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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000014-WC

DON GOGEL — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001143-WC
WORKERS' COMPENSATION NO. 09-01486

JOHN HANCOCK;
KENTUCKY UNINSURED EMPLOYERS' FUND;
HONORABLE J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Don Gogel, appeals from the dismissal of his workers' compensation claim. Gogel argues that the Administrative Law Judge, Workers' Compensation Board, and the Court of Appeals all erroneously found that he was injured while working as an independent contractor, and therefore ineligible for benefits. For the reasons set forth herein, we affirm the Court of Appeals.

Gogel was injured while exercise riding a thoroughbred horse at the request of John Hancock.[1] Gogel received ten dollars from Hancock for every horse he exercised. At the end of each year, Hancock would issue an Internal Revenue Service Form 1099 reporting the total amount he paid Gogel. Gogel understood that Hancock did not withhold any taxes from the amount he was paid. Gogel in turn would report the income he received from Hancock like a business, and as such, deducted expenses such as mileage and clothing from the exercising-riding income.

Prior to his injury, Gogel exercised horses not only for Hancock, but also for several other trainers, and had a full-time job at a factory. Gogel exercised horses in the morning and was free to come and go from the training facility as he pleased. Prior to exercising a horse, Gogel would receive instructions from a trainer, one of the trainer's assistants, or from a chart which noted what exercises needed to be performed (breezing, galloping, or jogging). However, Gogel could refuse to ride a horse if he believed exercising would injure it.

After his injury, Gogel lost his full-time job and his health insurance. Gogel then sought payment from Hancock for the medical bills incurred as a result of his injury. When Hancock did not pay those bills, Gogel filed for workers' compensation benefits, naming Hancock as the employer. Since Hancock did not carry workers' compensation insurance as required by law, the Uninsured Employers' Fund ("UEF") was added as an additional defendant.

[1] Gogel was injured when the horse he was riding rolled onto his right leg causing a displaced fracture of the left medial femoral condyle. He has undergone two surgical procedures to repair the damage.

Both Hancock and the UEF asserted that Gogel was an independent contractor when injured and therefore ineligible for workers' compensation benefits. Gogel disagreed and presented evidence that before the injury Hancock carried workers' compensation insurance (which was later cancelled for economic reasons) and listed six unnamed employees to be covered under the plan. Gogel contended that he was covered under the plan, and as such Hancock considered Gogel to be an employee. Hancock, however, argued that the six employees listed were family members of his and that he never represented to Gogel that he was an employee.

Following a hearing, the ALJ found that Gogel was acting as an independent contractor when he was injured, and dismissed his claim for benefits. The ALJ based his ruling on *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965) and *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969) which established the factors used to determine whether an individual is an employee or independent contractor. Using those factors, the ALJ held that:

> Hancock, the UEF and Plaintiff all agree that the services provided by Plaintiff to Hancock were part of Hancock's regular business and Hancock provided most of the instrumentalities and tools for the work. However, I am convinced that the extent of control Hancock exercised over the details of Plaintiff's services were [sic] minimal, Plaintiff admittedly was engaged in (and was licensed in) a distinct occupation or business (as he claimed on his income tax returns) and possessed and displayed significant professional skills, of which he was obviously (and deservedly) proud. I am further convinced that the exercise riding services provided by Plaintiff to Hancock were for services provided by a specialist without significant supervision and work that required a significant degree of skill. Plaintiff's pay was based on the number of horses he exercised, in other words, by the job performed. Finally, I am convinced, based on Plaintiff's freedom to go to and leave work when and as he pleased and his method of reporting his

income as a business indicates his intent to be an independent contractor, not an employee.

Gogel appealed the dismissal of his claim for benefits to the Workers' Compensation Board arguing that the ALJ placed too much emphasis on Hancock's lack of control over his work. Gogel also argued that the ALJ should have focused on the nature of the work performed instead of the control Hancock had over him. Despite these arguments, the Board affirmed the ALJ finding that he "sufficiently weighed each of the factors against the evidence as set out in *Ratliff* . . . and his conclusions are supported by substantial evidence." The Court of Appeals affirmed the Board.

Gogel now appeals to this Court making the same basic argument – that the ALJ, the Board, and the Court of Appeals all over emphasized the fact that Hancock did not exercise great control over his work activities. Gogel does not dispute the factual findings of the ALJ, but that the law was misapplied to those facts.

The factors for determining whether a person is an employee or independent contractor are as follows:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.

Ratliff, 396 S.W.2d at 324-325. Several years later, *Chambers*, 436 S.W.2d 265, clarified which *Ratliff* factors were the most important in determining whether an individual was an independent contractor. "While many tests are appropriately considered, we think the predominant ones encompass the nature of the work as related to the business generally carried on by the alleged employer, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the true intentions of the parties." *Id.* at 266; s*ee also Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118-119 (Ky. 1991).

Reviewing the record in light of the above factors supports the conclusion that Gogel was an independent contractor. While there are some facts to support Gogel's argument – Hancock did provide the location and many of the tools necessary for Gogel to perform his work and exercising horses is a regular part of Hancock's business as a trainer – the majority of the evidence points to him being an independent contractor. These facts include: that Hancock only provided general instructions on the type of work he wanted performed; that

Hancock did not supervise Gogel's work closely; that Gogel had significant freedom to perform the work as he desired; that Gogel was free to create his own work schedule; that exercising horses takes a specific skill set which Gogel possessed; that Gogel was licensed to exercise horses by the Commonwealth and frequently worked for other trainers; that Hancock did not withhold any taxes from his payments to Gogel; and that Gogel treated the income from Hancock as business income. Based on these facts, we cannot hold that the ALJ misapplied the law to the facts by finding Gogel was an independent contractor. *See generally Munday v. Churchill Downs, Inc.*, 600 S.W.2d 487 (Ky. App. 1980) (holding that a jockey who was paid by the race and who solicited multiple trainers for mounts did not become an individual trainer's employee merely because that trainer gave pre-race instructions to the jockey).

Gogel further argues that if the relationship between himself and Hancock was reviewed according to the "nature of the work theory," it would lead to a conclusion that he was Hancock's employee. However, the nature of the work performed is one of the factors to be considered in both *Ratliff* and *Chambers*. As such, the nature of the work Gogel performed for Hancock was considered as part of our conclusion.

Gogel also argues that even if he is considered an independent contractor, public policy mandates that he should receive workers' compensation benefits. He cites to 810 KAR 1:008 Section 3(2) which states that trainers, such as Hancock, "shall carry workers' compensation insurance covering his employees in connection with racing as required by KRS Chapter

342." Gogel argues that this provision exists to protect horse racing tracks from lawsuits caused when an exercise rider gets injured at their facility and as such, it is the General Assembly's intent to cover exercise riders by workers' compensation. However, this administrative regulation is inapplicable to Gogel because he is not an employee, but an independent contractor. If the General Assembly desires that independent contractors serving as horse exercise riders be covered under our workers' compensation scheme then it has the authority to pass such a regulation. Instead, when given the chance to pass a law which would have specifically designated exercise riders as employees of their trainer (and thus receive workers' compensation coverage) the General Assembly declined. *See* Ian C.B. Davis, *An Analysis of Horse Racing Jockeys Riding under Kentucky Workers' Compensation Laws*, 97 Ky.L.J. 173 (2008-2009).

The decision of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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