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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001136-WC

TERRY STEINROCK AND GLEN COKE,
D/B/A GLEN COKE GENERAL CONTRACTING — APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00137

HOWARD C. COOK; UNINSURED
EMPLOYERS' FUND; HONORABLE
LAWRENCE SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Terry Steinrock and Glen Coke, d/b/a Glen Coke General Contracting, petition us to review an opinion of the Workers' Compensation Board ("Board") entered May 14, 2010, reversing the Administrative Law Judge's

("ALJ") opinion holding that Howard Cook was an independent contractor and not an employee of Terry Steinrock. For the reasons stated herein, we affirm the Board's decision.

Since 1976, Steinrock has operated T.W. Steinrock Roofing. Steinrock is the sole proprietor, and roofing is his primary source of income. If Steinrock cannot complete a job alone, he will contract with other roofers or hire them to complete the work. However, he performs most jobs himself.

For several years, Steinrock subcontracted work from Glen Coke, d/b/a Glen Coke General Contracting ("Coke"). Coke is a general contractor and does residential and commercial renovations and room additions. Coke exclusively uses subcontractors for his jobs. Coke contracts a job and then subcontracts out specific portions of the job, such as roofing, to independent contractors like Steinrock. During 2008, Coke subcontracted five or six roofing jobs to Steinrock. It is undisputed that Steinrock is an independent contractor who contracted with Coke for roofing jobs.

Claimant Howard Cook graduated from high school in 1988. For several years after that, Cook held various jobs in the restaurant industry, the printing business, and in various warehouses. In 1992, Cook took his first job as a roofer at Kentuckiana Roofing. During several long gaps in Cook's employment history, he admitted that he was an independent contractor doing roofing. Cook worked for himself for three or four years and had his own tools that he used to complete the jobs. During this same time span, Cook also did some work for

Ray's Roofing and worked as an independent contractor for Lewis and Clark Construction Company.

On July 25, 2007, Cook was hired at Haverty's and worked in the warehouse there full-time. In 2007, Cook did some roofing work with Steinrock. Because there was very little work that year, Cook arranged for some of his own jobs, where he and Steinrock performed the work. On those jobs, the homeowner paid Steinrock and Cook separately.

In 2008, because Cook was employed with Haverty's full-time, he could only do roofing work sporadically on Mondays and Tuesdays, his days off. During this time period, Steinrock's records show that he had written Cook eight separate checks for work performed from March 2008 through August 2008. Steinrock produced evidence that during that time period, Cook worked with him on roofing jobs twelve days in total, and Steinrock paid him by the hour.

On August 12, 2009, Cook was working on a roof with Steinrock on his day off from Haverty's when he fell off a roof and was injured. The occurrence of the injury is not at issue in this case. The ALJ bifurcated the proceedings in order to determine if there was an employer-employee relationship between Cook and Steinrock. After consideration of the evidence and the factors set forth in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), the ALJ determined that Cook was an independent contractor rather than an employee of Steinrock. Accordingly, the ALJ dismissed Cook's claim on November 17, 2009.

The claimant thereafter filed a petition for reconsideration, which was denied on January 13, 2010.

On appeal to the Board, Cook asserted that the ALJ erred in not finding him to be Steinrock's employee, arguing that the evidence compelled a contrary result. On May 13, 2010, the Board reversed the ALJ, finding that as a matter of law, the evidence compelled the conclusion that Cook was an employee of Steinrock. This appeal now follows.

Steinrock and Coke argue on appeal that the Board substituted its judgment for that of the ALJ as to the weight of the evidence presented. In the alternative, they argue that the Board overlooked or misconstrued controlling law in reversing the decision of the ALJ. In support of their arguments, the appellants argue that Kentucky Revised Statutes (KRS) 342.285 precludes the Board from substituting its judgment for that of the ALJ.

When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). "It is well settled that a reviewing [body] may not substitute its judgment for that of [an administrative] [b]oard as a finder of fact." *Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418, 420 (Ky. 1985); KRS 342.285. "An erroneous application of the law by an administrative board or by the circuit court is clearly reviewable by this Court. Also, where an administrative body has misapplied the legal effect of the

facts, courts are not bound to accept the legal conclusions of the administrative body." *Abuzant v. Shelter Ins. Co.*, 977 S.W.2d 259, 260-61(Ky. App. 1998).

Applying the above to the instant case, in its opinion, the Board noted the nine factors set forth in *Ratliff*, *supra*, to be considered when determining whether an individual is an employee or independent contractor. These factors are: (1) the extent of control that the alleged employer may exercise over the details of the work; (2) whether the worker is engaged in a distinct occupation or business; (3) whether that type of work is usually done in the locality under the supervision of an employer or by a specialist, without supervision; (4) the degree of skill the work requires; (5) whether the worker or the alleged employer supplies the instrumentalities, tools, and place of work; (6) the length of the employment; (7) the method of payment, whether by the time or the job; (8) whether the work is part of the regular business of the alleged employer; and (9) the intent of the parties. The Board noted that the test in *Ratliff* was refined in *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969), to focus primarily on four of the nine factors: (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 intentions of the parties.

The Board also noted that in *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991), the Kentucky Supreme Court addressed the issue of control over the details of the work, noting that *Ratliff*, *supra*, relied upon

Professor Larson's treatise, *Larson's Workermen's Compensation Law*, for the proposition that control of the details of the work can be provided by analysis of the nature of a claimant's work in relation to the regular business of the employer.

Based on the above, the Board concluded that the ALJ's interpretation of the factors concerning whether Cook was engaged in a distinct occupation or business and the extent of control exercised by Steinrock over the details of Cook's work was clearly erroneous in the context of the evidence in the record. The Board concluded that the ALJ erred in finding Cook engaged in a "distinct occupation" or business under the *Ratliff* test at the time of the injury. The Board found that the ALJ's holding suggested that being a roofer necessarily constitutes a "distinct occupation." Under that analysis, according to the Board, any job with a recognized title would qualify as a "distinct occupation." The Board concluded that the ALJ failed to recognize the phrase as a legal term of art and had instead accorded the words their lay meaning.

The Board explained that 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, and thus whether the claimant was in fact engaged in a "distinct occupation." The Board concluded that in the instant case, there was nothing to indicate that Cook offered anything but a personal service to Steinrock and was not engaged in a roofing business independent of his work for Steinrock *at the time of the injury*. Finally, the Board noted that the ALJ found that the work Cook performed was part of the regular business of Steinrock, a

finding that was supported by substantial evidence. The Board determined that finding, combined with the evidence that Cook was not engaged in an occupation or business distinct from his work for Steinrock, necessitated a finding of an employer-employee relationship at the time of Cook's injury.

Based on the above, we simply cannot say that the Board overlooked or misconstrued controlling law or so fragrantly erred in evaluating the evidence that it caused gross injustice. *See Western Baptist Hosp.*, *supra*. Nor can we say that the Board substituted its judgment for that of the ALJ. Instead, the Board reviewed the ALJ's application of the controlling law to the facts and determined that the ALJ's ruling was in error. Because the Board is permitted to do just this, we affirm the Board's May 14, 2010, opinion reversing and remanding the findings of the ALJ.

ALL CONCUR.

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