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Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002194-WC

HAROLD HICKS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01397

ECK MILLER TRANSPORTATION;
HON. J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Harold Hicks (hereinafter "Hicks") has petitioned this Court for review of the Workers' Compensation Board's (hereinafter "the Board") September 25, 2002, opinion reversing and remanding the decision of the Administrative Law Judge (hereinafter "ALJ"). The only issue raised in this Petition for Review is whether the Board erred in reversing the ALJ's finding that Hicks was an employee of Eck Miller

Transportation (hereinafter "Miller") rather than an independent contractor. Having determined that the Board did not misconstrue the law, we affirm.

Hicks, currently a fifty-one year-old resident of London, Kentucky, filed an injury claim with the Department of Workers' Claims alleging that he sustained an injury to his back on October 27, 1999, when he fell from his trailer while unloading his flatbed truck in the course of his employment with Miller. Following the introduction of proof, the matter proceeded to a benefit review conference on March 13, 2002, after which the contested issues remained extent and duration, employment relationship, wages, and temporary total disability. After holding a final hearing and allowing the parties to brief the contested issues, the ALJ entered an opinion awarding benefits on April 23, 2002. Although the ALJ found that Miller failed to timely raise the defense of employment relationship, the ALJ, in the interest of judicial economy, conducted an analysis of whether Hicks was an employee of Miller or an independent contractor at the time of his injury. The ALJ applied the four-prong test as set forth in Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991), and concluded that he was an employee rather than an independent contractor. The ALJ then awarded medical benefits as well as temporary total and permanent partial disability benefits.

Miller filed a petition for reconsideration, arguing that the issue of an employment relationship had properly been preserved and that the ALJ erred in determining that Hicks was an employee of Miller and misapplied the evidence regarding the calculation of Hicks's average weekly wage. The ALJ denied the motion on May 17, 2002, and Miller filed a notice of appeal to the Board on June 17, 2002. Before the Board, Miller continued to argue that the ALJ erred in sustaining Hicks's objection to the timeliness of the employment relationship issue, in determining that an employment relationship existed, in applying a 1.5 multiplier to his impairment, and in calculating his average weekly wage.

The Board rendered an opinion reversing and remanding the matter for dismissal on September 25, 2002, agreeing with Miller that the employment relationship issue was timely raised and that the ALJ misapplied the facts in determining that an employment relationship existed. Hicks filed a timely Petition for Review with this Court solely on the issue as to whether the Board erred in reversing the ALJ's finding that he (Hicks) was an employee rather than an independent contractor.

Hicks argues before this Court that the uncontradicted evidence establishes that he was an employee of Miller, based upon his own testimony that Miller "owned" his truck when he leased it to the company, that Miller "hired" him, and that he

reported his injury to Miller's dispatcher as well as based upon Miller's purchase of coverage in Kentucky when it was actually an Indiana corporation. On the other hand, Miller presents a compelling argument that the Board properly reversed the ALJ on this issue due to his flawed analysis of the law.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] Court perceives 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." Id., at 687-88. If the facts are substantially undisputed, it is a question of law as to whether a claimant is an employee or an independent contractor. Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991).

It is axiomatic that before workers' compensation benefits may be awarded, an employer-employee relationship must be established. Pursuant to KRS 342.640(1), an employee is "[e]very person . . . in the service of an employer . . . if employed with the knowledge, actual or constructive, of the employer." In the cases of independent contractors, however, no coverage applies, as an independent contractor does not fall

under the definition of employee. Fields v. Twin City Drive-In, Ky., 534 S.W.2d 457 (1976).

Over the years, the courts have addressed the method to determine if an individual is an employee or an independent contractor. In Brewer v. Millich, Ky., 276 S.W.2d 12 (1955), the former Court of Appeals stated:

> [T]he approach to be used is that of determining the relation of employer-employee under the Workmen's Compensation Act rather than of master and servant or principal and agent in tort actions. The workmen's compensation approach is broader and uses a more liberal construction favoring the employee. This is in harmony with the purpose of the Act in affording protection to the employee and the resultant loss of work.

Id. at 15. After noting that courts have used many tests in determining this particular issue, the Court held that "[a]n independent contractor has been defined as one who is doing his own work in his own way; that is, he must have some particular task or work he has a right and an obligation to complete, and he must be subject to no control in the details of its doing." Id. at 17. In Reardon v. Southern Tank Lines, Inc., Ky., 346 S.W.2d 527 (1961), the Court noted that "the right to control the details of the work is indicative of the employer-employee relationship." Id. at 528. Later, in Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965), the Court looked to nine factors enumerated in Larson's Workers' Compensation Law, including

extent of control, the skill required, whether the work is a part of the regular business of the employer, and the intention of the parties.

In Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991), the Supreme Court of Kentucky set out a four-prong test based upon the tests examined in Ratliff, supra:

> The proper legal analysis consists of several tests from *Ratliff* and requires consideration of at least four predominant 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 intent of the parties.

Id. at 118–19.

In the present appeal, the Board presented an excellent analysis of the issue as to whether Hicks was an employee or an independent contractor. Because we cannot improve upon the Board's analysis, written by Board Member Gardner, we shall adopt that portion of the Board's opinion as our own.

> We now tackle the more difficult issue of the propriety of the ALJ's decision that Hicks was an employee rather than an independent contractor. The ALJ, in the interest of judicial economy, decided the issue of employee versus independent contractor status. He engaged in an analysis under Uninsured Employers' Fund v. Garland, supra, utilizing the four factors of: 1) the nature of the work as related to

the business carried on by the alleged employer; 2) the extent and control exercised by the alleged employer; 3) the professional skill of the alleged employee; and, 4) the true intent of the parties. The ALJ determined that Miller was in the business of shipping goods by truck, that Hicks exercised a great deal of control over his own work schedule, that Hicks was skilled as a truck driver, and though Hicks considered himself self-employed for tax purposes, such was not dispositive. The ALJ also determined Miller had compensation coverage at the time of Hicks injury. He thus concluded Hicks was an employee.

Larson, in his treatise, devotes considerable verbiage to how "employee" is defined in the realm of employee versus independent contractor status. Larson details the problem of analyzing compensation law under the common law purpose of the distinction, which was to limit the scope of a master's vicarious tort liability. Under common law vicarious liability, the issue concerned harm to a third person by an employee's activities. Therefore, the issue of the employer's right to control the detailed activities of the employee was the issue of primary importance. Larson explains that under compensation law the issue is not the injury by the employee but rather the injury to the employee. Therefore, the issue of right to control the details of the work for compensation cases does not bear a relationship to the purpose of the distinction as it does with the issue of vicarious tort liability. Larson submits that the most relevant factor for compensation purposes should be "the nature of the claimant's work in relation to the regular business of the employer." Vol. 2, Arthur Larson, Larson's Workers' Compensation, § 60.05 (1976). Larson's suggests that the purpose of compensation legislation should be that the cost of all

industrial accidents be borne by the customer as part of the cost of the product and, therefore, a worker whose services form a regular and continuing part of the cost of the product would not be a sufficiently independent business to be expected to carry his own protection. Thus, Larson's analyzes the present state of law under both the conventional theory of the "control" test and the more modern trend of the "relative nature of the work" test.

Under the traditional test of the employer/employee relation, the right to control the details was the central test, an element being who furnishes the equipment. Larson's explains that when the employer furnishes the valuable equipment, the relationship is invariably one of employment while if the employee furnishes the equipment when coupled with other factors, the indicia points more to independent contractorship. Larson's lists as a primary example the ownership of a valuable truck. Id. at 61.07(2). Larson's states there is no case where the employer owned the truck that the driver was held to be an independent contractor. But Larson also stresses that the reverse is not necessarily true. He explains that the test does not cut in both directions with equal force and when the worker owns the expensive piece of equipment, i.e., the truck, he is not necessarily always found to be an independent contractor. Larson's acknowledges, however, that an owner/operator of a truck is less likely to be under any type of control by an employer.

Under the relative nature of the work test, as the owner of an expensive piece of equipment, he may be expected to bear and distribute industrial loss. Clearly, under the traditional right of control test, an owner/operator truck driver is almost always found to be an independent contractor. Under the relative nature of the work test,

> however, if the business of the alleged employer is transportation, the issue may be closer.
>
> Though we have undertaken a discussion of the "relative nature of the work test," the fact remains that Kentucky still adheres to the traditional "control" test. We believe that while the ALJ correctly applied the control test pursuant to the court's holding in Uninsured Employers' Fund v. Garland, his actual analysis is flawed.
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> As cited by Miller in its brief before this Board, as in its brief before the ALJ, we believe the case of Reardon v. Southern Tank Lines, Inc., Ky., 356 S.W.2d 527 (1961), controls. In Reardon, the claimant owner/driver had the privilege of accepting or rejecting any particular load of freight, furnishing a driver other than himself to operate the equipment, and was paid a certain rate for a completed job. The court concluded as a matter of law, the claimant was an independent contractor. Inasmuch as the factors weighed by the court in Reardon are nearly identical to the factors herein, we hold the ALJ erred as a matter law in finding Hicks an employee rather than an independent contractor. Hicks's claim for compensation benefits must be dismissed.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

SCHRODER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: From my reading of the facts of this case, it was a close call requiring hair-splitting legal analysis by the Board to reverse the opinion of the ALJ. The problem posed as to the nature of the relationship (employee

or independent contractor) is not susceptible of clear classification either under tort law standards or under Workers' Compensation criteria. Therefore, since Workers' Compensation cases are to be liberally construed to afford coverage to an injured employee when such a close situation exists, I would reinstate the opinion of the ALJ, who found Hicks to be an employee for whom coverage should exist as opposed to an independent contractor eligible for no coverage. Under the complex facts of this case, I believe that the Board should have deferred to the ALJ and that it erred in reversing his opinion.

BRIEF FOR APPELLANT:

McKinnley Morgan
Hyden, KY

BRIEF FOR APPELLEE:

Marcus A. Roland
Lexington, KY