

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 018409-08

William Stone
All Seasons Painting and Decorating
Hartford Insurance Company

Claimant
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Katherine Lamondia-Wrinkle, Esq., for the employee
Garrett Harris, Esq., for the insurer

KOZIOL, J. The claimant, William Stone, appeals from a decision denying and dismissing his claim on the ground he was not an employee of All Seasons Painting and Decorating, or its subcontractor, Robert Beaumier.¹ We affirm the decision insofar as it determined Beaumier was an independent subcontractor of All Seasons Painting and Decorating; however, we vacate the judge's determination that the claimant and Beaumier were partners. We recommit the case for a hearing de novo concerning the nature of the relationship between Beaumier and Stone, and, if necessary, addressing the applicability of G. L. c. 152, § 18,² as well as the other issues raised by the parties.

¹ Throughout the decision, the judge incorrectly refers to Mr. Beaumier (Tr. 20) as Mr. Beauvier.

² General Laws c. 152, § 18, provides, in relevant part:

If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such

William Stone, forty-six years old at the time of hearing, alleges he was injured on May 29, 2008, when he fell from a ladder while working as an employee on a residential painting job (the Cantor job) for All Seasons Painting and Decorating, which was owned and operated by Douglas Guyette. (Dec. 2; Employee br. 2-3.) Alternatively, he argues he was an employee of Robert Beaumier, whom the judge found to be a subcontractor of All Seasons Painting.³ (Employee br. 13.)

The only issues addressed by the judge in his decision were those relating to the claimant's alleged employment status. (Dec. 2-5.) The testimony on this issue was conflicting. (Dec. 5.) The claimant testified he was hired directly by Guyette to paint a house owned by Gerald Cantor.⁴ The judge rejected the claimant's testimony on this issue, and credited that of Guyette and Beaumier.⁵ (Dec. 4.) Both Guyette and Beaumier testified Guyette subcontracted the Cantor

employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons. . . . This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured, nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured.

³ Beaumier testified he did not carry workers' compensation insurance at the time of the claimant's alleged injury. (Tr. 58.) Nonetheless, the claimant did not file a claim against the Workers' Compensation Trust Fund. See G. L. c. 152, § 65. Instead, he maintains that, should he be found to be an employee of Beaumier, the insurer for All Seasons Painting would be liable for payment of compensation under § 18.

⁴ The decision incorrectly refers to Mr. Cantor (Tr. 10.) as Mr. Canter.

⁵ The judge stated:

I find credible Mr. Beauvier's [sic] assertion that this particular job had been contracted by him from Mr. Guyette. I do not find credible Mr. Stone's assertion that Mr. Guyette gave the job to both he and Mr. Beauvier [sic]. . . .

(Dec. 5.)

job to Beaumier for \$2,080, and that Beaumier then brought the claimant on the job. (Dec. 2-3.) The judge further found that Guyette was not happy that Beaumier was using the claimant on the Cantor job, because Guyette had employed the claimant in the past, and had fired him because he was unreliable. Nonetheless, the claimant began the job and he alleged he was injured on the second day of work. He did not report to work for the next two days, after which Beaumier told him he was no longer needed. (Dec. 3.)

The judge found that, “Mr. Stone was a partner of Mr. Beauvier [sic], and Mr. Beauvier [sic] was an independent contractor in relation to Mr. Guyette.” (Dec. 4.) In support of these conclusions, the judge made the following subsidiary findings:

As to the independent contractor status of Mr. Beauvier [sic] in relation to Mr. Guyette, I find most persuasive the fact that Mr. Guyette paid Mr. Beauvier [sic] a fixed amount to perform the terms of the contract. Both Mr. Guyette and Mr. Beauvier [sic] testified they viewed the relationship as one of an independent contractor. Mr. Beauvier [sic] was not paid by the hour, or told specifically when to work (other than within the general timeframes of Mr. Guyette’s contract with the homeowner). He generally provided his own equipment. I also find it significant that Mr. Beauvier [sic] brought on Mr. Stone to help. Mr. Guyette strongly objected to this. But Mr. Beauvier [sic] brought him on anyway, further persuading me that Mr. Beauvier [sic] indeed was acting as an independent contractor in relation to Mr. Guyette.

The business relationship between Mr. Beauvier [sic] and Mr. Stone suggests a partnership rather than a hire. Previous times when they had worked together, they had split the money from a job equally. While Mr. Guyette [sic]⁶ got this job, Mr. Stone had arranged for other jobs the two had shared. Likewise, the terms of payment for this job were straightforward — a 50/50 split of the amount in exchange for a sharing of the work load. In fact Mr. Stone testifies that he worked the first day of the job alone — again suggesting a partnership rather than one of an employer/employee relationship.

⁶ We assume the judge meant to say, “While Mr. *Beaumier* got this job . . .”

(Dec. 4.) Accordingly, he denied and dismissed the claim, without reaching any other issues in dispute. (Dec. 5.)

On appeal, the claimant raises two issues. He first argues that the judge made insufficient findings to support both his conclusion that Beaumier was an independent contractor on the Cantor job for All Seasons Painting and Decorating, and, implicitly, that the claimant was not a direct employee of All Seasons Painting. We disagree. The determination of whether a person is an employee or an independent contractor is essentially a question of fact. Madariaga's Case, 19 Mass. App. Ct. 477, 481 (1985). The factors to be considered in making this determination are well-established:

- (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.

MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992)(citations omitted); Dolbeare v. Merchants Home Delivery Service, Inc., 9 Mass. Workers' Comp. Rep. 812, 816-817 (1995); Barrett v. D&P Contr./R.P. Valois Contr., 15 Mass. Workers' Comp. Rep. 94, 97-98 (2001). Foremost among these is the right to direct and control the individual in the performance of his

work. Fleming v. Shaheen Bros., Inc., 71 Mass. Ap. Ct. 233, 227 (2008); MacTavish, *supra*; Dolbeare, *supra* at 815; Barrett, *supra* at 98.

In holding that Beaumier was an independent contractor, the judge found that All Seasons Painting, through Guyette, hired Beaumier to perform the work specified in the painting contract Guyette negotiated with the homeowner. Guyette did not require Beaumier to work at specific times, other than within the general time frames of the contract with the homeowner. Guyette agreed to pay Beaumier a fixed amount for the job, rather than an hourly wage. Beaumier generally provided his own equipment, and Beaumier, rather than Guyette, hired the claimant to work with him, over Guyette's objections. Finally, both Guyette and Beaumier viewed Beaumier as an independent contractor. (Dec. 4.) Taken together, these findings adequately support the conclusion that Guyette did not exercise sufficient direction and control over Beaumier to confer on him the status of an employee.

In addition, the judge's findings offer a sufficient basis for his implicit conclusion that the claimant was not a direct employee of All Seasons Painting. Of particular relevance are the findings that Beaumier, not Guyette, hired the claimant, over Guyette's objections, (Dec. 3, 4); that Guyette did not give the job to both Beaumier and the claimant, (Dec. 5); and that Beaumier, in effect, fired the claimant.⁷ (Dec. 3).

Alternatively, the claimant argues the judge's findings were inadequate to establish that he and Beaumier were partners on the job at which he was allegedly injured.⁸ We agree. Factors relevant to determining the existence of a

⁷ Indeed, at oral argument before the reviewing board, claimant's counsel conceded that, on the facts found, the judge could have determined Beaumier was an independent contractor of All Seasons Painting, and that there was no direct employer/employee relationship between All Seasons Painting and the claimant.

⁸ Though the judge did not specifically find the claimant was an independent contractor of All Seasons Painting, the claimant assumes (correctly, we think) that the determination he and Beaumier were partners implies as much.

partnership, include: “(1) an agreement by the parties manifesting their intention to associate in a partnership, (2) a sharing by the parties of profits and losses, and (3) participation by the parties in the control or management of the enterprise.”

Fenton v. Bryan, 33 Mass. App. Ct. 688, 691 (1992); see also G. L. c. 108A, § 7, “Rules for determining the existence of partnership.” The judge here cites no evidence of an agreement to form a partnership or of participation by the claimant in the management or control of the painting job. The finding that the claimant and Beaumier were to equally split the contract amount is alone insufficient evidence of a partnership. See c. 108A, § 7(3)(“The sharing of gross returns does not of itself establish a partnership. . . .”) Moreover, the judge’s findings that Guyette contracted with Beaumier (not the claimant) to do the painting job, and that Beaumier hired and then fired the claimant, run counter to a finding that the two were partners.⁹ See Madariaga’s Case, *supra* at 481 (testimony that alleged employer could terminate arrangement with claimant at any time was strong evidence he had ultimate control over claimant and that claimant was, in fact, his

⁹ Beaumier testified that after he told Stone not to return to the Cantor job, he paid Stone “a day and a half worth of pay.” (Tr. 34, 36-37.) The judge’s finding that Stone had arranged previous contracts for jobs that he shared with Beaumier, (Dec. 4), is not explained and cannot be squared with the judge’s other findings or the evidence in the record. Stone testified that he worked as an hourly employee of Guyette’s until October of 2007, when Guyette fired him. (Tr. 125, 128.) Guyette corroborated that testimony. (Tr. 66-69.) After losing his job with Guyette, Stone worked for “Weed Man,” a job he continued to perform until he began to paint for Guyette in the spring of 2008. (Tr. 129-132.) Although Stone testified that in 2008 he secured the contracts from Guyette and then brought Beaumier onto those contracts, the judge did not find his testimony credible. Beaumier testified that he secured the contracts and began to work on Guyette’s projects in the spring of 2008; he worked on those contracts throughout the summer until September of 2008, and after he secured the contracts, he brought on helpers, such as Stone, to help him complete the jobs, and that Beaumier was responsible to pay his help. (Tr. 21-31.) Aside from the 2008 Guyette contracts, there was no evidence regarding any other contracts worked on by both Beaumier and Stone. Moreover, the judge credited Guyette and Beaumier’s testimony that Guyette was displeased with the fact that Stone was working on the project, militating against a finding that Stone had contracted directly with Guyette to perform any painting work in 2008.

employee).¹⁰ The judge's findings of fact and the remaining evidence in the record is insufficient to establish the existence of a partnership between Stone and Beaumier as a matter of law. Therefore, we vacate the finding that the claimant and Beaumier were partners.

In addition, the judge failed to address the majority of the MacTavish factors relevant to determining whether the claimant was an employee of Beaumier or an independent contractor. Although there was testimony on factors relevant to this distinction, the judge made few pertinent findings. For example, discussion of the claimant's past work history is limited to mentioning he had previously worked for Guyette, who had fired him, and that he had arranged for other jobs he and Beaumier had shared. There is no discussion of the details of his previous employment with Guyette or Beaumier, or of his prior work history in general, although Guyette, Beaumier and the claimant testified about these issues. Similarly, the judge did not make findings regarding to what extent, if any, the claimant provided his own equipment, or to what extent Beaumier controlled the claimant's work, other than finding that Beaumier told Stone "he wasn't needed anymore," (Dec. 3), despite the existence of evidence on these matters. The factor on which the judge relied most heavily -- that the claimant and Beaumier were to

¹⁰ The insurer suggests that the judge could have found that the claimant and Beaumier were engaged in a "joint venture," which is similar to a partnership, but is generally limited to a single enterprise. (Ins. br. 12, n.4); see Shain Investment Co., Inc. v. Cohen, 15 Mass. App. Ct. 4, 7 (1982).

The key requirement in finding [a joint venture] is an intent to associate. . . . [F]actors indicating such an intent include an agreement among the participants for joint profits and a sharing of losses; a contribution of money, assets, talents, etc., to a common undertaking; a joint property interest in the subject matter of the venture; and a right to participate in the control of the venture.

Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 623-624 (1990). The insurer's hearing brief to the judge argued Stone was an independent contractor engaged in a joint venture with Beaumier. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file). The judge's findings of fact are not sufficient to warrant that conclusion much less require it as a matter of law.

split the contract price -- is not controlling in determining employee status, Fleming, supra at 227, citing McDermott's Case, 283 Mass. 74, 76 (1933)(method of payment may be important, but is not controlling in determining employee status). The scarcity of relevant factual findings on whether the claimant was an employee of Beaumier's or an independent contractor makes recommitment necessary because we cannot determine whether "correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); Ballard's Case, 13 Mass. App. Ct. 1068 (1982)(specific and definite findings are required to enable proper appellate review).

We affirm so much of the decision as concludes Beaumier was an independent contractor of All Seasons Painting and Decorating, and that the claimant was not a direct employee of All Seasons Painting. Additionally, we vacate so much of the decision as concludes the claimant and Beaumier were partners. Accordingly, we transfer the case to the senior judge for reassignment to another administrative judge for hearing de novo regarding the nature of the relationship between the claimant and Beaumier.¹¹ If the judge determines the claimant was Beaumier's employee, then the judge must perform an analysis regarding the applicability of § 18, and address any remaining issues raised by the parties.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

¹¹ Because the administrative judge no longer serves on the industrial accident board, the recommitment proceedings must be de novo.

William Stone
Board No. 018409-08

Frederick E. Levine
Administrative Law Judge

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