IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000354-WC

ROBERT ROBINSON — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002328-WC
WORKERS' COMPENSATION BOARD NO. 08-00659

DAVE GATEWOOD;
UNINSURED EMPLOYERS' FUND;
HONORABLE RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits, having found that he was not an employee at the time of his injury. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that the ALJ erred as a matter of law in failing to find that he was an employee.

We affirm. The record did not compel a decision in the claimant's favor and contained substantial evidence to support the ultimate finding.

The claimant's application for benefits indicates that he was born in 1954 and has a sixth-grade education. His employment history includes work

for a construction company as a laborer and for a factory as an assembler as well as self-employment from 2003 to 2008 as a mason. He alleged that he sustained disabling injuries to his left wrist and neck on January 17, 2008, when he fell from a height of 12 to 15 feet while operating a bucket truck in the process of helping to dismantle a barn.

The claimant named Dave Gatewood as his employer. Upon certification that Gatewood lacked workers' compensation insurance, the Chief ALJ joined the Uninsured Employers' Fund as a party. Gatewood denied the claim on the ground that the claimant was an independent contractor rather than Gatewood's employee at the time of his injury.[1] The evidence consisted of the claimant's deposition and hearing testimony and Gatewood's deposition.

The claimant testified when deposed by the defense that he met Gatewood in June or July 2007, after a man in Sharpsburg agreed to give him a barn if he would dismantle and remove it. He stated that he had never done so before. His ex-wife knew Gatewood and knew that he tore down barns and houses, so he contacted Gatewood to ask if he wanted to purchase the barn. Gatewood did not, but he agreed to help dismantle it and share the profit from selling it. The claimant stated that they finished the job in late October 2007. Gatewood sold the barn over the internet for $10,500 and received over $6,900 because he provided a bucket truck or boom truck and a forklift, provided fuel

[1] Gatewood also asserted that the claimant was an exempt employee under KRS 342.650(2) or under KRS 342.650(5), the agricultural exemption from workers' compensation coverage. The Board reversed an earlier decision in which the ALJ dismissed the claim under the latter provision and ordered the claim to be remanded for further proceedings. No appeal was taken. The ALJ's decision on remand is at issue presently.

for the vehicles, and paid the wage of another man who helped. The claimant received about $3,500.

The claimant testified that Gatewood called him in January 2008; told him that he was tearing down a barn in Cynthiana; and offered to pay him $12 per hour to help. The claimant stated that only the braces and posts remained standing when he arrived and that a man named George was running the bucket. He stated that he ran it on the second day because George was absent and that Gatewood asked him to run it again on the third day because he was faster than George. He stated that he worked about eight hours per day for two and a half days. Gatewood paid him after the injury with a check for about $250 from which no tax was deducted and also gave him money a few times after the injury.

The claimant testified that Gatewood told him he had torn down several cabins and barns in the past. He also told him that he wanted him to help with two or three other nearby barns when they finished the Cynthiana barn. He stated that he knew how to remove pins and dismantle a barn from his experience on the Sharpsburg barn.

When deposed by his attorney Gatewood testified that he had farmed for most of his life and had operated a construction business with his brother for about ten years. He stated that he had operated a small business named Grendel, Inc., for the past 12 years. He also did two or three jobs per year inspecting reclamation sites for the Office of Surface Mining and received social security retirement income. Subsequent testimony indicated that Gatewood

was the sole shareholder and officer of Grendel. The business dismantled structures, primarily log cabins, and received payments for Gatewood's reclamation site inspections.[2]

Gatewood stated that he first met the claimant in May or June of 2007, after the Sharpsburg barn was partially dismantled. He informed the claimant that they could get more money by selling the timber frame separately and they formed a joint venture to do so. He stated that the claimant sold and kept the profit from most of the tin, tier rails, and boxing, but they split the profit from the frame. Gatewood stated that he and another man worked for about a week cleaning up the site and that he received most of the profit from the frame because he bore the expenses.

When asked about any special skill involved in Robinson's work on the barn, Gatewood testified that not many people could operate a bucket truck at the top of a barn. He also stated that dismantling a timber frame requires special skills because the frame will collapse if the wooden pegs that join the timbers are not removed in the proper sequence. He stated that the claimant brought large punches and hammers to the Sharpsburg site, which were used to knock the pegs loose, and also brought a generator, which they used when an electric drill was required.

Gatewood testified that the owner of the Cynthiana barn gave it to him personally rather than to Grendel. He agreed to remove the rubbish that it

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[2] When questioned about Grendel's assets, Gatewood stated that he thought his son owed the business about $40,000.00 according to courthouse records but that it had no other assets.

contained and dismantle it. Gatewood denied that he owned any other barns. He stated that Grendel paid George Dietz a flat fee to haul the rubbish away. Gatewood stated that he and Ralph and Junior White removed the boxing, roof, and rafters, then he rented a bucket truck. He stated that he and the Whites "piddled around with it" for one day but "didn't get along very good," so he contacted the claimant.

Gatewood stated that the claimant controlled the bucket and placement of the bucket truck; the time when he came and left the job; and whether to work on a particular day. Gatewood stated that he had never done this type of work before the Sharpsburg job; that he knew no one else who had the claimant's skills; and that he relied on the claimant's expertise concerning how and in what order to dismantle the frame. Grendel paid for the bucket truck and the claimant's work and the claimant also received some money for gasoline. Gatewood stated that the claimant completed about half of the frame in a day and a half and that it would have taken about another day and a half to complete the job.

Gatewood testified on cross-examination that his only agreement with the claimant regarding the Cynthiana barn was for him to operate the bucket truck and knock out the pegs for $12.00 per hour. He acknowledged that the claimant might have actually worked for two and a half days. He stated that everybody was supposed to be at the barn at about daylight "or hopefully everybody [would] get there about 7:30, start work about 8:30." The Whites got there a little earlier sometimes when it was cold to start the machinery and get

it "limbered up." The claimant arrived at about 8:00 or 8:30. Gatewood testified that he and the Whites finished taking down the frame after the claimant's injury. He paid them by the hour and sold the materials.

Gatewood also testified on cross-examination that the claimant gave him the punches and large hammer when they finished the Sharpsburg job, stating that he would never need them again. Gatewood stated that he did not anticipate needing the claimant's help with the Cynthiana barn but that the claimant had "nailed it in his deposition" when stating that he and the Whites were too old to do it alone. He explained that the Whites were "about as old as I am, so we weren't getting along best in the world."[3] He stated that he and George Dietz were on the scene when the claimant was injured.

Attached to Gatewood's deposition was a copy of a document styled "Demolition Contract." The contract indicates that Gatewood agreed to demolish Daniel Peters' barn and remove it as well as any material found inside. Gatewood agreed to be responsible for general liability and workers' compensation insurance.

The claimant testified at the hearing that Gatewood taught him how to dismantle a barn. He acknowledged that only the posts of the Cynthiana barn remained standing when he arrived; that removing pins required special skill; that he had such skill; and that he removed them alone. He reiterated his previous statements that he was paid by the hour and that Gatewood told him

[3] Gatewood testified early in his deposition that he was born in 1938.

he had two or three more barns to dismantle. He acknowledged that he had been self-employed previously, doing mostly concrete block work.

After summarizing the issues, the ALJ stated as follows:

> Robert Robinson testified at the hearing. I had an opportunity to observe the testimony and am in the position to judge his credibility and demeanor.

Addressing the threshold issue of whether the claimant worked as an employee or independent contractor at the time of his injury, the ALJ listed the factors discussed in *Ratliff v. Redmon*[4] and *Uninsured Employers' Fund v. Garland*[5] and added an additional factor from the Restatement (Second) of Agency – "whether the principal is or is not in business." Then the ALJ analyzed the evidence as follows:

> In this case the plaintiff and the defendant did not define their relationship by way of written contract. There was a "Demolition Contract" between Daniel

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[4] 396 S.W.2d 320 (Ky. 1965). The nine *Ratliff* 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. *Ratliff* emphasized that the workers' compensation approach to analyzing the parties' relationship was broader and more liberal than the approach found in the law of master and servant or principal and agent.

[5] 805 S.W.2d 116 (Ky. 1991). Relying on *Chambers v. Wooten's IGA Foodliner*, Ky., 436 S.W.2d 265, 266 (1969), the *Garland* court noted that the four primary factors in the analysis included: 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 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.

> Peters, the owner of the barn, and Dave Gatewood, the putative employer of Robert Robinson, but that has no bearing on whether Robinson is an employee of Gatewood. Mr. Gatewood had made substantial progress in fulfilling his contract to demolish the barn when Mr. Robinson was brought on board. When he was faced with the frame of the barn which required special knowledge and special tools to take down, Mr. Gatewood called on Mr. Robinson. Mr. Robinson acknowledged that he knew the special way to take the pins out to bring the barn down properly. Mr. Robinson acknowledged that he had generally been self-employed.
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> Mr. Robinson was self-employed in the construction business. Mr. Gatewood acquired log cabins and took them apart, selling the wood. This was done normally working by himself. Mr. Gatewood had no knowledge of tear down of the barn from the beginning of the project. Mr. Gatewood exercised no control whatsoever over Robinson's work. There does not appear to be any prior agreement that Mr. Robinson was an employee of Mr. Gatewood.
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> Under the criteria contained in *Uninsured Employers' Fund v. Garland, supra*, Mr. Robinson does not appear to be an employee of Mr. Gatewood.

Having concluded that the claimant was not an employee, the ALJ dismissed the claim. The claimant did not file a petition for reconsideration or request any specific findings. He appealed.

The claimant took issue with the accuracy of some of the findings on which the ALJ based the decision. He noted for example that Gatewood clearly had knowledge of how to dismantle a barn from having done it previously in Sharpsburg; that Grendel was in the business of dismantling structures; that his own previous work in construction involved working with concrete, not demolition; and that Gatewood's own testimony indicated that he "hired" the

claimant only after he and the Whites were unable to do the job due to their age. He also argued that the Demolition Contract anticipated that Gatewood would have employees on the site that were entitled to workers' compensation coverage and that KRS 342.640(4) did not require an employee to have a contract of hire.[6] He also argued that the facts the ALJ relied upon failed to support the finding that he was not an employee.

The Board reviewed the legal standard for analyzing the evidence of the parties' relationship "in light of the ALJ's inadequate findings under a minimum" of the factors listed in *Ratliff* and refined in *Chambers v. Wooten's IGA Foodliner.*[7] The Board noted that the ALJ appeared to have considered only two of the four *Chambers* factors – the nature of the work as related to the nature of the alleged employer's business and the professional skill of the alleged employee. Moreover, the Board took issue with the ALJ's conclusion that Gatewood exercised "no control whatsoever" over the claimant's work, noting that he did exercise some control. The Board affirmed the decision, however, reasoning that the claimant failed to petition for reconsideration in order to request adequate findings of fact and failed to complain in his appeal brief that the ALJ analyzed the evidence inadequately. The Court of Appeals agreed and affirmed.

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[6] *See Hubbard v. Henry*, 231 S.W.3d 124, 130 (Ky. 2007). "KRS 342.640(4) does not refer to a contract for hire. It protects workers who are injured while performing work in the course of an employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was performed with no expectation of payment or that the worker was a prisoner."

[7] 436 S.W.2d 265 (Ky. 1969).

Appealing, the claimant asserts that he was entitled to a favorable decision based on the arguments he raised to the Board. We disagree.

As noted by the Board and the Court of Appeals, the ALJ failed to conduct a thorough analysis of the evidence under the *Ratliff* factors as they were refined subsequently in *Chambers*. Yet, the claimant failed to request specific findings concerning the remaining factors and failed to preserve an argument that the ALJ did not conduct a complete analysis. His grounds for appeal are that the ALJ based the decision on inaccurate factual findings and that the facts the ALJ relied upon failed to support the finding that he was not an employee. We disagree.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases. It vests the ALJ with the sole authority to judge the credibility of witnesses, draw reasonable inferences from the evidence, and weigh conflicting evidence.[8] Only a finding that is unreasonable under the evidence may be reversed on appeal.[9]

The parties presented conflicting testimony concerning the nature of their relationship. We are not convinced that the claimant has shown the ALJ to have misunderstood any relevant evidence. Although the claimant argues that the ALJ mischaracterized certain evidence, the ALJ noted specifically that his credibility was evaluated at the hearing. The ALJ appears to have found

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[8] *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

[9] *Lizdo v. Gentec Equipment*, 74 S.W.3d 703, 705 (Ky. 2002); *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

him less credible than Gatewood in some respects and to have drawn unfavorable inferences from the evidence. Despite the claimant's assertions to the contrary, the record did not compel a decision in his favor and contained substantial evidence to support the ultimate finding.

The decision of the Court of Appeals is affirmed.

All sitting. Minton, C.J.; Abramson, Noble, Schroder and Scott, JJ., concur. Venters, J., dissents by separate opinion in which Cunningham, J., joins.

VENTERS, J., DISSENTING: I respectfully dissent because I believe the *Ratliff* and *Chambers* factors weigh more favorably toward the conclusion that Robinson was an employee, rather than an independent contractor. For example, Gatewood was engaged in the business of demolition. He owned the tools and obtained the bucket truck used by Robinson. Robinson was to be paid by the hour and he worked on the schedule set by Gatewood. I would therefore reverse the opinion of the Court of Appeals.

Cunningham, J., joins this dissenting opinion.

COUNSEL FOR APPELLANT,
ROBERT ROBINSON:

McKinnley Morgan
Morgan, Madden, Brashear, Collins & Yeast
921 South Main Street
London, KY 40741

COUNSEL FOR APPELLEE,
DAVE GATEWOOD:

Thomas Bennett Clark
Clark Law Office, Inc.
851 Corporate Drive
Suite 300
Lexington, KY 40503

COUNSEL FOR APPELLEE,
UNINSURED EMPLOYERS' FUND:

James Robert Carpenter
Office of the Attorney General
Uninsured Employers' Fund
1024 Capital Center Drive
Suite 200
Frankfort, KY 40601