Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2013

CLAIM NO. 200600294

TERRY ASHLEY PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, ADMINISTRATIVE LAW JUDGE**

MICHAEL MERCER,
OVA CARMEN,
UNINSURED EMPLOYER'S FUND,
HON. MARCEL SMITH,
and HON. OTTO DANIEL WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Terry Ashley ("Ashley") seeks review of the decision rendered October 17, 2007, by Hon. Marcel Smith, Administrative Law Judge ("ALJ Smith"), finding Michael Mercer ("Mercer") was his employee, and the order on reconsideration rendered November 20, 2007. Ashley also

appeals from the settlement between Mercer and the Uninsured Employer's Fund ("UEF"), approved by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ Wolff") on July 14, 2011. Ashley also appeals from the decision rendered by ALJ Wolff on February 18, 2013; and the orders on reconsideration issued on April 9, 2013, and April 10, 2013.

On appeal, Ashley argues no contract for hire existed between he and Mercer, therefore any claim against him should be dismissed. Ashley argues Mercer was an independent contractor or an employee of Ova Carmen ("Carmen"), the home owner. Ashley next argues this Board misinterpreted the effect of the settlement agreement in our previous opinion and order entered December 16, 2011. Finally, Ashley argues ALJ Wolff's denial of vocational rehabilitation is erroneous. Because we determine the opinions and orders rendered by ALJs Smith and Wolff were not erroneous, the analyses were appropriate and supported by substantial evidence, and further, because we did not misinterpret the effect of the settlement agreement, we affirm.

Mercer filed a Form 101 on March 3, 2006, alleging injuries to his left heel, left ankle, left lower extremity, ribs, left upper extremity/hand, chest, right foot and ankle, low back, left knee and abdomen, due to falling from

a ladder on November 7, 2005 during the construction of a house while employed by Ashley. Subsequent to the accident, Mercer underwent surgeries on the left distal radius, left calcaneus, and left arm.

Mercer testified by deposition on May 18, 2006, and at the hearing held August 29, 2007. He was born on March 19, 1964, and is a resident of Leitchfield, Kentucky. Mercer completed the ninth grade, and has no specialized vocational training. His previous work experience consists of remodeling, carpentry, concrete masonry, farming and engineering. He began working as Ashley's employee in September 2004, and continued to work thereafter on a consistent basis until he was injured. During his employment with Ashley, Mercer worked on seven or eight houses. He worked for no one other than Ashley from September 2004 until the date of injury. Mercer testified Ashley provided the tools, bid the jobs, directed the work, and communicated with the homeowner. Mercer believed Ashley, not Carmen, had the authority to direct his work. Mercer had no authority to make changes to the project without consulting Ashley. Ashley directed which project Mercer reported to on a daily basis. Ashley directed Mercer be paid directly by the homeowners of the various jobsites. No taxes were withheld from Mercer's pay. On the Carmen

jobsite, Mercer tracked the hours worked for him and a co-worker, which he submitted to Carmen.

On the day of the accident, Mercer was working on scaffolding when he fell approximately twenty-five feet, landing feet first, primarily on the left. He was taken to the Twin Lakes Regional Medical Center, in Leitchfield, Kentucky, via a pick-up truck driven by a co-worker. Ashley assured Mercer his medical bills would be “taken care of.” He has been unable to complete treatment due to unpaid medical bills, and is unable to work due to his injuries.

Carmen is a resident of Clarkson, Kentucky, and testified by deposition on December 27, 2006. In the spring of 2005, Ashley agreed to build a house for Carmen. Ashley had previously built houses for two of Carmen’s family members. Carmen provided the blueprints, but there was no written contract. Ashley agreed to provide labor and build the house, and Carmen agreed to pay him twelve to fifteen thousand dollars for his services. Ashley also provided the tools. Carmen testified he had never met Mercer prior to the beginning of the construction of the house.

Carmen did not act as a general contractor on the project. Likewise, he did not hire Ashley, Mercer, or anyone else as an employee. Carmen has never been involved in the business of building houses. He did not supervise or

schedule the work, provide tools, nor did he believe he had the authority to direct, hire or fire anyone working on the project. At the conclusion of the project, Carmen paid over fourteen thousand dollars to Ashley's wife, in two checks at Ashley's direction.

Ashley testified at the hearing held August 29, 2007, and again at the hearing held December 18, 2012. Ashley is a master electrician who was employed at a factory in Leitchfield, until it closed. He engaged in building houses as a sideline. He met Mercer through Allen Sanders in 2004. At that time, Ashley was engaged in building a home, and he advised Mercer he could work with him if the homeowner agreed. Subsequently, Mercer and Ashley were paid directly by the homeowner. Subsequent to that project, Mercer worked with Ashley on numerous other jobs until his accident at the Carmen house.

Ashley did not discuss his relationship with the other workers on the job with Carmen, and stated his estimated fee was twelve to fifteen thousand dollars for overseeing the project. Specifically, he testified he agreed to provide his labor and supervision. Ashley made contacts with homeowners regarding jobs, and submitted all bids, although there were never written contracts. He provided nearly all tools and equipment. Subsequent to the

factory closing, Ashley drew unemployment benefits, despite engaging in building houses. Ashley admittedly defrauded the unemployment compensation system, by asking Carmen to pay him in two checks payable to his wife in order to avoid an interruption of his unemployment benefits. Ashley stated he did not have workers' compensation insurance coverage because he did not know if he was going to continue in the home construction business on a long-term basis.

Ashley testified he did not participate in the settlement between Mercer and the UEF, and paid none of the settlement proceeds. He stated Mercer was not his employee, so he could neither hire nor fire him.

A hearing was held on August 29, 2007, and the claim was submitted for decision regarding the issues of coverage; whether Mercer sustained an injury on November 7, 2005; notice; temporary total disability ("TTD"); medical bills; employer/employee relationship; and average weekly wage ("AWW"). ALJ Smith rendered a decision on October 17, 2007, finding, based upon Ratliff v. Redmon, 369 S.W.2d 320 (Ky. 1965), and Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991), Mercer was not an independent contractor. She found Mercer was Ashley's employee at the time of the accident. ALJ Smith determined Mercer's AWW was $694.85, awarded TTD benefits at the rate of $463.23 per

week, and medical benefits to be paid by the UEF. She placed the claim in abeyance pending Mercer reaching maximum medical improvement ("MMI"). Finally, ALJ Smith dismissed Carmen as a party. In an order dated November 20, 2007, ALJ Smith denied Ashley's petition for reconsideration. Ashley appealed the interlocutory decision to this Board, which was dismissed by order dated January 9, 2008.

On February 10, 2009, ALJ Wolff issued an order retaining the claim in abeyance, requesting status reports, and again ordering Carmen dismissed as a party. ALJ Wolff also ordered the UEF to pay interest on past due TTD benefits.

A benefit review conference ("BRC") was held on May 12, 2011. In the BRC order and memorandum, the parties preserved issues of benefits per KRS 342.730 "(perm total)", "travel etc. out of pocket for pres.", whether UEF is obligated to pay interest on past due TTD benefits, "all issues raised in prev. indep. Contractor (issue preserved for app.)" and all issues preserved in ALJ Smith's decision. A hearing was scheduled for May 26, 2011. The hearing order dated May 26, 2011 reflects the claim was settled between Mercer and the UEF. A Form 110-I settlement agreement between Mercer and the UEF was approved by ALJ Wolff on July 14, 2011. The settlement agreement reflects as follows:

> This is a Compromise Settlement between Michael Mercer and the Uninsured Employer's Fund. Defendant Terry Ashley is not a participant in this settlement and retains the right to appeal the October 17, 2007 Opinion Award & Order of Administrative Law Judge Marcel Smith. Michael Mercer agrees to accept and the Uninsured Employer's Fund agrees to pay $255.04 for 425 weeks beginning July 21, 2009, brought current in a lump sum, without interest, and thereafter paid weekly, representing 17.5% whole person impairment. As a compromise, Mr. Mercer agrees to waive and dismiss any right to income or medical benefits for any psychiatric/psychological claim, waiver of interest on past due benefits, and waiver of his right to vocational rehabilitation. All rights regarding Mercer's physical injuries, including but not limited to Mr. Mercer's right to future indemnity and medical benefits and right to reopen, remain open pursuant to statute and regulation.
>
> Other responsible parties against whom further proceedings are reserved: Terry Ashley, Defendant

On August 10, 2011, Ashley filed a notice of appeal of the settlement agreement, as well as the October 17, 2007 decision, and the November 20, 2007 order on reconsideration. On December 16, 2011, this Board again dismissed Ashley's appeal, stating as follows:

> In the case *sub judice*, after Mercer and the UEF entered into the settlement agreement, no hearing was conducted and there was not a decision regarding the contested issues set forth in the BRC order. The ALJ did

not resolve Mercer's claim against Ashley; thus, that claim remains pending.

The ALJ was required to first finally resolve the issue of the employer/employee relationship. The interlocutory opinion, award, and order rendered by ALJ Smith is not a final determination regarding the employer-employee relationship nor of Mercer's claim against Ashley. Based upon subsequent hearing testimony and proof introduced in the record, the ALJ is permitted to reverse the ruling of ALJ Smith in the October 17, 2007, interlocutory opinion, award, and order since it is not a final and appealable decision.

. . .

If the ALJ accepts ALJ Smith's findings in the opinion, award, and order or modifies them in some manner but still determines Mercer was an employee of Ashley, since the parties stipulated to "an injury of November 7, 2005," the ALJ must determine the nature of Mercer's injury, his occupational disability, if any, and the income and medical benefits to which Mercer is entitled as a result of the work-related injury.

. . .

Certainly if the ALJ determines Mercer sustained an injury as defined by the Act justifying the award of income benefits, he has to determine which impairment rating was more appropriate and the extent of Ashley's occupational disability, i.e. whether he is permanently partially or totally disabled. Although Mercer agreed to waive and dismiss his right to income

> and medical benefits for any psychological claim, interest on past due benefits, and vocational rehabilitation, the agreement plainly states Ashley is not a participant in the settlement agreement. Therefore, Mercer did not waive and/or dismiss any portion of his claim against Ashley.
>
> Simply put, after conducting a final hearing, the ALJ must determine whether he will adopt the findings of ALJ Smith, and depending on his findings regarding the employer-employee relationship, he must either dismiss Mercer's claim or award income and medical benefits based on his finding as to the extent of Mercer's injury and occupational disability. In doing so, the ALJ is not required to give any credence to any statement contained in the settlement agreement or even consider the fact the UEF settled with Mercer. At this juncture in the proceedings, the October 17, 2007, opinion, award, and order of ALJ Smith and the settlement agreement certainly do not terminate the action, decide all issues, and operate to determine all rights of the parties so as to divest the ALJ of his authority. Clearly, with regard to Mercer's claim against Ashley, the October 17, 2007, opinion, award, and order and the settlement agreement entered into between the UEF and Mercer do not resolve any contested issues. Further, should the ALJ accept ALJ Smith's findings and enter an award, he must grant the UEF a right of recovery against Ashley.

On October 10, 2012, ALJ Wolff issued an order outlining the issues to be decided, and scheduled a hearing

for December 18, 2012. ALJ Wolff subsequently issued an opinion, order and award on February 18, 2013. He first outlined the following as issues to be determined:

> 1. Whether Plaintiff Mercer was an employee of Ashley's on November 7, 2005;
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> 2. The nature of Plaintiff's injury;
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> 3. Plaintiff's occupational disability;
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> 4. Plaintiff's entitlement to income benefits;
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> 5. Plaintiff's entitlement to medical benefits;
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> 6. Which of the two available impairment ratings most accurately reflect Plaintiff's impairment;
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> 7. The extent, if any, of Plaintiff's claimed psychological injury;
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> 8. Whether Plaintiff is entitled to vocational rehabilitation benefits;
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> 9. Whether Plaintiff is entitled to interest on any past-due benefits; and,
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> 10. Plaintiff's entitlement to travel and other out-of-pocket expenses.

ALJ Wolff first determined Ashley was Mercer's employer. He specifically found:

> Having reviewed ALJ Smith's Opinion, the undersigned is unaware of any reason to set aside or to alter any word, paragraph, recitation of the evidence, conclusions of law, or the determination

> the employer of Plaintiff at the time of his fall was Terry Ashley. Therefore, ALJ Smith's determination that Plaintiff's employer on November 7, 2005 was Defendant Terry Ashley is accepted and adopted herein.

ALJ Wolff next determined ALJ Smith correctly dismissed Carmen as a party, and for the third time he was dismissed. The ALJ also determined due to the work accident, Mercer sustained injuries to his left upper and lower extremities for which he had surgery. ALJ Wolff determined the 17% impairment rating assessed by Dr. Gregory Gleis was appropriate for the work injuries.

ALJ Wolff then outlined the criteria necessary for determining permanent total disability as set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). He appropriately analyzed the facts with criteria set forth in Watson and found as follows:

> Plaintiff's very limited education and being functionally illiterate; and having only one occupational skill (which he can no longer do); and, having the severe medical restrictions, strongly indicate Plaintiff is unlikely to "work." It is determined Plaintiff's permanently totally occupationally disabled.

He then determined Mercer did not sustain a psychological injury as a result of his November 7, 2005 work incident.

ALJ Wolff next determined Mercer's average weekly wage, at the time of his work-related injury, was $694.85, and found he was entitled to permanent total disability ("PTD") benefits at the rate of $463.23 per week. He also determined Mercer is entitled to interest at the rate of 12% per annum on all due, but unpaid benefits owed by Ashley, for which the UEF is obligated to pay in the event of default pursuant to KRS 342.040 and Bradley v. UEF, 301 S.W.3d 27 (Ky. 2009). He also determined Ashley is responsible for:

> payment of reimbursement for travel expenses and out-of-pocket expenses and other such expenses incurred in his attempt to have access to compensable medical treatment for his work injury, including all reasonable travel expenses, out-of-pocket payment for prescription medication, and such other similar expenses.

Regarding vocational rehabilitation benefits, the ALJ determined:

> Plaintiff requested an award of vocational rehabilitation benefits under KRS 342.710. Whether to award vocational rehabilitation benefits is solely at the ALJ's discretion. KRS 342.710 provides in pertinent part, "when as a result of the injury he is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services." Since it has been determined Plaintiff is permanently totally occupationally disabled, it is not appropriate to award

> vocational rehabilitation benefits. Plaintiff's claim for vocational rehabilitation benefits is dismissed.

Mercer, Ashley and the UEF filed petitions for reconsideration. In an order dated April 9, 2013, the ALJ amended the opinion to reflect PTD benefits initiated on November 7, 2005. On the same date, ALJ Wolff entered an order reflecting "Defendant shall take credit for all payments the UEF has made, and continues to make pursuant to its July 14, 2011 settlement with Plaintiff." The order further reflects:

> Because Plaintiff has previously settled with the UEF, any benefits awarded herein over and above those set forth in the Agreement as to Compensation are solely the responsibility of Defendant Terry Ashley. Moreover, the UEF is granted a right of recovery against Defendant Ashley for any and all income or medical benefits it has already paid in this claim, as well as for those it may pay in the future. (*as directed at page 16 in the Workers' Compensation Board's Opinion of December 16, 2011*)

On April 10, 2013, ALJ Wolff entered an order overruling Ashley's petition for reconsideration. He specifically stated, "There is no apparent or patent error in the Opinion(s), and therefore Defendant Ashley's Petition and Motion is overruled."

On appeal, Ashley argues there was no contract of hire between he and Mercer, therefore the claim against him should be dismissed. Ashley also argues Mercer was an independent contractor, or an employer of Carmen. Ashley next argues the Board misinterpreted the effect of the settlement agreement in its opinion and order of December 16, 2011. Finally, Ashley argues the ALJ's denial of vocational rehabilitation is erroneous.

Since Mercer was successful before the ALJ, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Because the outcome selected by the ALJ is supported by

substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We first address whether ALJ Smith erred in finding Mercer was Ashley's employer. In her opinion, whose findings were adopted by ALJ Wolff, ALJ Smith referred to the nine Ratliff, supra, factors, as well as the four predominant factors as refined in Chambers, supra, and subsequently carried out an analysis. In Ratliff, the Court of Appeals devoted much of its opinion speaking to the liberal inclination of the Kentucky's Workers' Compensation Act in the context of defining an "employee". As stated by the Ratliff Court, this liberal tendency favors a finding of an employee/employer relationship:

> Before attempting to apply the rules of law applicable to the facts of the present case, we should keep in mind the well recognized rule of law in this jurisdiction, that in determining the relationship of employer and employee under the Workmen's Compensation Act a broader and more liberal construction is used favoring employee. *See* Brewer v. Millich, Ky., 276 S.W.2d 12, 15 (1955), wherein this Court said:
>
> 'In answering this question, the approach to be used is that of determining the relation of employer-employee under the Workmen's Compensation Act rather than of master and servant or principal and agent in tort actions. The workmen's

> compensation approach is broader and uses a more liberal construction favoring the employee. This is in harmony with the purpose of the Act in affording protection to the employee because of his inability to withstand the burdens of injury occasioned by his employment and the resultant loss of work.' Ratliff at 323.

As articulated in Brewer v. Millich, 276 S.W.2d 12 (Ky. 1955) and cited by the Ratliff Court, it was the intention of the Kentucky Workers' Compensation Act "to place the burden for injuries received upon the industries in which they were suffered rather than upon a society as a whole." Id. Indeed, the definition of "employee" as set forth in KRS 342.640 is liberally inclusive, setting forth, in part, an employee includes "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury," despite even the lack of a "formal contract of hire." KRS 342.640(4); Hubbard v. Henry, 231 S.W.3d 124, 130 (Ky. 2007). The exemptions set forth in KRS 342.650 narrow the definition of employee, including an exemption for "[a]ny person who would otherwise be covered but who elects not to be covered." KRS 342.650(6). As noted by the Supreme Court in Hubbard v. Henry, supra, this exemption excludes independent contractors.

> An individual who performs service as an independent contractor in the course of an employer's trade, business, profession, or occupation has effectively elected not to be covered. Id. at 128-129

The distinction between "employee" and "independent contractor" is long recognized by Kentucky courts for the purposes of tort liability. However, its presence in the Kentucky workers' compensation context does not undermine the Act's liberal tendencies when it comes to extending the umbrella of the Act's protection over workers. This is stated best in Larson's Workmen's Compensation Law, Volume I, page 623, and cited by the Ratliff Court:

> The term 'employee' is defined by most statutes to include every person in the service of another under any contract of hire, express or implied. Judicial application of this definition to workmen's compensation status problems generally follows the tests worked out by common law distinguishing servants from independent contractors for vicarious liability questions. However, a recognition of the difference between compensation law and vicarious liability in the purpose and function of the employment concept has been reflected both in statutory extensions of the term 'employee' beyond the common law concept and in a gradual broadening of the interpretation of the term to bring within compensation coverage borderline classes for whom compensation protection is appropriate and practical. Id. at 324.

It is in this context that we turn to the nine Ratliff factors, which are the following:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (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;
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> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (f) the length of time for which the person is employed;
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> (g) the method of payment, whether by the time or by the job;
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> (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 the case of Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969), the Court of Appeals

"refined" the nine-factor test by identifying four factors that are most "predominant" by stating as follows:

> the nature of the work as related to the business generally carried on by the alleged employer, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the true intentions of the parties. Id. at 266

Subsequent case law warns 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." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 118, 119 (Ky. 1991).

In her opinion and order, as adopted by ALJ Wolff, ALJ Smith's analysis began by identifying the nine factors as articulated in Ratliff v. Redmon, supra. The ALJ then listed the four predominant factors as articulated in the case of Chambers, supra.

As Larson's Workers' Compensation Law, Desk Edition, Volume 2, Section 44 (1998) notes:

> The traditional test of the employer-employee relation is the right of the employer to control the details of the work. It is the ultimate right of control, under the agreement with the employee, not the overt exercise of that right, which is decisive. If the right of control of details goes no further than is necessary to ensure a

> satisfactory end result, it does not establish employment.

It was reasonable to conclude Mercer was Ashley's employee at all relevant times. Substantial evidence supports decisions by both ALJs Smith and Wolff, Mercer was not an independent contractor and was Ashley's employee. Ashley argues because Carmen actually paid Mercer, he was the employer. It is readily apparent from the testimony of both Carmen and Mercer the payments were made as an accommodation to and upon arrangement by Ashley. Significant is the fact Carmen had never even seen Mercer prior to observing him at the jobsite. Most, if not all other relevant factors lead to and support the conclusion Mercer was Ashley's employee. It is improbable Mercer instinctively appeared at the jobsite to work on a house for Carmen whom he had never met. It was reasonable for ALJs Smith and Wolff to conclude Mercer received direction from and was an employee of Ashley.

Because we believe the ALJs sufficiently weighed each of the factors against the evidence as set out in Ratliff, supra, and Garland, supra, and their conclusions are supported by substantial evidence, we affirm.

Ashley next argues the ALJ erred by failing to award vocational rehabilitation benefits governed by KRS

342.710. Use of the word "may" in KRS 342.710(3) indicates the issue of vocational rehabilitation benefits is entirely within the discretion of the ALJ. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). While ALJ Wolff could have awarded vocational rehabilitation benefits, or referred Mercer for a vocational evaluation, he was not compelled to do so. ALJ Wolff clearly explained his reasons for not awarding vocational rehabilitation benefits, and his findings will not be disturbed.

Finally, Ashley argues this Board misinterpreted the effect of the settlement agreement between Mercer and the UEF. Ashley argues he participated in the settlement to the extent he agreed with the settlement amount. We find this argument misleading, disingenuous and without merit. Nothing in the settlement agreement denotes Ashley participated in the agreement to any extent including the settlement amount. While Ashley and his attorney signed the settlement agreement, the documentation is bereft of any notation outlining his acquiescence to any portion of the agreement other than his right to appeal. Contrary to his argument, the settlement agreement specifically states Ashley was not a participant. In our previous decision, the appeal was dismissed as being yet another attempt at an interlocutory appeal. We further detailed the elements ALJ

Wolff was required to address on remand. He did so, and we find no error.

Accordingly, the October 17, 2007 decision of Hon. Marcel Smith, Administrative Law Judge, and the November 20, 2007 order denying the petition for reconsideration; the settlement agreement approved by Hon. Otto D. Wolff, IV, Administrative Law Judge, on July 14, 2011, and his decision rendered February 18, 2013, along with the orders on reconsideration entered April 9, 2013 and April 10, 2013, are hereby **AFFIRMED.**

ALL CONCUR.

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