Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 19, 2016

CLAIM NO. 201591743

SAM BASHAM PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

JACK RABBIT SERVICES and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Samuel Basham ("Basham") appeals from the Opinion and Order rendered April 16, 2016 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") dismissing his claim. The ALJ found Basham was an independent contractor for Jack Rabbit Services ("Jack Rabbit"). Basham also

appeals from the May 18, 2016 order denying his petition for reconsideration.

On appeal, Basham argues the ALJ erred in failing to apply the holding of Husman Snack Foods Company v. Dillon, 591 S.W.2d 701 (Ky. 1979). Basham argues the ALJ inappropriately weighed the length of time he was employed in determining the independent contractor relationship. Basham also argues the ALJ failed to make sufficient findings of fact addressing the supervisory relationship between himself and Randy Holder ("Holder"), who is now deceased. Because the ALJ engaged in the appropriate analysis, and the evidence does not compel a contrary result, we affirm.

Basham filed a Form 101 alleging he injured his right ankle, hips and low back on October 29, 2013 when he was struck by a vehicle in Panera Bread's parking lot while assisting a customer. Basham began his relationship with Jack Rabbit in 2013 providing emergency roadside assistance. Because the sole issue on appeal regards the employment relationship between Basham and Jack Rabbit, we will not discuss the medical evidence filed in this claim.

Basham testified by deposition on November 10, 2015, and again at the final hearing held February 26, 2016. Basham was born on February 18, 1985 and resides in

Bowling Green, Kentucky. Jack Rabbit provides roadside assistance service to stranded drivers. Basham responded to a job advertisement on Craig's list. Holder sent him an online application which he completed. After he received the completed application, Holder set up a meeting with Basham. During the meeting, Holder offered Basham the opportunity to work with Jack Rabbit, and taught him how to use the lockout tool. This was the only occasion Basham personally met with Holder. Basham believed Holder was his supervisor. Basham called Holder if he had any issues or conflicts.

Basham received assignments via text message from a dispatch service. The text included the job code, the dispatcher, the type of call, and the location of the vehicle needing assistance. The text also contained an estimated time of arrival. Basham paid for his own telephone expenses related to his work with Jack Rabbit. If Basham missed a text from dispatch, Holder called him with the service job information. Basham provided service to Warren County, and the surrounding areas. Basham testified he delivered fuel, changed tires, provided jump starts, and unlocked vehicles. Prior to his relationship with Jack Rabbit, Basham knew how to change tires and jumpstart vehicles.

Basham was paid $14.00 per completed call or $7.00 on arrival calls, and $1.00 per mile when he traveled outside the coverage area. Basham did not have discretion to adjust the amounts. Basham indicated his fiancée completed his weekly invoices which documented the date, invoice number, vendor, purchase order, and amount he was due to receive. The invoices were sent to Holder. Basham was paid weekly in cash or by check through Jack Rabbit, and taxes were not withheld from his earnings. Basham did not report his income on his tax returns, and does not believe he received a Form 1099 for tax year 2013.

Basham used his personal vehicle to perform service jobs. Basham was required to affix Jack Rabbit decals on his vehicle, and was also required to wear a shirt and a vest with a reflector strip containing Jack Rabbit logos. He purchased either the shirt or vest, and the vehicle decal from Jack Rabbit. To perform his job, Basham used gas cans, jacks, four-way lug wrenches, socket sets, breaker bars, lockout kits, a jump pack and battery cables. Basham provided all of the tools he used in performance of his duties, except for the lockout kit, which he bought from Jack Rabbit. Basham was unsure whether he could have purchased a lockout kit on his own. Basham also bought a yellow light to place on top of his

car. Jack Rabbit provided Basham with its business cards to distribute to customers. The business cards contained only Jack Rabbit's name.

Basham testified he had no set schedule, and responded to calls twenty-four hours a day, seven days a week. Basham never rejected a call, unless it was out of his area or an oversized vehicle because he felt either he would receive fewer jobs for the rest of the week or would be fired if he refused a service call. Basham did not have a choice of what days or hours he worked. He estimated he received eight to twelve texts a day. Basham notified Holder when he would be unavailable to take service calls. Holder warned Basham his inability could affect the number of future jobs he received.

On October 29, 2013, Basham received a call to assist a disabled car at Panera Bread. As he was walking to the disabled vehicle with his tool, another vehicle struck him while backing out of a parking space.

David Hain ("Hain") testified by deposition on February 4, 2016. He is Jack Rabbit's sole LLC member. He described the business as a brokerage which finds people "who want to perform roadside assistance" primarily for Jack Rabbit USA.

Jack Rabbit USA has contracts with motor clubs in several states. Hain stated, “Jack Rabbit USA pays Jack Rabbit Services on a daily basis, essentially making sure that I have the funds that I need in order to continue paying my salary or my expenses or what have you.”

At the request of Jack Rabbit, Hain “provide[s] independent contractors information, contact information, schedule information, to a third-part dispatch company.” The dispatch company is not owned by Jack Rabbit, but is an independent entity. Hain testified Jack Rabbit has seven or eight administrative employees, and two hundred to two hundred and seventy-five national independent contractors. Jack Rabbit does not perform roadside assistance service work. Hain does not participate in the calling and dispatching of contractors.

Hain confirmed Basham replied to an online advertisement and probably spoke with Holder about working with Jack Rabbit. Hain testified Holder was an independent contractor for Jack Rabbit who performed roadside assistant services and assisted in recruiting. Holder was paid a commission based on how many services calls were completed in a location. Hain stated Holder would have provided Basham with Jack Rabbit’s standard independent contractor contact. In turn, Basham would have forwarded the

agreement to Jack Rabbit to review and sign. Once signed, contractors are sent service calls on their cellular telephones by text message through the dispatching company. Hain described Basham as a "self-employed independent contractor" under contract with Jack Rabbit. Only Jack Rabbit, not Holder, has the power or authority to terminate a contract with a contractor.

A service job is initiated by a customer, who typically contacts their insurance company when they need roadside assistance. In turn, the insurer contacts Jack Rabbit USA and/or their dispatch company. The dispatch company then checks to see if there are any Jack Rabbit independent contractors available in the area. If so, the dispatch company texts the service job information to an available contractor. If there is no insurance coverage, the customer directly pays the contractor.

Hain testified Jack Rabbit does not require any terms of availability from its contractors. Contractors are not prohibited from having concurrent employment. Jack Rabbit does not provide any equipment to its contractors. Although Jack Rabbit sells equipment to contractors, it may be purchased elsewhere. Hain testified the tools needed for the job is, "left entirely to the independent contractor. There's a lot of different equipment that

could be used to perform these functions. But ultimately it's up to the budget and preference of the independent contractor or entity of what to use." Jack Rabbit does not provide training to its contractors, but it does expect them to have the necessary knowledge and skills to perform the job. The manner in which a contractor performs his or her job function, and the equipment used, is within the control of the contractor.

Jack Rabbit requires its contractors to wear reflector vests which clearly show they are independent contractors for Jack Rabbit. They are also required to have identifying signage on their vehicles which again identifies them as contracted by Jack Rabbit. Jack Rabbit sells the reflector vests and vehicle signage to the contractors which are required for the safety of the motorist needing assistance. Contractors are also required to have a valid driver's license and automobile insurance.

Contractors are required to submit weekly invoices with necessary information. Jack Rabbit provides the contractors copies of standard invoice forms, but it accepts other forms which they may choose to use. Jack Rabbit pays its independent contractors upon receipt of their invoices. Regardless of the type of call accepted, a contractor is paid $14.00 per completed call, $7.00 on

arrival calls, and $1.00 per mile outside the coverage area. Hain stated Jack Rabbit issues Form 1099's to all of its independent contractors. Basham's 2013 Form 1099 was entered as an exhibit and reflects he earned $10,152.50 in nonemployee compensation.

Hain agreed if there was a dispute on mileage, he had the final say in the sum to be paid to Basham. Likewise, Jack Rabbit resolved any issues regarding payment or disputes concerning fee sharing between contractors.

Attached to both Hain's and Basham's deposition testimony is a document titled, "Independent Contractor Agreement" signed by Basham containing twenty-two paragraphs. The agreement outlines Basham agreed to perform roadside assistance jobs within the Bowling Green area, including unlocking vehicles, tire changes or repairs, jump starts, fuel delivery and calling wrecker service as may be requested by the customer. The contract states Basham had no obligation to accept or perform jobs, but agreed to be available to accept jobs from dispatchers on the schedule and times he determines. Basham was required to perform all jobs in a professional and safe manner. The contract stated Basham shall at his own expense undergo and obtain roadside assistance training and education, purchase and maintain uniforms similar to other

contractors bearing his name and status as an independent contractor for Jack Rabbit, use his own vehicle in performing jobs and maintain liability insurance, acquire all tools, apparel and signage necessary to complete the calls he accepts, and maintain a cell phone so he may be contacted. The contract states Basham is to be paid $14.00 per service job completed, $7.00 for all "gone on arrival" jobs, and $1.00 for each mile traveled outside the standard coverage area. Basham was required to deliver invoices no later than seven days after the completion of a job. The contract is silent regarding Basham's ability to subcontract work to others.

The contract includes an "Independent Contractor Order Form" identifying vehicle signs, apparel, and the lockout tool kit available for purchase from Jack Rabbit. The contract also includes a background check authorization signed by Basham. Also attached was a sample invoice form completed for the week of October 16, 2015 through October 22, 2015.

In the April 15, 2016 opinion, the ALJ summarized the lay and medical evidence, as well as the factors to be considered in determining whether one is acting as an employee or an independent contractor outlined in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). The ALJ noted the

four dominant Ratliff factors to be considered pursuant to Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). The ALJ ultimately determined Basham was an independent contractor, and dismissed the claim since no employment relationship existed at the time of the injury. The ALJ considered the following factors in making his determination:

> **The extent of control, which by agreement, the master may exercise over the details of the work?**
>
> In this instance, the details of the work are set forth in the independent contractor agreement entered into between the parties. In numerical paragraph 2 the "contractor" is required to give the "company" a schedule of availability for the following week by Friday of each week. The "contractor" agrees to perform all jobs in a workmanlike, professional, safe, competent and reasonable manner and further agrees to be alcohol and drug-free during the performance of contracted jobs. The "contractor" is also required to utilize clothing with the insignia of the "company" and to display signage on his automobile while performing service calls. To the undersigned, this is not extensive control over the details of the work. Instead, it appeared to be a general basic outline of performing road service assistance in a professional manner. This factor seems to suggest an independent contractor relationship.
>
> **Whether or not the employee is engaged in a distinct occupation or business?**

This is a unique business arrangement and the services provided by the "contractor" are somewhat unique in that the "contractor" provides basic roadside assistance service which does not rise to the level necessary for towing operations. Neither does it rise to the level of mechanical operations. This factor also weighs in favor of an independent contractor relationship.

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?

To the undersigned, there is really not a lot of other similar occupations to make a comparative determination in regards to this factor. Clearly, the "contractor" performs the service calls without direct supervision from the "company." Instead, the "contractor" is simply dispatched to a location to render service to the third-party. Comparatively, a service like AAA would contact an independent tow truck operator in the event of a disabled vehicle. This factor also weighs in favor of an independent contractor relationship.

The skill required in the particular occupation?

To the undersigned, it does not appear that a great deal of skill is required in providing the roadside assistance services provided for under the contract. With the exception of "lockout" calls, the "contractor" performs such basic tasks as putting gas in the gas tank, changing a flat tire or jumping a dead battery. As indicated by the plaintiff in his

testimony, he has had these skills since he was a teenager. Other than the need for training in utilizing the specialized tools for providing the lockout service, these factors weigh in favor of an employee relationship.

Whether the employee or the workman supplies the instrumentalities, tools and the place of work for the person doing the work?

In this instance, the tools of the trade including the automobile, cell phone, gas can, blister kit, lug wrenches and lockout kit belong to the "contractor." While the "company" does sell the lockout kit to the "contractor" and does require the wearing of a company vest, this factor also weighs in favor of an independent contractor relationship. As pointed out in the defendant's brief, the necessity of wearing a vest with a logo is a necessary requirement to alert the stranded motorist that the individual is there to provide roadside assistance rather than some other nefarious purpose.

The length of time for which the person is employed?

In this instance, the terms noted in the contract indicate the relationship can be terminated at any time. This factor also weighs in favor of an independent contractor relationship.

The method of payment, whether by the time or by the job?

In this instance, the plaintiff’s testimony, the contract and the invoices clearly indicate the plaintiff was paid by the job rather than by the

hour. This is also an indication of an independent contractor relationship.

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

Both parties make valid points in consideration of this factor. The plaintiff argues the defendant is in the business of providing roadside services and the services provided by the plaintiff are an integral part of that service as the plaintiff performs the actual required tasks on a daily basis. However, the defendant argues that it simply acts as a broker who notifies local dispatch services of approved contractors in the area where the services are necessary. Once the approved contractor provides the service, the requesting party (an insurance carrier or other third-party) provides payment to the defendant who then provides the contracted amount to the plaintiff. This can be seen from a review of the invoices which have been offered wherein the plaintiff failed to note the odometer readings on service calls and therefore could not receive payment from the third parties. While this factor may be argued either way, I believe it weighs slightly in favor of the independent contractor relationship.

Whether or not the parties believe they are creating the relationship of master and servant?

In this instance, the relationship of the parties is set forth in the detailed independent contractor agreement. The agreement is detailed in nature and gives clear indication that neither party believed an employment relationship to be created as result of the agreement. The intent

of the parties concerning the agreement suggests heavily that all parties believed that no employment relationship was being formed in entering into the agreement. While the plaintiff's testimony indicates he may have believed that declining service would result in his not obtaining as many future calls, it does not take away from the fact that he had every right to do so. Instead, it is an indication the plaintiff wanted to maintain his good relationship and good standing as an approved contractor. The defendant did not withhold taxes from the plaintiff's pay and the agreement clearly set forth the "contractor" would be required to pay all taxes and obtain business licenses as required in his locality. To the undersigned, this important factor also weighs heavily in favor of an independent contractor relationship.

After considering all the factors noted above, including the four dominant factors, while being under the understanding that the act and reality favor an existence of the employer/ employee relationship, I must note that I find the great majority of the evidence and the law favors the finding of an independent contractor relationship in this particular instance. As noted in the discussion above, the alleged employer in this instance simply acts as a broker between third parties requiring roadside assistance and approved contractors in the area where the assistance is necessary. While at first blush it would appear the defendant is in the business of providing roadside assistance, an analysis of the business indicates otherwise. Additionally, the defendant did not provide extensive control over

> the details of the plaintiff's work. While the job did not require a great deal of professional skill, the true intent of the parties is clearly demonstrated to be an independent contractor relationship rather than that of the employer/employee.

Basham filed a petition for reconsideration essentially making the same arguments now raised on appeal, and requested additional findings of fact for several of the factors. After noting Basham did point to some of the factors which may weigh in favor of an employment relationship, the ALJ stated after his review of the evidence, he simply felt the factors weigh in favor of an independent contractor relationship. Therefore, the ALJ denied Basham's petition in the May 18, 2016 order.

On appeal, Basham argues the ALJ erred in not applying the holding of Husman Snack Foods Company v. Dillon, supra. Basham argues the ALJ inappropriately weighed the length of time for which the person is employed, in favor of finding an independent contractor relationship. Basham also argues the ALJ failed to make sufficient findings of fact addressing the supervisory relationship between himself and Holder.

As the claimant in a workers' compensation proceeding, Basham 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 he 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 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 which 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).

In Ratliff v. Redmon, supra, the Kentucky Court of Appeals established a nine-factor test to determine if a claimant was acting as an employee or as an independent contractor. Later, 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 in determining the employment relationship 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." Uninsured Employers' Fund v. Garland, supra. There, 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.
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> Id. at 117; *See also* Uninsured Employers' Fund v. Poyner, 829 S.W.2d 430 at 431 (Ky. App. 1992).

In this instance, the ALJ individually considered each of the nine factors identified in Ratliff v. Redmon, supra. Not unusually, the particular circumstances of a relationship do not point exclusively to one conclusion. Regarding the factors set forth above, the ALJ determined seven of the nine factors supported a finding Basham was an independent contractor. The ALJ reviewed the contract, specifically paragraph 2, to conclude Jack Rabbit did not

have extensive control over the details of the work performed by Basham. Rather, the contract provided a basic outline of performing roadside assistance in a professional manner. The ALJ also determined Basham was not engaged in a distinct occupation since he essentially provided basic roadside assistance which does not rise to the level necessary for towing or mechanical operations.

The ALJ determined Basham performed service calls without direct supervision by Jack Rabbit, and he supplied his own tools of the trade including the automobile, cell phone, gas cans, blister kit, lug wrenches, and lockout kit. The ALJ determined the contract indicates the relationship between Jack Rabbit and Basham could terminate at any time. The ALJ determined the contract and the testimony by Basham clearly established he was paid by the job rather than by the hour. The ALJ determined the contract clearly indicated neither party believed an employment relationship was created. The ALJ noted the contract stated Basham had the right to decline service calls, Jack Rabbit did not withhold taxes from his pay, and the agreement clearly set forth the contractor would be required to pay all taxes and obtain business licenses as required in his locality.

We do not believe the holding in Husman Snack Foods Company v. Dillon, supra, compels a different result. In that case, the Claimant was a route salesman. He drove a Husman truck and supplied the stores on his route with Husman goods. Id. at 702. The "old" Workers' Compensation Board determined the Claimant was Husman's employee at the time of a fatal motor vehicle accident. The Court of Appeals affirmed, noting . . . "price control is a relevant consideration . . . Therefore, when we look at the nature of Dillon's work in relation to the distribution of Husman's products, we conclude that this work formed an inseparable part of the regular business of Husman." Id. at 703. The Court further noted other factors pointed to establishing an employee relationship, and those factors buttress the Board's decision the Claimant was an employee. Id. at 703-704.

We note Basham has identified several circumstances supporting a conclusion he was Jack Rabbit's employee. However, acting within his discretion, the ALJ thoroughly considered and weighed the totality of the evidence, and reached a reasoned decision. Square D Co. v. Tipton, supra. The proof emphasized by Basham merely supports a different conclusion than that reached by the ALJ, but does not compel a different result. McCloud v.

Beth-Elkhorn Corp., supra. Because the ALJ's decision is supported by substantial evidence and a contrary result is not compelled, we affirm.

Accordingly, the April 16, 2016 Opinion and Order and the May 18, 2016 order on petition for reconsideration by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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