2021 IL App (1st) 191939WC-U

No. 1-19-1939WC

Order Filed: February 5, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SZYMON OLEKSY, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION and WK HEATING, INC., Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. 2019-L-50004 Honorable Michael F. Otto, Judge, Presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The decision of the circuit court confirming the Commission's decision is hereby reversed, and the Commission's decision reversed and cause remanded, where the manifest weight of the evidence demonstrates the existence of an employer-employee relationship.

¶ 2 Claimant, Szymon Oleksy, appeals a decision of the circuit court of Cook County confirming the decision of the Illinois Workers' Compensation Commission (Commission). The Commission adopted and affirmed the decision of the arbitrator

denying claimant benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2016)). The Commission found that claimant had failed to prove the existence of an employer-employee relationship between him and respondent, WK Heating, Inc., on the date of the accident. For the reasons that follow, we reverse the judgment of the circuit court, reverse the Commission's decision, and remand for further proceedings.

¶ 3 I. Background

¶ 4 On January 25, 2015, claimant filed an application for adjustment of claim seeking benefits under the Act (820 ILCS 305/1 *et seq.* (West 2016)) for injuries he sustained to his low back and left leg on January 9, 2015, while working for respondent, a company engaged in the business of repairing and replacing heating and cooling systems. Respondent was solely owned and operated by Wojtek Kowalczyk.

¶ 5 On August 3, 2017, an arbitration hearing was held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2016)). The following factual recitation is taken from the evidence adduced at the hearing. We recite only those facts necessary to our resolution of the issues on appeal.

¶ 6 A. Claimant's Testimony

¶ 7 At the time of the arbitration hearing, claimant was 39 years old, a father of three and the sole owner of SO System, Inc., a company engaged in the business of providing heating and cooling services. Sometime after claimant incorporated SO System, Inc. in September 2013, he expressed interest to work for respondent. In order to work for respondent, Kowalczyk informed claimant that he required all workers to form their own

business and obtain an individual workers' compensation insurance policy through that business. Despite this requirement, Kowalczyk allegedly told claimant that, in the event of an accident, Kowalczyk would cover claimant's injuries under respondent's workers' compensation insurance policy. Following this conversation, claimant obtained a workers' compensation insurance policy on May 20, 2014, for SO System, Inc.

¶ 8 With regard to the work-related accident, claimant testified to the following. On January 9, 2015, claimant and Marek,[1] the foreman on the project at Campbell Street in Chicago, Illinois (Campbell Street project), where the accident took place, picked up a furnace at Munch's Supply. After arriving to the Campbell Street project, claimant and Marek, who was "leading the job," lifted the furnace, which weighed 140 to 150 pounds, and began ascending a flight of stairs together. While ascending the stairs in a backwards position, claimant missed a step with his left foot. After claimant's foot slipped, claimant and Marek placed the furnace down, and Marek "showed [claimant] how the system is supposed to look ***." After Marek left the Campbell Street project, claimant, by himself, picked up the furnace and continued to work. Shortly thereafter, claimant felt intense pain in his lower left back and down his left leg. Later that day, after Kowalczyk arrived at the Campbell Street project, claimant informed him that "I cannot walk *** my leg is hurting, I can't walk." Claimant acknowledged, however, that he "didn't tell [Kowalczyk] how it happened," and he did not inform Marek about his pain.

[1] Marek did not testify at the arbitration hearing on August 3, 2017. Marek's full name is not provided in the record.

¶ 9 Claimant then testified to his belief that he was an employee of respondent. Given claimant lacked any real experience installing heating and cooling systems, he started working for respondent as a "helper." In this capacity, claimant focused on "preparing everything and uploading, finishing *** work" for Pawel Cembala and Marcin,[2] two other individuals who worked for respondent. After Marcin stopped working for respondent, claimant worked "with Pawel *** install[ing] *** the whole system, duct work and vents." According to claimant, Kowalczyk called or texted claimant when to report to a job site, advised him how to complete a project and stopped by the job site "every single day" around noon. Typically, when Kowalczyk came to a job site, he showed claimant how to perform his job and provided him instruction on the removal of walls, where to install duct work, where a "furnace [should] stand [and] where *** we [would] install the vents ***."

¶ 10 According to claimant, he generally worked 50 hours per week with a set work schedule from 7 a.m. to 5 p.m. Claimant initially earned $14 per hour but later earned $20 per hour as he continued to work for respondent. Claimant tracked his hours and submitted documentation to Kowalczyk in a "special notebook" that Kowalczyk had given him. Claimant admitted that he had no physical proof of this documentation (days worked, hours worked and the address of the job site) because he had given it to Kowalczyk to receive payment. To support claimant's contention that he was paid hourly and not on a per project basis, 14 paychecks (Petitioner's Exhibit 20) that Kowalczyk had written to SO System, Inc. were admitted into evidence. Out of the 14 paychecks, two paychecks reached an

[2] Marcin did not testify at the arbitration hearing on August 3, 2017. Marcin's full name is not provided in the record.

increment of $500, whereas the other 12 paychecks were of varying amounts because the number of hours claimant worked varied each week.[3] Claimant received a federal 1099 form rather than a W-2 form, and income taxes and social security were not withheld from claimant's compensation. Claimant did not recall signing an independent contractor agreement.

¶ 11 Claimant indicated that he was not prohibited from working for other companies while also working for respondent. In fact, claimant acknowledged that there was a two-week period in 2014 or 2015 when both he and Pawel worked for another company. Because claimant "didn't have any of [his own] tools, Kowalczyk purchased tools and equipment for claimant, including scissors, a screwdriver, "the leather, the driller and the hammer ***," as well as "welding machines to mend the pipes." Claimant often picked up material for Kowalczyk, although he did not receive reimbursement for gas or mileage. Additionally, while he performed work for respondent, claimant wore company tee shirts that displayed respondent's name, address and phone number.

¶ 12 Lastly, claimant testified with regard to SO System Inc.'s workers' compensation insurance policy. Claimant recalled requesting a basic workers' compensation policy for SO System, Inc. from Bilski on May 20, 2014. Although the forms were written in English, claimant acknowledged that Bilski had explained the application and exclusion page to him

[3] The following 12 paychecks had varying amounts not in increments of $500: (1) $844 (9/4/14); (2) $731 (9/8/14); (3) $858.50 (9/19/14); (4) $554.50 (9/24/14); (5) $663 (9/30/14); (6) $731 (10/8/14); (7) $765 (10/16/14); (8) $663 (10/23/14); (9) $697 (10/29/14); (10) $893 (12/19/14); (11) $1340 (12/30/14); and (12) $988 (1/20/15).

in Polish, his native language, before he signed. Claimant indicated that he did not speak or write in English.

¶ 13 B. Pawel Cembala's Testimony

¶ 14 Pawel, an HVAC specialist with 11 years of experience, believed he was an employee of respondent because he did "[w]hatever [Kowalczyk] directed me to do ***." Pawel, who started work between 7 a.m. and 8 a.m., was paid hourly, not on a per project basis, to install new HVAC systems and repair and replace furnaces. To receive payment, Pawel presented Kowalczyk with documentation of the total hours he worked each week. Pawel earned between $16 and $20 per hour, and he received roughly $800 every week by check and sometimes cash. Pawel confirmed that income taxes and social security were not withheld from his compensation. Pawel owned tools, but Kowalczyk provided him with more specialized equipment, including drillers and ladders. While at the job site, Kowalczyk called a "[f]ew times a day" to inquire about job progress. Although Pawel had performed work for other companies, he and claimant only worked together for respondent.

¶ 15 C. Magdalana Bilski's Testimony

¶ 16 Bilski was an insurance agent when claimant signed a workers' compensation application and exclusion form on May 20, 2014. According to Bilski, her standard procedure was to ask customers a series of questions, which included "their type of business [and] whether they have employees ***." The exclusion form, attached to the application and signed by claimant, was written in English, so Bilski explained the exclusion to claimant in Polish, his native language, because "that's the most important part of the Workers' Comp. coverage." After her explanation, she required claimant to sign

the exclusion form, which indicated his understanding that he was excluding himself from workers' compensation benefits under the Act. Because the exclusion form was the "most important part of the application," Bilski asserted that there was "no chance" she did not explain the form before claimant signed it.

¶ 17 D. Wojtek Kowalczyk's Testimony

¶ 18 Kowalczyk, the sole owner and operator of respondent, testified to the following. Kowalczyk and claimant entered into a purely verbal contract. Before hiring claimant, Kowalczyk informed claimant that he would receive "weekly pay" as a subcontractor on a per project basis. Respondent did not withhold income taxes or social security, and subcontractors were not provided benefits, such as health insurance, vacation time, or paid time off. In addition, subcontractors did not receive overtime wages, but were paid "a certain amount of money" per project, specifically $500 per furnace installation, after the project was finished. As such, Kowalczyk did not understand why claimant kept track of his hours. Additionally, all subcontractors, including claimant, were required to obtain individual workers' compensation insurance policies through their respective businesses. Kowalczyk denied claimant's testimony that he told claimant he would add him to respondent's workers' compensation insurance policy in the event of an injury.

¶ 19 In his capacity as sole owner and operator of respondent, Kowalczyk's scope of work focused on bidding for jobs and meeting with customers. Once Kowalczyk obtained a job from a general contractor, he hired subcontractors to fulfill the contracts. Kowalczyk generally called claimant to inform him of projects, met claimant at job sites to "explain the [general contractors' blueprint] plans" before work could start, and "[m]aybe once a

day, but not always" stopped by job sites to drop off material. Although Kowalczyk often showed claimant where to install a furnace, he did not supervise claimant's work. Instead, Kowalczyk asserted that, given claimant's prior experience, Kowalczyk relied on claimant to install heating and cooling systems. Kowalczyk acknowledged that he generally provided materials and equipment at job sites, however, all subcontractors, including claimant, used their own tools. Moreover, although Kowalczyk wore company tee shirts, he neither provided nor required subcontractors to do the same.

¶ 20 Lastly, although Kowalczyk initially denied visiting the Campbell Street project on January 9, 2015, he later admitted that he could not recall if he was there that day. When asked why he would have gone to the job site on January 9, 2015, Kowalczyk responded: "To tell [claimant] what he's supposed to do" and "what kind of job he is to perform." Claimant's job performance on January 9, 2015, benefitted respondent, and the accident occurred during respondent's regular course of business.

¶ 21 E. Claimant's Testimony

¶ 22 After claimant's attorney recalled claimant to testify, claimant testified to the following. Because claimant had never installed a heating or cooling system by himself before working for respondent, he did not own his own tools. Accordingly, claimant used "[a]ll the tools, even the basic ones [from Kowalczyk]," including, a ladder, drills, welding equipment and copper pipe devices. Claimant indicated again that Kowalczyk had given him company tee shirts to wear while he performed work for respondent. Moreover, claimant denied Kowalczyk's testimony that he was paid on a per project basis, asserting that he would be a "millionaire" if Kowalczyk had paid him $500 per furnace installation.

According to claimant, because he believed he was an employee of respondent, he thought he would lose his job if he "cho[se] to go to another work" and did not accept work from Kowalczyk when projects were available.

¶ 23 F. Arbitrator's Decision

¶ 24 On October 26, 2017, the arbitrator issued a written decision determining that claimant had sustained an accident that arose out of and in the course of employment, and that his current condition of ill-being was causally related to the accident. However, the arbitrator denied claimant's claim for compensation under the Act finding that claimant had failed to prove the existence of an employer-employee relationship between him and respondent on the date of the accident. Additionally, the arbitrator determined that the evidence, specifically "the unrebutted and credible testimony of Bilski, and Respondent's Exhibit 3 [claimant's signed workers' compensation insurance application and exclusion form]," supported a finding that claimant had "voluntarily and knowingly excluded himself from coverage under SO System, Inc.'s workers' compensation insurance policy ***." Claimant sought timely review of the arbitrator's decision before the Commission.

¶ 25 On December 12, 2018, the Commission, with one commissioner dissenting, adopted and affirmed the arbitrator's decision. In doing so, the Commission concluded that claimant had failed to prove that an employer-employee relationship existed between him and respondent on the date of the accident, and that claimant had voluntarily and knowingly elected out of workers' compensation insurance coverage under SO System, Inc.

¶ 26 In finding that there was no employment relationship, the Commission analyzed various factors. First, the Commission believed that the evidence demonstrated that

"[Kowalczyk] was clearly not monitoring Petitioner's work in a detailed manner." Although Kowalczyk supplied job materials for claimant, Kowalczyk's actions were "more a function of complying with Codes and the requirements specified by the General Contractor" when he met with claimant at job sites. Moreover, given claimant had incorporated a business engaged in repairing and replacing heating and cooling systems, the Commission found claimant's testimony incredible where he asserted that he lacked experience in the HVAC industry and did not own tools to perform such work. With regard to claimant's work schedule, the Commission determined that it "[wa]s dictated by when the General Contractor has the job site open and when the other trades are on site," not by Kowalczyk.

¶ 27 Moreover, although the Commission acknowledged that "[r]espondent's business certainly encompasses Petitioner's work," it determined that the relative nature of the parties' work and the work claimant performed was "not persuasive" on the issue of an employment relationship. In addition, although claimant acknowledged receipt of a federal 1099 form and that no taxes or social security were withheld from his compensation, the Commission did not believe these factors supported an employment relationship, given claimant "received no benefits such as paid time off, vacation or health insurance from Respondent," and "[t]he checks were made out to SO System, Inc." Lastly, the Commission could not determine the issue of an employment relationship as it related to two additional factors—at-will discharge and hourly pay.

¶ 28 The dissenting commissioner argued that the case hinged on credibility, finding Kowalczyk's testimony incredible and his claims that he had no employees, only

independent contractors, "patently absurd." Accordingly, the dissent argued that an employment relationship existed between claimant and respondent on the date of the accident, and claimant had not excluded himself from SO System, Inc.'s workers' compensation insurance policy coverage. Claimant sought timely judicial review of the Commission's decision in the circuit court of Cook County.

¶ 29 On August 23, 2019, the circuit court confirmed that the Commission's findings were not against the manifest weight of the evidence. This timely appeal followed.

¶ 30 II. Analysis

¶ 31 On appeal, claimant contends that the Commission's findings are against the manifest weight of the evidence where it determined that an employer-employee relationship did not exist, and that claimant had voluntarily and knowingly excluded himself from workers' compensation insurance coverage under SO System, Inc. workers' compensation insurance policy. We address these contentions in turn.

¶ 32 A. Employer-Employee Relationship

¶ 33 In a workers' compensation case, the claimant bears the burden of proving all elements of his case by a preponderance of the evidence, including the existence of an employer-employee relationship. *Pearson v. Industrial Comm'n,* 318 Ill. App. 3d 932, 935 (2001) (citing *O'Dette v. Industrial Comm'n,* 79 Ill. 2d 249, 253 (1980); *Ragler Motor Sales v. Industrial Comm'n,* 93 Ill. 2d 71, 71-72 (1982)). "[W]hen the evidence is conflicting and the facts are subject to diverse interpretations, it is within the province of the *** Commission to draw inferences from the evidence, ascertain the credibility of witnesses, evaluate conflicting testimony, and resolve whether the claimant has met his

burden of proof." *Ragler Motor Sales*, 93 Ill. 2d at 71-72 (citing *C. Iber & Sons, Inc. v. Industrial Comm'n*, 81 Ill. 2d 130, 136 (1980); see also *Eagle Sheet Metal Co. v. Industrial Comm'n*, 81 Ill. 2d 31, 39 (1980); *Phelps v. Industrial Comm'n*, 77 Ill. 2d 72, 74 (1979); *Keystone Steel & Wire Co. v. Industrial Comm'n*, 73 Ill. 2d 290, 293 (1978)). The question of whether an employment relationship existed at the time of the accident is one of fact. *Netzel v. Industrial Comm'n*, 286 Ill. App. 3d 550, 553 (1997). Accordingly, the findings of the Commission will not be disturbed on appeal unless they are contrary to the manifest weight of the evidence. *Hebeler v. Industrial Comm'n*, 207 Ill. App. 3d 391, 395 (1991) (citing *Morgan v. Industrial Comm'n*, 82 Ill. 2d 524, 527 (1980)). A finding is contrary to the manifest weight of the evidence if the opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 34 "No rigid rule of law exists regarding whether a worker is an employee or an independent contractor" (*Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000) (citing *Area Transportation Co. v. Industrial Comm'n*, 123 Ill. App. 3d 1096, 1099 (1984)), and the "term 'employee,' for purposes of the Act, should be broadly construed." *Ware*, 318 Ill. App. 3d at 1122 (citing *Chicago Housing Authority v. Industrial Comm'n*, 240 Ill. App. 3d 820, 822 (1992)). The Illinois Supreme Court, however, has provided a list of various factors for a court to consider when determining whether an employment relationship exists, including whether the employer: (1) may control the manner in which the person performs the work; (2) dictates the person's schedule; (3) pays the person hourly; (4) withholds income taxes and social security from the person's compensation; (5) may discharge the person at will; and (6) supplies the person with materials and equipment.

Roberson v. Industrial Comm'n (*P.I. & I. Motor Exp,, Inc.*), 225 Ill. 2d 159, 175 (citing *Wenholdt v. Industrial Comm'n,* 95 Ill. 2d 76, 81 (1983) (quoting *Morgan Cab Co. v. Industrial Comm'n,* 60 Ill. 2d 92, 97 (1975)).

¶ 35 The right to control the manner in which the worker performs the work is the single most important factor to consider (*Roberson,* 225 Ill. 2d at 175 (citing *Bauer v. Industrial Comm'n,* 51 Ill. 2d 169, 172 (1972)); *Horwitz v. Holabird & Root,* 212 Ill. 2d 1, 13 (2004), although, no one factor is determinative (*Davis v. Industrial Comm'n,* 261 Ill. App. 3d 849, 853 (1994) (citing *Earley v. Industrial Comm'n,* 197 Ill. App. 3d 309, 314-15 (1990)). "Although the test focuses upon the right to control, the actual exercise of control is strong evidence of the employer's right to control." *Ware,* 318 Ill. App. 3d at 1123 (citing *Bob Neal Pontiac-Toyota, Inc. v. Industrial Comm'n,* 89 Ill. 2d 403, 411 (1982)). Additionally, "the nature of the work performed by the alleged employee in relation to the general business of the employer" is of "great significance." *Ware,* 318 Ill. App. 3d at 1122 (citing *Ragler Motor Sales,* 93 Ill. 2d at 71; *Peesel v. Industrial Comm'n,* 224 Ill. App. 3d 711, 716 (1992)). Lastly, "a factor of lesser weight is the label the parties place upon their relationship." *Ware,* 318 Ill. App. 3d at 1122 (citing *Earley,* 197 Ill. App. 3d 317).

¶ 36 Turning to the most important factor, the right to control, we conclude that the manifest weight of the evidence clearly establishes that Kowalczyk exercised control over claimant's on-the-job activities. Despite Kowalczyk's testimony that he did not control claimant, the record supports a finding that Kowalczyk met claimant at job sites, not only to provide claimant with a physical copy of a general contractor's blueprints, but to "explain the [blueprint] plans" to claimant to ensure his compliance. Thus, it appears that

if, and when, a substantial change was required, it was Kowalczyk, not claimant, who evaluated and directed the change. Additionally, claimant's testimony demonstrated that Kowalczyk actually exercised control over the manner in which claimant performed his work when Kowalczyk showed claimant how to perform his job and instructed him on the removal of walls, where to install duct work, where a "furnace [should] stand [and] where *** we [would] install the vents ***." Moreover, Kowalczyk's own testimony demonstrated a strong showing of control when he was asked why he visited the Campbell Street project on the date of the accident, to which Kowalczyk testified: "To tell [claimant] what he's supposed to do" and "what kind of job he is to perform."

¶ 37 Next, we conclude that the manifest weight of the evidence clearly establishes that Kowalczyk dictated claimant's schedule. In resolving this factor and concluding that it did not support an employment relationship, the Commission determined that claimant's "schedule is dictated by when the General Contractor has the job site open and when the other trades are on site." We cannot agree. Despite conflicting testimony regarding the existence of set work hours for respondent, we find Kowalczyk dictated claimant's schedule, as demonstrated by Kowalczyk's frequent communication with claimant, and the overall regularity at which he visited job sites. We first note that claimant received job assignments solely from Kowalczyk, and, once assigned, Kowalczyk frequently checked in on claimant and the other workers to receive updates on the progress of a job. In fact, Pawel testified that Kowalczyk called a "[f]ew times a day," and claimant attested that Kowalczyk stopped by "every single day" around noon.

¶ 38 Moreover, the materials and specialized equipment used on the Campbell Street project were furnished by Kowalczyk. Although the Commission found it incredible that claimant had allegedly formed SO Systems, Inc. without owning any of his own tools, the testimonies of Kowalczyk and claimant support a finding that Kowalczyk provided the required materials and specialized equipment to complete work for respondent. Even if claimant did in fact possess his own tools, there is no evidence in the record that he furnished the required materials and specialized equipment to complete assigned jobs for respondent. Additionally, there is no indication that claimant had control over choosing materials, or that claimant chose, or had the ability to choose, the specialized equipment utilized during the installation process. Thus, because the evidence demonstrates that respondent provided the instrumentalities needed to conduct business, this factor demonstrates an employer-employee relationship. See *Ware*, 318 Ill. App. 3d at 1125 (" 'control may be realistically inferred even when the employer owns only a part of the equipment, if that part is of considerable size and value.' ").

¶ 39 Accordingly, we cannot agree with the Commission's determination that "[Kowalczyk] was clearly not monitoring Petitioner's work in a detailed manner." Rather, the evidence above demonstrates that Kowalczyk had the right to, and actually exercised, control over claimant's activities by supervising and instructing claimant as to the manner in which claimant performed his work, dictating claimant's schedule and supplying claimant with materials and specialized equipment to perform work for respondent. Thus, these factors indicate an employment relationship between claimant and respondent on the date of the accident.

¶ 40 Turning to the relative nature of claimant's work in relation to the general work of respondent's business, we conclude that this factor also indicates claimant was an employee of respondent. With regard to this factor, our Illinois Supreme Court has stated the following:

> "[B]ecause the theory of workmen's compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Ragler Motor Sales,* 93 Ill. 2d at 71 (citing *Kirkwood v. Industrial Comm'n,* 84 Ill. 2d 14, 22 (1981); *Alexander v. Industrial Comm'n,* 72 Ill. 2d 444, 449 (1978); *Coontz v. Industrial Comm'n,* 19 Ill. 2d 574, 578 (1960); see also 1C A. Larson, Workmen's Compensation sec. 43.51, at 8-17 (1980)).

Although claimant owned his own business, SO System, Inc., there is no evidence that he advertised as a separate business or held a book of business outside of respondent. Except for a two-week period in 2014 or 2015, claimant worked exclusively for respondent, accepting and completing projects provided and directed by Kowalczyk for the benefit of respondent. In addition, respondent's business, similar to SO System, Inc., focused on the repair and replacement of heating and cooling systems, and claimant's role for respondent was to install HVAC systems, duct work and vents. Thus, there is no dispute that the relative nature of the parties' work and the work claimant performed were similar. From

this evidence, it is apparent that the relative nature of claimant's work formed an integral part of respondent's regular business, which tends to demonstrate that claimant was an employee of respondent. Accordingly, we find the Commission's decision was against the manifest weight of the evidence where it determined that this factor was "not persuasive," despite its finding that "[r]espondent's business certainly encompasses Petitioner's work."

¶ 41 We next examine the method in which claimant was paid. Because there was conflicting evidence regarding this issue, the Commission determined that it could not conclude whether claimant was paid hourly or on a per project basis. As such, the Commission discounted this factor. We disagree and find the Commission's decision was against the manifest weight of the evidence.

¶ 42 The claimant consistently testified that he was initially paid $14 per hour and then received a raise to $20 per hour during the time he worked for respondent. Claimant stated that he presented Kowalczyk with written documentation (days worked, hours worked and the address of the job site) in a "special notebook" in order to receive payment. Claimant admitted that he had no physical proof of this documentation because he had given it to Kowalczyk. To support his position, claimant presented 14 paychecks (Petitioner's Exhibit 20) that Kowalczyk had previously written to SO System, Inc. Out of the 14 paychecks, only two paychecks reached an increment of $500, which is the specific dollar amount Kowalczyk testified that he paid claimant for each furnace installation. The following 12 paychecks had varying amounts not in increments of $500: (1) $844 (9/4/14); (2) $731 (9/8/14); (3) $858.50 (9/19/14); (4) $554.50 (9/24/14); (5) $663 (9/30/14); (6) $731 (10/8/14); (7) $765 (10/16/14); (8) $663 (10/23/14); (9) $697 (10/29/14); (10) $893

(12/19/14); (11) $1340 (12/30/14); and (12) $988 (1/20/15). Moreover, Pawel testified that respondent paid him hourly, and in order to receive payment, Pawel presented Kowalczyk with documentation of the hours he had worked each week. Pawel stated that he received roughly $800 per week by check and sometimes cash, which supported claimant's prior testimony, while discounting Kowalczyk's testimony that he paid subcontractors a certain amount of money per project, specifically, $500 for each furnace installation.

¶ 43 Kowalczyk, however, testified that claimant was not paid hourly but on a per project basis. As stated above, Kowalczyk claimed that he paid claimant, and other subcontractors, $500 to install a furnace. Because of this arrangement, Kowalczyk maintained that he did not understand why claimant kept track of his hours. Unlike claimant, Kowalczyk provided no documentation to support his testimony.

¶ 44 Although we recognize, similar to the Commission, that claimant and Kowalczyk disagreed on the method of payment, the manifest weight of the evidence clearly supports a determination that claimant was paid hourly. First, claimant consistently testified regarding his hourly pay and the method he used to track his hours for payment, which was consistent with Pawel's testimony that he, too, was paid hourly and had presented documentation of his hours to Kowalczyk for payment. Moreover, unlike Kowalczyk, who failed to present any evidence to support his testimony, claimant strongly supported his argument with the presentation of 14 paychecks, 12 of which were not in increments of $500. Consequently, had Kowalczyk paid claimant $500 per furnace installation, as he claimed, the paychecks he issued to SO System, Inc. would have reflected that assertion,

especially since income tax and social security were not withheld from claimant's compensation. Accordingly, this factor supports an employer-employee relationship.

¶ 45 Against the evidence set forth above, two factors point toward claimant being an independent contractor—failing to withhold income taxes and social security from the person's compensation and the label the parties place upon the relationship. Claimant acknowledged that respondent did not withhold income tax and social security from his compensation. While the failure of respondent to deduct tax withholdings and social security is "relevant" (*Kirkwood Brothers Construction v. Industrial Comm'n,* 72 Ill. 2d 454, 460 (1978) (citing *Penny Cab Co. v. Industrial Comm'n,* 60 Ill. 2d 217, 219 (1975)), it "is not decisive." *Kirkwood Brothers Construction,* 72 Ill. 2d at 460. Accordingly, given it has not been found to be a significant factor, we afford this factor little weight.

¶ 46 Moreover, Kowalczyk testified that he and claimant verbally agreed to claimant operating as an independent contractor at the time of hire. In support of Kowalczyk's testimony, claimant acknowledged that no tax withholdings occurred, he was provided a federal 1099 form, and he was required to obtain his own workers' compensation insurance policy. Although the testimonies of claimant and Kowalczyk point towards independent contractor status, "the label the parties place upon their relationship" is a factor of minor significance when determining and analyzing the parties' relationship. See *Ware,* 318 Ill. App. 3d at 1122 (citing *Earley,* 197 Ill. App. 3d at 317). Accordingly, we afford this factor little weight, given this is not a "close case" in which consideration of this factor would "swing the balance by aiding in establishing the true intent of the parties." *Id.*

¶ 47 A majority of the factors, including the two most important factors, point to claimant as an employee. Although we recognize that two factors point to an opposite conclusion, these factors, as noted above, carry minor significance when determining whether an employment relationship exists. Accordingly, we conclude that the decision of the Commission that an employment relationship did not exist was against the manifest weight of the evidence. Because we conclude that an employment relationship existed between claimant and respondent, we need not address the remaining issue.

¶ 48 We also find it necessary, as did the Commission, to address the subcontractor-contractor structure that claimant and Kowalczyk attempted to form. Similar to the Commission, we believe that both Kowalczyk and claimant "were trying to avoid the expenses of payroll taxes, unemployment taxes and wage and hour laws, along with workers' compensation insurance premiums ***." Dissimilar to the Commission, however, we do not believe the evidence demonstrates that claimant possessed a level of sophistication in forming contractual construction business relationships. Rather, the evidence demonstrates an inequity in bargaining power where Kowalczyk was able to use his business to take advantage of claimant. This type of structure erodes away at one of the purposes of the Act, which is to ensure that "the burdens of caring for the causalities of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public." *Shell Oil Co. v. Industrial Comm'n,* 2 Ill. 2d 590, 596 (1954). Our decision is fully consistent with these principles.

¶ 49 Lastly, we find it important to highlight that the Commission failed to clarify in its order which company it was referring to—SO System, Inc. or respondent—when it

concluded that certain factors did not support an employment relationship. These factors include: (1) dictating the claimant's schedule; (2) withholding income taxes and social security; (3) the nature of the work in relation to the general business of the employer; (4) discharged at will; and (5) claimant's ability to work elsewhere. We urge the Commission to be clearer when concluding each analyzed factor as it relates to an employment relationship.

¶ 50 III. Conclusion

¶ 51 For the reasons stated above, we reverse the judgment of the circuit court of Cook County that confirmed the Commission's decision, reverse the Commission's decision, and remand this matter to the Commission with directions to find that an employer-employee relationship existed between claimant and respondent on the date of the accident and for further proceedings consistent with this order.

¶ 52 Circuit Court judgment reversed.

¶ 53 Commission decision reversed and cause remanded to the Commission with directions.