From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: CAN A TRIAL COURT RELY ON TESTIMONY FROM EXPERTS ABOUT "PREVAILING INDUSTRY STANDARDS" TO SUPPORT A FINDING THAT AN INJURED PARTY IS AN INDEPENDENT CONTRACTOR AND NOT AN EMPLOYEE?

One of the most litigated areas of Ohio workers' compensation law concerns the issue of whether an injured worker is an employee or independent contractor. Generally, the inquiry is determined by answering the question of whether the alleged "employer" retained the right to control the manner and means of doing the work. *Bostic v. Connor*, 37 Ohio St.3d 144, 145 (1988). If an employer reserves the right to control the manner and means of doing the work, as well as the result, then an employer-employee relationship is created. In *Bostic*, the Supreme Court of Ohio also listed several factors that should be considered in making this determination. Recently, the Fourth Appellate District considered a case invoking *Bostic*, and also the issue of whether the trial court erred in relying upon the testimony of two "expert" witnesses about the "prevailing standard" in the logging industry.

Green v. Admr., Ohio Bur. of Workers' Comp., 2018-Ohio-2618, concerned a claimant who was hired to perform logging duties under the direction of an employer. He suffered injuries to his head, neck, back, and hip when he was struck by a log while performing "de-limbing" work for $80 per day. A workers' compensation claim was filed, which was contested by the employer, who claimed that the claimant was hired because he was an experienced logger, he was not trained nor directly supervised, he was free to come and go as he pleased so long as the de-limbing work was completed, and was free to engage other jobs with other logging concerns if desired. The employer also presented evidence that the claimant was told at the time of hire that he would be responsible for his own taxes and workers' compensation coverage. In response, the claimant argued that there was no written independent contractor agreement and no discussion of contractor status, he was paid on a per-day basis, his work was not technical or work that was traditionally performed by an expert, he was told when and what logs to de-limb, and he used a chainsaw and other equipment provided by the employer. (The record is unclear as to whether an IRS Form 1099 was issued.) The claim was denied administratively (with the DHO finding that the relationship consisted of "one person helping another out and being paid for it") prompting the claimant to appeal to the common pleas court pursuant to R.C. 4123.512. During a bench trial, the employer proffered testimony from two "expert" witnesses, each of whom testified that it was customary in the logging industry that experienced workers like the claimant would be hired as independent contractors. The trial court ultimately issued an order finding that the claimant was an independent contractor. The claimant appealed to the Fourth District, arguing that the trial court erred in its application of *Bostic* and its failure to exclude the "expert" testimony.

The Fourth District affirmed, finding that the testimony of the "experts" was not expert testimony, its admission into evidence was harmless error, and the employer had satisfied its burden to demonstrate that the claimant was an independent contractor. Initially, the Court

concerned itself with the application of the factors cited by the Supreme Court in *Bostic*, including whether the claimant provided his own truck and tools, had a written contract, was paid by the job and given an IRS Form 1099, and identified himself as an independent contractor for tax purposes. While acknowledging that perhaps the majority of these "factors" favored the claimant, the Court summarily concluded that "competent, credible evidence" supported the conclusion that the employer did not exert the "requisite control" over the work being performed necessary to establish an employer/employee relationship. The Claimant was an experienced logger, did not require training or instruction, worked without supervision, and was free to leave "when his work was completed for the day." As to the alleged expert testimony on the "prevailing industry standard," the Court noted that there was no objection as to qualifications, and the testimony provided was not "expert" testimony because it was within the knowledge and experience possessed by lay persons and was not based upon scientific, technical, other specialized information. Evid. R. 702. The "experts" were in fact lay witnesses testifying on customs and practices in the logging industry, and this testimony was offered "to establish the types of relationships that exist" in that industry. This testimony was relevant because the "type of business" has been cited by the Supreme Court of Ohio in determining whether an employer/employee relationship exists. Any alleged error was also harmless, because the testimony was mostly repetitive and other evidence supported the finding.

Green is the most employer-friendly interpretation of *Bostic* to come out in some time. The fact is that there was no written contract or agreement, tools and equipment were provided by the employer, and the work was not overly technical, and was assigned on a daily basis. Despite this decision, I would still recommend that employers use thorough independent contractor agreements to comply with *Bostic*.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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