

NO. 20140452

State of North Dakota**In Supreme Court**

BAHA PETROLEUM CONSULTING CORP.**Account: 1091247***Appellant,*

vs.

JOB SERVICE NORTH DAKOTA,*Appellee.*

**REPLY BRIEF OF APPELLANT BAHA PETROLEUM CONSULTING CORP.
APPEAL FROM DISTRICT COURT JUDGEMENT ENTERED SEPTEMBER 24,
2014 AND NOTICE OF ENTRY OF JUDGMENT SERVED OCTOBER 24, 2014**

**WILLIAMS COUNTY - NORTHWEST JUDICIAL DISTRICT
THE HONORABLE PAUL JACOBSON**

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LAW AND ARGUMENT

A. STANDARD OF REVIEW

¶1 The Supreme Court’s review of JSND’s decision must include whether the decision is “not in accordance with the law”; whether “the findings of fact made by the agency are not supported by a preponderance of the evidence”; and whether “the conclusions of law and order of the agency are not supported by its findings of fact”. N.D.C.C. §28-32-46(1),(5) and (6). See also, *Midwest Property Recovery, Inc. v. Job Service North Dakota*, 475 N.W.2d 918, 923 (N.D. 1991). Review of an agency’s finding is confined to questions of law **only** when supported by evidence and in the absence of fraud. See, N.D.C.C. §52-06-27.

¶2 The answer to each of these inquiries above is “they are not”. Where an agency’s findings are not supported, by the evidence, this Court may reverse. *Rennich ex rel. Rennich v. North Dakota Dept. of Human Services*, 756 N.W.2d 182 (N.D. 2008). A review of both the facts and law here will lead to the inevitable conclusion that the determination was made without the requisite evidentiary support and must be reversed.

B. STANDARD AND PRACTICE IN THE INDUSTRY SHOULD BE APPLIED TO LANDMEN WHO DO NOT MEET THE STATUTORY EXEMPTION

¶3 The unique qualifications and working relationship of the independent field landman has long afforded it independent contractor status with no participation in the unemployment compensation process. (Add.003) Those in the oil industry have been vocal in their advocacy against the use of the 20 factor common law test because of the inconsistency and unpredictability of its application to the landman position. Id.

¶4 While BAHA agreed at the time of the audit, it did not meet all criteria necessary for its landmen to fall within the exemption, it submits that, given the

singularity of this position, failure to meet all three requirements of N.D.C.C. §52-01-01-(18)(k) should not immediately lead to the strict 20 factor common law analysis. As was clear from testimony on SB2245 by the oil industry, the legislature and JSND, this analysis leads to unpredictable and incompatible results. (Add.003-4, 016) A more flexible inquiry or “easier test” was envisioned. (App.017)

[¶5] Following JSND’s determination in 2013, BAHA requested such an inquiry to avoid the more rigorous and less definitive common law analysis of the landman position. (App.023)

[¶6] In its submissions during the audit, BAHA provided precisely the type of evidence former JSND Executive Director Daley said was strong indicia of independent contractor status and that which was needed to avoid strict analysis under the common law test. (Add.017) BAHA met this more flexible, “easier test”. Despite this, JSND set the matter for hearing and analysis under the common law test. (App.023)

[¶7] Thereafter, JSND determined, against the weight of the evidence, that the BAHA landmen were employees, not independent contractors. (App.139) Knowing the entire record evidence in this case, no reasoning mind could have reasonably concluded as JSND did. This determination must be reversed.

C. PREPONDERANCE OF EVIDENCE ESTABLISHES INDEPENDENT CONTRACTOR STATUS

[¶8] The preponderance of evidence does not support the determination of employee status here. In many respects, JSND’s decision was based on conjecture and bold assumptions. Neither of these is sufficient to support the decision. In all respects, it makes clear why this position should not be analyzed under the strict common law test. (Add.016)

1. BAHA had No Right of Control over Landmen

[¶9] The common law test focuses upon one central question: “Who is in control of the worker?” See, BKU Enters., Inc. v. Job Service North Dakota, 513 N.W.2d 382, 385 (N.D. 1994). The 20 factors found in N.D. Admin. C. §27-02-14-01(5)(b) assist in determining whether sufficient control exists to create an employment relationship. Id. at 385-387. BAHA submits that, to the extent these factors are capable of application to landmen, they demonstrate no control or right of control by BAHA over the landman; this is supported by a preponderance of evidence in the entire record.

2. Proper Analysis Shows Independent Contractor Status

[¶10] As noted by industry representatives, the position of landman is unique and not well-suited for analysis under the common law test. Michael C. Haines and William A. Horn, *Michigan: Survey*, 1 Tex. A&M L. Rev. 143, 151. Most factors do not correspond well with the type of working arrangements between landmen and oil companies.

[¶11] Among the most obvious factors incompatible for analysis are No. 19. Right to Discharge and No. 20. Right to Terminate. Evidence in the record establishes that landmen are not hired and fired as “employees” are. They work by the project as long as work is available. When the project is completed or shuts down, landmen move on to find other work. (App.104-5) Uncontroverted testimony confirmed that BAHA did not fire the landmen it referred. (App.071). Landmen left at the conclusion of a project or were not hired back if there was no work. (Id., App.104-5). This does not establish any right of control over the landmen on the part of BAHA.

[¶12] JSND’s finding No. 3. Integration was not based on the evidence. To be “integral” to the business, the continued success of the business must rest to “an appreciable degree” upon the services performed by the landmen. N.D. Admin. C. §27-02-14-01(5)(b)(3). JSND argues the “services provided by the landmen are BAHA’s business.” Appellee’s Br. ¶28. Yet, the evidence established that BAHA was in the business of referring other services including Site Access Officers, Persons in Charge and Roustabouts. (App. 065) Record evidence was uncontroverted that if BAHA lost the landman business, it would remain in business by providing these other services. Id. JSND’s finding that BAHA’s continued success depended to “an appreciable degree” on landmen services was based purely on speculation.

[¶13] The analysis under factor No. 16. Realization of profit or loss was also done improperly by JSND. Its determination that this factor favored employee status relied exclusively on payment of an agreed upon daily rate and a *per diem*. (App.146) This finding ignored the industry standard and record evidence. Ron Ness, industry spokesman, testified that landmen operate their own businesses. (Add.003-4). They buy their own tools and equipment; (App.069, 099); the landman, not the broker, invests in the business. (App.070, 103-4) Furthermore, BAHA had no control over how these landmen conducted business with the client, whether they worked for other oil companies or subcontracted work to other landmen. (App.066-67) The evidence on this factor supports a finding of “independent contractor”.

[¶14] As to finding No. 17. Working for more than one firm, the greater weight of the evidence established that landmen placed by BAHA were free to work for other oil companies. (App.071-72) JSND argues more is needed to show that the landmen were

“free to engage in similar activities for others” citing *Midwest Property Recovery, Inc.*, 475 N.W.2d at 924. That case, however, is distinguishable as it was decided under the now obsolete “ABC” test.¹ BAHA submits that the common law test, on this factor, sets out completely different criteria. N.D. Admin. C. §27-02-14-01(5)(b)(17), requires only that “a person is **able** to perform services under multiple contracts for unrelated persons or firms at the same time” to be considered an independent contractor. (Emphasis added). The uncontroverted evidence here established that these landmen were able to work for other unrelated firms at the same time. (App.071-072). As a result, they should have been considered independent contractors under this factor.

[¶15] JSND’s determination on No. 14. Furnishing tools and materials is contrary to the weight of the evidence. Nothing in the record supports the conclusion that BAHA “**requires** the equipment and a **specific vehicle type**...” (App.145) (Emphasis supplied) Instead, JSND merely argues that without this equipment the landmen would be “useless” to BAHA. (Appellee’s Br. ¶54) Frankly, without this equipment and a vehicle, the landmen would be useless to themselves. BAHA submits that the Appeals Referee’s initial interpretation of the evidence that “the nature of the costs associated with this equipment and the vehicle investment...would normally weigh in favor of an independent contractor...” was the right interpretation. (App.145).

[¶16] The same is true with finding 11. Oral or written reports which tipped “slightly” in favor of employee status; nothing in the record supports this determination. BAHA did not require landmen to submit reports, much less the type of report envisioned

¹ As of July 17, 1991, the “ABC” test was replaced by the 20 factor common law test found at N.D. Admin. C. §27-02-14-01(5)(b). *Midwest Property Recovery, Inc.* at 925, fn 5.

by N.D. Admin. C. §27-02-14-01(5)(b)(11). Some clients asked BAHA to retain a copy of leases (as opposed to employee reports) for safe-keeping. (App.084-085) Maintaining client documents is not an indication of a right of control over the landmen as this factor requires.

[¶17] Relative to No. 2. Training, no evidence in the record exists to support the finding that BAHA trained any of the landmen it placed or that it wanted the services provided in any particular manner. (App.142) Hingtgen testified that landmen he placed were experienced landmen and knew the specifics of the job. (App. 101) JSND's support for this finding is purely argument and speculation as to what might be "more than likely" if training might become necessary. Appellee's Br. ¶45. This is not sufficient to support the finding of employee status.

[¶18] JSND conceded that the unique relationship of the landman played a role in its analysis of factors No. 10. Order and sequence of work and No. 9. Work on the premises, but found these factors were "neutral" as a result. The record evidence confirmed the nature of the work of landmen requires no particular order or sequence, no specific hours of operation or location. (App.067) As noted previously, work is performed at courthouses, in cars, home offices and at landowners' homes or offices. (App.098) JSND acknowledged that working off premises, may indicate "freedom from control". Appellee's Br. ¶42. These facts also demonstrate that BAHA has no right to control the method or manner of the work; landmen work independently of BAHA's direction and supervision in all aspects of the job. Nevertheless, JSND ignored the obvious evidence and gave no deference to these factors which clearly favor independent contractor status.

[¶19] JSND’s finding on No. 12. Payment by hour, week, month is illogical when considered in the context of landmen. Payment of a daily rate was the established industry standard and was recognized by our Legislature when passing SB2245. As long as the daily rate was connected to performance of the specific tasks associated with the work traditionally done by landmen, they were given independent contractor status. Despite the fact BAHA and the landmen did not have contracts at the time; the same logic should apply in the application of this factor. There was strong and sufficient evidence to support the connection between payment of the daily rate and performance of the specific tasks. (App.006, 010, 011-18) JSND’s finding on this factor should have been independent contractor.

[¶20] The same is true of finding No. 13. Payment of expenses. N.D. Admin. C. §27-02-14-01(5)(b)(13) provides that “[i]f the person or persons **for whom** the services are performed ordinarily pay the person’s ...expenses, the person is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the person’s business activities.” All the evidence in this case establishes the services performed by the landmen were done for the oil companies, not BAHA. (App. 064) The expenses were paid by the oil companies, not BAHA. (App.087). BAHA had no right to control these expenses; only the oil company had that right. (App.087) As to this factor, the evidence establishes the landmen were independent contractors. Not employees of BAHA.

CONCLUSION

[¶21] The determination made by JSND that landmen referred by BAHA were employees is against the greater weight of the evidence in this record. BAHA requests that the decision be reversed.

Respectfully submitted:

This 29th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

[¶22] The undersigned hereby certifies the following:

This Brief complies with the page and type-volume limitations under N.D. App. R. 32(a)(7). The Brief was prepared using Microsoft Word in a proportionate twelve point Times New Roman Font.

Date: April 29, 2015

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CERTIFICATE OF SERVICE

[¶23] I hereby certify that on April 29th, 2015, I electronically filed Appellant's Reply Brief with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and served upon the attorney for the Appellee, Michael Pitcher *via* e-mail at mtpitcher@nd.gov and upon Jacob Haseman, attorney for the American Association of Professional Landmen, *via* e-mail at jhaseman@thronelaw.com.

Date: April 29, 2015

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No.20140452

BAHA Petroleum Consulting Corporation,
Account : 1091247

Appellant

CERTIFICATE OF SERVICE

Job Service North Dakota,

Appellee

I hereby certify that on April 30, 2015 the following documents:

REPLY BRIEF OF THE APPELLANT**TABLE OF AUTHORITIES-page iii**

was electronically filed with the Clerk of the Supreme Court *via* e-mail at supclerkofcourt@ndcourts.gov and served upon the attorney for the Appellee, Michael Pitcher *via* e-mail at mtpitcher@nd.gov and upon Jacob Haseman, attorney for the American Association of Professional Landmen, *via* e-mail at jhaseman@thronelaw.com.

Dated this 30th day of April, 2015.**CENTER FOR MEDIATION &
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