SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0701-15T1

MICHAEL SAVIO,

Petitioner-Respondent,

v.

MATTHEW V. GIAMBRI, SR.,
a/k/a MATT GIAMBRI,

Respondent-Appellant.

Submitted December 22, 2016 – Decided July 12, 2017

Before Judges Lihotz and O'Connor.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Docket No. 2006-20819.

Kavanagh & Kavanagh, LLC, attorneys for appellant (Victoria S. Kavanagh, on the brief).

Law Offices of Sal B. Daidone, and The Blanco Law Firm, LLC, attorneys for respondent (Sal B. Daidone, on the brief; Pablo N. Blanco, of counsel and on the brief).

PER CURIAM

Following a hearing, a workers' compensation judge determined Michael Savio was an employee of Matthew V. Giambri, Sr., at the time Savio was injured on a job site on June 1, 2006, making him eligible for benefits under the Workers' Compensation Act (Act), N.J.S.A. 34:15-1 to -146. Giambri appeals from the August 31, 2015 judgment memorializing the judge's determination. After reviewing the record and applicable legal principles, we affirm.

I

At the hearing, held nine years after the incident, only Savio and John Carney, a co-worker present when Savio was injured, testified. None of their testimony was refuted.[1] Because Carney's testimony is immaterial to the issues on appeal, we summarize only the relevant testimony Savio provided.

Although he initially testified he had been working for Giambri for two weeks before the subject incident, Savio subsequently stated and the judge found credible he had been working for Giambri for four weeks before he was injured. During those four weeks, Savio "pour[ed] concrete" on one and

[1] We note here Giambri, who represented himself during the hearing, cross-examined Savio and conducted a direct examination of Carney. As revealed by the judge's written opinion and Giambri's brief, both regarded the content of Giambri's questions as evidence. We point out the contents of a question are never evidence, a premise so obvious we deem it unnecessary to provide a citation of authority for its support.

did plumbing work on another job site. Giambri paid him $150 per day to pour concrete; otherwise, Giambri paid Savio "$125, $100" per day. Savio testified he was paid by check or cash for his work and was "not on the books" but, significantly, also stated he did receive a W-2 form from Giambri's company.

On June 1, 2006, Giambri picked up Savio from his home and drove him to a job site. On the way, Giambri informed Savio he was taking him to a residence, where the siding was to be removed and replaced, but Savio's task was only to rip off the siding. When they arrived, Carney was present, as was the homeowner. When asked if Giambri gave him any directions on what he was to do, Savio replied Giambri "pointed everything out" and then left.

During the hearing, Savio was asked if he had his own tools, to which he replied in the affirmative, but there was no evidence he used his tools at the job site. Savio also stated he did not bring any materials to the residence, as what was needed was "already there."

After the siding was removed, Savio began to descend from a ladder when it suddenly broke, causing Savio to fall two-and-a-half stories and injure his spine. Savio was disabled from working for an unspecified period of time, and continued to receive treatment for his injuries until 2010. He was informed

by his physician he could never resume work in the construction field.

The judge found Savio "extremely credible," and, after considering the twelve factors set forth in Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 594 (2015), to determine if a party is an employee of another, concluded Savio was Giambri's employee at the time he was injured.[2] We address the judge's specific findings when we discuss the twelve factors, below.

II

On appeal, Giambri contends there was insufficient evidence to support a finding Savio was his employee under the twelve-

[2] These twelve factors are:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation—supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.
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> [Kotsovska, supra, 221 N.J. at 594 (quoting Pukowski v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998)).]

factor test adopted in Kotsovska, supra, 221 N.J. at 594. Giambri maintains Savio was merely a casual employee and, thus, ineligible to receive benefits under the Act. See N.J.S.A. 34:15-36.

The scope of appellate review in workers' compensation matters is well-established. That review is limited to "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

Deference is given to the factual findings made by the compensation judge, unless they are "manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice." Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)), certif. denied, 140 N.J. 277 (1995). Moreover, a reviewing court must give due regard to the special expertise of the workers' compensation judge. Sager v. O.A.

Peterson Constr., Co., 182 N.J. 156, 164 (2004) (citing Close, supra, 44 N.J. at 599).

Having reviewed the record in light of the principles of law governing our review, we conclude the judge's determination Savio was Giambri's employee was reasonably reached on sufficient credible evidence present in the entirety of the record. Therefore, we affirm. We review the twelve factors in light of the evidence and the judge's findings.

The first factor to be considered is the employer's right to control the means and manner of the worker's performance. The judge determined a question Giambri posed to Savio included an admission Giambri controlled how Savio was to complete his duties. However, questions asked of a witness are not evidence. Notwithstanding, the record reveals there was evidence to support the conclusion Giambri controlled the means and manner of Savio's performance.

On the day he was injured, Giambri picked up Savio from his home and told him he was taking him to a residence, where Savio was to remove the siding from a house. Although the ultimate job Giambri intended to complete for the homeowner was to put on new siding, Savio was instructed his role in the project was limited to remove the siding. Giambri supplied all of the materials Savio needed to complete the job. There is no

evidence Savio used any of his own tools or materials to complete the task assigned to him. After Giambri dropped Savio off at the site and "pointed out" what he was to do, Giambri left.

Although Giambri then left the site revealing, as Giambri argues, he was not exerting any control over and thus Savio was not his employee, there is no evidence Savio required any more supervision or direction from Giambri to complete the task at hand. Therefore, the fact Giambri left the workplace does not detract from Savio's premise he was an employee.

It has long been recognized the first factor carries less weight when the job in question does not require direction or supervision from the hiring party. See D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 121-22 (2007) (citing Marcus v. E. Agric. Ass'n, 58 N.J. Super. 584, 597 (App. Div. 1959) (Conford, J., dissenting), rev'g on dissent, 32 N.J. 460 (1960)). "[W]here 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, ... the factor of control becomes inconclusive." Ibid. (quoting Marcus, supra, 58 N.J. Super. at 597).

For the same reason, factor two, the supervision necessary over the job under review, and factor three, the skills entailed to perform the subject job, also have minimal significance in this matter. As the compensation judge correctly found, Savio's duties required little direction and only minimal skills.

Factor four requires a consideration of who furnished the equipment and workplace. There is no question Giambri furnished both and, contrary to Giambri's claim, there is no evidence Savio used any of his own tools.

Factor five is the length of time the individual worked for the alleged employer. As the judge found, there was credible, unrefuted evidence Savio had been working for Giambri for four weeks before he was injured.

The sixth factor is the method used to pay the alleged employee. The judge noted Savio was paid by cash or personal check, and the amount of his pay depended upon the kind of labor he performed. Significantly, it is unrefuted Giambri's company provided Savio with a W-2 form.

The seventh factor requires a consideration of the manner in which the work relationship terminated. The judge found there is no question the accident precluded Savio from returning to work for Giambri, a finding supported by the evidence.

The eighth (whether there was annual leave), tenth (whether the worker accrued retirement benefits), and eleventh (whether the employer paid Social Security taxes) factors are similar and are addressed collectively. The judge found there was no evidence addressing these factors. We note there was evidence of the eleventh factor. Specifically, Savio testified he received a W-2 form from Giambri's company. Although a copy of the W-2 form was not provided, such form typically reflects Social Security taxes have been withheld.

The ninth factor requires a determination whether the alleged employee's work was an integral part of the alleged employer's business. Here, the judge found Giambri was a contractor who employed laborers to perform services on his behalf and, thus, the work Savio performed was an integral part of Giambri's business.

While there was no explicit testimony Giambri was a contractor, it was implicit that he was. Savio testified Giambri hired him to "pour concrete" at one site, do plumbing at another, and remove siding from a house at the third and final site. Thus, there was sufficient evidence Giambri was providing contracting services.

The twelfth factor necessitates an examination of the parties' intentions. Here, there is no evidence of any express

statement made by either party characterizing their relationship, but the evidence discussed above reveals a dynamic between the two consistent with the existence of an employer and employee relationship.

We are satisfied from our review of the record that, considering the proofs as a whole, the judge's conclusion Savio was Giambri's employee is amply supported by the record. Accordingly, as an employee, Savio was entitled to compensation under the Act. Because of our disposition, we need not address Giambri's remaining argument.

Affirmed.