

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001611-WC

KELLY MOUNTAIN LUMBER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-01128

LARRY S. MEADE; K & J CONTRACTORS; UNINSURED  
EMPLOYERS FUND; KENTUCKY EMPLOYERS' MUTUAL  
INSURANCE; HON. JAMES L. KERR, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2006-CA-001707-WC

KENTUCKY EMPLOYERS' MUTUAL INSURANCE

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-01128

LARRY S. MEADE; KELLY MOUNTAIN LUMBER;  
UNINSURED EMPLOYERS' FUND; HON. JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND HOWARD, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Kelly Mountain Lumber appeals from a decision of the Workers' Compensation Board reversing the opinion of the Administrative Law Judge. The ALJ found that claimant Larry Meade was not an employee of Kelly Mountain Lumber based on a partnership agreement which he and four other men who worked there had signed. The Board, after fully analyzing the nine factors set forth in *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965), reversed the ALJ's decision and found that Meade was Kelly Mountain Lumber's employee as a matter of law. After a careful review of the record, we affirm.

Kelly Mountain Lumber, a corporation wholly owned by Rodney Wright, performed logging operations and ran a sawmill in Pike County for the purpose of supplying timber to local coal mines. Meade, who had an eleventh-grade education, had worked for Wright since 1996 in various capacities. On March 4, 2003, Meade formed a partnership, known as K & J Contractors, with his father and three other workers at the sawmill. According to Meade, they were required to do so by Wright in order to keep their jobs at the sawmill. The partners excluded themselves from coverage under their

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<sup>1</sup> Senior Judge David C. Buckingham 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.

workers' compensation policy as permitted by Kentucky Revised Statute (KRS) 342.012.<sup>2</sup> Each of the partners continued to work for Wright with Meade running the saw. On July 28, 2003, Meade's hand slipped while he was changing the saw's teeth and his left thumb was severed.

Initially, Meade filed a civil action against Kelly Mountain Lumber, but later dismissed it voluntarily after the defendant asserted its status as his putative employer, under KRS 342.690(1), protected it from civil liability. He then filed a Form 101, application for resolution of injury claim, naming K & J and Kelly Mountain Lumber as his employers. Kentucky Employers' Mutual Insurance (KEMI) filed an answer denying liability on its own behalf, as well as on behalf of its insureds, K & J and Kelly Mountain Lumber. The parties submitted proof in the form of depositions, medical reports and treatment records. After a final hearing, the ALJ reached a decision denying Meade's claim on the ground that he was the employee of neither K & J, nor Kelly Mountain Lumber. Meade appealed to the Board.

The Board, in a 2-1 decision, reversed the ALJ in a well-drafted opinion which examined each of the nine factors found in *Ratliff v. Redmon, supra*. Kelly Mountain Lumber appealed, and KEMI cross-appealed.

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<sup>2</sup> We note a disturbing consequence of this statute. By law, both K & J and Kelly Mountain Lumber were permitted to exclude the partners/owner of their respective businesses. Since neither business insured any other employees, the insurer, KEMI, was collecting premiums on policies which provided workers' compensation coverage to no one.

### **KEMI's cross-appeal**

KEMI argues that Meade's appeal should be dismissed for failure to name an indispensable party in its appeal from the ALJ to the Board. We turn to the Board's opinion and adopt the following language dealing with the insurance company's appeal:

Moreover, there is no requirement in KRS Chapter 342 or the administrative regulations by which the [Workers' Compensation] Act is implemented that the insurance carrier be joined by the claimant as a party to the action . . . .

Meade's claim for workers' compensation benefits was brought against K & J Contractors and Kelly Mountain Lumber. It is the employer who is immediately liable to its employee for the payment of workers' compensation benefits. Any disagreement over coverage between the employer and its workers' compensation carrier may be resolved by way of a declaratory judgment action and any payments made by the employer for which its carrier is contractually liable may be recovered by way of an indemnity action in civil court. It is of no consequence to Meade's claim for workers' compensation benefits, however[.]

### **Kelly Mountain Lumber's appeal**

Kelly Mountain Lumber argues the Board improperly substituted itself for the ALJ as fact-finder and then erroneously assessed the evidence, causing gross injustice. “The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor.” *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979) (citations omitted). “[I]f the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.” *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736

(Ky. App. 1984). “Compelling evidence is evidence 'so overwhelming that no reasonable person could reach the conclusion' of the ALJ.” *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999) (citation omitted). Where the evidence conflicts, “the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented . . . .” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). “The fact-finder 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 adversary party's total proof.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (citation omitted).

As the Board correctly notes, whether or not Meade was an employee of Kelly Mountain Lumber is a question of law if the facts are substantially undisputed. *Brewer v. Millich*, 276 S.W.2d 12, 15 (Ky. 1955). “When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value.” *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). The Board determined that the primary factual disagreement was whether or not Wright compelled Meade and the other “partners” of K & J to sign the partnership agreement. The ALJ's opinion failed to address this issue entirely in its rather paltry “Findings of Fact and Conclusions of Law.” Of the five paragraphs contained in that section of the ALJ's opinion, only the following two deal with the issue of Meade's employment status:

4. The Administrative Law Judge finds that the plaintiff was not an employee of K & J Contractors at

the time of the injury and he is therefore not covered under the policy which KEMI issued to the contractors. In so finding, the Administrative Law Judge relies on the application for insurance for K & J Contractors which [Meade's father] completed on behalf of the partnership as well as the policy issued by KEMI which has the endorsement specifically listing the plaintiff as a partner of K & J Contractors and thus excluding coverage.

5. The Administrative Law Judge further finds that the plaintiff was not an employee of Kelly Mountain Lumber at the time of the injury. The plaintiff himself, his father, and Mr. Wright all acknowledge the nature of the relationship of K & J to Kelly Mountain Lumber and the facts surrounding the working relationship of the entities.

The Board determined that the issue of Meade's status as an employee as opposed to an independent contractor could be decided without resolving the factual question of whether Wright compelled Meade to sign the K & J partnership agreement. The Board concluded that the ALJ erred, as a matter of law, when he found that the partnership agreement operated to legally deprive Meade of the protections of the Workers' Compensation Act, and further concluded that the issue is more appropriately determined in this case by application of *Ratliff*.

“Before attempting to apply the rules of law applicable to the facts of the present case, we should keep in mind the well recognized rule of law in this jurisdiction, that in determining the relationship of employer and employee under the Workmen's Compensation Act a broader and more liberal construction is used favoring [the] employee.” *Ratliff* 396 S.W.2d at 323.

The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, (sic.) is within the presumptive area of intended protection.

*Husman Snack Foods Co. v. Dillon*, 591 S.W.2d 701, 701 (Ky. App. 1979)(citation omitted).

While Kelly Mountain Lumber selectively references specific examples of conflicting testimony, the Board correctly concluded that the relevant facts are substantially undisputed. Hence, all that was necessary for the Board to resolve the issue of Meade's employment status was an analysis of the facts, focusing on the nine factors enumerated in *Ratliff v. Redmon*, *supra*. The *Ratliff* court, quoting from *Larson's Worker's Compensation*, laid out the following test for distinguishing between an employee and an independent contractor:

“In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (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 324-25 (citation omitted). Of these nine factors, “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.”

*Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265, 266 (Ky. 1969).

**Whether or not the work is a part of the regular business of the employer**

We begin our examination with the four factors emphasized by the *Chambers* court. Kelly Mountain Lumber's business was supplying lumber, cut to specified measurements, to local coal mines. The two main components of Kelly Mountain Lumber's day-to-day operation were logging and sawing timber. Meade was

working as a sawyer when he was injured and had previously worked in the logging side of the business. Thus, Meade's occupation at the time of his injury was within the scope of the business generally carried on by Kelly Mountain Lumber. The Board properly determined this fact to weigh in favor of finding an employer-employee relationship.

### **Extent of control**

Next, we evaluate the extent of control exercised by the purported employer. Meade testified, without contradiction, that he had previously worked driving a log truck and cutting timber for Wright, who had operated the business under several different names over the years. There was some dispute regarding whether Meade voluntarily stopped cutting timber in order to operate the saw, or whether Wright gave him no choice about changing jobs. Wright did testify that he told the workers what to saw each day according to the orders he needed to fill. However, he also stated that Meade and the others were free to determine their hours, as long as the work got done. Nevertheless, the extent of control is not determined by the amount of control actually exercised, but rather by the purported employer's right to control the details of the work. Vol. 2, Arthur Larson, *Larson's Workers' Compensation Desk Edition*, § 61.02 (2006).

The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract.

*Larson's*, § 61.08[1] (footnote omitted). There was nothing in the relationship between K & J and Kelly Mountain Lumber indicating any right held by the alleged contractors to complete a job for the sawmill without termination. In fact, although it occurred before the “partnership” was created, Wright had previously laid off most of his workers, and demoted Meade, after a previous sawyer suffered a serious injury. The Board correctly found that Wright's control over the details of Meade's work was indicative of an employer-employee relationship.

**The skill required in the particular occupation**

With regard to the professional skill required for the occupation, we note Meade had no prior experience as a sawyer when Wright asked him to operate his saw. Unskilled occupations are generally indicative of an employer-employee relationship. *Ratliff*, 396 S.W.2d at 325.

**Whether the parties believe they are creating the relationship of master and servant**

The fourth *Ratliff* factor regarded as a predominant one by the *Chambers* court is a determination, to the extent possible, of the true intentions of the parties regarding their business relationship. The evidence here is mixed. When Meade sought financing to purchase a home in November 2002, Wright signed a form verifying his employment and income. In 2003, Meade signed the partnership agreement, without reading it, on the hood of Wright's truck one day as he was working at the sawmill. Meade and his father both testified that Wright required them to form the partnership in order to keep their jobs at the sawmill. While Wright denies this, he admits that he

advanced K & J the money to obtain its workers' compensation policy and that he was never repaid as he expected. The Board's opinion conceded

that the parties believed they had created an independent contractor rather than an employment relationship through the mechanism of the partnership agreement by which K & J Contractors was formed. Notably, however, there was no written independent contractor agreement between K & J Contractors and Kelly Mountain Lumber, and the 'partners' of K & J Contractors were treated as employees of Kelly Mountain Lumber in every other respect[.]

Of the four predominant factors identified by *Chambers*, three favor the inference of an employer-employee relationship, and the fourth tends toward such an inference. Nevertheless, we will consider the remaining five factors outlined in *Ratliff*.

**Ownership of the instrumentalities, tools,  
and the place of work**

Kelly Mountain Lumber owned the sawmill where Meade worked, as well as all of the tools and equipment he used to perform his job. The Board quoted *Larson's Workers' Compensation* to explain the importance of this factor.

When the employer furnishes valuable equipment, the relationship is almost invariably that of employment . . . . In applying the test of who furnishes equipment, it is essential to bear in mind the rationale underlying the test . . . . The owner of a \$10,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like, in order to protect his investment. Moreover, since he has capital tied up in this piece of equipment, he will also want to ensure that it is kept as productive as possible . . . .

Vol. 2, Arthur Larson, *Larson's Workers' Compensation* § 44.34 (1998).

### **Length of time for which the person is employed**

Meade began working for Wright in 1996 and had worked in various capacities for him prior to his accident. “If the employment has continued for a considerable length of time, and does not have a termination date fixed, the relationship of employer and employee is likely, as distinguished from that of independent contractor.” *Ratliff*, 396 S.W.2d at 326. The Board correctly found this factor favored an employer-employee relationship.

### **Whether or not the one employed is engaged in a distinct occupation or business**

The Board noted that there was no evidence that Meade performed any work outside his job at Kelly Mountain Lumber. The lack of a distinct occupation or business favors a finding of an employer-employee relationship. *Ratliff*, 396 S.W.2d at 325.

### **Method of payment**

Payment by the job tends to indicate an independent contractor relationship while payment by the hour generally points to an employer-employee relationship. *Ratliff*, 396 S.W.2d at 326. Meade issued a check to K & J each week, and the partnership issued individual checks to Meade and the other workers. At first glance, this appears to be a classic contractor relationship. However, Meade's paycheck was determined by the number of hours he worked in a given week, plus a small bonus, and each of K & J's “partners” received a different hourly wage. Moreover, there was no difference between the wage Meade earned prior to the formation of K & J, when he was

unquestionably Wright's employee, and the amount he earned as a “partner” of K & J. Also, the amount Kelly Mountain Lumber paid the partnership was identical to the sum of the five workers' wages for the week. Thus, the Board properly found that the method of payment favored an employer-employee relationship.

**Whether the job in question is usually performed by an employee or by a specialist without supervision in the locality**

There was no evidence introduced as to whether, by local custom, sawyers were typically treated as employees or independent contractors. The Board did, however, express concern over Kelly Mountain Lumber's custom of labeling its workers as independent contractors. Wright maintained that he was the only employee of Kelly Mountain Lumber and that the business operated exclusively through independent contractors. In its opinion, the Board stated

We are disturbed by testimony suggesting that Kelly Mountain Lumber has engaged in business practices designed to populate its timber cutting and sawmill operations with a workforce uninsured for purposes of workers' compensation. Kelly Mountain Lumber's lack of consistency in treating workers as employees versus independent contractors and its apparent level of control over workers denominated as “independent contractors” is telling, we believe. Where a claimant strikes up a regular and continuing relationship with a single employer, so that the claimant is not available for work elsewhere and his fortune becomes tied to that of the single employer's, the relationship begins to look less like an independent contract and more like an employment relationship. Vol. 3, Arthur Larson, [*Larson's Workers' Compensation*], § 62.06[1] (1998).

Based on its thorough analysis of the nine factors, the Board found that *Ratliff* compelled a finding, as a matter of law, that Meade was an employee of Kelly Mountain Lumber. In reaching his opinion to the contrary, the ALJ clearly neglected to consider the *Ratliff* test. Thus, the Board correctly reversed the ALJ and remanded the case for entry of an award of workers' compensation benefits against Kelly Mountain Lumber commensurate with the evidence of record.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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