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INTRODUCTION

The injured worker in this case, Appellee-Respondent Craig Ali (“Ali”) was a police officer employed by Appellant-Relator Village of Oakwood (“Oakwood”). The question here is whether Oakwood or a construction company was Ali’s employer for purposes of his workers’ compensation claim. The Industrial Commission did not abuse its discretion in finding that Oakwood was the proper employer, and the court below correctly denied a writ of mandamus.

Appellee-Respondent Kokosing Construction Co., Inc. (“Kokosing”) was doing an interstate highway construction project that ran through the jurisdictional limits of Oakwood. Kokosing normally uses Ohio State Highway Patrol officers for traffic control duties, but was required by Oakwood to use its police officers inside its geographical boundaries. Kokosing and Oakwood did not enter into an agreement establishing who would be responsible for workers’ compensation purposes in the event of an injury to an officer performing the traffic control duties. Ali was injured and the Appellee-Respondent Industrial Commission of Ohio (“commission”) had to determine the proper employer for workers’ compensation purposes.

The commission, through a staff hearing officer (“SHO”), found that Oakwood was the proper employer. The SHO correctly looked at which potential employer had the right to control the manner and means of the work. The SHO found that Oakwood “directed” Kokosing to “utilize Village of Oakwood police officers for traffic control duties within the geographical boundaries of Oakwood Village and to not follow Kokosing’s usual practice of using Ohio State Highway Patrol officers for such duties.” Supplement at pg. 16 (“Supp. at 16”). The SHO also correctly found that Oakwood, not Kokosing, identified Ali as an officer appropriate for such duty and arranged for his use of a police cruiser during his activities at the Kokosing job site. *Id.* In addition, the SHO properly found that Ali wore his police uniform and “was at the site of the accident for purposes of maintaining traffic control, an activity not performed by Kokosing.” *Id.*

The SHO appropriately concluded that Oakwood was the proper employer, explaining that Ali “would not have been engaged in traffic control functions on 05/23/2008 were he not an Oakwood Village police officer, in uniform and in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village.” (Supp. at 17).

The Tenth District Court of Appeals correctly denied a writ of mandamus, and this Court should affirm.

STATEMENT OF THE CASE AND FACTS

Kokosing was performing road construction along I-271 in a marked construction zone. Kokosing’s usual practice for traffic control duties was to use the Ohio State Highway Patrol. (Supp. at 16). Oakwood, however, directed Kokosing to use Oakwood police officers inside its geographical boundaries. *Id.* One of the police officers made available to Kokosing—Respondent-Appellee Craig Ali—was rear-ended in the construction zone and injured.

Ali completed a First Report of Injury form and listed his employer as Oakwood Police Department. (Supp. at 1). The Bureau of Workers’ Compensation (“bureau”) allowed the claim and assigned it against Oakwood’s policy. (Supp. at 4). The bureau later decided that that assignment was a mistake, removed the charges against Oakwood’s policy and placed the charges against “the correct employer Kokosing Construction Co.” (Supp. at 6).

Kokosing is a self-insured employer responsible for the management of their own workers’ compensation claims, and therefore the bureau vacated its original allowance order. (Supp. at 8). Kokosing then denied certification of the claim, and the allowance determination and correct employer issues were referred to the commission for adjudication. (Supp. at 12). The District Hearing Officer (“DHO”) found Ali sustained an injury in the course of and arising out of his

employment and found Ali “to have been an employee of Kokosing Construction Company, Inc. at the time of the incident,” stating:

Injured Worker described being paid by Kokosing Construction via check with their name on it, assigned to his work by them, and directed as to his duties by them. Although Injured Worker wore his Oakwood Village police officer uniform and sat in the Village cruiser, the Oakwood Village Law Director testified that Kokosing leased the vehicle for the duration of the Injured Worker’s need of it. Examining the totality of the circumstances persuades the Hearing Officer that Kokosing Construction Company, Inc. was the Injured Worker’s employer on the date of injury in this claim.

(Supp. at 15). Thus, although Ali wore his police uniform and sat in a police cruiser, the DHO found that Kokosing was the employer.

Kokosing appealed the decision to an SHO who vacated the DHO order and found “the correct employer herein is Oakwood Village and not Kokosing Construction,” because, among other things, Oakwood insisted that Kokosing use their police officers:

Per the unrefuted testimony of Kokosing supervisor Mr. Schloss, Kokosing Construction was directed by Sergeant Biggam of the Oakwood Village Police Department to utilize Oakwood Village police officers for traffic control duties within the geographic boundaries of Oakwood Village and to not follow Kokosing’s usual practice of using Ohio State Highway Patrol officers for such duties. Sergeant Biggam identified claimant as an officer appropriate for such duty and arranged for claimant’s use of an Oakwood Village police cruiser during his activities relative to traffic control at the Kokosing Construction job site. Claimant wore his Oakwood Village police uniform and was at the site of the accident for purposes of maintaining traffic control, an activity not performed by Kokosing Construction. Claimant would not have been engaged in traffic control functions on 05/23/2008 were he not an Oakwood Village police officer, in uniform in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village.

(Supp. at 16). Thus, as Ali would not have been engaged in the traffic control functions if he had not been an Oakwood police officer, the SHO found that Oakwood was the proper employer.

Oakwood’s appeal to the full commission was refused. Oakwood filed a suit in mandamus alleging the commission abused its discretion. The case was referred to a magistrate who issued an opinion recommending a limited writ that ordered the commission to specifically apply the

enumerated three factors of the “totality of circumstances test” of *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, normally used to determine if an injury arises out of an injured employee’s employment. All respondents objected to the magistrate’s decision.

The court of appeals rejected the part of the magistrate’s decision recommending a limited writ of mandamus. (Decision at ¶13). The court of appeals relied on *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, in finding that “[t]here is no exhaustive list of factors to be used when determining whether an injury was incurred in the course of, and arose from, a claimant’s employment, and thus is compensable under the workers’ compensation system.” (Decision at ¶10). The court went on to state that, while the three factors listed by the magistrate are helpful in making this determination, these factors are not exhaustive, and the commission should not be required to apply the factors in every case in which the identity of the correct employer is uncertain. *Id.*

Even though the SHO had not specifically enumerated the *Lord* factors, the court found “[t]he facts cited by the SHO constituted some evidence to support the conclusion that relator [Oakwood] was the proper employer for purposes of claimant’s industrial claim. Thus, the commission did not abuse its discretion when it issued its order making that finding.” (Decision at ¶12).

ARGUMENT

Granting a writ of mandamus is appropriate only if: (1) a clear legal right supports the prayed for relief; (2) the commission has a clear legal duty to act as the relator requests; and (3) no plain and adequate remedy exists at law. See *State ex rel. Bailey v. Indus. Comm.* (1986), 23 Ohio St.3d 53. The relator can demonstrate these only if the commission abused its discretion, which, in turn, may be established only if the record is devoid of “some evidence” to support the commission’s order. *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 13. An

“abuse of discretion” has been defined as “not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only when there is no evidence upon which the commission could have based its decision.” *State ex rel. Commercial Lovelace Motor Freight v. Lancaster* (1986), 22 Ohio St.3d 191, 193.

Industrial Commission’s Proposition of Law No. 1:

The “employer,” for the purposes of a workers’ compensation claim, is the entity that had the right to manage the manner or means of day-to-day control over the employee.

The proper standard for determining which employer is responsible for a workers’ compensation case is which entity has control over the employee. Ali was employed by Oakwood as a police officer. Oakwood directed Kokosing to use Oakwood police officers for traffic control duties inside its geographical boundaries while Kokosing was conducting road construction on an interstate highway in its jurisdiction. Ali, the police officer assigned by Oakwood, was injured while performing traffic control duties.

An “employee” means “[e]very person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written....” R.C. 4123.01(A)(b). Oakwood incorrectly asserts the “loaned employee” doctrine dictates that Kokosing is the employer responsible for the claim. This Court has adopted a “right to control” test to determine whether a “loaned servant” is an employee of the party to whom he was loaned. For purposes of amenability to the workers’ compensation system, this Court has looked to “the right to control the manner or means of performing the work . . .” *Daniels v. MacGregor Co.* (1965), 2 Ohio St.2d 89, 94, quoting *Behner v. Indus. Comm.* (1951), 154 Ohio St. 433, paragraph one of the syllabus.

In *State ex rel. Stanadyne v. Indus. Comm.* (1984), 12 Ohio St.3d 199, this Court's position was similar: who will be considered an employer for the purposes of workers' compensation depends on who had the right to manage the manner or means of day-to-day control over the employee. 12 Ohio St.3d at 202. To determine that issue, the Court has enumerated several factors to be considered. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph one of the syllabus. These factors include, but are not limited to, who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts. 37 Ohio St.3d at 146.

Oakwood incorrectly asserts Kokosing had controlled the manner or means of performing the work because "Kokosing paid Ali" and because "Kokosing controlled the work that Ali did by telling him when and where to go for job duties." (Oakwood Brief at pg. 15). First, payment alone is not the critical inquiry. *Vandriest v. Midlem* (1983), 6 Ohio St.3d 183, 184. Second, there is no evidence in the record that Kokosing controlled when, where, and how Ali and the other police officers assigned the duty or performed the task of controlling traffic when sitting in a police cruiser. There are no affidavits or testimonial transcripts in the record to review, but the testimony the commission relied on is reflected in the SHO order.

The SHO found Oakwood "directed" Kokosing to "utilize Village of Oakwood police officers for traffic control duties within the geographical boundaries of Oakwood Village and to not follow Kokosing's usual practice of using Ohio State Highway Patrol officers for such duties." (Supp. at 16). The SHO found that Oakwood identified Ali as an officer appropriate for such duty and arranged for his use of a police cruiser during his activities relative to traffic control at the Kokosing Construction job site. *Id.* The SHO also found that Ali wore his police

uniform and “was at the site of the accident for purposes of maintaining traffic control, an activity not performed by Kokosing.” Id.

The SHO determined that Oakwood was the proper employer explaining that Ali “would not have been engaged in traffic control functions on 05/23/2008 were he not an Oakwood Village police officer, in uniform and in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village.” (Supp. at 17). The commission is the trier of fact and issued a decision supported by evidence. Questions of credibility and the weight to be given evidence are within the commission’s discretionary powers of fact-finding. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 167.

In short, the commission used the proper standard, made a decision based on evidence in the record, and therefore did not abuse its discretion here.

Oakwood improperly invites the Court to look at the findings of the DHO and urges the Court to find that those findings were “more competent evidence.” (Oakwood Brief at pg. 12). This is not the standard in a mandamus action. The court of appeals or Supreme Court should not substitute its judgment for the factual findings of the commission. *State ex rel. Nye v. Indus. Comm.* (1986), 22 Ohio St.3d 75, 78.

The determination of disputed facts is within the final jurisdiction of the commission, and subject to correction by action in mandamus only on a showing of gross abuse of discretion. *State ex rel. Haines v. Indus. Comm.* (1972), 29 Ohio St.2d 15, 16. An abuse of discretion exists where there is no evidence on which the commission could have based its factual conclusion. *State ex rel. Lyburn Constr. Co. v. Indus. Comm.* (1985), 18 Ohio St.3d 277. Here, the commission heard testimonial evidence and properly rendered a factual decision supported by “some evidence.”

Oakwood also incorrectly argues the “some evidence rule cannot be applied correctly if there is a lack of evidence in the record to satisfy all three prongs of the totality of the circumstances test.” (Oakwood Brief at pp. 10-11). The commission, however, does not have a clear legal duty to apply the three prongs of the “totality of the circumstances” test articulated in *Lord v. Daugherty*. This test applies when there is a single employer and there is a question of causal connection between an injury and that employment, not where, as here, the dispute is to which employer the claim is to be charged.

An injury sustained by an employee is compensable under the Workers’ Compensation Act only if it was received in the course of, and arising out of, the injured employee’s employment. R.C. 4123.01(C). A claimant has a right to participate in the workers’ compensation fund when a “causal connection” existed between an employee’s injury and his employment either through the activities, the conditions, or the environment of the employment. Whether there is sufficient “causal connection” between an employee’s injury and his employment to justify the right to participate in the Workers’ Compensation Fund depends on the totality of the facts and circumstances surrounding the accident, including: (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee’s presence at the scene of the accident. *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, citing *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, syllabus. When the issue is causal connection, the list of factors is not intended to be exhaustive, but rather illustrative of the factors that need to be considered. *Fisher*, 49 Ohio St.3d at 279, fn. 2:

[W]orkers’ compensation cases are, to a large extent, very fact specific. As such, no one test or analysis can be said to apply to each and every factual possibility. Nor can only one factor be considered controlling. Rather, a flexible and analytically sound approach to these cases is preferable.

49 Ohio St.3d at 280. “A reviewing court must examine the separate and distinct facts of each case.” *Id.*

But here there is no question of the causal connection; the injury arose out of the traffic control duties Ali performed. The *Lord-Fisher* “causal connection” test does not assist the commission or this Court in determining which employer is responsible for Ali’s claim.

Despite this, the court of appeals found the *Lord-Fisher* analysis applied here: “[w]e believe this principle applies in cases such as this one, in which the issue is the identification of the proper employer.” (Decision at ¶10.) However, the court of appeals also found: “we do not believe the commission must be required to apply the factors in every case in which the identity of the correct employer is uncertain.” *Id.*

Furthermore, even applying the three enumerated *Lord-Fisher* factors fails to establish that the commission abused its discretion. Oakwood argues the proximity of the accident was on a worksite Kokosing occupied and controlled. The scene of the accident was an interstate highway over which Oakwood has jurisdiction to patrol and maintain an orderly flow of traffic. Oakwood wanted—indeed insisted on—its police officers on the scene to control the traffic.

With regard to the “control over the scene” factor, Ali wore his police uniform, was at the site in his cruiser, and was there for purposes of maintaining traffic control, an activity traditionally performed by police and not performed by Kokosing. Oakwood did not have control of the overall road construction project. However, the SHO order certainly relied on some evidence to find Oakwood’s police officers sought out and exercised control of the traffic on the roads over which it had jurisdiction. No evidence in the record establishes that Kokosing controlled the hours worked by individual police officers or exactly how they performed the traffic control duties.

With regard to the “receiving benefit” factor, Oakland argues it received no benefit from having its police officers perform traffic control at the construction site. However, as the SHO noted, Oakwood demanded that Kokosing use its officers instead of following its usual practice of using Ohio State Highway Patrol officers for such duty. Kokosing and Oakwood obviously mutually benefited, as citizens of Oakwood and other interstate travelers were able to safely pass through the construction site.

Oakwood and Kokosing both discuss another case in which the *Lord-Fisher* test was applied in this context, *Cooper v. City of Dayton* (1997), 34. In *Cooper*, the Second Appellate District applied the *Lord-Fisher* test to an off-duty police officer engaged in secondary employment in a grocery store as a loss prevention specialist. A thief tried to flee and the police officer was hurt trying to arrest him. The court found that the police department was the proper employer because the officer was performing a function of a police officer when arresting the thief. The *Cooper* Court acknowledged the test “works best when an employee holds only one job and the sole issue is whether the employee’s injury stemmed from his employment.” 120 Ohio App.3d at 44.

Oakwood attempts to distinguish *Cooper* by asserting a police officer sitting in a police cruiser maintaining traffic control is not performing a task exclusively reserved for police officers. (Oakwood Brief at pg. 14). Actually, only Oakwood police officers are permitted to wear an Oakwood police uniform and sit in an Oakwood police cruiser to maintain the safe and orderly flow of traffic within the jurisdictional limits of Oakwood. In any event, *Cooper* is not precedent that the “totality of the circumstances” test must be applied when determining the proper employer.

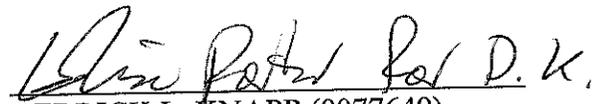
In short, even if the improper *Lord-Fisher* test is used, the commission did not abuse its discretion in finding that Oakwood was Ali's employer for purposes of his workers' compensation claim.

CONCLUSION

The SHO properly concluded the "claimant would not have been engaged in traffic control functions on 05/23/2008 were he not an Oakwood Village police officer, in uniform and in a police cruiser, having been specifically authorized to engage in such activity by his usual employer, Sergeant Biggam/Oakwood Village." (Supp. at 17). Oakwood has not established the commission abused its discretion in finding that the proper employer for Ali's claim was Oakwood. Therefore, Oakwood's petition for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Merit Brief of Appellee, Industrial Commission of Ohio, was served by regular U.S. mail, postage prepaid, this 24th day of August, 2011, to the following:

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