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IN THE
COURT OF APPEALS OF INDIANA

DARRYL VAN SWOL and JAN VAN SWOL,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 64A03-0812-CV-583
ISG BURNS HARBOR, LLC, and DONALD BOWENS,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Special Judge
Cause No. 64D01-0611-CT-10374

August 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-plaintiffs Darryl and Jan Van Swol appeal the trial court's order dismissing their complaint against appellees-defendants ISG Burns Harbor, LLC (ISG), and Donald Bowens for lack of subject matter jurisdiction. The Van Swols argue, among other things, that the trial court erroneously concluded that Darryl was an employee of ISG, meaning that his claim for injuries sustained on the job must be raised under the Worker's Compensation Act.[1] Finding that Darryl was not an employee of ISG and that the trial court has jurisdiction over the Van Swols' complaint, we reverse and remand for further proceedings on the complaint.

FACTS

In 2005, Darryl was employed by Tranco Industrial Services, Inc. (Tranco), and his duties involved rail track repair and maintenance. Darryl's work for Tranco was performed at different companies, including U.S. Steel, NIPSCO, the South Shore Railroad, and Bethlehem Steel, which became the ISG Burns Harbor Plant (the Plant). Tranco and ISG had a contract pursuant to which Tranco performed repairs on railroad tracks and equipment at the Plant. Occasionally, ISG did not have enough employees to work on the blast furnace train operation, and in such a situation, ISG contacted Tranco to supply employees to work as switchmen.

The use of Tranco employees for work as switchmen was typically handled by way of purchase orders issued by ISG. On April 3, 2005, Darryl's Tranco foreman instructed him to report to ISG and work as a switchman on the midnight shift that night.

[1] Ind. Code § 23-3-2-2 et seq.

The purchase order issued and drafted by ISG relating to that shift stated that "Tranco . . . provided supervision, labor, equipment to perform switchmens [sic] duties for 4/2, 3, 4 and 4/9 . . . ." Appellants' App. p. 47, 49. This language was the only written description of the service provided to ISG by Tranco and Darryl. Darryl's training as a switchman was provided by Tranco rather than ISG, and instruction about the work to be performed that night came from Tranco. When Darryl reported to ISG that night, he was wearing Tranco-supplied hardhat and safety glasses and was also wearing steel-toed boots and coveralls, which were required by Tranco. ISG supplied Darryl with a two-way radio but no other equipment.

As for Darryl's duties, one train is used in the rail operation at the Plant. The train is operated by a two-man crew, consisting of the switchman and the engineer. The engineer operates the locomotive, which pulls "submarine" cars carrying molten steel from a blast furnace to the basic oxygen furnace at the plant. Id. at 35. To move the train from one track to another, the switchman signals the engineer to move the train forward to a switch. Once there, the switchman gets off the train, throws the switch, and directs the engineer to reverse the engine past the switch to move the train to another track.

On the night in question, Bowens, an ISG employee, was the engineer working with Darryl. At some point near 3:00 a.m., Darryl got off the locomotive to unhook three of the cars. Subsequently, Bowens took off before Darryl was aboard the train. Darryl tried calling Bowens on the radio but received no response. Darryl grabbed onto the last car to avoid being left behind, and he was dragged by the train until he noticed a switch

ahead. To avoid being dragged over the switch Darryl let go and fell from the train. As a result of the fall, Darryl suffered head and neck injuries, problems with his shoulder and heel, dizziness, trouble walking, and memory problems.

Upon being injured, Darryl was not treated at ISG, which only treats contract employees at the Plant in the case of a life-threatening emergency. A Tranco safety director instructed Darryl to go to the doctor, which he did. Tranco generated the incident report relating to Darryl's injury; ISG only generates such reports when the accident involves its own employees. ISG did not investigate the accident and does not normally conduct an investigation when a contractor's employees are injured. Tranco investigated and interviewed Bowens during its investigation.

On November 3, 2006, the Van Swols filed a complaint against ISG, seeking damages for Darryl's injuries. On March 22, 2007, they amended the complaint to add Bowens as a defendant. On May 30, 2008, ISG filed a motion to dismiss the complaint for lack of subject matter jurisdiction, and on September 5, 2008, the trial court granted the motion without holding a hearing. Among other things, the trial court found as follows:

> [Darryl] was an employee of Tranco [] and ISG [] at the time of his injury and, therefore, his exclusive remedy for recovery in this instance is governed by the Indiana Worker's Compensation Act. . . . [T]his Court lacks subject matter jurisdiction to proceed with [Darryl's] claims against [ISG and Bowens].
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> . . . At the time of the incident, [Darryl] was acting in a capacity as a borrowed or dual employee of [] ISG.

> It is apparent that ISG had the right to discharge [Darryl] because it had the power to send [Darryl] home for poor work performance; or, they could tell Tranco that they no longer wanted [Darryl] to do any work for ISG.
>
> [Darryl] performed his duties using ISG-owned equipment at the time of the incident in question. In addition, the work boundary of [Darryl] was confined to the ISG plant where he received instructions from ISG employees. ISG had the authority to control the actions and the duties of [Darryl] in the performance of those duties as a switchman. Also, ISG paid Tranco based on the number of hours [Darryl] worked. Further, there is also evidence that [Darryl] had worked for [] ISG on at least fourteen (14) other occasions and this is sufficient to meet the length of employment factor.

Id. at 14-15. The Van Swols now appeal.

DISCUSSION AND DECISION

I. Standard of Review

Before granting the motion to dismiss, the trial court did not conduct an evidentiary hearing, instead ruling upon a paper record. In such a situation, we review the ruling de novo. Degussa Corp. v. Mullens, 744 N.E.2d 407, 412 (Ind. 2001). The trial court's ruling, however, is presumptively correct, and we will affirm on any legal theory the evidence of record supports. Id. We will reverse on the basis of an incorrect factual finding only if the appellant persuades us that the balance of evidence is tipped against the trial court's findings. Id. Because ISG challenges the trial court's jurisdiction, it bears the burden of proving that Darryl's claims fall within the scope of the Worker's Compensation Act. We will analyze this appeal in light of the evidence in the record and ISG's burden of proof.

II. The Hale Factors

Our Supreme Court has explained the underlying statutory scheme as follows:

> Indiana's Worker's Compensation Act provides the exclusive remedy for employees who experience personal injury arising out of and in the course of employment. Ind. Code §§ 22-3-2-2(a) & 22-3-2-6. "Employee" means "every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer." Ind. Code § 22-3-6-1(b). Therefore, to be excluded from coverage under the Worker's Compensation Act, "the employee must be one whose employment is not only casual but also not in the usual course of the employer's business." Hale v. Kemp, 579 N.E.2d 63, 66 (Ind. 1991). In addition, it is possible for an employee to be "in the joint service of two (2) or more employers," Ind. Code § 22-3-3-31, and an employee's remedies remain exclusive under the Worker's Compensation Act even in such dual employer situations.

Id. To determine whether an employer-employee relationship exists, thereby bringing an employee under the purview of the Worker's Compensation Act, we examine seven factors:

(1) the right to discharge,

(2) the mode of payment,

(3) the supplying of tools or equipment,

(4) the belief of the parties in the existence of an employer-employee relationship,

(5) the control over the means used in the results reached,

(6) the length of employment, and

(7) the establishment of work boundaries.

Id. (citing Hale, 579 N.E.2d at 67). Our Supreme Court has explained that "[t]hese factors are weighed against each other as part of a balancing test in which the right of the employer to exercise control over the employee is given the greatest weight." Id. at 412.[2]

A. Right to Discharge

Tranco had the right to terminate Darryl's employment; ISG did not. ISG reserved the right to ask Tranco not to bring a specific contract employee back to work at the Plant and had the right to send Tranco employees, including Darryl, home for poor work performance.

This court has found that an indirect right to discharge the employee is established where, in a dual employment situation, one employer can terminate the employee's services by contacting the other employer and explaining that it no longer wanted the employee's services. U.S. Metalsource Corp. v. Simpson, 649 N.E.2d 682, 685 (Ind. Ct. App. 1995). The Van Swols concede that this factor weighs in favor a finding of employment. Reply Br. p. 13. They emphasize, however, that this court has found this to be a minor factor:

[2] We acknowledge that a panel of this court recently eschewed application of the Hale factors, finding as a matter of law that a steel corporation that hired a temporary worker who was employed by a temporary employment agency was the employee's joint employer. Kenwal Steel Corp. v. Seyring, 903 N.E.2d 510, 513-15 (Ind. Ct. App. 2009). In reaching that conclusion, the Kenwal court applied Indiana Code section 22-3-6-1(a), which states that "[b]oth a lessor and a lessee of employees shall be considered joint employers of the employees provided by the lessor to the lessee" for the purpose of the Worker's Compensation Act. The court found that the steel corporation was the lessee of the temporary employee and the temporary employment agency was the lessor. In this case, the parties have not raised any arguments under Indiana Code section 22-3-6-1, and inasmuch as we are limited to the issues raised by the parties, we will not address this matter herein.

> . . . "It is hard to imagine an independent contractor arrangement that would not allow the hiring company to discharge the worker if it was unsatisfied with him or her." Indeed, in reviewing the multitude of cases on the issue of dual employment, we have been unable to find a single case in which an entity "borrowing" a worker from another entity did not have the "indirect" right to discharge the worker if the worker was unsatisfactory. Thus, although we are required to conclude here that the "right to discharge" factor weighs in favor of finding dual employment, we give this factor, at most, minimal weight.

Wishard Mem'l Hosp. v. Kerr, 846 N.E.2d 1083, 1089 (Ind. Ct. App. 2006) (quoting Jennings v. St. Vincent Hosp. & Health Care Ctr., 832 N.E.2d 1044, 1056 (Ind. Ct. App. 2005) (Barnes, J., dissenting), trans. denied) (emphasis added) (internal citations omitted). Here, likewise, we find that this factor weighs in favor of a finding of employment but afford it only minimal weight.

B. Mode of Payment

Darryl's paychecks came from Tranco, not ISG. It has been established, however, that this fact, alone, would not defeat the existence of an employer-employee relationship. GKN Co. v. Magness, 744 N.E.2d 397 (Ind. 2001). On the other side of the scale is the fact that ISG paid Tranco based on the number of hours worked by Darryl. This fact, likewise, is not dispositive.

ISG did not provide Darryl with health insurance, worker's compensation insurance, or any other benefits. ISG did not provide Darryl a W-2 form. Though not explicitly contained in the record, we believe it reasonable to infer that Tranco provided Darryl with such benefits and withheld his taxes before remitting his paycheck. Under

these circumstances, we find that the mode of payment factor weighs against a finding of employment. See GKN, 744 N.E.2d at 405 (concluding that this factor weighed against a finding of employment where, though contract employer signed the employee's time cards, the direct employer issued the paychecks, withheld taxes, paid employee's worker's compensation insurance premiums, and provided him with health insurance); Wishard, 846 N.E.2d at 1089 (concluding that this factor weighed against a finding of employment where, though contract employer signed the employee's time cards and paid the direct employer for the employee's services, the direct employer paid the employee after withholding taxes); see also Jennings, 832 N.E.2d at 1051 (holding that "in a dual-employment context, the mode of payment can never be determinative because only one of the employers is generally responsible for compensation").

C. Tools and Equipment

ISG provided Darryl with a two-way radio to be used for communication with the engineer. Tranco supplied Darryl with a hard hat and safety glasses, and he was wearing steel-toed boots and coveralls required by Tranco at the time of the incident. Furthermore, the purchase order issued by ISG to requisition Darryl's services and the services of other Tranco employees on specific dates stated that "Tranco [] provided supervision, labor, equipment to perform switchmen's [sic] duties at the blast furnace on 4/2, 4/3, 4/4, and 4/9." Appellants' App. p. 47 (emphasis added). Additionally, an ISG representative attested during a deposition that ISG "requested that [Tranco employees] come with the tools that they need to perform their job." Id. at 38. ISG emphasizes that

the locomotives, railcars, molten iron, blast furnace, switches, and track were all ISG property. While certainly true, we do not believe that these items constitute tools and equipment as contemplated by this analysis. Under these circumstances, we find that this factor weighs against a finding of employment.

D. Belief of the Parties

Indiana courts have repeatedly found that "'the belief of the parties in the existence of an employer-employee relationship can often best be determined by the terms of the contract.'" Wishard, 846 N.E.2d at 1090 (quoting Degussa, 744 N.E.2d at 413). Here, the only written document memorializing the arrangement between Tranco and ISG with respect to Darryl's employment was the purchase order, which stated that Tranco was to provide "supervision, labor, [and] equipment" for its employees working at the plant. Appellants' App. p. 47. This document clearly implies that Tranco bore the primary responsibility for its employees.

Furthermore, Darryl understood his employer to be Tranco, and never believed that he was employed by ISG. This belief is reasonable, given that his work on the night in question was for one shift only. ISG did not review the resumes of, do background checks on, or interview the Tranco employees who were sent to work at the Plant. And as noted above, ISG did not provide Darryl with health insurance, worker's compensation insurance, a W-2 form, or any other benefit of employment. Additionally, after Darryl was injured, ISG neither provided medical care nor investigated the incident. Under

these circumstances, we find that there was no mutual belief that Darryl was employed by ISG and that this factor weighs against a finding of employment.

E. Control over the Employee

The only documentary evidence relating to Darryl's assignment to ISG on the night in question was the purchase order, which stated that Tranco was to provide "supervision, labor, [and] equipment" for its employees working at the plant. Appellants' App. p. 47. Darryl attested that he received no training, instruction, or supervision from anyone at ISG. Appellants' App. p. 66. The ISG representative attested that ISG does not recall any specific instructions given to Darryl. Id. at 39.

Darryl communicated with Bowens—an ISG employee—as necessary to perform the job, but Bowens was not Darryl's supervisor. See GKN, 744 N.E.2d at 406 (finding that though the general contractor gave the truck driver a ticket for each load hauled, informed the driver where to take each load, gave him a cut-off sign at the end of the day, and told him where to report the following morning, these basic communications did not lead to a conclusion that the contractor exercised control over the driver); Williams v. R.H. Marlin, Inc., 656 N.E.2d 1145, 1153 (Ind. Ct. App. 1995) (finding that "[w]orkmen signaling to a crane operator with a 'thumbs-up' hardly constitutes an assertion of control").

ISG's representative attested that there was no ISG employee directly supervising Darryl on the night in question:

> Q. Under the purchase order generated by ISG for the work that Mr. Van Swol performed on April 4, 2005, ISG was not obligated to supervise the work of Mr. Van Swol, was it?
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> A. He received instruction from the turn foreman at the blast furnace as to the work that needed to be accomplished. Other than that, that's the only supervision he had, is request for services, basically.
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> A. There was no ISG supervisor directly supervising Mr. Van Swol.

Appellants' App. p. 38. The ISG representative later confirmed that "there is no supervision that tells [the Tranco substitute switchmen] what to do," id. at 44, and emphasized that "there is no supervision out there," id. at 38.

Furthermore, ISG had no control over screening—it did not request specific Tranco employees, nor did it check Darryl's background or interview him for the job. Tranco assigned Darryl to the job in question and was generally responsible for telling Darryl when and where to work, as well as what jobs to perform. As noted above, ISG did not have the power to fire Darryl.

After Darryl was injured, ISG did not provide medical care because it only provides medical care to contract employees in life-threatening emergencies. Additionally, ISG did not generate an incident report or conduct an investigation because it only generates such reports and investigates when the accident involves its own employees. Id. at 35(b), 35(c), 39-40. Tranco's safety director instructed Darryl to go to

a doctor, Tranco generated an incident report, and Tranco conducted an investigation, which included an interview of Bowens.

To counter all of this evidence, ISG directs our attention to the affidavit of Timothy Beck, Tranco's Director of Safety at the time of the incident in question. Beck attested that "ISG had authority to direct and control and did direct and control the duties Mr. Van Swol and all other Tranco employees performed as switchmen." Id. at 69. Beck, however, provides no facts or evidence supporting this legal conclusion. This affidavit does not supply evidence of control, it merely supplies a conclusory statement regarding control. Under these circumstances, we afford only minimal weight to this statement in Beck's affidavit. See Comfax Corp. v. N. Am. Van Lines, 638 N.E.2d 476, 481 (Ind. Ct. App. 1994) (holding that mere assertions that set forth conclusions of law or opinions in an affidavit will not suffice).

Furthermore, in Wishard, the defendant presented affidavit evidence of control by the Wishard hospital supervisory nurse, who stated that she believed that she had direct supervisory control over the temporary nurse who sued the hospital over a slip and fall. 846 N.E.2d at 1089. Despite this evidence, the court found that the evidence of control was conflicting given the nurse's status as a professional, determining control to be a neutral factor. Id. Here, even if we were to consider the statement in Beck's affidavit, all of the other evidence in the record leans heavily against a conclusion that ISG exercised control over Darryl. Therefore, we conclude that this factor weighs against a finding of employment.

F. Length of Employment

Darryl worked at the Plant for a finite amount of time—one shift. He had worked up to fourteen similar shifts over the past couple of years, each one for a finite period of time, none regularly scheduled. There is no evidence establishing that ISG could have prolonged the duration of Darryl's assignment to the Plant if it wished to do so. We find that this factor weighs against a finding of employment. See GKN, 744 N.E.2d at 406 (observing that "the longer the length of employment, the more indicative it is of an employer/employee relationship" and finding that a three-month job was "so abbreviated that it shed[] little light one way or another as to whether" there was an employment relationship, ultimately holding that this factor weighed against a finding of employment); Wishard, 846 N.E.2d at 1092 (holding that "where a contractual arrangement between 'borrowing' and 'lending' employers provides that a worker will be 'lent' for a limited, specific time frame, this should be indicative of independent contractor status, not employment by the 'borrowing' entity).

G. Establishment of Work Boundaries

ISG owns the Plant and all property thereon, and all of Darryl's work for ISG took place at the Plant. We find that this factor weighs in favor of a finding of employment, though we only afford it minimal weight, inasmuch as the nature of the work performed by Tranco employees for ISG is necessarily confined to the Plant.

H. Conclusion

There are two factors that weigh slightly in favor of a finding of employment—right to discharge and establishment of work boundaries. The remaining factors—mode of payment, provision of tools and equipment, belief of parties, right to control, and length of employment—weigh significantly against a finding of employment. And indeed, when we step back and consider the evidence as a whole, it is apparent that ISG disclaimed all employer-related responsibilities—on paper and in practice—until Darryl filed this lawsuit. Even when Darryl was injured, ISG declined to provide medical treatment, create an incident report, or investigate the accident. Those decisions were not inappropriate if Darryl was an independent contractor, but ISG may not now act as if that it considered Darryl to be an employee and treated him as such.

Under these circumstances, we can only conclude that the trial court erred by finding that Darryl was an employee of ISG. We hold that the balance of evidence tips against that conclusion and that the trial court does, in fact, have jurisdiction over the Van Swols' claims and should not have dismissed the complaint.[3]

The judgment of the trial court is reversed and remanded for further proceedings on the complaint.

MAY, J., and BARNES, J., concur.

[3] Inasmuch as we reach this result, we need not and will not consider the Van Swols' remaining arguments.