



**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE
FOR THE STATE OF TENNESSEE**

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TN POLICY ANALYSIS SECTION

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SECRETARY OF STATE

IN THE MATTER OF:)
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KUMAR TRANSPORTATION, INC.)
)
and)
)
TECHNOLOGY INSURANCE)
COMPANY)
)

**Docket No. 12.28-154175A
WC Appeal - Insurance**

FINAL ORDER

This matter was heard on December 18, 2018, before the Honorable Thomas Stovall, Administrative Law Judge, appointed by the Secretary of State, with Ms. Maliaka L. Bass, Deputy General Counsel for General Civil, Department of Commerce and Insurance, sitting as Designee of the Commissioner of Commerce and Insurance. As Commissioner’s Designee, Ms. Bass makes the final determination in this matter as to Findings of Fact and Conclusions of Law. Kumar Transportation, Inc. (hereinafter referred to as “Petitioner”) was represented at the hearing by Mr. Joseph B. Baker of McDonald Kuhn, PLLC. Technology Insurance Company (hereinafter referred to as “Respondent”) was represented at the hearing by Mr. Allen Callison of McAngus Goudeloc & Courie, LLC.

JURISDICTION

The Commissioner of the Department of Commerce and Insurance (“Commissioner”) has jurisdiction in this matter pursuant to Tenn. Code Ann. § 56-5-109(b), which provides:

Every insurer and rate service organization shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance afforded. If the insurer fails to grant or reject the request within thirty (30) days, the applicant may proceed in the same manner as if the application had been rejected. Any party affected by the action of the insurer on the request may, within thirty (30) days after written notice of the action, appeal to the commissioner who, after a hearing held upon not less than ten (10) days’ written notice to the appellant and to the insurer, may affirm, modify, or reverse the action.

ISSUES

The issues raised by the Petitioner’s appeal are as follows:

- (1) Whether the taxicab drivers working on behalf of the Petitioner should be considered “employees” within the meaning of Tenn. Code Ann. § 50-6-102(12);
- (2) Whether the Petitioner owes additional premium to the Respondent;
- (3) How should any premium the Petitioner may owe be calculated; and
- (4) Whether the Respondent acted unlawfully in assessing a premium based upon improper classification of employees pursuant to Tenn. Code Ann. § 56-6-109(c) and Tenn. R. & Regs. 0780-1-82-.10.

FINDINGS OF FACT

1. The Petitioner is a taxicab operator in Memphis, Tennessee, with a Certificate of Convenience and Necessity issued by the City of Memphis. (Exhibit 1; Tr. p. 11, l. 17-25; Tr. p. 12, l. 1-15)

2. The Petitioner holds a Certificate of Public Convenience and Necessity issued by the City of Memphis to operate its business pursuant to City of Memphis Ordinance § 6-80-7. (Exhibit 1; Tr. p. 11, l. 20-25; Tr. p. 12, l. 1-7)
3. The Petitioner operates by leasing motor vehicles outfitted as taxicabs to drivers for a daily, weekly, or monthly fee. Whether the lease payment to the Petitioner is made daily, weekly, or monthly is at the discretion of the driver. (Tr. p. 18, l. 15-19; Tr. p. 27, l. 22-25; Tr. p. 28, l. 1-6)
4. The Petitioner owns all the leased motor vehicles. (Tr. p. 62, l. 1-11)
5. If a prospective driver wishes to drive his or her own vehicle, the prospective driver is required to sign the title over to the Petitioner. The prospective driver then pays to have the vehicle painted as a taxicab, adds decals, adds signs, and has equipment installed into the vehicle. (Tr. p. 18, l. 25; Tr. p. 19, l. 1-21)
6. The Petitioner may track all the drivers on a GPS monitoring system. (Exhibit 6, Tr. p. 51, l. 1-10)
7. The City of Memphis Ordinance § 6-80-25 requires prospective taxicab drivers to complete a written application. The process for obtaining a permit from the City of Memphis consists of a health physical, drug screen, and background check. (Tr. p. 13, l. 1-22)
8. Before a prospective taxicab driver may obtain his or her permit, the City of Memphis requires that the prospective driver associate with a taxicab company. This driver may only drive for the sponsoring taxicab company. (Tr. p. 30, l. 5-8)
9. Each taxicab driver is responsible for cleaning and maintaining their leased vehicles. The Petitioner provides a person on-site who cleans the vehicles. (Tr. p. 28, l. 12-25; Tr. p. 29, l. 1; Tr. p. 52, l. 5-11)

10. The Petitioner is responsible for ensuring that the tires have safe treads, the brakes operate appropriately, and the seatbelts work properly. (Tr. p. 51, l. 25; Tr. p. 52, l. 1-4)
11. Each driver for the Petitioner is required to sign a "Taxicab Operator Agreement." The document specifies that the driver agrees not to use a taxicab affiliated with the Petitioner for personal use. Further, the document states that when the [driver] is not transporting paying fares or customers, the Petitioner's taxicab shall be parked at a governmentally approved taxicab stand. The "Taxicab Operator Agreement" requires all helpers who assist a driver be approved by the Memphis and Shelby County Taxi Cab Commission. (Exhibit 3; Tr. p. 49, l. 21-25; Tr. p. 50, l. 1-4)
12. The taxicab drivers and the Petitioner may end their affiliation at any time. (Tr. p. 37, l. 21-25; Tr. p. 38, l. 1)
13. The Petitioner does not set schedules or require taxicab drivers to drive certain hours. (Tr. p. 21, l. 7-9)
14. Each taxicab has dispatch equipment installed that allows a driver to accept or decline a service request. The driver is not required to accept a service request. (Tr. p. 21, l. 7-25; Tr. p. 22; l. 1-11)
15. If a driver accepts a service request and does not fulfill the service, the Petitioner may suspend the driver from working for the Petitioner. (Exhibit 6; Tr. p. 45, l. 8-25; Tr. p.46, l. 1-22)
16. The Petitioner does not receive any portion of cash payments received by their drivers. (Tr. p. 27, l. 22-25)
17. The Petitioner may receive payments through the credit card payment system installed in the taxicab if that credit card payment system is utilized by a driver after completing a ride.

Petitioner remits all payments received through this installed system back to the driver.
(Exhibit 6)

18. Every year, the Petitioner issues each taxicab driver a 1099 tax form. The Petitioner does not withhold any income for federal taxes, health insurance, or retirement benefits. (Tr. p. 26, l. 18-25; Tr. p. 27, l. 1-10)
19. The Petitioner does not offer health insurance or retirement benefits. (Tr. p. 26, l. 21-25; Tr. p. 27, l. 1-10)
20. The Petitioner maintains liability insurance for each driver. (Tr. p. 35, l. 19-22)
21. On the workers' compensation insurance application submitted to the Respondent, the Petitioner acknowledged it has two (2) drivers classified as employees. (Exhibit 5; Tr. p. 38, l. 16-24; Tr. p. 39, l. 6-20)
22. To determine the correct amount of premium owed, the Respondent audited the Petitioner's payroll. During that audit, the Respondent discovered the Petitioner does not track all payments made to its drivers. Because of the insufficient information, the Petitioner used the "basis of premium application" found in the Basic Manual's "Advisory Miscellaneous Values" section. (Exhibit 7; Exhibit 8; Exhibit 9; Tr. p.69, l. 8-25, Tr. p. 70-71; Tr. p. 72, l. 1-10)
23. After completing the audit, the Respondent sought an unpaid premium of fifty-nine thousand, five hundred and five dollars (\$59,505.00) on the 2016 workers' compensation policy. This is based on an assessment of sixty-six thousand, nine hundred dollars (\$66,900.00) in annual wages per vehicle. (Exhibit 10; Tr. p. 74-75; Tr. p. 76, l. 1-15)
24. A dispute arose between the Petitioner and the Respondent regarding the amount of premium the Petitioner owes the Respondent. (Tr. p. 75, l. 10-12)

CONCLUSIONS OF LAW

25. Pursuant to Tenn. Comp. R. and Regs. 1360-04-01-.02(3) and (7), the Petitioner has the burden of proof to show that the issues should be resolved in its favor by a preponderance of the evidence standard.

26. Tenn. Code Ann. § 50-6-102(12)(D)(i) provides in pertinent part:

In a work relationship, in order to determine whether an individual is an “employee,” or whether an individual is 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 furnishing of tools and equipment;
- (f) Self-scheduling of working hours; and
- (g) The freedom to offer services to other entities.

27. The Petitioner has failed to show by a preponderance of the evidence that the drivers working for the Petitioner should be considered independent contractors. While no factor mentioned in Tenn. Code Ann. § 50-6-102(12)(D)(i) is dispositive of whether an individual is considered an employee, the factors as applied demonstrate that the taxicab drivers working for the Petitioner are employees.

28. The right to control the conduct of a person’s work is generally viewed as the primary test for determining whether an individual is an employee or an independent contractor. *Mohamed v. Taxi USA of Tenn., LLC*, No. M2010-02062-WC, at 5 (Tenn. Sup. Ct. Workers Comp. 2012). However, no single aspect of a work relationship is conclusive in deciding whether an individual is an employee or independent contractor. This determination can only be made after examining all relevant factors and circumstances. *Boruff v. CNA Ins. Co.*, 795 S.W.2d 125, 127 (Tenn. 1990).

29. The facts, as stated in Paragraph 6, demonstrate that the Petitioner monitors all drivers on its GPS monitoring system. The facts, as stated in Paragraph 11, demonstrate that the “Taxicab Operator Agreement” severely limits the use of the leased vehicles. The facts, as stated in Paragraph 15, demonstrate that the Petitioner has the right to discipline drivers who behave poorly by accepting and then rejecting rides through the dispatch system. Further, the facts, as stated in Paragraph 21, demonstrate that the Petitioner acknowledges two (2) taxi drivers are considered employees. The Petitioner failed to distinguish between these two (2) drivers and every other driver employed by the Petitioner. While the Petitioner may not exercise its right to control the conduct of the work, it still has control of the operation of the taxicabs. Tennessee courts have repeatedly emphasized the importance of the right to control the work rather than whether such control is actually exercised. In consideration of all these facts, factor (a) of the employee test leans in favor of an employer-employee relationship between the Petitioner and its taxicab drivers.
30. The facts, as stated in Paragraph 12, demonstrate that both the Petitioner and its taxicab drivers have the right to terminate their affiliation at any time. “The power of a party to a work contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor.” *Masiere v. Arrow Transfer and Storage Company*, 639 S.W.2d 654, 656 (Tenn.1982). In consideration of all these facts, factor (b) of the employee test leans in favor of an employer-employee relationship between the Petitioner and its taxicab drivers.
31. The facts, as stated in Paragraphs 16 through 19, and Paragraph 22, demonstrate that the Petitioner does not keep an accurate payroll for its taxicab drivers. If a taxicab driver obtains payment in cash, the cash is not given to the Petitioner. If a taxicab driver receives

a payment using the Petitioner's credit card system that is installed in the taxicab, that payment is returned to the taxicab driver. The Petitioner does not withhold taxes, provide health insurance, or provide any other retirement benefits. Each year, the Petitioner provides the taxicab drivers a 1099 tax form instead of a W-2 tax form. In consideration of all these facts, factor (c) of the employee test leans in favor of an independent contractor relationship between the Petitioner and its taxicab drivers.

32. The evidence provided at the hearing demonstrates that the taxicab drivers do not have freedom to select and hire helpers. The facts, as stated in Paragraphs 3 through 6, demonstrate that the vehicles are "outfitted" to show the taxicab is owned by the Petitioner and has a GPS attached which allows the Petitioner to monitor the drivers. The facts, as stated in Paragraph 11, demonstrate that the vehicles can only be used while the taxicab drivers are working for the Petitioner. Further, the facts, as stated in Paragraph 11, demonstrate that the "Taxicab Operator Agreement" requires helpers be approved by the City of Memphis and Shelby County Taxi Cab Commission. The facts, as stated in Paragraph 8, demonstrate that the City of Memphis requires all drivers be sponsored by a taxicab company. A driver may only drive for that company. All helpers must be approved by, and affiliated with, the Petitioner. In consideration of all these facts, factor (d) of the employee test leans in favor of an employer-employee relationship between the Petitioner and its taxicab drivers.

33. The evidence provided at the hearing demonstrates that the taxicab drivers are furnished equipment from the Petitioner. The facts, as stated in Paragraphs 3 through 5, demonstrate that the Petitioner holds the title to every vehicle, outfits the vehicles company signage, and is responsible for maintaining and cleaning each vehicle. While the taxicab drivers

may pay the cost of outfitting cars if they wish to lease their own car, the Petitioner ultimately holds the title to the vehicle. The facts, as stated in Paragraph 9 and 10, demonstrate that the Petitioner is responsible for cleaning and maintain every vehicle. The facts, as demonstrated in Paragraph 20, demonstrate that the Petitioner maintains liability insurance for each driver. In consideration of all these facts, factor (e) of the employee test leans in favor of an employer-employee relationship between the Petitioner and its taxicab drivers.

34. The facts, as stated in Paragraph 13, demonstrate that the taxicab drivers are responsible for scheduling their own hours. The facts, as stated in Paragraph 14, demonstrate that each driver has the option to accept or deny a service request. The Petitioner waives its right to control the working hours of each driver in the “Taxicab Operator Agreement.” In consideration of all these facts, factor (f) of the employee test leans in favor of an independent contractor relationship between the Petitioner and its taxicab drivers.

35. The evidence provided at the hearing demonstrates that the taxicab drivers do not have freedom to provide services to other entities. First, the facts, as stated in Paragraphs 3 through 5, demonstrate that the vehicles are “outfitted” to show the taxicab is owned by the Petitioner. Second, the facts, as stated in Paragraph 11, demonstrate that the vehicles can only be used while the taxicab drivers are working for the Petitioner. While the Petitioner confirms that it gives the taxicab drivers the freedom to work for other employers or provide other services, for all practical purposes, the taxicab drivers can only work for the Petitioner. In consideration of all these facts, factor (g) leans in favor of an employer-employee relationship between the Petitioner and its taxicab drivers.

36. Petitioner relies upon the “Taxicab Operator Agreement” as evidence that the drivers are independent contractors. However, Tenn. Code Ann. § 50-6-114(a) provides that:

[n]o contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by [Title 50, Chapter 6]...

The Tennessee Supreme Court has ruled that provisions that attempt to insulate an employer from workers’ compensation liability have no effect. *Stratton v. United Inter-Mountain Telephone Co.*, 695 S.W.2d 947, 953 (Tenn. 1985). Therefore, the purpose of the “Taxicab Operator Agreement” has no bearing on the decision in this matter.

37. The evidence shows that this case is similar to *Nesbit v. Powell*, 558 S.W.2d 436 (Tenn. 1977). While the *Nesbit* case may have been decided more than forty (40) years ago, the conclusions of the Tennessee Supreme Court are still valid. In *Nesbit*, a taxicab company rented vehicles to its taxicab drivers. The company did not require its drivers to answer calls from the dispatcher, each driver collected his or her own fare, the company exercised some discretion over its drivers, and the company did not withhold income or social security taxes. *Id.* at 437. The Tennessee Supreme Court ruled that the above facts were sufficient to create an employer-employee relationship. *Id.* at 438. *Nesbit* was upheld by *Binkley v. Frontier Enterprises, Inc.*, 1989 WL 151824 (Tenn. 1989).

38. The Petitioner argues that both *Nesbit* and *Binkley* are no longer good law because of changes in both the City of Memphis ordinances and Tennessee statutes after the cases were decided. For this reason, the Petitioner argues that neither *Nesbit* nor *Binkley* are controlling in this matter. The Petitioner has failed to show how the law has changed in a significant enough manner that would render both *Nesbit* and *Binkley* ineffective. For this reason, this Court finds both *Nesbit* and *Binkley* to be controlling law.

39. The facts, as stated in Paragraphs 16 through 18, and Paragraph 22, demonstrate that the Petitioner does not keep accurate payroll records. The facts, as stated in Paragraph 22, demonstrate that in cases where a taxicab company fails to keep accurate records, it is proper for an insurance company to use the “basis of premium application” found in the Basic Manual’s “Advisory Miscellaneous Values” section.
40. The facts, as stated in Paragraph 22, demonstrate that the Respondent used the proper method in assessing the premium owed from the Petitioner.
41. The facts, as stated in Paragraph 23, demonstrate that the Petitioner owes the Respondent fifty-nine thousand, five hundred five dollars (\$59,505.00).
42. The facts, as stated in Paragraphs 1 through 24, demonstrate that the Respondent properly classified the relationship between the Petitioner and its taxicab drivers as an employer-employee relationship.

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby **ORDERED** as follows:

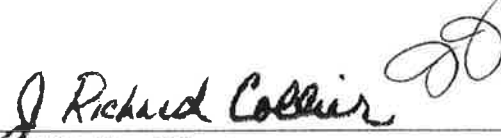
1. The taxicab drivers working on behalf of the Petitioner are considered “employees” within the meaning of Tenn. Code Ann. § 50-6-102(12) rather than independent contractors;
2. The premium owed to the Respondent should be calculated using the “basis of premium application” found in the Basic Manual’s “Advisory Miscellaneous Values” section.
3. The Petitioner shall pay the Respondent fifty-nine thousand, five hundred five dollars (\$59,505.00).
4. The Respondent acted lawfully in assessing the premium based upon a proper classification of employees.

5. Costs of this proceeding are taxed against the Petitioner, Kumar Transportation, Inc., or other successor to Kumar Transportation, Inc.
6. The total premium owed as well as all costs of this proceeding shall be paid by the Respondent within thirty (30) days of the date of entry of this Final Order.

This Final Order is entered and effective this the 29th day of April, 2019.


Maliaka L. Bass, Commissioner's Designee
Deputy General Counsel for General Civil

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 1 day of May, 2019.


J. Richard Collier, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the within and foregoing document has been sent by U.S. Mail, postage prepaid, to the following on this the 2nd day of May, 2019.

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