



ATTORNEYS FOR APPELLANT

Theodore Leonas III
Theodore Leonas, Jr.
Leonas Law Offices
Michigan City, Indiana

ATTORNEYS FOR APPELLEES

Jerry E. Huelat
David A. Mack
Huelat & Mack P.C.
La Porte, Indiana

Mark L. Phillips
Law Office of Mark Phillips, LLC
La Porte, Indiana

Robert P. Stoner
Valparaiso, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Richard Palmer,
Appellant-Plaintiff,

v.

Gregory Ake, Fas Pak, Inc., and
Matthew Bernacchi,
Appellees-Defendants.

December 22, 2021

Court of Appeals Case No.
21A-CT-1245

Appeal from the LaPorte Superior
Court

The Honorable Richard R.
Stalbrink, Jr., Judge

Trial Court Cause No.
46D02-1910-CT-2416

Brown, Judge.

[1] Richard Palmer appeals the trial court’s order which determined that he was an employee rather than an independent contractor. We reverse and remand.

Facts and Procedural History

[2] On December 18, 2018, Palmer was working on the roof of a pole barn and was injured when part of the building collapsed. The building was located on property owned by Greg Ake, and Ake is the owner of Fas-Pak, Inc. (“Fas-Pak”). On October 8, 2019, Palmer filed a complaint against Ake, Fas-Pak, and Matthew Bernacchi, who worked as a leadman on the construction project (collectively, “Defendants”). Palmer alleged that he had been on the premises in his capacity as an independent contractor for the purpose of performing skilled labor for construction of the building and that he was injured as the result of Defendants’ negligent acts and omissions.

[3] On September 22, 2020, Defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Trial Rule 12(B)(1). Defendants argued that Palmer was an employee and that his exclusive remedy is under the Worker’s Compensation Act (the “Act”). In his affidavit attached to the motion, Ake stated that he was the President of Fas-Pak, the principal business of Fas-Pak is liquid filling and packaging, he was the owner of the property where the pole barn was being constructed, the building was being constructed for the benefit of both Fas-Pak and himself, and his intent was that Fas-Pak would use part of the building for vehicle repairs and storing equipment and that he and his family would use part of the building for personal reasons. He stated that he hired Palmer, Bernacchi, and other workers to assist in the construction,

Bernacchi “was a working leadman on the job site,” and “I considered these workers to be employees of Fas-Pak.” Appellant’s Appendix Volume II at 43-44. Ake stated that, as President of Fas-Pak, he had the right to exercise direct control over the means and manner in which the building was constructed and did so on a daily basis, he had the right to control the hours of employment and dates of employment for each employee on the project including Palmer and did so on a daily basis, all building supplies for the construction project were purchased by Fas-Pak, him, or others at his direction and supplied to the on-site workers including Palmer, and as President of Fas-Pak he provided the workers with necessary tools and equipment and other related material and machinery required to construct the building.

[4] Ake further stated that Fas-Pak issued weekly payroll checks to each employee working on the project, the method of payment was strictly controlled by Fas-Pak, Palmer and the other job site workers were paid by the hour, as President of Fas-Pak he determined Palmer’s hourly pay rate, he and Bernacchi were responsible for keeping track of the number of hours worked by each worker on the job site, and the hours were reported each week to Fas-Pak which prepared the payroll checks. Ake also stated that the length of time for which Palmer and the other workers were employed was exclusively controlled by him as President of Fas-Pak, he had the authority to hire and fire the workers involved in the project including Palmer, Palmer “worked as a laborer/carpenter on this project,” and Palmer “was hired as an at-will employee and not as any sort of a contractor or sub-contractor.” *Id.* at 44.

[5] Palmer filed a response arguing that he was an independent contractor and requested that the court deny Defendants' motion to dismiss. In his attached affidavit, Palmer stated that he "was a carpenter by trade, who worked as an independent contractor, taking jobs on a freelance basis" and was hired by Ake "to serve as a solo sub-contractor carpenter" to build a pole barn on Ake's private residential property. *Id.* at 45-46. He stated that, when he was hired, Ake said to him that his work "was temporary and would last only as long as it took for the project to complete," that he would be an independent contractor, that no taxes would be withheld for him for the project, and that he would not be a regular payroll employee of Fas-Pak. *Id.* at 46. He stated that Fas-Pak is a manufacturing company specializing in packaging liquids. Palmer stated that his understanding that Ake hired him as an independent contractor was bolstered by the fact that his work was not to extend past the completion of the pole barn project, as well as the fact that Ake did not request his social security number for tax-withholding reasons. According to Palmer, Ake and Bernacchi told him that the pole barn was being built for personal use by Ake and his family, including a gym and bar area as well as a garage space, gas station, and car wash apparatus for the family's personal and recreational vehicles, and that the barn would also be used to store some items owned by Ake through his business.

[6] Palmer further stated that, in the course of his work, Ake and Bernacchi "assigned [him] tasks, but did not provide step-by-step instruction due to the specialized, skilled nature of the work and [his] experience in the carpentry

trade.” *Id.* at 47. He stated that, “in the locality and county of LaPorte, carpenters agreeing to temporary construction jobs similar to the pole barn construction job . . . ordinarily do so as independent contractors and not employees, without step-by-step supervised direction.” *Id.* He stated that carpentry work is a specialized skill requiring specialized knowledge and experience. He stated that, “as is local custom for independent contractors working temporary construction jobs similar to the pole barn project . . . , I brought my own tools, while Mr. Ake provided only the building materials and heavy machinery.” *Id.* He stated that, because the barn was being built on Ake’s residential property and largely for his family’s personal use, he believed that Ake hired him “in his personal capacity, rather than as an officer of Fas-Pak” and that the use of Fas-Pak’s checks to pay him was not the result of his status as an employee but rather Ake using his company to handle personal affairs. *Id.* In addition, Palmer stated that, “in the locality and county of LaPorte, carpenters agreeing to temporary construction jobs as sub-contractors are ordinarily paid hourly unless they are leading a team, in which case they are paid a lump-sum.” *Id.* at 48. He stated, “my belief that [Ake] hired me as an independent contractor in his personal capacity was bolstered by the fact that, to my knowledge, constructing pole barns for largely personal use on a private residential property, and likewise construction in general, are not a regular part of Fas-Pak, Inc.’s business.” *Id.*

[7] On March 15, 2021, the trial court held a hearing at which it heard arguments and requested proposed orders. On May 24, 2021, the court issued an order

granting Defendants' motion to dismiss. The court found Palmer was working as an employee of Fas-Pak and not as an independent contractor at the time of his injury, that as a result his exclusive remedy for his injuries is worker's compensation, and that it lacked subject matter jurisdiction over Palmer's claims.

Discussion

- [8] Palmer maintains that he was not an employee of Fas-Pak and that the trial court erred in granting Defendants' motion to dismiss. He argues that, on balance, the factors set forth in the Indiana Supreme Court's decision in *Moberly v. Day*, 757 N.E.2d 1007 (Ind. 2001), weigh in favor of the conclusion that he was an independent contractor and not an employee. Defendants respond that, under the ten-factor balancing test, Palmer was an employee.
- [9] The Worker's Compensation Act is the exclusive means by which an employee can pursue compensation for an injury arising out of and in the course of the employee's employment. *Fam. Christian World, Inc. v. Olds*, 100 N.E.3d 277, 280 (Ind. Ct. App. 2018), *trans. denied*. A defense against a negligence claim on the basis that the plaintiff's exclusive remedy is to pursue a claim for benefits under the Act may be advanced through a motion to dismiss under Ind. Trial Rule 12(B)(1). *Id.* In ruling on such a motion, the trial court may consider the complaint and any affidavits or submitted evidence. *Id.* Here, the parties agree that the applicable standard of review is *de novo*. *See id.* at 281 ("We review *de novo* a trial court's ruling on a motion to dismiss where the facts before the trial court are disputed and the trial court rules on a paper record."). Further, "[t]he

purported employer bears the burden of proving that an alleged employee's claim falls within the scope of the Act unless the complaint demonstrates the existence of an employment relationship." *Id.*

[10] In *Moberly v. Day*, 757 N.E.2d 1007 (Ind. 2001), the Indiana Supreme Court set forth a ten-factor analysis to distinguish employees from independent contractors. The factors 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.

Moberly, 757 N.E.2d at 1010 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2)). No single factor is dispositive. *Id.*

A. *Extent of Control over Details of the Work*

[11] “Restatement (Second) of Agency § 220(1) defines a servant (i.e. employee) as one ‘employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.’” *Id.* “Comment d. to subsection (1) further describes control or right to control as ‘important and in many situations . . . determinative.’” *Id.* We emphasize the “evidence of the *actual* control an alleged employer exercised in the course of the working relationship.” *See Fam. Christian World*, 100 N.E.3d at 282. In examining this factor, courts have examined the extent to which a worker was instructed as to the particulars of how to accomplish assigned tasks, *see Moberly*, 757 N.E.2d at 1011, the degree the worker controlled the method and details of the tasks, *see Vinup v. Joe’s Construction, LLC*, 64 N.E.3d 885, 891 (Ind. Ct. App. 2016), the extent to which the purported employer determined the location to perform the work, dictated the workers’ schedules including work hours and breaks, and provided the tools, equipment, and safety equipment and determined when those were used, *see id.*, and the degree to which the purported employer exercised actual control over the means, manner, and method by which the worker discharged the worker’s duties and supervised or directed the work. *See Fam. Christian World*, 100 N.E.3d at 283.

[12] According to Ake, he had the right to exercise direct control over the means and manner in which the building was constructed and did so, he had the right to control the hours and dates of employment of the workers and did so, all of the building supplies were purchased by Fas-Pak, him, or others at his direction, and he provided the necessary tools and equipment to construct the building. He stated that Fas-Pak controlled the method of payment and that he and Bernacchi were responsible for keeping track of the number of hours worked by each worker. On the other hand, Palmer stated that, in the course of his work, Ake and Bernacchi assigned him tasks but did not provide step-by-step instruction. According to Palmer, “in the locality and county of LaPorte, carpenters agreeing to temporary construction jobs similar to the pole barn construction . . . ordinarily do so as independent contractors and not employees, without step-by-step supervised direction,” and that, “as is local custom for independent contractors working temporary construction jobs similar to the pole barn project . . . , I brought my own tools, while Mr. Ake provided only the building materials and heavy machinery.” Appellant’s Appendix Volume II at 47. The record does not reveal the degree of direct supervision related to the construction, whether Palmer was one of relatively few skilled laborers or carpenters, the extent to which Ake or Bernacchi had construction experience and, in practice, supervised and directed the work of Palmer and the hired skilled laborers, the extent of the work hours or breaks, or whether safety equipment was provided and, if so, who determined when and how it was used. Given the conflicting and relative dearth of meaningful evidence related to the control over the details of the work, we conclude this

factor is neutral. *See Fam. Christian World*, 100 N.E.3d at 283 (finding the evidence did not show the pastors exercised actual control or supervised or directed the worker’s babysitting duties and the factor of control was neutral).

B. *Distinct Occupation*

[13] According to Ake, Palmer “worked as a laborer/carpenter” on the project. Appellant’s Appendix Volume II at 44. According to Palmer, he was “a carpenter by trade, who worked as an independent contractor, taking jobs on a freelance basis.” *Id.* at 45. Palmer also indicated that, in the locality, carpenters agreeing to temporary construction jobs ordinarily do so as independent contractors without step-by-step supervised direction and that carpentry work requires specialized knowledge and experience. Under the circumstances, we find that this factor at least slightly favors the conclusion that Palmer was an independent contractor. *See Moberly*, 757 N.E.2d at 1011 (“Hendershot worked as a truck driver and heavy equipment operator for a materials company. This is a distinct enough occupation to weigh at least slightly in favor of independent contractor status.”).

C. *Kind of Occupation*

[14] Depending on the job and arrangement, a carpenter may be hired as an unsupervised specialist or as an employee working under direct supervision. We cannot say this factor is particularly helpful under the circumstances. *See id.* (“Unsupervised specialists commonly perform this type of heavy-equipment

repair, although employers do sometimes direct such work. This factor is therefore not particularly meaningful in this case.”).

D. *Skill Required*

[15] Palmer stated that carpentry is a specialized skill requiring specialized knowledge and experience in carpentry work, and Ake stated that Palmer “worked as a laborer/carpenter.” Appellant’s Appendix Volume II at 44. We find this factor weighs slightly in favor of the conclusion that Palmer was an independent contractor.

E. *Supplier of Tools; Work Location*

[16] The fact a worker supplies his own tools is some evidence that he is not an employee. *See* RESTATEMENT (SECOND) OF AGENCY § 220, cmt. k. Ake stated that, as President of Fas-Pak, he provided the workers at the job site with necessary tools and equipment required to construct the building. Palmer stated that, “as is local custom for independent contractors working temporary construction jobs similar to the pole barn project . . . , I brought my own tools, while Mr. Ake provided only the building materials and heavy machinery.” Appellant’s Appendix Volume II at 47. As to the work location, the building was being constructed on Ake’s property, and while Ake asserted that his intent was for Fas-Pak to use part of the building for vehicle repairs and storing some equipment, part of the building would also be used by Ake and his family for personal use. Also, there is no indication Fas-Pak is in the construction

business. Under the circumstances, we find that this factor weighs slightly in favor of the conclusion that Palmer was an independent contractor.

F. *Duration*

[17] Comment a to Restatement (Second) of Agency § 220(1) “describes a servant (i.e. employee) as ‘one who performs continuous service for another,’” and comment h to § 220(2) indicates “that a long-term relationship can indicate employee status” and “refers to ‘employment over a considerable period of time with regular hours.’” *Moberly*, 757 N.E.2d at 1012 (citing RESTATEMENT (SECOND) OF AGENCY § 220(1), cmt. a, and § 220(2), cmt. h). The record does not reveal the extent to which Palmer worked regular hours. Ake stated that the length of time for which Palmer was employed was exclusively controlled by him and that he and Bernacchi were responsible for keeping track of the number of hours worked by each worker. Palmer stated that, when he was hired, Ake told him that his work was temporary and would last only as long as it took for the project to be completed and that he would not be a regular payroll employee of the company. This factor weighs moderately in favor of the conclusion that Palmer was an independent contractor.

G. *Method of Payment*

[18] According to Ake, Fas-Pak issued weekly payroll checks, the method of payment was strictly controlled by the company, and Palmer and the other workers were paid by the hour. Ake also stated that he and Bernacchi were responsible for keeping track of the number of hours worked by each worker

and that the hours were reported each week to Fas-Pak which prepared the payroll checks. According to Palmer, Ake told him that no taxes would be withheld for him for the project, he would be an independent contractor, and he would not be a regular payroll employee of Fas-Pak. He stated that Ake did not request his social security number for tax-withholding reasons. Palmer also indicated that he believed the use of Fas-Pak's checks to pay him was not the result of his status as an employee but rather Ake using his company to handle personal affairs. Further, Palmer stated that, "in the locality and county of LaPorte, carpenters agreeing to temporary construction jobs as sub-contractors are ordinarily paid hourly unless they are leading a team, in which case they are paid a lump-sum." Appellant's Appendix Volume II at 48. The IRS requires employers to report wage and salary information for employees on a Form W-2, and employers use Form W-4 to determine withholding from an employee's wages. *See Fam. Christian World*, 100 N.E.3d at 284. While the facts that Palmer was paid by the hour and the checks were issued by Fas-Pak may tend to support the conclusion that he was an employee, the facts that Ake told Palmer that no taxes would be withheld for him for the project and that he would not be a regular payroll employee of Fas-Pak tend to support the conclusion that he was an independent contractor. That no taxes were withheld by Fas-Pak under the circumstances is significant. We conclude that, on balance, this factor weighs in favor of the conclusion that Palmer was an independent contractor.

H. *Regular Business of the Employer*

[19] The record reveals that Fas-Pak is a manufacturing or packaging company. While having a building to use for vehicle repairs and to store some equipment may be part of Fas-Pak's operation, there is no indication that Fas-Pak is in the construction business. At most, the construction of the building is ancillary to Fas-Pak's regular business. See *Moberly*, 757 N.E.2d at 1012 ("Although farm operations involve periodic maintenance work, Day's regular business was not drainage tile repair."); *Fam. Christian World*, 100 N.E.3d at 284 ("At most, any babysitting services [the church] provides are ancillary to its 'business.'"). Moreover, the building was being constructed in part for personal use and was located on Ake's private residential property. This factor weighs in favor of the conclusion that Palmer was an independent contractor.

I. *Belief of the Parties*

[20] The record reveals that Ake considered Palmer to be an employee of Fas-Pak. Palmer stated that he was hired by Ake to serve as a sub-contractor carpenter on the project and that, when he was hired, Ake told him that he would be an independent contractor, that no taxes would be withheld for him, and that he would not be a regular payroll employee of Fas-Pak. As previously mentioned, the IRS requires employers to report wage information for employees on a Form W-2, and employers use Form W-4 to determine withholding from an employee's wages. See *Fam. Christian World*, 100 N.E.3d at 284. Defendants have not asserted that Fas-Pak used these forms, withheld any amounts from its payments to Palmer as required for employees, or paid the employer's portions of any social security and Medicare taxes owing related to Palmer's earnings or

that Palmer was eligible for any Fas-Pak employment benefits. This suggests that Ake and Fas-Pak did not believe Palmer was an employee of Fas-Pak and did not want him to be an employee. This factor weighs significantly in favor of the conclusion that Palmer was an independent contractor. *See Fam. Christian World*, 100 N.E.3d at 284-285 (the parties' intent that the worker was an independent contractor was manifested in part by the fact there was no withholding and the factor of belief of the parties weighed significantly in favor of independent contractor status).

J. Whether the Principal was in Business

- [21] Ake and Palmer stated the building was being constructed in part for Fas-Pak's use and in part for Ake's personal use, and Ake was the owner of the property. While Fas-Pak is a business, there is no indication that it is in the construction business. This factor is not particularly helpful under the circumstances.
- [22] The factors discussed above must be weighed against each other as a part of a balancing test as opposed to a mathematical formula. *See Fam. Christian World*, 100 N.E.3d at 285. While some of the facts and factors may be neutral or not particularly helpful, overall they support a finding that Palmer was an independent contractor. Based upon the record, we conclude that Defendants have not sustained their burden to show that Palmer was an employee for purposes of the exclusive remedy rule. Accordingly, we reverse the trial court's order granting Defendants' motion to dismiss and remand for further proceedings.

[23] Reversed and remanded.

May, J., and Pyle, J., concur.