RENDERED: MAY 21, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002328-WC

ROBERT ROBINSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00659

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

KELLER, JUDGE: Robert Robinson (Robinson) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the opinion and order of the Administrative Law Judge (ALJ). On appeal, Robinson argues that the ALJ erred when he found that Robinson was not David Gatewood's (Gatewood) employee. Robinson also argues that the Board erred when it held that Robinson's failure to file a petition for reconsideration foreclosed it from addressing the substance of Robinson's appeal. For the following reasons, we affirm.

FACTS

At the outset, we note that Robinson has filed medical evidence regarding his condition. However, the ALJ dismissed his claim because he found that Gatewood was not Robinson's employer; therefore, that medical evidence is not pertinent to this appeal. We limit our summary of the evidence accordingly.

On January 17, 2008, Robinson was operating a piece of heavy equipment while dismantling a barn. The equipment malfunctioned, causing Robinson to fall from a height of twelve to fifteen feet. As a result of that fall, Robinson suffered injuries to his left wrist and neck. Robinson alleged that, at the time of his injury, he was employed by Gatewood, who did not have workers' compensation insurance.

In May 2008, Robinson filed an application for adjustment of injury claim seeking benefits from Gatewood. Because Gatewood was uninsured, the Uninsured Employers' Fund (the UEF) was joined as a party.

The ALJ initially dismissed Robinson's claim based on his finding that Robinson was engaged in agricultural work at the time of the injury. The Board reversed the ALJ and remanded the claim for additional findings. In doing so, the Board found that the evidence did not support the ALJ's finding that Robinson was engaged in agricultural work. None of the parties appealed the Board's opinion.

On remand, the ALJ again dismissed Robinson's claim, finding that there was no employment relationship between Gatewood and Robinson. Because the adequacy of the ALJ's opinion is an issue on appeal, we set forth his analysis below:

> **Was the plaintiff employed by the defendant at the time of injury?** The next threshold issue in this case is whether the plaintiff was an employee at the time of injury or whether he was an independent contractor. Kentucky courts have generally used the Restatement of Agency for rules to determine whether one is an independent contractor or an employee. These were incorporated in the case of *Ratliff v. Redmon*, Ky., 396 S.W.2d 320 (1965). The elements to be considered are:
>
> (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 of 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.

The Restatement (Second) of Agency added another element "(j) whether the principal is or is not in business."

In the case of *Uninsured Employers' Fund v. Garland*, Ky., 805 S.W.2d 116 (1991), the court distilled these to the four most important elements:

(a) the nature of the work as related to the business generally carried on by the alleged employer;

(b) the extent of control exercised by the alleged employer;

(c) the professional skill of the alleged employee, and;

(d) the true intent of the parties.

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 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.
>
> 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.
>
> Under the criteria contained in *Unisured* [sic] *Employer's Fund v. Garland, supra,* Mr. Robinson does not appear to be an employee of Mr. Gatewood.

None of the parties filed a petition for reconsideration; however, Robinson appealed the ALJ's opinion to the Board.

In its opinion affirming the ALJ, the Board found that the ALJ had properly applied the correct standard of law. However, the Board indicated that it found the ALJ's analysis of the facts and the law to be inadequate. The Board then stated:

> In the absence of a petition for reconsideration, and in the absence of an appeal brief asserting an inadequate analysis on the part of the ALJ, this Board is unable to rectify inadequate findings of fact. Thus, we affirm. However, in light of the ALJ's inadequate findings . . . this Board feels compelled to briefly discuss the significance of a proper analysis of the employee/independent contractor issue.

In discussing the employee/independent contractor issue, the Board analyzed *Ratliff*; *Chambers v. Wooten's IGA Foodliner,* 436 S.W.2d 265 (Ky. 1969);[2] and related cases in detail, noting that the law favors a finding of an employment relationship. Furthermore, the Board noted that a simple recitation of the *Ratliff* or *Chambers* factors is not sufficient analysis. The Board then specifically addressed the ALJ's opinion with regard to his analysis.

> While it is difficult to discern from the ALJ's order which of the Ratliff factors have been considered, we are able to decipher an analysis of at least two of the four Chambers factors - the nature of the work as related to the business generally carried on by the alleged employer and the professional skill of the alleged employee. We find inadequate fact-finding with respect to the two Chambers factors that remain - the extent of control exercised by the alleged employer and the true intent of the parties. However, we are unable to reverse the ALJ's order in [the] absence of a petition for reconsideration, as substantial evidence does exist in the record to support the ALJ's ultimate conclusion that Robinson is an independent contractor. Having said this, this Board does take issue with the ALJ's conclusion that "Mr. Gatewood exercised no control whatsoever over Robinson's work." While this Board will not engage in fact finding [sic] here, our review of the record reveals that Gatewood did exercise *some* control over Robinson, particularly on the day he was injured. Additionally, this Board takes issue with the ALJ's meager fact-finding on the fourth Chambers factor - the true intent of the parties. The Ratliff Court offers guidance on analyzing this factor:

[2] The ALJ referred to *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116 (Ky. 1991), rather than to *Chambers;* however, both cases contain the same four factors. Therefore, the Board's use of *Chambers* in analyzing the issue of employment relationship, while not consistent with the ALJ's opinion, is not erroneous. Because it is the more recent case, we refer to *Garland* rather than *Chambers.*

> What the parties believe with respect to the relationship created is important in determining that relationship. . . . The important consideration is not what one of the parties believes, but what both parties believed from the circumstances.
>
> Ratliff continues by noting that the "educational standing of the two parties, their motives, and purposes in the creation of their relationship" are all factors that should be considered when analyzing the true intent of the parties. While the ALJ, in the case *sub judice*, did note that "[t]here does not appear to be any prior agreement that Mr. Robinson was an employee of Mr. Gatewood," we believe this statement does not clearly or adequately address this fourth factor. Again, in the absence of a petition for reconsideration asking for additional findings, and in the absence of an appeal brief pointing out the inadequate fact-finding under Chambers, supra, we are unable to reverse the ALJ's findings. (Emphasis in original.)

In order to resolve the issues raised on appeal, we summarize below the testimony of Gatewood and Robinson regarding their relationship.

1. Robinson's Testimony

Robinson testified that he was fifty-four years of age at the time of his 2008 deposition. He has a sixth grade education and has worked in factories and as a self-employed handyman, doing primarily concrete and block work. According to Robinson, he first met Gatewood in the summer of 2007. At that time, Robinson had reached an agreement with a landowner in Sharpsburg, Kentucky, to tear down a barn in exchange for the lumber. Robinson contacted Gatewood, who he believed had experience tearing down barns, and the two agreed to divide the proceeds from the sale of the lumber. Because Gatewood

supplied some equipment and an additional laborer, he received two-thirds of the money from the sale of the lumber and Robinson received one third. Robinson stated that he used hammers and punches to knock out the pins holding the beams together. After completing the job, Robinson gave the punches to Gatewood because he did not think he would need them again.

In January of 2008, Gatewood contacted Robinson and asked him if he wanted to help finish tearing down a barn in Cynthiana. Gatewood told Robinson he would pay him $12.00 per hour for his efforts. When Robinson got to the property, approximately half of the barn had been torn down and Robinson estimated that a little more than a week's work remained to be done. Robinson testified that, when that job was completed, Gatewood had two or three other barns he wanted Robinson to help tear down.

On January 17, 2008, Robinson's third day on the job, Gatewood asked him to operate the "bucket truck" because the person who had been operating it was too slow. Near mid-day Robinson suffered the above-mentioned injury. Gatewood paid Robinson for his work and made some additional payments, but paid nothing after February 2008.

In terms of experience, Robinson testified that the Cynthiana barn was only the second barn he had torn down. However, he stated that he knew what he was doing because he had gained all the experience he needed tearing down the barn in Sharpsburg.

2. Gatewood's Testimony

Gatewood testified that he has operated a business called Grendel, Inc., for approximately twelve years. In addition to operating that business, Gatewood has worked as a farmer and in a construction company with his brother.

Gatewood testified that tearing down a barn requires special skill to operate a bucket truck and to know which pegs to remove. According to Gatewood, he primarily tore down and sold log cabins, work which he usually did by himself. He stated that Robinson contacted him about helping with the Sharpsburg barn, and he agreed to help although he had no prior experience tearing down barns. On the Sharpsburg barn, Robinson supplied his own tools, including a generator, hammers, a punch, and a drill, and appeared to know what he was doing.

In January 2008, Gatewood entered into a contract to tear down a barn in Cynthiana. Gatewood began tearing down the barn, with the assistance of the "White boys." The men were having some difficulty operating the bucket truck efficiently; therefore, at the suggestion of the White boys, Gatewood called Robinson to help. According to Gatewood, Robinson controlled his hours and the details regarding how the work was performed. Gatewood relied on Robinson's expertise regarding removal of the pins and when to take down each section. Gatewood paid Robinson $12.00 per hour.

STANDARD OF REVIEW

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or

disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The determinative question to be answered is whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. " KRS 342.285; *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision because the ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc.*, 695 S.W.2d at 419.

ANALYSIS

We first address the adequacy of the ALJ's findings. An ALJ is required "to support [his] conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the

basis for the decision." *Shields v. Pittsburgh and Midway Coal Min. Co.,* 634 S.W.2d 440, 444 (Ky. App. 1982). We agree with the Board that the ALJ's analysis is somewhat lacking. However, the ALJ set forth in his opinion sufficient facts regarding the employment relationship, or lack thereof, to support his ultimate conclusion; therefore, that opinion is not so lacking in substance as to defy meaningful appellate review. *See Cook v. Paducah Recapping Serv.*, 694 S.W.2d 684, 689 (Ky. 1985).

Having determined that the ALJ's opinion, while not ideal, was sufficient, we address whether the evidence compelled a contrary result. Applying the facts to the four *Garland* factors, we conclude that it did not.

1. Work Performed *vis á vis* Gatewood's Business

Gatewood testified that he had been involved in the construction business for a number of years. As to demolition, Gatewood testified that he primarily tore down and sold log cabins, having only worked previously on the barn in Sharpsburg. The ALJ could have inferred that tearing down the barn in Cynthiana was at least tangentially related to the work Gatewood generally performed. This factor somewhat discredits Gatewood's claim that he did not employ Robinson.

2. Extent of Control by Gatewood

Gatewood testified that the men usually arrived around day break to begin work. However, there was no evidence that there were any set work hours; that Gatewood expected the men to work set hours; or that he enforced any set

work hours. Robinson testified that Gatewood asked him to operate the bucket truck; however, there is no evidence that Gatewood exercised any other control over the details of Robinson's work. Therefore, this factor supports Gatewood's claim that Robinson was not an employee.

3. Professional Skill

Gatewood testified that he contacted Robinson because Robinson had experience operating a bucket truck and removing the pins. Robinson testified that he had the necessary experience and knowledge to perform the work. Therefore, the ALJ could have inferred that Robinson had a specialized skill necessary to perform the job, a factor that supports Gatewood's position.

4. The Intent of the Parties

The Board is correct that the ALJ did not clearly address this factor. However, we note that there was no direct testimony from either Gatewood or Robinson regarding what relationship they intended to create. Robinson testified that he believed Gatewood had two or three other barns to tear down and that Gatewood wanted him to work on those. However, Gatewood denied that he had any other barns to tear down. Believing Gatewood, the ALJ could have inferred that whatever relationship Gatewood and Robinson had was only for the Cynthiana barn, which favors Gatewood's position.

Furthermore, Robinson's testimony that he had worked primarily as an independent contractor, in conjunction with the parties' past working relationship, indicates that the parties did not intend to create an employment

relationship. Therefore, the evidence supports the ALJ's finding that there was no "prior agreement that Mr. Robinson was an employee of Mr. Gatewood," which is indicative of their intent.

Taking the above into consideration we agree with the Board's finding that there is substantial evidence in the record to support the ALJ's conclusion. Therefore, we cannot disturb that finding on appeal.

Finally, we briefly address Robinson's argument that the Board found that it could not reverse the ALJ because Robinson failed to file a petition for reconsideration. We believe that Robinson is reading the Board's opinion too broadly. Admittedly, the Board does state, several times, that Robinson should have filed a petition for reconsideration seeking additional findings of fact from the ALJ. However, the Board does not state that, had Robinson done so, it would have reversed the ALJ. In fact, the Board's finding that "substantial evidence does exist in the record to support the ALJ's ultimate conclusion that Robinson is an independent contractor" is a finding that mandates affirmation. *See Jackson v. Gen. Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979). Therefore, whether Robinson filed a petition for reconsideration is, we believe, irrelevant.

CONCLUSION

For the foregoing reasons, we affirm the Board's opinion affirming the ALJ's dismissal of Robinson's claim.

ALL CONCUR.

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