

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000148-WC

WORDS OF LIFE CHRISTIAN BOOKSTORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-79213

JAMES E. LONG;
JOHN W. MANN, Arbitrator;
HON. DONALD G. SMITH, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BUCKINGHAM, JUDGE: In its petition for review of a decision of the Workers' Compensation Board (Board), Words of Life Christian Bookstore (the Bookstore) argues two issues: (1) that the Board erred as a matter of law in upholding the administrative law judge's (ALJ) determination that James Long was not an independent contractor, and (2) that the Board further erred in concluding the ALJ's award of partial and permanent occupational disability benefits to Long was supported by substantial evidence. Having reviewed the record, the arguments of counsel,

and the applicable law, we are constrained to reverse. In that our holding on the first issue raised is totally dispositive of this matter, we pretermitt discussion of the award of occupational disability benefits.

Long sustained a work-related back injury on October 9, 1997. At the time of the injury, he was sixty-one years old and had a high school education as well as three years of agricultural school. Previous employment included construction work, twelve years with the Lexington City Fire Department, owner/operator of Jim Long Construction from 1962-1982, and owner/operator of Kentucky Machine Works, Inc., from 1982 until 1992 when the company became Kentucky Machine Works, Inc., d/b/a Kentucky Lumber and Metal Building Supply. Long sold Kentucky Lumber and Metal Building Supply in 1996; however, he retained the parent company, Kentucky Machine Works, Inc. All of Long's various businesses were engaged in, among other things, excavation, demolition, and construction. Additionally, from 1990 through 1994 Long was employed by Camelot Construction as a construction supervisor.

In early 1997, Mary Ann Strickland, owner of the Bookstore, entered into a verbal contract with Long to supervise the construction of a new building in which to house her business. The contract called for Long to be paid a fee of \$18,000 to locate subcontractors, receive and determine which bids to accept, provide equipment, obtain materials, and generally oversee the entire construction project. In essence, Long became the general contractor.

The \$18,000 fee was paid in installments. Prior to project commencement, in March 1997, he received \$2,000. On July 10, 1997, a second installment of \$6,000 was paid at the project's physical inception. Thereafter, in September 1997, a third installment of \$5,000 was made once the building was under roof. The remaining \$5,000 was payable upon completion of the project or when the Bookstore occupied the new facility. The Bookstore was targeted for completion prior to the 1997 Christmas season.

According to Long's deposed testimony, he supervised the construction project as agreed until September 1997. Long contends that at this time, Mrs. Strickland and her husband, Harry, commandeered control over the project, hiring their own subcontractors and failing to keep him informed. He maintains that he quit the project and only at the Stricklands' behest agreed to remain employed at a rate of \$15.00 per hour. Long testified that he was employed by the Bookstore thereafter as an hourly employee from September through December 5, 1997, principally working on the application of a "Dryvit" exterior facade. He claims the Stricklands acted as his immediate supervisors.

Conversely, Mrs. Strickland testified by deposition that Long continued supervision of the project throughout its duration. She stated that all bills were presented by Long and paid from a construction account which was apart and distinct from any bookstore business. Additionally, Mrs. Strickland testified that only when the subcontractor hired to do the

"Dryvit" work was unable to complete the job in a timely manner did she discuss with Long the possibility that he perform the work. She stated that Long requested and the parties agreed that he would be paid \$15.00 per hour, above and beyond his \$18,000 supervisory fee, to complete the "Dryvit" job. Mrs. Strickland had no recollection that Long ever "quit" the project.

The Bookstore moved into the new building on November 24, 1997. Thereafter, on December 5, 1997, Long and Mrs. Strickland attempted to settle up all outstanding accounts and balances. At this time, all remaining debits and credits were paid with the exception of the final \$5,000 draw on the \$18,000 contractor's fee. Since the roof was still leaking in the same location where Long had previously attempted to repair it, Mrs. Strickland withheld \$2,500 of the final draw and gave Long forty-five days to satisfactorily complete the requisite repairs.

There was no further communication between the parties until April 1998, when Long contacted Mrs. Strickland seeking the remainder of his final draw. Mrs. Strickland informed him that the amount had been forfeited due to his failure to repair the roof. On September 28, 1998, Long filed an application for Resolution of the Injury Claim against the Bookstore, alleging he had sustained a work-related back injury on October 9, 1997.

Ultimately, the ALJ found in favor of Long's claim and awarded him \$50.29 per week for a 10% impairment rating, commencing October 9, 1997, and continuing for a period not to exceed 425 weeks. The Board affirmed, and this appeal followed.

The ALJ determined that Long was an employee of the Bookstore and stated as follows:

Although this is a very close question, the Court does believe that Plaintiff was an employee at the time of the injury. Plaintiff was initially hired as an independent contractor for the project. However, this situation changed in the fall of 1997. The Stricklands appeared to take control over the project from the Plaintiff around that time and also provided some of the tools needed for the Plaintiff to perform the work. Plaintiff had gone from receiving a set amount for the entire project to being paid on an hourly basis. The factors set forth to determine whether a person is an independent contractor is found in Ratliff v. Redm[oln], Ky., 396 S.W.2d 320 (1965). Although certain factors does [sic] support each side's argument, this Court does believe that enough factors are met to determine that Plaintiff had established an employee relationship at the time he was injured on October 9, 1997.

In affirming the ALJ's finding that Long's relationship with the Stricklands had transformed from that of independent contractor to employee, the Board found as follows:

This case does not easily fit into the usual independent contractor versus employee-employer framework. While the punitive employer is a Christian bookstore, obviously, the real issue is whether Mrs. Strickland had become a general contractor and whether Long was then to be considered her employee. The predominant factor set out in [Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991)], is the nature of the work as related to the business generally carried out by the alleged employer. At the point in time Long was allegedly injured, Mrs. Strickland was in the process of building [] her bookstore.

The next factor is the extent of control exercised by the alleged employer. According to Long, after the point in time he threatened to quit, Mrs. Strickland took over the supervision of the construction job, and

he became an hourly employe[e]. Her husband oversaw the application of the drivit [sic], and Long kept track of his hours by which he was paid.

The next factor is the professional skill of the alleged employee. Clearly, Long was experienced in the construction industry although he did not have experience in the application of drivit [sic], the job he was primarily performing at the time of his injury.

The fourth indicium is the true intent of the parties. As is usual, the alleged employer believes the alleged employee is an independent contractor while the injured party believes he is an employee.

Under the [Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965)] analysis[,] other indicia include whether or not the one employed is engaged in the distinct occupation or business, whether the employer supplies the tools and place of work for the person doing the work, the length of time for which the person [is] employed, and the method of payment. Long, although he still owned his business in Danville, was primarily working for the Stricklands at the time of his injury. The tools necessary to apply the drivit [sic] were minimal and supplied by the Stricklands. The method of payment was by the hour although the Stricklands did not withhold anything from Long's paychecks.

As is the rule in these hard-fought cases concerning the issue of independent contractor versus employee, each case becomes very fact oriented. Each of the parties in briefing this appeal set forth facts that each believed supports a finding in its favor. However, weighing and analyzing the evidence in light of these factors is within the general weight and credibility determination authority of the fact finder. Smyzer v. B.F. Goodrich Chemical Co., [Ky., 474 S.W.2d 367 (1971)]. We believe there is substantial evidence in the record to support the ALJ's conclusion that an employer-employee relationship existed.

We believe that under the facts of this case, the decision of the ALJ is not supported by substantial evidence contained in the record as a whole. See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). Further, it is our opinion the Board misconstrued the factors set forth in Ratliff and Garland in applying them to the facts in this case.

The Ratliff court delineated nine factors for the court to consider in ascertaining whether one acted in the capacity of an independent contractor or employee. Ratliff, 396 S.W.2d at 324-25. The court identified:

1. The nature of the work performed by the alleged employee as related to the business generally carried on by the alleged employer;
2. The extent of control the alleged employer exercised over the alleged employee;
3. The professional skill of the alleged employee in relationship to the skills ordinarily required in the alleged employer's business;
4. The actual intent of the parties;
5. Whether, in the locality, the work is generally performed under the supervision of the employer, or by a specialist absent supervisory intervention;
6. The period of time for which the person works for the alleged employer;
7. The method by which the alleged employee is paid, that is by the hour or by the job;
8. Whether the employer or the worker supplies the instrumentalities, tools, and designated the location wherein the work is performed;
9. Whether the person is engaged in a distinct or specialized occupation or business.

See id.

The Garland court identified the first four factors as the most predominant. Garland, 805 S.W.2d at 119. As such, our discussion will focus on those items first. The first factor concerns whether the nature of the work performed by the alleged employee relates to the business generally carried on by the alleged employer.

Unquestionably, Long is an experienced construction contractor. Kentucky Machine Works, Inc., constructed numerous projects including several houses, a television station, the building and paving of roads, and demolition work for the Commonwealth. On the other hand, the Bookstore is engaged in the business of selling Christian products, namely Bibles, books, contemporary Christian music, praise music, gifts, cards, church and Sunday school supplies, Christian videos, and sundry similar items for gifts and awards for children. Mrs. Strickland engaged Long for the purpose of overseeing the construction of a new facility in which to operate the Bookstore.

The Board referred to this first factor as the "predominant factor" in determining questions concerning whether a person was a contractor or an employee. Nevertheless, it addressed the issue by merely stating that "[a]t the point in time Long was allegedly injured, Mrs. Strickland was in the process of building of [sic] her bookstore." In short, we believe it to be clear that the nature of Long's work was in no way related to the business of the Bookstore. Thus, this factor indicates an independent contractor relationship.

The second factor—extent of control exercised over the details of the work—is a prime source of contention between the parties. Long claims the Stricklands commandeered the project sometime in September 1997 and from thereon provided his instruction/supervision. Conversely, the Stricklands maintain that Long continued to supervise the project from beginning to end. As such, it is virtually impossible to resolve this issue through the proof submitted. Therefore, as enunciated in Garland, “the control of the details of work factor can be provided by analysis of the ‘nature of the claimant’s work in relation to the regular business of the employer.’” Garland, 805 S.W.2d at 118, quoting Ratliff, 396 S.W.2d at 325.

In tandem with our above discussion, we note that employees within the bookstore industry normally do not engage in construction work. We further note that with respect to this factor, the Board relied on the ALJ’s finding that Mrs. Strickland took over supervision of the construction job while her husband oversaw application of the Dryvit work. We believe the record refutes this notion. Rather, Long’s deposed testimony sheds insight into the parties’ relative rolls:

Q. And so was Maryann Strickland telling you how to do the dryvit work?

A. Telling us exactly how to do it, no. We were putting the board, you know, on-- sticking the board on just like the other guy that she hired to start out with to do it, and we just came in and--we didn’t even have any tools to do this particular work, and Harry went and bought some tools. He went to the hardware store and got a bunch of tools. . . . He brought the trowels and the scrapers and things that we needed to do the

application with because I didn't have any dryvit tools. I'd never done that before.

. . . .

Q. Now let me ask you: As far as the tools required to construct the bookstore, what kind of equipment was required to construct the bookstore?

A. Well, the equipment, you know, was dozers and backhoes and loaders, and the tools was just nor--normal carpenter tools.

Q. And where did the dozer, backhoe, and loaders come from?

A. The backhoes and loader and things I owned. The dozer was there on the job. It belonged to Mike Conover, who owned the land.

Q. Did you borrow it from Mike Conover?

A. Yeah.

Q. Now, the carpenter tools, did you have your own carpenter tools?

A. I had my own tools.

. . . .

Q. Why would you need different types of tools?

A. Well, it takes a different type of tools [sic] to do dryvit work. It takes a specific type of tool to apply the glue and the cement and to mix the cement up--

Q. (Interrupting) How much. . .

A. --and that's when Harry--I told him if he'd go get us some tools, you know, we'd go ahead and be working on it and we'd do it.

. . .

. . . .

Q. Now as far as the tools needed to put the dryvit in, did you tell Harry what tools you needed?

A. Yeah, we told him what we had to have because the other guy had been coming in there, you know, working of [sic] the nights and weekends, and we'd talked to him about it, and I'd even stayed there with him a few evenings and gone over the thing trying to get him to go on and get the thing done, and then he just got to where he wasn't showing up. . . .

. . . .

Q. Now, besides those tools that he went out and bought to do the dryvit work, did you use any other tools that were Maryann Strickland's or Harry Strickland's?

A. I don't know of any others.

. . . .

Q. Now, let me go to the injury that you claim you sustained there. Tell me what happened.

. . . .

A. I don't know exactly where I went. I stepped on a board and it reared up, and I went down between the boards and the scaffold, and I grabbed--I grabbed the scaffold as I went by. I know that. As I shot down through it, I grabbed it, and it snapped my back. It hurt me in two places. It hurt me up in the middle of my back and down in the low part. I couldn't even hardly stand up.

. . . .

Q. So you fell off the scaffolding. Let me ask you: Where did the scaffolding come from?

A. The scaffolding, I had rented it.

Q. You rented it?

A. Uh-huh (affirmative).

Q. Where did you rent it from?

A. Finney (phonetically) Construction.

Q. Who set up the scaffolding?

A. Kenneth and I set the scaffolding up.

Long's testimony reveals that he supplied the tools and equipment necessary for the bookstore's construction with the exception of those required to perform the Dryvit work. Since Long did not possess the requisite tools to complete the Dryvit work, he instructed Mr. Strickland to procure the proper tools. He further admitted that Mrs. Strickland did not instruct him on how to perform the Dryvit job.

Moreover, Long stated that he sustained his back injury from a fall off the scaffolding which was being used to install the Dryvit. He further testified that it was he who had rented and erected the scaffolding. Furthermore, Long provided that he, personally, had remained at the construction site on several evenings in an attempt to persuade the former Dryvit installer to complete the project, albeit to no avail. As such, the sum of the evidence indicates that he continued to supervise and exercise primary control over the construction project.

The third factor addresses the professional skill required by the alleged employee in the relationship to the skills required by an ordinary employee of the business. If a special or unique skill is required to perform the work, an employer is inclined to engage an independent contractor. Ratliff, 396 S.W.2d at 325. This factor has been fully discussed in connection with the first two factors and must be resolved in favor of an independent contractor relationship.

The fourth factor examines the true intent of the parties. "The important consideration is not what one of the

parties believed, but what both parties believed from the circumstances." Ratliff, 396 S.W.2d at 326-27.

Long testified that he wanted to be paid through his company, Kentucky Machine Works, Inc.; however, Mrs. Strickland paid him directly. The record further reflects that all checks drafted to Long were made from the Stricklands' construction account as opposed to the payroll account retained by the Bookstore. As such, no state or federal withholdings were deducted from any of the checks issued to Long.

Additionally, Long was not covered by the Bookstore's workers' compensation plan, nor did he receive any of the benefits incidental to being employed by the Bookstore. Similarly, much of the construction materials purchased and equipment rented was procured by Long under the charge accounts of Kentucky Machine Works, Inc. Long would then produce the receipts to Mrs. Strickland, who would reimburse him for these expenses. In view of these facts, the professional standing of both parties, and their motives and purposes for undertaking the relationship, we believe the fourth factor must also be construed in favor of the independent contractor relationship.

Finally, we note that many of the remaining five factors identified in Ratliff have been addressed herein. We specifically turn our attention, however, to the fact that Long received the entire sum due under the parties' oral agreement that he supervise the project, except for the \$2,500 withheld due to his failure to properly repair the roof. Likewise, in addition to that sum, he received the hourly wages agreed upon

once it was recognized that the Dryvit work was not going to be completed in a timely manner. The project commenced in July 1997, and the Bookstore did not occupy the premises until late November 1997. Long and Mrs. Strickland settled their outstanding business affairs in December 1997. It is clear that Long continued in his position as supervisor in that Mrs. Strickland continued to pay him for this service, as well as for the additional labor called for by the Dryvit work.

Furthermore, even if there was substantial evidence that the Stricklands took over the supervisory position and discharged Long from that capacity, we would reach the same result. Analyzing this case under the factors set forth in the Ratliff and Garland cases, we believe there was not substantial evidence that Long became an employee. See Crum, 673 S.W.2d at 736.¹ Under the factors discussed in this opinion, it is clear that Long was an independent contractor.

We are mindful of this court's limited scope in reviewing the Board's determination of a workers' compensation award. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88. We conclude, however, that the Board erred in assessing the evidence and that such error was "so flagrant as to cause gross injustice." Id. Therefore, the Board's judgment is reversed, and this case is remanded to the Board for disposition in accordance with this opinion.

MILLER, JUDGE, CONCURS.

¹ The court in Crum held that when a claimant prevails before an ALJ, the issue then becomes whether the decision was supported by substantial evidence. Id. at 736.

BARBER, JUDGE, DISSENTS.

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