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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0272-WC

DATE 5-13-04 ELIA Grant, D.C.

HAROLD HICKS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-2194-WC
WORKERS' COMPENSATION BOARD NO. 01-1397

ECK MILLER TRANPORTATION;
HON. J. KEVIN KING, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

The claimant was a truck driver who owned his rig and worked under a lease arrangement with Eck Miller Transportation. He was injured while delivering a load and filed a workers' compensation claim. Reversing a finding that he was an employee, the Workers' Compensation Board (Board) determined that the evidence compelled a finding that he was an independent contractor and that the claim must be dismissed. The Court of Appeals affirmed in a two-to-one decision.

The claimant was born in 1951, completed the eighth grade, and had a commercial drivers' license. He testified that although he did construction and railroad work when he was young, most of his work history involved driving semi trucks. After working for another trucking company from 1985-1998, he began leasing his truck to Eck Miller and hauling loads of coil steel for five to seven days per week. On October 27, 1999, he was injured when he lost his balance while stepping off the back of his

trailer as he was making a delivery. He later testified to experiencing immediate lower back pain that radiated into his left leg to the knee. He drove to Eck Miller's headquarters in Rockport, Indiana, and returned to his home in London, Kentucky, the next day. He did not drive for Eck Miller thereafter.

In January, 2000, Dr. Kiefer performed a laminectomy at L3-4. In March, 2000, the claimant was released to return to work as a truck driver with restrictions against heavy lifting that precluded him from dragging chains, ropes, and binders to tie down loads of coil steel. He returned to work under a lease arrangement with KC Transportation. It required him to do nothing but drive and paid $1,500.00 to $1,800.00 per week. In November, 2001, he began working under a lease arrangement with Tri-Lex, driving five days per week and earning $1,400.00 to $1,500.00.

The claimant testified that he owned his truck and trailer. He leased the rig to Eck Miller and drove it in exchange for 75% of the gross receipts for each load. The lease had no definite term. He stated that he was responsible for the cost of purchasing fuel and maintaining the truck, which amounted to about half of what he received. Under the arrangement, he grossed $2,300.00 to $2,400.00 per week. He stated that either he called the dispatcher or the dispatcher would contact him at his home, and he would be offered a choice of the available loads to haul. He was not obliged to accept every load and was paid only for the hauls that he made. If he declined a load, he would still be called when another one became available. He stated that he was required to keep the vehicle ready for use and did not haul freight for others while working for Eck Miller. He also testified that he did not receive payment from Eck Miller for the use of his vehicle by another driver.

The claimant's 1999 tax return reported no wages but did report $10,618.00 in business income on which he paid self-employment tax. His Schedule C for Harold Hicks Trucking reported gross receipts of $93,263.00. A Form 1099 indicated that Eck Miller paid Hicks $44,341.12 in non-employee compensation. No evidence explained the source of the remaining $48,921.88 in receipts, and he was not questioned about the discrepancy when testifying at the deposition or hearing. The Schedule C indicated that after depreciation and expenses, he netted $10,618.00.

Eck Miller Transportation was no longer operating when the claim was heard but was represented by counsel. It presented no evidence concerning the relationship of the parties. Although the business was an Indiana corporation, it carried workers' compensation coverage in Kentucky. There was no evidence to establish whether the business owned some trucks, itself, and used employee drivers as well as owner-operators such as the claimant.

Relying on Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991), the Administrative Law Judge (ALJ) noted that the shipping of goods by truck was related to Eck Miller's business. Although the claimant could choose which loads to haul and could refuse a load, Eck Miller procured the loads, and he did not haul freight for others while working for Eck Miller or have others drive his truck. The ALJ concluded, therefore, that Eck Miller exercised a great deal of control over the claimant's work. Although noting that the claimant had a commercial drivers' license and that skill is required to operate a large truck, the ALJ was not persuaded that those factors necessarily indicated that the claimant was an independent contractor. Likewise, noting that the claimant may have filed his income taxes on a self-employed basis for tax reasons, the ALJ was not persuaded that his tax return necessarily

indicated that the parties intended an independent contractor relationship. Noting that Eck Miller had Kentucky workers' compensation insurance coverage at the time of the claimant's injury, the ALJ concluded that he was an employee for the purposes of Chapter 342. The claimant was awarded temporary total disability benefits from October 28, 1999, through March 8, 2000, followed by permanent partial disability benefits that were based upon a 17% impairment and enhanced under KRS 342.730(1)(c)1.

In Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965), the owners of a scrap metal business paid Redmon by the pound for copper and brass that he separated from other metals. He was paid in cash or by checks that were made payable to "Redmon Metal Cleaning Service." Redmon was 52 years old, illiterate, worked for no one else, and testified that he first learned of Redmon Metal Cleaning Service when he cashed a check. Rodney Ratliff, the alleged employer, testified that he was a college graduate in accounting and had done graduate work in accounting and economics. He maintained that Redmon was an independent contractor, asserting that he refused regular employment and that he worked when he wished and at the rate he wished. The court analyzed the evidence under each of nine factors, concluding that only the method of payment favored classifying Redmon as an independent contractor and that the chosen method was no more than a device to circumvent the Act.[1]

In resolving the extent of control over the details of work factor, the court observed that the work required little, if any, supervision; that distinguishing copper and

[1] The nine Ratliff v. Redmon factors were: 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 the type of work is usually done in that locality under the supervision of an employer or by a specialist, without supervision; 4.) the degree of skill required by the work; 5.) whether the worker or 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 a part of the regular business of the employer; and 9.) the intent of the parties.

brass from other metals was a matter of common knowledge; and that by controlling the amount of metal to be separated, the employer had automatic control over the period of time that Redmon worked. Furthermore, the court noted Professor Larson's opinion that although employer control over the details of work was required for vicarious liability, "the nature of the claimant's work in relation to the regular business of the employer" was truly the most relevant factor for compensation purposes. Id. at 325; see also Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, §§ 60.03 and 60.05 (2002). Emphasizing the quoted language, the court concluded that the extent of control factor favored an employee relationship.

After analyzing the remaining factors, the court noted Professor Larson's acknowledgement that the only accepted rule of law concerning the relative weight of the nine factors was that the right to control the details of the work was the primary test. Id. at 327. Concluding that Redmon was an employee, the court emphasized that he had no investment in the metal separation business, that he was not listed in the yellow pages of the telephone directory or otherwise advertised as a specialist or independent contractor, and that the first time he was designated as such was when checks were made payable to Redmon Metal Cleaners.

The Ratliff v. Redmon test was later refined, in Chambers v. Wooten's IGA Foodliner, Ky., 436 S.W.2d 265, 266 (1969), to focus primarily on four 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. Chambers, a professional roofer, was injured while repairing the roof of a grocery store. His claim alleged that he was the store's employee. Rejecting the argument, the court

noted that although the business's lease required it to repair the building, the roofing enterprise could not realistically be viewed as part of its customary business.

In a subsequent case, the court again noted that all of the Ratliff v. Redmon, supra, factors must be considered and that treating the role of the alleged employee's work in relation to the regular business of the employer as the predominant factor in the analysis fulfills the theory of risk spreading upon which workers' compensation is based. Husman Snack Foods v. Dillon, Ky.App., 591 S.W.2d 701, 703 (1979), citing Larson, Larson's Workmen's Compensation Law, § 43.51 (1978). Under the theory, the cost of industrial accidents is viewed as a cost of production that is factored into the price of the product. Therefore, a worker whose services are a regular and recurrent cost of a product and who has no independent route for channeling the costs of an accident to the consumer is part of the group that the Act is intended to protect. Id. The court concluded, therefore, that a route salesman who supplied stores along his route with Husman products was Husman's employee although he was paid on commission, could solicit new clients, purchased the products from Husman, sold them to stores, filed tax returns on a self-employed basis, and purchased his truck from Husman. Its rationale was that the salesman's work was "an inseparable part of the regular business of Husman" and that because Husman fixed the price of all its products, it was able to include the costs of production, including the costs of its salesmen's workers' compensation insurance. Id.

Most recently, in Uninsured Employers' Fund v. Garland, supra, the court addressed the issue of control over the details of work, noting that in Ratliff v. Redmon, supra, the court had relied upon Professor Larson's treatise for the principle "that 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.'" (Emphasis original). Uninsured Employers' Fund v. Garland, supra, at 118, citing Ratliff v. Redmon, supra at 325. Furthermore, citing to the decisions in Chambers v. Wooten's IGA Foodliner, supra, and Husman Snack Foods v. Dillon, supra, the court emphasized that at least the four primary factors must be considered and that a proper legal conclusion could not be drawn from only one or two factors. Id. at 119.

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. After analyzing the evidence under those principles, the ALJ determined that the claimant met his burden of proving that he was an employee. Therefore, the question on appeal was whether substantial evidence supported the finding under the standard set forth in Ratliff v. Redmon and its progeny or whether the evidence to the contrary was so overwhelming that the finding was unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

To support their conclusion that the ALJ erred in finding that the claimant was Eck Miller's employee, the Board and the Court of Appeals' majority relied upon Reardon v. Southern Tank Lines, Inc., Ky., 346 S.W.2d 527 (1961). Reardon and Bratcher, the injured workers, were freight haulers who owned and paid all costs of operating their vehicles. They leased the vehicles to a company that solicited goods to

be hauled, and they provided a driver. In return, they were paid a percentage of the revenue from each shipment. They had the option to accept or reject a particular load, to choose the route to take, and to drive the truck or hire other drivers. They agreed to pay unemployment and workers' compensation insurance premiums on their own employees and to indemnify Southern Tank Lines (Southern) against claims by their employees. A jointly executed letter of the parties expressed their interpretation of the lease contract "as not creating any relationship of master and servant or employer and employee." Noting that the workers had the right to accept or reject any load, that they had the right to furnish drivers other than themselves to operate Southern's equipment, and that they were paid a certain rate for a completed job, the court concluded as a matter of law that the workers were independent contractors. Id. at 529. The case was decided before Ratliff v. Redmon, supra, and also before Special Fund v. Francis, supra. Under the present state of the law, it is not authority for the principle that a trucker who leases a vehicle for a percentage of the gross receipts and who can choose among the loads that are offered must always be viewed as being an independent contractor.

The sole evidence of the claimant's arrangement with Eck Miller was his testimony and the copy of his 1999 tax return. Before concluding that the claimant met his burden of proof, the ALJ analyzed the evidence under each of the four essential factors that were addressed in UEF v. Garland, supra. The control factor was decided in the claimant's favor, with the ALJ noting that the shipping of goods by truck was Eck Miller's business; that the claimant did not haul freight for others while working for Eck Miller; and that although the claimant could refuse a load and pick among loads, it was Eck Miller who procured and offered them. Although acknowledging that driving a semi

truck required some degree of skill and that for tax purposes the claimant's income was reported on a Form 1099, the ALJ did not find those factors to be dispositive of the parties' relationship, particularly in view of the fact that the employer carried workers' compensation insurance in Kentucky. We conclude, therefore, that the ALJ's decision was reasonable under the evidence and should not have been reversed on appeal.

The decision of the Court of Appeals is reversed, and the claimant's award is reinstated.

All concur.

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