RENDERED: AUGUST 13, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000617-WC

KC TRANSPORTATION, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-01068

BILLY THOMPSON; HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,[1] SENIOR JUDGE.

NICKELL, JUDGE: KC Transportation, Inc., has appealed from a decision of the Workers' Compensation Board affirming the award of benefits to Billy Thompson.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

KC argues: (1) Thompson was an independent contractor and not its employee; (2) the Administrative Law Judge (ALJ) failed to make specific findings of fact; and (3) Thompson failed to establish work-related causation of his lower back injury. After reviewing the record and briefs, we affirm.

Thompson worked as a tractor trailer truck driver. In June 2006, Thompson purchased his own truck and signed an independent contractor lease agreement with KC. Some drivers are KC employees while others are independent contractors. Under the terms of the lease, Thompson agreed to grant KC "exclusive possession, control and use" of his truck and operate his truck "under the exclusive supervision, direction and control" of KC. The agreement further stated:

> The parties intend by this Agreement the relationship of Lessee and Lessor and not an employer-employee or master/servant relationship. Neither INDEPENDENT CONTRACTOR nor its employees are to be considered employees of the CARRIER at any time, under any circumstances or for any purposes. Neither party is the agent of the other and neither party shall have the right to bind the other by contract or otherwise except as herein specifically provided. *** INDEPENDENT CONTRACTOR shall retain sole financial responsibility for all worker's compensation and withholding and employment taxes due to federal, state or local governments on account of drivers, drivers' helpers and other workers necessary for the performance of INDEPENDENT CONTRACTOR'S obligations under the terms of this Agreement and is required to name CARRIER as an additional insured. INDEPENDENT CONTRACTOR agrees to save and hold harmless CARRIER from any claims by drivers, drivers' helpers and other workers used by INDEPENDENT CONTRACTOR, or by federal, state or local government

> agency of account of wages, industrial accident, or worker's compensation claims, withholding and employment taxes or any other actions arising from INDEPENDENT CONTRACTOR'S relationship with its employees. INDEPENDENT CONTRACTOR shall furnish to CARRIER a certificate of insurance for such worker's compensation insurance.

Thompson obtained workers' compensation insurance through KC with the amounts deducted from his payroll checks. KC chose the insurance company, and Thompson was not provided with copies of the policies.

On February 27, 2007, Thompson slipped and fell on ice while uncoupling his trailer, injuring his neck and back. Thompson reported headaches, shooting pain from the neck into his arms, and back pain. Several doctors examined Thompson with varying conclusions. The ALJ conducted a hearing and found Thompson was an employee of KC for purposes of the Workers' Compensation Act despite the language contained in the signed independent contractor lease agreement. The ALJ ultimately awarded Thompson benefits of temporary total disability and permanent partial disability. The Board affirmed, and this appeal followed. Additional facts will be developed as necessary.

KC first argues the ALJ failed to make specific findings of fact and erroneously found, as a matter of law, that Thompson was not an independent contractor but its employee. In reviewing a workers' compensation decision, this Court's function is to correct the Board only where "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

In *Ratliff v. Redmon,* 396 S.W.2d 320 (Ky. 1965), the former Court of Appeals set forth a nine-factor test for determining whether an employer-employee or an independent contractor relationship exists:

> (1) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (2) whether or not the one employed is engaged in a distinct occupation or business;
>
> (3) 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;
>
> (4) the skill required in the particular occupation;
>
> (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (6) the length of time for which the person is employed;
>
> (7) the method of payment, whether by the time or by the job;
>
> (8) whether or not the work is a part of the regular business of the employer; and
>
> (9) whether or not the parties believe they are creating the relationship of master and servant.

The former Court of Appeals subsequently refined the test to focus primarily on four factors: (1) the nature of the work as related to the business generally carried out 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

intention of the parties. *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265, 266 (Ky. 1969). Nevertheless, each *Ratliff* factor must be considered with the nature of the work in relation to the general business of the alleged employer as the predominant factor. *Husman Snack Foods v. Dillon*, 591 S.W.2d 701, 703 (Ky. App. 1979).

KC argues the ALJ failed to make a specific finding as to the true intention of the parties and, therefore, failed to afford them the basis of its decision and failed to permit meaningful appellate review. We disagree. The ALJ stated:

> [I]t is determined that the parties' intention, at least at the time of signing the independent contractor agreement, may have been for [Thompson] to work as an independent contractor as that term was contemplated at that time. However . . . it is determined the parties' intentions, even if clear, do not transform their actual legal relationship from what it was to what they wanted it to be. It appears [Thompson] understood the terms of the independent contractor agreement he signed with [KC]. But just because he understood and signed that agreement does not mean that his and [KC's] actions thereafter were consistent with that belief and/or intention.

The ALJ found that despite the parties' intention to form an independent contractor relationship, other factors outweighed the parties' intention and demonstrated the existence of an employer-employee relationship.

While the existence of the contract provides evidence of the parties' intention, it is not dispositive of the nature of the employment relationship. It is well-established that courts may look behind the labels used in employment

contracts to ascertain the actual nature of the relationship. *Brewer v. Millich,* 276 S.W.2d 12, 17 (Ky. 1955). The findings were sufficient.

KC cites *Reardon v. Southern Tank Lines, Inc.*, 346 S.W.2d 527 (Ky. 1961), to demonstrate the finding of employer-employee status was erroneous because, in *Reardon*, the Court found an independent contractor relationship based on facts similar to those in the present case. We find *Reardon* to be inapplicable to the present case because it was decided prior to *Ratliff*, and the Court did not apply the *Ratliff* analysis, which is the current state of the law.

We conclude the evidence supports the finding of an employer-employee relationship. The nature of Thompson's work for KC was as a truck driver and KC is a trucking company. KC exercised a considerable degree of control over Thompson by assigning him dedicated routes and specific travel and delivery itineraries. Thompson's qualifications as a truck driver did not set him apart from employee drivers in terms of professional skill. While the parties agreed in writing to an independent contractor relationship, their intention was not carried out by their actual course of conduct. Thompson testified he could not arbitrarily refuse loads and he lacked the autonomy of an independent contractor. The employment agreement between KC and Thompson was for an indeterminate amount of time. Apart from receiving non-employee compensation from KC and being responsible for paying taxes, Thompson was treated as an employee in all other respects.

KC has not demonstrated the Board overlooked or misconstrued controlling precedent or committed such a flagrant error in assessing the evidence as to cause gross injustice. We have reviewed the record and conclude the Board correctly applied controlling precedent. The ALJ applied the *Ratliff* factors to the facts presented in this case, made thorough findings, and concluded Thompson was an employee of KC based on the evidence of record.

KC next argues the ALJ erred in its determination of causation relating to Thompson's lower back injury. Specifically, KC argues the opinion of Dr. Robert Hoskins was predicated upon an inaccurate medical history and, therefore, could not constitute reasonably probable objective medical evidence.

If the decision of the ALJ is supported by any substantial evidence of probative value, it may not be reversed on appeal. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The ALJ has the right to believe part of the evidence, and disbelieve other parts, whether it comes from the same witness or the same total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

Although KC has not supported its arguments with citations to the record, our review of the record reveals Dr. Hoskins diagnosed Thompson with SI

joint dysfunction and lumbosacral sprain/strain with radiculitis. Dr. Hoskins stated within reasonable medical probability that Thompson's injuries were the result of the accident on February 27, 2007. Dr. Hoskins noted Thompson's medical history was "remarkable for lower back pain" beginning in 2001/2002. Dr. Hoskins allowed for the prior history of lower back pain by attributing five percent of Thompson's overall impairment rating to the preexisting injury.

KC cites *Cepero v. Fabricated Metals Corp*., 132 S.W.3d 839 (Ky. 2004), in support of its argument that Dr. Hoskins's opinion was so flawed as to not constitute objective medical evidence. We disagree. In *Cepero,* the claimant actively concealed a prior injury and the Court held an expert's medical opinion which is based on false or inaccurate history cannot constitute substantial evidence. *Id.* at 842. By contrast, Dr. Hoskins was aware of Thompson's history of lower back pain and made allowance for it in the impairment rating. Thompson's statement to Dr. Hoskins that his back was "relatively stable" or asymptomatic is an issue regarding the credibility and weight of Dr. Hoskins's testimony rather than its evidentiary value.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT

Roberta K. Kiser
Lexington, Kentucky

BRIEF FOR APPELLEE,
BILLY THOMPSON: