor Agreement" named Routine Maintenance & Services, Inc. as the "contractor," with Carlos Hernandez's signature, and claimant as "contractee." However, the next block of information requested the "Contractor Name," along with the address, telephone number, social security number, and federal employer identification number (FEIN). Claimant handwrote in his personal information, leaving blank the space for his FEIN.

¶ 30 The pertinent clauses of this agreement included a statement that the relationship between the parties was one of "customer to independent contractor, not one of employer-employee." It provided the "contractee" was free to hire its own employees and was required to provide its own insurance, including workers' compensation insurance. It stated the "contractee" must provide its own equipment and supplies and "retains the right to control the manner or means by which the tasks described in this Agreement are to be performed." Yet, the "contractor" retained "the right to control the results to be accomplished." It stated that by signing this agreement, the "contractee" represented he was "engaged in its own business."

¶ 31 The agreement stated the "contractee" "may, and [was] expected to," conduct business with other customers, just not the customers that were clients of the "contractor [for] which contractee performed services." The "contractee" was responsible for all taxes and its own insurance, including workers' compensation insurance. It stated the "contractee" was to provide an invoice to the contractor for payment. It stated: "This Agreement may not be interpreted by

anyone to create a partnership, joint venture, agency, or employer/employee relationship between the Contractor and the CONTRACTEE." Further, it stated the "contractee" must hold the contractor harmless from any loss, damage, or injury.

¶ 32 E. Arbitrator's Decision

¶ 33 Following the hearing, the arbitrator issued a written decision on August 9, 2019, finding, *inter alia*, the existence of an employer/employee relationship. She found claimant was entitled to benefits and awarded the same.

¶ 34 With regard to the existence of the employer/employee relationship, the arbitrator specifically found claimant's testimony regarding his hiring and the accident credible. The arbitrator found (1) claimant's initial interaction with Carlos, (2) Routine Maintenance's provision of transportation and equipment, and (3) the fact Carlos remained at the job site overseeing the work indicated the existence of an employer/employee relationship.

¶ 35 F. Commission's Decision

¶ 36 The Fund filed a petition for review of the arbitrator's decision before the Commission. On November 16, 2020, the Commission issued a unanimous decision, affirming and adopting the arbitrator's decision, with some modifications related to the award of benefits.

¶ 37 G. Circuit Court's Decision

¶ 38 Claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On October 7, 2021, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 39 II. ANALYSIS

¶ 40 In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*Nee v. Illinois Workers'*

Compensation Comm'n, 2015 IL App (1st) 132609WC, ¶ 19), including the existence of an employer/employee relationship between himself and the entity from which benefits are sought (*Pearson v. Industrial Comm'n*, 318 Ill. App. 3d 932, 935 (2001)). "When the evidence is conflicting and the facts subject to diverse interpretation, the question of whether such a relationship existed is one of fact to be resolved by the Commission." *Id.* Accordingly, this court will disturb the Commission's finding on this issue only if it is against the manifest weight of the evidence. *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 29. A finding of fact is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Id.*

¶ 41 Section 1(b)(2) of the Act defines an employee as "[e]very person in the service of another under any contract of hire, express or implied, oral or written." 820 ILCS 305/1(b)(2) (West 2020). "Although this definition is to be broadly construed, there can be no employer/employee relationship and, therefore, no liability under the Act absent a contract for hire, either express or implied." *Pearson*, 318 Ill. App. 3d at 935.

¶ 42 No rigid rule of law exists to determine whether a worker is an employee or an independent contractor. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000). Whether a person is an employee is a "vexatious" question. *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174 (2007). "The difficulty arises not from the complexity of the applicable legal rules, but from the fact-specific nature of the inquiry." *Id.* "When elements of both the relationship of employee and of independent contractor are present and the facts permit an inference either way, the Commission alone is empowered to draw the inferences and its decision as to the weight of the evidence will not be disturbed on review." *Young America Realty v. Industrial Comm'n*, 199 Ill. App. 3d 185, 188 (1990).

¶ 43 No rule has been, or could be, adopted to govern all the cases where the court must determine whether an individual is an employee or an independent contractor. *Roberson*, 225 Ill. 2d at 174-75. Instead, the court considers whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; whether the employer supplies the person with material and equipment; and whether the employer's general business encompasses the person's work. *Id.* at 175. The court also considers the skill the work requires. *Labuz*, 2012 IL App (1st) 113007WC, ¶ 30. No single factor is determinative, and the determination rests on the totality of the circumstances. *Roberson*, 225 Ill. 2d at 175. However, the single most important factor to consider in determining whether a person is an employee is whether the purported employer has a right to control the person's actions. *Ware*, 318 Ill. App. 3d at 1122-23.

¶ 44 Although a contractual agreement is a factor to consider, it does not, as a matter of law, determine an individual's employment status. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309, 317-18 (1990). Quoting Professor Larson, the *Earley* court noted: " 'In a close case, it [the employment status designated in a contract] may swing the balance by aiding in establishing the true intent of the parties-and, after all, that intent is entitled to considerable respect if it can be accurately ascertained.' " *Id*. at 318 (quoting 1C Larson's Workmen's Compensation Law, section 46.30 at 8-263 and 8-264 (1986)).

¶ 45 Here, elements of both the relationship of employee and of independent contractor are present. On the one hand, the agreement presented to claimant by Routine Maintenance and signed by claimant and Carlos, specifically and clearly defined the relationship as one of

contractor/independent contractor. It used many of the key components and terms one would look to in determining that claimant's relationship with Routine Maintenance was one of independent contractor. That is, referring only to the agreement, this court would have no qualm in determining claimant was, in fact, an independent contractor. Indeed, considering Majernik's testimony, that was apparently his intent as the owner. In theory, the laborers Carlos hired were independent and were merely referred to or placed with particular jobs to perform work for Routine Maintenance's clients. It seems Routine Maintenance sought to match laborers with customers needing services, acting as a recruiter, a placement service, or headhunter, if you will.

¶ 46 On the other hand, according to claimant's testimony, "that's what it says, but that's not what happens." Apparently, the agreement was not a reflection of what actually transpired on the job site. According to claimant's testimony, he was a brick layer by trade. He had never cleaned gutters or performed other maintenance-type work as a laborer prior to this incident. He answered a newspaper ad seeking individuals to perform this type of work. Because he had been laid off and needed extra money for the upcoming holidays, he responded to the advertisement. He did not have his own business. Upon meeting with Carlos on November 26, 2007, claimant testified he signed a few documents as part of, what he assumed to be, the application process. He acknowledged he did not read the agreement. He worked for Routine Maintenance from November 27 through 29, 2007, at small residential jobs, using his own transportation and equipment.

¶ 47 In this case, we cannot say the intent of Routine Maintenance as set forth in the agreement was "accurately ascertained." Instead, the classification of independent contractor by Routine Maintenance seemed to be "merely a sham label." *Earley*, 197 Ill. App. 3d at 318. That is, Routine Maintenance wrote in the agreement one way, yet performed another.

¶ 48 With regard to payment, the evidence was contradictory. The agreement stated the worker would submit an invoice to Routine Maintenance for payment. Majernik testified the worker would collect payment from the customer and pay Routine Maintenance a commission. Claimant testified Carlos told him he would be paid between $15 and $30 per job. He said after working three days, he received a check from Routine Maintenance in the amount of $600. The Commission found claimant's testimony credible.

¶ 49 With regard to the circumstances on November 30, 2007, according to claimant, Carlos directed claimant and other laborers to meet at the office for that day's work. This job was for a commercial client at the Arrow Apartment Complex. According to claimant's testimony, Carlos was in charge. He directed the laborers to meet at the office at a particular time and to load up the company truck, in which they would all ride together to the job site. En route, Carlos stopped and rented two 40-foot ladders. Once at the job site, Carlos directed the laborers where to start, who was assigned to do what duties, and in what order the buildings would be completed. He directed the workers to perform the work despite the windy weather conditions. Claimant testified Carlos remained at the job site and was overseeing the work. In fact, Carlos was there to see claimant fall.

¶ 50 Majernik's testimony added nothing to the circumstances as they occurred on November 30, 2007. He was not present, he was not aware they had a job at the Arrow Apartment Complex, he had not hired claimant, he did not know claimant, and he did not know or dispute Carlos was at the job site to oversee the work. His testimony could be described, as claimant does, as "a self-serving attempt to mislead and deflect from the fact that he was operating a business without providing proper workers' compensation coverage." He may have intended to use only

independent contractors but, based on the circumstances as testified to by claimant, on November 30, 2007, the evidence suggested the workers were serving as employees.

¶ 51 Analyzing the facts in light of the determinative factors, we find no reason to disturb the Commission's finding of the existence of an employer/employee relationship between claimant and Routine Maintenance. The manifest weight of the evidence, after considering the Commission's credibility determinations, establishes Routine Maintenance, through Carlos's actions, controlled the manner in which claimant performed the work, dictated claimant's schedule, supervised claimant at the job site, provided transportation and equipment, and hired claimant and others to perform maintenance duties consistent with the nature of their business.

¶ 52 Routine Maintenance argues the Commission's decision was against the manifest weight of the evidence. We disagree. The Commission found claimant sufficiently proved, by a preponderance of the evidence, the existence of an employer/employee relationship between himself and Routine Maintenance. See *Pearson*, 318 Ill. App. 3d at 935. Based on this evidence, we cannot say that an opposite conclusion is clearly apparent. See *Tolbert v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130523WC, ¶ 39.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision.

¶ 55 Affirmed.