

IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00776 COA

ANTHONY ALEXANDER

APPELLANT

v.

BRADFORD SEAFOOD COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

BEN F. GALLOWAY

ATTORNEY FOR APPELLEE:

STEPHEN J. MAGGIO

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: AFFIRMED THE DECISION OF THE COMMISSION TO
DENY BENEFITS

BEFORE BRIDGES, P.J., BARBER, COLEMAN, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

SUMMARY

Anthony Alexander appeals from a decision of the Workers' Compensation Commission denying benefits based on the fact that Alexander's employment status was as that of an independent contractor rather than an employee. The decision of the administrative law judge was affirmed by the full commission and by the Circuit Court of Harrison County. Alexander appeals to this Court asserting that the commission erred in concluding that Alexander's claim for workers compensation should be denied on the basis that Alexander was not under the control of Bradford Seafood Company except as to the results of his work and was an independent contractor.

FACTS

Alexander was injured while working as an oyster shucker at Bradford Seafood. Testimony from a neurosurgeon, Dr. Danielson, indicated that the Appellant suffered injury to his cervical region as a result of the work related accident.

In his work with Bradford Seafood, Alexander generally reported directly to the owner, Jordan Bradford. Alexander worked on and off for Bradford Seafood for approximately twenty-six years. During the past several years, however, Bradford Seafood has been the only oyster producer in the area, and Alexander has worked exclusively for it. Additionally, oyster production was in the past a seasonal operation, with Summer being the off season. Now, however, Bradford's oyster business is year round because of a number of leases which allow the company to harvest additional oyster beds in the summer months.

Bradford Seafood paid Alexander at the end of each week based upon the amount of oysters he shucked. Alexander received his net pay by check each week after deductions were withheld for Social Security and Medicare. Bradford was paying Social Security tax on behalf of Alexander at the time of the accident as it was required to do by the Internal Revenue Service. Additionally, Bradford Seafood provided Alexander with a W-2 form at the year's end.

All of the oyster shucking work was done at the Bradford Seafood facility. Bradford provided their workers with a covered work area and work benches, although some workers preferred to use their own. The workers did provide their own hammer or knife with which to open the oysters. However, Bradford also provided custom knives which the workers could purchase from them if they chose to do so. The execution of the work itself, i.e., shucking the oysters, consisted of prying open the oyster shell with either a knife or a hammer, cutting and taking the oyster out of the shell, washing them and containerizing them.

Alexander regularly presented himself for work at Bradford Seafood before it opened at 6:00 A.M. If for some reason he was unable to report for work, Alexander would telephone to let Bradford know. Alexander's promptness and keeping in touch with Bradford ensured his place in the work force even on days when there was an overabundance of labor. Alexander was a dependable and faithful employee, available to shuck oysters for Bradford throughout the year.

STANDARD OF REVIEW

The commission is the ultimate fact finder, and deference must be given to its findings, despite the fact that the administrative law judge is in a better position to assess the credibility of a witness. *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124-25 (Miss. 1992). If there is substantial

evidence supporting the commission's ruling, the decision of the commission must stand. *Id.* at 1125. On the other hand, the commission's decision must be overturned where its findings of fact are unsupported, and its decision is arbitrary and capricious, *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991), or where the commission has misapprehended the controlling legal principles, *Smith*, 607 So. 2d at 1120, 1123-24. In this case, there is no dispute as to the facts. The matter to be decided is one of law, and our duty is to examine the facts in the light of the statute and the decisions interpreting it. *Accord Sones v. Southern Lumber Co.*, 60 So. 2d 582, 582 (Miss. 1952); *Brown v. L.A. Penn & Son*, 227 So. 2d 470, 474 (Miss. 1969).

ANALYSIS

Alexander contends that the commission erroneously concluded that he was not under the control of Bradford Seafood except as to the results of his work and that he "chose the dates and times of his work." Moreover, Alexander argues that, based on those factors, as well as the fact that Alexander provided his own tool, worked in the same type of trade for other persons or firms, and contracted to do a piece of work according to his own methods, the commission erroneously concluded that he was an independent contractor and not an employee of Bradford Seafood.

According to the Workers' Compensation chapter of the Mississippi Code, an employee is defined as "any person . . . in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors . . ." Miss. Code Ann. § 71-3-3 (1972). An independent contractor is defined as

any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.

Miss. Code Ann. § 71-3-3 (1972).

Mississippi recognizes two tests in determining whether an employee or independent contractor relationship exists. They are the "control" test and the "relative nature of the work" test. *Dillon v. State*, 827 F. Supp. 1258, 1263 (S.D. Miss. 1993). The object of these tests is to place the burden of injuries to an employee in his employment, and not to limit the scope of a master's tort liability for the wrongful act of an employee; these principles are liberally construed in favor of a finding of employment. *Sones*, 60 So. 2d at 584.

The question before us is whether the contractor is in fact independent. Put another way, we must determine if the contractor is indeed actually free of the will of his employer and substantially free from his control. *Sones*, 60 So. 2d at 583. "[T]he right to control, not actual control of, the details of

the work is the primary test of whether a person is an independent contractor or an employee." *Georgia-Pacific Corp. v. Crosby*, 393 So. 2d 1348, 1349 (Miss. 1981). Under the control test, there are several factors to consider in determining whether an employer-employee relationship exists. *Sones*, 60 So. 2d at 583. They are as follows:

Whether the principal master has the power to terminate the contract at will; whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of the employment; whether he has the right to direct the details of the manner in which the work is to be done

Id. at 583-584.

Control may also be inferred from other factors such as the continuity of service for the same employer over an extended period of time and the existence of an understanding that the arrangement is terminable by either party at will. *Brown*, 227 So. 2d at 470.

Applying these factors to the facts present in this case, we find that Bradford had the power to terminate Alexander's contract at will. An independent contract must be a valid contract, not merely a sham to be disregarded, canceled, or unenforced at the whim of the company. *Crosby*, 393 So. 2d at 1350. Bradford had control of the premises. Bradford furnished the materials (oysters) upon which the work was done. Bradford received the entire output of Alexander's work. Alexander dealt with no other person in respect to the output. Bradford set the price that was to be paid for the output. At the time of the accident, Alexander had been working continuously and exclusively for Bradford for a period of several years. Bradford controlled the times that Alexander could work by the setting the time he opened his shop fully expecting Alexander to be present when he opened. Bradford controlled the amount of work that Alexander could perform by closing his shop on days when there were no oysters. Bradford exercised control over his workers by telling them that if they did not agree to open the small oysters, they would not be allowed to open the large ones. Furthermore, workers were instructed as to how to open the oyster without damaging it. Bradford also provided work benches and a place to work although it did not provide the knife used to open the oyster. It did on occasion, however, supply custom knives that the shuckers could purchase from them.

The employer-employee relationship is not destroyed merely because a worker provide some or all of the equipment necessary for the job. *See Texas Co. v. Mills*, 156 So. 866 (Miss. 1934) (holding that a bulk station agent was an employee despite the fact that he furnished his own truck in making deliveries of petroleum products); *Empire Home Builders v. Guthrie*, 187 So. 2d 17 (Miss. 1966) (plumber who furnished his own equipment, hired a helper, and signed a new contract for each job was held to be an employee because he agreed to work exclusively for one builder, and the

relationship could be terminated at the will of either party and because social security taxes were withheld by the builder). The significance placed on this factor varies with the facts presented. In the case at bar, we attach little significance to the fact that Alexander supplied his own knife, a relatively simple and inexpensive tool, with which to open the oysters. Additionally, we can place little significance in the fact that Bradford exercised little control over Alexander in the actual processing of the oysters. This is a simple task that requires little supervision, and Alexander had been doing this work for almost thirty years. In short, Alexander required no supervision. It is the ultimate right of control, not the overt exercise of that right, which is decisive. *Crosby*, 393 So. 2d at 1349.

The issue of control is one that must be addressed realistically. Was Alexander an independent contractor in fact, or in practical effect did Bradford have the right to control him? Under these facts, we believe that this question must be answered in the affirmative. Realistically, Alexander was under Bradford's direction and control.

The other test considered in Mississippi decisions regarding workers' compensation cases is the "relative nature of the work" test. The factors to be considered using this test are: the character of the claimant's work or business--how skilled it is, how much of a separate calling or enterprise it is, to what extent the claimant may be expected to carry his own accident burden, how much it is a regular part of the employers regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. *Boyd v. Crosby Lumber & Mfg. Co.*, 166 So. 2d 106, 110 (Miss. 1964). Other factors to consider are whether the activities are coordinated with the employer's overall production pattern and whether the work is an integral part of the business of the employer. *Brown*, 227 So. 2d at 473-74.

In applying the facts of this case to the various factors of the test, we find here also that there is an employment relationship. The nature of Alexander's work requires very little skill. Essentially it is a two step process which involves opening the oyster and removing the product from the shell. The work of an oyster shucker is obviously within the same calling or enterprise as Bradford Seafood. In fact, the evidence is wholly insufficient to show that Alexander, relative to his employer, furnished an independent business or professional service. Conversely, Alexander took a regular and continuous part in the production of Bradford Seafood. It is entirely unrealistic to expect that an oyster shucker, given their limited earning ability, should or would in fact be able to bear the burden of an industrial accident. Indeed, Alexander is precisely the type of worker for whose benefit the compensation statute was enacted. The oyster shucking process is an absolute necessity to the production of Bradford Seafood. Additionally, the amount of work available for Alexander has remained continuous because of Bradford's ability to harvest oysters year round. Finally, the length of time and regularity with which Alexander served Bradford Seafood is sufficient to amount to a hiring of continuing services as distinguished from contracting for the completion of a particular job. Alexander's employment activities were closely coordinated with Bradford's overall production pattern. Alexander showed up for work when Bradford opened for business at 6:00 A.M. and was told to stay home when there were no oysters available.

In *Georgia-Pacific v. Crosby*, Chief Justice Lee, writing for the Court, noted that "[t]he modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent

business or professional service." *Crosby*, 393 So. 2d at 1350. It is clear to us that Alexander's work as an oyster shucker was an integral part of Bradford Seafood's business process, and we have stated herein that Alexander, relative to Bradford Seafood, did not provide an independent business but instead devoted most or all of his time to Bradford Seafood.

The facts in *Sones v. Southern Lumber Co.*, 60 So. 2d 582, 585 (Miss. 1952) are analogous to the case at bar and we agree with the court's logic as follows:

To characterize such a laborer as an independent contractor would be simply to ignore the realities of the situation. A significant circumstance is that for keeping the [business] running defendant was more or less dependent upon the men who were in the habit of doing this work, that the men themselves, while under no contractual obligation to report regularly for work, or to maintain regular hours for working, yet could not but realize that they were more or less expected to do so, as their doing so was necessary for the continuous operation of the [business]. Their keeping their jobs necessitated, doubtless, some dependability on their part. Defendant had absolute control of them in the manner of allowing them to go to work, and discontinuing their work.

We find that here, the statute and prior cases interpreting that statute require a finding of employment. To do otherwise would be to subvert the purpose of the statute and close our eyes to the realities of the situation. The commission's findings, therefore, are not supported by substantial evidence. For these reasons, we find that the circuit court erred in affirming the decision of the commission.

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REVERSED. THIS CAUSE IS REMANDED TO THE WORKER'S COMPENSATION COMMISSION SOLELY FOR DETERMINATION AND SUPERVISION OF THE COMPENSATION DUE THE APPELLANT. COSTS OF THIS APPEAL ARE TAXED TO BRADFORD SEAFOOD COMPANY.

FRAISER, C.J., BRIDGES, P.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.