RENDERED: SEPTEMBER 30, 2005; 10:00 a.m.

ORDERED NOT PUBLISHED BY SUPREME COURT: AUGUST 10, 2006
(2005-SC-0863-WC)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000529-WC

DAVID RANCK — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-01362

BRIAN GRAY; NEIL SULIER; UNINSURED EMPLOYERS' FUND; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: David Ranck petitions for review of an opinion by the Workers' Compensation Board affirming a decision by an administrative law judge (ALJ) dismissing his claim for benefits in connection with an injury he suffered when he fell from the roof of a house. The two issues in this case are whether Ranck was an employee or an independent contractor of Brian Gray and whether the ALJ's decision must be vacated and

the matter remanded for a new hearing or proceedings because the ALJ that rendered the initial decision was not available to rule on Ranck's petition for reconsideration. We decide both issues adversely to Ranck, and we thus affirm.

For approximately 35 years prior to June 28, 2003, Ranck had worked primarily as a painter. He traveled extensively throughout this country painting as an independent contractor. He testified he had worked in approximately 45 different states.

In June 2003, Ranck did some interior painting work as an independent contractor for Neil Sulier at a house owned by Sulier. Brian Gray had been hired by Sulier to perform some exterior renovation work on the house. Gray and Ranck eventually entered into an arrangement whereby Ranck was to bleach and stain the shake roof. On June 28, 2003, Ranck fell from the roof while staining shingles and was injured.

Ranck filed a claim for benefits against Gray. Because Gray did not have workers' compensation insurance coverage, the Uninsured Employers' Fund was made a party to the case. The Fund claimed that Ranck was employed by Sulier, not Gray, and Sulier was made a party. Sulier likewise did not have workers' compensation insurance coverage.

The case was tried by ALJ Kevin King. In an opinion entered on May 11, 2004, ALJ King determined that Ranck was an

independent contractor and not an employee. Ranck filed a petition for reconsideration pursuant to KRS[1] 342.281. Because ALJ King was no longer an ALJ when the petition was filed, another ALJ considered the petition and entered an order denying it. Arguing that the same ALJ who heard the evidence and authored the original opinion must also rule on the petition for reconsideration, Ranck filed a motion to strike the ALJ's initial opinion. That motion was denied. Ranck then appealed to the Workers' Compensation Board, which entered an opinion affirming. From this opinion, Ranck filed a petition for our review.

Ranck first argues that he was an employee, not an independent contractor, and that the ALJ "confused himself as to the facts and erroneously and incorrectly applied the law." Second, Ranck argues that the second ALJ erred by failing to strike the initial opinion and "start this trial over" since the first ALJ was not available "to complete the trial." We conclude that neither of the arguments has merit.

In Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), the court noted factors that must be considered before determining whether one acted as an employee or an independent contractor. Those factors are: (1) the extent of control which, by the agreement, the master may exercise over the details of the work;

[1] Kentucky Revised Statutes.

(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. Id. at 324-25. In Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969), the court stated that the predominant factors from those listed above concern "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.

In his 19-page opinion, the ALJ analyzed each of the nine factors set forth in the Ratliff case. The ALJ determined that the evidence concerning some factors weighed in favor of an employer/employee relationship while the evidence concerning other factors indicated an independent contractor relationship.

The evidence concerning additional factors was found by the ALJ to be neutral. Ultimately, the ALJ determined that Ranck was an independent contractor based on the minimal control exercised by Gray over Ranck, the fact that the relationship between Ranck and Gray was to last for only the length of this particular job, and the intention of the parties concerning their relationship.

Concerning the extent of Gray's control over Ranck, the ALJ noted that Ranck painted according to his own schedule rather than a schedule imposed by Gray. Further, the ALJ noted Ranck's testimony that Gray was not always on the job site and that he was glad Gray would not be around over the weekend so that he could get the job finished without Gray's interference. Concerning the length of time for which Ranck was employed, both Gray and Ranck testified that Ranck would be working only until he finished staining the roof. While it was true that Gray and Ranck had discussed Ranck becoming an employee of a business Gray worked for as a crew leader painting new construction houses, that enterprise was separate from this project. Concerning the intent of the parties as to whether their relationship was one of employer/employee or independent contractor, the ALJ stated that "Ranck's belief that he was an employee was unrealistic" in the absence of an indication of an ongoing relationship or an indication from Gray that Ranck needed to provide information for tax withholding purposes.

Ranck states in his brief that "[i]t is probably the defendants that must carry the burden of proof on the issue of 'independent contractor' since they raised this issue as a defense." We disagree. "The claimant bears the burden of proof and risk of nonpersuasion before the fact-finder with regard to every element of the claim." Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999), citing Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Thus, the burden was on Ranck to prove that he was an employee of Gray.

The question before this court on appeal is whether the evidence was so overwhelming as to have compelled a finding in Ranck's favor. See Wolf Creek, 673 S.W.2d at 836. As the ALJ noted, there was evidence weighing for and against a finding that Ranck was an employee rather than an independent contractor. In determining whether the evidence was so overwhelming as to have compelled a finding in Ranck's favor, we must give consideration to the entire record. Id. Furthermore, as we review the evidence, we note that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." Miller v. East Kentucky Beverage/Pepsi-Co., Inc., 951 S.W.2d 329, 331 (Ky. 1997).

Having reviewed the entire record, we conclude that the evidence did not compel a finding that Ranck was an employee

of Gray. First, there was evidence that Ranck controlled the times that he worked. Second, even though there was a possibility that Ranck might get a future job with John James, for whom Gray was employed as a crew leader on other projects, there was no evidence that Ranck expected to continue working for or with Gray after completion of the roof work on Sulier's house. Thus, the length of time of the alleged employment relationship weighed in favor of a finding of independent contractor relationship. Third, the evidence does not compel a finding contrary to that of the ALJ regarding the intention of the parties. The fact that taxes and Social Security were not withheld from Ranck's pay by Gray supports the ALJ's conclusion. In short, considering the entire record, we do not believe the evidence compelled a finding in Ranck's favor. Furthermore, it does not appear that the ALJ was confused as Ranck claims.

Ranck's second argument is that the ALJ's initial opinion should have been stricken so as to "start this trial over" since the first ALJ was not available "to complete the trial." In essence, Ranck is arguing that the first ALJ's opinion must be vacated because that ALJ was not available to rule on his petition for reconsideration.

KRS 342.281 allows a party to petition for the reconsideration of an ALJ's decision. The statute provides that the ALJ "shall be limited in the review to the correction of

errors patently appearing upon the face of the award, order, or decision[.]" Id. Furthermore, the ALJ does not have the authority to reconsider and change his or her mind or to redecide a factual issue on a petition for reconsideration. See Wells v. Ford, 714 S.W.2d 481, 484 (Ky. 1986).

We believe Ranck has misconceived the manner in which a claim is resolved before an ALJ. Ranck asserts that the "trial" is not over until there has been a ruling on the petition for reconsideration. We disagree. Rather, the proceeding is over or complete once the ALJ enters his award, order, or decision. A petition for reconsideration only gives the ALJ an opportunity to correct errors that patently appear on the face of his award, order, or decision. Id. It is not part of the "trial." See also Tuttle v. O'Neal Steel, Inc., 884 S.W.2d 661 (Ky. 1994), wherein the Kentucky Supreme Court held that there was nothing in the statutes or regulations that required a claim to be decided by one ALJ throughout the life of the claim. Id. at 663.[2] In short, there was no error or due process violation due to an ALJ different from the one making the initial decision ruling on the petition for reconsideration.

The Board's opinion is affirmed.

ALL CONCUR.

[2] In the Tuttle case, the issue was whether a motion to reopen had to be heard by the same ALJ who ruled on the initial claim.

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