

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 23, 2024

CLAIM NO. 202300878

CHRISTINE NICOLE FALCONITE

PETITIONER

VS.

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

SHED WISE,
UNINSURED EMPLOYERS' FUND and
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Christine Nicole Falconite (“Falconite”) seeks review of the April 20, 2024 Opinion and Order and the May 20, 2024 Order overruling her Petition for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). On October 11, 2023, this claim was bifurcated for a determination regarding Falconite’s employment status with Shed Wise, LLC (“Shed Wise”). The

ALJ dismissed Falconite's claim, finding she was an independent contractor and not employed by Shed Wise at the time of her alleged injury.

On appeal, Falconite argues the ALJ erred in his application of the economic realities test outlined in Oufafa v. Taxi, LLC, 664 S.W.3d 592 (Ky. 2023) in finding Falconite was an independent contractor. Falconite argues the ALJ improperly failed to appropriately consider that her 2022 income tax return demonstrated she was economically dependent upon her income from Shed Wise. She claims the ALJ characterized her as a "marketing guru" with many clients which she argues is unsupported by the evidence. She also argues the ALJ's analysis is flawed based on his discussion of the parties' understanding of the employment relationship, which is now irrelevant based upon the holding in Oufafa, supra. Falconite also contends the ALJ's characterization of her testimony only focused on excerpts from her cross-examination and not her direct testimony and is therefore not an accurate summary of the complete testimony. Because the ALJ appropriately applied the economic realities test to the evidence, and we find no error, we affirm.

BACKGROUND

Falconite filed a Form 101 on September 8, 2023 alleging she was struck by a motor vehicle on September 22, 2022, suffering significant injuries to her lower left leg in the course and scope of her work for Shed Wise. Because Shed Wise did not have workers' compensation insurance coverage on the date of the alleged injury, the Form 101 named the Uninsured Employers' Fund ("UEF") as a party defendant. On September 19, 2023, the UEF filed a Form 111 denying the claim asserting, among other things, Falconite was not employed by Shed Wise, and the

alleged injury did not arise out of and in the course of employment. The cause, extent, and treatment of Falconite's injuries are not disputed. She underwent multiple surgeries following being struck by a wayward vehicle while working on Shed Wise's property. Because the sole issue on appeal pertains only to Falconite's employment status with Shed Wise, we will not conduct a summary of the medical evidence.

Falconite's Form 104 employment history indicates she previously worked as a call center technician and in patient pre-registration at various medical facilities. Falconite also worked regularly in the restaurant industry after 2004 as a server/bartender, often as a second job to supplement her income. It is undisputed that Falconite worked concurrently as a part-time server in a local restaurant during the time she worked at Shed Wise. She listed her position with Shed Wise on the Form 104 as "office manager."

Falconite testified by deposition on December 15, 2023. Falconite was born on August 29, 1986 and she is a single mother of four, who resides in Paducah, Kentucky. She is a high school graduate and completed three years of college. She has no specialized degree or certification. She had a previous worker's compensation claim approximately 20 years ago while working at a restaurant in Phoenix, Arizona when a beer case fell on her. That claim was resolved without any permanent injury or award.

Falconite described her job at Shed Wise as primarily clerical and marketing, including sales and paying bills or invoices. She also performed social media marketing, including Facebook, Instagram, etc. Her activities included posting

information regarding buildings that were for sale, and any special promotions or sales. Her daily work routine at Shed Wise included opening the doors, reviewing and paying invoices, updating the website, updating social media, and performing additional duties as required.

Shed Wise did not have an online presence before Falconite worked there. She created Facebook and Instagram pages, as well as a simple website for the company. Brent Arnold (“Arnold”), Shed Wise’s owner, had already chosen a logo design and color scheme for the website, which she incorporated. Falconite denied having any specific prior knowledge of social media marketing. Shed Wise paid for the advertising software she used.

Falconite admitted she briefly assisted both Arnold’s mother, a local realtor, and his cousin who owned a shed company in Arkansas with some similar social media advertising while she worked at Shed Wise. However, she qualified that, stating it “was contracted” and characterized it as Arnold’s family essentially “helping me out with. . . a little extra money because it was very tight at that time in my life.” Falconite created an Instagram page for Arnold’s mother and assisted her in 2022 for approximately one to two months on a “very limited” basis, stating she was paid \$100 for doing small jobs. Falconite also stated Arnold’s cousin, Justin Arnold, owned Frontier Shed Co. in Arkansas, and she also did some social media work for him. “That, I did fill out a 1099 for. And that only lasted a few months before it just didn’t make sense” to do marketing out-of-state. She estimated her income from Frontier Shed Co. was marginal. Regarding those two short-term jobs, she testified, “Essentially his family is really nice, and they were helping me.”

Shed Wise had two properties, one which housed the main office where Falconite worked. Multiple sheds were displayed for viewing onsite at that location. The other property housed the workshop where Arnold physically built and constructed the sheds. Falconite occasionally walked around the property to photograph sheds and showed them to prospective customers. She did not perform any physical labor or assist Arnold in constructing the sheds. She worked “maybe 30 to 35 hours a week” depending on weather, supply, and demand. She worked reduced hours on Fridays, normally leaving at noon to work extra shifts at a restaurant. She stated Shed Wise also participated at two annual trade shows which required her to work extra hours. Falconite had been with Shed Wise nine and a half months at the time of her injury.

Falconite and Arnold verbally agreed on \$400 per week as a base salary when she started working for Shed Wise. She received an additional 5% commission on each shed she sold, which was paid monthly. In August 2022, Arnold increased her base pay to \$500 per week because he knew she was struggling financially. Falconite agreed that she could set her own hours, was not required to work from the Shed Wise office all the time, and she was not provided a dress code, or told what to wear.

Arnold also testified by deposition on December 15, 2023. He is the founder and owner of Shed Wise and resides in Paducah, Kentucky. He has worked in the shed industry since 2012 and started Shed Wise in July 2021 where he personally builds and sells portable buildings. He initially performed all the work himself with the assistance of his father, but he had very little time or knowledge of

social media. He planned to hire Falconite to work for Swarco, his previous rent-to-own company; however, within a few days, he realized she had other skill sets and decided to use her marketing skills for Shed Wise. He additionally provided her the opportunity to earn commissions for selling sheds.

Falconite had previously worked with Arnold's wife at Mercy Hospital in patient registration. He knew she was working part-time at a restaurant at the time but "my wife had told me that she lost her job and that she needed one." Arnold maintained he hired Falconite at Shed Wise for her marketing skills, and she understood she was an independent contractor, she could set her own flexible hours, and he had no workers' compensation insurance. He hired her to do marketing, manage the website, and manage social media, in addition to selling sheds on commission.

Arnold explained his subjective impression regarding the employment relationship between Shed Wise and Falconite was based on the fact she set her own hours, she was not working full-time, and he was a sole proprietor who claimed to have no employees. He added Falconite set her own work hours, and he did not control when she was present or working.

Arnold also discussed a program through Ballard County, Kentucky offering grant money to small businesses with employees, stating although he knew it existed, he "didn't qualify for it. And that was \$10,000 per year that I could have been getting but I don't have employees... So, if I thought for a second I had employees, I would be taking grant money...." Arnold further testified he did not

obtain workers' compensation insurance because it was his understanding he had no need for it as a sole proprietor.

Arnold testified Falconite was paid weekly by check "just written from a checkbook" and she received a separate commission check if she had made a sale. He admitted he gave Falconite permission to sign checks because he trusted her and doing so made it easier for him "to know that she could openly write her own check." He also admitted she paid bills for Shed Wise, and he provided her with a company credit card with her name on it "for convenience purposes when she paid for Facebook boosting" and other marketing or company expenses. "It was convenient, strictly convenience."

Arnold noticed at some point in 2022 that Falconite was "shorting" the checks she wrote to herself and assumed it was for tax purposes. Apparently the two never discussed this detail. Arnold testified he wrote checks to Falconite following her September 22, 2022 injury for even amounts of \$500 and withheld nothing. He stated after Falconite was injured and it was clear she was not going to return to work for Shed Wise, she requested he pay her back the \$2,932.00 she had withheld from her paychecks, which he did in three installments. Arnold testified he paid Falconite extra for work she performed at the trade shows because he felt it was outside the scope of managing his website and his marketing. He continued to pay Falconite following her injury through December 2022.

Arnold admitted Falconite used his office computer with his company software on it for which she created her own login information and password. She also had the entry code to the office building and used a company mobile phone. He

stated, "I had a computer. She—she had her own iPad. She had her – she had a company phone. The company phone, we got that so I could have a company phone number that wasn't my cell phone." He later stated the phone "went to whoever needed it at the time" and that Falconite "didn't always carry that phone with her." He continued, "So that -- that's just a company phone number. And since she was the primary I guess doing the ads... it just made sense for her to have that phone, you know, whenever for whoever called." He added Falconite also had her own personal mobile phone "that she used for I would suppose marketing... that was her choice to use it or not to use it."

A Benefit Review Conference ("BRC") was held February 20, 2024 prior to the hearing. Contested issues included: Employment Relationship; AWW; TTD Benefits; Unpaid medical expenses; Medical Benefits per KRS 342.020; and Defendant's (UEF) subrogation interest is preserved. The BRC Order indicates the parties stipulated Falconite sustained a work-related injury on September 22, 2022.

At the hearing held February 20, 2024, both parties expanded upon their prior testimony. Falconite testified regarding her position with Shed Wise:

I was office manager and sales person. I did office work but also was there in case people came by. I was the contact for sales if they called the main number and I did books. I did marketing. I... got us into... shows or... tried to come up with ways to help build the company up since it was a brand-new company.

She testified Arnold gave her the door code and unfettered access to the Shed Wise office. She was provided a company phone that traveled with her, since Shed Wise had no land line. If a prospective customer called the Shed Wise main number, it rang to her company phone. However, Falconite stated she

sometimes forwarded the Shed Wise phone to her personal phone which was of better quality. Arnold also provided Falconite with a desktop computer with her own login password and complete access to Shed Wise's software and QuickBooks system. She provided none of her own equipment or tools used to perform her work at Shedwise, though she stated she later purchased a tablet for "personal use so I could access things" such as software so she could complete a sale if she was not in the office. Arnold permitted Falconite to have check-writing authority for Shed Wise as well as a company credit card with her name on it.

Falconite testified she had no ownership interest in Shed Wise. She was paid weekly, initially at the rate of \$400 which was later raised to \$500 a week because she was struggling financially. Falconite was responsible for entering her pay into QuickBooks and she had authority to write and sign her own paychecks. She testified the federal, state, and social security tax amounts withheld from her weekly checks were deducted automatically by QuickBooks when she set up the payroll system. She testified her paychecks for January 10 and 17, 2022 were signed by Arnold, "but once he put me on the bank accounts, he very rarely signed a check." She stated Arnold issued three checks to her in December 2022, after her injury, in the total amount of \$2,932.00 which represented a refund of amounts that were withheld from her checks for taxes.

Falconite testified Arnold was aware she had a second part-time job at a restaurant during evenings and weekends, with an occasional extra shift. She reiterated the fact she assisted Arnold's mother and his cousin on a very short-term basis with social media accounts earning marginal income while she worked at Shed

Wise. Falconite stated, “Jan just came in the office and asked if I could help her do it, and I said ‘Sure.’ And then Justin called me, and I talked to Brent, and he said it was fine.... I would say [it lasted] maybe two months.”

Falconite denied having specialized social media marketing skills. She agreed her hours were flexible, stating she and Arnold discussed what hours would be appropriate depending on busy seasons and leaving early Fridays due to her job at Max’s, and she had no uniform or set attire. She agreed Arnold did not control her performance over the social media marketing tasks and she had no specific sales quotas to meet. However, Falconite denied having knowledge in December 2021 she was hired as an independent contractor.

Falconite testified she did not specifically request Arnold to reimburse her for the withheld taxes. She “was confused” following the accident to learn that she “didn’t have work comp,” but that Arnold stated he would reimburse her, and “he would have to send me a 1099.” In reviewing her paystubs which were later entered into evidence, Falconite testified she had never discussed or received a W-2 from Arnold. She testified as follows regarding tracking her pay through QuickBooks:

Q: Did you ever fill out paperwork regarding any W-2?

A: In QuickBooks I filled out everything before I could even print these off. When you enter it in, you have to fill out all that stuff.

...

Q: Tell me what you understand a 1099 represents.

A: That you’re a contract worker.

Q: An independent contractor?

A: Uh-huh.

Q: And not an employee?

A: That is what was explained to me later on, yes.

Q: Okay. Have you ever been an independent contractor before coming to work at Shed Wise?

A: No.

Q: You had never received a 1099 before?

A: No.

Q: Okay. Did you not understand at the time what an independent contractor was?

...

A: I had heard of it, but I was not under the impression that I was one.

Falconite testified Shed Wise and the restaurant were her main sources of income. She thought she was employed by Shed Wise. When pressed to explain details relating to her 2022 tax return, she stated she did not include her income from Shed Wise under her W-2 wages because Arnold sent her a 1099 “and you can’t enter in a W-2 that you don’t have.” She specifically recalled the discussion with Arnold that payroll would not begin until January 2022, “and in my brain, ‘payroll’ means employee. So that’s why... I thought I was an employee.” She stated her first two checks had taxes withheld which Arnold signed. She was not aware until after her injury Arnold had not paid the federal and state withholdings into the system, which is why he ultimately refunded that money.

Arnold’s testimony at the hearing was that he was “able to run this business, build and sell sheds, on [his] own without” Falconite. He had previously

hired 1099 builders to assist him. He hired Falconite to perform marketing, social media, “anything to get my name out there. A new company, so we needed to get out there, and I had no knowledge of how to do it.” The sales commission was added as an incentive because his ability to pay Falconite was limited. He recalled a specific conversation with Falconite about hiring her as a 1099 independent contractor:

Well, she needed an opportunity to be able to work freely because she is a single mother with four children at home. To my knowledge, she had been previously released from a job because she could not have that ability.... So it worked perfect for me, because I could not afford a full-time employee of any type, so I needed someone – it was perfect.

Arnold testified he is familiar with how 1099s are issued and how independent contractors are taxed. He agreed he is not skilled in social media or marketing. He stated Shed Wise has never had any employees. He signed the Affidavit of Exemption from the Kentucky Workers’ Compensation Act because he was under the impression he had no employees, including Falconite, which relieved him of any obligation to carry workers’ compensation insurance.

Arnold stated Falconite had exclusive access to setting up her information in QuickBooks that was used to generate her electronic paystubs, and the two never discussed or reviewed those pay stubs. He never instructed her to withhold taxes and he has no QuickBooks training or knowledge. He stated he signed the first two checks in January 2022 which were for less than \$400.00. He signed blank checks, and Falconite filled in the amount. He allowed her to write her own checks because he trusted her, and it was convenient for him since he only came to that

office periodically. He never questioned why the checks were issued for less than the agreed-upon salary. He acknowledged he never reviewed his bank statements or the checks that were issued to Falconite. He provided Falconite with a 1099 at the end of 2022 and stated “she understood what it was.”

Arnold testified Falconite set her own hours and was free to come and go. He believed she averaged 20 to 25 hours per week. He did not control any aspect of her work and permitted her to do extra work for other companies. He acknowledged her work could be done from essentially anywhere using a smartphone or a tablet, including sales. He stated, “The main thing I focused on was the social media. It was out there, my name was out there.”

Arnold agreed he did not discuss a specific work period for Falconite and there was no written contract. He characterized Falconite’s paying bills as “occasional” and he permitted her to do so out of convenience for him. He agreed Falconite had unlimited access to his office, computer, and software programs. However, despite the fact she paid company bills, performed marketing, and sold sheds, he disagreed Falconite’s work was an integral part of Shed Wise’s business and claimed he could have operated the company without her help stating, “Oh yes sir. I’m still doing it.”

Arnold continued to pay Falconite immediately following her injury because “it was the right thing to do.” He admitted he was never told by any professional that he did not need workers’ compensation insurance, but he concluded on his own that he did not because he was a sole proprietor.

Falconite submitted as evidence Shed Wise payroll records from January 3, 2022 through March 28, 2022, along with numerous printed electronic paystubs from January, February, June, and July 2022 indicating taxes were withheld for Federal, State, Social Security, and Medicare. The paystubs indicate lines for “Regular Salary” and “Sales Commission” and state they were processed through Intuit Payroll system.

Falconite also submitted copies of the actual handwritten checks issued to her from the Shed Wise operating account through Independence Bank, indicating lesser amounts than the flat rates of \$400 or \$500 per week, due to taxes being withheld. Her first two checks in January 2022 and one dated February 28, 2022 numbered 2000, 2001 and 1023 bore Falconite’s handwriting, but were signed by a different person, presumably Arnold. All remaining checks, dated January 24, 2022 through November 28, 2022, were both written and signed by Falconite.

Falconite also submitted into evidence a Form 1099-NEC for 2022 from Shed Wise indicating nonemployee compensation of \$28,349.60. Her 2022 1040 Federal Income Tax Return indicates W-2 wages from the restaurant of \$6,140 and “miscellaneous income” from Frontier Shed of \$680 and Shed Wise of \$28,350 for a total of \$29,030. Arnold submitted a signed Affidavit of Exemption from the Kentucky Workers’ Compensation Act dated April 20, 2022 listing “no employees” as the basis for his exemption.

The ALJ issued the Opinion and Order on April 20, 2024 finding Falconite was an independent contractor and not Shed Wise’s employee. He outlined the Kentucky Supreme Court’s adoption of the economic realities test in

making that determination and completed an analysis pursuant to Oufafa, *supra*.

The ALJ specifically found as follows, *verbatim*:

In keeping with the Court's instructions, the undersigned will address the six factors set forth in Mouanda with a focus on Falconite's economic dependence on Shed Wise, LLC.

THE ECONOMIC REALITIES TEST

...

B. The Factors

The central question before the ALJ is whether Falconite was an employee of Shed Wise, LLC on September 22, 2022, when she was struck by a wayward vehicle. Pursuant to the Supreme Court of Kentucky's direction, that question must be answered based on the economic realities of the relationship between the parties. The central consideration being whether Falconite was economically dependent on Shed Wise at the time of her injury.

(1) Permanency of Relationship

This factor can include the length and regularity of the working relationship between the parties, but even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship. Keller v. Miri Microsystems, LLC, 781 F. 3d 806 (6th Cir. 2015). This analysis can also involve the exclusivity of the work.

Falconite did not have a contract for a specific term and the testimony indicates the work was open-ended. She worked for the Defendant for about 9 months before being injured. The ALJ views that relationship to be like that of a traditional at-will employment where there is no set term for the work and both parties intend the relationship to continue unless circumstances cause one party or the other to part ways. The relationship was clearly not one that had a true term—i.e. until a specific job was completed or 6 months.

(2) Degree of Skill

This factor assesses the complexity of the work performed, how the worker acquired their skill, and the length of the worker's training period. Tassy v. Lindsay Entertainment Enterprises, Inc., 591 F. Supp. 3d 191, 200 (W.D. Ky. 2022), *see also* Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1055-56 (6th Cir. 2019). Less complex work and a lower degree of skill is indicative of an employer-employee relationship. *See Id.* at 1056.

To a certain extent, however, every worker has and uses relevant skills to perform his or her job, but not everyone is an independent contractor. Keller v. Miri Microsystems LLC, 781 F.3d at 809. It is also important to ask how the worker acquired her skill. *Id.* at 809; *See Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1318 (11th Cir.2013) (“The meaningfulness of this skill as indicating that plaintiffs were in business for themselves or economically independent, however, is undermined by the fact that Knight provided most technicians with their skills.”). If a worker learned his craft through formal education, an apprenticeship, or years of experience, then it is more likely that the worker's compensation varies with his unique skill and talent. *Id.* at 809. On the other hand, if the worker's training period is short, or the company provides all workers with the skills necessary to perform the job, then that weighs in favor of finding that the worker is indistinguishable from an employee. *Id.* at 809.

Falconite was hired to create and maintain a social media presence for Shed Wise to help increase visibility and sales. Arnold professed to have no skill in that arena and that his focus was on building sheds. Vis-à-vis a lot of folks Falconite has more skill in that arena. She did similar work for another shed company and even for Arnold's mother who is a real estate agent.

On the issue of skill, the ALJ finds Falconite was specifically hired because of her ability to do social media marketing. This did not involve specific training but did require hands on experience with social media. This factor is more indicative of an a independent

contractor who is sought out because of her skill to provide a specialized service.

(3) Investment in Equipment or Materials for the Task

In Keller, the Sixth Circuit held a worker's investment in equipment or materials should be compared to the putative employer's total investment in the operation.

There is one additional wrinkle, however. When considering the worker's capital investment in the equipment needed to perform his job, we must consider those investments in light of the broader question: whether that capital investment is evidence of economic independence.

The Court went on to reason that some capital investments do not evidence economic independence. It gave the example of a vehicle as something that most people have for their own purposes and use in everyday life. *Citing Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998). It juxtaposed that example with investment in something like welding equipment which represents a greater degree of economic independence because it is not a common item that most people use daily. *See Id.*

Falconite had her own smart phone and Arnold purchased a company cell phone that she used and carried with her at times. Other times he had the company phone. Falconite also forwarded the Shed Wise calls to her phone at times. She did purchase an iPad that she used for pictures and posting to social media. That piece of equipment was hers.

The investment factor represents a mixed bag. Shed Wise shared office space with a real estate agent—his mother. There were a couple of computers there that Falconite used as well as the QuickBooks software for paying herself and some bills. The type of work she did could be done from anywhere that had an internet connection. That includes marketing posts and making sales. Sales could be made through software Shed Wise

subscribed to which made it possible to make sales from just about anywhere. Although Shed Wise provided a store front there were not a great deal of supplies to be had to perform Falconite's work. Her own iPad and smartphone would have been sufficient, however, the ALJ acknowledges she used the company phone and other office supplies provided by Shed Wise.

The ALJ finds this factor does not weigh in favor of one type of relationship over the other.

(4) Worker's Opportunity for Profit or Loss, Depending Upon Skill

Falconite was paid weekly at the rate of \$400.00 and then \$500.00. She also had ability to increase the amount of money she could earn by making sales of sheds. Arnold agreed to pay her a 5% commission on sheds she sold. Her ability to market the sheds and complete sales certainly allowed Falconite the potential of increasing her take home money based on her skills.

In reality, Falconite made some sales and had the opportunity for her to do so. She points out her primary income came from the weekly payments Shed Wise made for her office management work. A review of checks to her included commission checks as follows: 4/1/22, \$1,642.98; 5/22/22, \$469.94; 6/1/22, \$614.29; 7/1/22, \$982.76; 8/1/22, \$868.71; 8/2/22, \$806.16 (bonus); 8/5/22, \$806.16; and 9/30/22, \$794.56.

Arnold provided Falconite with the opportunity to work and earn steady income but also the chance to make additional money by making sales. The 5% commission is a share of the profit of an individual shed.

It is also important to note this factor contemplates control of ability to profit through skill. Although Falconite is not a marketing professional, there is clearly skill involved with effective marketing. She had the opportunity to boost sales and make sales herself.

The ALJ finds this factor slightly favors independent contractor status.

(5) Degree of Shed Wise's Right to Control the Manner in which the Work is Performed

The facts indicate Shed Wise did not exercise control over the manner in which Falconite did her work. She was free to come and go as she pleased from the office location. Arnold did not have Falconite write down hours or punch a clock. In fact, he testified he knew Falconite had four kids at home and needed flexibility. There was no indication Falconite had to do anything on a scheduled or routine basis--other than make sure she paid herself. There is no indication there were any minimum number of marketing posts or quotas required of her.

During her deposition, Falconite acknowledged she created a logo for Shed Wise and worked on the website independently of Arnold. She acknowledged Arnold was not present for her day-to-day activity and did not control the manner in which she performed any of her work.

The ALJ finds Shed Wise did not exercise control over Falconite. It seemingly had some right to expect marketing to get done but no real metrics were in place to monitor whether that was occurring or how effective Falconite's efforts were. Arnold seemingly had no expertise in marketing or use of social media platforms. He was dependent upon Falconite to do the work and know how to do the work effectively. This factor suggests the relationship was more that of an independent contractor.

(6) Whether the Service Rendered is an Integral Part of the Alleged Employer's Business

Falconite characterized her work as that of office manager. In her view she was at the office location, paid bills and tried to make sales. She argues her work was integral to Shed Wise's business. The Defendant argues Shed Wise was not dependent upon Falconite's marketing skills as social media is not an integral part of building and selling portable buildings.

One thing that is clear is that Falconite and Arnold perceive the scope of her work differently. His

version of Falconite's work is that of a person contracted to do social media marketing and sales. She, on the other hand, sees her work as being Shed Wise's office manager, marketing and sales. Arnold ran all the business prior to Falconite doing any work for Shed Wise. Since Falconite's injury and departure from Shed Wise, he has resumed all the operations for the business.

The ALJ finds Falconite provided value to Shed Wise but the work she did could not be said to be integral to the business of manufacturing and selling sheds. This is perhaps best-evidenced by the fact that Arnold ran the business before Falconite's services were enlisted and has continued to do so since she last provided services. There is no indication that her work was essential to operations. She certainly was a value-added piece to Shed Wise by attempting to provide it an online presence that could drive sales opportunities. The ALJ finds this factor favors independent contractor status.

(7) Totality of the Circumstances//Resolution of the Central Question and Conclusion

The central question in the analysis is supposed to be whether Falconite was economically dependent upon Shed Wise. Her income suggests that the majority of her income was coming from the Defendant. However, she was, on occasion, performing similar services for Frontier Sheds and for Arnold's mother. In addition, Falconite worked a job as a waitress on a regular basis.

The work Falconite performed was varied and wide in scope. She paid some bills while at the office and took pictures of sheds and made social media posts. Occasionally customer calls were fielded and an attempt at a sale would be made. All of these things, when viewed collectively, seem like actions taken by an employee. Arnold estimated Falconite performed work 20 to 25 hours a week while she estimated 30 to 35 hours.

Falconite did social media for Frontier Shed Co. and ran Arnold's mother's advertising for a couple months. Frontier Shed is in Arkansas and owned by

Arnold's cousin. That work also lasted only a few months. Her deposition testimony made it clear she was originally engaged by Arnold to do work for a different entity, Swarco, a rent-to-own company. Arnold asked her to do some advertising for that entity. It became clear there was not a need for that entity. Arnold then offered to make her a commissioned salesperson and do marketing for Shed Wise.

Falconite had a credit card in her name on the company account to allow her to pay for Google advertising and things she was doing on the marketing side. That is an oddity, as is the fact Falconite could write her own paychecks. Arnold was a solo owner of Shed Wise and testified he allowed Falconite great flexibility because it was convenient. His focus was to build sheds. Hers was to market and sell them when she could. It appears Arnold made every effort to give Falconite an opportunity to earn money and also was incredibly hands-off with how she went about doing it. He certainly did not exercise a level of control that would be typical in an employer-employee relationship.

It is also clear Falconite became more financially dependent on Shed Wise during 2022. The payment for her marketing, website and social media work went from \$400 a week to \$500. She also made sales and the wage records from her other employment at Max's indicate she worked less of that job, presumably because she did not need the money as she was earning money at Shed Wise. Also complicating things is Falconite's work for Frontier Shed and Arnold's mother. Both of those instances indicate she was offering her skills to others for work at the same time she was working for Shed Wise.

Based on the totality of the circumstances, and the evaluation of the factors identified by the Supreme Court of Kentucky, the ALJ finds Falconite was not an employee of Shed Wise. She suffered an unimaginable injury for which she has undergone a great deal of medical treatment. The relationship she had with Shed Wise was very much under her own direction and control. That included her ability to come and go as she pleased, set her schedule, work from home or at the physical location. It also included her incentive to make sales to increase the money she received. In large part

Arnold had all the financial risk and offered Falconite a situation where she could receive a consistent payment for marketing and creating an online presence for Shed Wise. He also allowed her to make sales and increase her income. Although Falconite's income would indicate she earned most of her money in 2022 from Shed Wise, the evidence also indicates she had other sources of income— Frontier Shed, Arnold's mother and Max's. Economic dependence is not simply a mathematical calculation, but also involves the question of whether a putative employee has the ability, option, and is actually earning income from other sources. Falconite is affable and capable and was earning income from three other sources, albeit small amounts, from other sources. Two of those sources paid her for the same type of services for which Shed Wise paid her. When her work activity is reviewed it is clear she was working independently.

There is no question this case presents facts that are unique and that a finding of an employment relationship is possible on the facts. The ALJ has weighed the facts and considered them at length. When one looks at Falconite's level of freedom and her opportunity to make more money through sales, her work seems independent and not that of an employee subject to Arnold's control. That, coupled with the fact Falconite was doing other work for different entities have persuaded the ALJ that she was not an employee of Shed Wise and was, in fact, an independent contractor.

Falconite filed a Petition for Reconsideration arguing, as she does on appeal, the ALJ erred in reaching the conclusion she was not Shed Wise's employee and in doing so, he failed to include certain facts and incorrectly characterized the evidence. She earned 83% of the income she reported in 2022 from Shed Wise upon whom she was clearly economically dependent. In his May 20, 2024 Order, the ALJ acknowledged that, while the Kentucky Supreme Court has found this factor to be the focus of the economic realities test, it is not the sole determinant, and the Court

has also directed fact-finders to look at the totality of the circumstances in applying the test. The ALJ stated “the background of the economic realities test indicates it is a hybrid test where no single factor is controlling and where the realities of the relationship are key.”

The ALJ acknowledged viewing the case based on that factor alone would lead to a conclusion that Falconite was economically dependent on Shed Wise. He reiterated his conclusion that Falconite was contracted to perform online and social media marketing for Shed Wise. He determined she did not perform her duties from a fixed location but rather from various locations, including Shed Wise’s shared office, via the electronic devices available to her, while maintaining a flexible schedule of her choosing. He found evidence persuasive that Shed Wise exercised essentially no control regarding the manner which she performed the services. In overruling Falconite’s petition, the ALJ stated, as compared to the factual scenario in Oufafa, supra, Arnold and Falconite “engaged in a course of dealing that was not at all complex. He exercised essentially no control over Ms. Falconite’s services, hours or location of work.”

ANALYSIS

As the claimant in a workers’ compensation proceeding, Falconite had the burden of proving she was Shed Wise’s employee on the date she sustained her injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Falconite was unsuccessful in that 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 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether his findings are so unreasonable under the evidence that 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 Co. 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 that would have supported a different outcome than that 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

This claim involved a determination regarding whether Falconite was an employee or an independent contractor. In Oufafa, supra, the Kentucky Supreme Court declared that “in order to bring more clarity to this area of the law, we hereby adopt the economic realities test to determine if a worker is an employee or an independent contractor for the purpose of workers’ compensation.” Id. at 597. After explaining the reasons for adopting the test, the Supreme Court defined the economic realities test *verbatim* as follows:

Oufafa's case presents the first opportunity since our Opinion in Mouanda for this Court to reconcile the apparent conflict in our interpretation of the same terms across different (though related) labor laws. Mouanda, 653 S.W.3d 65. In Mouanda, this Court adopted the economic realities test to determine the difference between employees and independent contractors in the context of the Kentucky Wage and Hour Act (KWHA). That test has six factors:

1. The permanency of the relationship between the parties,
2. The degree of skill required for the rendering of the services,
3. The worker's investment in equipment or materials for the task,
4. The worker's opportunity for profit or loss, depending upon his skill,
5. The degree of the alleged employer's right to control the manner in which the work is performed, and
6. Whether the service rendered is an integral part of the alleged employer's business.

Id. at 74. These factors are consistent with this Court's delineated factors in Ratliff. *Id.* at 75. In fact, the tests share five factors. *Id.* The fundamental inquiry in both Ratliff and Jani-King is the same: “In assessing the true

nature of the parties' relationship, courts must look at the practical, not just contractual, realities of the relationship." *Id.* at 80. Importantly, however, the "central question" to the economic realities test is "the worker's economic dependence upon the business for which he is laboring," an inquiry not specifically captured under the ALJ's in-depth analysis nor under our prior caselaw. *Id.* at 74 (citation omitted). The narrowing of enumerated factors, paired with this slight shift in focus, sets the economic realities test apart from previous attempts to distinguish between independent contractors and employees. While not inconsistent with the *Ratliff/Chambers* factors, the economic realities test improves upon their attempts to discern the actuality of the working relationship at issue while streamlining Kentucky's approach to employee/independent contractor designations.

Adopting the economic realities test in the workers' compensation context not only simplifies the definition of independent contractor across the Commonwealth; doing so also serves the purpose of the Workers' Compensation Act itself. In an Opinion clarifying the use of the *Ratliff/Chambers* factors soon after their adoption, the Court of Appeals wrote,

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 [sic], is within the presumptive area of intended protection.

Husman Snack Foods Co. v. Dillon, 591 S.W.2d 701, 703 (Ky. App. 1979) (citing Larson, Workmen's Compensation Laws 43.51 (1978)). ***Husman* elaborated that to serve the purpose of our workers' compensation statutes, the *Ratliff* factors should be construed with an eye toward whether the alleged employee's work formed the basis of the employer's regular business. *Id.* It makes sense, thus, to develop the law towards a test that more explicitly accounts for the centrality of a worker's dependence on an**

employer to incur the costs of risks associated with work. Although the *Ratliff/Chambers* factors struggled to achieve this aim, it may be captured within the economic realities test. To reiterate, the “central question” to the economic realities test is “the worker's economic dependence upon the business for which he is laboring.” For claimants such as Oufafa who work within ever-complex business schemes, that dependence is an integral part of deciphering whether he was an employee of Taxi 7. (emphasis added).

Id. at 599-600.

The Supreme Court concluded, in part, as follows:

This Court hereby adopts the economic realities test to safeguard the protections afforded by workers' compensation. Accordingly, our holding in *Mouanda* is extended to the workers' compensation context.

Id. at 600.

On appeal, Falconite argues considering the key question of economic dependence outlined in *Oufafa*, *supra*, undeniably the bulk of her 2022 income was earned through Shed Wise, thereby weighing heavily in favor of finding she was an employee. She argues Arnold was aware she worked part-time as a server for extra money and, further, she was no “social media marketing guru” with her own clients, nor did she own a social media marketing business. She claims the short-term social media work she performed for Arnold's mother and cousin was borne out of Falconite's financial struggles and their willingness to help her, not from performing traditional independent contractor work. She claims those details, coupled with other facts such as taxes withheld, check-signing authority, and use of Shed Wise's office equipment, leave no doubt she was an employee. She argues Arnold's protestations he has “never had employees” and his personal belief regarding their working relationship is irrelevant based upon the guidance in *Oufafa*, *supra*.

In his April 20, 2024 Opinion and Order, the ALJ conducted a detailed analysis applying the appropriate economic realities test outlined in Oufafa, supra, to the evidence in reaching his determinations regarding Falconite's employment relationship with Shed Wise. The ALJ additionally outlined his thought process and analysis with respect to his findings in his Order on Falconite's Petition for Reconsideration. The ALJ appropriately considered the required factors in reaching his decision. Thus, the question presented to this Board is not whether the ALJ conducted the analysis, but rather whether it was flawed or was such an egregious misapplication that his conclusions comprise patent error and compel a contrary result. We believe it does not.

In response to Falconite's claim she earned 83% of her income from Shed Wise, and that her social media work performed for Arnold's mother and cousin's businesses was temporary and marginal, the ALJ found this argument was not persuasive in finding the economic realities test "requires a more practical analysis" than simply dollars received from a specific company when reviewing this factor. He stated considering only money received "could result in findings of employment that are simply not supported by the actual work performed and the manner in which it is done." The ALJ was persuaded by Arnold's testimony that Shed Wise did not need an office manager to conduct business and, while Falconite occasionally paid some bills while she was in the office, the majority were paid by Arnold. He was also persuaded by the fact Shed Wise operated both before and after Falconite's tenure without an active online marketing presence.

In his analysis of the facts concerning Falconite's use of Shed Wise's office equipment and software and her purchase of an iPad, the ALJ stated he found the use of a shared office less significant than Falconite's purchase of the iPad since she used it primarily to increase her ability to earn sales commissions. He found her usage of QuickBooks on Shed Wise's office computer was insignificant and "not primary" in the services she performed for the business. Falconite argues her "investment" of an iPad is greatly outweighed by everything else that Shed Wise supplied. She claims the ALJ's conclusion that her work was not integral to the business of Shed Wise "simply defies logic." These are factual determinations that fall squarely within the purview of the ALJ's discretion.

The ALJ, while noting the key component of the economic realities test dealt with economic dependence, stated it is a hybrid test where no single factor is controlling, and the totality of the evidence is key. He compared this claim with the facts in Oufafa, supra, which he characterized as "a complex business arrangement replete with a taxi-cab leasing agreement and acknowledgement independent contractor status." He found the course of dealing between and Arnold and Falconite "was not at all complex." He acknowledged the oddity and non-traditional working relationship Arnold and Falconite shared, and how focusing on "the central question alone would lead to the conclusion Ms. Falconite was economically dependent on Shed Wise." He stated Kentucky Courts require review of the totality of circumstances. We find no error with this determination.

Falconite contends the ALJ misconstrued the nature of her testimony by only portraying her cross-examination, resulting in an inaccurate characterization

of the evidence. We disagree. The ALJ clearly understood and outlined the content of the testimony provided by both parties. There is no indication the ALJ was confused as to Falconite's position she thought she was an employee, nor did he misconstrue anything regarding her work hours, equipment used, payroll and tax deductions, her part-time restaurant work, or the fact she performed additional social media work for Arnold's mother and cousin, albeit very short-term. His understanding of the totality of the facts and nuances regarding those details is evident in the ALJ's opinions and analysis. A review of the evidence reveals no deficit in the ALJ's comprehension of each party's position vis-à-vis his legal analysis.

Falconite sustained serious injuries on September 22, 2022 while working at Shed Wise. Falconite points to many factors when, taken alone, could lead to a different result, including her economic dependence on Shed Wise. However, whether another adjudicator may have interpreted the evidence differently, given more or less weight to certain facts, or perhaps reached a different conclusion, is outside our limited scope of review and this Board is without authority to disturb those factual findings. 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., *supra*. Further, as stated in Special Fund v. Francis, *supra*:

If the fact finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was

such that the finding against him was unreasonable because the finding cannot be labeled “clearly erroneous” if it reasonably could have been made.

The ALJ adequately considered the evidence of record, conducted the proper legal analysis, and explained the basis for his determination on all issues. We note Falconite’s policy argument, warning the ALJ’s analysis in this case and “expansive view of what constitutes an independent contractor” would remove a large portion of the workforce from workers’ compensation coverage, urging this Board “to consider the practical effects of the ALJ’s holding in this case.” While we recognize this case presents factual details and nuances which very well may have led a different fact-finder to conclude otherwise, we are constrained to limit our review.

The ALJ provided a thorough and sufficient basis for his findings and conducted the proper analysis. This Board cannot superimpose its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Miller v. Go Hire Emp. Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015). The weighing of the evidence falls within the exclusive province of the ALJ. Square D Co. v. Tipton, supra. The ALJ adequately considered the evidence, provided a sufficient analysis, did not abuse his discretion, and a contrary result is not compelled. Therefore, we affirm.

Accordingly, the April 20, 2024 Opinion, Award, and Order, and the May 20, 2024 Order on Petition for Reconsideration, rendered by Hon. W. Greg Harvey, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

MILLER, MEMBER, DISSENTS AND PROVIDES A SEPARATE OPINION.

MILLER, Member. I acknowledge the Board is limited in its review of the ALJ's decision pursuant to KRS 342.285. Regarding findings of fact, the ALJ's findings are conclusive and binding; however, factual findings are erroneous as a matter of law if they are so unreasonable under the evidence that a contrary finding is compelled. With questions of law or mixed questions of fact and law, the reviewing body has greater latitude in determining whether the findings were supported by evidence of probative value than when only a question of fact is at issue. Purchase Transportation Services v. Estate of Wilson, 39 S.W.3d 816 (Ky. 2001).

Whether Falconite is an employee is a mixed question of law and fact. Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991).

The majority affirmed the ALJ's determination that Falconite was an independent contractor principally because the ALJ conducted the proper analysis under the factors set forth in Oufafa v. Taxi, LLC, 664 S.W.3d 592 (Ky. 2023). The ALJ outlined the appropriate elements of the economic realities test contained in Oufafa, but this alone does not render his Opinion immune from scrutiny. The fundamental purpose of the workers' compensation system reiterated in Oufafa states:

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 [sic], is within the presumptive area of intended protection. Husman Snacks Foods Co. v. Dillon, 591 S.W. 2d 701, 703 (Ky. App. 1979).

I disagree with the majority in affirming the ALJ because a review of the economic situation of the parties and the remaining elements of the Oufafa analysis compels a finding that Falconite was not an independent contractor. Therefore, I dissent and would reverse and remand this claim for the award of indemnity and medical benefits the ALJ deems appropriate.

Our courts have grappled with the question of whether an individual is working as an employee or independent contractor and developed factors for ALJs to consider in reaching their determination. Initially, in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), the Court adopted nine factors to review, but noted that the trend was to find employee status where such protection is appropriate. Of these nine factors, the case law evolved into finding four factors predominant:

1. The nature of the work being performed as it relates to the business;
2. The extent of control which is exercised by the employer;
3. The professional skill which is required by the worker;
4. The true intentions of the parties.

Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969).

These cases were decided more than 50 years ago. Recently, in Oufafa a case involving a taxi leasing company and the drivers, the Court decided to adopt

the economic realities test. This test had been adopted for purposes of wage and hour claims under the Kentucky Wage and Hour Act, and now workers' compensation claims must be decided in a consistent manner. The test has six factors:

1. The permanency of the relationship between the parties,
2. The degree of skill required for the rendering of the services,
3. The worker's investment in equipment or materials for the task,
4. The worker's opportunity for profit or loss, depending upon the skill,
5. The degree of the alleged employer's right to control the manner in which the work is performed, and
6. Whether the service rendered is an integral part of the alleged employer's business.

Oufafa at 599.

The Oufafa Court stated the central question to the economic realities test is the worker's economic dependence upon the business for which he is laboring. Id. The ALJ, to his credit, specifically outlined the six-factor test and made findings based upon them. The parties did not have a set time period of work, it was indefinite, and the ALJ deemed this to be akin to an at-will employee.

Concerning the degree of skill, the ALJ found Falconite was hired to perform social media marketing, indicative of an independent contractor relationship. Falconite invested in an iPad, her only equipment, and otherwise used the company computer and company-provided cell phone. The ALJ did not find this factor persuasive one way or the other. As to profit and loss, the potential for commission sales of 5% to Falconite and 95% to Shed Wise led the ALJ to conclude

this was an opportunity to boost sales and make sales herself as being indicative of an independent contractor. In terms of control by the employer, Shed Wise did not exercise control, as there was no time clock to punch, set hours, or marketing quotas. The ALJ found this favors an independent contractor relationship. Whether the service was integral to the business, the ALJ found Falconite's work was not. The ALJ noted Falconite considered herself an office manager. Shed Wise considered her strictly a social media marketer, and the ALJ viewed her as a social marketer. Lastly, viewing whether Falconite was economically dependent on Shed Wise, the ALJ stated: "her income suggests that the majority of her income was from the Defendant." The ALJ then found, because she did some work for Frontier Sheds, owned by Arnold's cousin, along with some work for Arnold's mother, as well as waitressing, this amounts to being an independent contractor.

In sum, the ALJ found Falconite to be an independent contractor and dismissed the claim. The Board affirmed, although noting on two occasions that another ALJ may have found differently. The majority deferred to the ALJ because he appropriately considered the requisite factors in reaching his decision. Thus, the question presented to the Board is not whether the ALJ conducted the analysis, but rather whether it was flawed or was such an egregious misapplication of the law that his conclusions comprise patent error and the evidence compels a contrary result.

A detailed review of the evidence leads to the conclusion Falconite was not an independent contractor. Since proving she was an employee is an essential element of her claim and she was unsuccessful before the ALJ, the evidence must compel a contrary result for her to prevail. This is admittedly a high burden.

The ALJ pigeonholed Falconite as a social marketer, although she worked at the location approximately 30 hours per week and drew a weekly paycheck. Falconite had no definite term of employment. She was initially paid \$400 weekly. Her wages were increased to \$500 per week and taxes were, at the time, taken out. Falconite had a company cell phone, could write checks for the business to pay bills or herself, and could order supplies. She had a key to the location, used the company computer, and was provided a cell phone since there was no landline. Falconite was hired to perform social media functions, but in today's business and personal arena, most persons have this skill, certainly most younger individuals. While this can be viewed as strictly anecdotal, there is no evidence of any specialized schooling or certification training in social media in Falconite's background. A review of her past work showed no social marketing jobs.

A further review of the evidence reveals that she worked at Shed Wise weekly. Falconite estimated she worked 30 to 35 hours while Arnold estimated 20 to 25 hours. Arnold did not control her specific hours of work. The ALJ placed particular emphasis on Falconite's work with Arnold's mother, being paid a total of \$100 for her short work with his cousin, being paid \$680.00. The ALJ found these two short ventures somehow equated to Falconite having a social media business. There is no evidence of a business name, marketing, or any other clients which would point to an independent business. Falconite was a single mother of four children. She waitressed on the weekends to earn extra money. The ALJ noted these facts favored independent contractor status; however, Falconite was clearly

economically dependent on her job with Shed Wise to the tune of more than 80% of her earnings.

In terms of personal equipment that could be viewed as tools of an independent business, Falconite solely purchased an iPad and had no other equipment, business location, or cards proclaiming her a social media marketer. Further, she used this iPad to take pictures of sheds where she would receive commission. She had been offered an extra 5% income for the sale of sheds. The bulk of the money, 95%, went to Shed Wise.

Falconite was taking a picture of a shed on the business property when she was run over by a motor vehicle that was driven onto the property. Ambulance and several leg surgeries followed. It is not unusual for an employee to be paid by salary plus commission.

Common sense must never leave the realm of the law. To do some work for your employer's family should not take you out of the realm of employment status to independent contractor. She undoubtedly had more computer and social media skills than Arnold. However, this is a universal truth of the next generation of workers compared to their older peers. Falconite was injured performing work involving the sale of sheds. Clearly, sales are an integral part of the business as was all her work for Shed Wise. The owner devoted his time to constructing the sheds, but that is only part of the business. Not only were sales the responsibility of Falconite, but so were other duties such as ordering supplies, paying bills, and marketing. She viewed herself as the office manager.

Even the ALJ acknowledged both Falconite's indefinite term, weekly salary, and total earnings lean in favor of her being an employee. The ALJ's reliance on the two short jobs for Arnold's mother and cousin as well as finding she had a social media business to invoke independent contractor status is misplaced. Further, her job duties certainly show she was not hired strictly for social media work, akin to hiring a business to design a web page. Falconite's other job duties and responsibilities were an integral part of the shed business.

It admittedly can be a difficult question to determine whether an individual is an employee or independent contractor. Viewing the totality of the evidence, even accepting the factual findings of the ALJ, compels a finding Falconite was an employee. Applying the law to the facts of this case, there is no criteria which can turn the work Falconite performed into a social marketing business. While Shed Wise did not control her hourly production as would be done in the manufacturing sector, employment has evolved with the advent of the computer age. The fact she had a particular skill does not remove her from the protection of the Act.

For the above reasons, I would reverse the ALJ as the evidence found by the ALJ compels a decision that she was an employee of Shed Wise. The economic realities, the totality of the circumstances, and the beneficent purpose of the workers' compensation system, compel a finding Falconite was an employee of Shed Wise. The intention of the Workers' Compensation Act is to place the burden for injuries received upon the industries in which they were suffered rather than upon society as a whole. Brewer v. Millich, 276 S.W.2d 12 (Ky. 1955). The claim should be

remanded to the ALJ for a determination of any appropriate disability benefits to be awarded.

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