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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001143-WC

DON GOGEL APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-09-01486

JOHN HANCOCK; KENTUCKY UNINSURED EMPLOYERS' FUND; HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

KELLER, JUDGE: The Administrative Law Judge (ALJ) dismissed Don Gogel's (Gogel) workers' compensation claim, finding that Gogel was an independent contractor, not an employee. The Workers' Compensation Board (the Board) affirmed the ALJ, and Gogel appeals from the Board's opinion. On appeal, Gogel,

who was an exercise rider for horse trainer John Hancock (Hancock), argues that the ALJ and the Board misapplied existing law. In the alternative, Gogel argues that the law should be changed from an analysis based on the "exercise of control," to one based on the "nature of the work." We disagree and affirm.

FACTS

For at least the past twenty-five years, Gogel has worked in the horse racing industry as a trainer, groom, and/or exercise rider. From the late 1990s to November 9, 2009, Gogel worked as an exercise rider, primarily at Riverside and Ellis Park race tracks. Gogel described the job of exercise rider as skilled, noting that a rider must know how to tack and handle horses, as well as how to recognize if a horse is healthy enough to be ridden.

In 2009, Gogel rode horses trained by his son, by Hancock, and by another trainer, Benji LaRue. At the time of his injury, Gogel was only riding for Hancock, although he admitted his relationship with Hancock was not exclusive, and that he was free to ride for other trainers.

Gogel received instructions regarding the specific type of exercise (breeze, gallop, or jog) to give a horse from Hancock, one of Hancock's assistants, or from a chart posted by the horse stalls. Although he testified that he could refuse to ride a horse, Gogel stated that he had only done so when a horse had a physical problem that could be aggravated by exercise. Furthermore, although he could come and go as he pleased, Gogel testified that he was at the track or training

facility every day, unless Hancock's assistant told him that no horses needed to be exercised.

Hancock, like other trainers, paid Gogel $10.00 for each horse he rode and did not withhold anything from Gogel's pay. At the end of the year, Hancock provided Gogel with an Internal Revenue Service Form 1099 reporting the total amount he paid Gogel, which, in 2009, was $6,840.00. Gogel had his tax returns professionally prepared, and he deducted business expenses, such as mileage and boots, from his exercise-riding income.

On November 9, 2009, Gogel suffered an injury when a horse he was going to exercise pulled back, sat, and rolled onto her side and Gogel's left leg. Gogel suffered a displaced fracture of the left medial femoral condyle and has undergone two surgical procedures to repair the damage.

At the time of his injury, Gogel had health insurance through his full-time employer. However, after the injury, Gogel lost that job and his insurance. Therefore, he sought payment of medical expenses from Hancock. When those payments were not forthcoming, Gogel filed his claim naming Hancock as the defendant/employer and, because Hancock was not insured, the Kentucky Uninsured Employers' Fund (the UEF) as an additional defendant. Both the UEF and Hancock asserted the defense that Gogel was an independent contractor, not an employee. In order to resolve this threshold issue before incurring expenses litigating extent and duration of disability and medical issues, the parties agreed to bifurcate the claim.

The parties generally agree to the underlying facts as set forth above. However, they disagree about what they intended their relationship to be. Gogel testified that, earlier in 2009, Hancock stated that he had workers' compensation insurance but cancelled that insurance because of the expense. In support of this testimony, Gogel filed Hancock's 2009 application for a trainer's license, on which Hancock stated that he had six employees. Gogel argues that Hancock's statement and the application are evidence that Hancock considered Gogel to be an employee.

Hancock testified that he did not tell Gogel that he had workers' compensation insurance or that he had cancelled that insurance. Furthermore, Hancock testified that Gogel was not included among the six employees referred to on the application, who were all relatives, and that he never considered Gogel to be anything but an independent contractor.

Following a formal hearing, the ALJ determined that Gogel was an independent contractor and dismissed his claim. In doing so, the ALJ found as follows:

> Hancock, the UEF and Plaintiff all agree that the services provided by Plaintiff to Hancock were part of Hancock's regular business and Hancock provided most of the instrumentalities and tools for the work. However, I am convinced that the extent of control Hancock exercised over the details of Plaintiff's services were minimal, Plaintiff admittedly was engaged in (and was licensed in) a distinct occupation or business (as he claimed on his income tax returns) and possessed and displayed significant professional skills, of which he was obviously (and deservedly) proud. I am further convinced that the

> exercise riding services provided by Plaintiff to Hancock were for services provided by a specialist without significant supervision and work that required a significant degree of skill. Plaintiff's pay was based on the number of horses he exercised, in other words, by the job performed. Finally, I am convinced, based on Plaintiff's freedom to go to and leave work when and as he pleased and his method of reporting his income as a business indicates his intent to be an independent contractor, not an employee.

Gogel appealed to the Board, arguing that the ALJ's focus on the amount of control Hancock exercised over the details of the work activity was misplaced. According to Gogel, the ALJ should have focused on the nature of the work performed, which would have inexorably led to a finding of an employment relationship. Furthermore, Gogel argued that, even if the ALJ correctly focused on control, the ALJ misapplied that standard. The Board disagreed and affirmed. It is from the Board's opinion that Gogel appeals, making essentially the same arguments he made to the Board.

STANDARD OF REVIEW

The ALJ, as fact finder, has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Id.* Therefore, unless the ALJ and/or the Board have overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence as to cause gross injustice, we will affirm. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

ANALYSIS

With the above standard in mind, we address the issue raised by Gogel - whether the ALJ erred in finding him to be an independent contractor. In *Ratliff v. Redmon*, 396 S.W.2d 320, 324-25 (Ky. 1965), the former Kentucky Court of Appeals set forth the following guidelines for determining whether a person is an employee or independent contractor:

> [T]o distinguish 'employee' situations from 'independent contractor' relationships, we quote . . . from Larson's Workmen's Compensation Law, page 624:
>
> > In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(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.

Four years later, the Court distilled the nine *Ratliff* factors to four key factors, stating in *Chambers v. Wooten's IGA Foodliner,* 436 S.W.2d 265, 266 (Ky. 1969) that "the predominant [factors] encompass the nature of the work as related to the business generally carried on by the alleged employer, the extent of

control exercised by the alleged employer, the professional skill of the alleged employee, and the true intentions of the parties."

Having reviewed the record and the opinions of the ALJ and the Board, we discern no error in their application of the *Ratliff* and *Chambers* factors. Under *Ratliff* and *Chambers,* the following evidence supports a finding that Gogel was an employee. Hancock provided the horses, saddles, bridles, and other tools necessary for Gogel to perform his work; Hancock provided the place where Gogel worked; exercising horses is part of Hancock's regular business as a trainer; Gogel had worked with Hancock for several years; and Gogel testified he thought he was an employee.

The following evidence supports a finding that Gogel was an independent contractor. Hancock provided a general outline of the work he wanted Gogel to perform, *i.e.*, gallop, breeze, or jog; however, Gogel had significant freedom to determine the details of performance. Gogel was free to come and go as he pleased; could choose not to exercise a horse if he determined the horse would be harmed by doing so; and was free to take whatever steps he deemed necessary to calm or motivate a horse prior to and during an exercise session. Furthermore, to perform as an exercise rider, Gogel was required to obtain a license from the Commonwealth, and he was free to ride for other trainers, which are indicia that he was engaged in a distinct occupation or business.

Although the parties gave differing testimony regarding the amount of skill needed by an exercise rider, the ALJ found that Gogel "possessed and displayed

significant professional skills," a finding supported by Gogel's testimony. Furthermore, the evidence indicates that, even if Gogel's skill level is not a requirement, a certain skill set is necessary to perform the services Gogel provided.

Finally, Hancock paid Gogel per ride and Gogel treated his pay as business income. As noted by the ALJ, this indicates that, despite his testimony to the contrary, Gogel intended to be treated as an independent contractor.

Taking the above factors into consideration, we cannot say that the ALJ or the Board overlooked, misconstrued, or misapplied controlling law. Furthermore, although there was some evidence that could have supported a finding that Gogel was an employee, that evidence did not compel such a finding. Therefore, we affirm the Board.

Although we need not do so, we briefly address Gogel's arguments that public policy mandates coverage and that the law should be changed from its current focus on control to a focus on "the nature of the work."

In support of his public policy argument, Gogel states that 810 KAR 1:008 § 3(2) "require[s] trainers to carry exercise riders on their workers' compensation coverage." However, as noted by Hancock, the UEF, and the Board, that regulation states that a trainer "[s]hall carry workers' compensation insurance covering his employees in connection with racing as required by KRS Chapter 342." Thus, before a trainer is required to provide coverage for an exercise rider, the exercise rider must be an "employee." Because the ALJ found that Gogel is not an employee, 810 KAR 1:008 § 3(2) is not applicable.

Furthermore, "[i]t is well-established that the enunciation of public policy is the domain of the legislature; the courts interpret the law and do not enact legislation. The propriety, wisdom and expediency of statutory enactments are exclusively legislative matters." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 93 (Ky. App. 2004) (footnotes omitted). Therefore, Gogel's public policy argument, while it may have social merit, is one for the legislature, not this Court.[1]

In support of his change of focus argument, Gogel cites to *Larson, Workers' Compensation Desk Edition*, § 43.54 (1999) and *Tuma v. Kosterman*, 682 P.2d 1275 (Idaho 1984). While we generally find Professor Larson's treatise to be helpful, we are not bound to follow it. Furthermore, while the criteria set forth in *Ratliff* and its progeny take into consideration the amount of control exercised by the putative employer, they also take into consideration the nature of the work performed. Therefore, *Ratliff* and its progeny are not at odds with the nature of the work performed test.

In *Tuma,* the relevant issue before the Supreme Court of Idaho was whether the evidence of record supported the industrial commission's finding of an employment relationship between a trainer and exercise rider. The Court noted that the industrial commission appropriately used the right to control analysis and that the evidence supported its finding. *Id.* at 1279. The Court did not hold that

[1] Gogel cites to *An Analysis of Horse Racing Jockeys Riding under Kentucky Workers' Compensation Laws*, 97 Ky. L.J. 173 (2008-2009) as further support of his public policy argument. However, we note that this article states that the Kentucky Legislature considered but did not pass a bill that would have designated exercise riders as employees of their trainers. Thus, it appears that the legislature does not believe that there is a need to make that designation or that doing so would further a public policy.

such a finding was or would be compelled or that the right to control analysis was faulty. Therefore, while noteworthy, *Tuma* is not persuasive.

CONCLUSION

The ALJ undertook the appropriate analysis in determining that Gogel was an independent contractor. Furthermore, evidence of substance supported the ALJ's opinion and neither the ALJ nor the Board overlooked or misconstrued controlling law. Therefore, we affirm.

ALL CONCUR.

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