Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 25, 2014

CLAIM NO. 200901137

MARTIN REED PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, JR., ADMINISTRATIVE LAW JUDGE**

LINCOLN JONES
UNINSURED EMPLOYERS' FUND
ROBERT DOCKERY PROPERIES, LLC
and HON. JONATHAN R. WEATHERBY, JR.,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

LINCOLN JONES CROSS-PETITIONER

VS.

MARTIN REED CROSS-RESPONDENT
ROBERT DOCKERY PROPERTIES, LLC
UNINSURED EMPLOYERS' FUND
and HON. JONATHAN R. WEATHERBY, JR.,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Martin Reed ("Reed") appeals and Lincoln Jones ("Jones") *pro se*, cross-appeals from the November 25, 2013, Opinion and Order and the January 24, 2014, "Order Upon Cross Petitions for Reconsideration" of Hon. Jonathan R. Weatherby, Jr., Administrative Law Judge ("ALJ"). In the November 25, 2013, decision the ALJ dismissed Reed's claim, finding Reed to be exempt from workers' compensation coverage pursuant to KRS 342.650(2).

The Form 101 alleges Reed injured his right upper extremity on August 19, 2009, in the following manner: "Plaintiff suffered work-related injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides when his Right Hand was nearly severed while moving a freezer." The Form 101 names "Lincoln Jones and Bob Creason" as the "Defendant/Employer."

The Uninsured Employers' Fund filed a Form 111 Notice of Claim Denial or Acceptance on October 23, 2009, denying the claim for the following reasons: "Plaintiff was not employed by defendant on the date of alleged injury"; "The alleged injury did not arise out of and in the course of employment"; "The plaintiff did not give due and timely notice to employer of the injury"; "The claim is barred by

limitations." Under "other reasons for denial" is the following:

> The Uninsured Employers' Fund has no prior knowledge of these parties or the facts, and has liability only if an award is made against an uninsured employer and the employer defaults on payments of the award. The Uninsured Employers' Fund has secondary liability.

On November 12, 2009, Reed filed a "Motion to Join Party and Motion to Dismiss Party" in which he moved to join Robert Dockery Properties, LLC ("Robert Dockery") and dismiss Bob Creason as a party. The Motion reads, in part, as follows:

> It is Counsel's understanding Robert Dockery Properties, LLC was the owner of the apartment complex where Mr. Reed was working at the time of the August 19, 2009 work related injury. It is counsel's understanding Bob Creason was not the owner and, thus, should not be a party to this claim.

On January 21, 2010, Robert Dockery filed a Form 111 Notice of Claim Denial or Acceptance and denied the claim for the following reason: "Plaintiff was not employed by the defendant on the date of Alleged injury."

On December 9, 2011, the claim was reassigned to the ALJ from Hon. James L. Kerr, Administrative Law Judge.

The September 12, 2013, Benefit Review Conference ("BRC") order lists the sole contested issue: "Bifurcated on the issue of Employment Relationship."[1]

In the November 25, 2013, Opinion and Order, the ALJ summarized the evidence as follows:

> 1. The Plaintiff testified by deposition on November 18, 2009, and at the Formal Hearing on September 24, 2013. The Plaintiff testified that he has a 6th grade education but went to the 8th grade in school. He stated that he learned concrete skills through on the job training and that he has also worked in landscaping and construction in the past. The Plaintiff testified that he met Lincoln Jones approximately three months after moving into his apartment several years ago and began performing odd jobs with him. He recalled that he asked Mr. Jones if he could help him perform some odd jobs for extra money. He said that he usually earned around $20 helping him but recalled that he earned about $100 or $120 one day when working on a wall. He said that he was always paid in cash and that he would pick up cans around the property, mow grass, paint, weed-eat the yard, and move appliances. He

[1] In the September 24, 2013, hearing, the following exchange took place between counsel for Lincoln Jones and the ALJ:

ALJ: Thank you. The record indicates, and I note, that there was a benefit review conference held in this matter on the 12th of September, wherein it was agreed upon that the sole issue to be decided is the bifurcated issue of employment relationship in this matter. Is that consistent with everyone's understanding of the issue today?
...
Counsel for Lincoln Jones: And, I would only say it's plural employment relationships.

ALJ: Okay. If so found, we'll see, but thank you for that.

said that Mr. Jones left him the lawnmower so he could mow the yard early in the morning and that Mr. Jones also supplied all tools necessary to complete the jobs. He said that Mr. Jones would give him his duties for the day and that he would perform them.

On the date of the injury, the Plaintiff got up and mowed the yard and then Mr. Jones came around and asked him to help him out with another job. He said that he rode with Mr. Jones to Indiana and they picked up a stove and also had a refrigerator that was to be moved into an apartment. He said that they brought the refrigerator back to the apartment complex and were moving it upstairs when a dolly fell on his hand. The Plaintiff recalled that he was taken by ambulance to Norton Hospital and was later seen at Kutz & Kleinhert.

On cross examination, the Plaintiff clarified that it was Mr. Mack for whom he was working for when he put up the stone wall, not Mr. Jones. On the date of his injury, he agreed that Mr. Jones came and asked him to help him move the refrigerator.

The Plaintiff also stated that he had no written work agreement with Mr. Jones and that he never received a 1099 or W-2. He stated that Mr. Jones paid him for the wall job and that Mr. Mack liked his work and said he would use him again. The Plaintiff believed that Mr. Jones owned all of the apartment complexes until Mr. Jones told him that he had to see Mr. Mack to get [sic] rest of the money. The Plaintiff stated in his 2009 deposition that he was working for Mr. Mack but later stated that he was working for Mr. Jones.

The Plaintiff recalled that on the date of his injury, he mowed the lawn and Mr. Jones showed up about 15 minutes after he finished and paid him. He then rode downtown with Mr. Jones and they worked on an apartment complex. He recalled that there never was a discussion of how much he would be paid for his services but rather Mr. Jones would just give him some money.

On cross examination by the UEF, the Plaintiff stated that he did all the odd jobs he could when he wasn't working as a maintenance man for Motel 6. The Plaintiff agreed that he would offer his services for whoever had work available and stated that he would sometimes ask Mr. Jones if he had work available while other times Mr. Jones would ask him. He said that he usually helped Mr. Jones two to three times per week.

2. The depositions of Lincoln Jones taken on February 9, 2010, and May 11, 2011, were introduced into evidence on behalf of the parties. Mr. Jones said that he retired in 2002 and became involved in property management and maintenance for Robert Dockery Properties. He stated that he was on-call all the time for the four properties owned by Mr. Dockery. He said that he also performed work for Fred Mack who owned one building and four apartments. He said that his duties for both included taking care of leaking pipes and running commodes, cleaning up basements, and whatever else is needed. He said that once work was completed, an invoice was sent to the owners and paid, but not by him. He said that before an apartment was rented, he would perform some cleaning, painting, drywall, or the replacing of

appliances. He added that on occasion, he would hire others to help him and pay them out of his pocket. He did recall hiring the Plaintiff on several occasions to help him perform different tasks around the apartments. On the date of the injury, the Plaintiff's left arm got caught on the dolly and he was pinned against the wall of the building. He agreed that the Plaintiff was helping him on that date and that he was going to be paid for moving the refrigerator. He further stated that Mr. Dockery paid him $30 per unit per month if the apartments were filled but not for vacancies. He said that he usually invoiced Mr. Dockery twice monthly and worked approximately 20 hours per week for Mr. Dockery and maybe 10 hours per week for Mr. Mack. He agreed that he received a 1099 from Mr. Dockery and that he began working for him in September or [sic] 2008. He also received a 1099 from Mr. Mack.

On cross examination, Mr. Jones agreed that he first worked for Mr. Mack who referred him to Mr. Dockery. He stated that he never paid the Plaintiff more than $20 to do anything and that he would also give him old appliances which he assumed the Plaintiff sold for scrap metal. He said that the Plaintiff sometimes rides with him and he didn't' [sic] ask for his help in moving the fridge but he rode with him to deliver it. He said that he just assumed the Plaintiff was going to help him move the fridge since he rode along with him but said that he didn't hire him to do so. Mr. Jones agreed that Mr. Dockery was aware that he would sometimes pay others to help him maintain the properties. On redirect, he did recall paying the Plaintiff to cut some grass and pick up around the dumpster on Mr. Mack's property.

The May 11, 2011, deposition dealt with the civil lawsuit. Mr. Jones stated that the Plaintiff lived next door to the property he managed for Mr. Mack. He added that he would leave scrap metal for the Plaintiff by the dumpster and he assumed that the Plaintiff would sell it. Mr. Jones stated that he never paid the Plaintiff for any job and stated that the Plaintiff never cut the grass on Mr. Mack's property. He added that he didn't leave the Plaintiff his lawnmower. He stated that he has allowed the Plaintiff to borrow money before but he has never hired and paid him to perform a job. He stated that on the date of the injury, the Plaintiff rode with him to Indiana to pick up a fridge but said that he could not recall why he rode with him that day. He said that he [sic] the two of them mounted the refrigerator on the dolly while on the trailer and the Plaintiff was pulling it up the stairs while he was lifting from the bottom. Mr. Jones stated that this was usually a one person job since there isn't much room for two people to hold onto the dolly. Mr. Jones was holding the door open for the Plaintiff as he was turning the appliance to get it into the building. The Plaintiff's right wrist got caught when he stumbled and he was pinned against the wall. Mr. Jones said that he called 911 and took the Plaintiff down the street to a corner so EMT could easily find them. He said that he placed a tourniquet on his wrist made of an old shirt because the Plaintiff was losing a lot of blood. Mr. Jones later went back and took the refrigerator in the building himself. He stated that he did not ask the Plaintiff to help him but the Plaintiff offered.

On cross examination, Mr. Jones stated that he has never paid anyone to help him do any task on Mr. Mack's or Mr. Dockery's property. Mr. Dockery may have hired someone to perform a job and he would pay them himself. Mr. Dockery owned 20 units and it was more work than the deposed could handle.

3. The deposition of Robert Dockery was taken on June 6, 2012, and introduced into evidence on behalf of the parties. Mr. Dockery resides in California but owns several rental properties in Louisville, Kentucky. He stated that he does know Lincoln Jones, who was referred to him by a friend. He said that Mr. Jones has performed various jobs for him on his properties, but was not employed on a regular basis. Mr. Dockery stated that he believed Mr. Jones to be an independent contractor and that Mr. Jones was hired to deliver a refrigerator to one of his apartments on Eastern Parkway. He said that he has had people work as emergency contacts over the years and that he would be billed for their services. He reiterated that he only used Mr. Jones for jobs that came up and that he was not an employee.

Next, he was cross examined by Mr. Jones' representative. He stated that he had no property manager in Louisville and that he took care of things from California. He added that when he used Mr. Jones for work he paid him by check and issued a 1099. He admitted that Mr. Jones was someone who was allowed to use his credit cards at Lowe's and Home Depot and agreed that Mr. Jones did various jobs for him.

Next, Mr. Willis took over with questioning. Mr. Dockery stated that he was introduced to Mr. Jones by Mr.

> Fred Mack over the telephone and that Mr. Jones began helping out with his properties around 2006. He stated that Mr. Jones still did work for him and that he considers Mr. Jones to be a friend. He denied giving Mr. Jones any tools to use on behalf of his business. Mr. Dockery said that he knew nothing about the Plaintiff until he was informed by the Department of Workers Claims that a claim had been filed against him.

The ALJ provided the following findings of fact and conclusions of law:

> 4. The determination of whether an individual holds the status of an employee or an independent contractor requires consideration of 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. *Husman Snack Food Co. v. Dillon*, Ky.App., 591 S.W.2d 701 (1979); *Chambers v. Wooten's IGA Foodliner*, Ky., 436 S.W.2d 265 (1969).
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> 5. It is clear from the evidence presented that the Plaintiff had no idea for whom he worked and that he was paid in cash only without any 1099 or W-2. The Plaintiff clearly performed repair and maintenance jobs for whoever was in need of his services in order to "make ends meet" as he put it. It is however contrary to all notions of common sense to believe that the Plaintiff provided services to Mr. Jones with no expectation of any compensation at all. The ALJ finds

that the Plaintiff's testimony has been more consistent and is more credible than that of the Mr. Jones in this matter. The ALJ further finds that the Plaintiffcredibly [sic] testified that he was regularly performing tasks for money for Mr. Jones and that he had been given access to a lawnmower so that he could regularly mow the grass. The ALJ therefore finds in accordance with the Plaintiff's testimony, that he and Mr. Jones reached an implied agreement of continued employment, that the nature of the work was of the type that Mr. Jones was engaged in and in which the Plaintiff was skilled, and that Mr. Jones maintained sufficient control over the employment relationship such that the four part test is satisfied. The ALJ therefore finds that the Plaintiff was an employee of Mr. Jones.

6. When applying this standard to the relationship between Mr. Jones and Mr. Dockery, the ALJ finds that Mr. Jones used his own materials and exercised his own judgment without direct control or supervision by Mr. Dockery such that the relationship established is that of an independent contractor. The ALJ therefore finds that absent an exemption, The Plaintiff is an 'up [sic] the ladder" employee of Mr. Dockery pursuant to KRS 342.610.

7. KRS 342.650(2) provides that the following employees are exempt from the coverage:

Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, ***or if the employer has no other employees subject to this chapter, in or about the***

> ***premises where that employer carries on his or her trade, business, or profession***. (*Emphasis added*)
> 8. The Plaintiff has testified that he regularly performed odd jobs and mowed grass for Mr. Jones and that he was paid in cash by the job. The Plaintiff has failed to establish that Mr. Jones had any other employees on or about the premises that are subject to the Workers Compensation Act and consequently, the ALJ finds that the Plaintiff is exempt from coverage pursuant to KRS 342.650(2).

Both Jones and Reed filed petitions for reconsideration making several arguments and asking for additional findings.

In the January 24, 2014, order on petition for reconsideration, the ALJ determined, in relevant part, as follows:

> 3. The Plaintiff requests a finding that the Plaintiff is not exempt from coverage based upon numerous invoices referencing work done by other individuals. The ALJ finds that these invoices are insufficient to establish an employment relationship using the standard enunciated in the Opinion and Order and specifically finds that the invoices submitted do not show the intent of the parties, the skill of the alleged employee, or the extent of control exercised by the alleged employer. The ALJ therefore reiterates the finding that the Plaintiff is exempt from coverage pursuant to KRS 342.650(2).

> 4. The Plaintiff has also requested additional findings regarding the relationship between Mr. Jones and Mr. Dockery or more specifically Robert Dockery Properties. Using the same factors listed above, the ALJ reiterates the findings that Mr. Jones was an independent contractor based upon the following additional findings:
>
> a. The ALJ finds based upon the previous finding of an employment relationship between the Plaintiff and Mr. Jones along with the testimony from Mr. Dockery that he had no knowledge of the hiring of the Plaintiff, that Mr. Jones exercised a substantial amount of individual control without input from Mr. Dockery.
>
> b. Robert Dockery testified in his deposition that he did not use Mr. Jones or any other company or person consistently but that he called a plumber when he needed a plumber, and an electrician when he needed an electrician, etc., and that he bid the jobs out. The ALJ finds based upon this testimony that the intent of the parties was not [sic] establish an employment relationship and that Mr. Jones was an independent contractor.

On appeal, Reed makes the following arguments. First, Reed asserts the ALJ utilized the incorrect standard in finding Jones is not an employee of Robert Dockery. Next, Reed asserts the issue of coverage and exemptions under the Act was not properly before the ALJ. Lastly, Reed asserts the ALJ erred in finding there was not more than one employee of Jones.

Concerning Reed's first argument that the evidence compels a finding Jones is an employee of Robert Dockery, we conclude the ALJ has not sufficiently advised the parties of the basis for his determination that Jones was an independent contractor and not Robert Dockery's employee.

In Ratliff v. Redmon, 396 S.W.2d (Ky. 1965), 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;
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> (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.

Id. at 324-325,

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.

As held by the Supreme Court of Kentucky in UEF v. Garland, 805 S.W.2d 116, 118-119 (Ky. 1991), the "proper legal analysis consists of several tests from Ratliff and requires consideration of at least four predominant factors." (emphasis added.)

In the November 25, 2013, Opinion and Order and the January 24, 2014, "Order Upon Cross Petitions for Reconsideration," the ALJ touched upon only two of the four factors articulated in Chambers, supra; specifically, the extent of control exercised by the alleged employer and the

true intent of the parties. The ALJ did not analyze the remaining two factors. While the ALJ is not required to set forth a detailed explanation of the minutia of his reasoning in reaching a particular result, he must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision. *See* Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). This is particularly true in light of the fact Reed requested additional findings regarding this specific employment relationship in his December 9, 2013, petition for reconsideration.

Therefore, the ALJ's determination Jones is an independent contractor of Robert Dockery shall be vacated and the claim remanded for an analysis in accordance with the applicable case law. On remand, the ALJ must provide some analysis of all nine factors articulated in Ratliff, supra in making a determination as to whether Jones is an employee or independent contractor of Robert Dockery. While the ALJ may give particular weight to the four factors set forth in Chambers, supra, he may not focus exclusively on those four factors or only a portion of those factors.

Reed's second argument is that it was improper for the ALJ to make a determination regarding coverage and exemptions under the Act as the only issues to be resolved by the ALJ pertain to the employment relationships between the parties. We agree. The BRC order reveals the sole issue under consideration was the employment relationships between the parties. This was confirmed at the final hearing. Pursuant to 803 KAR 25:011 §13 (14), only issues identified at the BRC as contested issues can be the subject of further proceedings. Thus, it was error for the ALJ to decide the issue of exemption, as the parties were not on notice this issue would be addressed.

On remand, after resolving the employment relationship between the parties, if appropriate, the parties shall be afforded the opportunity to introduce proof regarding the applicability of the exemption contained in KRS 342.650(2). This proof-taking must include whether Reed was employed by Jones for a period of time "not exceeding (20) consecutive work days," as per the plain wording of the statute. We note the ALJ failed to include an analysis regarding this portion of KRS 342.650(2).

Finally, Reed's third argument that the ALJ erred in finding Jones did not have more than one employee is moot by virtue of our ruling.

In his cross-appeal brief, Jones puts forth two responsive arguments to Reed’s appeal and asserts three direct arguments. In his first argument, Jones asserts he is an employee of Robert Dockery. As this case is being remanded for additional findings as to the nature of the employment relationship between Jones and Robert Dockery, this argument is moot.

Jones' second argument on appeal is that Reed is an independent contractor of Jones. As with the ALJ's findings on the employment relationship between Jones and Robert Dockery, the ALJ focused only on the four factors articulated in Chambers, supra. This is not sufficient. In analyzing an employment relationship, the ALJ must provide an analysis of all nine factors articulated in Ratliff, supra. While the ALJ may give particular weight to the four factors set forth in Chambers, supra, he may not focus exclusively on those four factors. Assuming, *arguendo*, the ALJ could just focus exclusively on the four Chambers, supra, factors, he failed to touch on the true intent of the parties, one of the four factors. On remand, the ALJ

must analyze the employment relationship between Reed and Jones consistent with the applicable law.

Jones' third argument is that if Reed was an employee, he was an employee of Robert Dockery. We note that despite the issue of employment relationships being properly preserved at the BRC and the final hearing, and despite Jones presenting this argument in his brief to the ALJ, the ALJ failed to analyze this specific employment relationship in the November 25, 2013, Opinion and Order. While the ALJ ultimately concluded that Reed is an employee of Jones and an up-the-ladder employee of Robert Dockery, this Board cannot address Jones' argument on appeal without first requiring the ALJ to conduct the appropriate analysis on this issue.

Jones failed to request additional findings in his December 9, 2013, petition for reconsideration regarding Reed’s alleged status of Robert Dockery's employee. Despite this oversight, we conclude an analysis of the employment relationship between Reed and Robert Dockery pursuant to Ratliff v. Redmon, supra, was required, particularly since the ALJ was to rule on this issue as part of the original proceedings and failed to do so. The ALJ is required to adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties

are reasonably apprised of the basis of the decision. *See* Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). Here, an analysis of employment relationships is not complete without addressing Jones' argument that Reed is Robert Dockery's employee, an argument that was properly preserved at the BRC and in Jones' brief to the ALJ.

Consequently, the ALJ's determination that Reed is an employee of Jones and an up-the-ladder employee of Robert Dockery is vacated. Further, the ALJ’s determination the exemption contained in KRS 342.650(2) is applicable is also vacated. On remand, the ALJ must address, in full, the argument made by Jones that Reed is an employee of Robert Dockery.

The remaining two arguments made by Jones in his appeal brief concern the exemption issue which, we have already determined was not properly before the ALJ.

Accordingly, those portions of the November 25, 2013, Opinion and Order and the January 24, 2014, "Order Upon Cross Petitions for Reconsideration" finding Jones is an independent contractor of Robert Dockery, Reed is an employee of Jones, Reed is an up-the-ladder employee of Robert Dockery, and Reed is an employee exempt from coverage pursuant to KRS 342.650(2), are **VACATED**. The claim

is **REMANDED** to the ALJ for a complete analysis of the employment relationship between Jones and Robert Dockery, Reed and Jones, and Reed and Robert Dockery pursuant to the applicable case as expressed herein. In addition, after making the above determinations and, if appropriate, the ALJ shall allow the parties sufficient time to introduce proof concerning the applicability of KRS 342.650(2). Based on our decision, all other issues raised on appeal are rendered moot.

ALL CONCUR.

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