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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 25, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000032-WC

TERRY STEINROCK AND
GLEN COKE, D/B/A
GLEN COKE GENERAL
CONTRACTING — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001136-WC
WORKERS' COMPENSATION NO. 09-00137

HOWARD C. COOK;
UNINSURED EMPLOYERS' FUND;
HONORABLE LAWRENCE SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board reversed a decision to dismiss the application for benefits filed by Howard C. Cook and remanded the claim for further consideration. The Board based the decision on a conclusion that the Administrative Law Judge (ALJ) erred as a matter of law by failing to determine that Cook sustained his work-related injury when working as Terry Steinrock's employee. The Court of Appeals affirmed the Board and Steinrock appeals.

Steinrock maintains that the ALJ's decision was not clearly erroneous and that the Board and the Court of Appeals exceeded the scope of their review; invaded the ALJ's province as fact-finder; and failed to analyze the evidence properly. We affirm.

The Board and the Court of Appeals complied with KRS 342.285(2) and KRS 342.290 respectively when reviewing the ALJ's decision. The ALJ misapplied the law when analyzing the evidence with respect to Steinrock's control and with respect to the nature of the work the claimant performed in relation to Steinrock's regular business. The evidence compelled a finding in Cook's favor when analyzed properly under either test.

The claimant was born in 1970. He completed high school, after which he worked at various times as a volunteer firefighter, cook, or mail sorter; as a laborer in various construction-related trades; and as a deliveryman for a furniture store. He testified that he learned the roofing trade from his father and had worked as a roofer off and on for 15 or 20 years, sometimes as an employee and sometimes as an independent contractor.

The claimant testified that his relationship with Steinrock began in 1997 or 1998, when they worked together on various roofing jobs and each was paid separately by the homeowners for whom they worked. They did not work together again until March 2007, when the claimant left his job at a furniture store to work full time with Steinrock. He returned to the furniture store job after about three months and worked for Steinrock only on his days off and holidays due to a decrease in the amount of available work. The claimant

stated that he worked from 16 to 24 hours per week for Steinrock in addition to his full-time job at the store except for the period from October 2007 to February 2008, when he was recovering from a broken leg. He resumed his work for Steinrock in February 2008, working on his days off and holidays when work was available. He continued to work until August 12, 2008, when he fell from a roof and fractured his left heel and ankle. Steinrock drove him back to get his truck and paid him for two days' work, after which he went to the immediate care center.

The parties did not dispute that the claimant sustained a work-related injury. They disputed the existence of an employer/employee relationship, without which the defendants bore no liability under Chapter 342.[1] Thus, the claim was bifurcated to resolve whether the claimant was working as Steinrock's employee or as a subcontractor when it occurred.

The claimant testified that he reported to Steinrock's house at 7:00 o'clock on the mornings that he was available for work and that Steinrock drove him and other workers to the house where they would work that day. He brought his own hammer, tool belt, and knife to work, but Steinrock found the sites to be roofed and provided all of the other tools and materials. The crew worked until sunset; until the job was finished; or until Steinrock said to quit.

The claimant testified that Steinrock paid him $12.00 per hour; that both he and Steinrock kept track of the hours he worked; that two or three times Steinrock paid him in cash; that Steinrock did not deduct taxes from his

[1] KRS 342.640 and KRS 342.610(2).

paycheck; and that Steinrock did not give him a Form 1099 for 2008. He claimed that he worked for Steinrock every Monday and Tuesday from July 2007 until his injury on August 12, 2008 except during the five-month period when his leg was broken; days when the weather precluded roofing work; and days when Steinrock had no work available. He stated that the eight checks Steinrock submitted as evidence, which totaled $1,056.00, represented his pay for 10 to 13 days of work between March 15, 2008 and August 12, 2008. He also stated that he thought he had received more than eight checks and that sometimes Steinrock paid him in cash.

Steinrock testified that he had operated his roofing business since 1976 as a sole proprietorship, with subcontractors but no employees. He explained that roofing is a skilled occupation, performed by subcontractors who work side by side without the need for supervision. Steinrock testified that some subcontractors were paid by the hour and some by the square. Coke paid him by the square.

Steinrock testified that he and the claimant had a loose agreement under which the claimant would work for $12.00 per hour when he was available and Steinrock had work. He testified subsequently that he agreed to pay a roofer by the name of Eicher by the square instead of by the hour on the day the claimant was injured because Eicher was "hurting for money."[2] Steinrock denied that the claimant agreed to be available every Monday and Tuesday. He

[2] Steinrock testified elsewhere in the deposition that an individual who worked quickly could earn more if paid by the square.

stated that he had never given a subcontractor a Form 1099 because none had ever made enough money to need one.[3] He did not recall ever paying the claimant in cash but stated that he did advance the claimant $20.00 in gas money nearly every time he worked. He confirmed that the checks submitted as evidence represented ten days' work.

The Uninsured Employers' Fund (UEF) was joined as a party because Steinrock did not have workers' compensation insurance. Glen Coke, d/b/a/ Glen Coke General Contracting, was joined as a party at the UEF's request because Steinrock was Coke's subcontractor for the job on which the claimant was working when he was injured. Coke testified that he subcontracted roofing projects to Steinrock; that roofers customarily subcontracted with other roofers for additional help; that he paid subcontractors by the job; and that roofing jobs were bid and paid based on the applicable number of squares. Coke, like Steinrock, did not have workers' compensation coverage at the time of the claimant's injury.

The ALJ dismissed the claim having concluded that the claimant failed to prove the existence of an employment relationship between himself and Steinrock. Although finding all of the witnesses to be credible, the ALJ found Steinrock's memory to be more consistent with the documentary evidence and to be internally consistent. The decision rested specifically on Coke's testimony

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[3] The Internal Revenue Service requires the payment of $600.00 or more for services performed for a trade or business by a non-employee to be reported on a Form 1099 MISC. Steinrock submitted checks indicating that he paid the claimant $1,056.00 from March 15, 2008 through August 12, 2008.

that Steinrock regularly subcontracted other roofers to work with him and on evidence that the claimant worked only 10 to 13 days for Steinrock in the five-month period immediately preceding the injury; that he considered himself to be a roofer and worked as a skilled tradesman, side by side with Steinrock and without supervision; that he exercised independent control over himself on the date of the injury and chose the course and conduct of his medical care; that neither he nor Steinrock seemed to think they were creating a master and servant relationship; that he was paid an hourly rate by the job, at the end of each day or pair of days, rather than weekly or biweekly; that he accepted pay without taxes being withheld; and that he stated he was awaiting a Form 1099 from Steinrock for 2008 tax purposes rather than a Form W-2. The ALJ also determined that no employment relationship existed with Coke.

The claimant appealed following the denial of his petition for reconsideration. The Board reversed, convinced that the ALJ erred by focusing on the amount of control that Steinrock exercised rather than the right to control. Moreover the ALJ misinterpreted the significance of the fact that the claimant was an experienced roofer with respect to whether he was engaged in a distinct occupation or business and to whether Steinrock controlled his work. The Board determined that a proper analysis of the evidence compelled a legal conclusion that the claimant worked as Steinrock's employee when he was injured. The Court of Appeals agreed.

Steinrock asserts that substantial evidence supported the ALJ's finding that the claimant was an independent contractor rather than his employee and

that the finding should not have been disturbed. He maintains that the Board and the Court of Appeals exceeded the scope of their review and invaded the ALJ's province as fact-finder rather than determining whether the ALJ misapplied the law. Moreover, they failed to analyze the evidence properly. He notes that a proper analysis must include all of the four predominant factors and argues that the Board and the Court of Appeals considered only one factor, the nature of the claimant's work in relation to his business. We disagree.

I. THE STATUTORY REQUIREMENTS.

As pertinent to this appeal KRS 342.640 includes within the term "employees" the following individuals:

> (1) Every person, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;
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> . . . .
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> (4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury. . . .

KRS 342.650(6) permits a worker who would otherwise be considered to be an employee to elect not to be covered by Chapter 342.[4]

[4] KRS 342.395(1) and 803 KAR 25:130, § 1 require an employee wishing to opt out of Chapter 342 to submit a notarized Form 4 notice of rejection to the employer. The notice becomes effective when it is filed with the Department of Workers' Claims.

A business owner generally is not considered to be the business's employee for the purposes of Chapter 342 even if self-employed.[5] A business owner who performs service in the course of another business's trade, business, profession, or occupation as an independent contractor or subcontractor has effectively elected not to be covered as the other business's employee.[6] KRS 342.012 does, however, permit such an individual to elect to be considered an employee of the individual's own business and to purchase insurance coverage.

II. THE EMPLOYER/INDEPENDENT CONTRACTOR TEST.

The court noted in *Ratliff v. Redmon*[7] that the approach to determining whether a worker is an employee for the purposes of Chapter 342 is broader than that used in the law of master and servant or principal and agent for the purpose of imposing vicarious tort liability. Chapter 342 broadens the concept of the employer/employee relationship and limits the scope of the independent contractor relationship. By favoring employee status, it protects both injured workers and society by placing the costs of an industrial injury on consumers of the product whose production caused the injury.[8]

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[5] *See Hale v. Bell Aluminum*, 986 S.W.2d 152, 154 (Ky. 1998).

[6] *See Hubbard v. Henry*, 231 S.W.3d 124, 128-29 (Ky. 2007).

[7] 396 S.W.2d 320, 323-24 (Ky. 1965). The court relied on KRS 342.004, which required Chapter 342 to be construed liberally. KRS 342.004 was later repealed, but the General Assembly enacted KRS 446.080(1) to require all statutes to be liberally construed to promote their purpose. *See also Standard Gravure v. Grabhorn*, 702 S.W.2d 49, 50 (Ky. App. 1985).

[8] *Ratliff v. Redmon*, 396 S.W.2d at 324-25.

Ratliff v. Redmon listed nine factors to be among those considered when determining whether an individual is an employee or independent contractor.[9] The list included: 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 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 court concluded, however, that the right to control the details of the work was the primary test.[10]

Chambers v. Wooten's IGA Foodliner[11] refined the *Ratliff v. Redmon* test 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 Co. v. Dillon*[12] explained subsequently that workers come within the scope of Chapter 342 if their services are a regular and continuing cost of

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[9] The court used the list from Professor Larson's treatise on workers' compensation law, which adopted it from the RESTATEMENT (SECOND) OF AGENCY § 220.

[10] *Id.* at 327.

[11] 436 S.W.2d 265, 266 (Ky. 1969).

[12] 591 S.W.2d 701 (Ky. App. 1979) (citing Arthur Larson, LARSON'S WORKMEN'S COMPENSATION LAW, § 43.51 (1978)).

production and they do not actually operate an independent business that can spread the cost of work-related accidents to consumers. The court noted that all of the *Ratliff v. Redmon* factors must be considered but that Chapter 342'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 being the predominant factor.

The court stated again in *Uninsured Employers' Fund v. Garland*[13] 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. The court also reminded the bar that *Ratliff v. Redmon* 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.'*"[14]

To summarize, 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*; 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 that the injured worker performed in relation to the regular business of the employer. The consolidated control and "nature of the work" analyses that the Larson treatise describes

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[13] 805 S.W.2d 116 (Ky. 1991).

[14] *Id.* at 118-19.

incorporate the primary *Ratliff v. Redmon* factors.[15] The substance of the parties' relationship prevails over its form regardless of the test employed.[16]

The Larson treatise explains that an analysis of the control factor turns on the right to control rather than the amount of control actually exercised,[17] and it notes that the distinction has particular significance when a skilled or experienced worker appears to work without supervision or interference.[18] Control only to the degree necessary to ensure the bargained-for result, such as over the quality or description of the work, does not imply an employment relationship; whereas control over the individual performing the work signifies such a relationship. Among the factors indicating control by the alleged employer are payment by a unit of time rather than by the completed project; the furnishing of equipment the size and value of which provide an incentive for control; and the right to discharge the individual performing work.[19]

An individual is generally considered to be an employee under the "nature of the work" test when the work being performed is part of the regular business of the alleged employer and the worker does not operate an independent business or provide a professional service.[20] Noting the increasing effort by employers to avoid the cost and inconvenience of social and labor

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[15] Arthur Larson and Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 60.05(3) (2009).

[16] *Husman Snack Foods Co. v. Dillon*, 591 S.W.2d at 703. An employer cannot force an employee to work outside Chapter 342's protection even if the employee acquiesces.

[17] *Id.* at § 61.02.

[18] *Id.*

[19] *Id.* at §§ 61.04-61.08.

[20] *Id.* at § 62.00.

legislation, Larson explains that analyzing employer control under the test serves the remedial purpose of workers' compensation legislation and produces greater consistency in coverage when subcontractors are used to perform work.[21]

Larson notes that the closest cases involve services such as repair, maintenance, and incidental construction.[22] The "nature of the work" test bases whether a tradesman performing such work is an employee or independent contractor on whether the individual operates a business rather than simply performs skilled labor.[23] If the individual does operate a business, the test becomes how independent, separate, and public the business is in relation to the putative employer. Thus, a tradesman who does not hold himself out to the public as performing an independent business service and who regularly works most or all of his independent time for a particular subcontractor is probably the subcontractor's employee.[24]

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[21] *Id.* at § 62.01. Larson notes, for example, that a roofing, siding, or plastering contractor may contract to perform the main job and then engage a tradesman to install the material at a fixed rate per square or square foot. The tradesman may then hire assistants, work without supervision, and serve the contractor only for a particular job but be considered the contractor's employee rather than an independent contractor under the test. *Id. at* § 63.03(3).

[22] *Id.* at § 62.06.

[23] Operating a business clearly involves more than having one's earnings reported on a Form 1099 MISC or paid in cash.

[24] *Id.* at § 62.06(1)(a). Larson cites the example of a welder who contracted with a trucking company to repair truck tanks during his free time and who worked when he could find time, completely without supervision, as being the company's employee.

III. ANALYSIS.

Contrary to Steinrock's assertion, the Board and the Court of Appeals complied with KRS 342.285(2) and KRS 342.290 respectively when reviewing the ALJ's decision. The evidence compelled a finding that the claimant worked as Steinrock's employee when analyzed properly under either the control or "nature of the work" test.[25]

The ALJ misapplied the law by failing to consider the evidence of control in terms of Steinrock's right to control rather than the amount of control exercised. As a consequence, the analysis failed to give proper significance to the evidence that Steinrock obtained the roofing jobs; chose workers to send to the location of available work; could decide how the work would be performed; could supervise the workers when working side-by-side; decided the method for paying workers; chose to pay them without withholding income taxes or subsequently providing a Form W-2 or 1099 MISC;[26] and could discharge a worker. Likewise, the ALJ appeared to equate the fact that the claimant provided his own tool belt and inexpensive hand tools with the fact that Steinrock provided all of the major tools, equipment, and materials necessary to perform the roofing jobs. When considered as a whole, the evidence compelled a conclusion that Steinrock had the right to control the details of the work and that the parties had an employer/employee relationship for the purposes of Chapter 342.

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[25] *See Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[26] The fact that the claimant "consistently accepted pay without taxes withheld" cannot reasonably be viewed as being evidence of a lack of control by Steinrock.

The ALJ also misapplied the law by failing to address the nature of the claimant's work as a roofer in relation to Steinrock's business as a roofing contractor. Moreover, the ALJ failed to analyze the evidence concerning the claimant's professional skill in terms of whether he performed a skilled trade as opposed to whether he operated an independent roofing business at the time of his injury. When analyzed properly under the test, the evidence compelled a conclusion that the claimant worked as Steinrock's employee at the time he was injured rather than as an independent contractor.

The record indicates that Glenn Coke General Contracting, Inc. negotiated roofing contracts and subcontracted some of the jobs to Steinrock, including the job on which the claimant was injured. Steinrock operated Terry Steinrock Roofing; had done so since 1976; and had no other source of income. His testimony indicates clearly that installing roofing was part of his regular business. The fact that he considered workers who helped him install roofing to be independent contractors or that Coke thought they were independent contractors had no impact on the legal effect of Steinrock's relationship to the claimant. Although the claimant was skilled as a roofer, he did not operate a business at the time of his injury. The evidence compelled a conclusion that he worked as Steinrock's employee because he performed work that was part of Steinrock's regular business and had no independent business of his own.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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