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IN THE COURT OF APPEALS OF IOWA

ALBERT W. MORGAN,	)	
Respondent-Appellant,	)	
vs.	)	Filed April 23, 1986
JAMES STARCEVIC,	)	5-852 / 85-454
Petitioner-Appellee.	)	

Appeal from the Iowa District Court for Monroe County (No. CL20644-0185), James D. Jenkins, Judge.

Respondent appeals from a judicial review decision reversing an award of workers'compensation benefits. **REVERSED AND REMANDED.**

Linda L. Haley of Williams, LaMarca, Marcucci, Wiggins & Anderson, P.C., West Des Moines, for respondent-appellant.

Marvin V. Colton, Albia, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., Donielson, and Snell, JJ.

OXBERGER, C.J.

Respondent Morgan appeals from a judicial review decision reversing an award of workers' compensation benefits. We reverse and remand.

Morgan was initially found to have sustained his injury while an employee of appellee Starcevic. This finding of the Deputy Labor Commissioner was affirmed on appeal by Starcevic before the Labor Commissioner.

Starcevic filed a petition for judicial review of the commissioner's decision in Monroe County on January 11, 1985. On January 16, 1985, the district court filed an order staying execution of the commissioner's order, ex parte. This temporary restraining order was dissolved in the same court on February 15, 1985. On that date, Morgan presented the court with a certified copy of the commissioner's appeal decision and requested that judgment be entered. The court, rather than entering judgment, scheduled the application for hearing.

On March 15, 1985, the district court reversed the decision of the Industrial Commissioner and Morgan appeals.

The question for the district court on judicial review of a decision of the Industrial Commissioner is whether the evidence supports the commissioner's findings. The commissioner's decision is binding on appeal "unless a contrary result is demanded as a matter of law." Wetzel v. Wilson, 276 N.W.2d 410, 412 (Iowa 1979).

The supreme court has set certain factors to aid in a determination of whether a person holds "employee" status for workers' compensation consideration. Those factors are:

1. Right of selection or to employ at will;
2. Responsibility for payment of wages by employer;
3. Right to discharge or terminate relationship;
4. Right to control work;
5. Identity of employer as authority in charge of work or for whose benefit it is being performed;
6. Intention of parties.

Caterpillar Tractor Co. v. Shook, 313 N.W.2d 513 (Iowa 1981).

We believe the record shows substantial support for Morgan's contention that he satisfied these factors at the time of his injury.

Starcevic clearly requested that Morgan drive for him in a probationary status pending final approval. The parties agreed that Morgan was to receive compensation through payment by Starcevic of 26 percent of the proceeds Starcevic received for truck loads hauled. Such a percentage payment was made following Morgan's injury. Starcevic retained the power to discharge Morgan if Starcevic found Morgan did not comply with their agreement. Professor Larson, Workmen's Compensation (Desk Ed.) § 44.35 (1976) notes that the power to discharge is an element of the power of control. Thus respondent meets this factor of the test.

Starcevic directed Morgan regarding his duty to pick up and deliver coal, from which mine he was to receive the coal, where he was to deliver the coal, and other incidental details of the task.

As the Commissioner noted, this power of control clearly indicates that Starcevic held controlling authority over Morgan's duties.

Starcevic's provision of the truck bearing his name is an additional element lending credence to Morgan's case. Professor Larson, supra, at § 44.34, pp. 8-27 notes the absence of any case on record where "the employer owned the truck, but the driver was held to be an independent contractor."

The court does not doubt that Starcevic intended to have Morgan enter into a lease agreement following a satisfactory probationary period. But this intention was not realized prior to Morgan's injury. Starcevic attempted to place Morgan in a private contractor's status subsequent to the accident by having him sign a truck leasing agreement while Morgan was hospitalized following the fall. This tardy precaution does not alter the fact that it was not in effect at the time of the injury.

By the foregoing discussion, we conclude that there was an employer-employee relationship between Starcevic and Morgan at the time Morgan was injured.

Morgan charges that the trial court accepted evidence in this matter which was not offered in either the hearing before the Deputy Industrial Commissioner, nor before Starcevic's appeal before the Commissioner.

"[I]n workers' compensation cases appellate review is limited to those matters raised and litigated before the commissioner." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 184 (Iowa 1980). Because we reverse on other grounds, we find it unnecessary to decide this issue.

REVERSED AND REMANDED.