COMMONWEALTH OF PENNSYLVANIA

BARLOW DRYWALL	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF LABOR & INDUSTRY,	:	
STATE WORKERS' INSURANCE FUND	:	DOCKET NO. 2660

FINDINGS OF FACT

1. During the period of time involved in this claim (the claim years 1996 and 1997), Claimant, Barlow Drywall, was a sole proprietorship owned by Daniel Washburn. (N.T. 53)

2. Respondent, Commonwealth of Pennsylvania, Department of Labor & Industry, State Workers' Insurance Fund, insured Claimant for workers' compensation and employer's liability from March 30, 1996 to October 21, 1997. (Stipulation)

3. During the period of time in question, Claimant employed as employees for whom it obtained workmen's compensation coverage, drywall finishers. (N.T. 55)

4. During that same time period, Claimant contracted with 18 independent contractors. (N.T. 56)

5. Those independent contractors performed either as drywall hangers or drywall finishers. (N.T. 56)

6. Those drywall finishers that Claimant employed as employees reported to Barlow's shop every morning. (N.T. 56)

7. The finishers on Claimant's payroll are paid by the hour. (N.T. 57)

8. Those finishers, who were listed as employees, would travel to Claimant jobs in Claimant's trucks. (N.T. 56)

9. These employees would operate as a crew of three to five individuals and would be supervised by a foreman who was also an employee of Claimant. (N.T. 57)

10. These employees were paid by the hour. (N.T. 57)

11. Whether or not those finishers worked overtime would be determined by Claimant's employee foreman, depending on the needs of the particular job in question. (N.T. 58)

12. With regard to those contractors not on the payroll performing finishing services, such individuals would not report daily to Claimant's office, but would rather call on a weekly basis to determine what work was available. (N.T. 58, 178, 190-191, 203-204)

13. The finishers not on the payroll would quote Claimant a price by the square foot rather than by the hour. (N.T. 59, 179, 190-191, 204)

14. All of the non-payroll finishers submitted square foot price quotations on their own forms, which varied widely and not on a standard form prepared by Claimant. (Exs. P-4 through P-15)

15. Each of the drywall finishers would be paid in a lump sum at the completion of the job rather than for hours worked at the end of the week. (N.T. 64, 186, 206)

16. All of the non-payroll finishers go to the job in their own vehicles, with no transportation provided by Claimant. (N.T. 70, 180, 191, 204)

17. All of the non-payroll finishers set their own hours. (N.T. 71, 180, 191, 205)

18. All of the non-payroll finishers worked on their own, with no direct supervision from Claimant other than occasional visits from Claimant's Daniel Washburn to check on the quality of work. (N.T. 71-72, 181, 190-191, 205)

19. Claimant provides no tools or equipment to the non-payroll finishers. (N.T. 76, 180, 191, 205)

20. The spackle or "mud" used by the independent contractor finishers was provided by Claimant to insure uniformity on the job. (N.T. 71)

21. Claimant did provide the drywall board and nails for the hanging segments of its jobs. (N.T. 78, 106)

22. Claimant chose to purchase a particular manufacturer's brand of drywall board based on its quality and its availability in particular dimensions. (N.T. 109)

23. The reason for Claimant's supply of material and accessories was to insure greater uniformity among jobs for a developer with particular specifications than Barlow's owner could obtain with the material and accessory choices left to individual finishers. (N.T. 71)

24. All of the hangers utilized by Claimant customarily billed by the job and were not listed as employees of Claimant's records. (N.T. 55, 58, 153-154, 168)

25. The hangers would contract for jobs in the same manner as the non-payroll finishers, typically calling up to see what work was available and negotiating a price. (N.T. 58-59, 153, 168)

26. All of the hangers were paid in a lump sum at the completion of the job. (N.T. 61, 155-156)

27. All of the hangers traveled to the house that was the work site in their own vehicle. (N.T. 70, 155, 169)

28. Typically, the independent contractor hangers would work without direction or supervision from any Barlow personnel except for extremely rare visits from Daniel Washburn. (N.T. 169)

29. Colleen Washburn is the wife of Daniel Washburn and works in Claimant's office doing bookkeeping and office work. (N.T. 136)

30. The application for workers' compensation coverage with Respondent was filled out by Colleen Washburn. (N.T. 137)

31. One of the questions on the application was "Do you employ subcontractors, owners, operators, and/or independent contractors?". (N.T. 137)

32. Colleen Washburn, at first, left such questioned unanswered. (N.T. 137)

33. When the application was returned, Colleen Washburn answered the question "no" because she was confused concerning the use of the word "employ". (N.T. 138)

34. The use of the word "employ", under the circumstances, is confusing. (N.T. 136-138)

35. During the period of 1996 to 1997, John Burch was a drywall contractor operating as part of a partnership with Barry McHugh. All proceeds received under contract from Claimant would be split evenly between John Burch and Barry McHugh. (N.T. 152)

36. Scott Saylor was a drywall spackler who would on occasion subcontract, to another contractor, jobs he contracted from Claimant, as well as from other contractors. (N.T. 189, 196)

37. These subcontractors would work on houses other than the house Scott Saylor was working on and would not work under his direction and control, but rather would perform the work on their own and submit a bill for the completed work at a square foot price at the end of the job. (N. T. 200-201)

38. Scott Saylor regarded these individuals as independent contractors. (N.T. 200-201)

39. Kenneth Titus described himself as a drywaller and doing business under the name of KT Contracting. (N.T. 163-164)

40. Kenneth Titus occasionally employed helpers. Those helpers, when hired, would work in a different location from Kenneth Titus and not under his direct supervision and control, and were not viewed by Kenneth Titus as employees carrying their own insurance. (N.T. 176-177)

41. Claimant's current auditor, Michael Gunshannon of Pennsylvania National Insurance, audited Barlow for calendar years 1998, 1999 and 2000, and testified that for those periods he regarded the independent contractor finishers and hangers as legitimate independent contractors. (N.T. 14, 17, 19)

42. As stipulated between the parties, if the Board were to find that all of the 18 individuals were independent contractors, the Respondent would owe Claimant a refund of $15,772.00 on the 1996 coverage (Stipulation on Measures of Damages, para. 4), and Claimant would owe Respondent $3,386.00 for the 1997 coverage (Stipulation on Measures of Damages, para. 7) for a total amount owed by Respondent to Claimant of $12,386.00. (Stipulation)

43. There was a period of time during which one of the 18 independent contractors, Kenneth Frey, was serving as office manager and running Claimant's business in the absence of Daniel Washburn. During that time, Kenneth Frey was paid $4,400.00. The parties agree that Respondent is entitled to charge a worker's compensation premium on that $4,400.00 at the worker's compensation premium rate that would have been applied for an office manager. (Stipulation)

CONCLUSIONS OF LAW

1. The individuals listed as independent contractors by Claimant for the years in question were in fact independent contractors.

2. The work of others appointed by four of the independent contractors in question did not create a Statutory Employee situation as set forth in Section 302(b) of the Workers' Compensation Act.

3. The doctrine of equitable estoppel is not applicable to the answers in the signed

application for coverage as there was not a misrepresentation of a material fact, but confusion in the use of the word "employ".

4. By signed Stipulation of the parties, Claimant is entitled to damages in the sum of $12,386.00, plus interest from March 12, 1998.

OPINION

A panel hearing of this matter was held on January 15 & 16, 2002. The Panel Report has been submitted and reviewed.

Claimant had purchased Worker's Compensation Insurance from Respondent on September 22, 1997. Respondent canceled Claimant's insurance policy and later conducted an audit. Respondent, as a result of the audit, determined that Claimant owed Respondent additional premiums because certain drywall hangers and drywall finishers had been incorrectly identified as independent contractors by Claimant, while Respondent took the position that the individuals in question were actual employees of Claimant and billed Claimant for the increased premium. As a result, Claimant seeks to have the Board determine that no such premiums are due.

Respondent further contends that a certain number of the individuals appointed by Claimant to perform such services used outside personnel on occasion to complete the job. It is contended that the use of these individuals creates a statutory employment situation under Sections 301 and 302 of the Workers' Compensation Act, which provides that a contractor who subcontracts all or any part of a contract shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor has coverage as specified under the Act.

Further, in the application for coverage, the following question appeared:

> "Do you employ subcontractors, owner operators and/or independent contractors?"

The completed application listed the answer to this question as "no". Respondent contends that such answer is an admission by Claimant that the individuals in question were not independent contractors and are estopped from a contrary assertion. Claimant's bookkeeper, who completed the application, contends that the use of the word "employ" was confusing and interpreted such word to mean actual employment.

Equitable estoppel arises when a party intentionally or negligently misrepresents a material fact, knowing or having cause to know that another will rely on the misrepresentation, and that the other justifiably relies on the misrepresentation. Moon Area School District v. Garzony, 107 Pa. Cmwlth. 375, 529 A.2d 540 (1987) We conclude, as did the hearing panel, that the question was confusing. The use of the word "employ" could be confusing. Under such circumstances, there can be no intentional or negligent misrepresentation. Accordingly, estoppel is not applicable.

We further find that the individuals in question were independent contractors for the premium years in question.

The legal distinction between an employee and an independent contractor is basic. In an employment situation, the master controls the way work is performed, while in the independent contractor relationship, the person engaged in doing the work controls the manner in which the result is obtained. Feller v. New Amsterdam Casualty Co., 363 Pa. 483, 70 A.2d 299 (1950)

In the Workers' Compensation context, the Commonwealth Court has set forth certain

guidelines to determine the relationship. Some are: 1) control of the manner in which work is to be done; 2) responsibility for result only; 3) terms of agreement between the parties; 4) the nature of the work or occupation; 5) skill required for performance; 6) which party supplied the tools; 7) whether payment is by time or by the job; and 8) whether there is the right of the employer to terminate the employment at any time. J. Miller Co. and Selective Insurance Company v. Samuel E. Mixter, 2 Cmwlth. 229 (1971)

The hearing panel in this matter concluded that the individuals in question did not report to Claimant's office daily, but called on a weekly basis to determine available work, quoted prices by the square foot and not by the hour, were paid in a lump sum at the end of the job rather than for hours worked, set their own hours, worked on their own rather than under supervision by Claimant, used their own tools and equipment and possessed a degree of skill acquired on their own.

A consideration of all of these factors leads to the inevitable conclusion that all workers at issue were, in fact, independent contractors.

We further conclude that the use of helpers by those appointed by Claimant to perform work did not create a "Statutory Employee" situation.

John Burch testified that he operated in partnership with Barry McHugh and that all proceeds paid by Claimant were split evenly between himself and Mr. McHugh. It is settled that partners are not employees subject to workers' compensation. Wehr v. Philadelphia Derrick & Salvage Corp., 192 Pa. Super. 161, 159 A.2d 924 (1960)

Scott Saylor testified that he would occasionally subcontract some of the jobs that Claimant had given him to other individuals. These individuals would work independently in a different house than

Mr. Saylor worked and the subcontracts would be at a square footage price. Accordingly, they would be working independently and not in the presence of Mr. Saylor. There is thus also no basis for a "Statutory Employee" claim based on Mr. Saylor's testimony.

Mr. Titus testified that he would occasionally employ helpers. Mr. Titus testified that these individuals would only work occasionally and they would work at a different location, traveling to the job separately and supplying their own tools. The evidence again establishes that they are independent contractors from Mr. Titus rather than his employees. Finally, the statements of Kenneth Frey do not demonstrate that the individuals he contracted with were under his direction and control and were thus employees rather than independent contractors.

The statutory employment relationship is created by Sections 301 and 302 of the Workers' Compensation Act. (77 P.S. §461 and 77 P.S. §462) Section 301 provides that "a contractor who subcontracts all or any part of a contract and his insurer shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured its payment as provided for in this act" (77 P.S. §461). Section 302 provides that "any employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor" shall be liable for the payment of workers' compensation. These two sections provide that when a subcontractor has employees, the employee of that subcontractor may be able to assert a workers' compensation claim against the contractor - even though the contractor is, in no other sense, his employer.

Although four of the contractors did use subcontractors, we conclude that they were independent contractors. There is nothing in the record to suggest that any of the individuals were statutory

employees as defined under the Workers' Compensation Act.

Under all the circumstances above, the parties have stipulated that Claimant is entitled to an award of $12,386.00, and accordingly, we find for the Claimant in that amount.

ORDER

AND NOW, this 4th day of November, 2002, after hearing by a panel and submission to the Board, it is **ORDERED** and **DECREED** that judgment is entered in favor of the Claimant, Barlow Drywall, and against Respondent, Commonwealth of Pennsylvania, Department of Labor & Industry, State Workers' Insurance Fund, in the sum of Twelve Thousand Three Hundred Eighty-Six Dollars ($12,386.00), plus interest from March 12, 1998.

Each party to bear its own costs and attorney fees.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien, P.E.
Engineer Member

John R. McCarty
Citizen Member