

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 2, 2020

CLAIM NO. 201900222

DAOUD OUFABA

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

TAXI, LLC d/b/a TAXI 7 (AKA TAXICAB)
AIG, UNINSURED EMPLOYERS' FUND
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Daoud Oufafa (“Oufafa”) appeals from the January 31, 2020, Opinion and Order and the March 3, 2020, Order of Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ dismissed Oufafa’s claim for benefits holding Oufafa was an independent contractor and not an employee at the time of the January 5, 2018, robbery and shooting which severely injured him.

On appeal, Oufafa asserts the ALJ incorrectly applied the law in resolving the question of whether he was an independent contractor or an employee at the time of the robbery and shooting. Oufafa further asserts the ALJ failed to correctly resolve five of the factors outlined in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965).

We reverse the ALJ's determination TAXI, LLC d/b/a TAXI 7 (AKA TAXICAB) ("Taxi 7") is a taxi leasing company and vacate the determination Oufafa is an independent contractor. We remand the claim for an amended opinion finding Taxi 7 is a taxicab company and a renewed analysis pursuant to the law set forth in Ratliff, Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969), and Kelly Mountain Lumber v. Meade, Nos. 2007-SC-000507-WC, 2007-SC-000526-WC (Ky. 2008) in light of this new finding.

BACKGROUND

The Form 101 indicates Oufafa sustained work-related injuries on January 5, 2018, while in the employ of Taxi 7 in the following manner: "Petitioner was shot in the back while transporting passengers near the intersection of Indian Trail and Newburg. The shots were being fired at Petitioner's passengers. Petitioner was paralyzed from the waist down due to the injury."

The Uninsured Employer's Fund was added as a party to the litigation on February 27, 2019.

Oufafa was deposed, through the use of an interpreter, on March 26, 2019. He began driving for Taxi 7 on February 8, 2016. Exhibit 1 to Oufafa's deposition is a document entitled "Status as a Self-Employed Businessperson" which

Oufafa signed. On this document, Oufafa was also required to handwrite the following: "I am self-employed for all purposes including workers' compensation and unemployment. Whether or not I drive the rented taxicab, I am not an employee of the company." Oufafa testified he did not understand the ramifications of what he had written.

Exhibit 2 to Oufafa's deposition is the "Taxi, LLC Company Car Driver Agreement" ("Driver Agreement"). Oufafa testified that Michael Cregan ("Cregan"), the individual at Taxi 7 who hired him, did not explain the document to him. Nonetheless, Oufafa agreed that he signed at various places throughout the document.

Cregan explained to Oufafa that the rental rate for the taxi was \$405.00 per week. Concerning the parties' responsibility for fixing and repairing the taxi, Oufafa testified as follows:

Q: What did he say about fixing the car?

A: He said if there was any damages or something happens to the car that he is responsible. If the engine or power train have problems, then the company will fix it.

Q: Okay.

A: So the car is also, he said, only for customers. You don't use it for personal use.

Oufafa testified that Taxi 7 informed him that \$30 a week would be deducted from his check which he assumed was for car insurance. Oufafa was provided a 1099 after each year he operated the taxi.

Oufafa testified concerning the penalties which would ensue after rejecting an assignment to transport a customer he had previously accepted:

A: If you accept an assignment or a customer and then you refuse it later one, you just say, 'No, I cannot take it,' then they will shut down your system 15 to 30 minutes so you cannot get a customer.

Q: Okay. So to your understanding, how did the system work? Explain how you would be notified of customers through Taxi 7.

A: So they have a tablet in each car, and that's where the dispatch would send the message. And then I accept or decline. So that's what you do, how you get notified.

Q: Were you allowed to decline dispatches without negative consequence at work?

A: There's no consequences if you refuse or reject the first time at the beginning. But the consequence is if you accept the assignment and then later say, 'No, I cannot do it,' reject it, then that's where the 15 minutes of shutdown would happen.

Oufafa was financially responsible for the gasoline; Taxi 7 was responsible for changing the oil and other fluids. Taxi 7 paid the registration fees and taxes on the taxicabs.

Oufafa testified that Cregan never explained to him that the taxicab rental would increase every year. He was required to go to Taxi 7's physical location every week to pay his weekly vehicle lease.

Oufafa described how the shooting occurred:

A: It was in the morning. It was Friday, 5:00 in the morning. I left my house. I started the car to just warm it up.

And then I got the first assignment. I accepted it. It was on National Turnpike, the intersection of National Turnpike and Third Street. I went there.

When I reached, I called them. They did not answer the call. They sent me a text message, 'Wait. Be patient a little bit.' I waited.

Then two came up. I asked them, 'Where are we going?' Newburg Road is what they told me. And then we left.

We went east on Newburg Road. The others, they give [sic] me at the beginning. Then they told me, 'It's not this address.' They started giving me directions. Then I reached the place, a place that's closed.

One of them got out. They saw somebody who lives there, and who was going to work in the morning. So they said, 'There's somebody here,' and one of them got out of the car.

And then the other one said, 'We need to go to Iroquois Park.' So I asked him if he may pay me the rate for this one that we finished up. 'First, you have to pay me what we did right now, and then we can go to your next – to Iroquois Park.'

He said, 'I don't have change. I have \$100.' So he said – I told him to give me the \$100; and then when we reach Iroquois Park, I can provide the change.

And he took his gun, and he put it on my head and said, 'Give me what you have.' I gave him everything I had. So I told them that, in my head, so I gave them what I have so I would be safe, so they would run away. That's what I thought.

And he took the key of the car. He turned off the car, and he took the key. Then he put the gun to my shoulder, and then he hit me.

Q: Okay. And that is when you were shot?

A: Yes.

Oufafa provided additional details regarding how the dispatch system

worked:

Q: Mr. Oufafa, I want to talk about the way the dispatch system worked. I want to get into that a little bit more.

When the call came up on your tablet to accept or reject, did you know the location of where that call came from?

A: No.

Q: So before you chose to hit accept or reject, you had no idea where the call was coming in from?

A: No, I don't.

Q: So the day of the accident when you accepted that call, you didn't know before you accepted it that it was going to National Turnpike and Seventh Street?

A: I didn't know. Yes. I didn't know.

Q: And this is following up on your previous testimony. If you accepted a call and it went to somewhere that you weren't comfortable going, were you penalized if you then rejected the call?

A: Yes. There was a penalty.

Q: And were you ever told whether you could eventually – could you tell me whether or not you were told there could be any additional consequences if you continued to reject calls?

A: Yes.

Q: What were those?

A: They would stop you from work [sic].

Oufafa testified that when he signed the “Status as a Self-Employed Businessperson,” he did not understand what it meant to waive his workers’ compensation rights.

Q: Sitting here today, March 26, 2019, do you know what ‘workers’ compensation’ means now?

A: Yes.

Q: If you had known what you know now, just in terms of the meaning of 'workers' compensation,' would you have signed this agreement on February 5, 2016?

A: I wouldn't, no.

Oufafa considered Cregan his boss. "He's the one who is responsible, and he's the one who calls you if something happens, and he's the one who solves the problem if there is a problem between you and the customers."

Cregan, the general manager for Taxi 7, was deposed on May 31, 2019. He testified the insurance policy and the vehicle registrations were and are in Taxi 7's name. Importantly, Cregan testified Taxi 7 has workers' compensation insurance.

Q: So, originally, we weren't sure that you had worker's comp insurance. In fact, we didn't believe you had it at all. Who is your worker's comp insurance with?

A: We're with ADP TotalSource, and I believe they use Helmsman as the insured [sic].

Q: Do you know when that policy became effective? Have you had that since you opened

A: Since we opened.

Q: - in 2015? Since you opened in 2015?

A: (Witness nodding head up and down.)

Cregan testified that Taxi 7 owns the permit to operate as a "taxicab company" in Louisville. Taxi 7 also owns the contracts including the contract with the airport. "It's Taxi 7's. It doesn't belong to the driver." Drivers are required to obtain a permit in order to drive/operate a taxicab in Louisville. Taxi 7 is responsible for repairs and maintenance of the taxicabs, including oil changes, and resolving issues with the

brakes, tires, and engine. Only approved drivers covered under Taxi 7's insurance policy can drive the taxicabs.

Cregan acknowledged that Taxi 7 may, in its sole discretion, revoke the right of any driver to operate the taxicab:

Q: So if you'll go to page 23 with me, it's page four of the driver agreement. And 1.16 Lease. If you'll go to the third line there and read the first sentence beginning with 'Company may in its sole discretion.'

A: 'Company may in its sole discretion revoke the right of any driver, including me, to operate the taxicab.'

Q: So if you decided you didn't want them driving, you would have the right just to take the taxicab away and way, you're no longer a Taxi 7 driver?

A: Yes.

Q: Okay. And also, on that same page – we'll go ahead and move on from there.

So let's go to page 24. Will you read 3.1 Early Termination for the record.

A: 'Early Termination. Notwithstanding any other provision of this agreement, either party may end the term at any time, without advance notice, in the event the other party defaults on or breaches any provision of this agreement. I understand and acknowledge that I will be in breach of this agreement if any of the following occur:'

Q: And you can stop there for a second. So if they're in breach of the agreement, does that mean that you would take their right away to drive the taxicab?

A: If they're in breach of their agreement –

Q: You would –

A: - I would use my discretion.

Concerning early termination of drivers for rejecting calls or “gaming the system” as set forth in Section 3.1 in the Driver Agreement, Cregan testified:

A: Okay. That means that- the drivers get their calls on a computer tablet, and they are offered calls from our dispatch. People call in the company number, ask for a taxicab, and the job is sent out to all the drivers. And it comes up on the screen, and if they accept the call, that’s their call. Now they have to go pick up Mr. Jones at 123 Mockingbird Lane.

If they take the call and then they realize, I don’t like that person, or the trip is not what I’m looking for, I’m not going to go pick them up, and they just don’t go and pick them up, now that’s an issue because they customer’s going to call back. And there’s a problem with that. So what drivers tend to do is they’ll learn how to dump calls on the tablet and not go pick them up and be able to move on to another call.

And if they accept the call and dump the call, nobody knows that they’ve dumped the call and that customer is left hanging out there waiting for a ride that they think is coming. If they do that, they’re basically gaming the system. And that’s nothing something that – that’s detrimental to our business. So that’s something that we will talk to them about.”

He testified further as follows:

Q: Now, on these calls, they don’t know where they’re going to pick up somebody before they take the call, do they?

A: Yes, they do. The city is broke up into zones, and they know the general area of where that call is. And if they don’t want to work that zone, for whatever particular reason, when the job pops up on the screen and it says zone 110, if that’s a zone that they don’t want to work, you just hit decline.

Q: Now, if they accept that zone – but they don’t see the address before they accept the call though, do they?

A: They do not.

Q: They see the zone only?

A: Correct.

Q: So if they got a call to a particular address and then decided they weren't comfortable going to that address, even though they're generally comfortable in that zone, they would be penalized if they tried to dump that call?

A: No.

Q: They wouldn't be if they dumped that call?

A: If they dump that call, I'm going to have a conversation with them and find out why they dumped it and tell them what they should do in the future.

Q: Now what if they then reject the call, where they're not gaming the system and they say I'm just not going to take this one?

A: No problem.

Q: But they're not allowed to get calls for 15 minutes after that; am I correct?

A: No.

Q: So if they dump a call – not dump, not gaming the system. I'm talking about they reject the call where you all know they accepted it and then they reject it?

A: They accepted it first?

Q: They accept it first, and then they reject it?

A: If they accept the call, they can't reject the call. It's either accept or reject. If they accept it, they own the call, and they have to go pick the person up.

Q: So their only option is to go pick the person up, to not pick the person up and to cause harm to the business, or to dump the call and cause harm to the business –

A: No.

Q: - those are their three options?

A: There's other options. They could call dispatch, and they could tell them why they can't pick this person up.

Q: Okay.

A: And then the call would get sent back to the base and it would go out to another driver so the customer still gets serviced.

Q: Is that in this driver's agreement? Does it explain that anywhere?

A: No.

Q: Okay.

A: It also doesn't explain what you're saying, you know, what you're saying about it they reject the call. It's something that we discuss with them.

Q: How often do you have to have that discussion about gaming the system with drivers?

A: Not often. The drivers know how the system works. They know what their – you know, what zones they want to work in. And if they have a problem with a call, they'll call our dispatch center, they'll explain to them what the reason is, and that's it.

Q: Have you ever had a problem with someone gaming the system?

A: Not outside of the realm of what we just discussed.

Q: Okay. So you have in the realm we just discussed? I'm a little confused by the answer. I apologize. It's probably me.

A: There are drivers that would dump calls, but after discussing what they were doing and how they were impacting business, it was correct.

Cregan had previously terminated driver's leases because their driving became an unacceptable insurance risk:

A: I believe it was last year when this insurance policy was expired, we shopped for a new insurance policy and the procedure, obviously, is you send all the driving records to the insurance company, they'll review their driving record, and they will tell you which drivers are acceptable to go on the policy and which ones that they think are too high of a risk.

Q: How many drivers did you all have to terminate their leases for when that happened?

A: Two.

Cregan has also terminated a lease due to reckless or dangerous driving. When someone complains to the company about a driver not letting him or her in a lane or cutting that person off, Cregan will speak to the driver and review the dash cam video. Cregan testified this happens a "couple of times a month."

Taxi 7 provides the camera, tablet, meter, and credit card machine inside each of the cabs. The drivers are covered by Taxi 7's insurance policy covering the vehicle. The drivers are not permitted to remove the Taxi 7 logo on the car. Cregan explained:

Q: Okay. So let's talk about branding then. The Taxi 7 logo, very distinct green logo. If a driver wanted to paint the taxicab and start his own driver's – put his own logo on there, would you allow that?

A: No.

Q: Okay. What if he kept the coloring the same and he just took the Taxi 7 out and put his own name on there, would you allow that?

A: No.

Cregan acknowledged that he does not explain what workers' compensation is when he reviews the Driver Agreement with the drivers.

Cregan clarified that Taxi 7 has a permit to operate taxicabs in Louisville. **"We, Taxi 7, have a license to operate taxicabs in the City of Louisville."** (Emphasis added).

Cregan again recounted what happens when a driver dumps a call:

A: It's explained to them that if they accept a call, that they need to service the call, and it's your call. If you've accepted it, it's your call. And unless they call dispatch or call my office and explain why they can't service the call so we can get someone else to do it, if you dump that call and the person's not getting picked up and he still thinks he is, that's a problem, and we're going to have a conversation about that.

...

Q: Is there any way for you – you had testified there's no way for you to know if they dumped a call?

A: No, I would know if they dumped a call. If the customer calls my office and says, I'm waiting for cab 123 to pick me up, it says he's on his way and – yeah, I can figure it out.

Michael Solomon ("Solomon"), President of NBRS Management Services, LLC ("NBRS"), was deposed on September 23, 2019. He testified NBRS provides employees for the group of companies that it owns and pays the employees. He testified as follows:

Q: So what do they specific employees do?

A: They manage various companies, mostly transportation related.

Q: Okay. When you say they manage companies, what do you mean by the term of manage?

A: Depending on the kind of company that we're referring to, the kind of transportation company that they manage, each one of those responsibilities varies by city and the transportation service that we provide.

Q: Okay. Do they manage any taxi companies?

A: Yes.

Q: Okay. What would their job be while they're managing the taxi companies?

A: They're job managing taxi companies, the responsibility lies in the day-to-day operation of the company as it relates to permit of vehicles, keeping vehicles on the road, getting back and forth to the shop, looking for drivers to driver our cars. The revenue source comes from the driver paying for the services they buy from us. They're responsible for looking for accounts to generate revenue for taxicab drivers. Their job is to be vocal and involved in the community, which obviously from a networking perspective increases the ridership or the call count so the driver can earn a living on the road. (Emphasis added).

Solomon testified that he considers himself an expert on "taxi companies" and how they operate across the country. He acknowledged the "drivers" are an integral part of Taxi 7's business. Drivers are not allowed to let non-approved drivers drive their taxis. The drivers are not permitted to alter the colors or branding on the cars they drive. Drivers also cannot "game the system" by accepting a call and then rejecting it. He provided the following:

Q: Okay. Michael Cregan was testifying about how one way that some Louisville drivers tried to do it is they'll I guess accept a call then not find where it is and then drop it and not tell anybody, then they get flack for that. Are you familiar with that at all?

A: Yes. They cannot reject a call once they've accepted it. If they reject a call – they've agreed to take the call. If they reject the call after they've accepted the call there could

be ramifications. In Louisville we don't penalize the driver for it. In some markets we do. In those markets that we do we penalize them 15 minutes the first time, an hour the second time, three hours the next time from taking radio calls. It doesn't mean they can't taxi. It doesn't mean they can't sit in a taxi stand or go work the airport or go do anything else. They just indicated to use they're not interested in taking the calls and picking up the customers that have depended on them to do so by accepting that trip. But it's been years since we suspended a driver in Louisville for any amount of time for what you're referring to in this case as gaming the system by accepting a call then dumping the call.

Q: So you all don't do a 15-minute hold period then in Louisville?

A: No anymore. Not anymore. It's been, like I said, years.

Q: Can you give me like an estimate?

A: Three years, three and a half years maybe. Sometime in the middle 2016s.

Solomon testified that drivers are unable to pick up fares through Uber or Lyft while also working for Taxi 7.

A: You're either a TNC or you're taxicab, not both. A single person can do anything he wants. A private citizen can do whatever they want. But our cabs are branded as permitted taxicabs to operate under the taxi code.

Q: So if you're a permitted taxicab you can't also use that permitted taxicab to drive with Uber or Lyft.

A: That's correct.

The drivers are paid by the job from the "customer."¹

Both Oufafa and Cregan testified at the December 2, 2019, hearing.

Oufafa testified that Taxi 7 set the lease rates and the meter rates. He had no ability to

¹ While Solomon ultimately switched his verbiage to "passenger," we find it significant that Solomon regularly referred to taxicab's passengers as "customers."

change those rates. He estimated that ninety to ninety-five percent of his customers came through the dispatch.

Oufafa discussed an example of what happened when a customer lodged a complaint against him. A woman complained to Taxi 7 because Oufafa did not help her with her bags, and Cregan called him afterwards. Oufafa recounted the following:

A: He called me to warn me about the complaint from that customer because he saw what happened on the camera. He watched what happened between him and the customer through the camera. That's why he called him and he warned him about it.

Q: Now, you – that doesn't make sense, Mr. Oufafa. You said that a customer called and complained, but now you're saying that they were watching through a camera?

A: No, no. Mr. Cregan, he was watching on the camera. He said he use his car to activate the camera and watch the whole thing, what happened between him and the customer.

Q: But I thought you said that the customer called and complained.

A: The customer, she called the office. And office, they called me, that's why I took the car to the office. So they watch through the camera what happened, and that's why they call him and warn him about it.

Cregan testified Taxi 7 has a dispatch system: "So that people – the customers call the number, and then we have an avenue to get the jobs picked up for – you know, put them out there for the independent contractors to take them if they wish."

The City of Louisville inspects the taxicabs every six months, sets the rates, and dictates how the cabs are to operate and look. Cregan referred to other cab companies as "**competing cab companies.**" (Emphasis added).

Cregan could not recall giving Oufafa a warning after a customer complaint. However, Cregan testified as follows:

Q: Okay. Now, it's true that at least a couple times a month you had to discuss bad driving and customer complaints with drivers; isn't that correct?

A: Correct.

Q: And it's also true that you had the power that if they continued – if they go in an at-fault accident, they tried to game the system, if they got too many customer complaints, you had the power to terminate them?

A: I did; terminate their contract.

The following exchange took place regarding a driver's ability to procure his or her own insurance policy covering the vehicle:

Q: And you also just testified that everybody follows the Driver's Agreement; isn't that correct?

A: Everybody follows the driver's –

Q: Well, everybody has to sign and abide by the driver's agreement, correct?

A: Correct.

Q: Okay, and so if the driver's agreement limited insurance policies to those approved by – those procured by the company, you wouldn't disagree with that, would you?

A: I don't understand what you're asking me.

Q: So the driver's agreement, if it limited insurance to only insurance procured by the company, would you disagree with that, that that's the policy you operated on?

A: But it doesn't. They can get their own insurance if they want to.

Q: So you're just saying that the driver's agreement doesn't say that?

A: I'd have to read the driver's agreement again.

Q: Okay. Let's look at the driver's agreement here. Go to page 2.

A: Okay.

Q: And then come down here to 1.6, and read that last sentence of 1.6 for me.

A: Commercial automobile liability insurance policy is approved – is an approved insurance policy if it is produced – procured by the company.

Q: Okay.

A: Okay.

Q: So do you disagree with that?

...

A: I don't disagree with that, no.

Taxi 7 also procures contracts such as with the airport, and it also provides marketing services. Cregan reiterated the Taxi 7 logo cannot be changed on the cars.

Cregan set forth the following pertinent testimony:

Q: Okay. Now, if Taxi 7 had a reputation for having bad drivers, it would hurt your brand, wouldn't it?

A: I'm sure it would, yes.

Q: And you-all actually represent on your business cards that you have neat, clean and polite drivers, correct?

A: We do.

Q: And you performed the background check in part because – for public safety and to show responsibility on Taxi 7’s part, didn’t you?

A: Correct.

The certificate of operation is granted to and owned by Taxi 7. Cregan testified that the drivers cannot negotiate their lease with Taxi 7.

Both parties filed the aforementioned Driver Agreement entered into between Taxi 7 and Oufafa. Pertinent to the issues on appeal are the following sections:

1.6 Commercial Automobile Liability Insurance. I understand that at no time may any driver operate the TAXICAB unless it is insured under a policy of Commercial Automobile Liability Insurance approved by the COMPANY (\$500,000 CSL minimum) and in accordance with all State, City and County rules and regulations (an “Approved Insurance Policy”) that is in full force and effect. ***A Commercial Automobile Liability Insurance policy is an Approved Insurance Policy if it is procured by the COMPANY.*** (Emphasis added).

3.1 Early Termination. Notwithstanding any other provision of this Agreement, either party may end the Term at any time, without advance notice, in the event that the other party defaults on or breaches any provision of this Agreement. I understand and acknowledge that I will be in breach of this Agreement if any of the following occur:

...

(b) I reject calls or ‘game’ the system;

Taxi 7 filed relevant portions of the Louisville Metro Government Regulations pertaining to Ground Transportation. Significant to this appeal are the following definitions:

Ground Transportation Service Carrier. **A business that offers the service of transporting a person or persons within a vehicle for hire upon the streets of Louisville Metro in return for compensation** which is given either at the time of transportation or at some other prearranged time or method.

Vehicle For Hire. Any public conveyance operated to transport passengers for compensation by meter, by contract or fixed rate that shall include limousines, taxicabs, charter buses, wheelchair accessible taxicabs, disabled person vehicles, and airport shuttles, but excludes courtesy and para-transit vehicles. A vehicle for hire must be affiliated with a certificate holder in order to operate in Louisville Metro.

Certificate. A certificate issued by the Department authorizing the holder thereof to provide a specific type of ground transportation service within Louisville Metro.

Certificate Holder. A person who has, owns, or controls a certificate issued by the Department to provide a specific type of ground transportation service. (Emphasis added.)

Sections 115.243 and 115.244 pertain to applications to provide ground transportation service.

The December 2, 2019, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: “employee v. independent contractor” and “coverage exist for the alleged injury.” Under “other contested issues” is the following: “This matter is bifurcated to first determine whether Plaintiff had an employment relationship and, if so, whether there is coverage for the Defendant. All other issues are preserved for future adjudication.” The BRC Order indicates the parties stipulated to a work-related injury occurring on January 5, 2018.

In the January 31, 2020, Opinion and Order, the ALJ provided the following findings and conclusions which are set forth *verbatim*:

...

B. Employment Relationship

The threshold question is whether Oufafa was an employee of Taxi, LLC d.b.a. Taxi and therefore entitled to benefits pursuant to KRS Chapter 342. Taxi 7 argues Oufafa, per the terms of the Car Driver Agreement and Status as a Self-Employed Businessperson document was an independent contractor and therefore not entitled to benefits under the Act. The Defendants also argue the factual nature of the relationship between Oufafa and Taxi 7 does not support a finding that he was an employee.

Assuming for the moment Oufafa understood the terms of the agreements and there was no contractual ambiguity, the contract is not necessarily controlling with reference to establishing the parties' business relationship for purposes of KRS Chapter 342.

In determining whether an employee or independent contractor relationship exists, case law instructs fact-finders are mandated to consider other aspects of the parties' affiliation taken as a whole.

KRS 342.640 defines various classes of employees. In relevant part, it provides as follows:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:

(1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;

....

(4) Every person performing service in the course of the trade, business, profession, or

occupation of an employer at the time of the injury[.]

By contrast, KRS 342.650(6) exempts from coverage workers who would otherwise be covered but elect not to be covered. 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. Hubbard v. Henry, 231 S.W.3d 124, 129 (Ky. 2007).

That said, it is well established that “in a contract of hire, the name adopted by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume.” Duke v. Brown Hotel Co., 481 S.W.2d 289, 290 (Ky. 1972). Depending on the facts of the given case, a claimant labeled by an employer as an independent contractor may, in reality, be no more “independent” than any other at-will employee in Kentucky.

Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), sets forth nine factors to be considered when determining whether an individual is an employee or independent contractor. They are:

- 1.) the extent of control that the alleged employer may exercise over the details of the work;
- 2.) whether the worker is engaged in a distinct occupation or business;
- 3.) whether that type of work is usually done in the locality under the supervision of an employer or by a specialist, without supervision;
- 4.) the degree of skill the work requires;
- 5.) whether the worker or the alleged employer supplies the instrumentalities, tools, and place of work;
- 6.) the length of the employment;
- 7.) the method of payment, whether by the time or the job;
- 8.) whether the work is a part of the regular business of the alleged employer; and

9.) the intent of the parties.

The Ratliff v. Redmon test was refined in Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969) in that the focus is on four of the nine 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 intentions of the parties.

In Husman Snack Foods v. Dillon, 591 S.W.2d 701 (Ky. App. 1979) the Court of Appeals subsequently explained that the purpose of the Act is to spread the cost of an industrial accident to consumers of the product being produced, or, in this case, delivered. Thus, workers come within the Act's scope if their services are a regular and continuing cost of operations and they do not actually function as an independent business that can spread the cost of their industrial accidents. The court noted that all of the Ratliff v. Redmon factors must be considered, but that the Act's risk-spreading theory is fulfilled by treating the role of the alleged employee's work in relation to the employer's regular business as the predominant factor. *See also* Kelly Mountain Lumber v. Meade, Nos. 2007-SC-000507-WC, 2007-SC-000526-WC, 2008 WL 3890701 (Ky. 2008).

In Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 118-19 (Ky. 1991), the court addressed the issue of control over the details of work, noting that Ratliff v. Redmon, *supra*, relied upon Professor Larson's treatise for the principle that the control of the details of work factor can be satisfied through an analysis of the nature of a claimant's work in relation to the regular business of the employer. Citing to the decisions in Chambers v. Wooten's IGA Foodliner, *supra*, and Husman Snack Foods Co. v. Dillon, *supra*, the court emphasized at least the four primary factors must be considered, and a proper legal conclusion could not be drawn from only one or two factors.

Most recently, in Kelly Mountain Lumber v. Meade, supra, the Supreme Court stated:

[i]In summary, the employer/independent contractor analysis has evolved into three major principles: 1.) that all relevant factors must be considered, particularly the four set forth in Chambers v. Wooten's IGA Foodliner, supra; 2.) that the alleged employer's right to control the details of work is the predominant factor in the analysis; and 3.) that UEF v. Garland, supra, and Husman Snack Foods Co. v. Dillon, supra, permit the control factor to be analyzed by looking to the nature of the work that the injured worker performed in relation to the regular business of the employer.

Slip opinion at p. 4.

The parties have briefed the issue thoroughly and done so quite well. Plaintiff submits he is an employee based on three of the four primary factors outlined in Chambers, seven of the nine factors outlined in Ratliff and twelve of sixteen factors outlined in 803 KAR 1:005.

The parties cite Purchase Transp. Services v. Estate of Wilson, 39 S.W.3d 816 (Ky. 2001). Plaintiff notes the holding that a deceased taxi driver was found to be an employee and argues the most compelling fact was that the driver's business came through the dispatch service which the defendant controlled. The Defendants argue Wilson is both clearly distinguishable from this case and also supports the contention that Oufafa was an independent contractor and not an employee.

In Wilson, the decedent entered into an agreement to lease a cab and provide taxi services. Contrary to Oufafa's situation, the Defendant in Wilson set a schedule that the driver must work and, after subtracting the cost of gasoline from the total fares charged, took 50% of the net fares. Wilson did not have the autonomy of working when she wanted and was required to directly share the fare with the defendant.

Oufafa argues the holding in Husman is authoritative as it found a delivery truck driver and salesman was an employee despite the fact that he had a flexible work schedule, signed a purchase agreement for the truck and equipment and was treated as a contractor for federal and

state income tax purposes. He argues the Court's reasoning that the snack food company had control of profit, purchase of goods and pricing applies herein. He also argues the cost of taxicab driver accidents should be borne by the consumer as a part of the cost of the product. The Court in *Husman* found only the snack food company had the opportunity to build the price of the merchandise into the cost of the compensation to the driver.

The ALJ will undertake analysis of the factors bearing on the question of whether or not Oufafa was an employee of Taxi 7.

1.) Nature of the work as it relates to the business of the alleged employer

Taxi 7 leased the taxicab and equipment to Oufafa. It also providing the certificate of operation that allowed Oufafa to drive a cab and the dispatch service that notified Oufafa of the overwhelming majority of potential customers in the city. However, Oufafa did not work a set schedule and could accept or reject pick-ups as he saw fit. In fact, he could park the cab for as long as he wanted provided he paid the lease as it came due. The Defendant alleges it is a taxicab leasing company whose customer is the driver. It submits the driver's customer is the passenger.

As a regulated industry, the city of Louisville also exercised control over the appearance of the cab, did routine inspections and required Oufafa to be permitted to drive. Taxi 7 did not actually transport people, it provided Oufafa the means to do so. The ALJ agrees with Solomon's testimony that the structure of the business is driven by costs considerations on both sides—both from the owner of the cabs and the driver. Each has reasons to desire the relationship to be other than that of employee-employer.

The obvious cost driver for the owner of the cab fleet is worker's compensation insurance. By setting up a relationship that is that of independent contractor with the drivers, the owner of the vehicles and certificate enables itself to generate revenue through lease payments rather than direct fare-splitting. It also does not have employees. Similarly, the driver retains the autonomy of setting his own schedule, avoiding withholdings, working

in areas and at times he desires and to have some control over the amount of fares he generates with a set cost of the cab. In other words, once the driver has the lease payment covered, all the earnings over and above that amount are his and his alone.

In the absence of drivers, a taxi leasing company would have no market for leasing the cabs it owns and outfits. Consistent with Solomon's testimony, the ALJ finds Oufafa's work as a taxicab driver was an integral part of Taxi LLC's business of leasing cabs to operators and this factor weighs in favor of an employer/employee relationship.

2.) Extent of control exercised by the alleged employer

Oufafa argues Taxi 7 controlled (1) the cab; (2) the equipment inside; (3) the method of payment to the driver; (4) insurance; (5) registration and certificates of operation; (6) rates of the lease and of the fares; (7) customers and dispatch services; (8) logo and branding; (9) use of the cab; (10) dash cameras; and (11) operation and driver conduct. He claims Taxi 7 provided everything to the driver—marking, airport contracts, dispatch services, repairs, certificates, insurance and processing of credit card payments. He claims that Taxi 7's income is directly and inseparably connected to the drivers and the drivers are an integral part of the business. Solomon's testimony was also cited in support of a finding that the drivers are an integral part of the Defendant's business.

The ALJ is aware that similar arguments have been raised with regard to business such as Uber. That company facilitates the connection of drivers and passengers while the drivers actually perform the service of transporting customers. *See Saleem v. Corporate Transportation Group, Ltd.*, 854 F.3d 131 (2d. Cir. 2017); *Razak, et al. v. Uber Technologies, Inc.*, 16-CV-00573 (E.D.Pa. April 11, 2018) and *McGillis v. Department of Economic Opportunity*, 210 So.3d 220 (FDCA 3d Dist. 2017) for the proposition that Uber and other ride-sharing services have been found independent contractors in the courts.

Saleem involved drivers who owned or operated for hire vehicle franchises. The drivers paid franchise fees pursuant to a franchise agreement. Drivers had multiple ways to procure fares—(1) physically waiting outside

high volume locations; (2) pursuant to a contract assignment for a designated clients or (3) through a proprietary dispatch system where requests were received via an application (“app”) on a smart phone. The 2nd Circuit noted most of the drivers worked for other services, could chose the area in which they wanted assignments and could switch between dispatch bases as they wanted. The Court held the drivers were independent contractors under the economic reality test. In doing so it found the Plaintiffs regularly actually set their own schedule and turned down assignments and used their business acumen in deciding the manner and extent of their affiliation with the franchise; worked for other car services and could cultivate their own clients.

In McGillis, the Court used Florida common law to determine he was an independent contractor for Uber and not an Uber employee for purposes of deciding whether or not he was eligible to statutory reemployment assistance. It engaged in an analysis similar to that prescribed by Ratliff, *infra*. It found the contractual designation of independent contractor was consistent with the actual conduct of the parties.

The ALJ has also consulted the Board decision of Hartman v. Yellow Cab of Newport, Inc. et al., WCB No. 1993-31135, September 3, 1996. Then ALJ James Kerr had determined Hartman was an independent contractor and dismissed her claim. The Board initially reversed citing Professor Larson’s treatise:

Larson states that when the employer furnishes valuable equipment, the relationship is almost invariably that of employment. Section 44.34(a). Larson informs that cases where the employer owns an expensive truck, the driver is always found to be an employee. Larson cautions, however, that the employer’s equipment test did not necessarily apply if the employer, instead of merely turning the equipment over to the employee, leases it to the employee under an agreed payment scheme. He specifically mentions taxicab owner leasing cabs to drivers:

In such cases the return to the owner flows directly from the rental of the property, rather than incidentally from the utilization of the capital equipment. But even in such cases, evidence of various forms of control, of display of employer's name on the cab, of legal requirements that the cab company carry compensation insurance, of servicing the cab by the employer, and the right to discharge the driver will often lead to the holding of employment relationship.

The Board was reversed by the Court of Appeals and the claim was ultimately remanded to the ALJ for further findings. Those were as follows:

The nature of business of Yellow Cab of Newport, Inc., consists of a permit to operate taxicabs in the City of Newport and the lease of its taxicabs to various drivers to operate under the provisions of Yellow Cab's lease agreement. . . . There is no evidence that any direct employee of Yellow Cab operates a cab under the taxi permit or that Yellow Cab has salaried drivers or employees paid by the hour to operate its cabs. Further, the undersigned finds that the testimony of Carl Ward is credible that Yellow Cab collects a stipulated lease fee from the drivers for the use of the cab and does not participate in a division of gross revenue produced by the drivers during the shift for which the driver worked. Further, Yellow Cab paid no employer withholding tax, no unemployment, no payroll, no Social Security tax and furnished no W-2 to any driver, who were responsible for their own income taxes.

The Board went on to note the ALJ found:

...that "while Hartman received assignments from the dispatcher, she was not required to accept those runs, and that she was free to cruise and pick up fares if

she was flagged down or hailed while cruising. She was not required to stay within the confines of any particular area, was not required to pick up a set number of fares during any shift nor was she restricted to what routes to take while delivering fares to their destination. . . Hartman was free to determine [her]. . . shift, was free to determine how many days she wanted to drive. . .".

The ALJ found Hartman was not required to account for the amount of fares taken during a, but instead paid Yellow Cab the rental of the vehicle and was provided a receipt for the purpose of enabling her to calculate her income tax. The ALJ also found that her daily logs were required of her because it was a governmental requirement and that Yellow Cab was required by statute, as the owner of the vehicle, to maintain insurance on the cab. The ALJ held:

Hartman paid Yellow Cab to use the cab and Yellow Cab did not pay for picking up and delivering passengers for a fare. The undersigned concludes that Yellow Cab did not control the details of the work and its only control over Hartman was its right to refuse to lease the cab to her.

The other factor regarding control over the details of the work is the regulation of the industry by city of Louisville. The fact that the city has promulgated regulations regarding the appearance of cabs, permit requirements, inspections, and sets the maximum rates is significant. Oufafa alleges Taxi 7 controlled the rates he could charge and would not let him put his name on the exterior of the cab, et. cetera. Many of those allegations of control are actually regulatory requirements set by the city. Similarly, the allegation regarding attire is shown from the record to be a part of the contract for picking up passengers from the airport. That is not a mandate of Taxi 7, but rather a contractual obligation determined by the airport for the allowance of the Taxi 7 flag to have cabs at the airport to transport travelers.

Oufafa was free to drive his cab when and where he saw fit. He alleges the flexibility in his schedule is illusory, but

the ALJ finds it important. Also important is that he paid a set lease payment and was free to generate fare over as he saw fit and could drive in whatever zone he desire. He could even reject dispatch and had free reign to choose to accept or reject any lead on a passenger.

The fact that Oufafa retained autonomy in his schedule, had the ability accept and reject any dispatch calls causes the ALJ to find that Taxi 7 did not exercise significant control over either the Oufafa. The ALJ is aware there is a distinction between the right to control and the extent of control. Once Oufafa decided to enter into the lease, Taxi 7 did not have the right to control his every day work and did not do so. It did have the right to control the equipment it owned and to monitor its' use.

The ALJ finds this factor weighs in favor of a finding of an independent contractor.

3.) Degree of professional skill the work requires

Plaintiff argues there is no specialized skill or training involved in the Plaintiff's work as a taxicab driver. Nothing more than a background check and drug test is required. Oufafa cites the decision in Wilson for the premise that a cab driver need only be over age 16 and eligible for a license.

The Defendant argues that since Wilson was decided, the requirements for operating a cab have changes. Oufafa was required to apply for a permit from the city. The regulations promulgated by the city also require drivers to take a hospitality course and safety training.

An independent contractor typically possesses the skill or trade for which he or she is hired and requires no training by the party contracting for services. Oufafa did not have to be taught how to drive and the use of the equipment associated with operating the cab—a tablet, meter and credit card machine—was not such that the ALJ is persuaded he had professional skill.

This factor favors a finding of an employment relationship.

4.) Intent of the parties.

The intent of the parties is manifested in the contract signed by Oufafa in both the Company Driver's Agreement and Status as a Self-Employed Businessperson document. Cregan testified he told Oufafa he would be an independent contractor and Solomon's testimony echoed the intent of Taxi 7 as to the relationship with Oufafa.

Plaintiff signed the agreements that clearly identify him as an independent contractor and was issued a 1099. He did not have any withholdings from his income and kept 100% of the fares he received. Oufafa filed taxes and identified himself as self-employed.

Oufafa argues he felt Cregan was his boss and that is indicative of his belief that he was an employee. The ALJ is not persuaded by the use of that moniker as determinative of intent. The intent of the parties is most readily gleaned at the outset of the relationship and the evidence indicates both the Defendant and Oufafa intended him to be an independent contractor. The terms of the agreement also are indicative of a capital lease and not an employment agreement. Taxi 7 has the right to insure and protect the equipment and brand. Nothing about the ability to insure a cab it owns or to comply with Louisville-Metro regulations is persuasive to the ALJ that an employment relationship was intended.

The undersigned finds the most persuasive fact on the parties' intentions regarding the relationship to be the fact that all Taxi 7 received was a lease payment and not a percentage of fares collected. One could argue that distinction is semantical because how else was Oufafa to pay the lease payments except through collecting fares. However, by setting a set lease rate Oufafa had control over his ability to make profit over and above that amount. If he desired to make just enough to pay the lease rate he could do so. The same is true if he wanted to make more than the rate. Also important is the fact that Taxi 7 has owner-operators who pay a lower rate because they own their cabs.

Because Oufafa maintained control over how much money he would make based on how much time he spent driving his cab, the ALJ finds he too intended an independent contractor relationship. He has work history as an employee who earned an hourly wage. He then

entered into this arrangement and showed no signs of ceasing it until he was tragically shot and injured.

The undersigned finds both parties intended Oufafa's relationship with Taxi 7 to be that of an independent contractor. Of the four predominant factors, the ALJ has determined two support a finding of an employee/employer relationship while the other two support a finding of an independent contractor relationship.

5.) Whether the worker is engaged in a distinct occupation or business

This issue is very closely aligned with the analysis above. Defendant argues that it was in the business of leasing cabs while the Plaintiff was in the business of transporting passengers. Unlike the integral part of the business analysis performed above, the question of whether or not Oufafa's work was distinct is different. He drove a cab. The alleged employer is Taxi 7 who provides the capital equipment, certificate of operation and dispatch services. It does not also transport passengers. It leases vehicles and provides information but does not drive. Oufafa is in the business of driving passengers. He could perform that work for Uber or Lyft or for another cab company. His work is distinct from leasing cabs and performing dispatch services.

The undersigned is persuaded Oufafa was engaged in a distinct occupation or business as a cab driver. Although that business is an integral part of Taxi 7's business of leasing taxicabs it is still distinct.

The ALJ believes Oufafa was engaged in a distinct occupation or business but that his work was an integral part of Taxi 7's business. Because his work was distinct, this factor supports a finding Oufafa was an independent contractor.

6.) Whether the type of work is usually done in the locality under the supervision of an employer or by a specialist, without supervision;

The record is clear that Oufafa performed his day-to-day work without direct supervision. Oufafa did stop by once a week to pay his lease and occasionally to pick up paper

for his credit card machine, but he was not supervised by Cregan. Solomon testified it was an industry norm taxi services to be set up on a lease basis with the drivers being independent contractors.

The autonomy enjoyed by Oufafa in his daily work weighs in favor of him being an independent contractor.

7.) Whether the worker or the alleged employer supplies the instrumentalities, tools, and place of work

Oufafa was furnished the cab, dispatch equipment, tablet and credit card machine pursuant to the lease agreement. Taxi 7 argues the industry standard was for a leasing company to lease equipment to the driver. It feels that fact should be determinative of this factor. The ALJ disagrees. There is no dispute that Taxi 7 provided the tools and even the certificate of operation. While Oufafa did apply for and receive his own permit, he could not have worked as a cab driver without the cab, equipment therein and dispatch services.

This factor weighs in favor of an employment relationship.

6.) Length of the employment

The Car Driver Agreement did not contain a specified term of Oufafa's relationship. It contemplated weekly lease payments and termination by both parties on a monthly basis. The testimony regarding the agreement was that it could be indefinite if all parties were satisfied with the relationship. Both Oufafa and Taxi 7 could end the relationship. Oufafa had been driving a Taxi 7 cab from February 8, 2016 until the day he was shot on January 5, 2019.

This factor is difficult as it has a contractual component—the lease. The capital lease was a monthly lease that Oufafa played on a weekly basis. Provided the lease was paid, all indication are he would be able to continue driving his cab as long as he wanted. In essence, this factor supports neither classification over the other as it is a mixed bag of month-to-month contract work and indefinite duration provided the lease was paid.

7.) Method of payment, whether by the time or the job

Oufafa was not paid by Taxi 7. He received fares from the public at the conclusion of delivering them to their destinations. Although Taxi 7 provided credit card processing and accounted for those transactions, it did not compensate Oufafa by the hour, by the job or in any other fashion. It simply provided the equipment and Oufafa earned whatever he could depending on the work he did and the fares he collected. The documents filed by Plaintiff that show the lease payments and credit card transactions do not record or reflect the cash payments he received. They simply served to track his lease obligation and credit card receipts and any other fees.

The undersigned is persuaded this factor weighs in favor of an independent contractor relationship because Oufafa was entitled to keep 100% of the fare he generated.

8.) Whether the work is a part of the regular business of the alleged employer

The undersigned has evaluated this factor above in paragraph 1.). As indicated therein, consistent with Solomon's testimony and the symbiotic relationship between a cab leasing company and cab drivers, the undersigned finds Oufafa's work was a part of the regular business of Taxi 7. In fact Turner's work was integral to Ladder Now's business. Therefore this factor favors an employee/employer relationship.

As the parties can see from the above analysis, this claim presents a very difficult set of facts and law. The ALJ has evaluated the factors required by the Courts in both Ratliff and Chambers. The predominant factors are split. The remaining Ratliff factors weigh slightly in favor of a finding of independent contractor. This is a unique situation where Oufafa's employment is an integral part of Taxi 7's business but he plays a distinct role. The Taxi 7 business model is that of a leasing company. It has priced the lease of the cabs and allowed the driver to make whatever profit he can. It has also left the amount of work and schedule up to the driver.

Oufafa has suffered a tragic injury through no fault of his own. His injuries are permanent and he is drawing Social Security and is enrolled in Medicare. He was simply performing his work early one morning and was the

victim of a horrific crime. He argues the ALJ should find, pursuant to the holding in *Husman*, that it was Taxi 7 who had the ability to pass on the costs of his injuries to the consumer rather than society as a whole. The risk in this instance was a random and heinous criminal act. It was not a motor vehicle accident or trip and fall.

Taxi 7 leased the cab and Oufafa was the driver. Oufafa paid Taxi 7 the lease amounts while the city dictated the maximum fare Oufafa could charge. Taxi 7 had no way, in this particular relationship, to pass on the costs of the injuries to passengers in Oufafa's cab. This is not a situation where a product is being sold. This is a service provided by Oufafa with capital equipment provided by Taxi 7.

This is a claim where great empathy exists for Oufafa's plight. The undersigned is obligated, however, to apply the law to the facts presented. In doing so, the ALJ finds the factors evaluated lead to the finding that Oufafa was an independent contractor. He signed an agreement to drive a cab as an independent contractor and did so for approximately three years. His tax returns reflect he identified himself as a self-employed taxicab driver. Taxi 7 provided him with a cab and services to help him procure passengers. It did not control his day to day work activities and he had autonomy.

Although it gives the undersigned no pleasure to do so the analysis dictates the result and Oufafa's claim for benefits against Taxi, LLC d.b.a. Taxi 7 is hereby dismissed as the ALJ find he was an independent contractor and not an employee.

The remaining issues are moot in light of the above finding.

Oufafa and AIG filed Petitions for Reconsideration. Oufafa alleged several errors of law and fact, including all of the errors he now alleges on appeal. In the March 3, 2020, Order addressing Oufafa's Petition for Reconsideration, the ALJ set forth the following additional findings:

This matter is before the ALJ on Plaintiff's Petition for reconsideration of the January 31, 2020 Opinion and

Order. Oufafa alleges numerous errors of both fact and law. KRS 342.281 limits the scope of a Petition for Reconsideration the ALJ believes the January 31, 2020 Opinion and Order provided well more than sufficient explanation of his findings to permit meaningful appellate review. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Nonetheless, the ALJ will attempt to address the arguments raised by Oufafa in his Petition. First, Oufafa alleges the following errors of fact were made by the ALJ.

1. Plaintiff was required to procure insurance through Taxi LLC

Oufafa argues the driver's agreement required him to obtain insurance through Taxi 7 because the agreement stated the insurance had to be an Approved Insurance Policy. He argues only insurance obtained through Taxi 7 satisfied that requirement. The ALJ addressed the issue of insurance in the Opinion and Order. As the owner of the vehicle, Taxi 7 retained the right to approve the insurance procured. Nothing is unusual to the ALJ about that fact as Oufafa was not the owner of the vehicle. The driver's agreement noted the right of approval and the ALJ declines to adopt the Plaintiff's interpretations of the facts.

2. Taxi 7 was in the best position to pass risk of the work injury to the industry instead of society

This allegation was argued at length by the parties and addressed by the ALJ in the Opinion and Order. The risk of loss in Oufafa's claim was that of a robbery and injury via gunshot. There are no facts of record that address the frequency of such events in the taxi industry as compared to the general public. Further, the ALJ specifically addressed Oufafa's ability to generate more income. He could obtain a dedicated customer base, drive more, flat rate fare, etc. Nothing in the record persuades the ALJ that he erred in addressing the Plaintiff's argument in light of the holding in Husman Snack Foods Co. v. Dillon, 591 S.W.2d 701 (Ky. App. 1979).

3. The Certificate of Operation was Taxi 7's

- a. It was a taxi transportation service and in the business of transporting customers;
- b. Had training procedures for drivers;
- c. Set rules and regulations for driver conduct and appearance;

Oufafa next argues Taxi 7 represented it was a taxi transportation service when it obtained the Certificate of Operation from the City of Louisville. In doing so, Plaintiff asserts Taxi 7 represented it had training procedures for drivers and rules regarding driver conduct and appearance. He argues as a result of the certificate, these facts are established and were not found by the ALJ. Oufafa argues Taxi 7 cannot be simply a taxicab leasing company in light of the representations made in the application for the certificate. In essence, Oufafa argues Taxi 7 should be estopped from arguing it is not an employer engaged in the business of a transportation service. The ALJ's analysis was focused on the conduct of the parties based on the evidence of record. The estoppel argument contemplates an evaluation of Taxi 7's conduct vis-à-vis the City of Louisville. Although possibly relevant, the ALJ's findings do not rely solely on the certificate of operation and, instead, look to Taxi 7's dealings with Oufafa. Based on the driver's agreement and the testimony from Oufafa, Cregan and Michael Soloman, the ALJ concluded the relationship between Taxi 7 and Oufafa was that of an independent contractor. The application for the certificate of operation does not change the nature of the ALJ's analysis.

4. Taxi 7 disciplined, supervised and monitored drivers

Oufafa next argues the ALJ failed to find Taxi 7 had video footage of the activity in its' cabs and that the drivers did "not have access or control" over the footage. Taxi 7 also had a GPS tracking system on each cab and required the cab to be clean. The video footage was available to the drivers through Cregan. The ALJ does not find that fact significant. Again, Taxi 7 owned the cab and was merely leasing it to Plaintiff. It retained the right to have video footage and GPS tracking on the car that it owned. Those facts represent efforts to protect an interest in the cab and do not amount to control over Oufafa. Oufafa also argues he was disciplined following customer complaints on two

occasions. There is no evidence of anything other than a conversation regarding complaints phoned in to Taxi 7. Oufafa suffered no pecuniary penalty, suspension or fine. Plaintiff also argues the ALJ erred in failing to make findings regarding the so called 15-minute penalty. Oufafa never experienced any such discipline and the ALJ does not find that issue relevant to the findings herein. The driver's agreement allowed Taxi 7 some measures to protect the certificate of operation and the taxicab. Those provisions were not viewed by the ALJ as evidence of control over the day-to-day activities of the Plaintiff. That findings will not be changed herein.

5. Taxi 7 had the right to control Oufafa's employment whether it exerted control or not Oufafa next argues Taxi 7 had the right to control Oufafa whether it actually did so or not. This issue is dealt with above and will not be addressed herein again.

6. Taxi 7 represented to the public that the drivers were employees The next argument is akin to the argument in 3 above—that Taxi 7 represented to the public it had drivers and therefore is estopped from claiming it is not an employer. Oufafa argues Cregan's business card represents Taxi 7 has neat, clean and polite drivers. The ALJ does not consider the content of the business card to govern the nature of the relationship of the parties.

7. Plaintiff's employment was for an indefinite period The argument regarding the duration of employment was addressed by the ALJ in the Opinion and Order. The undersigned found the issue was a "mixed bag" because the lease was month-to-month and both parties retained the right to terminate the relationship at any time. Granted, by virtue of that fact the end date of the relationship was unknown but it was tied to performance under the lease agreement. The ALJ is not persuaded he committed error in making the finding that this factor was a mixed bag.

8. True intention of the parties cannot be discerned Plaintiff argues the true intention of the parties was not capable of being discerned. The ALJ stated the reasons for his findings on this issue and will not expand upon them herein.

Errors of Law

Oufafa also alleges the ALJ committed a number of errors of law. Those arguments are not properly the subject of a Petition for Reconsideration and the ALJ, even if persuaded by the Plaintiff's contentions, cannot step outside the statutory scope of a Petition pursuant to KRS 342.281. The ALJ declines to modify any of the findings made in the January 31, 2020 Opinion and Order.

Plaintiff's Petition for Reconsideration is OVERRULED.

The ALJ sustained AIG's petition for reconsideration and amended the January 31, 2020, decision to reflect AIG and the Uninsured Employers' Fund ("UEF") were dismissed as parties to the claim.

ANALYSIS

Oufafa first asserts the ALJ incorrectly engaged in a ten-factor "hybrid" analysis in which he implemented a combination of the nine factors set forth in Ratliff v. Redmon, *supra*, and the four factors set forth in Chambers v. Wooten's IGA Foodliner, *supra*. Oufafa argues that in doing so the ALJ failed to properly consider the law as set forth in Kelly Mountain Lumber v. Meade, *supra*, specifically Taxi 7's *right* to control Oufafa's work in relation to the nature of Taxi 7's business.

KRS 342.640 defines various classes of employees. In relevant part, it provides as follows:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:

- (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;

.....

(4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury[.]

By contrast, KRS 342.650(6) exempts from coverage workers who would otherwise be covered but elect not to be covered. 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. Hubbard v. Henry, 231 S.W.3d 124, 129 (Ky. 2007).

There has been an evolving analysis pertaining to the independent contractor/employee question. Ratliff v. Redmon, supra, set forth nine factors to be considered when determining whether an individual is an employee or independent contractor which are as follows: 1.) the extent of control that the alleged employer may exercise over the details of the work; 2.) whether the worker is engaged in a distinct occupation or business; 3.) whether that type of work is usually done in the locality under the supervision of an employer or by a specialist, without supervision; 4.) the degree of skill the work requires; 5.) whether the worker or the alleged employer supplies the instrumentalities, tools, and place of work; 6.) the length of the employment; 7.) the method of payment, whether by the time or the job; 8.) whether the work is a part of the regular business of the alleged employer; and 9.) the intent of the parties.

However, the Ratliff v. Redmon test was refined in Chambers v. Wooten's IGA Foodliner, supra, as the focus was narrowed to four of the nine Ratliff 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 intentions of the parties.

In Husman Snack Foods v. Dillon, 591 S.W.2d 701 (Ky. App. 1979), the Court of Appeals explained that the purpose of the Act is to spread the cost of an industrial accident to consumers. Thus, workers come within the Act's scope if their services are a regular and continuing cost of operations. The Court held, in pertinent part, as follows:

Larson, in his text *Workmen's Compensation Law* s 43.51 (1978), wrote that **the treatment of the claimant's work in relation to the regular business of the employer as the dominant factor in the decision of whether the claimant is an employee, fulfills the theory of risk spreading embodied in compensation.** Larson describes the proposition in this fashion:

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

Id. at 703. (Emphasis added.)

In Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991), the Kentucky Supreme Court agreed that the “control of the details of work factor can be provided by analysis of the ‘*nature of the claimant's work in relation to the regular business of the employer.*’” *Ratliff*, 396 S.W.2d at 325. (Emphasis in original.)” Id. at 118.

Finally, in Kelly Mountain Lumber v. Meade, supra, the Kentucky Supreme Court stated as follows:

In summary, the employer / independent contractor analysis has evolved into three major principles: 1.) that all relevant factors must be considered, particularly the four set forth in Chambers v. Wooten's IGA Foodliner, *supra*; 2.) that the alleged employer's right to control the details of work is the predominant factor in the analysis; and 3.) **that UEF v. Garland, supra, and Husman Snack Foods Co. v. Dillon, supra, permit the control factor to be analyzed by looking to the nature of the work that the injured worker performed in relation to the regular business of the employer.**

Slip Op. at 4. (Emphasis added).

In Hicks v. Eck Miller Transportation, No. 2003-SC-0272-WC, 2004 WL 868489 (Ky. 2004), the Supreme Court reiterated the three principles announced in Meade.

In the case *sub judice*, the ALJ indeed engaged in an exhaustive and commendable ten-factor analysis which encompassed all nine Ratliff factors and the first of the four Ratliff factors (i.e. the nature of the work as related to the business of the alleged employer) the Court found most significant in Chambers. In essence, the ALJ analyzed the eighth Ratliff factor (i.e. whether the work is a part of the regular business of the alleged employer) twice. This is of no consequence. Further, despite Oufafa's claims to the contrary, the ALJ drew several distinctions between the "extent of control" and the "right to control." Therefore, we are satisfied that the ALJ understood and acknowledged the distinction.

That said, while the ALJ may have carried out an analysis consistent with the law set forth in Ratliff, Chambers, and Meade, his erroneous conclusion that Taxi 7 is a "taxi leasing company," instead of a taxicab company, tainted the entirety of his analysis. Both the January 31, 2020, Opinion and Order and the March 3, 2020,

Order more than once refer to Taxi 7 as a “taxi leasing company,” a “leasing company,” and “in the business of leasing.” Unquestionably, a proper understanding of the nature of the alleged employer’s regular business is essential before undertaking an analysis under Ratliff, Chambers, and Meade. As we previously pointed out, the Court in Dillon stated, “**the treatment of the claimant's work in relation to the regular business of the employer as the dominant factor in the decision of whether the claimant is an employee, fulfills the theory of risk spreading embodied in compensation.**” Dillon at 703. (Emphasis added). In other words, before the ALJ can accurately determine if his delineation of a worker as an “employee” or “independent contractor” satisfies the theory of risk spreading which is essential to the workers’ compensation system, he must have an accurate understanding of the claimant’s work in relation to the regular business of the employer. Absent an accurate understanding of the regular business of the employer, the ALJ cannot fulfill his obligations to the parties and the workers’ compensation system as a whole. Consequently, we reverse the ALJ’s determination Taxi 7 is a taxi leasing company, vacate the ALJ’s determination Oufafa is an independent contractor, and the February 21, 2020, Order dismissing AIG and the UEF as parties. The claim is remanded to the ALJ for an amended opinion finding Taxi 7 is a taxicab company. Consequently, a renewed analysis pursuant to the law set forth in Ratliff, Chambers, and Meade in light of this new finding is necessary.

Persuasive on this issue is the deposition and hearing testimony of Cregan as well as the deposition testimony of Solomon. In Cregan’s May 31, 2019, deposition, he testified that Taxi 7’s permit from the City of Louisville was to operate

as a “**taxicab company**.” (Emphasis added). As a taxicab company, Taxi 7 owns certain contracts such as the contract with the airport. Later in his deposition, Cregan testified as follows: “We, Taxi 7, have a license to **operate taxicabs** in the City of Louisville.” (Emphasis added). Cregan also was asked to clarify the issue of Taxi 7’s permit to operate taxicabs in Louisville. As noted, Cregan repeatedly characterized Taxi 7 as a taxicab company. We agree.

Further bearing on the issue of Taxi 7’s status as a taxicab company as opposed to a taxi leasing company, is that drivers are not allowed to alter the logo or color on their cars. We are cognizant the appearance of taxicabs is regulated by the City of Louisville and have reviewed the applicable regulations. However, the regulations pertain to Ground Transportation Service Carriers, not leasing companies, and drivers like Oufafa. Pursuant to Section 115.251(C), when a vehicle for hire fails to meet the requirements of the inspection, it is the “certificate holder,” in this case Taxi 7, that is “informed promptly of inspection results” and not the driver.

Perhaps most significant is Cregan’s testimony regarding Section 3.1 of the Taxi 7 Driver Agreement pertaining to rejecting calls or “gaming the system.” Cregan testified that when a driver accepts a call and subsequently drops it, the “customer is left hanging out there waiting for a ride that they think is coming.” Cregan emphasized such behavior is “detrimental to our business” and something that he would discuss with the driver. Wholly incongruous is the notion a taxi leasing company would not only refer to the passengers riding in its leased taxis as “customers” but also characterize the act of leaving passengers (customers) hanging as being detrimental to its business.

Cregan's deposition testimony reveals he spoke to drivers a couple of times a month regarding complaints about their driving, something that is presumably beyond the scope of a taxi leasing company's purview. Oufafa's hearing testimony disclosed an incident in which a customer called the office to complain that he did not help her with her bags which prompted a warning after Cregan reviewed the taxi monitor. Cregan did not deny giving Oufafa the warning but instead did not recall doing so.

Cregan's hearing testimony is a reiteration of much of the above-cited pertinent deposition testimony. Notably, at the hearing, Cregan referred to other taxi companies as "competing **cab companies**" rather than taxi leasing companies. (Emphasis added). Cregan also reaffirmed that bad drivers are detrimental to Taxi 7's "brand." He also admitted that Taxi 7's business cards refer specifically to "neat, clean, and polite **drivers**," which raises the question - does a taxi leasing company have drivers? (Emphasis added).

Further, at the hearing, Cregan acknowledged that, pursuant to Section 1.6 of the Driver's Agreement, an "approved" commercial automobile liability insurance is that which is procured by Taxi 7, a fact that is strongly supportive of Taxi 7 being a taxicab company.

Buttressing the conclusion Taxi 7 is a taxicab company is the deposition testimony of Solomon. As an initial matter, Solomon testified that the employees of NBRS, the company over which Solomon is the President, manage mainly "transportation related" companies, including "**taxi companies**." (Emphasis added). Moreover, Solomon testified he considers himself an expert on "**taxi companies**." He

testified that “drivers” are an integral part of Taxi 7’s business. Solomon also confirmed that drivers are not allowed to change the colors or branding on their cars, and are also not allowed to game the system by accepting and then rejecting calls without “ramifications.” He confirmed drivers are not allowed to work for Uber or Lyft in conjunction with working for Taxi 7. Solomon, like Cregan, referred to the taxi passengers as “customers.”

The evidence in the record compels only one conclusion – Taxi 7 is a taxicab company and not a taxi leasing company. “Compelling evidence” is defined as evidence that is 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). Here, the evidence supporting Taxi 7 being a taxicab company is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Put another way, the ALJ’s finding of fact concluding Taxi 7 is a taxi leasing company is so unreasonable under the evidence that it must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We emphasize that much of the evidence persuasive in our analysis of the nature of Taxi 7’s business also directly addresses the extent of control Taxi 7 exercised over the details of Oufafa’s work as well as the *right to control* the details of Oufafa’s work. This is unsurprising, as the Courts have, on numerous occasions, acknowledged the intertwined association between an analysis of the control factor and an analysis of the nature of the claimant’s work in relation to the *regular business of the employer*. See Husman Snack Foods v. Dillon, supra, Uninsured Employers' Fund v. Garland, supra, and Meade, supra. Therefore, on remand, the ALJ must look to the

nature of the work Oufafa performed in relation to the regular business of Taxi 7 as a taxicab company when re-analyzing the control factor. Meade, Slip Op. at 4.

We are compelled to address the weight given to the language of the Driver Agreement and the document entitled “Status as a Self-Employed Businessperson.” This issue was preserved for review in Oufafa’s appeal brief. In the January 31, 2020, Opinion and Order, the ALJ stated that the “intent of the parties is manifested in the contract signed by Oufafa in both the Company Driver’s Agreement and Status as a Self-Employed Businessperson document.” This is not entirely accurate, since “in a contract of hire, the name adopted by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume.” Duke v. Brown Hotel Co., 481 S.W.2d 289, 290 (Ky. 1972). Moreover, depending on the facts of the given case, a claimant labeled by an employer as an independent contractor in a contract of hire may, in reality, be no more “independent” than any other at-will employee in Kentucky. “While the existence of the contract provides evidence of the parties’ intention, it is not dispositive of the nature of the employment relationship. Well-established is the principle that courts may look behind the labels used in employment contracts to ascertain the actual nature of the relationship. Brewer v. Millich, 276 S.W.2d 12, 17 (Ky. 1955).”

All remaining issues on appeal are rendered moot due to our resolution of Oufafa’s first argument. Even though Oufafa has directly challenged the ALJ’s resolution of five of the ten factors, given our holding that Taxi 7 is not a taxi leasing company, the analysis as to all factors on remand must begin anew.

Accordingly, we **REVERSE** the ALJ's determination Taxi 7 is a taxi leasing company. We **VACATE** the ALJ's determination Oufafa is an independent contractor as held in the January 31, 2020, Opinion and Order and the March 3, 2020, Order. We also **VACATE** the February 21, 2020, Order dismissing AIG and the UEF as parties. We **REMAND** the claim for an amended opinion finding Taxi 7 is a taxicab company and a renewed analysis pursuant to Ratliff, Chambers, and Meade in light of our holding and pursuant to the guidance set forth herein. Should the ALJ, on remand, determine Oufafa is an employee, he must resolve Oufafa's claim for income and medical benefits on its merits. In the event he determines Oufafa is an employee, the parties stipulated a work-related injury occurred on January 5, 2018, as indicated by the December 2, 2019, BRC Order. Further, should the ALJ on remand determine Oufafa is an employee, the ALJ must also resolve the workers' compensation coverage issue.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON ANDREW WEEKS
440 S 7TH ST STE 200
LOUISVILLE KY 40203

LMS

COUNSEL FOR RESPONDENT:

HON RONALD POHL
3292 EAGLE VIEW LN STE 350
LEXINGTON KY 40509

LMS

COUNSEL FOR RESPONDENT:

HON KYLE JOHNSON
610 S 4TH ST STE 701
LOUISVILLE KY 40202

LMS

COUNSEL FOR RESPONDENT/UEF:

HON WILLIAM JONES
UNINSURED EMPLOYERS' FUND
1024 CAPITAL CENTER DR STE 200
FRANKFORT KYH 40601

LMS

ADMINISTRATIVE LAW JUDGE:

HON GREG HARVEY
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601

LMS