

RENDERED: December 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003207-WC

GLADYS MOLLETTE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-002629

MARCUM AND TRIPLETT LAW OFFICE;
MAYBERRY REALTY, INC. & CAROL MARCUM,
INDIVIDUALLY; SPECIAL FUND; UNINSURED
EMPLOYERS' FUND; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Gladys Mollette (Mollette) petitions for review of an opinion of the Workers' Compensation Board (Board), rendered on November 14, 1997, which affirmed the decision of the Administrative Law Judge (ALJ). The ALJ dismissed Mollette's claim for benefits after finding that Mollette was working in the

capacity of an independent contractor at the time of her injury. We affirm.

Mollette filed an injury claim against Marcum and Triplett Law Offices (the law firm) for injuries she suffered to her back, leg and neck on May 16, 1994, while laying floor tile in a building being prepared for use by the law firm. The building was not owned by the law firm, but was owned by Carol Marcum (Marcum), the wife of one of the firm's partners. Marcum placed the building with a leasing company, Mayberry Realty, Inc. (Mayberry), of which Marcum is the incorporator and sole shareholder. Because Mollette had been paid for her services by Mayberry, the law firm was dismissed as a defendant and Mollette amended her claim to name Mayberry and the Uninsured Employers' Fund as parties. However, on March 6, 1997, Mollette's claim against the law firm was reinstated and the issue of which entity, if any, was responsible for Mollette's benefits was reserved until final adjudication of the claim.

In the Prehearing Order and Memorandum entered on April 16, 1997, every conceivable issue was identified as being contested. However, those issues became moot as a result of the ALJ's decision on the threshold issue of Mollette's employment status. In his determination that Mollette was an independent contractor, the ALJ found as follows:

Prior to the relocation of the law office facility to the Lomansville site, [Mollette] performed work for the Marcum family at their home and for the law firm at Inez. She testified that she

worked in the Marcum home for Ms. Marcum and would also work in the evenings at the law office facility in Inez. Her work at the Marcum home involved housekeeping and baby sitting, and her work at the law office facility consisted of wall papering, laying tile, painting and cleaning and assembling furniture. [Mollette] was paid \$5.00 per hour for work done at the law office facility and \$4.50 per hour for her housekeeping work. She testified that for work done at the law office she was paid out of the law office account, and for work done at the home, she was paid out of the Marcum's personal account.

. . .

[Mollette's] work for the Marcum family and the work performed in the past at the former law office in Inez present separate situations from the installation of tile at the Lomansville site. Ms. Mollette was a long term domestic employee of the Marcum[s]. The work at the Inez site was apparently done on an occasional basis, and Ms. Mollette was compensated by the law firm for that work. At the time of the May 16, 1994 injury, work at the Lomansville site was being completed, although office personnel were in the building in order to ready it for the operation of the law office.

According to the testimony of Carol Marcum, she informed [Mollette] that tile installation would need to be done at the Lomansville site. Ms. Mollette then volunteered to perform that work along with her husband, whose work at that time consisted of working as an independent contractor in the carpet installation business. They undertook to go to the Lomansville site for the purpose of installing tile. During the same general period that this was occurring, other independent contractors were working at the site performing maintenance and construction work.

After her injury, [Mollette] returned to the Lomansville site for the purpose of removing grouting and applying a sealant to the tile.

Immediately after this recitation of facts, the ALJ continued with an analysis of facts bearing on the criteria set out in Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965), the seminal case in this jurisdiction on the issue of employee versus independent contractor. The ALJ found: (1) that virtually "[a]ll maintenance and remodeling at the [Lomansville] site had been performed by independent contractors"; (2) that Mollette worked "at a time of her choosing" and that she and her husband "provided their own tools"; (3) that there was "some degree of professional expertise required" in the installation of the tile; (4) that he was "not persuaded that the nature of the relationship was intended by all parties to be that of employee/employer as opposed to an independent contractor."

In its review, the Board concluded that the ALJ's determination of Mollette's status to be that of an independent contractor, was "supported by evidence of substance" and that the evidence did not compel a different result. In her petition for review in this Court, Mollette argues that the evidence is "so overwhelming as to compel a finding" in her favor. To be successful in such an argument, Mollette must convince us that the "Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital

v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). We disagree with Mollette's position that the Board so erred.

In addition to the standard of review set forth in Western Baptist Hospital, our highest Court described the standard of review specifically for issues concerning the claimant's employment status in Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991), as follows:

Whether decedent was an employee or an independent contractor is a question of law if the facts below are substantially undisputed, and is a question of fact if the facts are disputed. Brewer v. Millich, Ky., 276 S.W.2d 12 (1955). A reviewing court must give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled. When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value. Aetna Casualty and Surety Co. v. Petty, 282 Ky. 716, 140 S.W.2d 397 (1940); M.H. & H. Coal Co. v. Joseph, Ky., 310 S.W.2d 257 (1958).

Id. at 117. Garland reiterated that "the proper legal analysis" of the issue required application of the "tests from Ratliff" Id. at 118.

Having reviewed the entire record, it is clear that Mollette had a long-standing employer/employee relationship with the Marcums in their household, and that she had an intermittent relationship with the law firm in Inez providing it with maintenance and cleaning services. However, there was

substantial evidence to support the ALJ's finding that her employment at the law firm's new facility in Lomansville was of a different character. Much of Mollette's argument concerns the factual issue of which entity hired her in the first instance to install tile at the law firm's new facility. However, whether she was working for the law firm (the entity which was ultimately going to use the premises where she was working and which terminated her services), or Mayberry (the entity which paid her and which leased the building to the law firm), or Marcum (who initially discussed the work with Mollette and who owned both the building and the realty company), has little, if any, bearing on the issue of her status as an independent contractor.

The record contains evidence that showed that when Mollette became aware that the law firm needed someone to lay tile at the new location, she volunteered for the work. Mollette was hired to perform that one task; she found her own assistants, one of which was her husband; she worked at her own pace and was not supervised by Marcum, or anyone. These circumstances simply do not compel a conclusion that Mollette was anyone's employee at the time of her injury, but do, as the Board found, support the ALJ's determination that Mollette was an independent contractor.

Accordingly, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, Marcum and
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BRIEF FOR APPELLEE, Uninsured
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BRIEF FOR APPELLEE, SPECIAL
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Hon. Joel D. Zakem
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