

OPINION ENTERED: March 22, 2013

CLAIM NO. 201200099

CARL DECKARD (DECEASED),
REGINA DECKARD
(ADMINISTRATRIX OF ESTATE)

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

LAMAR SMITH,
UNINSURED EMPLOYERS' FUND,
and HON DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Regina Deckard ("Regina"), Administratrix of the Estate of Carl Deckard, deceased, ("Estate") seeks review of the opinion and order rendered November 9, 2012 by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") finding Carl Deckard ("Deckard") and Lamar Smith ("Smith")

were engaged in a partnership at the time of the July 31, 2011 accident. The ALJ dismissed the claim after noting Deckard had no workers' compensation insurance and had not elected to be covered by the Workers' Compensation Act ("Act"). The Estate also seeks review of the December 10, 2012, order overruling its petition for reconsideration.

On appeal, the Estate argues it was reversible error for the ALJ to rely upon David Rucker v. Wayne Beckley, Claim No. 1998-0118, rendered September 17, 1999, an unpublished decision previously issued by this Board. It also contends the ALJ erred in relying upon the above decision to subvert the holding in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). Next, the Estate argues there is no evidence of the existence or intent to form a partnership between Deckard and Smith. Likewise it argues Deckard was incapable of such formation due to his lack of knowledge and experience. The Estate then argues Deckard is not an independent contractor pursuant to the analysis in Ratliff, supra, UEF v. Garland, 805 S.W.2d 116 (Ky. App. 1991) and UEF v. Poynter, 829 S.W.2d 430 (Ky. App. 1992). Finally, the Estate argues Deckard was an employee and should be covered by the Act. It points to the fact Deckard is unable to testify to his version of the facts. It asserts Smith's testimony does not prove Deckard was a partner or

independent contractor, and as a result, he can only be considered an employee.

Because we believe substantial evidence supports the ALJ's determination Deckard was a partner who failed to elect to be covered by the Act, we affirm.

The Estate submitted a Form 101 on January 25, 2012, stating Deckard sustained fatal head and neck injuries on July 31, 2011 when he was struck by a limb while cutting logs. Deckard did not succumb to his injuries until August 5, 2011.

The Estate identified Smith; Michael Clark ("Clark")¹, the alleged property owner of the location where the accident occurred; and the Uninsured Employer's Fund as Defendants. The Form 101 alleges Deckard completed the tenth grade, and was working as a log cutter earning a weekly wage of \$200.00 at the time of his injuries. In the Form 104, the Estate listed Deckard as an employee of Smith as a log cutter for over ten years prior to the accident. Neither Smith nor Clark had a valid Kentucky workers' compensation insurance policy in effect on July 31, 2011.

¹ Clark was later dismissed as a party by order dated April 26, 2012. Clark testified by deposition on March 30, 2012, he had sold the property to the Commonwealth of Kentucky prior to the July 31, 2011 accident. In his Form 111, Clark attached the Deed of Conveyance reflecting he had sold the track of land to the State as part of a right of way. The Deed was executed on November 3, 2010 and later recorded with the Hardin County Clerk on December 21, 2010.

The Estate submitted as evidence medical records from the University of Louisville Hospital, reflecting Deckard arrived via air transport on July 31, 2011 after being struck in the head by a branch while cutting down a tree. On August 5, 2011, his final diagnoses included subarachnoid hemorrhage, respiratory failure, C3 spinous, leukocytosis and fever. The cause of death was determined to be cardiopulmonary arrest.

Clark testified by deposition on March 30, 2012. He stated Deckard was injured at 691 Safari Trail in Hardin County, Kentucky on July 31, 2011. Although unsure of the exact date, Clark stated he sold the above property to the State of Kentucky as part of a right-of-way for a proposed road prior to the July 31, 2011 accident.

Clark's father had previously discussed removal of the trees with Smith. In January 2010, Clark initially rejected an offer by Smith to purchase the trees for \$1,000.00. Later in 2010, Clark "told my dad to call [Smith] to see if he still wanted to buy the trees when I found out the State was buying my property." Smith subsequently renewed the offer for the trees, which Clark accepted. The Estate introduced into evidence the November 23, 2010 contract reflecting Clark sold his timber to Smith for \$1,000.00. The document identified Clark, Smith and

other witnesses. Smith and Deckard initiated the tree removal in late July 2011.

Clark testified he had never sold timber before. He had never dealt with Deckard in the past, and did not meet him until July 30, 2011. He confirmed Deckard's signature does not appear on the November 23, 2010 contract, and stated Deckard did not take part in any negotiations for the sale of the trees. Prior to the accident, he witnessed Deckard cutting a tree in the front yard with a chainsaw, while Smith was running a skidder. Clark did not witness the accident and was unaware of the payment agreement between Smith and Deckard. Clark again confirmed the trees he sold to Smith were located on the property he sold to the Commonwealth of Kentucky.

Smith testified by deposition on March 29, 2012 and August 13, 2012.² Smith resides on Knob Road in Battletown, Kentucky. Smith testified he is self-employed, farms and cuts timber. He explained eighty percent of his

²On the same day of August 13, 2012, the ALJ entered an order extending proof time to allow Smith to depose Rick Stansbury and rebuttal time for the Estate. He also ordered the parties to file a motion for a hearing within sixty days, if so desired. It appears the hearing was originally scheduled for August 13, 2012, but due to the request to depose an additional party, the testimony by Smith and Regina on August 13, 2012 was by "deposition." Following the September 7, 2012 deposition of Rick Stansbury, the telephonic conference order and memorandum dated September 24, 2012 stated "Parties waived a hearing. Claim taken under submission as of this date."

income is derived from farming and twenty percent from timbering. He testified he primarily farms for Rick Stansbury ("Stansbury"). At the August 13, 2012 deposition, Smith stated he is not a corporation, limited liability company or independent business, and he has never advertised.

From approximately the 1960s thru the 1990s, Smith was partners with either his uncle and/or cousin in the timbering business. Smith testified he met Deckard in 2002. At that time, Deckard advised he could cut timber. Thereafter, between 2002 and 2006, Smith testified he and Deckard periodically worked together cutting timber. During that time, they either split the profits equally, or Deckard was paid by the board foot, depending on the size of the job. Deckard also performed some "handyman jobs" on Smith's farm. Other than the July 2011 job, Smith last performed logging work in late 2006 with Deckard and a crew. Deckard was paid by the board foot for that job. Smith testified he primarily worked for Stansbury as a farmer between December 2006 and July 2011, and he did not do any timbering or logging. Smith testified Deckard did not receive any money from him in any capacity between the end of 2006 and the date of the accident. Smith testified he saw little of Deckard in the two years immediately prior to the accident.

During that two year period, Smith testified they never worked together nor did Deckard perform any work on his farm.

Smith testified Deckard had a home near Battletown, Kentucky. Deckard stayed at a house on Smith's property when they worked together. Smith denied a landlord/tenant relationship existed, explaining Deckard did not pay rent. Smith testified he and Deckard both benefited from the arrangement since Smith's house had basic amenities Deckard's house lacked and transportation to job sites was easier.

Regarding the July 2011 timbering job, Smith testified Clark's father called and asked if he wanted to buy the trees before the State bulldozed them. Smith negotiated with Clark regarding which trees to cut, the price, and the date to cut the trees. Smith then marked the trees. Smith also testified Clark had previously rejected his offer to purchase the trees. He confirmed Clark is a distant relative and they had not previously worked on any timber removal projects.

After negotiating the purchase of the trees, Smith called Deckard to see if he wanted to help him cut the trees. At the hearing, Smith testified as follows regarding the payment arrangement for the job:

A: He was going to come from Indiana and there was probably a 2,000 foot job and he would have probably made \$40.02 a foot. And, I told him, if he'd come and help me, I'd take the \$1,000 I paid for the logs off and give him half of the profit.

Q: So you entered into a partnership agreement.

A: Yes, sir.

Q: So, the--so the Judge and Mr. Webster understands, had he cut in his normal arrangement on a per foot basis, would--what would his rate of pay have been?

A: What now?

Q: On a per foot basis--

A: Oh, he'd make two cents a foot.

Q: Two cents a foot. And, is that standard in the industry for independent cutters?

A: Yes, sir.

Q: All right, how many feet of lumber were actually cut off that Clark property?

A: I think 1,700, less than 2,000 feet.

Q: So, he did all the cutting?

A: Yes, sir.

Q: He'd of made thirty-five, forty bucks?

A: Yes, sir.

Smith confirmed their agreement was not reduced to writing, and there was no written partnership agreement between he and Deckard.

Smith testified he and Deckard arrived at the job site on July 30 and 31, 2011. Smith transported Deckard to the work site on both days. Smith testified Deckard cut the trees and topped them. Smith would then drag the trees with a skidder to the log yard. Smith testified he did not witness the accident which occurred on the second working day, July 31, 2011. Smith found Deckard unconscious and not breathing. Deckard passed away on August 5, 2011.

Smith characterized his relationship with Deckard as a partnership and repeatedly denied the existence of an employer/employee relationship. Smith testified he provided the skidder and its fuel which he hauled with his truck and trailer to the work site. Deckard provided a chainsaw, chains, oil and gasoline. Deckard "probably" furnished a wedge and maybe a hammer. Smith stated each was responsible for the out-of-pocket expenses related to their own tools and equipment. The ultimate buyer of the timber would haul it away. Smith described Deckard as a "very skilled" cutter. Smith did not direct, supervise or control Deckard's work or his schedule. Deckard worked by the job, not the hour. Smith said he, not Deckard, had a master's logger card which he explained is required for each timbering job site in Kentucky, regardless of the number of workers. Smith also admitted he would call potential

buyers, usually a man named Dwight Stovall ("Stovall"), to negotiate the sale of lumber.

Several exhibits were introduced during the depositions. Exhibit one is a copy of a check dated August 15, 2011 payable to Regina from Smith in the amount of \$256.50. It notes "partnership ½ profit Carl Deckard Mike Clark Job." Exhibit three is a spreadsheet which Smith identified as an accounting of the July 2011 job for Clark ("the accounting document"). It indicates:

- Mike Clark/ 11-23-2010 15 trees/walnut 1000
- Sold Logs- 8-8-2011 Sold logs to Stovall's Veneer Timber 1513
- Reimbursement for logs 1000
- Partnership Profit 513
- Lamar Smith - ½ 256.5
- Carl Deckard - ½ 256.5

Smith testified the accounting document was prepared by his wife, who had previously prepared similar accountings each time he and Deckard worked on a profit sharing basis. Smith's wife wrote checks to Deckard when he worked by the board foot. All payments to Deckard were either by check or cash. Smith confirmed the amount of the check payable to Regina represents half the partnership profit on the July 2011 job reflected in the accounting

document. Smith testified the check and accounting document were mailed to Regina after Deckard's death. Also attached as an exhibit is an August 8, 2011 check to Smith by Stovall in the amount of \$1,513.00, along with a receipt reflecting the purchase of logs from Smith a few days following Deckard's death.

Smith also introduced several exhibits for the purpose of contradicting Regina's testimony, the majority of which he denied. Specifically, Smith denied Regina ever worked for him or made utility payments to him. Smith also denied he ever paid anything to Regina, and denied Deckard worked for him consistently for the ten years immediately prior to the July 2011 accident. He likewise denied paying Deckard on an hourly basis. He also denied Deckard performed work on his farm at any time from 2009 thru 2011, or that they had cut timber for Stansbury the day before the accident.

Regina testified by deposition on May 30, 2012 and on August 13, 2012. She is Deckard's daughter and was appointed the Administratrix of the Estate. Regina testified Deckard was residing at his house in Battletown at the time of his death and had not lived anywhere else since approximately 2000. Regina denied Deckard was living in Indiana at the time of the accident or immediately prior.

Deckard was 63 years old at the time of his death. Regina testified Deckard had logged as a young adult, but never owned his own business and was never involved in a partnership. To her knowledge, Deckard had not filed tax returns since at least 1992. Regina stated Deckard met Smith in 2000 or 2001 at which time logging was discussed.

Regina testified Smith was Deckard's only employer and her father had worked for him from approximately 2006 or 2007 to July 31, 2011. Deckard primarily logged for Smith, but also performed other odd jobs. Despite her previous testimony, she stated when he worked for Smith, he stayed at the house on Smith's property, making transportation more convenient. Regina admitted Deckard's house near Battletown had no electricity, water, gas, sewer, air or heat. However, it did have a generator providing power to a light bulb. Regina occasionally stayed at the Smith house with Deckard. Regina stated Deckard worked in lieu of rent and utilities, and she paid Smith for the electric bill when her father could not.

Regina testified she and her father worked together during the course of her life and she worked for Smith with her father. Regina testified she sharpened and maintained the chainsaws, ran the skidder cable, and hooked and cut trees. At her deposition, Regina testified at

length regarding specific jobs she and/or Deckard performed for Smith each month from July 2009 through June 2011, which included logging, caring for cattle, cutting firewood and timber, building fences, working on a truck and helping with Smith's farm. She occasionally received payment from Smith. She also admitted she had some memory loss. Regina disagreed with Smith's assertion he had not worked with Deckard during the two years prior to the July 2011 logging job. Regina testified Smith paid her and Deckard each five dollars per hour in cash, because "he did not like to pay by check." At the hearing, Regina testified:

Q: Do you have any evidence or can you produce any evidence, 'cause I'll just kind of tell you, he's going to say he's--you've never worked for him ever in your life.

A: He never paid me cash. I worked--

Q: Did he ever pay you, period?

A: He paid me through my dad once in a while. But, as far as me being--him saying that I'm employed for--was ever employed for him and me saying that I was employed for him, no, I did odd jobs for him.

Q: Did Mr. Smith--

A: And, I did help him do odd jobs.

Q: Did Mr. Smith every pay you for any work?

A: Once in a while, yes.

Q: He only paid me in cash.

Regina testified Smith was their employer. Smith "gave orders," supervised their work and determined where they would work. They could not come and go as they pleased. Neither she nor Deckard owned any logging tools, and only used tools and equipment provided by Smith. Deckard did not own his own vehicle. Either she or Smith provided Deckard transportation to and from work. Deckard did not have a master logging card, did not solicit business and did not locate timber jobs. Deckard had a tenth grade education and had no degrees, licenses or certificates related to logging. "The only thing my father did was operate the chain saws."

Regina testified she was neither involved with nor present at the cutting job where her father was fatally injured. She gave birth to her daughter on July 31, 2011, the same day Deckard was injured. She was unable to speak to her father after the accident. However, at her May 30, 2012 deposition, Regina testified she participated in a conversation between Smith and Deckard regarding the compensation for this particular job. She stated that on Friday, she and Deckard cut and hauled logs on Stansbury's property. The next morning on Saturday July 30, 2011, "we

sat at the table at [Smith's] house that we was staying at, and discussed what the payment was, what was going on, who he was going to try to have remove the logs." She testified Deckard asked Smith to pay him \$10.00 per hour for this job. At the hearing, she testified she did not pay attention to that meeting and did not hear the ultimate outcome of the discussion. Regina testified her father often told her he and Smith did not split the proceeds from a job. She also testified "he never discussed the way Lamar was paying him. He would say either cash or check and that's all he would say to me."

Regina admitted the August 15, 2011 check in the amount of \$256.50 from Smith was delivered by mail. She also admitted receiving the accounting document by mail the same day. She was unaware of and had not previously seen similar accounting documents or checks notating a partnership.

Stansbury testified by deposition on September 7, 2012. Stansbury currently resides in Starksville, Mississippi. He resided in Meade County, Kentucky for the majority of his childhood and adolescent life. He eventually served as head coach of Mississippi State University basketball team for twenty-two years. He

testified he met Smith as a child, and has known him for approximately forty years.

Stansbury testified over the years, he has acquired "a bunch of land" in Meade County and visits the area a few months each year. The property is located approximately one mile away from Smith's farm. Stansbury testified Smith has worked solely for him since 2007 managing his land and performing odd jobs. He talks to Smith on the telephone daily. He testified he became acquainted with Deckard through Smith. Stansbury testified neither Deckard nor Regina have worked for him.

Sometime in 2011, Smith informed Stansbury he and Deckard had partnered to cut a few trees. Stansbury stated Smith told him the job would not take more than two days. When Stansbury returned to Kentucky from April 2011 to July 2011, he did not see evidence Deckard was staying at the building on Smith's property. Stansbury is unaware of whether Smith had any other logging jobs between 2007 through July 2011. Stansbury also disputed several statements made by Regina during her deposition. Stansbury stated Smith worked for him prior to July 2011 and could not have employed Deckard in any capacity.

After summarizing in detail the lay testimony provided by Regina, Smith, and Stansbury, the ALJ dismissed

the claim, finding a partnership existed between Deckard and Smith regarding the July 2011 logging job. The ALJ stated as follows in the November 9, 2012 Opinion and Order:

Findings and Conclusions

Deckard argues that he should be found to have been Smith's employee, under the employment versus contractor test from *Ratliff v. Redmon*, 396 S.W. 320 (Ky. 1965). Alternatively, he argues that Smith is a subcontractor liable for Deckard's death benefit pursuant to the up-the-ladder statute, KRS 342.610(2). He disputes the suggestion that he was a partner of Smith's at the time. Smith's position is that he and Carl Deckard were engaged in a partnership or joint venture at the time of Deckard's fatal accident. As in any case, Deckard, as the claimant, has the burden of proof. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979).

Aspects of this claim are quite similar to those in the case of David Rucker v. Wayne Beckley, Claim No. 1998-01188. At the time of his injury, Rucker was living in a trailer on property owned by Beckley. His finances were poor. To make money, he decided to cut cedar trees with Beckley. Rucker testified that Beckley supplied all the tools and transportation. Rucker cut the trees, and Beckley dragged them to the truck for delivery to the mill. He was paid by the board foot, with Beckley receiving the remaining profits. Checks from the mill were made to Beckley. He thought he was Beckley's employee, and he said Beckley affirmed that in certain statements.

The ALJ on the claim analyzed the evidence pursuant to *Ratliff v. Redmon*, and concluded that Rucker and Beckley were partners. He supported his finding noting that Beckley had no control over the cutting work performed by Rucker; that Rucker possessed specialized skill in cutting cedar trees; that the two had specific, separate jobs; that Rucker was not paid by the hour but by board foot; and that Beckley did not intend an employer-employee relationship, that there had never been any discussion about what the relationship was.

On appeal, the Board noted that while the *Ratliff v. Redmon* case had some applicability, it was "only of limited application." (p. 4). The Board said that the issue there, as in the case at bar, was not to distinguish between an employment relationship and an independent contractor relationship, but rather distinguishing between an employment relationship and a partnership. Therefore, as the Board did in *Rucker*, the ALJ will examine the characteristics of a partnership in Kentucky.

Kentucky's version of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." KRS 362.175(1). KRS 342.202(1) states that "the association of two (2) or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." KRS 362.180(4) states that "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no inference shall be drawn if such

profits were received in payment:...(b) as wages of an employee or rent to a landlord..." The existence of a partnership is determined by the totality of the facts and circumstances. *Roethe v. Sanger*, 68 S.W.3d, 352 (Ky. 2001).

The Board in *Rucker* said the *Ratliff v. Redmon* analysis would then be useful for the limited purpose of "determining whether the association between (Deckard) and (Smith) have the characteristics of an 'employment' relationship." (p. 9).

The factors from *Ratliff v. Redmon* for determining whether a claimant is an employee or independent contractor 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 employee 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 employee 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.

Recognizing that some of these factors are not applicable in distinguishing between employment and a partnership, the Board in *Rucker* said

the following factors from *Ratliff v. Redmon* should be considered: a) the extent of control that one party exercises over the work of another; b) the skill required in a particular work performed by the alleged employee; c) the method of payment, that is, whether the alleged employee participates in the profits and/or losses of the enterprise; and d) the intent of the parties in creating the relationship. Intent is the most important of these considerations. *Hardymon v. Glenn*, 56 Fed. Supp. 269 (D.C. Ky. 1944).

The ALJ's summary of the evidence set forth above is more detailed than any Opinion he has issued. He has carefully reviewed, and re-reviewed, the evidence. Having considered the evidence against the criteria set forth above, the ALJ finds that Carl Deckard and Smith were partners on the Clark property job at the time of Deckard's unfortunate accident.

As is frequently the case in "swearing contests" where both parties have a pecuniary interest in the outcome of the case, some degree of inconsistency is evident from the testimony of both Regina Deckard and Smith. However, as demonstrated through the summaries above, the ALJ found Smith's testimony more reliable and credible. Besides being the more convincing testimony, Smith's testimony alone was supported by another witness, Stansbury, and credibly so in this instance.

The ALJ therefore finds that Carl Deckard had not lived in Kentucky for some two years before his accident. That Deckard had been in Indiana for an extended period is supported, in part, by the testimony from Smith, from

Stansbury, from Regina Deckard when she said "me and (Carl) came down on Friday." The ALJ finds that Smith called Deckard about the timber cutting job on the Clark property, and that Deckard agreed to travel to the job from Indiana in exchange for a 50/50 split of the profits. Their intent, therefore, was to be partners. As Smith explained, Deckard had reasonably advised that it would not be worth his while to travel to the job site otherwise; certainly he would not have come for the \$5 per hour Regina said her father was paid for most work. Regina's testimony that Carl had cut timber for Stansbury the day he arrived in Kentucky was credibly countered by Stansbury's testimony that no such work occurred; and by Smith's testimony that he had already moved the skidder to the Clark property in preparation for the job by the time the Deckards arrived in Kentucky.

The finding of a partnership is also demonstrated by the fact that Carl Deckard was a highly skilled timber cutter whose work was not controlled by Smith, who was not a cutter at all. The ALJ also accepts the validity and accuracy of the accounting that was prepared showing Carl Deckard's share of the profits from the Clark job.

The ALJ notes that the Board in Rucker did not find the facts that Beckley decided when to take lunch and go home; that he incurred the majority of the expenses of the enterprise; or that checks for services rendered were made payable solely to him did not discount the finding of a partnership.

The law does not require an express agreement in order for a partnership to be formed, but rather

will look to the conduct of the parties to determine their true intent in formation an association. *Guthrie v. Foster*, 76 S.W.2d 927 (Ky. 1935). In Plaintiff's Brief, Deckard argues the effect of the lack of any formal documentation of a partnership. The failure of a partnership to file a copy of a partnership agreement is prima facie evidence that the partnership is composed of "non-qualified partners." KRS 342.012(5).

The effect of a statutory provision making certain facts prima facie evidence only has the effect of shifting the burden of going forward with the evidence. *Kirkshouse v. Eastern Kentucky Univeristy*, 501 S.W.2d 581 (Ky. 1973). Thus the burden is upon Smith to prove that the partnership was not composed of non-qualified partners, and the ALJ finds that there is substantial evidence to support such a finding. As stated above, the evidence demonstrates that the business relationship between Carl Deckard and Smith was that of a partnership or joint venture. A partner is not an employee of a partnership entitled to coverage under the Act, unless he elects to be covered by acquiring workers compensation insurance. KRS 342.012(1); *Wallins Creek Lumber Co. v. Blanton*, 15 S.W.2d 465 (Ky. 1929). Carl Deckard had no such coverage.

Finally, the ALJ finds Deckard's argument for liability under KRS 342.610 without merit. First of all, there is no firm evidence as to who owned Clark's property at the time of Carl Deckard's accident, so the finding urged by Deckard that the state of Kentucky was the general contractor cannot be made. (Clark depo p. 5).

Even if the state did own the property, it had not contracted with Clark to have timber removed. In acquiring Clark's property for a right of way, it allowed him to remove his timber if he desired to do so.

The Estate filed a petition for reconsideration requesting a finding the ALJ essentially overruled Ratliff, supra, by his reliance on Rucker, supra. It also notes the Rucker decision was not relied upon by either party and requested the ALJ attach it to his order on reconsideration. The Estate also requested additional findings of fact regarding who owned the property upon which Deckard was injured; what conduct the parties demonstrated "an attempt to form an association"; what actual control Deckard had over any of the job details; any specialized skill Deckard had regarding cutting trees which justify a determination he was "highly" skilled; which "partner" solicited and negotiated the price of the job; and whether Deckard knew or evidenced any knowledge or understanding of his share of the profits prior to his death.

In the December 10, 2012 order overruling the Estate's petition for reconsideration, the ALJ stated as follows:

Plaintiff initially contends that the ALJ's findings were not pursuant to the seminal case on employment versus

independent contractor disputes, *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965). To the contrary, the ALJ's decision heavily relied on the *Ratliff* decision, as is indicated throughout the Opinion. The ALJ found the facts of this case similar to *David Rucker v. Wayne Beckley*, Claim No. 1998-01188, and applied the *Ratliff* decision consistent with what the ALJ and Board did in that case. (The Rucker decision is a matter of record with the Department of Workers Claims. At Plaintiff's request, copies of the ALJ and Board opinions in that case are provided with this Order.)

Plaintiff next contends that there was "firm evidence" that the Commonwealth owned the property where Deckard's accident occurred, apparently in support of the subcontractor argument made in its Brief. Plaintiff states that Mike Clark's deposition confirmed that the state had acquired ownership of his property at the time of the accident. Again, to the contrary, the testimony is unclear as to who owned the property at the time. Clark could not remember the dates of the transaction. (p. 5). No deed documentation was attached. The exhibit to which Plaintiff refers is a contract for cutting timber between Clark and Smith dated November 23, 2010; such an exhibit does not prove who owned the land on July 31, 2011.

The ALJ is aware of the obligation to make sufficient findings of fact to permit meaningful appellate review. *Shields v. Pittsburgh and Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky. App. 1982). In the Opinion, the ALJ elaborated at length in support of his findings. Plaintiff's testimony on the various *Ratliff v. Redmon* elements was

not convincing for the reasons indicated. The Petition is overruled.

The Estate makes four arguments on appeal. It first argues the ALJ committed reversible error by relying upon the "unpublished Board opinion" of Rucker, supra, which he should have requested the parties address in their briefs. Because the ALJ failed to do so, the Estate did not have the opportunity to argue Rucker is inapplicable to the case *sub judice*. The Estate then pointed to several factual differences between Rucker and the case *sub judice*. The Estate also argues the ALJ "in a sense allowed the non-published decision to overrule" Ratliff, supra.

Second, the Estate argues there is no evidence of a partnership, and the ALJ's determination was tainted by the Rucker decision which mischaracterized the issue. The Estate states there "was absolutely no evidence of an intent for Smith and Deckard to form a partnership after the fact" asserting Smith could fabricate such a relationship since Deckard is unable to testify. The Estate argues there is no evidence an "itinerant poor drifter could possibly be a partner of a wealthy land owner in Meade County" especially since Deckard did not know he was engaged in one at the time given his lack of knowledge and business sophistication. The Estate argues the totality of the facts and

circumstances demonstrate Smith was looking for a profit and needed help removing trees stating: "Deckard was nothing more than a mule and Smith was the teamster."

Third, the Estate argues Deckard was not an independent contractor as established in the test set forth in Ratliff, supra, UEF v. Garland, supra, and UEF v. Poynter, supra. The Estate argues each factor to be considered in determining whether a person is an employee versus contractor favors a finding of an employment relationship.

Finally, the Estate argues Deckard was an employee and should be covered by the Act. It also asserts even though the ALJ found Smith more credible than Regina, his testimony does not prove the existence of a partnership or that Deckard was an independent contractor. Therefore, the ALJ should have determined Deckard was an employee.

As the claimant in a workers' compensation proceeding, Deckard, and therefore the Estate, had the burden of proving each of the essential elements of his cause of action, including the existence of an employee-employer relationship. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since the Estate was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum,

673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to determining whether the ALJ's findings are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find no merit in the Estate's first argument the ALJ erred by relying upon the unpublished Board opinion of Rucker, supra. The Estate fails to cite any case law, statute or regulation to support its argument the ALJ cannot rely upon a Board opinion not cited by either party in forming his ultimate determination. In addition, 803 KAR 25.010, Section 21(4)(g)6.e., allows parties to rely upon prior Board opinions when appealing an ALJ's decision to this Board. We therefore in turn, find it reasonable for an ALJ to rely upon a prior Board decision in reaching his or her determination.

In Ratliff, 396 S.W.2d at 324-325, the Court of Appeals provided nine factors to be considered when deciding whether a worker is an employee or an independent contractor. The nine factors are as follows:

(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.

In Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969), the Court of Appeals "refined" the nine-factor test by identifying four factors that are most "predominant" stating as follows:

[T]he 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.

A proper legal analysis involves consideration of "at least" the four factors set forth in Chambers, and "proper legal conclusions may not be drawn from consideration of one or two of these factors." UEF v. Garland, at 119. In that case, the Supreme Court stated:

A reviewing court must give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled. 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.

. . . .

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 117, 118-119; See also UEF v. Poynter, 829 S.W.2d 430 at 431.

On the other hand, the Courts have not outlined a similar factor test in determining whether a claimant is an employee or partner. Rather, KRS 362.175 defines partnership as "an association of two (2) or more persons to carry on as co-owners a business for profit" In determining whether a partnership exists, KRS 362.180(4) states in part:

The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise,
- (b) As wages of an employee or rent to a landlord.

We find the ALJ did not err by relying upon this Board's opinion in Rucker, supra, in determining the relationship between Smith and Deckard at the time of the accident was a partnership. In Rucker, the claimant was injured by a falling tree. Prior to the accident, the claimant had resided in a trailer on the Defendant's property. Claimant approached the Defendant, stating he needed to earn money, to which Beckley replied they would try to find trees to cut. The defendant provided all the equipment. Once cut, they took the trees to a mill where

they were each paid individually. The ALJ found the parties operated as partners rather than employee/employer after considering each of the four predominant factors, and dismissed the claim.

In an opinion rendered September 17, 1999, the Board affirmed the ALJ. However, the Board found Ratliff, supra, and UEF v. Poynter, supra, "are only of limited application" since they outline the rules for distinguishing between an employment and independent contractor relationship. Rucker, at 8. The Board therefore reviewed the above statutes regarding partnerships. It also noted the law does not require an express agreement in order for a partnership to be formed, but rather looks to the conduct of the parties to determine their true intent in forming an association. Id. at 8-9, citing Guthrie v. Foster, Ky., 76 S.W.2d 927 (1935).

The Board then found it may refer to the factors enumerated in Ratliff, supra, solely for the purpose of determining whether the association between the claimant and defendant has the characteristics of an "employment" relationship. However, the Board also stated as follows:

We believe some of the factors identified in Ratliff, supra, are not particularly applicable when attempting to distinguish between employment and partnership. Whether or not the one

employed is engaged in a distinct occupation or business has no real weight in such a determination since partnerships are often, if not usually, composed of individuals in the same occupation or business. Likewise, whether the work is part of a regular business of an individual would seem to have no relevance with regard to partnership. A partnership ordinarily involves a community of interest in the business and an agreement to share profits and possibly losses. Hardymon v. Glenn, 56 Fed. Supp. 269 (DC Ky. 1944). Thus, for purposes of distinguishing between employment and partnership, the following factors from Ratliff, supra, would seem to be most important: (a) the extent of control that one party exercises over the work or another; (b) the skill required in a particular work performed by the alleged employee; (c) the method of payment, that is, whether the alleged employee participates in the profits and/or losses of the enterprise; and (d) the intent of the parties in creating the relationship.

Id. at 10-11.

This Board then found substantial evidence existed regarding the above-cited factor indicating the parties were involved in a partnership. In that case, the testimony established the Defendant exercised little or no control over the details of the claimant's work, the claimant's job required a certain degree of skill and the evidence supported a finding the claimant participated in the profits. The Board also found substantial evidence

established the conduct of the parties was such as would indicate the existence of a partnership. The Board found no error in dismissing the claim since the evidence as a whole supported the ALJ's finding of a partnership or a joint venture, and the claimant did not elect to come under the provisions of the Chapter. Id. at 11-14.

We find the ALJ did not err in his analysis in determining Deckard and Smith were engaged in a partnership at the time of the accident. The ALJ acted well within the scope of his authority in relying upon this Board's previous opinion in Rucker, supra. Here, the ALJ identified the appropriate factors set forth in Ratliff, supra, the four dominant factors set forth in UEF v. Garland, supra, and the factors identified in Rucker, supra. The ALJ also identified the controlling statutes regarding partnerships. The ALJ performed the proper analysis and identified substantial evidence regarding the factors before reaching his ultimate conclusion Deckard was a partner rather than an employee. The ALJ ultimately found Smith and Deckard were partners at the time of the accident based upon the lay testimonies from Smith, Regina, Stansbury and Clark. The ALJ found Smith to be the most credible, reliable and convincing witness. The ALJ acted well within his role as fact-finder, as he has the sole

authority to determine the weight and credibility of the evidence. Square D Company v. Tipton, supra. In addition, the ALJ noted Smith's testimony was supported by Stansbury's testimony. Substantial evidence supported the ALJ's various factual findings and a contrary result is not compelled.

Most importantly, the ALJ found the formation of a partnership was evidenced by Deckard agreeing to travel to the job from Indiana in exchange for an equal share of the profits. The ALJ also referred to the accounting document reflecting the profit sharing pay arrangement. The ALJ also found Deckard was a highly skilled timber cutter whose work was not controlled by Smith.

The ALJ, after weighing all the factors, found in Smith's favor in determining the existence of a partnership. Although contradictory testimony and evidence may exist in the record, the ALJ identified substantial evidence supporting each of his findings regarding the relevant factors. The ALJ considered all the evidence which applied to the various factors in reaching his conclusion. Since substantial evidence supports the ALJ's conclusions, and a contrary result is not compelled, the ALJ's decision will not be disturbed.

Accordingly, the November 9, 2012 Opinion and Order and the December 10, 2012 Order overruling the Estate's Petition for Reconsideration by Hon. Douglas W. Gott, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON MARK WEBSTER
332 W. BROADWAY, STE 300
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON C GILMORE DUTTON, III
P O BOX 967
SHELBYVILLE, KY 40066

UNINSURED EMPLOYERS FUND:

HON DENNIS STUTSMAN
1024 CAPITAL CENTER DR, STE 200
FRANKFORT, KY 40601

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 EAST MAIN ST, STE 300
BOWLING GREEN, KY 42102