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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-11-08 ElizGravitt, D.C.

2007-SC-000507-WC

KELLY MOUNTAIN LUMBER — APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. 2006-CA-001611-WC
WORKERS' COMPENSATION BOARD NO. 04-01128

LARRY S. MEADE; KENTUKY EMPLOYERS' MUTUAL INSURANCE COMPANY; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

2007-SC-000526-WC

KENTUKY EMPLOYERS' MUTUAL INSURANCE COMPANY — CROSS-APPELLANT

ON APPEAL FROM COURT OF APPEALS
V. 2006-CA-001707-WC
WORKERS' COMPENSATION BOARD NO. 04-01128

LARRY S. MEADE; UNINSURED EMPLOYERS' FUND; KELLY MOUNTAIN LUMBER; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant was not entitled to workers' compensation coverage as either a direct or up-the-ladder employee of Kelly Mountain Lumber because he worked for the company as a partner in K & J Contractors. A divided Workers' Compensation Board reversed, holding that the evidence compelled a finding that he was Kelly Mountain's direct employee under Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). The Board also rejected an argument that Kentucky Employers' Mutual Insurance Company (KEMI) was an indispensable party to the appeal. The Court of Appeals affirmed and we affirm.

The claimant has an eleventh-grade education, with miner's papers and a master logger's license. He had worked for Rodney Wright at Kelly Mountain Lumber and its predecessors since 1997, as a timber cutter, log truck driver, and finally as a sawyer in Kelly Mountain's sawmill. In March 2003, the claimant and four other sawmill workers formed a partnership, K & J Contractors, but continued to work for Wright. K & J obtained a workers' compensation insurance policy from KEMI but, as KRS 342.012 permits, the partners excluded themselves from its coverage. Nothing indicates that K & J had any employees but the partners or performed work for anyone but Wright.

On July 23, 2003, the claimant severed his left thumb while resetting the saw guides after changing the teeth. He filed a civil suit against Kelly Mountain, which he dismissed voluntarily after Kelly Mountain asserted that it was his employer and raised an exclusive remedy defense. He then filed an application for workers' compensation benefits, naming both K & J and Kelly Mountain as his employers. Hon. Barry Lewis

entered an appearance in the matter on behalf of "the Defendant, Kentucky Employers' Mutual Insurance." Lewis also filed a Form 111 denying liability on behalf of KEMI as well as on behalf of the named defendants as insured by KEMI. Several months later, Hon. James Carpenter entered an appearance as counsel for Kelly Mountain as insured by KEMI.

Kelly Mountain Lumber conducts a logging and sawmill operation that provides timber to local coal mines. Wright, the company's only shareholder and officer, obtained workers' compensation coverage from KEMI but excluded himself from coverage. He asserted that he was Kelly Mountain's only employee and that he used independent contractors to perform its work. He maintained that K & J contracted with him to operate the sawmill and that the partnership agreement precluded a finding that Kelly Mountain was either the claimant's direct employer or his up-the-ladder employer under KRS 342.610(2)(b).

The ALJ determined that the partnership agreement precluded a finding that the claimant was Kelly Mountain's direct employee. The ALJ also determined that the claimant was a partner in K & J rather than its employee, noting that K & J's policy with KEMI excluded him specifically as a K & J partner. Thus, Kelly Mountain could not be his up-the ladder employer because KRS 342.610(2)(b) applies only to employees.

The claimant's notice of appeal to the Board listed as respondents the named defendants (K & J, Kelly Mountain, and the UEF) as well as the ALJ. Kelly Mountain moved to dismiss for failure to name KEMI, which Kelly Mountain asserted was an indispensable party. The claimant then moved to amend his notice of appeal to include KEMI. The Board passed Kelly Mountain's motion to a consideration of the merits and

permitted KEMI to file a brief. It determined ultimately that KEMI was not an indispensable party to the appeal. It also determined under Ratliff v. Redmon, supra, that compelling evidence required a finding that Kelly Mountain was the claimant's direct employer. It did not take issue with the finding that Kelly Mountain bore no liability as an up-the-ladder employer.

Kelly Mountain asserts that the Board erred by substituting its judgment for the ALJ's regarding the parties' business relationship. KEMI asserts in a cross-appeal that the Board lacked jurisdiction over the appeal because KEMI was an indispensable party that the claimant failed to name.

I. Failure to name an indispensable party

KEMI was not a party before the ALJ and was not an indispensable party before the Board. Tolliver v. Pittsburgh-Consolidation Coal Co., 290 S.W.2d 471 (Ky. 1956), explains that indispensable parties have an interest in the disputed matter of such a nature that a final decree cannot be made without affecting that interest or resulting in a final decision that is wholly inconsistent with equity and good conscience. KRS 342.630 and KRS 342.340 require employers to comply with Chapter 342 and to insure or otherwise secure the payment of workers' compensation liability, but KRS 342.610(1) places the primary liability for compensating an injured worker on the employer. Nothing in Chapter 342 requires a defendant's insurance carrier to be named a party to a workers' compensation claim.[1] As the Board pointed out, any disagreement between an employer and its carrier over coverage may be resolved in a declaratory judgment

1 Custard Insurance Adjusters, Inc. v. Aldridge, 57 S.W.3d 284, 287 (Ky. 2001), explains that an insurance carrier may be made a party to a claim, in which case the ALJ has subject matter jurisdiction to decide questions affecting the carrier's obligation to pay benefits on behalf of its insured.

action and an employer's payment of any benefits that the policy covers may be recovered in an indemnity action in circuit court.

The claimant's application for benefits named K & J Contractors and Kelly Mountain Lumber as defendant-employers. Although the claimant moved and was granted leave to join the Uninsured Employers' Fund as a party, neither he, nor Kelly Mountain, nor K & J moved to join KEMI as a defendant. Likewise, although Lewis entered an appearance on KEMI's behalf, purportedly as a defendant, and filed various pleadings, KEMI neither moved for leave to intervene as a defendant nor was it granted leave to do so. The ALJ considered the list of individuals excluded from coverage under the policy that KEMI issued to K & J to be evidence that the claimant was a partner in K & J and, thus, concluded that he was neither K & J's employee nor Kelly Mountain's up-the-ladder employee.

The issues the claimant raised on appeal to the Board did not affect KEMI's interest or result in a decision wholly inconsistent with equity and good conscience. He argued that Kelly Mountain was his de facto employer or that it was his up-the-ladder employer under KRS 342.610(2)(b). In the alternative, he argued that K & J should be liable because it secured insurance with KEMI. None of these issues concerned KEMI's obligation to pay benefits on behalf of K & J or Kelly Mountain.

II. Employee/Independent Contractor

The claimant had the burden to prove every element of a claim, including his status as an employee who is covered by Chapter 342.[2] KRS 342.285 designates the ALJ as the finder of fact, which gives the ALJ the sole discretion to determine the

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2 Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.1984); and Snawder v. Stice, 576 S.W.2d 276 (Ky.

quality, character, and substance of evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that if a party with the burden of proof fails to convince the finder of fact, the party must show on appeal that the favorable evidence was so overwhelming as to compel a favorable finding. In other words, it must show that no reasonable person would have failed to be convinced by the evidence.

The Board determined that the ALJ erred as a matter of law by finding that the partnership agreement, alone, showed that the claimant was not Kelly Mountain's employee and by failing to consider the evidence under Ratliff v. Redmon, supra. The Board concluded that the overwhelming evidence compelled a finding that the claimant worked an employee.

Chapter 342 does not infringe on the freedom of a worker who prefers to be an entrepreneur rather than an employee to be treated as an independent contractor. Nor does it permit an employer to thwart the purpose of the Workers' Compensation Act by classifying workers as partners or independent contractors when they are, in fact, employees. To that end, KRS 342.640 defines employees, in pertinent part, as being:

> (1) Every person, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied . . . ;
>
> . . . .
>
> (4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury. . . .

Ratliff v. Redmon, supra, sets forth nine factors to be considered when determining whether an individual is an employee or independent contractor. They are: 1.) the extent of control that the alleged employer may exercise over the details of the

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App. 1979).

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 a part of the regular business of the alleged employer; and 9.) the intent of the parties.

The Ratliff v. Redmon test was refined, in Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (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. Husman Snack Foods v. Dillon, 591 S.W.2d 701 (Ky. App. 1979) (citing Larson, Larson's Workmen's Compensation Law, § 43.51 (1978)), explained subsequently that the purpose of the Act is to spread the cost of an industrial accident to consumers of the product being produced. Thus, workers come within the Act's scope if their services are a regular and continuing cost of production and they do not actually operate an independent business that can spread the cost of their industrial accidents. The court noted that all of the Ratliff v. Redmon factors must be considered but that the Act's risk-spreading theory is fulfilled by treating the role of the alleged employee's work in relation to the employer's regular business as the predominant factor.

In Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 118-19 (Ky. 1991), the court addressed the issue of control over the details of work, noting that Ratliff v.

Redmon, supra, 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). Citing to the decisions in Chambers v. Wooten's IGA Foodliner, supra, and Husman Snack Foods Co. 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.

In summary, the employer/independent contractor analysis has evolved into three major principles: 1.) that all relevant factors must be considered, particularly the four 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 UEF v. Garland, supra, and Husman Snack Foods Co. v. Dillon, supra, permit the control factor to be analyzed by looking to the nature of the work that the injured worker performed in relation to the regular business of the employer.

Although Kelly Mountain points to specific examples of conflicting testimony and asserts that the Board usurped the ALJ's function as fact-finder, the record indicates that the relevant facts are essentially undisputed. It also indicates that overwhelming evidence compelled a finding that the claimant was Kelly Mountain's employee. Thus, the Board did not err by failing to remand the matter for further consideration.

The claimant's work was within the scope of Kelly Mountain's business and Wright controlled the details of the work, both of which favored employee status. Kelly Mountain's business was to fell timber, cut it to specific measurements, and supply the lumber to local coal mines. Wright had operated the business under different names

over the years, sometimes with "partnerships" and sometimes not. The claimant had worked for Kelly Mountain as a log truck driver and timber cutter but later was demoted to work as a sawyer. There was some dispute whether the demotion was voluntary or whether Wright gave him no choice in the matter by assigning the timber-cutting job and equipment to a different crew. Wright did testify that he told the partners what to saw each day based on the orders that he needed to fill. Nothing contradicted the claimant's testimony that Wright approached him as he was cutting timbers on the day of the accident and advised him to change the teeth on the blade because they were going to begin sawing crib blocks.

The other Ratliff v. Redmon, supra, factors also favored employee status. No evidence indicated that being a sawyer was a distinct occupation or business or that the work was performed in the locality by individuals who were not under an employer's supervision. Wright testified that he did not know how to operate the saw but did not dispute that the claimant had no previous experience as a sawyer. Though Wright testified that K & J was supposed to maintain the equipment, he provided all of the tools and owned the sawmill where the "partners" worked. The claimant had worked for Wright since 1997, first as an employee and later as a partner. Wright paid K & J based on the hours that the members worked, sometimes including a bonus, and K & J paid the members.

Nothing indicated that K & J actually operated an independent business. The claimant asserted that Wright required him and the other four workers to form the partnership in order to work for Kelly Mountain and also gave them money to purchase the KEMI policy. Although Wright denied that he required them to form the partnership, he did

state that he gave K & J a $700-800 "down payment" to use to purchase insurance. The evidence indicated that the parties intended for K & J to be no more than a conduit through which Wright could filter the partners' hourly wages in order to avoid providing workers' compensation coverage to individuals that performed service in the course of his business.

The decision of the Court of Appeals is affirmed.

Minton, C.J., and Abramson, Cunningham, Noble, Schroder, and Scott, JJ., concur. Venters, J., not sitting.

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