COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 053705-96 053338-96**

David Barrett	Employee
D & P Contracting/R. P. Valois Contracting	Employer
Eastern Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Deborah G. Kohl, Esq., for the employee
John A. Smillie, Esq., for Eastern Casualty/D & P Contracting at hearing and on brief
Michael E. Scott, Esq., for Eastern Casualty/R. P. Valois Contracting at hearing

WILSON, J. The insurer appeals from a decision in which an administrative judge determined that the claimant was an employee, rather than an independent contractor, and awarded workers' compensation benefits. After a review of the evidentiary record, we vacate the decision and recommit the case for further proceedings.

At the time of the hearing, the claimant, David Barrett, was a thirty-seven year old, married father of one minor child. He has a twelfth grade vocational education and recently attended some night school classes. (Dec. 5.) The vast majority of his work experience has involved general construction work, both in his own general contracting business, commencing around 1986, and as an employee with various employers. (Dec. 5.) Around 1990, the claimant incorporated his contracting business but subsequently gave it up due to lack of work. Later, in May 1996, he again became self-employed doing business as Dave Barrett's General Contracting, a business name he registered with the City of New Bedford. (Dec. 5.)

[1] Judge Smith no longer serves in the department.

During the summer of 1996, the claimant discussed employment with D & P Contracting and Home Improvement (hereinafter "D & P"). There is conflicting testimony as to whether the claimant was hired as an employee or a sub-contractor. (Dec. 6.) The claimant accomplished two roofing projects for D & P without incident. (Dec. 6.) In November 1996, the claimant was working in Mattapoisett on a construction job where R. P. Valois Contracting was the general contractor and D & P was a sub-contractor. (Dec. 7.) On November 22, 1996, while working at that job site, the claimant sustained a significant injury to his left ankle. (Dec. 8-9.) He has not worked since that date. (Dec. 9.)

The claimant underwent an immediate open reduction and internal fixation to the left ankle, which involved insertion of plates and screws. In September 1997, he underwent a follow-up arthroscopic procedure. (Dec. 8-9.) Asserting employee status, the claimant sought workers' compensation benefits. The matter was conferenced before an administrative judge. Following the conference, the claimant was awarded § 34 benefits as against Eastern Casuality/D & P. The claim against Eastern Casualty/R. P. Valois Contracting was denied. Both orders were appealed to a hearing de novo.[2] (Dec. 3-4.)

In his hearing decision, the judge addressed the claimant's "employee status." Although he observed that the two roofing jobs prior to the November 1996 incident reflected aspects of both employee/employer and contractor/subcontractor relationships, he concluded that the work surrounding the November 1996 incident was more indicative of an employer/employee relationship. (Dec. 7.) The judge credited the claimant's testimony that the claimant believed he would be covered under D & P's workers' compensation policy. (Dec. 7.) Additionally, the administrative judge was "absolutely convinced by Mr. Valois' testimony that he would never permit a subcontractor (D & P Contracting) to hire another subcontractor (Mr. Barrett) on one of his projects." (Dec. 7-8.) Further, the judge found the employee's testimony persuasive that D & P had

[2] As the conference judge no longer served in the department at the time of the hearing de novo, the matter was heard by another administrative judge. (Dec. 3-4.)

specifically requested that the claimant keep his truck across the street out of view and that D & P left its dump truck at the site for the removal of debris. (Dec. 8.) The judge concluded that the claimant was under the direction, control and supervision of D & P and was thus an employee of D & P on the day of his work-related injury. (Dec. 8, 12.) The judge also determined that there was no employee-employer relationship between the claimant and R. P. Valois Contracting. (Dec. 12.)

The administrative judge ordered Eastern Casualty/D & P to pay the claimant § 34 benefits from November 23, 1996 and continuing, reasonable medical expenses for the diagnosed left ankle injury and the claimant's counsel fees.

On appeal, the insurer's sole contention is that the claimant was not an employee at the time of the November 22, 1996 injury. The insurer bases its argument on the following evidence: the claimant purchased a workers' compensation policy for his own employee, Scott Theodore, in September 1996 from Legion Insurance; the claimant employed two individuals on the job; the claimant owned a truck marked "David Barrett Contracting," which was driven to the job site; the claimant filed tax returns for 1996 as the sole proprietor of his business, complete with depreciation of equipment, office expenses and labor costs; the claimant hired a second employee, Peter Vaughan, to finish the job once the claimant became disabled due to the November 22, 1996 injury; and the claimant received the job as a result of a written bid for the whole project. The insurer asserts that on these facts, the administrative judge's decision must be reversed as a matter of law.

In reviewing decisions where the often thorny issue is whether the claimant is an independent contractor or employee, we find guidance in Dolbeare v. Merchants Home Delivery Service, 9 Mass. Workers' Comp. Rep. 812, 815-817 (1995), and MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174 (1992), and other authorities cited therein. In weighing all of the circumstances of the contract of hire, factors to be considered are:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

Dolbeare, supra at 817 and MacTavish, supra at 177 (citations omitted). In considering the various indicia, it is well established that supervision and control over the actual work performed are fundamental elements in determining whether the claimant is an independent contractor or there is an employee/employer relationship. Hartman's Case, 336 Mass. 508 (1957); McDermott's Case, 283 Mass. 74 (1933). As the court explained:

> The test to be applied in determining which of these relationships one stands in is whether in doing the work he is responsible only for the performance of what he agrees to do, in the way in which he agrees to do it, and is not subject to direction and control as to every detail of the work, in which case he is an independent contractor. On the other hand, if at every moment, with respect to every detail, he is bound to obedience and subject to direction and control, as distinguished from a right of inspection and insistence that the contract be performed or a right to designate the work to be done under the contract, then he is a servant or employee.

Hartman's Case , supra at 510, citing McDermott's Case, supra.

Here, the judge's findings regarding the central issues of D & P's control and supervision are sparse: "[a]lthough the employee had his own tools, the materials were supplied by either Mr. Deree [of D & P] or the general contractor on that project. Mr.

Deree would check on the job once or twice a day to see how things were going."[3] (Dec. 6.) More specific to the November 1996 project, the judge was persuaded that an employee/employer relationship was somehow established when the claimant and D & P went to an insurance agent "to straighten out an insurance issue" although it was the claimant who "obtained an insurance certificate under his name listing D & P Contracting as a certificate holder." (Dec. 7.) The judge did not expand upon this point nor did he provide any analysis indicating the significance of this finding or the claimant's relationship with the two workers he hired.[4] He also made no comment on either the significance of the method of payment which, although it was weekly, was "shared" by the claimant with his two employees, or the testimony that the claimant's accountant reported "profits" from the three jobs. Nor did he comment on the claimant's bid for the job. (Dec. 10, 11.) Given the conflicting evidence and findings in this case and the inconclusive findings on the issues of control, payment and workers' compensation insurance, we are hard put to see a rationale for the judge's conclusion that there was an employee/employer relationship. See Ballard's Case, 13 Mass.App.Ct. 1068 (1982) (specific and definite findings required to enable proper appellate review).

We vacate the decision insofar as it concludes that an employer/employee relationship existed between D & P and the claimant. As the administrative judge no longer serves in that capacity, we transfer the case to the senior judge for reassignment and recommittal to a different judge for a hearing de novo and further findings on that limited issue, and the entry of orders in accordance therewith.

So ordered.

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[3] This commentary by the judge is specific to the jobs performed prior to the November 1996 project. It is unclear whether the judge viewed these factors as the standard practice of the parties when working together on a job site or whether he found that supervision was provided by Mr. Deree's brother, who "was present on the job stripping siding." (Dec. 6-8.)

[4] We point out that the fact that a claimant hires others to work on a job need not necessarily preclude a finding that he is a servant or employee. See McDermott's Case, supra at 77, and cases there cited.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **March 15, 2001**

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William A. McCarthy
Administrative Law Judge