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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000256-MR

CAROLYN BOILS, PRESIDENT;
AND CAROLYN ENTERPRISES, INC. APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-00662

DWIGHT T. LOVAN, COMMISSIONER;
AND DEPARTMENT OF WORKERS'
CLAIMS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HARRIS,[1] SENIOR JUDGE.

VANMETER, JUDGE: Appellants Carolyn Boils and Carolyn Enterprises, Inc. appeal from an opinion and order of the Franklin Circuit Court which affirmed an

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

opinion and order of the Administrative Law Judge (ALJ). For the following reasons, we affirm.

Carolyn Enterprises was formed as a corporation on April 20, 1998, with Boils as president. In 2005, the Office of Workers' Claims (now Department of Workers' Claims) (DWC) issued a notice of citation and levied a $20,000 fine against Carolyn Enterprises for failure to maintain workers' compensation insurance, as mandated by KRS Chapter 342, from its inception until June 23, 2005. Appellants challenged the citation and levy and the ALJ conducted a hearing to address their contest.

Boils, her husband, and the supervisor of the investigating DWC inspector testified during the hearing. The testimony revealed that Carolyn Enterprises is in the business of coordinating the provision of hauling services by commercial truck drivers to certain companies, including Stephens Pipe and Steel, and Cardinal Steel. In particular, the testimony disclosed that Carolyn Enterprises holds title to the trucks used by the drivers. The dispute between Carolyn Enterprises and the DWC concerns the employment status of the drivers. Carolyn Enterprises claims that the drivers are independent contractors, for whom workers' compensation insurance is not required, while the DWC claims that the drivers are employees for whom Carolyn Enterprises must provide such insurance.

The ALJ determined that the drivers are employees of Carolyn Enterprises and dismissed Appellants' challenge to the citation. Appellants then

appealed the ALJ's findings to the Franklin Circuit Court, which affirmed. This appeal followed.

Our standard for reviewing this case is as follows:

> Whether [the driver] 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. 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.

Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991) (internal citations omitted). Further, "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Appellants assert that under the guidelines articulated by the Kentucky Supreme Court in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), the drivers are not employees of Carolyn Enterprises. In *Ratliff*, the court, quoting Larson's Workmen's Compensation Law, volume 1, page 624, elucidated the following factors for consideration in determining whether an employer/employee relationship exists:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer; and
>
> (i) whether or not the parties believe they are creating the relationship of master and servant.

Id. at 324-25. At least four of these factors are predominant: "(1) the nature of the work as related to the business generally carried on by the alleged employer; (2) the extent of control exercised by the alleged employer; (3) the professional skill of the alleged employee; and (4) the true intent of the parties." *Garland,* 805 S.W.2d at 119. The factor of greatest importance is the right to control the details of the work. *See Ratliff*, 396 S.W.2d at 327.

The ALJ, in determining that the drivers are employees of Carolyn Enterprises, reasoned in part, as follows:

> None of the drivers affiliated with Carolyn Enterprises have title to their own trucks. They received weekly pay checks from which Social Security and taxes are withheld. It appears that at least some of them received W2 Forms at the end of the year. The Unemployment Insurance data base lists Carolyn Enterprises, Inc. as having employees. During the second quarter of 2005, when the inspection which gave rise to this Citation was issued, this data base showed Carolyn Enterprises as having eight (8) employees. They have had at least this number of employees at all times since. It is undisputed that this company never had workers' compensation coverage.

The trial court found that substantial evidence supported the ALJ's findings, and that, contrary to Appellants' assertion, the ALJ considered, albeit *sub silentio*, the *Ratliff* factors in making its findings. *See Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981) ("if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record"). Without undertaking a point-by-point application of the guidelines set forth in *Ratliff*, it seems clear that "some evidence of substance" supports the ALJ's findings. *See Special Fund*, 708 S.W.2d at 643.

We note that, "when the employer furnishes valuable equipment the relationship is usually that of employee/employer." *Garland,* 805 S.W.2d at 118. The rationale of this rule, as articulated in Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation, Desk Edition* Volume 2 § 61.07[2] (Matthew Bender & Company, Inc., 2004) (1972), is as follows:

> When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business. The owner of a $10,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like, in order to protect his or her investment. Moreover, since there is capital tied up in this piece of equipment, the owner will also want to ensure that it is kept as productive and busy as possible. For these reasons, it is not surprising that there seems to be no case on record in which the employer owned the truck but the driver was held to be an independent contractor.

In this case, Boils explained that she and her husband obtain financing to purchase trucks for drivers who are "down on their luck" and unable to obtain financing. In turn, Carolyn Enterprises takes deductions from the drivers' wages to pay for the trucks. Although title can be transferred to the drivers after the payments are completed, Boils testified that several drivers have left title with Carolyn Enterprises in order to obtain lower insurance rates. The DWC stresses, however, that by financing and holding title to the drivers' trucks, Carolyn Enterprises retains a measure of control over the vehicles used by the drivers in performing their work.

"[I]n determining the relationship of employer and employee under the Workmen's Compensation Act a broader and more liberal construction is used favoring employee." *Ratliff*, 396 S.W.2d at 323. "'This is in harmony with the purpose of the Act in affording protection to the employee because of his inability to withstand the burdens of injury occasioned by his employment and the resultant loss of work.'" *Id.* (quoting *Brewer v. Millich*, 276 S.W.2d 12, 15 (Ky. 1955)).

Here, the fact that Carolyn Enterprises retains title to the drivers' trucks, issues to the drivers weekly paychecks withholding amounts for social security and taxes, and issues W2 forms at the end of each year evinces a right to control the details of the drivers' work sufficient to conclude that the drivers are employees.

The opinion and order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gregory D. Simms
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BRIEF FOR APPELLEES:

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