Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 3, 2020

CLAIM NO. 201771568

JUAN LECHUGA FUENTES PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

RICKY ROBINSON CONSTRUCTION, INC.
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Juan Lechuga Fuentes ("Fuentes") appeals from the September 4, 2019, Opinion and Order of Hon. Roland R. Case, Administrative Law Judge ("ALJ") in which the ALJ dismissed Fuentes' claim against Ricky Robinson Construction, Inc. ("Robinson Construction"). The ALJ concluded Fuentes failed to establish he was an employee of Robinson Construction at the time of his fall.

On appeal, Fuentes asserts the ALJ misapplied the facts to the relevant legal standard in resolving the issue of whether Fuentes was an employee of Robinson Construction at the time of his fall.

BACKGROUND

The Form 101 alleges Fuentes sustained work-related injuries to multiple body parts on April 1, 2017, when he fell approximately 16 feet from a roof while employed by Robinson Construction.

Fuentes was deposed on December 1, 2017. He has seventeen years experience in the roofing business. He testified how his fall occurred on April 1, 2017:

> Q: And where did your injury occur on April 1, 2017?
>
> A: I don't know exactly what that village is called, but I think it's close to Hazard or Prestonsburg.
>
> Q: And were you injured on a construction job site?
>
> A: Yes. I was placing roofing.
>
> Q: Was this a residential building or a commercial building?
>
> A: I don't know exactly. I think it was part of a school because there were school buses around there.
>
> Q: And was this your first day or day number one on the job?
>
> A: Yes.
>
> Q: And who told you to come there to start work? Was it Mr. Robinson?
>
> A: Yes.
>
> Q: And what was your work that day supposed to be?
>
> A: Place the roofing.

> Q: Did Mr. Robinson tell you what time to start work that day?
>
> A: No, not exactly, but regularly he wanted us to start at 8:00 or 9:00 in the morning.

Fuentes drove his own pick-up truck in following Ricky Robinson ("Robinson"), President of Robinson Construction, to the job site where his fall occurred.

> Q: Was it a pickup truck or a car?
>
> A: It was a pickup truck.
>
> Q: Did you use that pickup truck to do roofing work?
>
> A: Yes, because I had all my tools, like the pistol and the hose and all that, in there.

Two other people who were also working on the same job – Jose Luis Perez, another roofer, and Geronimo Garcia, rode with Fuentes. Fuentes testified that Robinson paid him a lump sum, and he was responsible for dividing the money equally between himself and the other two.

Fuentes described the tools he needed to perform his job:

> Q: How does one remove or tear off old shingles?
>
> A: We took the old shingles off. When they're warm, you can just tear them off; and if not, one uses a hammer or a shovel.
>
> Q: And did you have that type of hammer and shovel in your pickup truck?
>
> A: Everybody who works there has their own hammer.
>
> Q: And does a roofer have to use a tape measure?
>
> A: When one starts to work in roofing, yes. But when one has experience with roofing, no.

Q: So you personally didn't have to use a tape measure because you were experienced?

A: Yes. I hardly ever used one.

Q: And does a roofer have to use any sort of shears or snips to cut the roofing materials?

A: No, it's a type of knife, a blade.

Q: And did you have one of those that you used, that you carried with you that day?

A: It's like – yes, I have my own tool belt and it was in there.

Q: Did you have to use any sort of chalk lines for measuring or to keep the shingles straight?

…

A: No, we never used that.

Q: Did you have to use any sort of caulking tools?

A: No.

Q: Did you have to use any type of a metal square or other tool to keep things straight and correct?

A: No.

Q: Did you have to use any type of hand saw to do roofing?

A: No, not really, because everything was prepared by him. He had a carpenter and he would do all the cutting.

Q: And does the roofer have to use any other sort of hand tools such as a seam roller or anything like that?

A: No, I don't think so.

Q: A roofer has to use a nail gun?

A: Yes.

> Q: And did you own your own nail gun?
>
> A: Yes. Everybody who works in roofing has to have their own nail gun.
>
> Q: And how is that nail gun powered? Is it by – is it pneumatic or by air?
>
> A: It's an air gun and you plug it in.
>
> Q: Did you also have your own air hose and air compressor for your nail gun?
>
> A: I'm sorry. What was the first one?
>
> Q: Air hose.
>
> A: Yes, all that comes together with the nail gun. The air hose was mine, but the air compressor was owned by all three of us or four of us, depending.
>
> …
>
> Q: And a roofer has to use ladders?
>
> A: Yes.
>
> Q: And did you have your own ladders that day?
>
> A: Yes, that day I did.

Robinson Construction provided all of the materials needed for that particular job, "Yes, everything that was pertaining to the construction of the house. Everything, the shingles, the pipes, everything."

Fuentes had worked for Robinson Construction on previous occasions before working on the job where he was injured. He testified as follows:

> Q: How many previous occasions had you worked for Ricky Robinson?
>
> A: I don't know exactly how many times.

> Q: Can you estimate approximately how many work days you had working for Mr. Ricky Robinson before your injury?
>
> A: No.
>
> Q: Was it many days or just a few days?
>
> A: No. Sometimes there were jobs where we worked one or two days, other jobs required three or four days. It was always different and varied. It depended on the type or work, if it was a big job or a small job.

Fuentes was paid a set amount for every three packages of shingles he completed, "Three packages equaled 10 by 10 feet, and that's what I got paid for."

Concerning his business and whether he advertised, Fuentes testified:

> Q: Did you ever do any sort of advertising for your roofing services?
>
> A: No.
>
> Q: Anything such as a Facebook page, a Craigslist ad for your roofing services? Anything like that?
>
> A: No, no, I never did something like that.
>
> Q: Have you ever incorporated your own business or created a limited liability company with the Secretary of State?
>
> A: No.
>
> Q: Did you have any written contract with Ricky Robinson for this roofing work?
>
> A: No.
>
> …
>
> Q: Did you ever have any office or business location for your roofing work?
>
> A: No.

Robinson was deposed on December 1, 2017. He and his wife, Tonia Robinson, are the shareholders of the corporation. He testified concerning the nature of the business:

> Q: And is the line of work of the company what the name says, construction?
>
> A: It is.
>
> Q: What type of construction?
>
> A: We build residential homes, custom homes mostly.
>
> Q: Do you do any commercial work?
>
> A: I have done some smaller commercial work, dental offices.

Robinson Construction normally averages having approximately five employees. He described the work they performed:

> Q: And what job titles do these five employees have?
>
> A: Framing, finish workers.
>
> Q: Does your company have any roofers?
>
> A: No.
>
> Q: And I would be certain that the Administrative Law Judge knows what a framer and a finish carpenter is, but just so some reader of your deposition would be absolutely sure, could you tell us what these jobs are?
>
> A: We frame from the top of the foundation up, which is a block or on a slab. Put it under a roof. Put plywood on it and set the windows and doors. And the finishers come in and finish, hanging up drywall, painting, laying the flooring around the trim, floor covering.
>
> Q: Does your company do the base of the slab construction?

> A: I have subcontractors that does the foundation work.
>
> Q: So you use a subcontractor to do the excavation and the concrete?
>
> A: No. I do the excavation and my subcontractor does the block work, the foundation part.
>
> Q: And what about the roofing, do you use a subcontractor for that as well?
>
> A: Subcontractor.
>
> Q: So your company has the framers and the people who do the general construction and the finish carpenters, but you sub out the masonry or the block work and the roofing?
>
> A: I sub out the masonry, the roofing, the plumbing and electric – not electrical, but plumbing and HVAC. I have subcontractors for that.
>
> Q: So you're a general contractor?
>
> A: I'm a general contractor, yes.

Fuentes performed work for Robinson Construction on three different roofing jobs before his accident. The first job was in 2015, which Fuentes completed in one day. The next two jobs were in 2016. Fuentes completed both jobs in a total of three days. Robinson testified how he first met Fuentes:

> A: I think it was in September of 2015 one of my lead guys had got – he had worked for one of my lead guys' pastors in Johnson County and they gave him his number. He called and asked him if he wanted to frame the – or shingle the roof. And he said, 'Yeah.'
>
> We told him the size of the roof, the pitch of the roof, and he said he'd take 40 to $45 – I don't remember exactly on that roof – to do it. And he come up from Lexington, I guess. It was an 859 number. And that was the first day I met him. It was on a Saturday.

Robinson testified concerning the work Fuentes was to perform on the job where he was injured:

> Q: And so I assume you were fairly far along in the process to need the roofer?
>
> A: Yes. We had done the roof and we'd done the electrical and plumbing.
>
> Q: So you called Mr. Fuentes on his cell and told him you were pretty far along and had another roofing job?
>
> A: Yes.
>
> Q: And what did you talk about? Pay?
>
> A: I told him what the pitch of the roof was and how many square it figured for, and he told me it would take $45 a square for him to do the job. And we agreed on that price.

Robinson confirmed that he was to pay Fuentes who would then divide the money between himself and the two other workers Fuentes brought to the job. Robinson did not supervise the other two workers, and it was Fuentes' decision to bring them along. He provided the following testimony regarding his supervision of Fuentes:

> Q: Did you, for example, tell him when he could take a break, tell him when he could take a lunch break?
>
> A: No.
>
> Q: Did you have to get on the roof with him and supervise him?
>
> A: No.
>
> Q: And his pay was by the square and that's it?
>
> A: By the square.

Robinson confirmed that Fuentes brought his own tools, and Robinson Construction provided the shingles:

> Q: Okay. So let's break this down for the Judge as to who provided what. Did you give Mr. Fuentes his tool belt?
>
> A: No.
>
> Q: His air hose?
>
> A: No.
>
> Q: Nail gun?
>
> A: No.
>
> Q: The compressor?
>
> A: No.
>
> Q: He said there was a gasoline-powered motor on that compressor?
>
> A: Yes.
>
> Q: Was that his property?
>
> A: Yes.
>
> Q: Is the compressor and the motor in one unit or –
>
> A: It's one unit.
>
> Q: So that's the same thing?
>
> A: Yes.
>
> Q: And he had his own hammer?
>
> A: Yes.
>
> Q: Knife?
>
> A: Yes.

Q: And snips?

A: Yes.

Q: And ropes?

A: Yes.

Robinson Construction provided the shingles, the drip edge, and the nails. It did not have a written contract with Fuentes. He explained:

Q: Did you have any written contract with him?

A: No, I did not.

Q: What about the right to quit? Could he walk off the job at any time?

A: He could.

Q: If he did that, you had no contract with him, he didn't have to pay you back?

A: No.

Robinson Construction did not have roofers as employees. Robinson did not tell Fuentes when he was allowed to leave for the day. He explained Fuentes followed him to the job site on the day of his fall because Fuentes did not "know the territory." Fuentes was not going to perform any other job on this particular project besides roofing.

In discussions with Fuentes, Robinson believed Fuentes operated his own business. He testified as follows:

Q: And what made you believe that?

A: Because he done shingling work and he kept the materials in his truck to do the shingle work with.

Robinson testified Robinson Construction has never employed a roofer during the duration of its business.

> Q: Have you ever employed a roofer in the 14 years you've been in business?
>
> A: No.
>
> Q: In other words, had one on salary?
>
> A: No.
>
> Q: Withheld payroll taxes and the like?
>
> A: No.
>
> Q: Okay. Is the reason that you don't like to keep roofers on payroll is because they complete their jobs so quickly?
>
> A: Yeah. In one or two days they're done. You don't need them again for three, four, or six months.

In contrast, Robinson Construction's framers have been with the business for over fifteen years.

Fuentes was free to pick and choose which jobs he wanted to perform for Robinson Construction.

> Q: Was Mr. Fuentes permitted to choose which jobs he wanted to do for you or perform for you? Could he tell you no?
>
> A: Yes.
>
> Q: So he could – if you call him and say, 'I've got work for you,' he could decline it if he wanted?
>
> A: He could.
>
> Q: What about if he just – for example, let's say he wanted to leave at lunch and never come back. Could he do that?
>
> A: He could.

…

> Q: What would happen, Mr. – one of the – you know, let's assume one of your five framers decided they didn't want to show up for work. What would happen to them?
>
> A: They –
>
> Q: Would you fire them?
>
> A: No.
>
> Q: All right. If they didn't show up for five days?
>
> A: They would get a warning. After the second warning, they'd be fired.
>
> Q: Okay. But they have the choice whether or not they want to show up for work?
>
> A: No, they don't. Not employed for me.

The claim was bifurcated solely for the ALJ to determine whether Fuentes was an employee of Robinson Construction or independent contractor. In the September 4, 2019, Opinion and Order, the ALJ set forth the following extensive findings of fact and conclusions of law:

> This claim was bifurcated on the sole issue of whether the plaintiff [sic] an employee of the defendant or an independent contractor.
>
> KRS 342.640(1) and (4) defines an employee as "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" and "every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury."
>
> In Ratliff v. Redmon, Ky. 396 S.W. 2d 320 (1965), the Supreme Court noted that in determining whether one

acting for another is a servant or an independent contractor the following matters of fact among others, are considered: a) the extent of control, which by the agreement, the master may exercise over the details of the work; b) whether or not the employee is engaged in a distinct occupation or business; c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d) the skill required in the particular occupation; e) whether the employee or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; f) the length of time for which the person is employed; g) the method of payment, whether by the time or by the job; h) whether or not the work is a part of the regular business of the employer and i) whether or not the parties believe they are creating the relationship of master and servant.

In Uninsured Employers' Fund v. Garland, Ky. 805 S.W.2d 116 (1991), and Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (KY 1969) the Court held the four dominant factors of Redmon to be: 1) the nature of the work as related to the business generally carried on by the alleged employer; 2) the extent of control exercised by the alleged employer; 3) the professional skill of the alleged employee; and 4) the true intent of the parties.

The plaintiff argues roofing work is an essential part of the business of the defendant and that the defendant had the right to control the work performed by the plaintiff. The plaintiff further argues the plaintiff was not operating his own roofing business and further argues roofing work was not the type of professional skill that would tend to show an independent contractor status.

However, the defendant notes the plaintiff has 17 years of roofing experience and brought his own tools to the job site, including nail guns, air hoses, an air compressor, and ladders as well as used his own vehicle for transportation to the site. The defendant noted the plaintiff performed similar roofing work with other contractors including Horton Construction. The defendant argues Mr. Robinson did not have control of the details of the plaintiff's work and indicated the plaintiff was the one to decide what tools to use, how to install the roofing shingles and what hours to work. The defendant points out that the plaintiff brought two people to assist him on

the job site as well. Mr. Robinson testified that the plaintiff previously performed work for him in 2015, 2016 and 2017, which equaled approximately five days in a three-year span of time. The defendant argues the plaintiff relied upon his own skill and experience to perform roofing tasks with no supervision from the defendant and that the plaintiff was paid $45 per square indicating the work was not permanent and was only going to last for one day. The defendant argues roofing work was outside the normal course of the defendant's business because they did not employ a full-time roofer. Mr. Robinson testified that he never intended the plaintiff to be an employee of the defendant-employer.

The ALJ will now conduct a review of the criteria contained in Ratliff v. Redmon, *supra*.

A. EXTENT OF CONTROL

The extent of control that Ricky Robinson exerted over the plaintiff seems minimal. Mr. Robinson did not control the details of the work, did not control the hours that the plaintiff was to work, did not tell the plaintiff how to install the shingles and did not control who the plaintiff had to help him perform the work. Obviously, Mr. Robinson did have the control to discharge the plaintiff if he did not satisfactorily perform the job. Obviously, any contractor would have this ability over a subcontractor that was doing shotty [sic] work. There was no direct supervision and no direct control over the details of the work. When the plaintiff started and how many hours he spent doing the job was controlled by the plaintiff. Therefore, the ALJ concludes that the extent of control is in favor of the plaintiff being an independent contractor.

B. DISTINCT OCCUPATION OR BUSINESS

The plaintiff was hired for a specific job. He was an experienced roofer and did other roofing jobs for other contractors. The plaintiff had worked for the defendant for a total of approximately five days in a three-year period. Although, a roofer may not be a highly skilled profession, and one that can be learned on the job, it is still a profession like any other. There is no evidence of record that the plaintiff did work other than roofing for approximately seventeen years. This factor again weighs

in favor of the plaintiff being an independent contractor rather than an employee of the defendant.

C. KIND OF OCCUPATION WITH REFERENCE TO WHETHER WORK DONE UNDER DIRECTION OF EMPLOYER OR BY SPECIALIST WITHOUT SUPERVISION

As previously indicated, the plaintiff worked without direct supervision and although the defendant had five employees, none of them were qualified as roofers. This particular criteria weighs slightly in favor of the plaintiff being an independent contractor rather than an employee.

D. SKILL REQUIRED IN THE PARTICULAR OCCUPATION

This criteria would neither point to the plaintiff being an independent contractor or an employee. While the job of a roofer does require skill it is a skill that can be learned on the job.

E. WHETHER THE EMPLOYEE OR WORKMAN SUPPLIES THE INSTRUMENTALITIES, TOOLS AND PLACE OF WORK FOR THE PERSON DOING THE WORK

This factor weighs in favor of an independent contractor relationship because the plaintiff supplied all the tools for doing the job, although the supplies were furnished by the defendant. The plaintiff even transported the tools and ladder in his pickup truck.

F. THE LENGTH OF TIME FOR WHICH THE PERSON IS EMPLOYED

In this case, the plaintiff was employed by the job and the job was only to last one day for approximately 4-5 hours. This short length of time would weigh in favor of the plaintiff being and independent contractor.

G. THE METHOD OF PAYMENT

The plaintiff was paid by the job, the work was not permanent and was only going to last for one day. He was to receive $45 per square and from that amount of money

he was to pay the others that were helping him on the roofing job. The method of payment weighs in favor of the plaintiff being an independent contractor.

H. WHETHER OR NOT THE WORK IS A PART OF THE REGULAR BUISNESS OF THE EMPLOYER

Although, roofing would be a recurring part of the business that the defendant was in, he indicated he was too small to employ a full time roofer. The plaintiff, in fact, had only worked five days out of the last three years. As previously indicated, although the defendant had several employees, none of them were roofers. Although roofing would be considered a recurring part of the regular business of the defendant, it only occurred for a short period of time and was a small portion of the defendant's business of building custom homes.

I. WHETHER OR NOT THE PARTIES BELIEVE THEY ARE CREATING THE RELATIONSHIP OF EMPLOYER / EMPLOYEE.

It would appear clear that the defendant considered the plaintiff an independent contractor. The plaintiff had requested to be paid in cash and no taxes were withheld or no employment forms were filled out. The plaintiff did not even know the defendant's last name. He only knew and referred to him as "Ricky." The plaintiff was going to be paid $45 per square regardless of how long he took to do the job. The ALJ does not discern anything in the evidence which would indicate that the plaintiff believed he was establishing an employer/employee relationship.

After considering all these factors, the ALJ concludes that the plaintiff has failed to prove he was an employee of Ricky Robinson Construction, Inc. The plaintiff furnished his own tools and essentially the only control the defendant exerted over the plaintiff was to review the plaintiff's work to ensure it met satisfactory workmanship. The plaintiff was free from direction during the performance of his job. Considering all the factors, the ALJ is persuaded that the plaintiff was an independent contractor rather than an employee. Having failed to establish that he was an employee of the defendant, the plaintiff's claim for workers' compensation benefits must be dismissed.

No petition for reconsideration was filed.

In his first argument on appeal, Fuentes asserts the ALJ misapplied the facts to the applicable law as set forth in the case of Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). Specifically, Fuentes asserts the ALJ erred by focusing on the *actual control* Robinson Construction imposed on Fuentes' work instead of the *right to control* his work. Fuentes cites the unpublished case of Steinrock v. Cook, No. 2011–SC–000032–WC, rendered Aug. 25, 2011, Designated Not To Be Published. We affirm.

ANALYSIS

As the claimant in a workers' compensation proceeding, Fuentes had the burden of proving each of the essential elements of his cause of action, including the existence of an employee-employer relationship. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to determining whether the ALJ's findings are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico,

Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record to support the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision.

KRS 342.640 reads, in relevant part, 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).

Ratliff v. Redmon, supra, sets forth nine factors to be considered when determining whether an individual is an employee or independent contractor. As noted by the ALJ, they are as follows: 1.) the extent of control the alleged employer exercised 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) to a focus 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 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 the 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, 591 S.W.2d 701 (Ky. App. 1979), 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.

In an unpublished opinion by the Kentucky Supreme Court, Kelly Mountain Lumber v. Meade, Nos. 2007–SC–000507–WC, 2007–SC–000526–WC, rendered Aug. 21, 2008, Designated Not To Be Published, the Court reiterated that the four factors as articulated in Chambers, supra, must be considered and further advised 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.

In the case *sub judice*, the ALJ considered each of the nine factors identified in Ratliff v. Redmon, supra, and ultimately determined all nine factors support a finding Fuentes was an independent contractor.

The holding in Steinrock, supra, persuasively establishes the ALJ did not erroneously analyze the evidence in reaching his decision. In Steinrock, the ALJ determined Cook, a roofer, was not Steinrock's employee. This Board reversed, the Court of Appeals affirmed the Board, and the Supreme Court of Kentucky ultimately affirmed the Court of Appeals. In affirming the Court of Appeals, the Supreme Court of Kentucky noted that the correct analysis indeed involves assessing the alleged employer's right to control an individual versus the amount of control actually wielded. The Court further noted this is particularly important "when a skilled or experienced worker appears to work without supervision or interference." Slip Op. at 5. However, the Court provided this important distinction in its analysis:

> **Control only to the degree necessary to ensure the bargained-for result, such as over the quality or description of the work, does not imply an employment relationship; whereas control over the individual performing the work signifies such a relationship. Among the factors indicating control by the alleged employer are payment by a unit of time rather than by the completed project; the furnishing of equipment the**

> **size and value of which provide an incentive for control; and the right to discharge the individual performing work.**

Id. (emphasis added).

The Supreme Court pointed towards the following facts in affirming the Court of Appeals:

> The ALJ misapplied the law by failing to consider the evidence of control in terms of Steinrock's right to control rather than the amount of control exercised. As a consequence, the analysis failed to give proper significance to the evidence that Steinrock obtained the roofing jobs; chose workers to send to the location of available work; could decide how the work would be performed; could supervise the workers when working side-by-side; decided the method for paying workers; chose to pay them without withholding income taxes or subsequently providing a Form W–2 or 1099 MISC; and could discharge a worker. Likewise, the ALJ appeared to equate the fact that the claimant provided his own tool belt and inexpensive hand tools with the fact that Steinrock provided all of the major tools, equipment, and materials necessary to perform the roofing jobs. When considered as a whole, the evidence compelled a conclusion that Steinrock had the right to control the details of the work and that the parties had an employer/employee relationship for the purposes of Chapter 342.

Slip Op. at 6.

Additionally, Cook was paid by the hour and was working approximately 16 to 24 hours a week at the time of his injury.

In the case *sub judice*, the testimony establishes Fuentes was paid a set amount for every three packages of shingles he installed and not by the hour. Prior to the job during which Fuentes was injured, he worked on three different occasions for Robinson Construction for a total of four days in 2015 and 2016. Further, Fuentes supplied his own tools – from minor tools like a hammer and knives to all major tools

like an air gun and compressor. Robinson Construction only supplied the materials. Additionally, the ALJ was persuaded by testimony indicating Robinson Construction did not control Fuentes' working hours, including when he took his lunch break and for how long. Robinson Construction also did not control who Fuentes brought with him to help him with the job, nor did anyone get on the roof with Fuentes and supervise the details of his work. The testimony further establishes Fuentes could have walked off the job at any time.

We acknowledge Robinson testified he could have stopped Fuentes from performing his work and even discharged Fuentes from the job if Robinson had noticed Fuentes was placing the shingles on the roof "in some weird fashion." In other words, Robinson Construction had the *right to control* Fuentes' work and even discharge him if he was not installing the shingles correctly. However, as held by the ALJ, "Mr. Robinson did have the control to discharge the plaintiff if he did not satisfactorily perform the job. Obviously, any contractor would have this ability over a subcontractor that was doing shotty [sic] work." Thus, Robinson Construction's right to control Fuentes' work or even discharge Fuentes in the event he performed shoddy work falls squarely within the language in Steinrock indicating "[c]ontrol only to the degree necessary to ensure the bargained-for result, such as over the quality or description of the work, does not imply an employment relationship." Id.

Substantial evidence supports the conclusion that Robinson Construction neither controlled nor had the right to control Fuentes and a finding he was not Robinson Construction's employee at the time of his injury. Further, the

ALJ's analysis was in accordance with the statutory and case law. Therefore, we affirm on this issue.

In its second argument on appeal, Robinson Construction asserts that, when analyzing the nature of Fuentes' work as a roofer as related to Robinson Construction's business, a finding that Fuentes was an employee is compelled. We disagree and affirm on this issue.

In Husman Snack Foods v. Dillon, supra, 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 delivered. In citing Larson's, the Court explained 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 channelled, is within the presumptive area of intended protection. Larson, Ibid.

Husman at 703.

In the case *sub judice*, and as noted by the ALJ, while roofing is typically a regular and recurring part of the construction business, Robinson Construction, a

builder of custom homes, was too small to employ a full-time roofer. In fact, as also noted by the ALJ, Fuentes only worked five days for Robinson Construction in three years, the fifth day being the actual day of Fuentes' fall. Consequently, as concluded by the ALJ, within the *specific* context of Robinson Construction, roofing was a small component of its overall business.

The ALJ identified the appropriate factors set forth in Ratliff v. Redmon, addressed each factor, and ultimately determined Fuentes was an independent contractor and not an employee of Robinson Construction. Regarding the two specific factors of the ALJ's analysis Fuentes addresses on appeal – Robinson Construction's right to exercise control over Fuentes and the nature of his work within the overall context of Robinson Construction's business – the ALJ exercised his discretion in reaching his ultimate determination based upon substantial evidence in the record. Consequently, a contrary result is not compelled. As such, the ALJ's decision will not be disturbed.

Accordingly, the September 4, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

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