BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

EDUARDO HERNANDEZ-ESCOBAR,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No.: 1486700
	)	
J.T. HOOVER CONCRETE, INC.,	)	
	)	
Employer,	)	
	)	
and	)	Hearing No.: 1486120
	)	
DSH ENTERPRISES, INC.,	)	
	)	
Employer.	)	

ORDER ON DSH ENTERPRISES, INC.'S MOTION FOR REARUGUMENT AND J.T. HOOVER CONCRETE, INC.'S MOTION FOR REARGUMENT

Mr. Eduardo Hernandez Escobar ("Claimant") contends that he injured his thoracic spine in a work accident on April 17, 2019 while doing concrete flatwork at Building 91 of the Bayberry North project. Blenheim Homes was the general contractor of this job. On June 21, 2019, Claimant filed a Petition to Determine Compensation Due against J.T. Hoover Concrete, Inc. ("Hoover"). On July 8, 2019, Claimant filed a Petition to Determine Compensation Due against DSH Enterprises, Inc. ("DSH"). On July 12, 2019, DSH filed a motion requesting the Board to dismiss it from Claimant's claim on the grounds that DSH was not Claimant's employer at the time of the alleged work accident. On September 25, 2019, the Board issued an Order denying DSH's Motion to Dismiss and holding that Claimant was under the joint employ of Hoover and of DSH at the time of the alleged work accident.

DSH filed a Motion to Reargue dated October 21, 2019 under Rule 21(C) in which it requested the Board to reconsider its order and to dismiss DSH from this claim. On October 25, 2019, Hoover filed a response to DSH's Motion that included its own Motion to Reargue under Rule 21(C) in which it requested the Board to reconsider its order by finding DSH is solely liable for benefits to Claimant and to award Hoover a payment by DSH of a reasonable attorney's fee for DSH's counsel allegedly acting in bad faith. On November 1, 2019, Claimant filed his response to both Motions. Also, on November 1, 2019 DSH filed its response to Hoover's Motion to Reargue.

All three parties contend that the Board was in error when it decided that Claimant was under the joint employ of DSH and of Hoover because the issue of the existence of a joint employment relationship was not properly before the Board. After reconsideration, the Board acknowledges that the parties are correct. None of the parties argued the existence of a joint employment relationship. DSH argued that Claimant was under the exclusive employ of Hoover. Hoover argued that Claimant was under the exclusive employ of DSH. Claimant did not take a position other than to protect his interests that either DSH or Hoover is liable to Claimant for his work injury. The Board, therefore, vacates its decision finding a joint employment relationship. After weighing the evidence and choosing between employers, the Board finds for the purposes of Claimant's workers' compensation claim, that Hoover is Claimant's employer.

Ms. Nicole Borowenski has been simultaneously serving as the head of Human Resources for DSH and Hoover for over ten years. Her father, John Hoover, is the exclusive owner and president of Hoover. Her mother, Ms. Deanna Hoover, is the exclusive owner and president of DSH.

Ms. Borowenski testified that DSH's State Business License is for registered contracting services. Only Hoover had a County contracting license. DSH does administrative work, specifically, payroll and human resources functions for Hoover. DSH does not charge Hoover a premium to handle Hoover's administration. She stated that DSH is a leasing company that exclusively leases to Hoover employees listed on DSH's payroll to provide services to Hoover. DSH submits to Hoover the wage amount owed to such employees. Hoover deposits such amount to DSH's bank account and DSH issues paychecks with the DSH company name on them. Hoover is ultimately responsible for 100% payment of wages to employees identified as DSH employees.

Mrs. Borowenski testified that only Hoover could hire and fire Claimant. Upon Claimant's hire, Hoover assigned Claimant to work under the Blenheim contract. The job site where Claimant was allegedly injured was under Hoover's exclusive control. The contract under which Claimant was performing services was between Blenheim and Hoover. DSH was not identified as a party to the contract. Claimant took direction from his foreman, Mr. Celestino, who Mrs. Borowenski testified was employed by Hoover. Hoover presented evidence that Mr. Celestino was not listed as an employee on its payroll. Even if Mr. Celestino was under DSH's payroll, the evidence supports that Hoover ultimately directed performance of work under the Blenheim contract, not DSH. Hence, at the time of the work accident, Claimant was under the control of Hoover.

Claimant was performing services for Hoover as evidenced by Claimant's testimony that his construction equipment such as his helmet identified Hoover and not DSH. The trucks on the job site including the truck providing Claimant's transportation to the job site had Hoover written on them. DSH was not identified in any written form anywhere on the job site. Blenheim did not request a certificate of insurance from DSH. The certificate of insurance pursuant to the Blenheim contract only identified Hoover as a subcontractor. DSH was not identified anywhere in the

contract or in correspondence regarding the certificate of insurance. The accident report was completed on a Hoover form by a Hoover employee.

Ms. Borowenski testified that although the job application Claimant completed did not identify either Hoover or DSH as the employer for whom Claimant was applying for a job, there was a question on the job application that pertained to Claimant's employment history with Hoover. There was also a question on the job application asking Claimant to identify the names of Hoover employees Claimant knows. There was no question specifically relating to DSH employees or DSH employment history.

Hoover alternatively contends that DSH should ultimately be responsible to Claimant because: DSH had previously accepted similar claims while insured by another company (the same insurance company insuring Hoover); NorGUARD (DSH's current insurance carrier) refuses to acknowledge responsibility for this claim by narrowly interpreting DSH to be a payroll service when DSH recognized that NorGUARD's system identifies DSH as performing concrete flatwork and excavation; and NorGUARD failed to explain its charge of a single outsized premium inconsistent with a payroll company. DSH's Brief in Response to Hoover's motion rebuts Hoover's contentions.

"The rights of the employee are determined primarily according to the relationship of the employee and the employer." Bureau of Adult Corrections v. Dernberger, 529 A.2d 245, 247 (Del. Supr. 1987). "The insurer is the surety for the employer. The Workmen's Compensation Act requires that an application of the statute ...be governed by its relation to the employer and not be confined to its relation to a particular surety." *Id.* at 246-47.

Mr. Albin Marcincavage, an employee of NorGUARD Insurance, testified that DSH's insurance policy became effective April 2, 2019. He testified that the premium was calculated on

misinformation. As is customary, at the end of the year, NorGUARD will perform an audit of the policy and make appropriate adjustments. He testified that the type of work Claimant was performing would not be covered under the insurance policy although he acknowledged that NorGUARD was aware that DSH employees performed concrete flatwork, excavation and clerical work. The latter does not change the analysis for the purposes of the workers' compensation statute. For the reasons previously cited, the Board finds that the employment relationship for the purposes of Claimant's claim is between Claimant and Hoover.

> The fact that a previous insurance carrier mistakenly paid another employee's workers compensation claims provides no support for, and in fact is irrelevant to, a conclusion that ... [an employer] brought ... [an activity] into the orbit of ... [a claimant's] employment. It would be a curious result indeed if the prior mistakes of a third party, no longer involved in any way with any party here, were to define for ... [the employer] the orbit of ... [the claimant's] employment.

Morris James, LLP v. Weller, Del. Super., C.A. No. N17A-08-005, Wharton, J., 2018 WL 1611267, at *8 (March 29, 2018). Aff'd by *Weller v. Morris James, LLP*, 196 A.3d 1252 (Del. Supr. 2018):

Hoover charged DSH's attorney of acting in bad faith and came prepared with multiple copies of Hoover's attorney's Affidavit of Attorney's Fees pursuant to Hoover's allegation. Hoover's allegation of bad faith against DSH was not properly noticed and, therefore, not properly before the Board. To allow Hoover to proceed with such allegation would be to allow trial by ambush. The Board makes no ruling on such allegation.

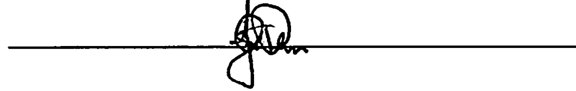
WHEREFORE, the Board vacates its Order of September 25, 2019 and grants DSH's initial Motion to Dismiss due to the finding that Hoover is the employer liable to Claimant pursuant to Claimant's Petition to Determine Compensation Due.

IT IS SO ORDERED THIS 2nd DAY OF MARCH, 2020.

____
ROBERT MITCHELL

____
ANGELIQUE RODRIGUEZ

I, Julie Pezzner, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



Mailed Date:

____
OWC Staff

Cynthia Pruitt, Attorney for Claimant
Joseph Andrews, Attorney for DSH Enterprises, Inc.
Nicholas Bittner, Attorney for J.T. Hoover Concrete, Inc.