

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2009 Session

GLORIA KAZELESKI v. DIXIE MOTORS, INC.

**Direct Appeal from the Chancery Court for Davidson County
No. 06-1456-I Claudia C. Bonnyman, Chancellor**

**No. M2009-00276-WC-R3-WC - Mailed - January 7, 2010
Filed - February 10, 2010**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The plaintiff, Gloria Kazeleski, was involved in an automobile accident, and sought workers' compensation benefits from defendant Dixie Motors, Inc. Dixie Motors contended that she was not its employee, but an independent contractor. The trial court ruled that she was an employee, and awarded benefits, including 100% permanent disability of the left arm. The defendant has appealed, arguing that the trial court erred by finding that plaintiff was its employee. We conclude that she was an independent contractor, and reverse the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Reversed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and DONALD P. HARRIS, SR. J., joined.

Michael Gigandet, Nashville, Tennessee, for the appellant, Dixie Motors, Inc.

Jeffrey S. Strickland, Brentwood, Tennessee, for the appellee, Gloria Kazeleski.

MEMORANDUM OPINION

Factual and Procedural Background

The plaintiff, Gloria Kazeleski, was injured in an automobile accident on July 29, 2004. At the time of the accident, she was driving a vehicle either to or from the premises of the defendant, Dixie Motors, Inc. She sustained a severe fracture of her arm, and extensive damage to her median nerve. Three surgical procedures were required to treat the injury. These were successful in repairing the fracture. However, she was left without sensation in the median nerve distribution in her hand.

Dixie Motors is involved in both the retail and wholesale automobile business. The retail side of the business, which is not at issue in this case, is conducted by full-time sales personnel, working on commission, selling vehicles which have been purchased at wholesale by Dixie Motors.

Ms. Kazeleski was involved in the wholesale side of the business, which is structured in a substantially different manner. Mike Caldwell, the general manager of Dixie Motors, testified concerning the structure of its wholesale business. Automobiles are purchased at wholesale by brokers, who are independent contractors. Dixie Motors provides financing for the purchase of the automobiles, and also for repairs and detailing. The vehicles are stored on its premises. Brokers are provided with a desk, a telephone, and accounting or bookkeeping services. When a vehicle is sold by a broker to a retail automobile dealer, Dixie Motors receives 30% of the broker's net profit from the sale. Automobiles purchased by brokers are transported to and from the premises by one of two methods. If several vehicles have been purchased at once, they are moved by a transport truck. Individual vehicles are transported by drivers, such as Ms. Kazeleski. Mr. Caldwell's description of the operation was corroborated by the testimony of Reese Payne, who had been a broker there for fifteen years. Mr. Payne was one of the brokers who occasionally engaged Ms. Kazeleski's services.

Drivers are initially "hired" by individual brokers. However, before a driver could actually move a vehicle, the driver had to provide a copy of her drivers' license to Dixie Motors. Dixie Motors would then forward that information to its insurer, which would review the driver's record. The drivers were covered by insurance purchased by Dixie Motors. Drivers received their work assignments from individual brokers. Many, including Ms. Kazeleski, worked for several brokers. The drivers negotiated their hourly wage with each broker separately. Thus, Ms. Kazeleski was paid as little as \$7.00 per hour or as much as \$10.00 per hour for delivering automobiles, depending on her agreement with the individual broker. She testified that, to receive driving assignments, "I would call them or they would call me or at the end of the day they would say to be here at nine o'clock, we have a delivery." When Ms. Kazeleski completed a driving assignment, she would advise the individual broker how many hours it had taken. The broker would submit an expense

voucher to Dixie Motors' office manager. At the end of the week, a check was issued to Ms. Kazeleski reflecting the total of the vouchers submitted. Taxes were not deducted, and she was provided with a 1099, rather than a W-2, for IRS purposes.

Ms. Kazeleski testified that she had the option of declining any individual assignment. However, she was reluctant to do so, because the broker offering the assignment might not request her services again. As a result, she accepted the assignments offered to her "nine times out of ten." On cross examination, she testified that one of the reasons she chose to work in this manner was that it allowed her time to spend with her family.

Ms. Kazeleski testified that she did not receive any assignments from Mr. Caldwell, the general manager, but that she once "did a favor for" him. She also testified that she worked in the office on one occasion. Mr. Caldwell and Wendy Stoker, the office manager, disputed that this occurred. Also, for an unspecified period of time, Ms. Kazeleski had a key to the gate of Dixie Motors's lot. She had been given this for the purpose of opening the gate to permit delivery of automobiles after normal business hours.

The trial was bifurcated. A hearing was held on March 27, 2008 for the purpose of determining whether or not Ms. Kazeleski was an employee of Dixie Motors for workers' compensation purposes. The trial court ruled that she was an employee. A second hearing was held on December 18, 2008 to determine the amount of benefits due to her. The trial court awarded 100% permanent disability of the left arm, fifty-five weeks of temporary total disability, and ordered the payment of medical expenses. Dixie Motors has appealed, contending that the trial court erred by finding that Ms. Kazeleski was its employee for purposes of the workers' compensation law.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

Dixie Motors does not contest the amount of the award in this appeal. The sole issue presented is whether Ms. Kazeleski was an employee of Dixie Motors for purposes of the workers' compensation statute.

Dixie Motors contends that Ms. Kazeleski was an independent contractor, rather than an employee. In support of its position, it points out that she did not submit an employment application and was not interviewed by any employee of Dixie Motors before she began driving for the brokers; that the individual brokers determined which drivers to use, when to use them and how much to pay them. Dixie Motors also notes that Ms. Kazeleski was free to accept or reject any given assignment; that it did not maintain personnel files on any drivers; that taxes were not deducted from the checks issued to drivers; that Ms. Kazeleski's income tax returns stated that she was self-employed; and that the Tennessee Department of Labor determined that the drivers were not employees of Dixie Motors for purposes of the unemployment compensation law.

Ms. Kazeleski argues that the trial court correctly found her to be an employee. She points out that she was paid by checks from Dixie Motors for all of her driving; that she and other drivers were required to provide copies of their drivers' licenses to Dixie Motors before they were permitted to driver for any broker; that she was covered under its liability insurance policy while driving the vehicles; that she was provided with a key to the premises; and that she had no other employment after she began driving vehicles for its brokers.

Tenn. Code Ann. § 50-6-102(10)(D)(Supp. 2003) provides:

[I]n order to determine whether an individual is an "employee," a "subcontractor," or an "independent contractor," the following factors shall be considered:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishings of tools and equipment;
- (F) Self scheduling of working hours; and
- (G) The freedom to offer services to other entities[.]

Tenn. Code Ann. § 50-6-102(10)(D) (Supp. 2003). "[N]o single factor is determinative." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). However, "this Court has repeatedly emphasized the importance of the right to control, the relevant inquiry being whether the right existed, not whether it was exercised." Id.

We note that the evidence in this record overwhelmingly supports the conclusion that the brokers, such as Mr. Payne, were independent contractors. This issue was not disputed in the trial court. The status of the brokers is significant in determining Ms. Kazeleski's status, because her relationship with Dixie Motors was conducted primarily through them. Drivers were recruited and hired by the individual brokers. Dixie Motors' only involvement in that process was to ask its insurer to determine that a proposed driver was insurable. After being approved, drivers were paid by Dixie Motors. A individual driver's rate of pay was determined by separate agreements, negotiated individually with each broker. Thus, Ms. Kazelski received as much as \$10.00 per hour or as little as \$7.00 per hour, depending on which broker she was working for. The amount paid to a driver for a given job was charged to the responsible broker by Dixie Motors. A single paycheck issued to a driver by Dixie Motors could include work performed for several brokers at several different hourly rates. The selection of a particular driver to transport a vehicle was made by the broker who purchased or sold the vehicle. There is no evidence that Dixie Motors directly participated in the assignment of work to individual drivers.

Asked about her work schedule, Ms. Kazeleski said "I would call them or they would call me or at the end of the day they would say to be here at 9:00 o'clock, we have a delivery." This answer suggests, or permits the inference, that she did not work a regular schedule. She stated that she could either accept or decline an assignment from an individual broker, depending on whether she had other tasks. However, she accepted "nine times out of ten." She agreed that one of the benefits of working as a driver was that the flexible schedule allowed her to spend time with her family.

The only employees of Dixie Motors with whom Ms. Kazeleski had direct contact were Mr. Caldwell and Ms. Stoker.¹ She testified that Mr. Caldwell did not assign any work to her, but that she "did a favor" for him on one occasion. She also testified that she performed filing in the office on one occasion, though Ms. Stoker disputed this. She had a key to the vehicle lot for a period of time. This was given to her by Mr. Caldwell, so that she could open the gate to deliver vehicles outside of regular business hours. He also gave her documents confirming that she was insured while driving vehicles being purchased or sold through Dixie Motors. She gave a copy of her driver's license to Ms. Stoker when she first began to drive for the brokers. She drank coffee in the office while waiting for driving assignments. These activities constituted all, or virtually all, of Ms. Kazeleski's direct interaction with Dixie Motors. The remainder of her dealings with Dixie Motors were through the individual wholesale brokers.

In summary, Ms. Kazeleski's hiring, work assignments, schedule and rate of pay were

¹Ms. Kazeleski testified that she considered the wholesale brokers to be employees of Dixie Motors. For the reasons stated herein, we conclude that they were not.

all determined by the individual brokers, who were independent contractors. She was paid by checks issued from Dixie Motors' account, and was insured by Dixie Motors when driving its vehicles. The evidence does not support the conclusion that Dixie Motors had the right to control any aspect of her day-to-day work as a driver. We therefore conclude that the evidence preponderates against the trial court's finding that Ms. Kazeleski was an employee of Dixie Motors for purposes of the workers' compensation law.

Conclusion

The judgment of the trial court is reversed. The complaint is dismissed. Costs are taxed to Gloria Kazeleski, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Gloria Kazeleski, for which execution may issue if necessary.

PER CURIAM