

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 16, 2023

CLAIM NO. 202101455

WAUNEDA HINES

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

JERRY WALKER
D/B/A AT YOUR SERVICE TAXI
UNINSURED EMPLOYERS' FUND
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING AND REMANDING**

* * * * *

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

STIVERS, Member. Wauneda Hines (“Hines”) appeals from the August 11, 2022, “Opinion on Bifurcated Issues” and the September 6, 2022, Order on Reconsideration of Hon. Stephanie Kinney, Administrative Law Judge (“ALJ”). In the August 11, 2022, decision, the ALJ determined Hines was working as an independent contractor at the time of the alleged work incident of May 26, 2021, and

dismissed her claim. Hines filed a Petition for Reconsideration requesting additional findings, which the ALJ provided in the September 6, 2022, Order.

On appeal, Hines asserts she was an “employee” at the time she sustained her injuries on May 26, 2021, under both the economic realities test and the factors set forth in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965) and Chambers v. Wooten’s IGA Foodliner, 436 S.W.2d 265 (Ky. 1969).

BACKGROUND

The Form 101 alleges Hines sustained work-related injuries to multiple body parts on May 26, 2021, while in the employ of At Your Service Taxi in the following manner: “While driving taxi cab for employer, car accident on expressway – resulting in inquiries [sic] to right hip, knee and shin.”

By Order of Hon. Douglas Gott, Chief Administrative Law Judge, the Uninsured Employer’s Fund was joined as a party to the claim as At Your Service was determined to be uninsured at the time of the alleged work-related accident.

By Motion dated December 1, 2021, Hines requested the ALJ bifurcate the claim to resolve the following issues: “employment relationship, employee vs. independent contractor, work-relatedness, eligibility for temporary total disability benefits, average weekly wage, and the necessity and reasonableness of medical treatment.” By Order dated December 20, 2021, the ALJ sustained Hines’ Motion.

The February 7, 2022, Benefit Review Conference Order and Memorandum has the following contested issues checked: “TTD Benefits, AWW, and Medical benefits.” Under “Other Issues” is handwritten the following:

“Jurisdiction, employment relationship, employee v. independent contractor, notice.”

During his April 13, 2022, deposition, Jerry Walker (“Walker”) testified that he started At Your Service Taxi in 1993. At the time of the deposition, the business was “AYS Transportation.” At the time of Hines’ accident, there were approximately seven people who owned/operated their cars that used just the company’s radio service. Approximately three people leased cars from Walker, and Hines was one of them. The drivers who lease their vehicles from Walker keep them for 24 hours a day 7 days a week. Walker is in charge of maintaining the leased vehicles, and the drivers are supposed to report any accidents to Walker’s automobile insurance company. The following testimony ensued:

Q: If one of the drivers who’s leasing a vehicle from you has a concern about vehicle maintenance, who would they report that to?

A: To me.

Q: If they have a concern about a flat tire, who would they report that to?

A: To me.

Q: What about something as simple as a windshield wiper?

A: Well, if they would tell me, I would have it fixed. I have a mechanic on call. He don’t work for me. He’s on call and I pay him by the job.

Some companies with whom Walker does business pay using a voucher system. He explained as follows: “Well, we have some companies that we do business with that wants to run credit, so, and pay at the end of the month. So we

use a voucher to verify that trip, and then we send them a bill at the end of the month. And the driver turns those in for their lease.” Walker explained that the drivers turn in the vouchers “to pay their lease as cash money.”

Walker established a \$2.00 per mile limit on what the drivers could charge their passengers. He explained:

Q: So were any of the drivers permitted to charge more than \$2 a mile?

A: It came from me and my forefathers and everybody, you know, before me that, since the horse and buggy days. You know, if you overcharge a customer, you’re going to go out of business.

Q: Okay. Who chose \$2 a mile?

A: State of Kentucky, I believe. No, it wasn’t the state. No, it was local. I think it was Covington, Covington City Council, I think, come up with that, I believe. And then, in Cincinnati they charge \$2 a mile so we went with that.

Q: And when you say we, is that a decision you made or who is we when you’re saying we?

A: We is me.

Walker did not prepare a work schedule for Hines. Once Hines paid the monthly rental fee, everything else that she earned was hers. Walker elaborated further:

Q: Okay. So good. I’m glad we’re asking about this then because I’m confused. So At Your Service calls her and tells her there’s a fare, and she picks somebody up, takes them from Point A to Point B, and they pay her 20 bucks.

A: Right.

Q: Let’s say. Does that just go in her pocket?

A: Right.

Q: None of that goes back to you or ATS or AYS?

A: No. No.

Q: Okay. So it's just strictly she leases a vehicle from you for \$360 a month, and anything she makes over and above that is her money and hers alone?

A: It's hers alone. She don't pay no maintenance, nothing. She just pays the 360 and that's it. Everything she makes over the 360 belongs to her.

Walker testified he did not assert any control over the routes Hines chose to take. However, if he learned Hines was intentionally taking a longer route in order to increase the fare, Walker would revoke the lease on the cab.

Hines testified at the June 14, 2022, hearing. At the time she was hired, there were approximately 8 to 10 drivers and four dispatchers. There were also three managers. Hines worked a set schedule of five days a week from 10:00 a.m. to 10:00 p.m., and if she wanted a day off, she called the manager named "Mike" to request the day off. When a passenger was sent to her by dispatch, she could not decline it.

Hines recounted the following concerning the voucher system:

Q: Can you describe what the vouchers were?

A: The vouchers were to pick up from Saint Elizabeth Hospital from Behavior Health from the school districts the Women's Battered Shelter.

...

Q: And then what would you do after you completed this voucher?

A: They would hold on to it because every Monday we had to pay our cab fare our cab fees of \$360.00. And we could use these to go towards the cab.

Q: Okay. So for the fares that you picked up that used this voucher did those fares also pay you in cash?

A: No, we were able to get it but we were never able to get it if that makes sense.

Q: It does not can you clarify?

A: If we wanted to cash them in we were told that we could. But when it came down to it – it was [sic] I never have the money to be able to cash in the vouchers. So we used them toward our liens on the cab.

Q: Okay. So lien you mean lease?

A: Lease, yeah.

Walker testified at the hearing and offered the following concerning the voucher system:

A: Well, we have some companies that want to charge they don't want to pay cash like, for example, the hospital. They have nobody there to pay you in cash for your trips so we have a charge account with them. We also have a charge account with Newport School. We also have a charge account with the Northern Kentucky Health Department. And they pay us with a voucher and at the end of the month I turn those vouchers in and they settle up with a check.

Q: So do the drivers turn the vouchers in?

A: Drivers turn the vouchers in to pay their lease. Our lease is \$360 a week if they have three hundred in vouchers then they owe \$60.00.

Q: Right. I just want to back you up a little bit. So do the drivers carry the vouchers in their cab?

A: Ah, yeah, we give them some blank vouchers to fill out when they take the trips.

Q: All right. So whoever's riding doesn't come with a voucher?

A: Right. Except for the hospital now the hospital had their own vouchers. The – the hospital issues a voucher to the driver.

Q: Directly to the driver?

A: Directly to the driver, yeah.

Q: All right. So like if Ms. Hines got a hospital voucher would she turn that into you as well?

A: That's correct.

Q: That would go against her lease?

A: Uh-huh.

In the August 11, 2022, Opinion on Bifurcated Issues, the ALJ provided the following Findings of Fact and Conclusions of Law *verbatim*:

...

Employment relationship

The threshold question is whether Hines was an employee of AYST and is entitled to benefits under KRS Chapter 342. AYST argues Hines operated as an independent contractor. However, Hines alleges she was an employee and is entitled to benefits under the workers' compensation Act.

AYST is owned by Walker. He leases taxi cabs to individuals and provides dispatching services. Hines began operating a taxi in conjunction with AYST on April 8, 2021. Hines paid \$360 per week for the cab lease and dispatching services. She continued to operate a cab through the date of the motor vehicle accident on May 26, 2021, which is the subject of this claim.

In determining whether an employee or independent contractor relationship exists, case law mandates factfinders to consider other aspects of the parties' affiliation taken as a whole. An individual who performs

service as an independent contractor in the course of an employer's trade, business, profession, or occupation has effectively elected not to be covered. *Hubbard v. Henry*, 231 S.W.3d 124, 129 (Ky. 2007). That said, it is well established that “in a contract of hire, the name adopted by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume.” *Duke v. Brown Hotel Co.*, 481 S.W.2d 289, 290 (Ky. 1972). Depending on the facts of the given case, a claimant labeled by an employer as an independent contractor may, in reality, be no more “independent” than any other at-will employee in Kentucky.

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

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

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

1. the nature of the work as related to the business generally carried on by the alleged employer;
2. the extent of control exercised by the alleged employer;
3. the professional skill of the alleged employee; and
4. the true intentions of the parties.

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

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

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

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.

The ALJ reviewed the evidence in tandem with applicable case law. After doing so, this ALJ finds Hines was an independent contractor. The ALJ notes that three of the four predominant factors support a finding of an independent contractor. The remaining factors also weigh in favor of a finding of an independent contractor.

a. Extent of control

AYST provided Hines with a functional taxicab which she retained exclusive possession of during the pendency of her lease. Simply put, Hines retained possession of the taxi for as long as she made her monthly lease payments. Hines did not receive any instruction regarding how to drive the cab. She was restricted from driving for Uber and Lyft but was encouraged to establish her own clientele. In fact, her passenger on the date of the accident, called Hines directly to avail herself of Hines' taxi services.

AYST used an unsophisticated system to dispatch calls. Passengers phoned and those calls were routed to one cell phone. A driver answered the call, obtained the passenger's address, accepted the route, or farmed it out to another available driver. Thus, it appears there was some flexibility to accept or reject fares. However, Hines claimed she could not reject passengers, but admitted she could accept passengers that called her directly.

This ALJ notes testimony regarding the existence of a schedule. Hines maintained a schedule existed. Walker's testimony indicated the drivers kept their own schedules. Hines indicated she worked Monday, Tuesday, Wednesday, Friday, and Saturday from 10:00 a.m. to

10:00 p.m. However, she also testified that she worked 14 to 16 hours per day seven days per week. Hines maintained there was a schedule and she had to “kind of” request time off. In any event, Hines’ hours do not appear to be regulated. Rather, this ALJ concludes Hines could work as many hours as she wished. By the same token, this ALJ concludes she could have worked as few hours as she wished provided the weekly lease payment was made.

The rate Hines could charge passengers was regulated. Walker was adamant that she could only charge \$2 per mile for a trip regardless of how many passengers she transported. At first blush, this appears to be an attempt to exert significant control over Hines. However, a conclusion that Walker set this \$2 per mile mandate is devoid of an understanding of where that number emanates from. Walker explained \$2 per mile was instituted by the Greater Cincinnati Airport and local ordinances. Thus, this mandate is not an attempt for Walker to control Hines, but rather an attempt to remain compliant with local laws and regulations.

This ALJ finds the factor concerning the extent of control over Hines’ work favors a finding of an independent contractor. This ALJ concludes little control was exercised over Hines considering she retained exclusive jurisdiction of the taxi, operated the taxi with little, if any, supervision, had the ability to work as many hours as she wished, and accepted passengers that called her directly.

b. Parties’ intent

This ALJ acknowledges a lease agreement was filed. However, Hines did not sign the agreement. Consequently, this ALJ finds the written agreement has no bearing in her analysis. Thus, there is no written document to review to assess the parties’ intent. Rather, the ALJ must look to the parties’ conduct to determine their intent.

Hines had little interaction with Walker following receipt of her taxi. The two met on Mondays to effectuate lease payments, but any other contact was rare. Additionally, Hines’ earning derived from passenger fares. At no point did AYST issue any wages

or payments to Hines. Hines provided a service to her passengers, which consisted of transporting them to a desired location, and she received remuneration for that service. This payment arrangement differed greatly from Hines' prior work, which primarily consisted of retail or fast-food work that presumably paid an hourly wage. Thus, this ALJ concludes the parties' intent supports a finding that Hines was an independent contractor.

c. Distinct occupation or business and whether work is a part of employer's regular business

Hines worked as a taxi-driver whereas Walker provided cabs to lease to drivers and provided dispatch services. These are distinct activities. The ALJ acknowledges that these activities are intertwined. A driver requires a cab to transport a passenger. Walker required drivers to lease his cabs and to dispatch fares to. However, the independency of Hines' work as a taxi driver and AYST's business is not lessened because there is an interrelationship. The ALJ is persuaded that Hines was engaged in a distinct occupation as a taxi driver. Thus, this ALJ finds this factor supports a finding that Hines was an independent contractor.

d. Degree of skill

The primary skill required of any taxi driver is an ability to operate a motor vehicle. In any event, Hines did not have to be trained or taught how to drive a taxi. Arguably, a certain level of customer service skills is required to interact with passengers. However, this ALJ is not persuaded that an ability to interact with potential customers or to drive a taxi is a professional skill. Thus, this factor favors an employee relationship.

e. Length of the employment

Hines began operating a cab on April 8, 2022, and continued to do so until the motor vehicle accident. Thus, Hines spent less than two months operating a cab, which is a relatively short duration. However, it appears she could have continued to operate the cab indefinitely if she paid her weekly lease and dispatching fee. Thus, her employment and the length of said employment was tied to whether she continued to make weekly payments.

Consequently, this ALJ finds this factor supports a finding of an independent contractor.

f. Method of payment

Hines' earnings stemmed from her passenger's fares. Passengers paid in cash or by voucher. AYST maintained accounts with various entities that required transportation services. These entities were not amenable to an immediate cash payment arrangement. Thus, the amount owed for the fare was documented on a voucher. AYST provided copies of the vouchers and the driver completed the voucher and noted the amount due for the fare. Drivers used these vouchers to apply toward their weekly lease payments. Simply put, Hines paid \$360 per week to lease a cab and utilize AYST's dispatching service, which provided increased access to customers. Passengers paid her directly either by cash or voucher, and she retained anything over \$360 per week. AYST did not derive any additional revenue other than the amount paid for the cab lease and dispatching services. Thus, this factor supports a finding that Hines was an independent contractor.

g. Instrumentalities, tools, and place of work

Hines used a cab, which she leased monthly. She did not maintain insurance or registration for the cab. Additionally, she was not responsible for any necessary repairs for the cab. However, she was allowed to keep the cab in her possession. Also, the cab had decals that indicated it was owned and operated by a marine, which referred to Walker. As such, this ALJ finds this factor favors an employment relationship.

h. Supervision

Hines drove a cab with little supervision. Hines' ability to perform the majority of her job duties without any supervisor supports a finding that she was an independent contractor. Thus, this factor supports a finding that Hines was an independent contractor.

Hines timely filed a Petition for Reconsideration requesting additional findings of fact relating to the following issues: the nature of Hines' work as it relates

to the business carried on by At Your Service; the extent of control exercised by At Your Service; and the true intentions of the parties.

In the September 6, 2022, Order, the ALJ set forth the following additional findings which are set forth *verbatim*:

...

The ALJ carefully reviewed Hines' petition in tandem with her prior decision. This ALJ concludes Hines' petition is an attempt to re-argue the merits of her claim. This ALJ previously reviewed the evidentiary record and applicable case law to determine whether Hines was an independent contractor or an employee. After doing so, the ALJ determined Hines was an independent contractor and set forth her reasoning for that finding. The ALJ will provide additional findings and conclusions as outlined below to further apprise the parties of the basis of her findings.

Case law requires factfinders to consider aspects of the parties' affiliation taken as a whole. An individual who performs services as an independent contractor in the course of an employer's trade, business, profession, or occupation has effectively elected not to be covered. Hubbard v. Henry, 231 S.W.3d 124, 129 (Ky. 2007). That said, it is well established that "in a contract of hire, the name adopted by the parties to describe their relationship is ordinarily of very little importance against the factual rights and duties they assume." Duke v. Brown Hotel Co., 481 S.W.2d 289, 290 (Ky. 1972). Depending on the facts of the given case, a claimant labeled by an employer as an independent contractor may, in reality, be no more "independent" than any other at-will employee in Kentucky.

Case law also requires the ALJ to consider nine factors to determine whether a claimant is an independent contractor or an employee. These factors were outlined in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). Those factors include:

1. the extent of control that the alleged employer may exercise over the details of the work;

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

Per Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969) the ALJ's focus must center upon the following four 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.

All of the Ratliff factors must be considered, but the Act's risk-spreading theory is fulfilled by treating the role of the alleged employee's work in relation to the employer's regular business as the predominant factor. Husman Snack Foods v. Dillon, 591 S.W.2d 701 (Ky. App. 1979); *See also* Kelly Mountain Lumber v. Meade, Nos. 2007-SC-000507-WC, 2007-SC-000526-WC, 2008 WL 3890701 (Ky. 2008).

All relevant factors must be considered, particularly the Wooten factors. The employer's right to control is a predominant factor in the analysis. The control factor

must be analyzed by looking to the nature of the work that the injured worker performed in relation to the regular business of the employer.

This ALJ was not convinced Jerry Walker exercised significant control over Hines. The ALJ found that Walker received a weekly lease payment from Hines for the cab and dispatching services. Walker's interaction with Hines was limited to a weekly meeting wherein the lease and dispatching payment was made. Hines did not receive any direct orders from Walker. She received dispatches, but this was part of the service that Walker and Hines contracted for. This ALJ is not persuaded that Walker exercised significant over Hines.

This ALJ notes testimony regarding the mandated rate Hines charged passengers. However, the ALJ has already addressed where that mandate emanated from in her opinion. Thus, this ALJ finds the predominant factor of control does not support a finding that Hines was an employee.

This ALJ thoroughly considered the control factor within the landscape of the type of work Hines performed in relation to Walker's regular business. Once again, this ALJ finds Walker's regular business was to lease cabs and provide dispatching services to individuals that operated their own cabs or cabs leased from him. He did not directly transport passengers. Rather, he provided cabs which were available to lease, and provided customers to those who operated cabs and required passengers. Simply put, Walker wished to obtain a weekly lease and dispatching payment. Thus, this ALJ finds Hines' work as a cab driver was not analogous to Walker's business. Hines and Walker engaged in distinct and different activities. As such, this factor supports a finding that Hines was an independent contractor.

This ALJ notes Walker's testimony that he would "fire" a driver if he or she charged in excess of two dollars per mile regardless of how many passengers were transported. However, Walker also adamantly maintained throughout his testimony that nobody worked for him. He also testified that the primary reason he ceased leasing a cab to a driver was if the lease payments were not made.

This ALJ reviewed Walker's deposition testimony and observed him testify at the hearing. This ALJ concludes Walker ran an unsophisticated business wherein he leased taxi cabs and provided dispatch services. He did not provide day-to-day instruction to drivers regarding how to operate a cab. Furthermore, the dispatching system used was simple and straight-forward. Customers called a phone number that was routed to one driver. However, that driver could choose to accept the route or pass it along to another driver. This illustrates a situation wherein drivers are not compelled to accept fares. It also illustrates a situation wherein Walker did not exercise significant control over Hines or other drivers that leased cabs or paid for his dispatching services.

Walker precluded Hines from working for Uber and Lyft. He explained this limitation was in place to prevent other companies from stealing customers. Walker essentially provided trips or fares to taxi-drivers that paid for his dispatching services. This appears to be the only area wherein Hines received instruction regarding what passengers she could transport. Overall, this ALJ concludes this restriction was minimal considering Hines could work as much as she wanted and kept the cab 24/7.

Work means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In this claim, Hines provided a service which entailed transporting passengers to various destinations. Importantly, at the time of the motor vehicle accident, Hines was transporting a passenger that contacted her directly to obtain transportation. Hines received remuneration from her passengers. She did not receive any remuneration from Walker. A voucher system was in place, but this was closely intertwined with Walker's dispatching services. Entities called At Your Service Taxi to request transportation and cab drivers charged for those rides. The only difference is those rides were paid differently. Those rides were not paid immediately but were billed. However, Hines received remuneration by virtue of voucher rides, which applied toward her weekly lease and dispatching payments. Thus, all of Hines' remuneration was provided by her customers. Also,

under these facts, Hines never performed “work” for AYS as defined by the statute.

This order is disputed to the parties noted below on September 6, 2022.

On appeal, Hines asserts she was an employee of At Your Service under all six factors comprising the “economic realities test” pursuant to Daoud Oufafa v. Taxi, LLC, Claim No. 2022-SC-0003-WC, rendered February 16, 2023, Designated Not To Be Published. She further argues that she meets the definition of “employee” under Ratliff v. Redmon, *supra*, and Chambers v. Wooten’s IGA Foodliner, *supra*.¹

ANALYSIS

We vacate the ALJ’s determination Hines is an independent contractor and remand for an analysis pursuant to the economic realities test outlined in Daoud Oufafa, *supra*.

In Oufafa, the Kentucky Supreme Court adopted the economic realities test in order to distinguish between one acting as an “employee” or an “independent contractor” within the workers’ compensation context. The Supreme Court specifically rejected the tests set forth in Ratliff and Chambers, describing the state of the law in this area as “haggard.” *Id.* at 597. The Court commented, in part, as follows:

Below, the Board and Court of Appeals reviewed for issues of fact. However, these reviewing bodies operated under the auspices of the *Ratliff/ Chambers* framework, as well as the definition of “work,” in their reviews. The approaches used by the ALJ, Board, and Court of Appeals are wrought with difficulty in application. In

¹ In its brief, the Uninsured Employers’ Fund takes the position Hines’ “claim must be remanded for reconsideration under the ‘economic realities standard.’”

cases such as *Oufafa's*, a worker's status as an employee comes to a splitting of hairs or conjecture. In order to bring more clarity to this area of the law, we hereby adopt the economic realities test to determine whether a worker is an employee or independent contractor for the purposes of workers' compensation.

Id.

In the case *sub judice*, the ALJ determined Hines was an independent contractor at the time of her injury after analyzing the factors set forth in Ratliff and Chambers. Specifically, the ALJ looked at the extent of control At Your Service Taxi exercised over Hines' work; the parties' intent; whether Hines was engaged in a distinct occupation or business; the degree of skill; the length of employment; the method of payment; instrumentalities, tools, and place of work; and supervision. After a consideration of these factors, the ALJ determined Hines was an independent contractor at the time of her May 26, 2021, injuries.

In the September 6, 2022, Order, responding to Hines' request for additional findings in her Petition for Reconsideration, the ALJ reaffirmed her conclusion Hines was acting as an independent contractor at the time of her injury based on the auspices of Ratliff and Chambers and also turned to the definition of "work" set forth in KRS 342.0011(34). Significantly, the Supreme Court in Oufafa specifically warned against an analysis *only* taking into consideration KRS 342.0011(34) by stating as follows: "Using KRS 342.0011(34) alone is clearly an untenable solution." Id. at 598. However, the ALJ in the case *sub judice* did not consider KRS 342.0011(34) in isolation in the September 6, 2022, Order, as she reiterated her findings pursuant to Ratliff and Chambers and even provided additional findings.

Finally, the ALJ did not have the benefit of the Oufafa Opinion, rendered on February 16, 2023, at the time she rendered the August 11, 2022, “Opinion on Bifurcated Issues” and September 6, 2022, Order on Reconsideration. Thus, on remand, the ALJ must be given the opportunity to perform her analysis anew utilizing the economic realities test set forth in Oufafa. The Oufafa Court outlined a test consisting of six factors which are as follows:

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 599.

The Court further noted that the key inquiry in the economic realities test is “the worker’s economic dependence upon the business for which he is laboring.” Id. The Court continued:

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.

Id.

Accordingly, the ALJ's conclusion Hines was an independent contractor at the time she sustained her May 26, 2021, injuries, set forth in the August 11, 2022, "Opinion on Bifurcated Issues" and reaffirmed in the September 6, 2022, Order on Reconsideration, is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings in accordance with the directives of Oufafa and a decision consistent with the views set forth herein.

ALL CONCUR.

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ADMINISTRATIVE LAW JUDGE:

HON STEPHANIE L KINNEY
MAYO-UNDERWOOD BUILDING
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LMS