

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 09-1279

BENJAMIN LANE

APPELLANT

V.

JOE HARRIS TRUCKING and
COMMERCE & INDUSTRY
INSURANCE CO.,

APPELLEES

Opinion Delivered APRIL 7, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION, [NO. F808333]

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Benjamin Lane was denied benefits by the Worker's Compensation Commission after consideration of a single issue: whether Lane was an independent contractor or an employee of appellee Joe Harris Trucking on August 5, 2008, when he fell and injured his left ankle. Lane contended he was an employee; Harris contended that Lane was an independent contractor. The administrative law judge found in Lane's favor, but on de novo review by the Commission, it found Lane to be an independent contractor. This appeal followed. We affirm.

In considering this appeal, the question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Minn. Mining and*

Mfg. v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999). The determination of the credibility and weight to be given to testimony is within the sole province of the Commission. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* We review the evidence and all inferences in the light most favorable to the Commission's findings.

Lane, a man in his fifties, spent the majority of his working life as a hauler of logs and other materials in south Arkansas. He owned his own truck, as did his two grown sons. They operated independent of one another as "Lane Trucking." Lane was informed by one of his sons that a friend, Joe Harris, who also conducted a trucking business, had contracted with Terra Renewal Services (TRS) to remove waste water from a Tyson plant near Fulton, Arkansas. The job required truck drivers to fill tankers on their trucks, drive to a designated sod farm, and release the water as fertilizer. After each delivery, the drivers returned to Tyson to repeat the process. Harris had his own truck drivers but needed two more. Harris relayed where Lane and his son could find TRS's tankers prior to the job. For the loads, Harris paid Lane's son, who was also hauling waste water, and the son paid Lane.

The pay was a flat \$90 per load, as many as could be done in a day and proven by tickets provided after the tankers were filled. Harris did not deduct any taxes from the flat-rate pay. Harris did not provide any equipment, fuel, or per diem expense monies. There were no employment papers between Harris and Lane. Harris said he only told Lane's son

about the work available under his contract with TRS, and that they could haul as many tanks as they wanted between the time Tyson was open and closed in a work day. Harris did not direct any of Lane's conduct between loads, and Harris did not believe Lane to be an employee. Rather, Harris said he and Lane had over the years shared work with each other when it was available.

Lane testified that he had no major medical insurance and had never acquired workers' compensation coverage. Lane held a commercial driver's license for years and pieced together a living by accepting various hauling jobs for various companies, mostly in the logging business. Lane said that over the years he paid for his own minor injuries, but this was a major expense that he could not afford to pay. Lane explained that he was knocked off the back of the tanker on his truck at the Tyson location while he watched the tanker fill.

One of Lane's sons took him to the hospital. The hospital forms showed Lane's employer as "Lane Trucking," but Lane said he did not fill it out. He said that he was paid by his son from Harris, but he believed Harris to be his employer because (1) Harris acquired the contract with TRS to haul Tyson's waste water, and (2) Harris instructed him and his son where to get TRS tankers, when to report to work, and when the workday ended. Lane agreed that the tanker on the back of his truck belonged to TRS, but he said Harris told them where to get the tankers. Lane used the term "control" to describe Harris's behavior in various points of his testimony.

The ALJ decided that based upon case law precedent, and applying the relevant factors to this situation, Lane had proven by a preponderance that he was an employee of Harris at the time of his injury, mainly relying on the inference of control. The Commission reviewed the evidence anew and decided just the opposite, that Lane had not proven that he was an employee but rather was “clearly” an independent contractor.

The Commission deemed relevant: that Lane was in a distinct skill-based profession with his own equipment and a tanker provided by TRS (not Harris); that the truck bore Lane’s company name and was maintained and fueled by Lane; that the details of delivery were left to the driver’s professional judgment; that this was a transitory job to last only until all the waste water was delivered; that Harris exercised no supervisory control over Lane other than providing his pay per load and basic instructions on what the job required; that there were no employment documents or employment benefits; and that Harris testified about their long-standing relationship of coordinating work projects for each other despite Lane’s frequent use of the word “control” in his testimony. It is from this order that Lane appeals.

There is no fixed formula for determining whether a person is an employee or an independent contractor; thus, the determination must be based on the particular facts of each case. *Arkansas Transit Homes v. Aetna Life & Cos.*, 341 Ark. 317, 16 S.W.3d 545 (2000). Although no one factor of the relationship is determinative, the “right of control” is the principal factor. *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

An independent contractor is one who contracts to do a job according to his own method and without being subject to the control of the other party, except as to the result of the work. *Ark. Transit Homes, supra*. The control at issue is primarily the control of the means of accomplishing the work. *Id.* The issue of whether one is an employee or an independent contractor is analyzed under two separate tests: (1) the control test; and (2) the relative nature of the work test. *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

In *Riddell Flying Service v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005), we set out numerous factors that may be considered in determining whether an injured person is an employee or an independent contractor for coverage purposes. Included in these factors are:

- (1) the right to control the means and the method by which the work is done;
- (2) the right to terminate the employment without liability;
- (3) the method of payment, whether by time, job, piece or other unit of measurement;
- (4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials;
- (5) whether the person employed is engaged in a distinct occupation or business;
- (6) the skill required in a particular occupation;
- (7) whether the employer is in business;
- (8) whether the work is an integral part of the regular business of the employer; and
- (9) the length of time for which the person is employed.

Id. at 391–92, 206 S.W.3d at 287–88.

The ultimate question in determining whether a person or entity is an independent contractor is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control the work. *See Irvan v. Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943); *Dairy Farmers of Am. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007);

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Wright v. Tyson Foods, Inc., 28 Ark. App. 261, 773 S.W.2d 110 (1989). Arkansas cases demonstrate precedent for finding truck drivers to be either employees or independent contractors, depending upon the facts of each case. *E.g.*, *Ark. Transit Homes, supra* (employee); *Massey v. Poteau Trucking*, 221 Ark. 589, 254 S.W.2d 959 (1953) (independent contractor); *Wren v. D.F. Jones Constr. Co.*, 210 Ark. 40, 194 S.W.2d 896 (1946) (independent contractor); *Parker Stave Co. v. Hines*, 209 Ark. 438, 190 S.W.2d 620 (1945) (employee); *Steinert v. Ark. Workers' Compensation Comm'n*, 2009 Ark. App. 719 (employee).

Lane points out various factors weighing in favor of finding him to be an employee. Based upon our standard of review, the fact-intensive nature of this inquiry, and the lack of clear precedent directing otherwise, we affirm the Commission's decision. It displays a substantial basis for the denial of relief.

Affirmed.

HART and HENRY, JJ., agree.