



In the Missouri Court of Appeals Eastern District

DIVISION TWO

LEON BONE,	)	ED108470
	)	
Respondent,	)	Appeal from the Labor and Industrial
	)	Relations Commission
v.	)	#2055498
	)	
MACZUK FARMS TRUCKING, LLC,	)	Filed: January 19, 2021
	)	
Appellant,	)	
	)	
and	)	
	)	
DIVISION OF EMPLOYMENT SECURITY,	)	
	)	
Respondent.	)	

Maczuk Farms Trucking, LLC (Appellant) appeals from the decision of the Labor and Industrial Relations Commission (Commission), which adopted the findings and conclusions of the Division of Employment Security's Appeals Tribunal (Appeals Tribunal). The decision concluded that Leon Bone (Claimant) did not quit work but was discharged. We reverse the Commission's decision.

BACKGROUND

Claimant filed a claim for unemployment benefits, which Appellant protested, asserting Claimant earned no wages and he was a "1099 paid driver-contractor." Appellant's owner,

William Maczuk (Owner) signed the protest, which included details that Claimant was an independent contractor paid by 30 percent of the gross income on each load he hauled as a truck driver.

A deputy at the Division of Employment Security (DES) determined that Claimant was discharged, but not for misconduct connected with Claimant's work. The deputy found there was not a final incident, but that "the employer did not think it would work." Accordingly, Claimant was not disqualified from benefits. The deputy did not address the issue of whether Claimant was an employee or an independent contractor as raised in Appellant's protest. Appellant appealed from the deputy's determination specifically contesting the award of benefits on the basis that Claimant was an independent contractor. A hearing took place on September 9, 2018, before the DES's Appeals Tribunal Referee (Referee).

At the beginning of the Appeals Tribunal hearing, even though Appellant was specifically challenging Claimant's employment status, the Referee stated, "Well, for today's purposes, [Appellant is] deemed an employer, sir." He referred to a separate pending tax case in which the issue of whether Claimant was an employee would be addressed. Appellant immediately objected on the record to the characterization of Claimant as an employee. While the Referee acknowledged that the outcome on the tax matter could moot the hearing, the Appeals Tribunal would not determine the issue on appeal and decided whether Claimant left work voluntarily or was discharged, according to Section 288.050, which effectively ignored the properly raised relief sought by Appellant.

Claimant testified on his own behalf, and Owner testified on behalf of Appellant. In spite of Referee's decision to deem Claimant an employee for purposes of the hearing, Appellant was allowed to present substantial evidence regarding Claimant's status as an independent contractor

without objection. In fact, Claimant never contested Appellant's evidence. Specifically, the evidence showed Appellant had no control over when Claimant delivered his loads, and Claimant had received no written warnings or a policy handbook. Claimant repeatedly ignored Appellant's "8 a.m. rule" and set his own driving schedule, even though Appellant preferred drivers to be at a business to unload their trucks when a business opened. Claimant was responsible for how, when, and where he would work. Claimant also admitted against his own interest he had not been paid W-2 wages but was paid a percentage of the loads he hauled pursuant to a Form 1099. Claimant and Appellant operated under two written contracts expressly acknowledging that Claimant was an independent contractor and either could terminate the contract at any time for any reason.

The Appeals Tribunal reached its decision on July 31, 2019. It first found a pending tax case would address the issue of whether Claimant was an employee or independent contractor. Therefore, even though the appeal was specifically disputing Claimant's employment status, the decision assumed Claimant was an employee for purposes of the hearing. It found Claimant was hired by Appellant as an over-the-road truck driver and that Appellant "failed to provide substantial and competent evidence that [C]laimant had violated any policies of the employer or committed misconduct connected with work." The Appeals Tribunal concluded Claimant did not quit but was discharged for misconduct not connected with work. Therefore, he was entitled to benefits.

Appellant sought review with the Commission, again challenging Claimant's employment status. On October 28, 2019, the Commission found the Appeals Tribunal's decision was "fully supported by the competent and substantial evidence on the whole record" and "it is in accordance with the relevant provisions of the Missouri Employment Security Law."

The Commission affirmed and adopted the Appeals Tribunal's decision as its own. This appeal follows.

DISCUSSION

Appellant raises three points on appeal. Its first point alleges the Commission erred in deeming Claimant an employee of Appellant prior to the Appeals Tribunal's hearing because the decision is not supported by facts. Appellant claims the initial benefits determination did not address the matter of employer-employee status or acknowledge the information Appellant submitted to the Division upon being notified of Claimant's claim that Claimant was not an employee but was an independent contractor.

Appellant's second point alleges the Commission erred in deeming Claimant an employee of Appellant during and after the Appeals Tribunal hearing because there is no competent and substantial evidence in the record as a whole that Claimant had been an employee. Appellant contends Claimant admitted he had not been paid W-2 wages; Claimant agreed to be considered an independent contractor and not an employee in two written agreements; Claimant was responsible for how, when, and where he would work; Claimant was responsible for all tax obligations regarding his earnings; Claimant was responsible for paying his own unreimbursed expenses while working; Claimant would not wear any clothing indicating he might be employed as a wage earner; Claimant performed the very work he contracted to perform; Claimant did not work at Appellant's direction or under any set of its policies; Claimant could unilaterally terminate the written truck lease agreement at any time and for any reason; and Claimant could work for Appellant's competitors without restriction.

Appellant's third and final point alleges the Commission erred in finding Claimant had not been discharged for misconduct because the facts as found by the Appeals Tribunal do not

support the award of unemployment benefits in that Claimant stopped working for two months, made himself and the Appellant's truck unreachable and unavailable during that time, and indicated he would not work any longer by allowing his daughter to hang up on Owner when he inquired whether Claimant would continue to work and how Owner could find the truck so as to ensure its availability for use.

Standard of Review

Appellate review of the Commission's decision in an unemployment case is governed by Missouri's Revised Statutes, Section 288.210, and Article 5, Section 18 of the Missouri Constitution. *Sanders v. Div. of Employment Sec.*, 417 S.W.3d 895, 897 (Mo. App. W.D. 2014). The court, on appeal, may modify, reverse, remand for rehearing, or set aside the commission's decision on the following grounds and no other: (1) the commission acted without or in excess of its powers; (2) the decision was procured by fraud; (3) the facts found by the commission do not support the award; (4) there was no sufficient competent evidence in the record to warrant the making of the award. *Nat'l Heritage Enters., Inc. v. Div. of Emp't Sec.*, 164 S.W.3d 160, 165-66 (Mo. App. W.D. 2005); *see also Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). The appellate court reviews the Commission's decision, but reviews the Appeals Tribunal's decision to the extent it is adopted by the Commission. *Sanders*, 417 S.W.3d at 897. While the court gives deference to the Commission's findings of fact, the court is not bound by the Commission's conclusions of law or the Commission's application of law to the facts. *Kimble v. Div. of Employment Sec.*, 388 S.W.3d 634, 638 (Mo. App. W.D. 2013). "In reviewing the Commission's decision, an appellate court must view the evidence objectively, not in the light most favorable to the decision of the Commission." *Id.* (internal citation omitted).

Moreover, we examine the record as a whole to determine if it contains sufficient competent and substantial evidence to support the award. *Hampton*, 121 S.W.3d at 223.

Analysis

Although Appellant strenuously and repeatedly protested Claimant's award of unemployment benefits based on his status as an independent contractor, DES, the Appeals Tribunal and the Commission all refused to consider his properly raised claim. Appellant argues this determination was a threshold issue and the decision to essentially ignore it requires reversal. Appellant further argues the competent and substantial evidence in the record proves that Claimant was an independent contractor. We agree with Appellant's first two points.

The Missouri Employment Security Law, Sections 288.010-.390, require employers to make unemployment tax contributions to their employees, but not for independent contractors. *Nat'l Heritage Enters., Inc. v.*, 164 S.W.3d at 166. Section 288.034 defines "employment" and subsection 5 provides

Service performed by an individual for remuneration shall be deemed to be employment subject to [Missouri's employment security] law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.

Section 288.034.5. Where a worker has received remuneration from an employer, there is a presumption of an employer-employee relationship, and to the extent it challenges that presumption, the burden of proof rests with the employer to show, under the common law right to control test, that the worker is an independent contractor. *Bedford Falls Co. v. Div. of Emp't*

Sec., 998 S.W.2d 851, 856 (Mo. App. W.D. 1999); *see also Burns v. Labor & Indus. Relations Comm'n*, 845 S.W.2d 553, 556 (Mo. banc 1993).

Missouri Courts routinely apply a 20-factor test as “indices of control” in determining the nature of the employment relationship and whether an individual is an employee or independent contractor under the common law rules. *E.P.M. Inc. v. Buckman*, 300 S.W.3d 510, 514 (Mo. App. W.D. 2009). However, we note the 20 factors are guides in determining the nature of the employment relationship, not the only factors to consider. *Nat’l Heritage Enters., Inc.*, 164 S.W.3d at 167 (internal citation omitted). They are not bright-line rules, but are indices of control in determining employment status. *Id.* No single factor is conclusive, but some may be more important than others depending on the industry and context in which the services are performed. *Id.* The inquiry’s focus must be the degree to which the employer has the “right to control the manner and means of performance.” *Id.*

Thus, the first step in determining whether a claimant is covered by the Missouri employment security statutes is to determine whether his relationship constitutes one of “employment.” *Gateway Taxi Mgmt. v. Div. of Emp’t Sec.*, 461 S.W.3d 830, 832 (Mo. banc 2015). Simply characterizing a party an independent contractor or employee does not make it so; rather, a court must make a factual determination of independent contractor or employee status. *See Sakabu v. Regency Const. Co.*, 392 S.W.3d 494, 499 (Mo. App. E.D. 2012).

Even though Appellant had the burden to prove that Claimant was an independent contractor as alleged, the Appeals Tribunal and Commission refused to consider Appellant’s properly raised claim. In fact, the Appeals Tribunal went so far as to tell Appellant not to address this issue. Throughout the hearing, however, the Referee allowed Appellant to present evidence on the issue. The Appeals Tribunal and Commission left the issue of Claimant’s

employment status to be determined in some mysterious pending tax matter.¹ However, Appellant repeatedly and properly preserved the issue with an objection at each level of appeal. We find the Commission erred in deeming Claimant an employee of Appellant prior to the Appeals Tribunal's hearing because the initial benefits determination did not address the matter of employer-employee status despite Appellant's repeated assertions, which were uncontested by Claimant, that he was an independent contractor. Appellant's first point is granted.

Furthermore, the record as a whole contains competent and substantial evidence in addition to the specific findings of the Appeals Tribunal and Commission regarding Claimant's right of control to support a determination that Claimant was an independent contractor. Thus, we reverse on Point II in light of the entire record before us. *Hampton*, 121 S.W.3d at 222-23 (Mo. banc 2003). Appellant not only challenged, but successfully rebutted, the presumption that Claimant was an employee, with undisputed testimony from both sides that Claimant was an independent contractor. "The findings of the commission as to the facts, if supported by competent and substantial evidence and in the absence of fraud, shall be conclusive[.]" Section 288.210. Where the great weight of the evidence establishes that the appellant business did not have control over the manner in which the claimant worked, we conclude the claimant was acting as an independent contractor. *See Nat'l Heritage Enters., Inc.*, 164 S.W.3d at 173.

The Appeals Tribunal and Commission similarly found – but ignored – the facts that Appellant neither had control over Claimant delivering his loads nor had policies or handbooks in place regulating Claimant's conduct. The record supports this finding in that Claimant

¹ We would strongly question such an inefficient process that wastes judicial resources because a subsequent determination in a separate matter would moot the entire case, as admitted by the Appeals Tribunal Referee on the record in this matter. Moreover, claimants are given potentially false hope and security that they are entitled to unemployment benefits, only to be later informed that a different conclusion in another case (to which they might not even be a party) as to this threshold issue which would make them ineligible to the benefits they have been paid and the possible financial consequences.

repeatedly ignored Appellant's "8 a.m. rule" and set his own driving schedule even though Appellant preferred drivers to be at a business to unload their trucks when a business opened. Claimant was responsible for how, when, and where he would work. Claimant also admitted against his own interest he had not been paid W-2 wages but was paid a percentage of the loads he hauled pursuant to a Form 1099. Claimant and Appellant operated under two written contracts expressly acknowledging that Claimant was an independent contractor and either could terminate the contract at any time for any reason.

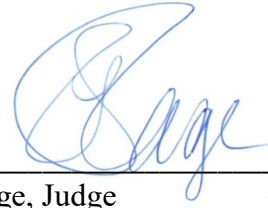
Moreover, the Appeals Tribunal and Commission made no contrary finding that would support a conclusion that Appellant had any control over Claimant as an employee. We determine that "the great weight of the evidence in the whole record favors the conclusion that [Claimant] was acting as an independent contractor[.]" *Nat'l Heritage Enters., Inc.*, 164 S.W.3d at 173. We do not defer to the Commission's determinations of law. Consequently, we find Claimant does not meet the statutory requirements for an employee to show he was entitled to unemployment benefits on the record before us.² Thus, we find the Commission erred in assuming Claimant's employment status and refusing to consider substantial and competent evidence on the record regarding the properly raised issue that Claimant was an independent contractor. Point II is granted.

Finding Appellant's first and second points dispositive, we do not address Appellant's remaining point.

² Our threshold determination is limited solely to the facts, parties, and record before us and is not necessarily binding on Appellant's pending tax litigation.

CONCLUSION

We reverse the Commission's decision and find Claimant was an independent contractor, not qualified for unemployment benefits.



Lisa P. Page, Judge

Robin Ransom, P.J. and
Sherri B. Sullivan, J., concur.