STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Roger D. Parker t/a Courier Express Charlotte, Inc., Appellant, vs. South Carolina Department of Employment and Workforce, Respondent,	Docket No. 11-ALJ-22-0304-AP

FINAL ORDER AND DECISION
May 15, 2014

STATEMENT OF THE CASE

On November 7, 2007, the South Carolina Employment Security Commission ("ESC")[1] issued a determination that Appellant, Roger D. Parker t/a Courier Express Charlotte, Inc. ("Courier Express" or "Appellant"), had an employer-employee relationship with certain delivery drivers who had been designated as independent contractors.[2] On December 6, 2007, Courier Express appealed this determination for administrative review to the ESC. A hearing was held on February 28, 2008, and on March 1, 2008, the Chief Administrative Hearing Officer, Ronnie H. Hoover, issued his opinion and upheld the determination.

On March 26, 2008, Courier Express appealed the Administrative Ruling to the full Employment Security Commission. The Appellate Panel issued an Appellate Panel Decision and Order on May 6, 2011. On June 3, 2011, Courier Express filed a Notice of Appeal in the Administrative Law Court ("ALC"). The appeal is now before this Court on the merits. The ALC has jurisdiction to hear this matter pursuant to S.C. Code Ann. § 41-35-750 (Supp. 2013).

Upon consideration of the record and the briefs of the parties, this Court affirms, finding that substantial evidence supports the Department's Appellate Panel decision.

[1] South Carolina Employment Security Commission is currently known as South Carolina Department of Employment and Workforce ("DEW").

[2] In September 2007, a delivery driver ("Claimant") for Courier Express filed a claim for unemployment benefits naming Courier Express as his bona fide employer. Appellant responded that the Claimant was not an employee, but rather, was an independent contractor. An investigation ensued.

FACTUAL BACKGROUND

Courier Express is a licensed motor carrier providing delivery services to various clients. They are a Georgia Corporation authorized to do business in South Carolina, operating out of Duncan, South Carolina, and Charlotte, North Carolina among other locations. The Charlotte and Duncan operations served two primary customers; Office Depot and Acuity. The Office Depot operations involved daily line-haul shipments of office products from Office Depot to the Duncan facility. The Acuity operations primarily involved arranging for the delivery of concentrated hazardous cleaning chemicals.

Approximately twenty-five (25) drivers worked from four (4) distribution warehouses across the state. Courier Express assigned each driver to a geographic region and retained the right to reassign drivers to different regions as needed. Other than delivery of merchandise, all work was performed at the Courier Express warehouse. Upon employment, Courier Express required that interested individuals pay for a background check and drug-screen; have an up-to-date driver's license with an operable vehicle; have proof of insurance; and, sign an independent contractor agreement, W-9, and worker's compensation exemption notice as conditions of employment. Some of these requirements are due to Department of Transportation ("DOT") regulations because Courier Express transports hazardous materials through Acuity. Further, due to the presence of hazardous materials at the Duncan facility, DOT regulations require Courier Express to be responsible for hazardous material training to all delivery drivers, regardless of employment or independent contractor status.

Upon employment, drivers were required to provide a vehicle approved by Courier Express and maintain liability, property, and cargo insurance that met Courier's deductible and coverage requirements. Workers were required to log in upon arrival by entering a personal key code into a scanner, which logged hours worked. Similarly, at the end of the day, workers were required to log out. Claimant provided his own van and equipment for deliveries and was provided with a route by the Appellant. Further, Claimant, and other delivery drivers, bore the expenses associated with maintaining their delivery equipment. However, Claimant was not required to obtain a business license or certification to operate as an independent delivery driver. In the Agreement, Claimant was permitted to hire replacement or additional drivers to complete driving services. Claimant was also allowed to contract with other business entities engaged in delivery services. Further, Courier Express did not require Claimant, or other delivery drivers, to

appear to accept delivery assignments daily. However, Claimant had to inform Courier Express of his inability to complete delivery of all cargo that he accepted.

A supervisor, along with more experienced workers, trained new workers. Workers were required to wear a blue collar shirt bearing a "Courier Express" logo or the logo of the customer. The purchase of the shirt was made through settlement deductions or from third parties. However, Claimant was not required to display the logo of Courier Express on his van. Before loading merchandise, workers were required to scan all the material into a scanner provided by Office Depot and assigned to them by Courier Express. Office Depot does not charge for the use of the scanner, but a delivery driver must pay the replacement cost if the scanner is lost or damaged.

Routes were assigned by Courier Express and any deviations in the delivery routes or process had to be cleared with Courier Express. Upon arrival for work, Claimant would log into the Office Depot scanner by entering a personal code. Claimant would then load the Office Depot cargo into his delivery truck and scan each box to inform Office Depot and its customers that the cargo had been loaded. Claimant would then retrieve addresses from Office Depot for the deliveries. Claimant was trained on how to use the scanner and the route he would be on by the delivery driver he replaced. Delivery drivers are free to select the routes they use to make deliveries. As the cargo was delivered, Claimant would scan the shipment for confirmation of delivery. Finally, at the end of the work day, the Claimant would log off the Office Depot scanner. Claimant, and other delivery drivers, had to complete deliveries to Office Depot customers between 8:00 A.M. and 5:00 P.M. each day, a timeframe established by Office Depot to ensure deliveries are completed before the end of the business day and before dark in residential areas.

Drivers did not receive money from customers; instead, customers paid Courier Express for the delivery service. Payment of delivery drivers was in the form of a percentage of the revenue generated from each package actually delivered. Customers, such as Office Depot, paid Courier Express for the delivery service, and, Courier Express then paid workers by check. If a customer had a complaint, the customer contacted Courier Express, which would then discipline the worker as it deemed appropriate. Courier Express does not withhold any taxes from the payment to delivery drivers, and Courier Express reports this revenue on Form 1099. In addition, delivery drivers could negotiate for more money, which is referred to as "stem pay," and is

usually granted to delivery drivers who operate a route that is more rural and therefore more expensive.

Appellant terminated Claimant's Agreement for breach of contract because Claimant did not timely perform deliveries he agreed to complete. On September 6, 2007, Claimant filed an unemployment claim with the ESC. As a result, a Field Deputy for ESC investigated whether the Claimant was an independent contractor or an employee. On November 7, 2007, the ESC issued a determination finding that the Claimant was an employee of Courier Express. The determination specifically noted:

> The service provided by the worker was integrated into the business operation and essential for its continued success. Although the worker leased a truck to perform these services, [Courier Express] provided direction and control over methods in which services should be performed. In addition, [Courier Express] maintained direct control over payments to the worker and discharged the worker for delivering packages to the wrong locations. Therefore, the compensation paid to this worker and all similarly employed workers are wages subject to the unemployment tax.

On December 6, 2007, Appellant filed the appeal of the ESC determination to the Appeal Tribunal. A hearing before the Appeal Tribunal was held on February 28, 2009 and a decision was mailed on March 1, 2008. The Appeal Tribunal affirmed the determination of ESC dated November 7, 2007. The Appeal Tribunal found:

> While there are some factors in the relationship that if taken alone would indicate some independence of the workers, there are many which are indicative of an employer/employee relationship. Drivers are subject to the will and control of the employer as it relates to the work to be accomplished and the end results. Much of this control is due to the contractual agreements Courier Express has with its clients. Drivers have to meet these demands in order to accomplish Courier Express's responsibilities to the client. There are requirements to work scheduled hours; maintain and submit documentation; operate equipment safely; wear a prescribed uniform; not to mix delivery service or change delivery instructions. Courier Express also provides additional monies for certain expenses, and drivers generally do not stand to lose money for damaged merchandise. Courier Express assumes responsibility to complete routes, offers training and daily management support, and provide[s] at least one piece of equipment.

The Appellant timely filed an appeal of the Appeal Tribunal decision to the Appellate Panel. The Appellate Panel affirmed the decision of the Appeal Tribunal on May 6, 2011. The Appellate Panel held:

> While there are elements in practice that lend support to Courier Express's contention that the drivers are independent contractors, we find that Courier Express retains the right to exercise substantial control over the means and manner by which the delivery services are performed. Therefore, we find the drivers are employees of the company and should be reported for unemployment tax purposes.

Courier Express then commenced this action before the ALC on June 3, 2011, seeking judicial review of the Appellate Panel's decision.

ISSUE ON APPEAL

Did the DEW Appellate Panel err in affirming DEW's determination that Courier's workers are employees for unemployment tax purposes?

STANDARD OF REVIEW

DEW is an "agency" under the Administrative Procedures Act ("APA"). See Gibson v. Florence Country Club, 282 S.C. 384, 386, 218, S.E.2d 365, 367 (1984) (finding that the ESC, a predecessor of DEW, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of DEW. See S.C. Code Ann. §§ 1-23-380 and 1-23-600 (Supp. 2013); Gibson, 282 S.C. at 386, 318 S.E.2d at 367; McEachern v. S.C. Employment Sec. Comm'n, 370 S.C. 553, 557, 635 S.E.2d 644, 646-647 (Ct. App. 2006). The standard used by appellate bodies to review agency decisions is provided by S.C. Code Ann. § 1-23-380(5); which states:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence of questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions, are:
>
> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probable and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5); see also § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner as prescribed in § 1-23-380).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth. v. Pub Serv. Comm'n of S.C., 387 S.C. 360, 692 S.E.2d 910 (2010). The fact the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. Waters v. S.C. Land Res. Comm'n, 321. S.C. 219, 467 S.E.2d 913, 917 (1996). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892, 893 (1995). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001)(quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 307 (1981)). Appellant bears the burden "to prove convincingly that the agency's decision is unsupported by the evidence." Waters, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

Pursuant to the South Carolina Labor and Employment Act, common law rules, as well as other specific provisions not applicable to this case, determine whether an employer-employee relationship exist as opposed to an independent contractor relationship. S.C. Code Ann. § 41-27-230(1)(b). Accordingly, "the determination of whether a [worker] is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work." Wilkinson ex

rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). In making this determination, this Court must "examine four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of right or exercise of control; (2) furnishing of equipment; (3) method of payment; [and] (4) right to fire," Id. Wilkinson requires a court to "evaluate the four factors with equal force in both directions to provide an even-handed and balanced approach." Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 318-19, 713 S.E.2d 267, 270-71 (2011) (*quoted in* Lewis v. L.B. Dynasty, Inc., 400 S.C. 129, 133-34, 732 S.E.2d 662, 664 (Ct. App. 2012).

Based on the following, this Court concludes there was substantial evidence to justify the Appellate Panel's finding that Courier Express possessed the right to control the workers that were hired to perform work for Courier Express customers as uniformed Courier Express representatives, and were therefore employees for unemployment tax purposes.

Contract

This Court is "guided initially by the parties' independent contractor agreement. But more importantly, [it is] guided by the parties' conduct . . ." Wilkinson, 382 S.C. at 300, 676 S.E.2d at 702. Hence, "in determining the nature of [the parties'] relationship," the contract "has considerable weight," but the language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive." Id. Therefore, the Court must still ultimately look at the conduct of the parties in carrying out the terms of the contract in assessing the four factors in this case.

Direct Evidence of the Right or Exercise of Control

The Appellate Panel found that Courier Express exercised and reserved the right to exercise significant control over drivers by having the ability to disqualify any driver deemed unsatisfactory or unprofessional; by requiring drivers maintain a directed level of insurance; by controlling all monies involved in the delivery process; by requiring drivers to wear shirts branding themselves as Courier Express representatives; by assigning delivery drivers to a specific delivery area with a specific delivery schedule with limited discretion as to methods and time of delivery; and by Courier Express's handling all client or customer disputes in an employer/employee manner. I find these factors are evidence of Courier Express's right to control and ultimately delineate an employee-employer relationship.

Although the contracts between Courier Express and the workers purport to create an independent contractor relationship, the legal effect of such contracts is a question for the trier of fact. Young v. Warr, 252 S.C.179, 165 S.E.2d 797 (1969). Mere language in an agreement declaring an independent contractor relationship is not dispositive. Kilgore Group, Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 437 S.E.2d 48 (1993). An examination of the Independent Contractor agreements in the record reveals Courier Express's significant rights to control the delivery drivers.

Courier Express argues that an agreement to maintain workers' compensation insurance or evidence of compliance with customer requirements or Federal regulations are not evidence of control for purposes of demonstrating an employment relationship and that Courier Express did not control the manner and means of work. However, in addition to the control previously mentioned, here the workers lacked autonomy to deal directly with clients, who instead communicated wishers directly to Courier, who then instructed the workers. See Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971). The evidence does not reflect Courier Express ever relinquished that control. Clients communicated their dissatisfaction to Courier, upon which Courier Express took the action they deemed appropriate.

Here, Courier Express clearly had the right or power to direct and control the workers in the performance of their work and in the manner in which the work was to be done. See Jamison v. Morris, 385 S.C. 215, 221, 684 S.E.2d 168, 171 (2009).

Furnishing of Equipment

In this case, there was very little equipment to furnish. The Appellate Panel noted that drivers were required to provide a vehicle approved by Courier Express and the Independent Contractor Agreement stipulated the vehicle was Courier Express's property and subject to their control during the term of the agreement. Also, Courier Express's clients supplied a scanner for use by workers. The state Supreme Court found in Kilgore that when a client, rather than an employer, supplies equipment to a worker, this weighs in favor of the worker's being an employee, not an independent contractor. 313 S.C. at 69, 437 S.E. 2d at 50. Therefore, I conclude there was substantial evidence such that a reasonable mind could conclude, as the Appellate Panel did, that the factor of furnishing equipment leaned in favor of an employer-employee relationship.

Method of Payment

The Appellate Panel found the method of payment to workers was indicative of an employer-employee relationship because "Courier Express controls all of the money involved in providing delivery services. . . receives payment from its customers and then passes along the driver's percentage, and the drivers are prohibited from accepting payment directly from Courier Express's customers." There is substantial evidence to support this determination.

Workers were paid on a per parcel basis. Courier Express argues the amount of remuneration was strictly within the delivery driver's control; however, that is inaccurate. Courier Express assigned delivery areas to the drivers. Packages were distributed to drivers based on the geographic region to which they were to be delivered. The driver had no discretion to get packages in another driver's area without knowledge and permission of Courier Express.

Also, some drivers received additional bonus pay, referred to as "stem pay" for drivers that deliver to rural locations. I find there was substantial evidence to support the Appellate Panel's conclusion that Courier Express's method of payment favored an employer-employee relationship. The fact that two inconsistent conclusions could be drawn from the evidence does not mean that the Appellate Panel's conclusion is unsupported by substantial evidence. See Jeffrey v. Sunshine Recycling, 386 S.C. 174, 178, 687 S.E.2d 332, 335 (Ct. App. 2009) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.").

Right to Fire

The Appellate Panel found that Courier Express had a right to fire its employed workers, which indicated an employer-employee relationship based upon its determination that Courier Express retained "the right to fire the drivers much like a standard employer would an employee: for subjective dissatisfaction with work performance or demeanor, as well as for defined policy violations. Courier Express, citing Wilkinson, argues that Courier Express retained only the right to terminate the agreement, thus indicating an independent contractor relationship.

In Wilkinson, the Court recognized that a right of termination exists in both employment and independent contractor agreements. The Court thus found that in determining whether an employment relationship exists, the critical inquiry is the term "fire." The contract in that case provided that either party could terminate the contract upon thirty days' notice. The agreement further provided that "[i]n the event either party commits a material breach of any term of this

Agreement; ... the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages." Wilkinson, 382 S.C. at 304, 676 S.E.2d at 704. Based upon those terms, the Court found that the agreement did not grant a "right to fire" but rather "[t]he termination of the party's relationship was controlled by their agreement."

In this case, however, the agreement grants Courier Express much greater latitude in terminating the relationship than was addressed in Wilkinson. As the Appellate Panel found, pursuant to its agreement, Courier Express retains the ability to terminate its relationship with the worker if they found the worker unsafe, unprofessional, or if the worker failed to adhere to Courier Express or customer policies. Thus, Courier Expresses' autonomy to terminate the contract is much greater than the contract in Wilkinson. When viewing the evidence as a whole, there is substantial evidence to support the Appellate Panel's finding that the termination provision as applied by Courier Express supports a finding of an employer-employee relationship.

CONCLUSION

I find, based on a careful weighing of the four factors articulated in Wilkinson, the record contains substantial evidence supporting the Appellate Panel's finding that the drivers were employees of Courier Express for unemployment tax purposes.

THEREFORE, the Department's Appellate Panel decision is **AFFIRMED.**

AND IT IS SO ORDERED.

Carolyn C. Matthews

CAROLYN C. MATTHEWS
Administrative Law Judge

May 15, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Mary Elizabeth Campbell, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Mary Beth Campbell

Mary Elizabeth Campbell
Judicial Law Clerk

May 15, 2014
Columbia, South Carolina