IN THE SUPREME COURT OF GUAM

CRESENCIO C. BONDOC,
Petitioner-Appellant

vs.

WORKER'S COMPENSATION COMMISSION and GERBER ENTERPRISES, INC.,
Respondents-Appellees

OPINION

Supreme Court Case No. **CVA98-016**
Superior Court Case No. **SP0205-97**

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Appeal from the Superior Court of Guam
Argued and submitted on May 11, 1999
Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, RICHARD H. BENSON and JOHN A. MANGLONA, Designated Justices.

CRUZ, C.J.:

[1] This is an appeal of the lower court's decision to deny Appellant's petition for Writ of Review and/or a Writ of Mandamus to suspend or set aside the Worker's Compensation Commission Order.

BACKGROUND

[2] On or about May 9, 1993, Appellant Cresencio C. Bondoc (hereinafter "Bondoc") and his brother Roy Bondoc entered into an oral agreement with Gerber Enterprises (hereinafter "Gerber") to construct a warehouse on property leased by Gerber. While working at the warehouse construction site, Bondoc was electrocuted. Shortly thereafter, Bondoc filed a notice of claim with the Worker's Compensation Commission (hereinafter "Commission") for compensation.

[3] On October 4, 1994, a hearing officer conducted a hearing on Bondoc's claim. The officer then filed a "Proposed Decision Respecting Coverage" (hereinafter "Decision I") with the Commission on March 3, 1995.[1] Decision I provided extensive findings of fact and a detailed analysis on the issue of whether Bondoc was entitled to compensation. Decision I then held that Bondoc was covered by the Worker's Compensation Act and consequently, entitled to compensation.

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[1]Merely for ease of reference and reading, this Court shall substitute the term "Proposed Decision Respecting Coverage" with the term "Decision I." Likewise, this Court shall substitute the term "Decision and Compensation Order with "Decision II." When referring to both Decision I and Decision II, we shall use the collective term, "Decisions." Our analysis of the instant case shall bear in mind the difference between the two "Decisions." Accordingly, the proper legal significance shall be accorded to each.

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[4] However, on June 11, 1997, more than two years after receiving Decision I, the Commission issued its official Decision and Compensation Order (hereinafter "Decision II") regarding the Bondoc matter. Decision II reversed Decision I and effectively denied Bondoc any compensation. Bondoc then filed a petition for a Writ of Review with the Superior Court of Guam. The Superior Court denied this petition on November 21, 1997. In response, Bondoc filed the instant appeal.

ANALYSIS

[5] This Court has jurisdiction over this matter pursuant to 7 GCA sections 3107 and 3108 (1994).

[6] We review the lower court's denial of a Writ of Review for an abuse of discretion.[2] *Haeuser v. Department of Law,* 97 F.3d 1152, 1154 (1996); *Apusento Garden (Guam) Inc. v. Superior Court of Guam,* 94 F.3d 1346, 1351 (1996).[3] Two inquiries shall largely determine whether there was an abuse of discretion. First, we shall first determine whether Decision II was supported by substantial evidence. *See Holmes v. Territorial Land Use Commission,* 1998 Guam 8, ¶ 6; 5 GCA § 9240 (1994). For purposes of our analysis, substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 1427 (1971) (citation omitted).

[2] As a preliminary matter, we note that Bondoc properly petitioned for a Writ of Review because subsequent to the Commission's Decision II, he was left with "no plain, speedy, and adequate remedy in the ordinary course of law. 7 GCA § 31203 (1998). We further recognize that pursuant to 5 GCA section 9241, a Writ of Mandate was the proper vehicle for relief.

[3] 7 GCA section 31201 provides that the "writ of mandamus may be de-nominated a writ of review." Thus, in this case a "Writ of Review" shall be afforded the same analysis as a "Writ of Mandamus."

[7] The second prong of our analysis requires us to determine whether Decision II was in accordance with law. 5 GCA § 9240 (1994). As a question of law, we shall review this issue *de novo. Haeuser*, 97 F.3d at 1154. We note that "if the facts underlying the judgment are not in dispute, this court may arrive at its own legal conclusions. *Holmes v. Territorial Land Use Commission*, 1998 Guam 8, ¶ 6.

[8] In the event that we determine that the lower court's denial of the Writ of Review was an abuse of discretion, this matter shall be reversed and remanded to the lower court. On remand, the lower court shall then issue a Writ of Review that shall effectively reverse the Commission's Decision II and afford appropriate relief. *See Johnson v. Civil Service Board of the City of Portland*, 161 Or. App. 489, 1999 WL 460769 at 5 (Or. App. 1999). *Id.*

A. Bondoc's Employment Status.

[9] Turning now to merits of the case, we note that the lower court's decision to deny Bondoc's petition for Writ of Review necessarily should have addressed two inquiries: 1) Was Decision II in accordance with law? and 2) Was Decision II supported by substantial evidence? *See* 5 GCA § 9240. Under the *de novo* standard, we focus our analysis upon the Commission's determination in Decision II that Bondoc was not an employee and the resulting denial of compensation to him.[4]

[10] Decision II was divided into four parts: 1) Findings of Fact, 2) Conclusions of Law, 3) Conclusion, and 4) Order. In its "Conclusion" the Commission stated that "Bondoc did not [adduce]

[4] From the oral argument we note that the Commission's counsel drafted Decision II. He did not draft Decision I, nor was he the original hearing officer assigned to this matter. Furthermore, he did not attend the initial hearing nor is there a record of his attendance at any hearing with the parties.

sufficient evidence that a employer-employee relationship existed to trigger the statutory presumption of coverage . . . ." Decision II at 30-31. The Commission then held that "Gerber has adduced 'substantial evidence' that an independent contractor relationship existed to rebut the statutory presumption." *Id.* at 31. Finally, in the section entitled, "Order" the Commission held that Bondoc was "not entitled to compensation under the Worker's Compensation Law." *Id.* Due to the nature and scope of our review, each of the four sections shall be addressed in turn.

[11] In addressing the Commission's findings of fact, we are mindful of our duty to consider the record as a whole. *See Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991). We note that, in addition to the briefs by the respective parties, the record before the court includes the Commission's "Decisions." We also recognize that the Decisions contain virtually identical "Findings of Fact" sections. The record reveals that this section of the Decisions appears to have been drafted by the original hearing officer who personally had the opportunity to hear and observe the witnesses and their demeanor. Consequently, we believe that substantial evidence exists to support the Findings of Fact sections as contained in both Decisions.[5]

[12] We now turn to the Conclusions of Law section which contained a legal analysis of Bondoc's employment status. In Decision II, the Commission explicitly adopted the "Relative Nature of the Work Test" to determine whether Bondoc was an employee.[6] Decision II at 14. Appropriately, the Findings of Fact provided the factual background against which the following six factors were

[5] Neither party disputes the facts as set forth in the Findings of Fact. Thus, the undisputed nature of the facts supports a *de novo* review. *See Holmes v. Territorial Land Use Commission*, 1998 Guam 8, ¶ 6.

[6] Rather than comment on the Commission's decision to apply the "Relative Nature of the Work Test," for purposes of this opinion, we choose instead to review not the decision to implement the test, but the manner in which this test was applied.

applied: 1) The degree of skill involved; 2) The degree to which there was a separate calling or business; 3) The extent to which Bondoc could be expected to carry his own accident burden; 4) The extent to which the claimant's work was a regular part of the employer's regular work; 5) The extent to which the claimant's work was continuous or intermittent; and 6) Whether the duration of the job was sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of the particular job.

[13] As to the first factor pertaining to the degree of skill involved in Bondoc's work, Decision II stated that "the degree of skill exercised by Bondoc does contribute to the employer's showing that there was substantial evidence in favor of an independent contractor relationship." Decision II at 17-18. This outcome is consistent with the analysis and conclusion also set forth in Decision I. Indeed, the two documents are identical in both form and substance relative to this specific factor. Because of this consistency, and a lack of contrary evidence, we find that the Commission's Decision II determination on this particular matter was proper and in accordance with the law. We also find that there is substantial evidence to support the Commission's conclusion.

[14] The Commission next considered the degree to which Bondoc conducted his work as a separate calling or business. A comparison of Decision I and Decision II highlights the significant similarity of the two analyses. Both Decisions relied on the same Findings of Fact. In addition, the Decisions engaged in identical analysis. Decision I, however, determined that "Bondoc did not conduct his work as a separate calling or business within the meaning of the relative work test." Decision I at 32. Because Decision II utilized the same test and applied the same facts within the same analytical framework as Decision I, Decision II's conclusion on this particular factor should

follow Decision I. However, it does not. Decision II omitted the conclusion from the text that appeared in Decision I and failed to arrive at its own conclusion. Indeed, the omission of this conclusion was the only significant difference in the text of the analysis in the respective Decisions.

[15] The portion contained in Decision I that was omitted in Decision II stated, "[i]t appearing that Bondoc was neither an owner of Montana Construction, nor an employee of it, we find unmeritorious Gerber's argument that his relationship with Bondoc was through Montana Construction, the latter acting as a separate business and independent contractor." Decision I at 26. Upon review of the facts shared in the Decisions relative to this particular matter, we find no evidence that Bondoc was an employee or owner of Montana Construction. Both Decision I and II point out that Roy C. Bondoc was a sole proprietor doing business as Montana Construction. The record also demonstrates that "for a period immediately before the accident occurred, Gerber paid all the workers hired directly by him with a single check payable to cash." *Id.* In turn, Bondoc would cash the check and distribute the proceeds to the workers. *Id.* The record also reveals that Bondoc worked on the warehouse project for 12 weeks. During this time, he "devoted himself exclusively to the warehouse project." Decision II at 25. We further note that Bondoc's agreement with Gerber was couched in terms of personal services and that during this period, there was no evidence that Bondoc held himself out to the public as furnishing his services. *Id.* These facts provide substantial evidence in favor of the determination that Bondoc did not act as a separate business or independent contractor.

[16] The next factor considered by the Commission also relates to the issue of whether Bondoc conducted his work as a separate calling or business. Specifically, the Commission looked to

whether the ownership of the equipment used by Bondoc was consistent with him working "as a separate calling or business." Because Decision II's conclusion on this matter directly contradicts that of Decision I, a comparison of the two Decisions proves highly informative.

[17] In Decision I, the relevant part of the analysis provides:

> As described below, however. [sic] we believe that Gerber's construction of the warehouse was pursuant to his real property development business, not a surplus business. Hence, his ownership and furnishing of equipment was not incidental, and the rule that the employer furnishing equipment shows an employer-employee relationship is applicable.
>
> Inasmuch as Gerber furnished the valuable equipment in this case, we find that application of this rule would indicate that Bondoc was not conducting his work as a separate calling or business.
>
> Therefore, except for the degree of skill exercised by Bondoc, the evidence relative to whether Bondoc was engaged in a separate calling or business would contribute toward Bondoc's making an initial showing that there was an employer-employee relationship.

Decision I at 33-34.

[18] Decision II omits the text set forth above. Following this omission, Decision II concludes that Bondoc was engaged in a separate calling or business. Aside from this omission and the contradictory holding, the analysis in the Decisions is identical in every respect. In other words, no new facts are considered in Decision II, and no new analysis is employed. Decision II merely omitted the objective finding that was inconsistent with the notion of a "separate calling or business" and then proceeded to conclude otherwise, based on this omission. In view of the fact that the Commission considered no new facts, did not apply an alternative analysis or provide different reasoning, Decision II's conclusion is not supported by substantial evidence.

[19] The next factor concerns the extent to which Bondoc could be expected to carry his own accident burden. Both Decisions I and II concluded that Bondoc's salary of only $100.00 per day

indicated that he was "dependent on Gerber to cover those risks attendant to performing the kind of work Bondoc performed for Gerber." Decision I at 35; Decision II at 27. Because the analysis in each Decision was logical as well as identical to the other, we believe that substantial evidence exists to support this determination.

[20] The Commission next considered the extent to which Bondoc's regular work was a part of Gerber's regular work. An examination of the record reveals that Gerber regularly developed property during the period of time at issue. As for Bondoc, Decision I held that while the evidence also demonstrated that Bondoc worked for people other than Gerber in the past, it did not indicate that Bondoc "held himself out generally to perform this kind of work." The entire text devoted to this issue in Decision I reappears in Decision II but Decision II adds the particularly important words, "not in our view" to the concluding sentence. To illustrate, Decision I states:

> Therefore, the evidence relative to the extent to which Bondoc's work was a regular part of Gerber's regular work would contribute to Bondoc's making an initial showing that there was an employer-employee relationship.

Decision I at 36.

In contrast, Decision II states:

> Therefore, the evidence relative to the extent to which Bondoc's work was a regular part of Gerber's regular work would **not, in our view,** contribute to Bondoc's making an initial showing that there was an employer-employee relationship.

Decision II at 29 (emphasis added).

[21] Once again, the text and analysis of this factor in Decision I and Decision II are virtually identical. The only difference occurs in that concluding sentence. No new facts were added to the consideration. No new law was applied. Precisely what "point of view" compelled the Commission

to change its conclusion, without justification, remains a mystery. Thus, Decision II's conclusion relative to this factor is not supported by substantial evidence, the Commission's "view" notwithstanding.

[22] The Commission next considered whether Bondoc's work was continuous or intermittent. Decision II held that Bondoc's intermittent work indicated that an employee-employer relationship did not exist. Decision II based this conclusion on the fact that Bondoc's attendance at the warehouse was irregular and less than full time. In addition, during the twelve weeks preceding his injury, Bondoc worked "five days in two weeks, four days in four weeks, three-and-a-half days in two weeks, and three days in four weeks." Decision II at 29. Although this appears to indicate that Bondoc did work intermittently, Decision I found otherwise. Once again, the two Decisions contained the exact same Findings of Fact. However, Decision II noticeably omits certain portions of the analysis without substituting its own.

[23] In Decision I's analysis, the same record of Bondoc's attendance or lack thereof is noted, to wit, "five days in two weeks, four days in four weeks, three-and-a-half days in two weeks, and three days in four weeks." Decision I at 37. Following this, however, Decision I goes on to state:

> However, the testimony suggested that Bondoc's attendance was determined by the availability of materials for the job and other similar exigencies related to the warehouse job, not because he was occupied elsewhere. We conclude, therefore, that Bondoc's central role in Gerber's business was reflected in his irregular attendance. Therefore, the evidence relative to whether Bondoc's work was continuous or intermittent would contribute to his making an initial showing that there was an employer-employee relationship.

Id.

[24] Unlike Decision I, Decision II makes no attempt to justify its conclusions and there is no evidence that the construction of the warehouse required more regular attendance than that already exercised by Bondoc. In light of the foregoing explanation of the irregularity of Bondoc's attendance contained in Decision I, the contrary finding in Decision II is not supported by substantial evidence.

[25] Lastly, the Commission considered whether the duration of the job was sufficient to amount to the "hiring of continuing services" as distinguished from "contracting for the completion of the particular job." Decision I found that "no conclusions may be drawn from the duration of the warehouse project which would help either party meet its burden of production." Decision I at 38. By comparison, Decision II does nothing other than change the conclusion of the text originally contained in Decision I. Decision II then concluded that "Bondoc's services were not so continuous as to give rise to an inference of an employer-employee relationship." Decision II at 30. Again, Decision I analyzed the same facts and applied the same law. Indeed, the text of both Decisions was once again identical but for the conclusion.

[26] In view of the record before the Court and because the property development business is, by its nature, sporadic,[7] we find that there is substantial evidence in favor of the determination set forth in Decision I. "[N]o conclusion may be drawn from the duration of the warehouse project which would help either party meet its burden of production." Decision I at 38. Accordingly, we find that Decision II's conclusion on this matter was not supported by substantial evidence.

[27] In light of the foregoing analysis of the six factors, we find that there is substantial evidence of the existence of an employee-employer relationship between Bondoc and Gerber.

[28] In addition, Bondoc's employment status may be readily assessed by looking to relevant Guam statutes and applying routine statutory interpretation. As a matter of statutory interpretation, we note that "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." *Monex Int'l Ltd. v. Commodity Futures Trading*

[7] With all due respect, while the Commission used the term "spasmodic" to describe the nature of the property development business, we prefer to use the term "sporadic."

Comm'n, 83 F.3d 1130, 1133 (9th Cir. 1996) (citation omitted).

[29] Title 22 section 9103 (1995) of the Guam Code Annotated sets forth the statutory definition of an employee. In its entirety, it provides:

> (i) *Employee*. This term, as used herein, is synonymous with *worker*, and means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer. It includes aquacultural and agricultural workers but excludes a person whose employment is purely casual and not, for the purpose of the employer's trade or business. As used herein the term *employee* includes any person who has worked forty (40) hours per week during the previous sixty (60) days, exclusive of holidays, for the same employer.

22 GCA § 9103 (i) (1998) (emphasis in original).

[30] Under this same section, the statutory definition of an employer also provides as follows:

> (j) *Employer*. This term, unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is in fact the proprietor, or operator of the business carried on there but who by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured it includes his insurer as far as applicable.

22 GCA § 9103 (j) (1998) (emphasis in original).

[31] The record before the court indicates that, initially, Bascom Enterprises entered into an agreement with Gerber to construct the warehouse. Subsequently, on or about May 9, 1993, Gerber orally agreed with Bondoc and his brother Roy to construct a warehouse. This oral agreement was referenced in a letter sent to Gerber by Eddie C. Suarez, the president and general manager of Bascom Corporation. In relevant part, the letter indicated that "the Bondoc brothers (Roy and Boy) of Montana Construction Company will assume responsibility of this project and structural integrity of this building." Decision II at 6. In addition, the Commission found that "Bondoc and his brother,

Roy, and the other workers hired directly by Gerber, were paid directly by Gerber." Decision II at 9.

[32] Guam law provides that an employee is one who, "works under contract of service or apprenticeship with an employer." *See* 22 GCA § 9103 (i). As indicated in the Findings of Fact Bondoc and Gerber had an oral agreement, Bondoc worked at the construction site, and Gerber paid Bondoc for services rendered. In addition, Bondoc was working pursuant to this oral agreement at the time he was injured. Collectively, these facts provide substantial evidence that Bondoc and Gerber entered into a contract of service. Therefore, under such a contract, Bondoc was an employee of Gerber at the time he was injured at the construction site.

[33] Nothing in Decision II directly contradicts our finding that Bondoc was a "employee under contract." Indeed, it appears that the Commission merely decided Bondoc's employment status on grounds that noticeably excluded reference to the statutory definition of an employee set forth in section 9103 (i) as well as Guam case law highly informative of the issue.

[34] *Frieze v. Sandcastle, Inc,* CV0139-94 (Sup. Ct. Guam Aug. 1, 1994) provides an example of such case law. In *Frieze,* the plaintiff suffered an injury as a result of slipping on water that had collected on the stage on which she was performing. Claiming that she was an independent contractor, the plaintiff argued that she was entitled to compensation beyond that which the Guam's Worker's Compensation Act (hereinafter "the Act") provided. *Id.* at 3. The Superior Court disagreed. Citing Guam Government Code section 37002 (i), the court explicitly found that "any person who has entered into the employment of or works under contract of service . . . with an

employer" was a statutory employee whose relief was limited to only what the Act provided.[8] The court also stated that "[t]he law is crystalline that under these sections, [plaintiff] is an employee for the purpose of worker's compensation and may not seek relief elsewhere ...." *Id.* at 4. As demonstrated in the discussion above, Bondoc also worked under a contract of service. Thus, in accordance with *Frieze*, Bondoc was an employee.

B. Bondoc's Compensation.

[35] Title 22 of the Guam Code Annotated Section 9105 provides for Liability Compensation. In its entirety it states:

> (a) Every employer shall be liable for and shall secure payment to his employees of the compensation payable under §§ 9108, 9109, and 9110. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
> (b) Compensation shall be payable irrespective of fault as to the cause of the injury.

22 GCA § 9105 (a) (1998).

[36] As set forth above, Bondoc and Gerber were engaged in a employer-employee relationship at the time of Bondoc's injury. Consequently, pursuant to section 9105, Bondoc is entitled to compensation.

CONCLUSION

[37] Upon considering the record as a whole, we hold that the Commission's Findings of Fact are

[8] 22 GCA Section 9106 presently codifies the provision relative to the exclusiveness of liability set forth previously in Guam Govt. Code section 37005 (1970).

supported by substantial evidence. Decision I contained an analysis of the issue and ultimately concluded that Bondoc was an employee. However, Decision II arrived at the opposite conclusion only after omitting objective points of analysis that were consistent with Bondoc's status as an employee.

[38] Decision II neither considered new facts, nor applied new law. Moreover, it did not employ an alternative means of analysis. Consequently, Decision II's conclusion that Bondoc was not an employee was neither supported by substantial evidence, nor in accordance with law. Furthermore, by law, the lower court's denial of the petition for a Writ of Review must have been supported by substantial evidence. However, the lack of substantial evidence in Decision II necessarily deprived the lower court of proper support for the denial of the petition. Although Decision II's lack of substantial evidence, by itself, indicates that the lower court erred in denying the Writ of Review, our finding that there was substantial evidence in favor of an employee-employer relationship further justifies the lower court's reversal.

[39] As a statutory matter, we note that under Guam law, Bondoc was an employee pursuant to 22 GCA section 9103 (i). Accordingly, he was entitled to compensation pursuant to 22 GCA section 9105.

[40] This case is hereby **REVERSED** and **REMANDED** in order for the lower court to issue a Writ of Review effectively reversing Decision II and for proceedings consistent with our holding.

JOHN A. MANGLONA BENJAMIN J. F. CRUZ

Designated Justice

Chief Justice

RICHARD H. BENSON, Concurring:

[41] I concur with the court in its reversal of the lower court's denial of the Writ of Review, and its remand for further proceedings. I also agree with the court's analysis of Decisions I and II and its conclusion that an employee-employer relationship existed.

[42] I do not concur with the alternative ground of the court in paragraphs 28 through 33 which introduces the "employee under contract" concept. This is *dicta*. All proceedings have centered on whether an employee-employer relation or an independent contractor existed.

[43] I do not join the court in its discussion in paragraph 34 and the authority it cites. I am not persuaded that the holding in *Frieze v. Sandcastle* is correct.

RICHARD H. BENSON
Designated Justice