

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 26, 2018

CLAIM NO. 201602382

NOEMIS DE LA CRUZ GONZALEZ (DECEASED);
MARIA ESTHER PALENCIA (ADMIN) PETITIONER

VS.

APPEAL FROM HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE

DAJA EXPRESS LINES, LLC.;
UNINSURED EMPLOYERS' FUND;
AND HON. RICHARD E. NEAL,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Maria Esther Palencia, as Administrator of the Estate of Noemis de la Cruz Gonzalez, ("the Estate") appeals from the July 12, 2017 Opinion and Order and the September 6, 2017 Order on Reconsideration rendered by Hon.

Richard E. Neal, Administrative Law Judge ("ALJ"). The ALJ determined Noemis De La Cruz Gonzalez ("Gonzalez") was not an employee of DAJA Express Lines, LLC ("DAJA") at the time he was fatally injured in a motor vehicle accident. The Estate appeals this determination. For the reasons set forth herein, we affirm.

DAJA is a trucking company owned by Reisdell Alvarez ("Alvarez"). DAJA contracts with commercially licensed drivers to transport general freight. Alvarez testified concerning the relationship between DAJA and its drivers. He holds a Department of Transportation number and the drivers would operate under this number. Alvarez would get on various websites to bid out loads for transport. He would negotiate the price for the load and then present the negotiated price to his drivers. The drivers were not obligated to accept the load; they enjoyed discretion to reject any load without repercussion.

DAJA's drivers owned their own trucks and insured their truck and trailer. DAJA would insure the contents of the load. The drivers were free to determine the route to be taken and were responsible for the repairs and maintenance of their trucks. The drivers also paid for their own fuel, meals

and accommodations while on the road. DAJA did not train the drivers, but required one year of experience.

While transporting a load, the drivers were required to place a DAJA sign on their trailer. The drivers were prohibited from driving for other companies while under contract with DAJA. DAJA's drivers were paid per load and received a Form 1099 each year for tax purposes.

On January 1, 2016, Gonzalez completed an "Application for Employment" with DAJA. His position was listed as "driver". He attached a copy of his commercial driver's license and results of drug and alcohol testing. On July 6, 2017, Gonzalez was fatally injured while transporting a load of motor oil for DAJA.

The Estate filed a claim for survivors' benefits. In the July 12, 2017 Opinion and Order, the ALJ determined Gonzalez was not an employee of DAJA, but an independent contractor. After setting forth the analysis required by Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965) and Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969), the ALJ considered the required factors:

1) The extent of control which, by the agreement, the master may exercise over the details of the work.

Mr. De La Cruz operated his own tractor-trailer in the manner he chose fit. He chose which loads to reject, which loads

to accept, the route, when he stopped, and where he slept. The only requirement was that he get the goods delivered within the time constraints of the contract. The ALJ finds that, while DAJA did confirm through logbooks that Mr. De La Cruz was operating in accordance with federal regulations, DAJA did not exercise any significant control over the details of the work performed by Mr. De La Cruz. DAJA simply procured prospective loads for Mr. De La Cruz to transport and had no real control of the details thereafter. As such, this element weighs heavily in favor of a finding that Mr. De La Cruz was an independent contractor.

2) Whether or not the employee is engaged in a distinct occupation or business?

Mr. De La Cruz was in the business of transporting goods. While he apparently did not drive for other companies while driving for DAJA and put a "Daja 7 Express Lines" sign on his truck while driving loads negotiated by DAJA, he had his own tractor-trailer that he drove, he received a Form 1099 at the end of the year, he was in charge of his own taxes, and he was in charge of his own fuel. The ALJ finds that this element is equivocal and does not weigh strongly in favor of either an employee or independent contractor relationship.

3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision?

There was little evidence submitted as to whether or not the type of truck driving performed by Mr. De La Cruz is usually done under the direction of an employer or by a specialist without supervision. However, the ALJ does note that Mr. De La Cruz worked with essentially no

supervision and had specialized training in driving a tractor-trailer. As such, this element weigh in favor of an independent contractor relationship.

4) *The skill required in the particular occupation?*

The operation of a track-trailer hauling freight over a highway requires special skill. Drivers must attend specialized training, be licensed by the Department of Transportation, and pass a road test. The ALJ finds that this factor weighs heavily in favor of the finding of an independent contractor.

5) *Whether the employee or the workman supplies the instrumentalities, tools and the place of work for the person doing the work?*

Mr. De La Cruz owned both the tractor and trailer that he drove. He was responsible for his own fuel and there is no indication in the record that DAJA was responsible for either maintenance or repairs. Accordingly, Mr. De La Cruz clearly supplied his instrumentalities, tools and place of work and this element weighs heavily in favor of finding independent contractor status.

6) *The length of time for which the person is employed?*

The ALJ finds that the length of time that Ms. De La Cruz was employed was simply by the load. Mr. De La Cruz decided whether to accept any future loads, and DAJA chose whether any future loads would be offered. This element weighs heavily in favor of finding independent contractor status.

7) *The method of payment, whether by the time or by the job?*

Mr. De La Cruz was paid by the job - not for the time he spent working. He

received 90% of the value of the load that he delivered. He was in charge of paying for his own fuel, expenses, and taxes out of this amount. As such, this element weighs heavily in favor of an independent contractor relationship.

8) Whether or not the work is a part of the regular business of the employer?

DAJA negotiated with companies for the delivery of goods, then found a driver willing to deliver the load for 90% of the negotiated price. There was no evidence the DAJA had any purported salaried employees outside of potentially the owner, nor was there any evidence of salaried drivers. It is true that DAJA's owner owned his own truck and drove loads that he had negotiated; however, it is unclear from the record the actual relationship between the dispatch work performed by DAJA and the driving work performed by the company's owner, Mr. Alvarez. Ultimately, the ALJ finds that DAJA's primary regular business was that of securing transportation for the delivery of goods, and that the work performed by Mr. De La Cruz was that of a driver of goods. As such, this element weighs slightly in favor of an independent contractor relationship.

9) Whether or not the parties believe they are creating the relationship of master and servant?

Mr. Alvarez testified that he believed that Mr. De La Cruz was an independent owner/operator - not an employee. His testimony is supported by other evidence in this claim including the facts that the checks supplied to Mr. De La Cruz clearly state "owner/operator" in the memo line, no taxes were taken out of the checks written to him for delivery of loads, a Form 1099 was sent out at the

end of the year - not a W2, Mr. De La Cruz provided his own fuel and equipment and Mr. De La Cruz could choose which loads he wanted to take and reject others. All of these factors strongly support Mr. Alvarez's belief of the intent to create an independent contractor relationship. As counsel for the Plaintiff has pointed out in her brief, Mr. De La Cruz did complete a document entitled "Driver Application For Employment" that also indicated that he was hired. However, in reality this was simply a generic application that DAJA used to gather information used to determine which drivers they wanted to contract with for deliveries. As such, this element weighs heavily in favor of an independent contractor relationship.

The ALJ dismissed the claim, and the Estate petitioned for reconsideration. The ALJ provided further discussion of the nine Redmon factors as requested, but denied the petition. The Estate now appeals, arguing the ALJ incorrectly applied the law to the facts of this case.

The ALJ correctly cited to Redmon and Chambers as the applicable legal guidelines to determine whether a claimant is an employee or an independent contractor. We find no indication the ALJ misconstrued controlling statutes or case law, as the Estate alleges. Rather, the Estate's challenge is to the ALJ's assessment of each factor, and the conclusions drawn therefrom. However, as the fact-finder, the ALJ has the sole authority to determine the weight,

credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

There is sufficient evidence in this claim to support the ALJ's conclusion Gonzalez was an independent contractor. As explained by the ALJ, several of the Redmon factors weigh heavily against the finding of an employee/employer relationship. Gonzalez owned his truck and was solely responsible for its upkeep and maintenance. He chose which loads to accept or reject, and was not assigned or otherwise obliged to accept loads. He also was free to determine the route taken during each trip. He received a Form 1099 for tax purposes, and was paid by the load. He held a commercial driver's license.

The Estate emphasizes certain factors that would support the finding Gonzalez was DAJA's employee: Alvarez also drove for DAJA but was its employee, DAJA insured the truck's loads, Gonzalez was not permitted to drive for other companies, and his skill set as a licensed commercial driver was no different than any other DAJA driver or employee. The ALJ considered these circumstances and placed greater weight

on other facets of the relationship between DAJA and Gonzalez. We find no abuse of discretion in his analysis. Furthermore, it is not the function of this Board to reweigh the evidence and draw alternate conclusions. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

The Estate draws our attention to the unpublished opinion of the Kentucky Court of Appeals in KC Transp. Inc. v. Thompson, 2010 WL 3214062 (Ky. App. 2010). In that claim, the Court of Appeals affirmed the ALJ's determination Thompson, a tractor-trailer driver, was an employee of KC Transportation. The circumstances in Thompson differ from this claim. Thompson's employer assigned him dedicated routes with specific travel itineraries, and he agreed to work under the "exclusive supervision, direction and control" of KC Transportation. He could not select which loads to accept. Thompson owned his truck but granted KC Transportation exclusive possession, control and use of it. These circumstances clearly distinguish Thompson from Gonzalez's relationship with DAJA.

Finally, the Estate argues the ALJ erred in his analysis of the intent of the parties. Redmon and Chambers require the ALJ to determine whether or not the parties believed they were creating an employment relationship. The

Estate argues it was error for the ALJ to consider Alvarez's testimony in light of the fact Gonzalez was not available to testify. Furthermore, according to the Estate, the "Application for Employment" executed by Gonzalez weighs in favor of an employment relationship.

Kentucky's former version of the so-called "dead man's statute", KRS 421.210, was repealed and replaced by the Kentucky Rules of Evidence, which do not specifically adopt the prior rule governing testimony concerning transactions and conversations with deceased persons. KRE 804 governs exceptions to the hearsay rule which might otherwise prohibit the admission of statements of the deceased. However, in this claim, Alvarez did not testify to conversations with Gonzalez, but rather to his own beliefs as to the relationship created with DAJA. The Estate points to no evidentiary rule prohibiting this testimony.

Furthermore, this argument overlooks the fact, explained in the Order on Reconsideration, that the ALJ looked beyond Mr. Alvarez's testimony to deduce the intent of the parties. The ALJ noted the checks paid to Gonzalez stated "owner/operator" in the memo line, no taxes were taken from his checks, he received a Form 1099, he was not reimbursed for fuel or lodging costs, and he was hired and paid by the

load. We find no error in the consideration of Alvarez's testimony for the purpose of determining the true intentions of DAJA and Gonzalez.

For the foregoing reasons, the July 12, 2017 Opinion and Order and the September 6, 2017 Order on Reconsideration rendered by Hon. Richard E. Neal, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MELISSA M ANDERSON
640 S FORTH ST #400
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT, UNINSURED EMPLOYERS FUND:

HON WILLIAM H JONES
1024 CAPITAL CENTER DRIVE #200
FRANKFORT, KY 40601

DAJA EXPRESS LINES, LLC.:

REISDEL ALVAREZ
189 TANYARD PARK PLACE
LOUISVILLE, KY 40229

ADMINISTRATIVE LAW JUDGE:

HON RICHARD E. NEAL
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601

