SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5180-14T2

DARRYL HOPKINS,

Petitioner-Cross-Appellant/
Respondent,

v.

CAPONE TRANSPORTATION, LLC,
CAPONE SCRAP IRON & METAL,
LLC, LEHIGH HANSON, INC.,
HANSON AGGREGATES, BMC., INC.,
and UNINSURED EMPLOYERS FUND,

Respondents-Respondents,

and

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,

Respondent-Appellant/
Cross-Respondent.

Argued October 2, 2017 – Decided April 16, 2018

Before Judges Messano, O'Connor and Vernoia.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition Nos.

2012-12762, 2012-12764, 2012-15267, 2012-24484, 2012-24489, and 2012-24490.

Richard J. Williams, Jr., argued the cause for appellant/cross-respondent New Jersey Manufacturers Insurance Company (McElroy Deutsch Mulvaney & Carpenter, LLP, attorneys; Owen C. McCarthy, on the briefs).

Marci Hill Jordan argued the cause for cross-appellant/respondent Darryl Hopkins (Stark & Stark, attorneys; Marcie Hill Jordan, of counsel and on the brief).

Michael A. Katz argued the cause for respondent Capone Transportation, LLC (Paul & Katz, PC, attorneys; Michael A. Katz, of counsel and on the brief).

Angela B. Kosar argued the cause for respondent Capone Scrap Iron & Metal, LLC (Connor, Weber & Oberlies, attorneys; Angela B. Kosar, of counsel and on the brief).

Walter F. Kawalec, III, argued the cause for respondents Lehigh Hanson, Inc. and Hanson Aggregates, BMC, Inc. (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Robert J. Fitzgerald and Walter F. Kawalec, III, on the brief).

PER CURIAM

In this workers' compensation matter, respondent New Jersey Manufacturers Insurance Company (NJM) appeals from a provision in the June 5, 2015 order finding petitioner Darryl Hopkins was an employee of respondent Capone Transportation, LLC (Transportation) at the time he was injured on a job site.

Petitioner cross appeals from a provision in the same order finding respondent Lehigh Hanson, LLC was not a general

contractor at the time of petitioner's injury. After reviewing the record and applicable legal principles, we affirm the provision finding petitioner was an employee of Transportation at the time he was injured. Because of this disposition, we dismiss the cross-appeal.

I

Following an evidentiary hearing on the question whether petitioner was Transportation's employee at the time he was injured, the judge of compensation determined:

> All of the testimony and records surrounding this issue point to the fact that petitioner was hired by Capone Transportation. He was paid by Capone Transportation, used equipment provided by Capone Transportation. Applying the traditional tests, namely, the control test and the relative nature of the work test, I find that petitioner was an employee of Capone Transportation.

On appeal, NJM's fundamental contention is the judge's conclusions are unsupported by the evidence, and the "overwhelming weight" of the evidence established petitioner was employed by an entity other than Transportation at the time he was injured. The salient evidence adduced at the hearing was as follows.

Years ago, Leonard Capone, Jr., formed Transportation, a single-member LLC. In June 2011, Capone formed another entity,

Capone Scrap Iron & Metal (Scrap), also a single-member LLC. Capone was the principal and sole member of both.

In February 2012, on Scrap's behalf, Capone entered into a contract (purchase order) with Lehigh Hanson, an entity that wanted some old structures on one of its properties in Newport demolished. In the purchase order, Scrap and Lehigh Hanson agreed Scrap would demolish the structures and purchase any scrap metal in such structures from Lehigh Hanson, for six cents per pound. Scrap intended to sell such scrap metal to a third party for a higher price. Other pertinent provisions of the purchase order were that Scrap was to be covered by workers' compensation insurance, and was not permitted to assign the purchase order to a third party without Lehigh Hanson's consent.

After signing the purchase order, Capone assigned Scrap's rights in the purchase order to Transportation because Scrap did not have workers' compensation insurance coverage, but Transportation did. Transportation had acquired such coverage from NJM. Capone did not obtain Lehigh Hanson's consent before assigning the purchase order to Transportation.

Transportation then hired petitioner and two other workers to do the demolition. Transportation was familiar with petitioner's demolition skills because, in 2011, Transportation hired him to do demolition work on a site owned by Lehigh Hanson

in Upper Township, and Transportation discovered petitioner possessed the skills it required.

Work commenced at the Newport site at the beginning of March 2012. Consistent with the purchase order, Lehigh Hanson provided certain equipment and, in particular, safety equipment. It provided a manlift, safety harnesses, hardhats, glasses, and gloves. However, Transportation provided all other equipment for petitioner to use at the job site. Transportation supplied a back hoe, excavator, torches to be used to cut the metal, oxygen tanks, propane tanks, respirator hoses, masks, and repair kits to fix the torches. Petitioner testified he would not have been able to have cut any metal without the use of the torches, hoses, oxygen, and propane.

Transportation sold the scrap metal it recovered from the Newport site and used the proceeds to pay Lehigh Hanson for the scrap metal and to pay Transportation's workers. One of NJM's arguments in support of its claim petitioner was not an employee of Transportation was there was no evidence he was on Transportation's payroll. However, Capone testified the Morely Group, an accounting firm, handled Transportation's payroll needs and, during the Newport project, Capone called the Morely Group weekly to report petitioner's and the other workers'

wages. Capone informed the Morely Group petitioner earned $875 per week.

Capone's testimony was corroborated by cell phone records showing he placed a call to the Morely Group every week. Capone pointed out there was no other reason for him to telephone the firm at that time. The Morely Group also prepared a W-2 form for petitioner for tax year 2012, which indicated Transportation was the source of petitioner's income.

That said, Leonard Capone, Sr., who is Capone's father and was the foreman for the Newport job, testified he paid petitioner $1200 per week in cash. Therefore, while some of the petitioner's pay from Transportation was unreported, nonetheless there is evidence Transportation paid petitioner wages for the period he worked at the Newport site. There is no evidence Scrap ever paid petitioner for any services he performed. In fact, the Morely Group did not handle Scrap's payroll needs because Scrap never had any employees or, for that matter, any income.

Capone's father testified that, as foreman, he had the authority to tell petitioner and the other workers what to do on the jobsite, but only needed to give them instructions a couple of times. On behalf of Transportation, Capone's father ordered

some of the equipment petitioner used on the job, all of which was paid for by Transportation.

Petitioner testified that, in 2011, he was looking for work and heard Capone needed a person who could do demolition work. Petitioner was hired for the job, but it lasted only three or four weeks. In early 2012, Capone's father called petitioner and offered him another demolition job, which he accepted. At that time, he believed he was working for Transportation because he saw two trucks at the Newport site that had the Transportation logo on them.

Petitioner testified Capone's father was on the site daily "driving some equipment" and "pointing out things he wanted done." On April 9, 2012, petitioner fell sixty feet from a silo on the property, sustaining injuries that rendered him a quadriplegic. Petitioner filed an action seeking workers' compensation benefits, but NJM contended he was an employee of Scrap and not Transportation at the time of the incident and, thus, NJM was not required to provide him such benefits.

After the accident, Transportation, not Scrap, was fined $6500 by the U.S. Mine Safety and Health Administration for violating safety regulations. Transportation paid the fine. Lehigh Hanson advised Transportation it did not want it to complete the demolition job at the work site. However, there is

no evidence Lehigh Hanson ever took any action against Scrap for assigning the purchase order to Transportation.

II

As stated, NJM asserts there is insufficient evidence petitioner was employed by Transportation at the time of his accident, and makes various observations about the evidence that, in its view, supports the rejection of the judge of compensation's conclusions. NJM maintains petitioner was employed by Scrap when he was injured.

Our standard of review requires us to uphold the decision of a court of compensation if the factual findings are supported by reasonable and sufficient credible evidence in the record, considering the proofs as a whole, and giving due regard to the judge of compensation's assessment of a witness's credibility. Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (citing Close v. Kordulak Bros., 44 N.J. 589. 599 (1965)). We thus defer to the factual findings and legal determinations made by the judge of compensation unless they are "manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (quoting Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994)).

"[T]he Compensation Act provides employees who have sustained work-related injuries medical treatment and limited compensation 'without regard to the negligence of the employer.'" Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 584 (2015) (quoting N.J.S.A. 34:15-7). Notably, the Court has "long recognized that this system for the compensation of injured workers is 'remedial social legislation and should be given liberal construction in order that its beneficent purposes may be accomplished.'" Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 42 (2008) (quoting Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974)). The Act is interpreted broadly in favor of coverage. Kotsovska, 221 N.J. at 584.

The Workers' Compensation Act defines "employee" as

> synonymous with servant, and includes all natural persons, including officers of corporations, who perform service for an employer for financial consideration, exclusive of . . . casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring . . . .
>
> [N.J.S.A. 34:15-36.]

"Employer" is

> synonymous with master, and includes natural persons, partnerships, and corporations
> . . . .
>
> [Ibid.]

The decisional authority pertaining to determining whether a party is an employee has generally arisen when there is an assertion an alleged employee is an independent contractor. Nevertheless, such authority governs even if there is no allegation a party is an independent contractor and the only issue to resolve is whether a party is an employee of another. To determine if a party is an "employee" within the meaning of N.J.S.A. 34:15-36, our courts have developed two tests, which are (1) the "control test" and (2) the "relative nature of the work test." Pollack v. Pino's Formal Wear & Tailoring, 253 N.J. Super. 397, 407 (App. Div. 1992) (citing Smith v. E.T.L. Enterprises, 155 N.J. Super. 343, 350 (App. Div. 1978)).

The control test "considers whether . . . the employer ha[s] 'the right to direct the manner in which the business or work shall be done, as well as the results to be accomplished.'" Sloan v. Luyando, 305 N.J. Super. 140, 148 (App. Div. 1997) (quoting Kertesz v. Korsh, 296 N.J. Super. 146, 153 (App. Div. 1996)). However, "[t]he control test is satisfied so long as the employer has the right of control, even though the employer may not exercise actual control over the worker." Ibid. This

is particularly so when the skills of the worker or the task to be accomplished is such that the worker does not need to be told how to complete the job for which he was hired.

> A clear showing of control leads easily to the affirmative conclusion that an employer-employee relationship existed. But absence of control of details of the work, where not appropriate in the light of the skill of the employee in the circumstances under which the work is done, is not necessarily significant.
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> [Brower v. Rossmy, 63 N.J. Super. 395, 405 (App. Div. 1960).]
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> Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship.
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> [Marcus v. E. Agric. Asso., 58 N.J. Super. 584, 597 (App. Div. 1959) (Conford, J.A.D., dissenting), rev'd on dissent, 32 N.J. 460 (1960).]

The "relative nature of the work test" is "essentially an economic and functional one, and the determinative criteria [are] not the inconclusive details of the arrangement between the parties, but rather the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business." Id.

at 603. "Under this test it is necessary to analyze the nature of the employer's business and decide whether 'the work done by the petitioner was an integral part of the regular business of respondent,' as well as whether the worker is economically dependent upon the employer." Kertesz, 296 N.J. Super. at 154-55 (quoting Smith, 155 N.J. Super. at 352).

Here, there is unrefuted evidence petitioner performed services for Transportation for financial consideration, fulfilling the definition of employee under N.J.S.A. 34:15-36. There is no evidence he performed services for or was remunerated by Scrap. Capone had initially intended that Scrap perform the demolition services Lehigh Hanson sought. Capone went so far as to enter into a contract with Lehigh Hanson on Scrap's behalf promising to render such services. But before Scrap provided any services, Capone assigned the purchase order to his other business, Transportation, because it had workers' compensation coverage in place.[1]

Applying the control test here, it is not refuted Transportation could control petitioner's work and, according to petitioner, the foreman told him what needed to be done at the

[1] The fact the assignment violated one of the terms of the purchase order is immaterial, as the propriety of Scrap's assignment of the purchase order to Transportation is a matter between only Scrap and Lehigh Hanson and does not affect the employment relationship between Transportation and petitioner.

job site. There is no evidence Transportation exerted control over the specific manner in which petitioner completed his demolition duties. However, given the nature of the work to be performed and the fact petitioner had previously proved himself to be skilled and capable of providing demolition services, Transportation did not need to oversee and directly manage how petitioner executed his duties.

As for the relative nature of the work test, the work petitioner performed at the Newport site was an integral part of Transportation's business. One of the services Transportation provided was demolition, as evidenced by the fact it had provided the exact same service to Lehigh Hanson just months before Transportation was assigned the purchase order and took over the Newport job.

As for petitioner's economic dependency upon Transportation, petitioner was not questioned about the extent to which he relied upon the wages he earned from Transportation. However, there is evidence petitioner was looking for work when hired by Transportation in 2011 and, when Capone's father sought him out for the Newport job in early 2012, petitioner was again available for work. It is inferable that when petitioner accepted the offer to work on the Newport site in early 2012, he was not employed and took the job because he needed the income.

We recognize the judge's findings were conclusory but, after searching the record, we find sufficient support for his determination petitioner was respondent's employee within the meaning of N.J.S.A. 34:15-36, and therefore entitled to workers' compensation benefits for the injuries he sustained in this work-related accident.

As previously stated, NJM launches various arguments about the quality of the evidence, contending it was insufficient to support the judge's finding petitioner was employed by Transportation at the time in question. We have determined NJM's arguments are without sufficient merit to warrant discussion in a written opinion, see Rule 2:11-3(e)(1)(D). NJM's remaining arguments and the contention petitioner raises in his cross-appeal are rendered moot by our disposition.

Affirmed on the appeal; dismissed on the cross-appeal.