CHRISTOPHER MALPASS
(Appellant)

v.

PHILIP J. GIBBONS d/b/a P. JAMES GIBBONS CONSTRUCTION

and

JAMES GIBBONS d/b/a JMG CONSTRUCTION, INC.
(Appellees)

Conference held: January 31, 2014
Decided: July 1, 2014

PANEL MEMBERS: Hearing Officers Elwin, Greene, and Pelletier
BY: Hearing Officer Elwin

[¶1] Christopher Malpass appeals from a decision of a hearing officer (*Collier*, *HO*) denying his Petitions for Award and Petitions for Order of Payment against both Philip J. Gibbons d/b/a P. James Gibbons Construction (collectively, Gibbons Construction) and James Gibbons d/b/a JMG Construction, Inc. (collectively, JMG). The issue on appeal is whether the hearing officer properly determined that no employee-employer relationship existed between Mr. Malpass and either Gibbons Construction or JMG. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Mr. Malpass has worked primarily in construction jobs since graduating from high school. He was out of work for several years after suffering

a work-related back injury in 1991. After recovering from back surgery, he returned to work in approximately 2002. Because he had restrictions against heavy lifting and repetitive bending, Mr. Malpass mainly performed finish or trim carpentry.

[¶3] Philip J. Gibbons is a general contractor in residential home construction. He is the president, sole owner and shareholder, and the only director and employee of P. James Gibbons Construction. He hires subcontractors to perform all aspects of construction, including excavation, foundation, concrete, flooring, plumbing, electrical, roofing, and insulation work. He also hires framing carpenters and finish carpenters as subcontractors. While he periodically checks on the progress of work and provides general direction to the subcontractors, he does not directly control their work. If he is not satisfied with a subcontractor's work, he simply avoids hiring that subcontractor for future jobs.

[¶4] James M. Gibbons, the son of Philip J. Gibbons, is the president and sole employee of JMG Construction, Inc. JMG works in residential construction doing framing carpentry for general contractors, including Gibbons Construction.

[¶5] For two years prior to February 2007, Mr. Malpass, who considered himself self-employed, joined forces with Albert Gaudet, who had been self-employed as a carpenter since 1984. Initially, Mr. Gaudet paid Mr. Malpass by the hour, but they later agreed to split the proceeds equally for jobs they did together.

Mr. Gaudet, who obtained the jobs, would receive payment by check from the general contractor, and then would give Mr. Malpass half the payment amount in cash. Mr. Gaudet and Mr. Malpass considered themselves partners, scheduled work as needed to complete each job, and decided between themselves who would do which tasks. The general contractor would supply materials (primarily wood, nails, and other fasteners) and the carpenters used their own tools. Although Mr. Gaudet and Mr. Malpass also worked for other general contractors, they did finish carpentry on approximately ten homes for Gibbons Construction.

[¶6] On February 13, 2007, Mr. Malpass and Mr. Gaudet were doing finish carpentry in a house being built by Gibbons Construction in a subdivision in Scarborough. At a nearby house also being built by Gibbons Construction, JMG was working as the framing subcontractor. James Gibbons was not at the JMG job site that day, but his brother Jacob Gibbons was working as a member of the JMG framing crew.

[¶7] Jacob Gibbons walked over to the job site where Mr. Gaudet and Mr. Malpass were working, and asked Mr. Gaudet for help lifting a second-story wall that was too heavy for the four men on the framing crew to lift. Both Mr. Gaudet and Mr. Malpass agreed to help, while two other workers at their job site declined.

[¶8] As the six men lifted the wall, some straps holding the base of the wall broke, and it shifted. All four members of the framing crew scooted out from under

the wall, and it fell on Mr. Malpass and Mr. Gaudet, injuring them both. Mr. Malpass had surgery in June of 2007 to repair a torn rotator cuff in his right shoulder.

[¶9] Mr. Malpass filed Petitions for Award and for Order of Payment of Compensation against Philip J. Gibbons d/b/a P. James Gibbons Construction and James Gibbons d/b/a JMG Construction, Inc. The hearing officer denied the petitions and Mr. Malpass's subsequent Motion for Additional Findings of Fact and Conclusions of Law. Mr. Malpass then filed this appeal.

II. DISCUSSION

[¶10] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer's] factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

A. "Lent Employee" Doctrine

[¶11] Mr. Malpass first contends that the hearing officer erred when determining that he was not a "lent employee" of JMG at the time of the injury. The "lent employee" doctrine provides that "the servant of a general employer may, with respect to a particular work, be transferred, with his own consent or

acquiescence, to the service of another so that he becomes the servant of the special employer." *Torsey's Case*, 130 Me. 65, 67, 153 A. 807, 808 (1931).

[¶12] The hearing officer concluded that Mr. Malpass did not have an employee-employer relationship with Gibbons Construction, the alleged general employer who could have transferred him to JMG, and that absent such a relationship with a general employer, there can be no "lent employee" situation. Mr. Malpass contends that the hearing officer misapplied the law in this regard. Citing Professor Larson, he argues that the existence of a general employer is not important:

> In one sense, the lent-employee doctrine is not a separate doctrine at all. Theoretically, the process of determining whether the special employer is liable for compensation consists simply of applying the basic tests of employment. . . . If they are satisfied, the presence of a general employer somewhere in the background cannot change the conclusion that the special employer has qualified as an employer of this employee for compensation purposes.

3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 67.01[2] (2013).

[¶13] We disagree with Mr. Malpass's contention. First, central to the lent employee doctrine is the notion that an employee can be "transferred" from the "general" (or lending) employer to the "special" (or borrowing) employer. *See Torsey's Case*, 130 Me. at 67, 153 A. at 808. The Larson quote cited above assumes the existence of a general employer.

[¶14] Second, assuming, as Mr. Malpass claims, that the lent employee doctrine merely requires an assessment of the relationship between the special employer and the employee, *see* 3 Larson § 67.01; *see also Doughty v. Work Opportunities Unlimited/Leddy Group*, 2011 ME 126, ¶ 17, 33 A.3d 410, the hearing officer, after applying the basic tests of employment, concluded that there was no contract for hire, express or implied, between Mr. Malpass and JMG, the purported special employer. *See* 39-A M.R.S.A. § 102(11)(A)(7) (Supp. 2013).

[¶15] Mr. Malpass suggests that the hearing officer should have inferred the existence of a contract for hire from Mr. Malpass's testimony that he agreed to help raise the wall in order to enhance his chances of getting future work from Gibbons Construction. *See* 3 Larson § 65.03[2] (stating that in certain situations an expectation of reciprocation may give rise to an implied contract of employment).

[¶16] However, the hearing officer's explicit findings support the conclusion that there was no contract for hire, express or implied, between Mr. Malpass and JMG. The hearing officer found that Mr. Malpass: "simply agreed to assist with no expectation of compensation for his service"; "was an unpaid volunteer rendering a purely gratuitous service"; "did it as a favor"; "had no expectation of compensation for his assistance, nor was he under the control of Jacob Gibbons"; and that he "chose to help raise the wall." Moreover, any expectation of future work would have come from Gibbons Construction, not JMG

(despite the family relationship between the owners of the two businesses). Accordingly, the hearing officer did not misapply the law when determining that Mr. Malpass was not an employee, lent or otherwise, of JMG when raising the wall.

B. Adequate Findings of Fact

[¶17] Mr. Malpass next contends that the hearing officer's findings of fact and conclusions of law are insufficient. He specifically argues that the hearing officer erred when finding that Philip Gibbons's testimony that he dealt directly with Mr. Gaudet only, and that Philip Gibbons had no knowledge of the relationship between Mr. Gaudet and Mr. Malpass, was sufficient to defeat the claim that there was an employee-employer relationship between Mr. Malpass and Gibbons Construction. Mr. Malpass asserts that the hearing officer was obligated to make further findings regarding Gibbons Construction's and JMG's employment practices; specifically, whether they routinely misclassified employees as independent contractors, and whether Mr. Malpass had been likewise misclassified.

[¶18] Because Mr. Malpass made a request for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (2001), and submitted proposed additional findings, we do not assume that the hearing officer made all the necessary findings to support the conclusion that there was no employment

relationship between Mr. Malpass and Gibbons Construction, or between Mr. Malpass and JMG. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Id.* (quotation marks omitted). When requested, a hearing officer is under an affirmative duty under section 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982).

[¶19] The findings provide an adequate basis for appellate review. The issue in the case turns on the employment relationships between Mr. Malpass, Gibbons Construction, and JMG. The Act defines the term "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written, except . . . (7) an independent contractor." 39-A M.R.S.A § 102(11)(A)(7) (Supp. 2012). In addition to finding that Philip Gibbons dealt directly with Mr. Gaudet and had no knowledge of the relationship between Mr. Gaudet and Mr. Malpass, the hearing officer also found that in the past, Mr. Malpass had done some work directly for Philip Gibbons, installing a mantelpiece and two sets of stairs with railings in Philip Gibbons's home. For these jobs at his home, Philip Gibbons paid Mr. Malpass by check, based on a set price. In contrast, Gibbons

Construction did not engage Mr. Malpass directly to perform the finish carpentry work at the job site where he had been working on the day he was injured.

[¶20] Because Mr. Gaudet and Mr. Malpass considered themselves partners, the hearing officer also made findings regarding the employment relationship between Gibbons Construction and Mr. Gaudet to determine whether Gibbons Construction could have hired Mr. Malpass as an employee derivatively, even though Philip Gibbons dealt only with Mr. Gaudet. After reviewing the factors set forth in 39-A M.R.S.A. § 102(13) (2001),[1] the hearing officer determined that Mr. Gaudet (and, by extension, Mr. Malpass) was an independent contractor and not an employee vis à vis Gibbons Construction. The hearing officer made ample findings of fact to support this determination, including that Mr. Gaudet (1) received a fixed price from Gibbons Construction for a specific job, rather than being paid by the hour; (2) had the right to (and actually did) employ assistants, including Mr. Malpass; (3) furnished his own carpentry tools; (4) divided up and scheduled his own work with Mr. Malpass; (5) engaged in finish carpentry, one of various residential construction trades commonly conducted by independent contractors; (6) had an ongoing, but not exclusive, relationship with Gibbons Construction to perform a series of discrete projects; and (7) was paid for each project upon completion of the finish carpentry work.

[1] Title 39-A M.R.S.A. § 102(13) has since been repealed and replaced. *See* P.L. 2011, ch. 643 §§ 7, 8 (effective Dec. 31, 2012, codified at 39-A M.R.S.A. § 102(13-A) (Supp. 2013)). The changes do not apply in this case.

[¶21] With respect to JMG, the hearing officer found that Mr. Malpass volunteered to help raise the wall, did not expect any compensation, agreed to help as a favor, and was not under the control of JMG.

[¶22] These findings provide an adequate basis to review the hearing officer's conclusion that any contract of hire between Gibbons Construction and Mr. Malpass was as an independent contractor,[2] not an employee, and that there was no contract of hire between Mr. Malpass and JMG.

[¶23] In addition, the hearing officer was under no obligation to make specific findings, despite being requested, regarding the nature of the relationships among Gibbons Construction, JMG, and their regular crew of workers. The issues for resolution in this case involved the relationships between Mr. Malpass and two potentially responsible employers, Gibbons Construction and JMG—not the other workers that may have been on the job sites. The hearing officer made specific, adequate findings regarding the nature of the relevant relationships.

C. *Harlow v. Agway, Inc.*

[¶24] Finally, Mr. Malpass contends the hearing officer erred when finding that Mr. Malpass acted voluntarily when he assisted the framing crew in lifting the wall, and was not under the control of Jacob Gibbons or JMG, pursuant to *Harlow v. Agway, Inc.*, 327 A.2d 856 (Me. 1974). *Harlow* stands for the proposition that

[2] Being an independent contractor assumes the existence of a contract of hire, albeit one where the person "performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing those services." 39-A M.R.S.A. § 102(13).

a person "accidentally injured while gratuitously performing a type of service for another, during which he does not subject himself to any control by the person for whom such service is rendered" is excluded from coverage. *Id*. at 860. The claimant in *Harlow* injured his back while unloading sheet rock that had been delivered to a site where his brother was building a house. *Id.* at 859. The former Commission awarded compensation benefits, finding an implied contract of employment. *Id.* at 860. The Law Court reversed that decision, determining that no contract of hire existed because there was no payment or expectation of payment for the work and the delivery company had no right to control the claimant. *Id.*

[¶25] The hearing officer found that, like the injured helper in *Harlow*, Mr. Malpass (1) had no expectation of compensation for assisting JMG's crew with lifting the wall, (2) was not under the control of Gibbons Construction or JMG, and (3) was under no compulsion to assist.

III. CONCLUSION

[¶26] The hearing officer's factual findings are supported by competent evidence, the decision involved no misconception of applicable law, and the application of the law to the facts was neither arbitrary nor without rational foundation.

The entry is:

The hearing officer's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

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