RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000140-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01818

JOHN T. WILSON;
JEWISH HOSPITAL HEALTHCARE
SERVICES, INC.;
LONNIE TROXELL;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: The Uninsured Employers' Fund appeals from an opinion of the Workers' Compensation Board reversing and remanding an opinion of the Administrative Law Judge. The ALJ found that John Wilson was an independent contractor rather than an employee of Lonnie Troxell when Wilson sustained a work-

related injury to his left elbow. We affirm the opinion on appeal.

Having closely examined the record, the written arguments and the law, we have concluded that we cannot improve upon the well-written opinion of the Workers' Compensation Board Member Stanley. Rather than simply restate its analysis of the facts and the law, we adopt the Board's opinion as that of this Court. The Board stated in its December 17, 2004 opinion as follows:

> John T. Wilson ("Wilson") seeks review from an opinion and order rendered June 29, 2004, by Hon. Marcel Smith, Administrative Law Judge ("ALJ"), wherein she found Wilson to be an independent contractor rather than an employee of Lonnie Troxell ("Troxell") when he sustained an on-the-job injury to his left elbow on August 20, 2003. Wilson also appeals the ALJ's order issued August 4, 2004, denying his petition for reconsideration.
>
> On appeal, Wilson argues the ALJ erred by failing to observe the legal preference for finding an employer-employee relationship and failing to give the proper legal significance to her finding that the nature of Wilson's work was a regular part of Troxell's business. Wilson also argues that the ALJ improperly considered the amount of control actually exercised by Troxell over the detail of Wilson's work, rather than the right of control held by him. Wilson concludes that the evidence of an employer-employee relationship is overwhelming and that it was clearly erroneous for the ALJ to hold otherwise.

Troxell was not insured for purposes of workers' compensation on the date of injury at issue and, therefore, the Uninsured Employers Fund ("UEF") was made a party to these proceedings. The issue of employment relationship was bifurcated and decided by the ALJ adversely to Wilson in the decision now under consideration on appeal. The ALJ acknowledged the nine factors identified in Professor Larson's treatise on workers' compensation and adopted by the supreme court of Kentucky in Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965), as the legal test for answering the "employee" versus "independent contractor" question, as well as those four deemed to be of primary importance in Chambers v. Wooten's IGA Foodliner, Ky., 436 W.W.2d 265 (1969). We agree with Wilson, however, that the ALJ erred in her application of the law to the facts of his case. Accordingly, we reverse.

SUMMARY OF THE RECORD

Wilson was born June 27, 1953, and resides in Worthville, Owen County, Kentucky. He graduated from high school and completed two years of study at Jefferson Community College. His work history is varied and includes jobs as a telemarketer, account representative, and over-the-road truck driver, He worked as a carpenter from 1984 until 1990 and then returned to this profession in 2000. Wilson secured work through Troxell upon moving to Kentucky from Missouri in mid-2003. Wilson was driving around a subdivision in Carrollton and inquired with the developer as to the identity of the framing contractor on a particular house under construction. Wilson was put in touch with Troxell and went to work for him on August 19, 2003.

The evidence is conflicting regarding the understanding between Wilson and Troxell as to the nature of their business relationship. The two had a telephone

conversation on August 18, 2003, in which Wilson explained his desire to be paid an hourly wage with taxes withheld. Wilson indicated that he needed to have proof of employment in order to secure a loan to buy a house in the area. He could not recall agreeing on an hourly rate during this phone call. Because Troxell was unfamiliar with Wilson and his work, it was understood that terms would be agreed upon after Wilson was on the job. Wilson made clear to Troxell, however, that he had been a lead man previously, which indicated a certain level of experience and expertise on his part.

His first day on the job, Wilson worked alongside Troxell the better part of the day, setting up the skeleton for the rafters. Work on the job site started at 8 a.m., though Wilson arrived early. He was not required to punch a time clock or keep written time records. Wilson brought along his personal tools, such as a nail bag, hammer, tape measure, and calculator, and Troxell supplied the more substantial power tools, like the saws, nail guns, air compressors, and hoses. At the end of the day, Troxell gave Wilson $50.00 as a cash advance to see him through financially until the regular payday.

The following day, August 20, 2003, Troxell left the job site early and left Robert Rogers ("Rogers") in charge of the crew. There were approximately six other workers on Troxell's crew. After lunch, Wilson was installing rafters with Rogers when he accidentally bumped the pneumatic nail gun being used by Rogers with his left elbow. Because Rogers' finger was on the trigger, the gun discharged a nail, which penetrated and lodged itself in Wilson's left elbow. The nail was removed on-site and Wilson drove himself to an emergency clinic, where he was treated and released to light duty. Because Wilson is left handed, substantial limitations on the use of his

left arm essentially precluded him from performing carpentry work. When he presented Troxell's son with his return-to-work slip on August 21, 2003, it was agreed that Wilson should not try to work that day.

On August 22, 2003, Wilson appeared at the job site and spoke with Troxell directly. Troxell informed him that the medical bills from his visit to the clinic would be taken care of. Wilson performed some light work that day, assisting other crew members who were laying felt on the sheets of roofing material. There was some conflict when he advised Troxell that he would not attempt to lift the 80-pound rolls of felt paper, but Wilson stayed on the job. The following Monday, Wilson performed some light work in a new job for Troxell before his afternoon appointment with Dr. Dabriel, a hand specialist. Troxell informed Wilson that morning that his injury would not be treated as a workers' compensation claim.

Dr. Gabriel evaluated Wilson that afternoon and advised that he would likely need surgery to address the neurological symptoms in his left hand. Dr. Gabriel recommended electrodiagnostic studies to evaluate further. The next day, Wilson went to work and helped with installation of some sub-flooring. By the end of the day, his left hand was burning and painful. He informed Troxell of the situation and that surgery seemed likely. Troxell was hostile, but allowed Wilson to return to work the next day. On Wednesday, Wilson again broached the subject, advising Troxell that he would probably need surgery, but offering to forego the electrodiagnostic testing in order to save the expense. Troxell dismissed Wilson at that point, and he never returned to work for the respondent. Troxell later sent him an envelope with cash representing wages for 23 hours' worth of work, paid at an hourly rate of $12.00.

Wilson ultimately underwent surgery on his left ulnar nerve on September 25, 2003. Troxell sent him a check for $239.76 to cover a portion of his medical expenses. There were over $9,000.00 in hospital, physical therapy and doctor bills that were unpaid, however. Wilson was released to return to work as of December 3, 2003, and took a supervisory position over some construction work at a BW-3s restaurant.

Troxell testified in the proceedings below that he considered Wilson, and all other workers on his crew, to be independent contractors. In years past, he had treated his workers as employees, issuing W-2s and securing workers' compensation coverage for them. However, his workers' compensation insurance was cancelled in mid-2003 after a high loss claim was filed against him. Troxell did not have coverage at the time of Wilson's accident. He explained that he began issuing 1099s and treating his workers as independent contractors because they preferred it that way. They did not want to have taxes withheld from their paychecks. Troxell explained that, in the construction industry, workers come and go at their own will. The turnover rate is high. He exercises little control over his workers. Troxell confirmed that he does supply the more expensive tools necessary to perform the work of his business, because the workers typically do not have the means to purchase such equipment. That being said, the tools and equipment needed to do framing work are modest. Troxell provided a box truck to carry the crew's tools, primarily to protect them from the weather. Troxell confirmed that he has once again secured workers' compensation coverage for his workers. Troxell denied liability for workers' compensation benefits to Wilson on grounds that there was no employment relationship between the two parties.

Wilson filed his Form 101, application for resolution of injury claim, on September 15, 2003. Wilson's claim was reassigned to the current ALJ in January of 2004 and preceded through presentation of proof, including testimony from both Wilson and Troxell pertinent to the employment relationship issue. Following the final hearing on May 4, 2004, the matter was submitted on briefs by the parties.

OPINION AND ORDER OF THE ALJ

The ALJ rendered a determination on the bifurcated issue of employment relationship, concluding as follows:

> The first issue to be determined is whether plaintiff was an employee of defendant, Lonnie Troxell, or an independent contractor. In order for defendant to be liable, he must be found to be an employer, KRS 342.630 and plaintiff must be found to be an employee. KRS 342.640. The five [sic] factors listed in Ratliff v. Redmon, Ky., 396 S.W.2d 320 (Ky. App. 1065) must be considered when determining whether one acting for another is an employee or an independent contractor:
>
> 1. Did the defendant exercise control? Plaintiff and Defendant Troxell gave conflicting versions of how much control was exercised. Each witness is as credible as the other. From what they agree upon, we do know that Defendant Troxell was not on the building site on some days. This indicates that the workers tended to control their own work. Plaintiff's work schedule as indicated by the notes on the

envelope attached as an exhibit to Defendant Troxell's deposition indicates that he did not exercise a lot of control over when the workers came to and left the work site. This indicates an independent contractor situation.

2. Was this a distinct occupation? Plaintiff has done mostly carpentry work. This involves using all hand tools. It is a distinct occupation. This indicates that plaintiff was an independent contractor rather than an employee.

3. Was a job done with or without supervision in this locality? Again, we get conflicting testimony. Defendant Troxell was not on the site everyday. He said that in the construction business, it is difficult to tell workers when to do anything. They are not receiving enough money to move around like that. He said workers show up when they want to show up and leave when they want to leave. He said he is at their mercy. What we know from the information that does not conflict is that this is the type of work that is done without heavy supervision. There appears to be some, but not a great deal of supervision. Again, this indicates that plaintiff was an independent contractor.

4. Was this a skilled occupation? This is a skilled occupation, indicating independent contractor status.

5. Who supplied tools? Plaintiff supplied his own hand tools and defendant supplied power tools. This could be the case in either type of relationship.

6. What was the length of the work relationship? The plaintiff was on his second day of work when he was injured. He worked very little thereafter. This does not indicate an employer/employee relationship.

7. What was the method of payment: Defendant Troxell paid plaintiff $12.00 an hour. Taxes and Social Security were not withheld. While an hourly rate might otherwise indicate an employer/employee relationship, the fact that taxes and Social Security were not withheld indicates otherwise.

8. Is the work part of the regular business of defendant? The work was part of Defendant Troxell's regular business. This would indicate an employer/employee relationship.

9. Did the parties believe they created a relationship of master/servant? Again, we have conflicting testimony. Plaintiff said that he said he wanted to be a salaried or waged employee, where Defendant Troxell would take out taxes and pay him by the hour. He said that Mr. Troxell said that was okay and told him to come to the job in Sligo/New Castle on the following day and go to work for him, and they would see how it went. This last part of the statement corroborates Defendant

Troxell's version of the conversation that plaintiff could come work and see how it went. As conflicting as the testimony is on this point, it is not an indicator one way or the other.

Of the nine factors of Ratliff v. Redmon, Ky., 396 S.W.2d 320 (Ky. App. 1965), four are predominant:

1. Is the work related to the defendant's business?

2. Control Exercised by defendant.

3. Skill of the plaintiff.

4. Parties' intent.

Uninsured Employers' Fund vs. Garland, Ky., 805 S.W.2d 116 (1991).

Considering all of these factors, particularly the four listed above, and applying the facts of this case, I find that plaintiff was an independent contractor and not an employee. Most of the facts, when applied to the nine factors of Ratliff v Redmon and when applied to the four factors of Uninsured Employers' Fund v Garland demonstrate independent contractor status. Although plaintiff's work was a part of Defendant Troxell's regular business, that alone would not be dispositive.

Since plaintiff was not an employee, he is not entitled to temporary total disability

benefits or medical benefits. Any other issues are moot.

Accordingly, the ALJ dismissed Wilson's claim against Troxell.

ANALYSIS

On appeal, Wilson acknowledges that consideration of the employment relationship issue turns on the nine factors identified in Ratliff, supra, and recited in the ALJ's opinion herein. Wilson further acknowledges that, of those nine factors, four have been identified by the supreme court in Chambers v. Wooten's IGA Foodliner, supra, and Uninsured Employer's Fund v. Garland, Ky., 805 S.W.2d 116 (1991), as being of principal importance. This precedent, too, is cited within the ALJ's conclusions of law.

Nonetheless, Wilson argues, the ALJ erred in failing to find him an employee of Troxell. He contends that the ALJ failed "to indulge the legal preference for finding an employer-employee relationship." He argues that the ALJ misconstrued the "extent of control" factor and improperly weighed the "nature of the work" factor. Wilson submits that the evidence compelled a finding he was an employee of Troxell at the time of his injury. The arguments made by Wilson present mixed questions of law and fact, and we will tailor our analysis accordingly. Garland, supra.

I. LIBERAL COSTRUCTION OF THE STATUTE

We read Wilson's first argument that the ALJ failed to give a sufficiently liberal construction to the statute in deciding the employment relationship issue to be a general appeal for a more favorable decision. We do not believe this argument, in and of itself, sets out grounds sufficient to reverse the ALJ's decision. Nonetheless, Wilson makes a valid point.

Notwithstanding the repeal of KRS 342.004, the law continues to favor a liberal construction of the Workers' Compensation Act, with a view to effectuating the beneficent intent of the legislature. Standard Gravure Corp. v. Grabhorn, Ky.App., 702 S.W.2d 49 (1985).

Furthermore, the ability to pass on the cost of workers' compensation coverage is relevant to consideration of the nature of the work as related to the business generally carried on by the alleged employer. See Adjuster Service of Kentucky, Inc. v. Hamilton, 2004 WL 1909379 (Ky.App., 2004). Kentucky jurisprudence is in accord with Professor Larson's preference for this factor to predominate the employment relationship test, which serves to "fulfill the theory of risk spreading embodied in compensation." Purchase Transp. Services v. Estate of Wilson, Ky.App., 39 S.W.3d 816, 818 (2001); Husman Snack Foods Co. v. Dillon, Ky.App., 591 S.W.2d 701, 703 (1979). Nonetheless, where the controlling facts "collectively outweigh the liberal construction of the workmen's compensation law," the determination must go against the claimant. Chambers, supra, at 267. Therefore, the question of whether the ALJ failed to construe the statute liberally and consistently with its beneficent purposes is subsumed in answering whether her decision is supported by substantial evidence.

In short, this Board is not vested with the power to reverse the ALJ on equitable grounds alone and we decline to do so here. See KRS 342.285. That being said, we believe other, valid grounds for reversal do exist in the case *sub judice*. Specifically, we agree that the ALJ's interpretation of those factors concerning whether Wilson was engaged in a distinct occupation or business and the extent of control exercised by Troxell over the details of Wilson's work is clearly erroneous in the context of the

evidence of record. Moreover, we conclude that the evidence in this case compels the finding of an employer-employee relationship. It is worthwhile to point out here again that the factors set out in Ratliff, supra, were derived by the court from Professor Larson's learned treatise, Workmen's Compensation Law[1]. (Footnote in original). Accordingly, we will draw liberally from that treatise in our review of the ALJ's holding herein.

II. "NATURE OF THE WORK" AND "DISTINCT OCCUPATION OR BUSINESS" FACTORS

We agree with Wilson that the ALJ erred in finding him engaged in a "distinct occupation or business" under the Ratliff test. Her conclusion reflects a misunderstanding of the nature of this particular factor. The ALJ's holding suggests that carpentry work necessarily constitutes a "distinct occupation." Although the ALJ did not elaborate on this finding, it seems that any job with a recognized title would qualify as a "distinct occupation" given the reasoning supplied. We believe the ALJ has failed to recognize the phrase as a legal term of art and has, instead, accorded the words their lay meaning.

The "distinct occupation or business" factor goes to the question of whether the claimant offered to the alleged employer his personal services or a business service. That is, was the claimant engaged in a business independent of his work for the alleged employer? See Larson's, Workmen's Compensation Law § 62.06[1] (2000 Edition). In the case *sub judice*, there is nothing to indicate that Wilson was so engaged. The

[1] Though it is worthy of mention that the factors identified by Professor Larson were admittedly taken directly from Restatement (Second) of Agency § 220 as a means of providing a generic legal definition for the term "employment" and not necessarily a definition tailored to the workers' compensation setting.

record simply is devoid of any evidence upon which a fact-finder reasonably could conclude that, during the relevant time period, Wilson held himself out to the public as a business operator. He was unemployed when he went to Troxell seeking work. He was under no other contracts for work and had no employees of his own. He was not operating in the capacity of a sole proprietorship, corporation or any other business organization. He clearly was offering Troxell his personal services as a carpenter and not a business service. The ALJ erred in finding Wilson to be engaged in a "distinct occupation."

What, then, is the significance of this error? Professor Larson informs us that the "modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." Larson, supra, at § 62. Elaborating on the relationship between the two factors, Professor Larson explains as follows:

> In the discussion of two tests to follow, it should be stressed that they are interdependent, and that both should ordinarily be satisfied, to establish employment on these grounds. Thus, the job or process contracted out may be an integral part of the employer's production sequence, but, if he contracts it out to a separate and independent factory or shop, the result is of course not employment.

Id. at § 62.01. In the case *sub judice*, the ALJ found that the work being performed by Wilson was part of the regular business of Troxell. That finding is supported by substantial evidence. Combined with the

uncontroverted and compelling evidence that Wilson was not engaged in an occupation or business distinct from his work for Troxell, we believe these factors weigh heavily in favor of finding an employer-employee relationship at the time of Wilson's injury.

Although Wilson may overstate the matter somewhat, it is also true that the "nature of the work" factor has been identified as one of the predominant considerations in the employment relationship analysis. That Kentucky is following this trend is evidence from the court of appeals's holding in Hicks v. Eck Miller Transp., 2004 WL 868489 (Ky.App., 2004), wherein the court stated:

> In summary, since Ratliff v. Redmon, supra, the employer/independent contractor analysis has evolved into three major principles: 1.) that all relevant factors must be considered, particularly the four that were set forth in Chambers v. Wooten's IGA Foodliner, supra; 2.) that the alleged employer's right to control the details of work is the predominant factor in the analysis; and 3.) that the control factor may be analyzed by looking to the nature of the work in relation to the regular business of the employer. UEF v. Garland, supra; Husman Snack Foods v. Dillon, supra.

III. "EXERCISE OF CONTROL" FACTOR

This naturally brings us to Wilson's third argument, that the ALJ erred by focusing on the amount of control actually exercised by Troxell rather than his right to control the details of Wilson's work. As Wilson points out, the court in Garland, supra, relies on Professor Larson as support

for the proposition that "the absence of exercise of control has seldom been given any weight in showing absence of right of control." Id. at 119. In his treatise, Professor Larson elaborates as follows:

> If the control factor depended upon a showing of the degree of control actually exercised, it would be more readily subject to proof. It is easier to prove that an employer in fact directed a truck driver to take a particular route than to prove that it had the right to do so. But the test is, and must be, based on the right, not the exercise. Most often the distinction is of importance when a skilled or experienced worker appears to be doing his or her job without supervision or interference. By an "exercise" test, he or she would seem to be uncontrolled; yet it will often be found that the employer in any showdown, would have the ultimate right to dictate the method of work if there were any occasion to do so. Conversely, there may be exercise of control without the right, but the right is still what counts.

Larson, supra, § 61.02.

A. DIRECT EVIDENCE OF RIGHT OF CONTROL

The question then becomes how exactly to determine the extent of the alleged employer's "right of control." Professor Larson offers helpful insight into this question, too. The following passage will place into context the excerpt from his treatise quoted by the court in Garland, supra, above:

> In the great bulk of the cases, however, there is no written or tangible document indicating the degree of control reserved. There may be an oral contract or understanding, but such agreements almost never get down to such details as extent of control. In fact, in some cases, people will simply start working without even discussing wages or terms of any kind. Evidence of actual control exercised by the employer and submitted to by the employee becomes, in such cases, the best indication of what the parties understand the employer's right of control to be.
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> ****
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> If control is actually exercised, only the clearest evidence that the exercise was beyond the rights of the employer will overcome the inference, as where there is a clear and bona fide written contract whose limitations on control have been temporarily exceeded by the employer. It should be stressed, however, that the absence of exercise of control has seldom been given any weight in showing absence of right of control, since the nonexercise can often be explained by the lack of occasion for supervision of the particular employee, because of competence and experience.

Larson, supra at § 61.05[3].

We believe Professor Larson's admonition squarely addresses the situation in the case *sub judice*. While it was proper for the ALJ herein to consider the actual exercise of control by Troxell over the

details of Wilson's work, in the absence of any direct evidence concerning his right of control (*i.e.*, a written agreement or even stated understanding to which either party might have testified), we believe her analysis represents a misapplication of the law to the facts. The ALJ found that Troxell and Wilson were each as credible as the other regarding the extent of control exercised by Troxell. She further found, "From what they agree upon, we do know that Defendant Troxell was not on the building site on some days." The conclusion drawn by the ALJ from this finding – that the workers tended to control their own work – fails to acknowledge the converse truth that Troxell *was* on the building site on some days. More importantly, it fails to acknowledge that, on Wilson's first day on the building site, Troxell personally oversaw the details of his work and, on Wilson's second day on the building site, Troxell assigned a supervisor to oversee the details of his work. We believe it is clearly unreasonable under these facts to conclude that Troxell did not have the right to control the details of Wilson's work.

B. INDIRECT EVIDENCE OF RIGHT OF CONTROL – METHOD OF PAYMENT

Our conclusion is bolstered by the other indicia of control cited by Professor Larson, which include the method of payment, furnishing of equipment and right to fire. Larson, supra, § 61.04. Of course, the first two of these are independent factors for consideration under the Ratliff, supra, analysis. With respect to the method of payment, the ALJ noted that the payment of an hourly wage indicates an employer-employee relationship, while the failure to withhold taxes indicates otherwise. Professor Larson, once again, informs us that payment by a unit of time is a strong indicator of an employer-employee

relationship. He cautions, however, that this is not a bright line rule:

> Although, as these cases indicate, payment by time is a potent factor indicating employment, it is by no means conclusive. It is only one of the elements throwing light on the presence or absence of control, and as such can be outweighed by a convincing demonstration based on other evidence of lack of control.

Larson, supra, at § 61.06[1].

The ALJ gives no indication as to how the method of payment factor weighed in her ultimate determination as to employment relationship. We believe the only reasonable conclusion to be drawn from her findings, however, is that she considered this factor to weigh equally for and against an employer-employee relationship. While we are not inclined to find such a conclusion erroneous as a matter of law, we do believe it worthwhile to point out that the single wage payment made by Troxell came after Wilson's injury, and it was within Troxell's power either to withhold or not withhold taxes from said payment, as suited his purposes. By contrast, Troxell did not have the option of paying Wilson by some means other than time, such as on a project basis, because Wilson was not hired for a single project and his services were excused before completion of the project. This evidence will be further addressed below in reference to the ALJ's conclusion regarding the significance of the length of the work relationship.

C. INDIRECT EVIDENCE OF RIGHT OF CONTROL – PROVISION OF EQUIPMENT AND TOOLS

In determining the significance of the factor relating to provision of equipment and tools, another indicia of control cited by Professor Larson, it is important to bear in mind the rationale underlying this particular consideration. If the alleged employer has entrusted a piece of equipment to the claimant's care, a right of control is generally presumed. The alleged employer has a financial stake in the manner in which the claimant utilizes the piece of equipment. Professor Larson concludes, "This being the rationale, the rule should not be applied to items of equipment whose size and value are not so large as to provide this incentive for control and for efficient employment of capital." Id. at § 61.07[2]. As Wilson points out, Professor Larson specifically admonishes that the provision of inexpensive hand tools, such as hammers, should be given "very little weight" in the employment relationship balancing test. Id. at § 61.07[7].

Here, Wilson asserts the ALJ "equated" his provision of small hand tools with Troxell's provision of larger, more expensive equipment. We do not read the ALJ's holding as equating the two. Rather, the ALJ stated that the provision of small hand tools by a claimant and provision of more valuable equipment by an alleged employer "could be the case in either type of relationship." This statement is true enough and, therefore, we cannot say the ALJ erred as a matter of law on this point. We assume the ALJ deemed this factor to weigh equally for and against an employer-employee relationship. We believe this is a close call, given Troxell's provision of ladders, power equipment, air compressors, and a box truck, all necessary to the job on which Wilson was working. However, given that Wilson did not personally utilize the more valuable of these tools and pieces of equipment supplied by Troxell, we believe it

was not unreasonable for the ALJ to consider this factor a "draw."

D. INDIRECT EVIDENCE OF RIGHT OF CONTROL – RIGHT TO FIRE

The final indicia of control cited by Professor Larson, which does not appear independently in the list of nine factors bearing on the employment relationship decision, is the right to fire. In the absence of an express understanding, the presence or absence of this right must be inferred from the circumstances. Where there is no fixed quantity of work set and the worker simply continues to work as instructed, it may be inferred that the employment relationship is terminable at the will of the alleged employer, giving him a considerable right of control. Larson, supra, § 61.08[4]. We believe the ALJ's analysis of the control factor is deficient in failing to take into account Troxell's right to terminate Wilson at will, as evidenced by his dismissal the week after his injury, prior to conclusion of the pending work project. We acknowledge that the right to fire is not dispositive evidence of control. That is to say, "its impact can be markedly affected by its interplay with other tests or circumstances." Id. at § 61.08[5].

Considering all four indices of control set out by Professor Larson, we believe the evidence compels a conclusion contrary to that reached by the ALJ herein. That is, the evidence is so overwhelming that no reasonable person could conclude that Troxell did not have the right to control the details of Wilson's work and, in fact, exercised that right during the brief period of Wilson's employment. Thus, returning to the guiding principles set out in Hicks v. Eck Miller Transp., supra, and advocated by Professor Larson, we see that the predominant factors to be considered in

determining the nature of the employment relationship – the right of control and the nature of the work in relation to the regular business of the alleged employer – both weigh in favor of Wilson. Nevertheless, mindful of the court's direction that all of the nine Ratliff factors must be considered, we turn to the remaining factors not previously addressed herein.

IV. OTHER RATLIFF FACTORS TO BE WEIGHED

Wilson's final argument addresses the remaining Ratliff factors and concludes that the ALJ erred as a matter of law in concluding that the weight of the evidence favors an independent contractor relationship. Wilson does not take issue with the ALJ's findings with respect to whether his was a skilled occupation, and we also find no error in that regard.

Wilson argues that the ALJ's conclusion with respect to the length of the work relationship is clearly erroneous, and we agree. The relevant consideration is not the actual number of days a claimant works before or after his on-the-job injury, a figure that is more a product or chance than an indicator of employment relationship. Rather, the question is whether the claimant's services were retained for an indefinite period of time. *See* Adjuster Service of Kentucky, Inc. v. Hamilton, supra, at 6 ("no excepted fixed termination date" weighed in favor of employee status); *See also* Golden Rule Publishers v. Edwards, 2004 WL 2315272 (Ky.App., Oct. 15, 2004) (independent contractor status indicated where task lasted only three days "*and* there is no indication that [the parties] intended for [the claimant] to continue"). Here, there is no evidence to suggest that Wilson was hired for a fixed period of time, delimited either by date or by project. The

ALJ erred in concluding that the length of the employment relationship between Troxell and Wilson weighs in favor of independent contractor status.

The ALJ was also obligated to consider the kind of occupation, with particular reference to whether, in the given locality, the work is usually done under the direction of an employer or by a specialist without supervision. This factor is intended to reflect the usual and customary employment status of workers in the claimant's occupation. *Cf.* Hamilton, supra, at 5 (where extensive testimony was offered concerning whether persons engaged in the claimant's type of work are generally considered to be independent contractors or employees on both a national and local level). There was no evidence presented by the parties below directly on point. The ALJ's analysis focused instead on Troxell's testimony with respect to the degree of control he exercised over his construction workers, and the ALJ concluded that the limited supervision he described indicated an independent contractor relationship. Whether we agree with the inferences drawn by the ALJ from Troxell's testimony regarding the level of supervision he provided to his workers is of no consequence. This Board is not empowered with fact-finding authority. KRS 342.285.

More importantly, we do not believe the findings rendered by the ALJ are probative on the issue of whether carpentry is the kind of work generally performed by independent contactors or employees in the relevant locality. The ALJ's findings on this factor essentially duplicate her findings regarding Troxell's exercised of control over the details of Wilson's work and, to that extent, place additional, undue emphasis on the control issue. Of course, we have already held that the ALJ erred in

her analysis of the control factor in the first instance.

Given the lack of proof relevant to this factor, we believe it was error for the ALJ to find it weighted in favor of Troxell. That being said, we note that the evidence is unrebutted that, both before and after Wilson's injury, Troxell deemed his workers to be employees. Troxell held workers' compensation insurance on his employees for 18 years, up until just three months prior to Wilson's injury. In light of these uncontroverted facts, we question the legal significance of the ALJ's finding that work was performed on Troxell's job sites "without heavy supervision." Even if Troxell provided "some, but not a great deal of supervision" to his workers, we are not convinced that this finding supports the conclusion that they were independent contractors, given that Troxell admitted he had always treated his workers like employees until his workers' compensation insurance was cancelled following submission of a significant claim against his policy. Is it to be believed that Troxell not only changed the manner by which he paid his workers after cancellation of his workers' compensation insurance, but also changed the manner by which he directed their work, so as to bring them within the realm of independent contractors and beyond the protection of the Act?

This question leads us to the final factor to be weighed by the ALJ, that of the parties' intent. On this point, the ALJ concluded that the testimony of Troxell and Wilson was simply too conflicting to be a reliable indicator one way or the other with respect to the employment relationship issue. We agree that the evidence is conflicting. In such instances, it may not be said that the evidence compels a different conclusion than that of the fact-

finder. *See* RFO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985).

CONCLUSION

Thus, in the final analysis, we are left with only one of the nine Ratliff factors pointing definitely in the direction of an independent contractor relationship. The ALJ concluded that carpentry is a "skilled occupation," and we agree that this factor weighs against Wilson. We also believe it was reasonable for the ALJ to conclude that the "provision of tools" and "intent of the parties" factors do not favor one party over the other. With respect to the ALJ's conclusion that carpentry is the kind of work done without supervision in the given locality, we do not believe it is supported by substantial evidence and, in any event, we believe her conclusion represents a misunderstanding as to the nature of this particular factor. We find no evidence of record to indicate one way or the other whether carpenters in the area are customarily hired on an independent contractor or employer-employee basis.

The foregoing does not constitute evidence of substance sufficient to support the ALJ's conclusion that Wilson was an independent contractor at the time of his injury. The predominant factors to be considered on the issue of employment relationship - Troxell's right of control over the details of Wilson's work and the nature of Wilson's work in relation to Troxell's regular business – weigh heavily in favor of an employer-employee relationship. Indeed, reviewing the record as a whole in the context of the governing case law and persuasive secondary authority, we believe the evidence in favor of an employer-employee relationship to be overwhelming. Because Wilson had the burden of proof and was unsuccessful before the ALJ below, the question before us on

> appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Having answered that question in the affirmative, we must reverse.

The Board correctly determined that the evidence compels a finding that Wilson was an employee and that the ALJ erred in failing to so rule. Accordingly, we find no error in the Board's opinion reversing and remanding the matter for entry of an order finding that Wilson was an employee of Troxell at the time of the injury.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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