NO. COA14-356

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

REFIK ADEMOVIC, Employee, Plaintiff,	
v.	North Carolina Industrial Commission I.C. No. X60056
TAXI USA, LLC d/b/a YELLOW CAB OF CHARLOTTE, Alleged Employer, RIVERPORT INSURANCE CO., Carrier (KEY RISK MANAGEMENT SERVICES, INC., Servicing Agent), Defendants.	

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission filed 21 October 2013. Heard in the Court of Appeals 8 September 2014.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for defendant-appellants.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendant-appellant Taxi USA, LLC.

McCULLOUGH, Judge.

Defendants Taxi USA, LLC d/b/a/ Yellow Cab of Charlotte and Riverport Insurance Company appeal the Opinion and Award of the Full Commission, concluding that plaintiff Refik Ademovic was an employee of defendant Taxi, USA, LLC d/b/a Yellow Cab of

Charlotte on 11 August 2011. Based on the reasons stated herein, we reverse the opinion and award of the Full Commission.

I. Background

On 17 August 2011, plaintiff Refik Ademovic filed a Form 18, "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent" alleging a worker's compensation claim arising out of a shooting that occurred on 11 August 2011. Plaintiff alleged that he was shot in the face by a passenger while driving a taxi for defendant Taxi USA, LLC d/b/a/ Yellow Cab of Charlotte ("defendant Taxi"). Plaintiff also filed a Form 33 "Request that Claim be Assigned for Hearing" on 22 September 2011.

On 19 January 2012, defendants denied plaintiff's claim by filing a Form 61 "Denial of Workers' Compensation Claim." Defendants asserted that plaintiff was an independent contractor and argued that no employer-employee relationship existed at the time of plaintiff's injury.

On 30 May 2012, a hearing was held before Deputy Commissioner Chrystal Redding Stanback on the issue of whether there was an employer-employee relationship between plaintiff and defendant Taxi. On 21 March 2013, Deputy Commissioner Stanback filed an Opinion and Award, finding as follows:

2. Plaintiff and Defendant Taxi USA, LLC d/b/a/ Yellow Cab (hereinafter "Defendant Taxi USA") entered into an Associate Agreement on November 19, 2010 allowing Plaintiff to drive a cab under Defendant Taxi USA's operating certificate. Plaintiff also executed an agreement indicating that he understood that he was a self-employed business person and that he was not an employee of Defendant Taxi USA for, among other things, workers' compensation insurance.

. . . .

4. Defendant Taxi USA did not impose any additional rules or requirements in addition to those established by the City of Charlotte and the ordinances established by the City of Charlotte for Personal Vehicles for Hire. . . .

5. Plaintiff owned his own taxi-cab and was responsible for any maintenance needed on the vehicle. Plaintiff paid all the taxes on the vehicle, and was responsible for maintaining automobile insurance on the vehicle. Plaintiff was free to use his vehicle for any purpose he chose, so long as he was not transporting a fare at the time. Plaintiff had the opportunity, when he picked up a fare, to provide the fare with information on how to contact him directly for future services, without going through the dispatcher for Defendant Taxi USA.

6. Plaintiff kept all the fares he earned. Defendant Taxi USA did not take any social security deductions out of the fares. Additionally, Plaintiff filed tax returns indicating that he was self-employed.

7. Defendant Taxi USA did not pay Plaintiff any wages. Instead, Plaintiff paid

> a weekly franchise fee of $195.00 to Defendant Taxi USA in order to maintain operation of his taxi cab under Defendant Taxi USA's operating certificate.
>
> 8. Defendant Taxi USA did not determine the days nor the number of hours that Plaintiff worked. Plaintiff was free to take off days as he wished.
>
> 9. Plaintiff was free to perform his taxi cab driver duties under his own control. He had the right to control both the manner and method of his duties, subject only to the guidelines established by the City of Charlotte for personal vehicles for hire.
>
> 10. Plaintiff had the choice of whether to use and accept calls from Defendant Taxi USA's dispatcher. . . .

Deputy Commissioner Stanback concluded that there was no employee-employer relationship between plaintiff and defendant Taxi. Based on the foregoing, Deputy Commissioner Stanback concluded that the Industrial Commission did not have subject matter jurisdiction over plaintiff's claim and plaintiff was not entitled to workers' compensation benefits.

Plaintiff appealed the 21 March 2013 Opinion and Award to the Full Commission. The Full Commission heard plaintiff's appeal on 15 August 2013. On 21 October 2013, the Full Commission entered an Opinion and Award reversing the 21 March 2013 Opinion and Award and finding, *inter alia*, as follows:

> 3. In approximately November or December

of 2010, plaintiff applied for work with defendant-employer as a taxi driver. Plaintiff signed a written contract with defendant-employer; said contract was prepared by defendant-employer. The language in the contract characterizes plaintiff as an independent contractor of defendant-employer. . . .

4. Plaintiff did not own a taxi cab prior to applying to be a taxi driver with defendant-employer. Once plaintiff applied, plaintiff purchased a vehicle from defendant-employer to use as a taxi. This taxi was the only taxi that plaintiff owned or operated.

5. Plaintiff was provided equipment from defendant-employer for his work as a taxi driver. Defendant-employer provided plaintiff with a Blackberry which defendant-employer used to dispatch calls for potential customers to plaintiff. Defendant-employer also provided the top light attached to the roof of his taxi; the decals on the taxi which identified defendant-employer's business name and phone number; the taxi meter that also served as a backseat credit card device; and also provided a two-way radio. All the equipment provided to plaintiff by defendant-employer was necessary or required for plaintiff to drive the taxi.

6. When plaintiff picked up a customer from a dispatch call, there were two steps involved. First, plaintiff received the notification on the BlackBerry, which was termed a "bid offer. The Blackberry indicated only that a call had been dispatched to him and the amount of time plaintiff had left to accept the offered call. Plaintiff could choose to not respond to the bid offer. If plaintiff responded, he

had to accept the dispatched call and pick up the customer and he would thereafter receive the customer's name and location from defendant-employer.

7. On 11 August 2011, plaintiff received a dispatched offer from defendant-employer on the Blackberry, which he accepted. The customer had called defendant-employer's phone number for dispatches. Plaintiff picked up the customer and took him to the requested destination. When they arrived, the customer shot plaintiff in the face with a gun. . . .

8. As a result of the gunshot wound, plaintiff sustained a mandible fracture, a right condylar dislocation, and a large hematoma in the right masseter muscle. Plaintiff has gone through surgeries, and he still has metal bullet fragments lodged in his head. Plaintiff receives counseling for post-traumatic stress disorder, anxiety, paranoia, hypervigilance, social withdrawal, and panic attacks.

. . . .

10. Although plaintiff was under the jurisdiction of the City of Charlotte, most, if not all, of his day-to-day dealings in his work, including any fines or penalties for not complying with ordinances or defendant-employer's rules, was with defendant-employer.

11. According to the contract with plaintiff, defendant-employer owned the company operating permit, the vehicle operating permit, and the driver's permit under which plaintiff operated his taxi.

12. Plaintiff paid a weekly franchise fee of $195.00 to defendant-employer in order to

maintain operation of his taxi cab under defendant-employer’s operating certificate.

. . . .

15. Under defendant-employer’s contract with plaintiff, the goodwill associated with the color scheme had great value in terms of its marketability to the public, because the public knew and recognized taxis painted yellow as being affiliated with defendant-employer. For this reason, the contract provided that the goodwill associated with defendant-employer’s color scheme belonged exclusively to defendant-employer.

16. Plaintiff’s taxi was required to be painted yellow, which corresponded to defendant-employer’s unique color scheme with the City of Charlotte. When plaintiff purchased his taxi from defendant-employer it was already painted in accordance with defendant-employer’s color scheme.

17. The top light and decals provided by defendant-employer for plaintiff’s taxi had defendant-employer’s name and telephone number (704-444-4444) for dispatches. The top light and decals were advertisements and marketing to the public to attract potential customers to call defendant-employer’s dispatch service.

18. Plaintiff’s taxi had to correspond with the color scheme and décor of defendant-employer. Even though plaintiff owned and had title to the taxi, he could not continue working for defendant-employer if he painted the taxi another color or if the taxi did not have the top light and decals advertising defendant-employer.

. . . .

22. Based upon the preponderance of the evidence in view of the entire record, defendant-employer's business as a taxi service company is not independent and distinct from plaintiff's work as a taxi driver. Plaintiff's work as a taxi driver is a necessary and integral part of defendant-employer's business.

. . . .

29. Defendant-employer imposed penalties on drivers for non-compliance with the City of Charlotte ordinances, which the ordinances themselves did not provide. . . .

. . . .

43. Based upon the preponderance of the evidence in view of the entire record, defendant-employer exerted sufficient control over plaintiff's activities as a taxi driver, as a result of both the City of Charlotte ordinances and the contractual agreement between the parties, to establish the relationship between the two as an employer-employee relationship, since having taxis and working as a taxi driver are necessary and integral parts of operating a taxi service company.

44. Based upon the preponderance of the evidence in view of the entire record, defendant-employer held plaintiff out as its own driver to the public through defendant-employer's marketing and advertising efforts, which also substantiates the level of control required of an employer-employee relationship.

45. Defendant-employer provided plaintiff with equipment that was necessary to drive taxis under the City of Charlotte ordinance.

Based on the foregoing, the Full Commission concluded that it had subject matter jurisdiction over plaintiff's claim. The Full Commission also concluded that at the time of his injury, plaintiff was an employee of defendant Taxi and that the parties "reserved the right to litigate the issues of disability and other benefits stemming from plaintiff's compensable injury." Because the Opinion and Award was interlocutory in nature, the Full Commission certified the "issue of the employer-employee relationship as final and ripe for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)[.]"

From this Opinion and Award, defendants appeal.

II. Standard of Review

"This Court reviews an opinion and award by the Commission to determine: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact." *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 294, 713 S.E.2d 68, 73 (2011). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Discussion

On appeal, defendants argue that the Full Commission erred by concluding that plaintiff was an employee of defendant Taxi. Rather, defendants assert that plaintiff was an independent contractor, not subject to the jurisdiction of the Industrial Commission. We agree.

Defendants specifically challenge findings of fact numbers 35 and 37, arguing that they are not supported by competent evidence in the record. Defendants also challenge conclusion of law number 2.

Finding of fact number 35 provides as follows:

> 35. Although the City of Charlotte ordinances would allow plaintiff to list up to three (3) different companies with company operating certificates on his driver's permit, plaintiff's permit listed only one company, defendant-employer, and plaintiff only owned one taxi. Plaintiff did not have the resources or opportunity to drive for another taxi service company legally, that is by operating more than one vehicle as a taxi, each painted in the unique color scheme of the different companies. Furthermore, plaintiff's driver's permit identified defendant-employer as the taxi service company holding the company operating certificate under which plaintiff operated his taxi. The City of Charlotte ordinances required the driver's permit to be posted in the back seat so that the customers could see the driver's permit.

In their brief, defendants argue that finding of fact number 35 “confuses the suspension of the use of the Blackberry dispatching services with a suspension of a driver’s permit issued by the City of Charlotte.” Defendants contend that the evidence before the Full Commission made it clear that only dispatching services were suspended. However, after reading finding of fact number 35, we are unable to see how defendants’ arguments correspond with this finding of fact. The substance of finding of fact number 35 addresses the operating certificate under which plaintiff operated his taxi.

Nevertheless, a review of the record reveals that finding of fact number 35 is supported by competent evidence. Plaintiff testified at the 30 May 2012 hearing that he only owned one taxi. Although the City of Charlotte allowed a taxi driver to list up to “three companies that you could be affiliated with on your driver’s permit,” plaintiff only listed defendant Taxi. John Walsh, the operations manager of defendant Taxi confirmed this portion of plaintiff’s testimony. Because plaintiff worked “eight hours or ten hours all day or all night,” he did not drive for another taxi service company. Plaintiff testified that his name, as well as defendant Taxi’s name, appeared on his driver’s permit. In order to be viewable by all passengers, the

driver’s permit was posted in the back seat of plaintiff’s taxi. Based on the foregoing evidence, we reject defendants’ argument that finding of fact number 35 is not supported by competent record evidence.

We note that the focus of defendants’ argument – suspension of the use of the Blackberry dispatching services versus the suspension of the driver’s permit issued by the City of Charlotte – is most closely addressed in the Full Commission’s finding of fact number 34. Although defendants do not specifically challenge finding of fact number 34, in an abundance of caution, we will address it here.

The portion of finding of fact number 34 that defendants seem to challenge provides:

> 34. Based upon a preponderance of the evidence in view of the entire record, under the City of Charlotte ordinances, plaintiff could not legally operate the taxi if defendant-employer has suspended him for three (3) or more hours. . . .

After careful review of the record, we are unable to find competent testimony to support this portion of finding of fact number 34. Instead, the testimony indicates that suspension from defendant Taxi’s dispatching service did not amount to suspension of a driver’s permit issued by the City of Charlotte. Plaintiff testified that if a taxi driver accepted a dispatched

call, otherwise known as a "bid call," from defendant Taxi and subsequently turned down the dispatched call or failed to pick up the passenger, defendant Taxi would suspend the taxi driver for a period of three hours. If a taxi driver turned down more than one bid call that he or she had already answered and accepted, the penalty would be suspension from the dispatch service for a whole day. John Walsh also testified that if a driver is awarded the bid call and the driver does not pick up the passenger, there is a three-hour suspension or penalty to the driver for non-service of the bid call. During the suspension, the driver would not receive any dispatched calls. Walsh explained that "[t]hat means that he will be taken off posting. He will not be able to post in on the Blackberry to take bid calls, but again, as discussed, he can go out and taxi other places and do other taxi[i]ng." Walsh testified that if a taxi driver is suspended from getting dispatches for three hours, the taxi driver is still able to obtain fares through other means such as going to taxi stands, getting hailed fares, or servicing personal customers. The three-hour suspension did not revoke the taxi driver's ability to work under defendant Taxi's operating certificate with the City of Charlotte. Walsh also testified that the City of Charlotte's ordinances do not

penalize a driver for failing to pick up a passenger. Based on the foregoing, we find that the Full Commission erred in this finding of fact, as it was not supported by competent evidence in the record.

Next, defendants argue that finding of fact number 37 is not supported by competent evidence in the record. Finding of fact number 37 provides as follows:

> 37. Although defendant-employer did not give plaintiff a work schedule, plaintiff worked between eight (8) and twelve (12) hours per day and did so exclusively for defendant-employer. Plaintiff received between fifteen (15) and twenty (20) dispatches a day from defendant-employer and he did not receive dispatches from any other company. Plaintiff only got customers from dispatches on the Blackberry.

Defendants argue that finding of fact number 37 "ignores that Plaintiff had control over his work activity, but chose on his own to only utilize the Blackberry dispatch service." We reiterate that "[b]ecause the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence[,] [w]e have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Medlin v. Weaver Cooke*

Constr., LLC, __ N.C. __, __, 760 S.E.2d 732, 738 (2014) (citation and quotation marks omitted).

Although the evidence in the record supports defendants' contention that plaintiff had control over his work schedule and the method by which he picked up customers, defendants' contention is not undercut by finding of fact number 37 which refers to plaintiff's regular schedule and preferred method of obtaining customers. At the 30 May 2012 hearing before Deputy Commissioner Stanback, plaintiff testified that although defendant Taxi did not determine what days he had to work or what time he had he work, he worked between eight (8) to twelve (12) hours per day. Plaintiff testified that he received fifteen (15) to twenty (20) dispatches per day from defendant Taxi and did not receive dispatches from other cab companies. Furthermore, plaintiff testified that he "only used the dispatcher from the Blackberry." Therefore, finding of fact number 37 is supported by competent evidence in the record.

Nevertheless, we agree with defendants' central argument that the Full Commission erred by ultimately concluding that plaintiff was defendants' employee. Even assuming *arguendo* that all of the Full Commission's findings of fact were supported by competent evidence, the Full Commission's findings of fact do

not justify its conclusions of law. Here, defendants specifically challenge the Full Commissions conclusion of law number 2, which provides as follows:

> 2. On 11 August 2011, plaintiff was an employee of defendant-employer under the common law tests for an employee-employer relationship established by the Supreme Court of North Carolina. N.C. Gen. Stat. § 97-2(2). *See Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944). Despite its similarity to two other cases, *see, e.g.*, *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 511 S.E.2d 9 (1999); *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976), the present case involves additional facts and circumstances that are different from those two cases. In the present case, defendant-employer could terminate a driver and had supervisory control over many of plaintiff's work activities and conduct, unlike the employer in *Alford*. Furthermore, the city ordinances at the time *Alford* was decided in 1976 apparently allowed taxi drivers to turn down potential customers on the basis of undesirable geographical locations; whereas in the present case, defendant-employer could suspend plaintiff for doing so, since defendant-employer did not give plaintiff any information about the location of the customer until plaintiff had already accepted the bid offer and failure to pick up the customer after accepting the bid offer would result in suspension. *Fulcher* is distinguishable because it was not clear in that case whether the assailant was a customer of the taxi driver, whereas here, that fact is not in dispute.

It is well established that

> [t]o be entitled to maintain a proceeding

> for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed. The issue of whether the employer-employee relationship exists is a jurisdictional one. An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions.

Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted).

"The question of whether a relationship is one of employer-employee or independent contractor turns upon the extent to which the party for whom the work is being done has the right to control the manner and method in which the work is performed." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 630, 516 S.E.2d 187, 191 (1999). In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the North Carolina Supreme Court set out eight factors to consider in determining the degree of control exercised by the hiring party, including whether the 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.

Id. at 16, 29 S.E.2d at 140 (citations omitted).

> The presence of no particular one of these indicia is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.

Id.

The Full Commission cited to *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 511 S.E.2d 9 (1999) in its 21 October 2013 Opinion and Award. In *Fulcher*, the plaintiff entered into a contract with the defendant cab company in which the defendant was the lessor and the plaintiff was the lessee. *Id.* at 75, 511 S.E.2d at 10. The plaintiff rented a taxicab from the defendant and paid a "per-shift" fee of $55.00 each time he drove the taxicab. *Id.* The parties' lease stated that the plaintiff was free from the defendant's "control or direction" and that he was to "exercise complete discretion in the operation" of the leased taxicab. It also expressly denied any employer-employee relationship. *Id.* The plaintiff was to keep all fees and tips he collected; he was not restricted to any specific geographic

area in the operation of the taxicab; and, he was free to take or refuse calls from the defendant's dispatch. *Id.* On 1 November 1994, the plaintiff accepted a dispatch to pick up a passenger and was later found with a gunshot in the back of the head. *Id.* at 75, 511 S.E.2d at 11. The plaintiff died and his estate filed a workers' compensation claim against the defendant. *Id.* "Sustaining the decision of the deputy commissioner, the Full Commission found that an employer-employee relationship existed and that [the plaintiff] was fatally wounded in the course and scope of his employment. It confirmed the award of benefits to the plaintiff[.]" *Id.* The plaintiff argued that because the plaintiff's contract with defendant did not allow him to carry or possess a handgun while driving the defendant's taxi and did not permit any other person to operate the cab, defendant exercised control over the plaintiff's work. Our Court held that while these provisions demonstrated that the "defendant exerted some control over [the plaintiff's] work, they are the only such evidence of an employer-employee relationship. Standing alone, they do not establish that [the plaintiff] was [the] defendant's employee." *Id.* at 78, 511 S.E.2d at 12. Thus, our Court held that the findings of the Full Commission did not show that the defendant

had the right to exert an employer's degree of control over the plaintiff and reversed the decision of the Full Commission. *Id.*

The Full Commission also cited to *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 228 S.E.2d 43 (1976) which is closely related to the facts in *Fulcher*. In *Alford*, the question before our Court was whether the plaintiff taxi driver was an employee or an independent contractor. *Id.* at 660, 228 S.E.2d at 45. Our Court affirmed the Opinion and Award of the Full Commission and held that the plaintiff was an independent contractor because the right of control did not rest in the defendant cab company based on the following findings of fact made by the Full Commission:

> [the plaintiff] rented a taxicab from [the defendant] for a twenty-four hour period for a flat fee of $15, and [the defendant] had no supervision or control over the manner or method [the plaintiff] chose to operate that cab. [The plaintiff] had complete control over his work schedule while he used the cab. He could disregard the radio dispatcher, use the cab for his own purposes during the time it was rented, and he kept all the fares and tips he earned.

Id. at 661, 228 S.E.2d at 46.

We find our decisions in *Fulcher* and *Alford* to be controlling on the facts before us. Here, like in *Fulcher*, the Full Commission's findings indicate that plaintiff signed an

associate agreement with defendant Taxi on 19 November 2010 that contained express and explicit language indicating that plaintiff was not an employee of defendant Taxi, but an independent contractor. Similar to the facts found in both *Fulcher* and *Alford*, plaintiff kept all the fares and tips he earned. Defendant Taxi did not pay plaintiff any wages, but plaintiff paid defendant Taxi a weekly flat franchise fee of $195.00. Defendant Taxi did not determine the number of days or the number of hours plaintiff worked, instead allowing plaintiff to determine his own work schedule. In addition, plaintiff was not required to use defendant Taxi's dispatch services to pick up fares. Plaintiff was free to accept hailed fares, go to taxi stands to pick up customers, or obtain personal customers.

A distinguishing fact from *Fulcher* and *Alford* found in the case *sub judice*, further supporting the conclusion that plaintiff was an independent contractor, is that plaintiff owned his own taxi. Plaintiff paid the taxes and insurance due on the taxi and was responsible for any maintenance required on the taxi. Plaintiff was free to use his vehicle for any purpose he wanted, so long as he was not accepting a fare at the time.

In contrast, the evidence in a fairly recent case before this Court, *J.D. Mills v. Triangle Yellow Transit*, __ N.C. App.

__, 751 S.E.2d 239 (2013), indicated that the plaintiff taxi driver was the defendant taxi company's employee. In *J.D. Mills*, the defendant taxi company owned, maintained, and insured the plaintiff's taxi. *Id.* at __, 751 S.E.2d at 241. The plaintiff was prohibited from using the taxi for his own personal purposes and picked the taxi up from the defendant's office each day and returned it to the same location at the end of his shift. *Id.* at __, 751 S.E.2d at 243. The plaintiff's work schedule was set by the defendant. The plaintiff did not keep all the fares and tips he earned, but rather the defendant "created a pay structure with each driver individually, whereby collected fares were divided equally with [the defendant]." *Id.* at __, 751 S.E.2d at 241. Further, when the plaintiff drove the taxi, "he was required to follow service routes and pick up customers based on the commands of [the] defendant['s] dispatcher." *Id.* at 243. The facts of the present case are in stark contrast to those found in *J.D. Mills*.

We recognize that the Full Commission made several findings of fact which demonstrate that defendant Taxi exerted some degree of control over plaintiff. For example, defendant required plaintiff to have specific equipment, which defendant provided, in order to drive his taxi. Defendant Taxi provided a

Blackberry, a top light to attach to the roof of plaintiff's taxi, decals which identified defendant Taxi's business name and phone number, a taxi meter that also served as a backseat credit card device, and a two-way radio. Defendant Taxi also required plaintiff's taxi to be painted yellow. Under the terms of the contract with plaintiff, defendant Taxi could also terminate "the working relationship at any time, with or without advance notice, with or without cause, for any reason or no reason, at the end of any term." Nonetheless, we hold that they are the only such evidence of an employer-employee relationship and do not definitively establish that the right of control rested with defendant Taxi.

Thoughtful and careful consideration of the facts of this case, in light of the cited authorities, leads us to the conclusion that the Full Commission erred by concluding that plaintiff was an employee of defendant Taxi. Because a claimant must be an employee from whom compensation is claimed in order to maintain a proceeding for workers' compensation, we reverse the Opinion and Award of the Full Commission.

Reversed.

Judge BELL concurs.

Judge Ervin concurs in result per separate opinion.

NO. COA14-356

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

REFIK ADEMOVIC, Employee,
Plaintiff-Appellee,

v.

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. No. X60056

TAXI USA, LLC d/b/a YELLOW CAB OF CHARLOTTE, Alleged Employer, RIVERPORT INSURANCE CO., Carrier (KEY RISK MANAGEMENT SERVICES, INC., Servicing Agent),
Defendants-Appellants

ERVIN, Judge, concurring in part and concurring in the result only in part.

Although I concur in a considerable portion of the Court's opinion and in my colleagues' determination that the Commission's order should be reversed based upon a determination that Plaintiff occupied the status of an independent contractor, rather than an employee, of Taxi USA, I am unable to concur in the Court's treatment of the standard of review that should be utilized in addressing and resolving Defendants' challenge to the Commission's decision. As a result, I concur in the Court's opinion in part and concur in the result reached by my colleagues in part.

In its opinion, my colleagues state that "[t]his Court reviews an opinion and award by the Commission to determine: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's conclusions of law are justified by the findings of fact." *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 294, 713 S.E.2d 68, 73 (2011). In light of its decision to utilize this standard of review, my colleagues have conducted an extensive analysis of the sufficiency of the evidence to support certain of the Commission's findings of fact and then determined that the Commission's conclusions of law, instead of demonstrating that Plaintiff was an employee of Taxi USA, compelled the conclusion that he was an independent contractor who was not eligible to receive workers' compensation benefits. I do not believe that the Court has utilized the correct analytical framework in the course of deciding that the Commission's order should be reversed.

The approach utilized by the Court in reviewing Defendants' challenge to the Commission's order overlooks the fact that the sole issue raised by Defendants' challenge to the Commission's order was the extent to which Plaintiff had the status of an employee or an independent contractor and that this question

requires us to address and resolve an issue of jurisdictional fact. *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (stating that, "[t]o maintain a proceeding for workers' compensation, the claimant must have been an employee of the party from whom compensation is claimed," so that "the existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact"). According to well-established North Carolina law, "[w]hen issues of jurisdiction arise, 'the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court,'" so that this Court is "required to make independent findings with respect to jurisdictional facts." *Williams v. ARL, Inc.*, 133 N.C. App. 625, 628, 516 S.E.2d 187, 190 (1999) (quoting *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990)). Thus, the appropriate standard of review for use in reviewing Defendants' challenge to the Commission's order is *de novo* rather than the traditional workers' compensation standard of review set out and utilized in my colleagues' decision. *Capps v. Southeastern Cable*, 214 N.C. App. 225, 227, 715 S.E.2d 227, 229 (2011). As a result, in spite of the fact that Defendants have challenged several of the Commission's findings of fact as lacking in adequate evidentiary

support, the proper step for us to take in this case is to refrain from addressing the sufficiency of the evidence to support the Commission's findings of fact and to make our own independent findings of jurisdictional fact instead.

After carefully considering the evidentiary record, which reveals the existence of remarkably few disputed factual issues, I would find as a fact that, according to the contract between Plaintiff and Taxi USA, Plaintiff acknowledged his status as an independent contractor rather than an employee and acted as such in the course of most of his dealings with Taxi USA; that Plaintiff owned the motor vehicle that he utilized to transport clients and was responsible for any and all maintenance costs associated with the operation of the vehicle; that Plaintiff was required to have his taxi painted a certain color and to display certain decals and other information on his vehicle that announced and publicized his affiliation with Taxi USA; that Taxi USA provided Plaintiff with certain equipment that he utilized in the course of obtaining fares and providing taxi service; that Plaintiff was required to comply with various provisions of the municipal ordinances in effect in the City of Charlotte governing the provision of taxi service as a prerequisite for being able to continue his relationship with

Taxi USA; that Plaintiff paid the applicable taxes and the premiums required to properly insure his vehicle; that Plaintiff paid a weekly franchise fee to Taxi USA for the right to operate his vehicle under Taxi USA’s operating certificate; that Plaintiff had the right to keep all of the fares and tips that he collected for customers and was not required to turn any portion of his earnings over to Taxi USA; that Plaintiff had the right to determine the number of days of the week and hours of the day that he provided taxi service; that Plaintiff was entitled to use his vehicle for any purpose of his own choosing at any time when he was not actually providing taxi service; that, while Plaintiff was offered the opportunity to provide service to certain fares made available to him by Taxi USA’s dispatcher, he was not required to accept any of those fares if he did not choose to do so; that Plaintiff could be suspended from the opportunity to use Taxi USA’s dispatch service for varying periods of time in the event that he accepted a fare and then failed to pick that fare up; and that, even during periods of time when his right to accept fares made available by Taxi USA’s dispatcher had been suspended, Plaintiff was free to obtain fares using other means, such as waiting outside the airport and hotels or restaurants, responding to telephone calls

or other messages sent directly to him by potential fares, or being hailed by customers on the side of the road. Although certain of these facts are, as Plaintiff and the Commission suggest, consistent with the notion that Plaintiff was an employee rather than an independent contractor,[1] I, like my colleagues, am unable to distinguish the facts of this case from those at issue in *Fulcher v. Willard's Cab Co.*, 132 N.C. App. 74, 78, 511 S.E.2d 9, 12 (1999), and *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 661, 228 S.E.2d 43, 46 (1976), in which this Court held that cab drivers who leased their vehicle from various entities under circumstances similar to those at issue here were independent contractors rather than employees, in any material way. In addition, like my colleagues, I agree that the degree of control exercised by the defendant in *Mills v. Triangle Yellow Transit*, __ N.C. App. __, __, 751 S.E.2d 239, 241-43 (2013), was much greater than that at issue here.

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[1]For example, the fact that Taxi USA could suspend Plaintiff's right to utilize its dispatch services for failures to pick up accepted fares does tend to suggest that Taxi USA exercised a certain degree of control over Plaintiff's activities. On the other hand, I do not believe that the fact that the applicable municipal ordinance allowed a driver to turn down fares based on the location at which the fare was supposed to be picked up at the time of the events at issue in *Alford* or that the extent to which the assailant in *Fulcher* was or was not a customer was unclear has any bearing on the determination of whether a particular driver was an employee or an independent contractor.

According to well-established North Carolina law, these decisions are binding upon us in this case, *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court"), and define the outcome that we are required to reach. Thus, although I believe that my colleagues have failed to utilize the correct standard of review and have utilized an incorrect analytical framework in reaching their decision to overturn the Commission's order, I am compelled to conclude that the result that they have reached on the merits is compelled by our precedent. As a result, I concur in the Court's decision in part and concur in the result that my colleagues have reached in part.