IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS= COMPENSATION APPEALS PANEL
AT NASHVILLE
(July 2000 Session)

GARY L. HOLT, SR. v. OZBURN-HESSEY MOVING COMPANY and AMERICAN ALTERNATIVE INSURANCE CORPORATION

Direct Appeal from the Chancery Court for Davidson County
No. 98-3108-III - Ellen Hobbs Lyle, Chancellor

No. M1999-02563-WC-R3-CV - Mailed - March 14, 2001
Filed - June 14, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated Section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The Appellant appeals from the amount of the award of permanent partial disability benefits. After a complete review of the entire record, the briefs of the parties, and the applicable law, we affirm the award made by the trial court.

Tenn. Code Ann. ' 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed

LEE RUSSELL, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J. and JAMES L. WEATHERFORD, SR.J., joined

Jeffrey P. Boyd, Jackson Tennessee, for the appellant, Ozburn-Hessey Moving Company

James R. Tomkins, Nashville, Tennessee, for the appellee, Gary L. Holt, Sr.

MEMORANDUM OPINION

This is an appeal by Defendant Ozburn-Hessey Moving Company (hereinafter referred to as "Ozburn-Hessey" or "the company") from an award of benefits made in favor of Gary L. Holt

("Claimant") on a claim filed pursuant to the Tennessee Workers Compensation Act. The trial court held that the Claimant was an employee of Ozburn-Hessey and awarded the Claimant a forty percent permanent partial disability to the body as a whole as a result of an injury to the back which allegedly occurred on July 23, 1998. The sole issue on appeal is whether the trial judge erred in her holding that the Claimant was an employee of Ozburn-Hessey and not a mere independent contractor. We conclude that the evidence does not preponderate against the trial judge's finding that the Claimant was an employee.

FACTS

The Claimant is a male high school graduate who was forty-six years of age at the time of trial. He has had no further formal education or vocational, technical, or clerical training. In 1977, he began to work as a part-time laborer for a moving company. He then obtained full-time employment as a laborer with a second moving company. He remained with that company for three or four years before he began to work for a third moving company. In 1995, the Claimant began his working relationship with Ozburn-Hessey.

Ozburn-Hessey contracts with customers to assist in the moving of personal property from one location to another. The moves may be from another area into the Nashville area or they may be simply from one location in the Nashville area to another. If the moves are from a substantial distance, Ozburn-Hessey simply sends a crew to "meet the truck on the road" and assist in the unloading and setting up process. If the move originates within a moderate distance of Nashville, then Ozburn-Hessey sends a truck or trucks, equipment, and a mover or crew to load the customer's items and to transport them to the new location.

Ozburn-Hessey has between twenty-five and thirty-five individuals whom the company acknowledges are full-time employees hired to move customers. In addition, there are between six and fifteen other individuals whose services are utilized by Ozburn-Hessey for moving but on a more or less part-time basis. Ozburn-Hessey identifies these individuals as "lumpers" and considers them to be independent contractors. The Claimant takes the position that this second category of laborers are simply part-time employees, and that they are employees and not independent contractors.

The Claimant alleges that on July 23, 1998, while participating in a moving job for Ozburn-Hessey, the Claimant was moving table tops and injured his lower back. The Claimant's back pain worsened over the succeeding couple of weeks, and on August 9, 1998, the Claimant went to a hospital emergency room. The Claimant was treated at Meharry General Hospital on August 18, 1998. The Claimant was provided with a list of three physicians and selected Dr. Stanley Hopp.

Dr. Hopp confirmed that the Claimant had a herniated disk and performed surgery on November 25, 1998. Dr. Hopp rated the Claimant as retaining a ten percent impairment to the body as a whole and placed the Claimant on permanent restrictions not to lift more than twenty pounds on any occasion and no more than ten pounds frequently. After the surgery and release by Dr. Hopp, the Claimant was never again offered work by Ozburn-Hessey. Both Ozburn-

Hessey's operations manager and the company's president testified at trial that there was no work available as a mover at their company or in the moving industry in general for a person with the restrictions that the Claimant now has.

Prior to trial, counsel for Ozburn-Hessey announced that there were only two contested issues, first, whether the Claimant was an employee or an independent contractor, and second, whether the Claimant was injured on a job he was performing for Ozburn-Hessey or on a later job on which he was working on his own. This second issue was not pursued by Ozburn-Hessey either in their closing argument at trial or in their brief on appeal. No issue is raised about the amount of the award given or about the Claimant's workers' compensation rate. The only issue on appeal is the status of the Claimant as an employee or an independent contractor.

While there is considerable dispute about the interpretation of the facts in this case, there is very little dispute about the facts themselves. The majority of the proof deals with the issue of the Claimant's employment status. The Claimant worked between four and five days each week for Ozburn-Hessey, while the fulltime employees worked six days per week. When the Claimant reported back to Ozburn-Hessey after completing a moving job, he would be offered the next job if one was available, and if not, Ozbum-Hessey would call him when one was available. The testimony was that the Claimant had the option of turning down jobs, but that in fact he never did. The company used him extensively because he performed very well.

The company told the Claimant on what date and at what time to check in at work and then at what time to be at the customer's home or business. Ozburn-Hessey determined how many movers, which movers, how many trucks, and which trucks, loaded with what equipment, would go out on any particular moving job. All of these details would come out of negotiations between Ozburn-Hessey and their customers, and Ozburn-Hessey obviously sought to please their customers. However, these details of time, personnel, and equipment were all presented to the Claimant as pre-determined aspects of the job.

Because of labor shortages, the company would occasionally ask the Claimant to locate and bring with him possible helpers for a given job. The Claimant sometimes located other workers and sometimes could not. The company always determined the number of the workers needed, their rate of pay, and the details of the helpers' assignments. The Claimant was not given money to pay the helpers, and he was not authorized to commit the company to a rate of pay or even authorized to guarantee that the helper would be able to work. As to any given moving job, the Claimant might be in charge of the crew or he might not be, but that would be determined entirely by Ozburn-Hessey's operations manager. The Claimant did not negotiate with the customer concerning any matter; agreements were worked out entirely between company sales personnel and the customers.

The Claimant typically brought his dolly to work with him because he preferred to use his own rather than a dolly provided by Ozburn-Hessey. The company argues that use of the dolly supports the argument that the Claimant was an independent contractor who provided his own equipment. However, the company's own witnesses testified that Ozburn-Hessey maintained its own equipment, which was stored on the company's trucks or trucks the company rented. Ozburn-Hessey provided not only the trucks, the number of which the company

determined in negotiations with customers, but Ozburn-Hessey also provided tow motors, computer carts, screwdrivers, wrenches, wheel dollies, book dollies, reefer dollies, and other equipment. Virtually all tools and equipment for virtually all jobs was provided by Ozburn-Hessey

When the Claimant was the head of a crew, or the Claimant was the only mover on a job, there was no one physically present to supervise his work. The testimony was that the Claimant was a very experienced and reliable mover, and he knew how loading should be done. On the other hand, if loads were to be split, that is, loads from two different locations were to be put on the same truck, the company and not the Claimant always determined whether it was appropriate to allow a split load and determined which part of the load would be picked up first.

The Claimant was paid by the hour, not by the job. He was generally paid every other day. Ozburn-Hessey did not withhold any money for Social Security or for Federal income taxes. The Claimant did not belong to the retirement system. Ozburn-Hessey reported the Claimant's income on 1099 forms, and the Claimant reported his income as business income rather than wages on his 1040 form each year. However, the Claimant showed only revenues and not expenses on his Schedule C with his tax returns, which the Claimant correctly points out is unusual for an independent contractor in reporting his business income.

The company's witnesses testified that they had the right to end the Claimant's work at any time by directing him to cease working and to leave the job site. In fact, Ozburn-Hessey simply ceased using the Claimant without giving prior explanation to the Claimant after the Claimant's treatment began. Ozburn-Hessey opinted out that the Claimant never completed an employment application and that on at least three occasions the Claimant was offered and declined to accept employee status. Claimant's counsel argues that the Claimant turned down full-time employment but retained part-time employment. The record is not clear on why the Claimant turned down the proposed change in his work status, whatever that change was. However, it appears that the practical effects would have been to increase the Claimant's work each week from four or five days to six days per week and would have triggered withholding and participation in the retirement program.

SCOPE OF REVIEW

Review on appeal of findings of fact by the trial court in a workers' compensation case shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated Section 50-6-225(e)(2). *Stone v. City of McMinnville,* 896 S.W.2d 548 (Tenn. 1999). The appellate court

must perform an independent examination in depth of a trial court's factual findings in order to determine where the preponderance of the evidence lies. *Galloway v. Memphis Drum Ser.,* 822 S.W.2d 584, 586 (Tenn. 1991).

ANALYSIS

The sole issue to be determined is whether the evidence at trial preponderates against the trial court's conclusion that the Claimant was an employee of Ozburn-Hessey rather than an independent contractor. A plaintiff making a workers' compensation claim has the burden of proving each element of his case by a preponderance of the evidence, but once it has been established that there was a working relationship between a worker and a business, then the burden of proof is on the business to prove that the worker was an independent contractor rather than an employee. *Galloway v. Memphis Drum Service, Inc.*, 822 S.W.2d 584, 586 (Tenn. 1991); *Jones v. Crenshaw*, 645 S.W.2d 238, 240 (Tenn. 1983). It is clear in this record that there was an ongoing, extensive working relationship of long duration between the Claimant and Ozburn-Hessey, and the burden was on the company at trial to prove that the Claimant was an independent contractor. Doubts about employment status must be resolved in favor of the worker in order to give effect to the purposes of the Workers' Compensation Act. *Galloway*, 822 S.W.2d at 586.

There are four indicia of employment status that have been expressly identified as appropriate for scrutiny by the trier of fact: 1. the right to control the conduct of the work; 2. the right of termination; 3. the method of payment; 4. the freedom to select and hire helpers; 5. the furnishing of tools and equipment; 6. self-scheduling of work hours; and 7. being free to render services to other entities. *Wright v. Knox Vinyl & Aluminum Company, Inc.*, 779 S.W.2d 371, 373 (Tenn. 1989); *Masiers v. Arrow Transfer & Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982). These indicia are not absolute, however, and use of them does not preclude examination of each work relationship as a whole; the seven indicia are merely a means to facilitate analysis of a given fact situation. *Masier*, 639 S.W.2d at 656; *Jackson Sawmill v. West*, 619 S.W.2d 105 (Tenn. 1981).

While all seven factors are important, the right to control the work is the most important single test. *Wright*, 779 S.W.2d at 373; *Masiers*, 639 S.W.2d at 656. The more control the business has over the details of the worker's work, the more likely it is that an employer-employee relationship exists. *Wright* , 779 S.W.2d at 373. However, the mere fact that a business controls the final result of the product and sets standards for the final product does not necessarily take the work relationship out of the independent contractor status. *Wright* , 779 S.W.2d at 373; *Masiers*, 639 S.W.2d at 656. It is control of the details of the work, not control of the quality of the final product that is decisive. *Id.*

The power to terminate is also sometimes described as having gained some "controlling significance" in determining the status of an employment relationship. *Masiers*, 639 S.W.2d at 656; *Wooten Transports, Inc. v. Hunter*, 535 S.W.2d 858, 860 (Tenn. 1976). The right to control and the right to terminate have been characterized as "strong evidence" of an employer-employee

relationship. *Starflight, Inc. v. Thoni*, 773 S.W.2d 908, 910 (Tenn. 1989). While the power to terminate at any stage of the work can be a "strong factor" in finding an employer-employee relationship, the power to terminate has been held to be just one factor to be considered and the

power to terminate does not *ipso facto* create an employer-employee relationship. *Wright,* 779 S.W.2d at 374; *German v. Whaley,* 760 S.W.2d 627, 628 (Tenn. 1988).

The right to control the work of the Claimant clearly remained with Ozburn-Hessey. The company determined, in negotiations with the customer, on what date and at what time the moving would commence, how many movers would be involved, how many trucks would be involved, and what equipment would be sent along on the trucks. The company took the position at trial that the customer controlled these details, but the question actually is, as between the business and the worker, who exercised control over the details of the work. In this case, all negotiations with the customer were done by Ozburn-Hessey sales personnel, and none by the Claimant, and the company gave the details to the Claimant as directives.

It is true that it was not necessary for the company to provide someone to tell the Claimant how to load a truck. He knew from his experience as a mover for over two decades how to load a moving truck. However, the issue is not whether control was exercised but rather whether there was a right to control. *Jones v. Crenshaw,* 645 S.W.2d 238, 241 (Tenn. 1983). In this case, the company had the right to control all the details of the job and in fact did control the great majority of the details. It is significant that Ozburn-Hessey determined which mover would be in charge of any given moving job, and sometimes that was the Claimant and sometimes that was another mover. If the Claimant were truly an independent contractor in control of the details of each job in which he was involved, he would be either in charge or would have the right to determine who was in charge, and he did not.

Both the operations manager and the president conceded at trial that they could have, at any time, caused the Claimant to cease his work and leave the premises of Ozburn-Hessey or its job site. The presence of that right to terminate suggests an employer-employee relationship. The company argues that the Claimant's use of his own dolly suggests that he provided his own equipment and was therefore an independent contractor. However, the testimony of Ozburn-Hessey's witnesses, as well as the testimony of the Claimant, confirms that the Claimant brought his own dolly on jobs because he preferred to use it and not because it was needed by the company. The company provided dollies and had dollies available to the Claimant and to every other employee. Dollies were just a small part of the equipment used, and all other equipment (trucks, tow motors, pads, etc.) were provided by the company. The company even decided whether to send their own trucks or to rent a truck or trucks for the particular job. Both right of termination and the providing of the equipment suggest an employer-employee relationship.

The method of payment provides some support for the position of each party in this case. The company did not withhold from the Claimant's wages for Social Security or incomes taxes, and the Claimant and Ozburn-Hessey both reported the payments for tax purposes as if the Claimant were an independent contractor. However, the Claimant was paid an hourly wage and was not paid

by the job. He deducted no expenses on his own tax returns as an independent contractor ordinarily would. Method of payment does not control, even when it clearly by itself suggests an independent contractor relationship, the characterization of the working relationship where

other factors strongly suggest a different characterization. *Starflight, Inc.*, 773 S.W.2d at 909 (co-pilot held to be employee even where no withholding taken from wages).

The Claimant had the right to work for other employers, but in fact he did not do so, except where he took moving jobs on his own without a business relationship with any other moving business. He took every moving job offered by the Claimant. Ozburn-Hessey, in consultation with its clients, set the Claimant's schedule for moving, suggesting an employer-employee relationship. The company asked the Claimant occasionally to locate helpers for jobs, but the company determined their number, set their wage rate, decided whether to use their services, and gave the helpers the same directions on the details of the moving job that the company gave the Claimant (date, time, number of co-workers, equipment to be used, etc.). Again, this factor suggests an employer-employee relationship.

The various factors considered separately do not favor just one interpretation of the working relationship between the parties, but the majority of the factors, including right to control, favor an employer-employee relationship. The trial judge expressed concern about the fact that Ozburn-Hessey had offered the Claimant another working relationship with the company on at least three occasions. These conversations may be evidence that the company considered the Claimant to be an independent contractor, and the conversations suggest that the Claimant did not want the same relationship with Ozburn-Hessey that some of the company's employees had. However, it is clear from the record that the choice that the Claimant was actually asked to make was whether to continue as a "part-time" employee working four to five days a week without full benefits or to work as a "full-time" employee six days a week with full benefits.

Reviewing the record as a whole, the evidence does not preponderate against the trial judge's conclusion that Ozburn-Hessey failed to meet its burden of proof to establish that the relationship of the Claimant to Ozburn-Hessey was that of an independent contractor.

DISPOSITION

The judgment of the Chancery Court is affirmed, and the costs on appeal are assessed against the Appellant.

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LEE RUSSELL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

GARY L. HOLT, SR. v. OZBURN-HESSEY MOVING COMPANY and AMERICAN ALTERNATIVE INSURANCE CORP.

No. M2000-02563-SC-WCM-CV - Filed June 14, 2001

ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the appellant.

IT IS SO ORDERED this 14th day of June, 2001.

PER CURIAM

Birch, J. - Not participating.