

[J-114-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

UNIVERSAL AM-CAN, LTD. AND	:	30 W.D. Appeal Docket 1999
NATIONAL UNION/AIAC,	:	
	:	Appeal from the Order of the
Appellants	:	Commonwealth Court entered February 2,
	:	1998 at No. 2055 C.D. 1997 affirming the
	:	Order of the Workers' Compensation
v.	:	Appeal Board entered June 27, 1997 at
	:	A95-4511.
	:	
WORKERS' COMPENSATION APPEAL	:	
BOARD (CLARENCE O. MINTEER),	:	
	:	ARGUED: September 13, 1999
Appellee	:	
	:	
	:	
	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CAPPY

DECIDED: NOVEMBER 27, 2000

I join that part of the majority opinion which holds that relevant federal and state regulations governing written lease requirements for equipment leasing by an authorized carrier do not mandate a determination of employee status for an owner-operator of leased trucking equipment. Furthermore, I agree with the majority that this court's decision in Hammermill Paper Company v. Rust Engineering Company, 243 A.2d 389, 392 (Pa. 1968) sets forth the relevant factors in undertaking an analysis of employee or independent contractor status. However, I respectfully dissent with respect to the majority's conclusion that Clarence O. Minteer (Claimant) was an independent contractor of Appellant Universal Am-Can, Ltd. (Universal) for purposes of the Pennsylvania Workers' Compensation Act (Act). 77 P.S. §1, et seq.

Federal law has extensively regulated the motor carrier field. 49 CFR Ch. III. Of course, compliance with federal regulation in this area is mandatory. Thus, I agree with the majority that conduct required by federal regulation should not be considered when determining employee/independent contractor status. However, since federal regulation has eliminated many of the traditional considerations used in determining employee/independent contractor status, then necessarily, heightened scrutiny must be given to those remaining aspects of the relationship that are extra-regulatory.

At the outset, it is important to note that there is no public policy in favor of employee or independent contractor status. Rather, inferences favoring a claim need only be slightly stronger than those against claim recognition. Diehl v. Keystone Alloys Co., 156 A.2d 818, 820 (Pa. 1960). Thus, only a slight tipping of the scales in favor of employee status is required to sustain granting benefits to a claimant.

While certain criteria pointed to by the majority suggests independent contractor status, other weightier factors tip the scales in favor of employee status. Numerous aspects of the relationship between Universal and Claimant confirm that Universal's significant right to control Claimant's work and the manner in which Claimant's work was to be performed goes beyond the requirements found in federal regulations and mandate a finding of an employer/employee relationship.

Claimant's "independence" from Universal's control, upon closer scrutiny, is severely limited and commands a finding of employee status. Specifically, Universal purports to allow Claimant to refuse a load, yet he may do so only if no other commodity is available ("The Contractor may decline to haul any particular commodity provided by the Carrier and Carrier shall not provide to Contractor any commodity load previously declined by the Contractor unless there is no other commodity available."). Contractor Operating Agreement (Agreement) p.2 para. 4. Likewise, according to Claimant, he could not return home empty without Universal's approval. R.R. 231a-32a.

Claimant may broker a load for another carrier only if there is no Universal freight available. Driver Manual (Manual) p.7. Claimant may not trip lease if Universal freight is available. Manual p.9. Thus, while purporting to be an independent contractor, Claimant is captured, absent limited circumstances. Moreover, in the instance in which trip leasing is permitted, Universal takes from Claimant, not a set expense fee, but a percentage of Claimant's gross transportation revenue. Agreement, p.1, para. 1; Manual p. 49. Thus, rather than operating independently, even when Universal permits Claimant to perform work for another entity, Universal uses Claimant's "independent" work as a profit center for itself.

Another prime example of the control exercised by Universal over Claimant is in the purchase of insurance. The testimony of record establishes that when he began working for Universal, Claimant was required to cancel his insurance and to purchase all his insurance from Universal. If Claimant failed to purchase insurance through Universal, Claimant could not drive for Universal. RR. 16a-17a, 233a. These examples of Universal's significant control over Claimant belie a finding that Claimant is a true independent contractor.

The right to control the manner of performance is another significant factor in determining employee/independent contractor status. Outside of compliance with federal regulations, Universal governs the performance of Claimant's work in numerous ways. While federal regulations set forth criteria for qualified drivers, the Agreement with Claimant goes farther and allows Universal the unfettered right to disapprove of any of Claimant's drivers, whether or not they are otherwise qualified under federal regulation. Agreement, p.4, para. 7F. While Universal and Claimant are subject to federal safety requirements, Universal goes beyond these requirements and subjects Claimant to random safety checks. Manual p.48.

Not the subject of regulation, Universal requires all drivers to telephone Universal's dispatcher every 12-24 hours. Significantly, Claimant is subject to fine for failure to comply. Manual pp.9-10. Furthermore, the Agreement purports to place upon Claimant all responsibility for, inter alia, paying operating and maintenance expenses including all expenses for fuel, road taxes, mileage taxes, fuel taxes, licenses, permits, and tolls. Agreement p.4, para. 7. Yet, Universal mandates that Claimant purchase enough fuel to cover the mileage driven and to turn in fuel tickets verifying required purchases. Manual p. 18. Universal requires that it file fuel tax reports. Manual p.18. It is Universal that applies for and files Ohio Highway use tax, and fuel receipts must be in Universal's name. Manual p.18. Universal requires documentation from Claimant for fuel receipts, fuel and use tax worksheets and toll receipts. Manual p.20. Although there was testimony that the carrier must ultimately be in compliance with regulations regarding reporting for fuel tax purposes, other evidence indicated that federal regulations only required designation as to the responsible party, and in this case, it was Claimant that was deemed to be responsible for all fuel taxes. 49 CFR §376.12(e); R.R. 245a-247a, 252a-254a; Agreement p.4, para 7D.

Likewise, while all permits are supplied by Universal, Claimant is responsible for their expense. Manual p. 42; Agreement p.4. para 7D. However, during the first year, Universal charges claimant for permits, but during subsequent years, all permits are provided by Universal at no charge if certain minimum gross revenues are maintained. Manual p.42. Related thereto, even though Claimant was responsible for keeping a daily log, Universal retained the right to "audit" the logs and to "reprimand" Claimant for violation for Hours of Service Regulations in conjunction therewith. Manual p. 27.

Finally, numerous rights possessed by Universal are cast in terms of an employer/employee relationship. Universal grants "advances" and "credit" to its drivers. Manual p.1; Agreement p.2, para. 5, p.4, para. 9. Universal requires that Claimant obtain

prior approval for a “leave of absence.” Manual p. 8. Similarly, it is especially telling of the relationship that Universal may “fine,” “reprimand” and “terminate” Claimant for non-compliance in a number of areas. Specifically, Claimant is subject to progressive discipline and can be punished in the nature of a fine or “termination” for failing to call Universal’s dispatcher for approval to work for another carrier. Manual p.49. Likewise, Claimant can be fined for failing to call every 24 hours while under load. Manual p.9. Claimant can be reprimanded for failure to properly maintain his daily log. Manual p.27. The right to punish or to discipline is clear indicia of an employer/employee relationship.

Thus, while federal regulation impacts the relationship between Universal and Claimant, the terms of the Agreement and Manual evince Universal’s great right to control Claimant’s work and the manner in which Claimant performs his work. I conclude that Universal’s pervasive and significant extra-regulatory right to control Claimant tips the scales in favor of a finding that Claimant was an employee of Universal for purposes of the Act. Thus, I would affirm the order of the Commonwealth Court, albeit for different reasons.¹

Mr. Justice Nigro and Madame Justice Newman join this Concurring and Dissenting Opinion.

¹ We may affirm the decision of the immediate lower court on any basis, without regard to the basis on which the court below relied. Bearoff v. Bearoff, 327 A.2d 72 (Pa. 1974); Taylor v. Churchill Country Club, 228 A.2d 768 (Pa. 1967); Sherwood v. Elgart, 117 A.2d 899 (Pa. 1955).