COLORADO COURT OF APPEALS **2017COA104**

Court of Appeals No. 16CA1358
Industrial Claim Appeals Office of the State of Colorado
DD No. 5162-2016

Varsity Tutors LLC,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Division of Unemployment Insurance Employer Services-Integrity/Employer Audits,

Respondents.

ORDER REVERSED

Division II
Opinion by JUDGE BERNARD
Dailey and Fox, JJ., concur

Announced July 27, 2017

Polsinelli PC, Bennett L. Cohen, Denver, Colorado, for Petitioner

Cynthia H. Coffman, Attorney General, Evan P. Brennan, Assistant Attorney General, Denver, Colorado, for Respondents

No Appearance for Respondent Division of Unemployment Insurance Services-Integrity/Employer Audits

¶ 1 The Internet has changed how we work in many ways. For example, it provides opportunities for consumers seeking services to find businesses offering them. One way businesses provide such services fits a standard employer-employee model: Businesses use the Internet to recruit workers; the businesses and the workers have a standard employer-employee relationship; and the workers provide services to consumers.

¶ 2 There are other models that do not fit the standard employer-employee model. Some businesses may not want to have employees, and some workers may not want to be employees. But businesses may have a large enough Internet presence that they can provide certain advantages those independent workers cannot match. The Internet provides a convenient forum for businesses to introduce workers to consumers. As the "middle man," the business takes a fee to make the introduction, but the workers and the consumers work out most of the details of the business relationship between them. In such circumstances, workers may often be independent contractors instead of employees.

¶ 3 Courts in Colorado have historically looked at a variety of different circumstances when determining whether workers are

employees of a business or independent contractors. But some of the circumstances that point to workers being independent contractors have lost some of their descriptive force in the Internet Age. Two examples are that independent contractors tend to have their own business cards and their own offices. While these examples still ring true in many cases, the Internet has, for some workers, made business cards and offices obsolete. Workers can solicit business online, and they can work from anywhere — a home, a coffee shop, a hotel room, an airplane, a car — they can connect their laptops to the Internet.

¶ 4 How, then, in the Internet Age, can we differentiate between employees and independent contractors? We apply, as we always have, a test that the legislature has established. We describe it below. But, in applying this test, we must also recognize how the Internet has changed and continues to change the business world.

¶ 5 We are asked in this appeal to decide whether several workers are the employees of a business or whether they are independent contractors. The business, Varsity Tutors LLC, recruits tutors to teach students. Varsity claims that the tutors fall on the independent contractor side of the line. The Division of

Unemployment Insurance Employer Services — Integrity/Employer Audits for the Colorado Department of Labor and Employment, which we shall call the "Division," thinks that the tutors fall on the other side of the line, so they were Varsity's employees.

¶ 6 The difference between independent contractors and employees was the crux of this appeal. If the tutors were employees, then Varsity was obligated to pay unemployment taxes on any wages that it paid the tutors. But, if the tutors were independent contractors, then Varsity did not have to make such payments. *See generally* Colorado Employment Security Act, §§ 8-70-101 to 8-82-105, C.R.S. 2016. (We refer to this act by its initials, "CESA.")

¶ 7 The dispute between Varsity and the Division found its way first to a hearing officer and then to a panel of the Industrial Claim Appeals Office. The hearing officer and the panel decided that twenty-two tutors who performed services for Varsity in 2013 were in "covered employment" — meaning that they were Varsity's employees — for CESA's purposes. As a result, the hearing officer and the panel agreed with the Division, and they ordered Varsity to pay delinquent unemployment insurance taxes.

¶ 8 Varsity appeals the panel's final order. We reverse because we conclude that the tutors were independent contractors, not Varsity's employees.

¶ 9 (In reaching this conclusion, our analysis does not address the question whether the tutors were independent contractors under federal law for purposes of either Varsity's or the tutors' federal income tax liability.)

I. Background

¶ 10 Varsity provided an online platform that connected tutors with students. To facilitate the process, Varsity entered into contracts with individual tutors, who, in turn, advertised their services on its website to students who were members of the general public. The process went as follows: Students who were interested in working with particular tutors contacted Varsity. Varsity then put the tutors and the students together by providing contact information. Students and tutors then contacted one another to arrange tutoring sessions.

¶ 11 Varsity and the tutors agreed to an hourly rate that Varsity would pay them for providing tutoring services. Varsity generally charged students about twice that much.

¶ 12 In 2014, the Division audited Varsity's books for calendar year 2013 to determine the nature of the employment relationship between Varsity and the tutors. The Division decided that at least twenty-two tutors were Varsity's employees. So the Division issued a liability determination that required Varsity to pay $133.73 in unemployment taxes on the amounts that it had paid the tutors.

¶ 13 Varsity asked for an evidentiary hearing before a hearing officer. The hearing officer found that the written agreements between Varsity and the tutors did not create a rebuttable presumption of an independent contractor relationship. Accordingly, Varsity then had to assume the burden of proving that the tutors were independent contractors for CESA's purposes. *See* § 8-70-115(1)(b), C.R.S. 2016.

¶ 14 Although the hearing officer found that the tutors were not subject to Varsity's direction and control in the performance of their services, he also decided that Varsity had not proved that the tutors were customarily engaged in an independent trade, occupation, or profession related to the services performed. He therefore concluded that the tutors were in covered employment during calendar year 2013 for CESA's purposes.

¶ 15 Varsity appealed. The panel affirmed the hearing officer's decision. It noted that, because the agreements between Varsity and the tutors did not satisfy the requirements of section 8-70-115(2), Varsity had the burden to prove that the tutors were customarily engaged in independent businesses. Consequently, because Varsity had not provided significant evidence that the twenty-two tutors had been involved in ongoing businesses, the panel decided that the hearing officer had not erred when he had found that the tutors were Varsity's employees for CESA's purposes.

II. Standard of Review

¶ 16 "The determination of an employment relationship is a question of fact . . . ." *John W. Tripp & Assocs. v. Indus. Claim Appeals Office*, 739 P.2d 245, 246 (Colo. App. 1987). Whether a business has met its burden of proving that a worker was an independent contractor is also a question of fact. *Visible Voices, Inc. v. Indus. Claim Appeals Office*, 2014 COA 63, ¶ 11.

¶ 17 "[W]e will not disturb the agency's factual findings if they are supported by substantial evidence." *Id.*; *see also* § 8-74-107(4), C.R.S. 2016. "Substantial evidence" is evidence that is "probative, credible, and competent, of a character which would warrant a

reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences." *Allen Co. v. Indus. Comm'n*, 735 P.2d 889, 890-91 (Colo. App. 1986) (quoting *Rathburn v. Indus. Comm'n*, 39 Colo. App. 433, 435, 566 P.2d 372, 373 (1977)), *aff'd*, 762 P.2d 677 (Colo. 1988).

¶ 18 If, as in this case, "there [was] no material conflict in the evidence before" the [panel], we "may reach [our] own conclusions, and [we are] not bound by [the panel's] findings of fact." *Denver Post Corp. v. Indus. Comm'n*, 677 P.2d 436, 438 (Colo. App. 1984). In other words, "since the facts are undisputed, we are not bound by the [panel's] legal conclusions." *Irwin v. Indus. Comm'n*, 695 P.2d 763, 766 (Colo. App. 1984).

¶ 19 The question of whether an administrative agency "applied the correct legal standard or legal test raises a question of law that we review de novo." *Visible Voices, Inc.*, ¶ 11; *see also* § 8-74-107(6)(d) ("The industrial claim appeals panel's decision may be set aside only [if] . . . the decision is erroneous as a matter of law.").

III. The Contract, the Hearing Officer's Findings, and the Panel's Approach

¶ 20 Before we can begin our analysis, we must dive more deeply into the facts of this case.

A. The Contract

¶ 21 We begin by examining the contract between Varsity and the tutors. We focus first on the language supporting a conclusion that the tutors were independent contractors.

¶ 22 The contract's second line states, in bold print, "Independent Contractor Agreement for Services." One paragraph in the body of the contract is entitled "Independent Contractor." It states, among other things, that (1) the tutor's status in the contract "is that of an independent contractor and not of an employee, agent or representative of [Varsity] for any purpose"; (2) Varsity is not required to use the tutor's services; (3) the tutor is "free to pursue other professional and personal activities," as long as they do not interfere with the tutor's contractual obligations; (4) nothing in it "will be construed to create a partnership, joint venture, agency or employment relationship between" Varsity and the tutor; and (5) the contract is "NOT an employment agreement" between Varsity and the tutor.

¶ 23 The contract also states that Varsity (1) "does not possess the skills, services or personnel necessary to train, supervise or provide tutoring services to students and relies on independent contractors to provide such services"; (2) "interviews and evaluates available contractors to determine" whether they have the "skills, availability, and dedication" that it requires "to enter into a tutoring relationship with a specific student"; (3) "does not provide any training, required work programs or other instructions regarding the preparation, content, or the manner in which tutoring services are provided"; and (4) "desires to engage the services of [the tutor] as an independent contractor . . . for the purposes of providing services including, but not limited to, academic tutoring and test preparation for" students.

¶ 24 Turning to the tutors, the contract states that they (1) will provide the tutoring services; (2) are solely responsible for "the preparation and manner, means[,] . . . method of delivery . . . [and] content" of those services; (3) acknowledge that Varsity does not "participate in or support the development of the [s]ervices or their delivery"; (4) are solely responsible to set up the tutoring meetings with the students; (5) "shall be fully responsible to provide all tools

and materials necessary to carry out the [s]ervices," and the contract gives examples of tools and materials, including "computers, calculators, reference materials, textbooks, notebooks, pens, [and] art supplies"; (6) "acknowledge[] that [Varsity] is not obligated to provide any insurance of any type that covers" the tutors' activities; (7) will be paid "only for time spent tutoring and will not be compensated at that rate for time spent traveling to and from tutoring sessions or preparing for tutoring sessions"; (8) understand that Varsity will not "pay any federal state or local income tax, or any payroll tax of any kind and [that] such taxes will not be withheld or paid" by the business and that paying such taxes is the tutors' responsibility; (9) understand that, as "independent contractor[s]," they are not eligible for benefits, such as "pension, health or other fringe benefits"; and (10) understand that Varsity is "not obligated to obtain workers' compensation or unemployment insurance on behalf" of the tutors.

¶ 25 We next examine the language suggesting that the tutors were employees. Most of this language discusses control that Varsity has over the tutors or limitations on the tutors' freedom of action within their working environment. But this control and these

limitations involve matters that are peripheral to the task of providing tutoring services. For example, the contract describes (1) how tutors report their hours; (2) how they must stay in touch with Varsity; (3) how they must stick to arrangements that they make with students; (4) the kinds of conduct that they must avoid, including criminal behavior; (5) a dress code; (6) limitations on revealing Varsity's proprietary information; and (7) the requirement that tutors must have insurance on cars that they drive to tutoring sessions.

B. The Hearing Officer's Findings of Fact

¶ 26 The hearing officer found that Varsity had approximately 11,000 tutors nationwide. One hundred of those tutors worked in Colorado. Out of the one hundred Colorado tutors, twenty-three performed tutoring services for Varsity in the fourth quarter of 2013. Only one of the twenty-three tutors had an independent business.

¶ 27 The hearing officer also found that the contract described the business relationship between Varsity and the tutors. He found that "many tutors . . . maintain[ed] listings in directories and websites." The tutors' average income from Varsity was $250

during the period in question; they did "not rely on income provided by Varsity as their primary source of income"; and they "devoted a minimal amount of their professional time to work through" Varsity. Varsity did not instruct the tutors on how to "perform their . . . services," and it was up to the tutors to "determine the best method of providing services to the individual student."

¶ 28 Varsity sent the tutors "occasional e-mails reminding them that Varsity considered them to be independent contractors, and not employees, and advising them that they had to handle their own tax responsibilities." Varsity informed students in writing that the tutors were independent contractors, not employees.

¶ 29 Varsity's website recruited tutors by stating that tutoring "jobs" were available. The website also stated, in small print, that tutors were independent contractors and that they were not applying for employment.

¶ 30 Although the twenty-two tutors were free to pursue a business providing other tutoring services, Varsity did not provide much evidence that any of them had. The hearing officer also found that none of the tutors were using the money they earned from Varsity as their primary source of income, and that the amounts that they

had earned were so low that they might have been providing these services as a hobby. Varsity's witnesses testified about what the tutors were allowed to do in addition to providing tutoring services for Varsity, which included full-time work elsewhere. But the hearing officer decided that he had not heard any persuasive evidence that the twenty-two tutors had been customarily engaged in providing tutoring services to other entities.

C. The Panel's Approach

¶ 31 The panel concluded that Varsity had not proved that the twenty-two tutors were engaged in an independent business because the record did not contain "evidence of an [ongoing] business structure maintained" by the tutors in 2013. To reach this conclusion, it focused on the lack of evidence that the tutors had businesses cards, used a "separate business phone number and address," had a "financial stake in a business," had the "ability to employ others to perform the work and to set the price for performance," or "carried liability insurance."

IV. The Tutors Were Independent Contractors

A. Legal Principles

¶ 32 CESA establishes the test that we use to determine whether a worker is an employee or an independent contractor. Section 8-70-115(1)(b) sets out a general rule: "[S]ervice performed" by one worker for another person "shall be deemed to be employment, "irrespective of whether the common-law relationship of master and servant exists . . . ."

¶ 33 Independent contractors are exceptions to the general rule, found in section 8-70-115(1)(b), that a "service performed" by one worker for another person "shall be deemed to be employment." CESA sets out two different ways in which a business — Varsity in this case — can show that a worker is an independent contractor.

¶ 34 The first way requires a business to prove, by a preponderance of the evidence, both parts of a two-part test. This means that the business must show that a worker was

- "free from control and direction in the performance of the service" under any "contract for the performance of the service" and "in fact"; and
- "customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

§ 8-70-115(1)(b), (c).

¶ 35 (We note that the hearing officer and the panel ruled in Varsity's favor on the first part of the independent contractor test. They both decided that the tutors were free from Varsity's control and direction in the performance of their services under their contracts and in fact. *See* § 8-70-115(1)(b), (c). Varsity obviously does not contest this determination.)

¶ 36 The second way a business can establish that its workers are independent contractors requires it to show, in a written document signed by the business and the worker, that the business did not do nine different things that are listed in section 8-70-115(1)(c). For example, the business cannot "[p]rovide more than minimal training" for the worker, § 8-70-115(1)(c)(V), or "[p]ay the [worker] personally but rather makes checks payable" to the worker's "trade or business name," § 8-70-115(1)(c)(VIII).

¶ 37 A document that satisfies these conditions creates a "rebuttable presumption of an independent contractor relationship" between the business and the worker as long as it also contains one other thing: a particular kind of disclosure. § 8-70-115(2). This disclosure must be in either larger print than the rest of the document or "in bold-faced or underlined type . . . ." *Id.* The

disclosure must also state that (1) the worker, as an independent contractor, "is not entitled to unemployment insurance benefits" unless the worker or "some other entity" provides them; and (2) the worker must "pay federal and state income tax on any moneys paid pursuant to the contract relationship." *Id.*

¶ 38 Returning to the question of whether a worker was "customarily engaged in an independent trade, occupation, profession, or business related to the service performed," our supreme court has made four salient points to guide this inquiry. *Indus. Claim Appeals Office v. Softrock Geological Servs., Inc.*, 2014 CO 30, ¶ 1 (citation omitted).

¶ 39 First, the question is one of fact that "can only be resolved by analyzing several factors," and not merely the single factor of whether a worker worked for a business. *Id.* at ¶ 2.

¶ 40 Second, a proper analysis evaluates the "totality of the circumstances" of the "dynamics of the [working] relationship" between the business and the worker. *Id.*

¶ 41 Third, although the nine factors found in section 8-70-115(1)(c) are relevant to the analysis of the question, they are not "an exhaustive list." *Id.* In addition to the nine factors, the

supreme court held that "other factors may also be relevant." *Id.* at ¶ 16. Citing *Long View System Corp. USA v. Industrial Claim Appeals Office*, 197 P.3d 295, 300 (Colo. App. 2008), the court identified some examples of such "other factors," including whether a worker (1) had an "independent" business card, business address, or business telephone; (2) "used his or her own equipment on the project"; (3) "set the price for performing the project"; or (4) "employed others to complete" it. *Softrock*, ¶ 16.

¶ 42 Fourth, when applying a totality-of-the-circumstances, multi-factor test, the single factor of whether a worker "actually provided services for someone other than" the business cannot be dispositive. *Id.* at ¶ 18. To rely on this single factor would ignore other factors such as "the intent of the parties, [and] the number of weekly hours" that the worker actually worked for the business, or whether the worker "even sought other work in the field." *Id.*

¶ 43 The supreme court applied *Softrock*'s fourth point in *Western Logistics, Inc. v. Industrial Claim Appeals Office*, 2014 CO 31. It emphasized that "a court or agency [cannot] determine whether [a worker] is an independent contractor based on a single-factor

inquiry into whether the individual performed work in the field for someone else." *Id.* at ¶ 14.

B. Application of Legal Principles

¶ 44 Varsity asserts that it did not have an employer-employee relationship with the tutors and instead that the tutors were independent contractors. As a result, Varsity's contention continues, the panel erred when it concluded that Varsity was required to pay unemployment taxes.

¶ 45 More specifically, focusing on the second part of the two-part independent contractor test, Varsity asserts that the tutors were, for the purposes of subsections 8-70-115(1)(b) and (c), "customarily engaged in an independent trade, occupation, profession, or business related to the service performed." It asserts that the panel committed a legal error because it did not "apply the totality of the circumstances test" that our supreme court set out in *Softrock*. Instead, its contention continues, the panel relied on "traditional signs" of a separate business enterprise, such as business cards, that the division described in *Long View*. We agree, and, when we apply *Softrock*'s totality-of-the-circumstances test, we reach a different conclusion.

¶ 46 We conclude, for the following reasons, that the undisputed evidence in the record establishes that Varsity satisfied its burden of proving that the twenty-two tutors were independent contractors because they were customarily engaged in independent businesses in 2013 that were related to the tutoring services that they were performing.

¶ 47 First, we recognize that Varsity's contracts do not create a rebuttable presumption that the tutors were independent contractors. *See* § 8-70-115(2). They do not contain a disclosure, in large or bold-faced type, stating that the tutors are "not entitled to unemployment insurance benefits" and that they are "obligated to pay federal and state income tax" on the money that Varsity pays them. *See id.*; *cf. Fischer v. Colorow Health Care, LLC*, 2016 COA 130, ¶¶ 40-46 (concluding that, based on a statute, the absence of bold-faced type rendered an arbitration clause unenforceable).

¶ 48 But the absence of a large or bold-faced type disclosure does not mean that the contract does not incorporate the information that is supposed to be emphasized. Rather, the contract gives clear and prominent voice to those propositions. It states that Varsity is "not obligated to obtain . . . unemployment insurance on [the

tutors'] behalf" and that Varsity will not "pay any federal state or local income tax, or any payroll tax of any kind and [that] such taxes will not be withheld or paid" by the business and that paying such taxes is the tutors' responsibility.

¶ 49 So, although Varsity's contract does not precisely follow the letter of the statute, its only deviation is that the disclosures do not appear in large or bold-faced type. Including such large or bold-faced type is easy enough, but we nonetheless think that its absence does not prevent us from including the information that is supposed to be emphasized in our totality-of-the circumstances analysis. Most importantly, the tutors knew from the contract that Varsity would not obtain unemployment insurance for them or pay any income or payroll taxes for them and that they were obligated to pay those taxes. In other words, the disclosures in the contract are indicative that the tutors were independent contractors.

¶ 50 Second, we look to the rest of the contract's contents. It repeatedly refers to the tutors as "independent contractors"; in fact, the term "independent contractor" appears at least sixteen times. It does not provide the tutors with any training or instruction concerning their expertise. It places the burden on the tutors of

establishing the working relationship with the students. It gives Varsity minimal oversight or supervision over the tutors' work with the students. And it does not establish a curriculum or require the tutors to use any specific materials.

¶ 51 Third, we look to the nine-factor test found in section 8-70-115(1)(c)(I)-(IX). *See Visible Voices, Inc.*, ¶¶ 20-22 (noting that the nine statutory factors are relevant to the inquiry of "how a putative employer may prove an independent contractor relationship"). Six of those factors point to the tutors being independent contractors. Varsity does not (1) require the tutors to work exclusively for it; (2) establish specific quality standards for the tutors; (3) pay the tutors a fixed or contract rate, as opposed to an hourly rate; (4) provide any training for the tutors; (5) provide any tools, benefits, materials, or equipment to the tutors; or (6) establish the time when tutors are supposed to perform their duties.

¶ 52 (Three of the factors point to the tutors being employees. Varsity (1) can terminate the tutors' work during the contract period for reasons beyond violating the terms of the contract, such as committing crimes; (2) pays the tutors' personally, rather than

making out checks to their businesses; and (3) combines its business operations with the tutors' work.)

¶ 53 Fourth, we examine the criteria that the panel applied when considering whether the tutors were employees, which involved the lack of evidence that the tutors (1) had businesses cards; (2) used a "separate business phone number and address"; (3) had a "financial stake in a business"; (4) had the "ability to employ others to perform the work and to set the price for performance"; or (5) "carried liability insurance." By placing decisive weight on these factors, we conclude that the panel erred because it did not apply *Softrock*'s totality-of-the-circumstances test.

¶ 54 Fifth, the panel did not consider factors such as "the intent of the parties [or] the number of weekly hours" that tutors actually worked for Varsity, or whether the tutors "even sought other work in the field." *Softrock*, ¶ 18. In this case, the undisputed evidence, including the contract, indicated that Varsity and the tutors intended for the tutors to be independent contractors.

¶ 55 The tutors worked only a handful of hours in a week. One tutor worked about forty-six hours during the last three months of 2013; a few worked between twenty and twenty-five hours during

that quarter; and the rest worked less than twenty hours, including several who worked less than ten.

¶ 56 They did not make much money. The highest earner made about $865, followed by two tutors who made between about $435 and $475. Earnings then fell precipitously to a few tutors who made between $315 and about $380. Among the rest, the highest income was $280, and the lowest was $27.

¶ 57 And almost all of the tutors had "day jobs," ranging from a psychologist, to a certified pharmacy technician, to a financial advisor, to an English instructor, to a graduate research assistant, to a field engineer, to a student, to a tutor working for another company. When combined, the small number of hours, the modest income, and the tutors' day jobs suggest that the tutors' work for Varsity was more of a hobby and less of a second job. But it was a hobby in which they were customarily and independently engaged. *See* § 8-70-115(1)(b), (c).

¶ 58 Sixth, as *Western Logistics*, ¶ 14, made clear, the single factor of whether the tutors provided similar services to a company other than Varsity cannot be dispositive. In this case, the tutors had the necessary education and skills to tutor students in specific areas.

Almost all of the tutors only provided tutoring services through Varsity, but they could have tutored other students, either through another company or on their own.

¶ 59 Seventh, although New York's statutory test differs somewhat from Colorado's, one court in that state concluded that tutors in circumstances similar to those in this case were independent contractors, not employees. *See In the Matter of the Claim of Leazard*, 903 N.Y.S.2d 198, 199-200 (N.Y. App. Div. 2010).

¶ 60 Eighth, as we mentioned in the introduction, the Internet Age is changing how people work. As a Florida District Court of Appeal observed in *McGillis v. Department of Economic Opportunity*, 210 So. 3d 220, 223 (Fla. Dist. Ct. App. 2017), "[t]he [I]nternet [is a] transformative tool[], and creative entrepreneurs are finding new uses for [it] every day." (Citation omitted.) As a result, "[m]any more people have access to, and [a] voice in, markets that may once have been closed or restricted. . . . [M]any more people can now offer their services or hawk their wares to a vast consumer base." *Id.* (citation omitted). And they can do so as independent contractors.

¶ 61 Independent contractors no longer need business cards; they can advertise for clients online. Certain businesses, like the ones in this case, do not need their own telephone numbers or business addresses; they can do their work online from almost anywhere. They may choose to work without liability insurance, or they may not wish to employ other workers. But none of these things mean that they cannot be independent contractors, particularly under *Softrock*'s totality-of-the-circumstances analysis.

¶ 62 As the *McGillis* court noted, the question becomes "whether a multi-faceted product of new technology should be fixed into either the old square hole or the old round hole of existing legal categories, when neither is a perfect fit." *Id.* In this case, we are confident that the relationship between Varsity and the tutors, which is a product of the Internet, fits fairly comfortably into the old round hole of independent contractor, not the old square hole of employer-employee.

¶ 63 Because we have concluded that the tutors were independent contractors, we will not address Varsity's other contentions in support of their request that we reverse the panel's decision.

¶ 64 The decision of the panel of the Industrial Claim Appeals Office is reversed.

JUDGE DAILEY and JUDGE FOX concur.