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NO. COA10-1017
NORTH CAROLINA COURT OF APPEALS

Filed: 21 June 2011

MICHAEL R. LEE, Husband; MATTHEW
R. LEE, Adult Child; and MELINDA
R. LEE, Adult Child, of MARY ANN
LEE, Deceased Employee
Plaintiffs,

v.

N.C. Industrial Commission
I.C. No. 786921

CITY CAB OF TARBORO, Employer,
TRAVELERS INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by Plaintiffs from opinion and award entered 8 April
2010 by Commissioner Laura Kranifeld Mavretic on behalf of the
Full Commission. Heard in the Court of Appeals 26 January 2011.

*Prather Law Firm, by J.D. Prather, for Plaintiffs-
appellants.*

*Cranfill Sumner & Hartzog LLP, by J. Michael Ricci and
Ashley Baker White, for Defendants-appellees.*

HUNTER, JR., Robert N., Judge.

Mary Ann Lee ("Decedent") died in 1993 when she was
assaulted and killed while operating a cab owned by City Cab of
Tarboro ("City Cab"). Her relatives were unaware they were
potentially entitled to receive workers' compensation benefits

until shortly before Michael R. Lee, her former husband, and Matthew R. Lee, her son, filed a claim with the Industrial Commission in 2007 against City Cab and Travelers Insurance Company (collectively, "Defendants"). Deputy Commissioner John B. Deluca found in favor of Defendants, and Plaintiffs appealed. The Full Commission concluded Plaintiffs failed to establish Decedent was a City Cab employee at the time of her death, and therefore, the Industrial Commission had no jurisdiction over this case. Plaintiffs timely appealed to this Court.¹ After careful review, we affirm.

An individual may seek compensation under the Workers' Compensation Act (the "Act") only if that person "is an employee of the party from whom compensation is claimed at the time of his injury or death." *Richards v. Nationwide Homes*, 263 N.C. 295, 301-02, 139 S.E.2d 645, 649 (1965). An independent contractor is not an employee under the Act, and the Industrial Commission has no jurisdiction to consider a claim by a person who was an independent contractor at the time of the injury or death. *Id.* at 302, 139 S.E.2d at 649. "[W]here a party

¹ We have jurisdiction over Plaintiffs' appeal. See N.C. Gen. Stat. § 97-86 (2009) (providing for appeal of Industrial Commission decision to this Court); N.C. Gen. Stat. § 7A-26 (2009) (authorizing this Court to hear appeals from administrative agencies).

challenges the jurisdiction of the Commission, the findings of fact are not conclusive and the reviewing court may consider all of the evidence in the record and make its own findings of fact." *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 314, 309 S.E.2d 273, 276 (1983). The claimant has the burden of demonstrating this jurisdictional requirement is met. *Hicks v. Guilford Cnty.*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966).

"[T]he central issue in determining whether one is an independent contractor or an employee is whether the hiring party 'retained the right of control or superintendence over the contractor or employee as to details.'" *Gordon v. Garner*, 127 N.C. App. 649, 658, 493 S.E.2d 58, 63 (1997) (quoting *Hayes v. Bd. of Trs. of Elon Coll.*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944)). Our Supreme Court has indicated we should consider, among other things, whether

[t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h)

selects his own time.

Hayes, 224 N.C. at 16, 29 S.E.2d at 140. No particular factor controls. *McCown v. Hines*, 353 N.C. 683, 687, 549 S.E.2d 175, 178 (2001). "Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." *Id.* With these principles in mind, we turn to the most probative evidence presented to the Industrial Commission.

Margaret Darlene Jackson, Decedent's sister, testified that Decedent initially worked with City Cab as a dispatcher, but for the last three months of her life, Decedent drove a cab bearing the City Cab logo. Ms. Jackson testified she did not know of any contractual agreement between Decedent and City Cab, but that she believed Decedent leased a cab from City Cab. Plaintiffs stipulated that the vehicle was leased to Decedent. Ms. Jackson testified that Decedent had no special training and had never worked as a cab driver before working with City Cab.

Defendants entered into evidence a document entitled "Motor Vehicle Lease Agreement." The document identifies City Cab as lessor and Decedent as lessee. However, the document was executed only by Decedent—the signature line for a City Cab

representative is blank. The agreement contains, among others, the following terms. Decedent, as a full-time driver, was to pay City Cab a fixed fee of twenty-one dollars per day plus ten cents per mile. (The document does not state Decedent was a full-time driver, and there is a different rate indicated for part-time drivers, but the parties appear to agree on appeal she was a full-time driver.) Decedent was to be the only vehicle operator, was required to park the cab on City Cab property when it was not in use, and was required to compensate City Cab for all damage resulting from Decedent's misuse or negligence. City Cab was required to perform most vehicle maintenance, although Decedent was responsible for fueling the vehicle.

The document describes Decedent as an independent contractor who was responsible for "all taxes and social security" she might owe. This section of the document also states Decedent had no right to "social security or unemployment benefits resulting from employment with [City Cab]." The document contained a covenant not to compete. City Cab had a workers' compensation insurance policy. A letter from an insurance agent attached to the purported contract indicated Ms. Lee was not covered under City Cab's workers' compensation policy.

The parties deposed Lieutenant Gary Brady of the Edgecombe County Sherriff's Department. Lieutenant Brady stated that he was involved in the investigation of Decedent's murder in 1993. He also stated that, at the criminal trial associated with Decedent's murder, Ray Lancaster, the then-owner of City Cab, testified about the business relationship between Decedent and City Cab. Lieutenant Brady described Mr. Lancaster's testimony as being consistent with the lease document.

Michael Lee testified that Decedent often picked up her children in the cab. A newspaper article concerning Decedent's death stated she had the ability to turn down a cab fare. In the newspaper article, a City Cab official referred to Ms. Lee as an "employee."

Based on this evidence and our review of the remainder of the record, we find the following facts:

(1) Decedent initially worked with City Cab as a dispatcher.

(2) Decedent ceased working as a dispatcher and drove a cab belonging to City Cab for the last three months of her life.

(3) Decedent agreed, in a written document, to lease a cab from City Cab, be the sole operator of the cab, and make certain repairs to the vehicle if necessitated by her misuse or

negligence. Defendant also agreed in that document that she was an independent contractor and that she would not compete with City Cab.

(4) No representative of City Cab signed the document.

(5) Despite the fact that a City Cab representative did not sign the document, the parties' behavior was in accordance with the terms of the agreement.

(6) Decedent was not covered by City Cab's workers compensation insurance policy.

(7) Decedent employed no specialized skills as a cab driver.

(8) Decedent had significant autonomy in the operation of the cab, including the ability to decline a fare.

(9) Decedent was the only person who could operate the cab under the agreement between she and City Cab.

While some of these factual findings suggest Decedent was an employee, we conclude they weigh in favor of an independent contractor relationship. Decedent leased the cab, rather than being provided with it free-of-charge. In prior decisions in which we have concluded cab operators are independent contractors, we have found this type of arrangement to be persuasive. See *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74,

77, 511 S.E.2d 9, 12 (1999); *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 661, 228 S.E.2d 43, 46 (1976). Decedent had a great deal of autonomy in performing her work—she had the freedom to decline a fare, indicating she was “not subject to discharge because [s]he adopt[ed] one method of doing the work rather than another.” *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. Furthermore, City Cab did not treat Decedent as an employee with respect to workers’ compensation insurance and social security contributions, which is similar to the facts in *Willard’s Cab Co.*, where the defendant did not withhold social security taxes from the plaintiff, 132 N.C. App. at 75, 78, 511 S.E.2d at 10, 12.

There were several restrictions placed on Decedent’s use of the vehicle, including her ability to hire assistants. However, in *Willard’s Cab Co.*, this Court stated that a contractual prohibition on non-lessees driving the lessor’s taxicabs did not indicate “employer-like control” because “this provision was designed to protect [the lessor’s] property from being operated by persons it had not approved.” *Id.* at 78, 511 S.E.2d at 12. The Court also explained that driving a cab is not a task that requires the labor of many people, it only requires the labor of one person: the cab driver. *Id.*

Plaintiffs are correct to point out that the non-compete clause and the non-specialized nature of the work weigh in favor of an employee relationship. Nevertheless, we conclude City Cab did not "retain[] the right of control or superintendence over the contractor or employee as to details," which is the critical inquiry. *Gordon*, 127 N.C. App. at 658, 493 S.E.2d at 63. We hold that Plaintiffs failed to meet their burden of establishing an employment relationship existed. Therefore, we do not reach the remaining issues presented by Plaintiffs' appeal.

Affirmed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).