

2024 KY Wrk. Comp. LEXIS 37

KY Workers' Compensation Decisions

June 21, 2024

Claim No. 202300257 & 202100261

Reporter

2024 KY Wrk. Comp. LEXIS 37 *

Cecelia Mack, Petitioner

v.

June Jeanes (Deceased) C/O Iva Jeanes-Frank Uninsured Employers' Fund and Hon. Kimberly O'Bryan, Administrative Law Judge, Respondents

Core Terms

caregivers, independent contractor, caretaker, skill, mother's, wheelchair, economic reality, fill, food, bed, replace, mom, companion, weigh, chair, hire, dog, care provider, signature, bathroom, lift, reconsider, remember, print, pain, leg, coordinated, long-term, withheld, license

Opinion

APPEAL FROM HON. KIMBERLY O'BRYAN, ADMINISTRATIVE LAW JUDGE [*1]

OPINION AFFIRMING

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

STIVERS, Member. Cecelia Mack ("Mack") seeks review of the December 22, 2023, "Opinion and Order on Bifurcated Issue" rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ Rice-Smith") dismissing her claim for income and medical benefits against Iva Jeanes-Frank ("Jeanes-Frank"). Mack also appeals from the January 23, 2024, Order of Hon. Kimberly O'Bryan, Administrative Law Judge ("ALJ O'Bryan")

¹overruling her Petition for Reconsideration and affirming ALJ Rice-Smith's Opinion and Order. Upon review of the lay testimony, both ALJ Rice-Smith and ALJ O'Bryan found Mack was an independent contractor and not an employee of Jeanes-Frank at the time of her alleged September 28, 2020, injury.

On appeal, Mack contends both ALJs committed reversible error in finding she was an independent contractor while caring for June Jeanes ("Jeanes"). Mack argues her work as a caregiver for Jeanes-Frank's mother, Jeanes, now deceased, created an employer/employee relationship. Mack asserts Jeanes-Frank paid her to provide her mother caregiving/nursing services. Even though [*2] Jeanes-Frank paid Mack for her caregiving/nursing services out of her mother's account, Mack insists the testimony establishes Jeanes-Frank intended to procure 24-hour home health care assistance for her ailing and elderly mother thereby creating an employer/employee relationship between Mack and Jeanes-Frank. Mack asserts Jeanes-Frank provided all of the tools, medications, food, supplies,

¹ ALJ O'Bryan no longer serves as an Administrative Law Judge.

and other items necessary to provide care for her mother. Mack requests the Board reverse both decisions and remand the claim to another ALJ to enter the appropriate findings as to her status as an employee of Jeanes-Frank.

BACKGROUND

Because the proceedings were protracted, a discussion of the proceedings and the pleadings is necessary. Further, since the parties ultimately agreed ALJ Rice-Smith must first determine whether Mack was an employee or independent contractor, the medical evidence will not be summarized and discussed herein.

On February 19, 2021, Mack filed a Form 101 asserting a claim against Jeanes-Frank alleging she was injured on September 28, 2020, when her "left foot was injured by wheelchair of patient" resulting in a strain or injury of the lower leg. Because Jeanes-Frank [*3] did not have workers' compensation insurance coverage on the date of the alleged injury, the Uninsured Employers' Fund ("UEF") was joined as a party defendant by Order dated February 24, 2021. On May 11, 2021, Jeanes-Frank filed a Form 111 denying the claim asserting among other reasons that Mack was not her employee and the alleged injury did not arise out of and in the course of employment.

On May 18, 2021, Mack was deposed by the UEF. She testified that in 2019 she graduated in "early childhood" which she explained as follows: "It's like for - the early childhood I'm going for is like birth to six years old, like a student." At the time of her deposition, she was attending Campbellsville University seeking her bachelor's degree. From 1990 to 1991, Mack was employed at the Home of the Innocents as a certified nursing assistant. From 1991 to 2013, she performed various in-home care jobs. In 2013, she began working for Antoinette Linville ("Linville") as an in-home caregiver. She was paid \$ 12.00 an hour and left that job to return to school. Mack did not work 40 hours weekly because Linville was in and out of the hospital. Mack left Linville because Mack developed cancer in her [*4] left leg.

²After undergoing radiation treatment, the cancer went into remission. In 2019, she attended Jefferson County Technical College ("JCTC") seeking a degree in early childhood education. Mack elaborated about her schooling:

Q: Oh, excellent. Congratulations. When you said you went to work as a full-time student or study as a full-time student, was that at Campbellsville University?

A: No, I started out at JCTC.

Q: Okay. And what were you studying?

A: Early childhood education.

Q: Okay. And then were you just a full-time student from 2015 until 2019?

A: Yes.

Q: Okay. And did you leave JCTC to - I'm just making it clear for the record - to go to Campbellsville University?

A: Yes. When I graduated, I went to JCTC.

Q: Okay.

A: I mean, when I graduated from JCTC, I went on in [sic] to Campbellsville.

Q: Okay. So you got an associates, or you went two years to JCTC and then went on to university; is that correct?

A: I went four years because I did like a dual enrollment

Q: Okay.

A: -- in early education; so I branched off two different ways. So when I went to my bachelor's program, I can either do two years [*5] and do - be a teacher towards administrative for elementary school, or I can veer off and be an early childhood teacher, like a daycare/school up until six years old, when you go into school.

² Mack characterized the diagnosis as carcinoma in the left thigh.

Mack explained how she began working as a caregiver for Jeanes and what transpired when she met Jeanes and Jeanes-Frank.

A: I have a friend, Donna, and she's on Care.com, and Iva Jeanes-Frank contacted her. And she was already on a case; so she said, "I have a friend that doesn't mind doing it while she's in her college."

So she contacted me, and Iva Jeanes-Frank called me and set up a meeting to meet with her at her mother's home.

I went to her mother's home. We sat down and talked, and then she asked me could I work for her mother and that I would work five days with two days off. And I said that would be fine.

Q: And you mentioned a website. I'm sorry. You cut out. What was the website you mentioned where you found out about the - or your friend found out about the employment opportunity?

A: Iva Jeanes-Frank found my friend off of Care.com.

Q: Okay. And you went to go meet her at her mother's home; is that correct?

A: Yes.

Q: And where is her mother's home?

[*6] A: I think it's 3518 Hurstbourne Ridge Parkway.

Q: In Louisville?

A: In Louisville, Kentucky.

Q: Okay. And what was - did you discuss pay with her?

A: Well, before I could discuss pay, she says, "I pay \$ 180 a day."

Q: Okay. And did she give you any tax documents?

A: She gave me two pieces of paper to fill out that she had made up.

Q: Okay.

A: And I -

Q: And what - go ahead.

A: I had to fill them out. And I asked her, I said, "What is this for?"

She said it was for taxes and, I'm assuming, for - to run - to make sure I wasn't a criminal, but she said, "Your background."

And she took the two pieces of paper and put them in her purse because she told me I had to fill them out right then and there before she left. So I filled them out. She had to have the papers.

Mack was paid by check drawn on Jeanes' personal checking account. She did not know if taxes were withheld from the amounts she received and was unsure whether she received the full allotment of \$ 180.00 per day as she has no records of the amount paid. Mack did not pay taxes on the amount she received in 2020 because she assumed Jeanes-Frank paid the taxes. Mack did not receive a W-2 **[*7]** or a 1099 regarding the money she received from Jeanes. Mack did not keep a copy of the form she initially completed just before she began providing services to Jeanes. Mack explained she was hired the day she met with Jeanes-Frank. After she filled out the paperwork, Mack was asked to start immediately and began working the next day. Mack described her duties as follows:

A: I had to take care of her mother and all aspects of her mother's life. I had to bathe her, give her medications, potty her. I did blood pressures on her and make [sic] sure her blood pressure was up because some of that medicine that she was on, she had to have blood pressure checks.

We did a schedule on her as far as her medication because she was on a controlled substance. I went with Ms. Frank with her mother to take her to the place where she got her drugs, the legal drugs, to make sure that

the drugs were in her system. I had to take her mother to the bathroom and get the samples for the place, the urine samples and stuff, put her mother back in the chair, take her mother, put her mother in the car, fold up the wheelchair, put the wheelchair in the car both times, taking her and bringing her back.

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Mack recounted what occurred when she was injured on September 28, 2020, as follows:

Q: Okay. And tell me about the day of the injury. What happened?

A: Okay. The day of the injury I was in the bathroom with her mother and getting her ready for bed, and so she was on the potty. We brushed her teeth, washed her face, and we was always singing a song. Her mother would always say, "You're a good girl, Charlie Brown." And we would be singing it.

Well, on this particular day, I had to put her mother in the wheelchair in this small bathroom in the center of the house, and I was in the corner, and I was reaching to throw away the baby wipe that wiped her mother's hands and put it in the garbage can. When I learned [sic] over towards the sink itself, the washbasin, to flush the toilet, the mother reared back in her wheelchair because she's good about helping you try to push back to help you out of the bathroom.

And I was still singing the song, "You're a good girl, Charlie Brown." Well, when I kind of leaned over to try to reach to flush the toilet, when she reared back, she had a piece on the wheelchair that holds her oxygen tank cannula - her mother did. That piece pinned **[*9]** me in the corner, and she was steady, rearing back laughing. So I wouldn't scare her, I was like, "Ew. Okay. Okay. Okay. Okay. Okay." And I was trying to get her off of me because she had me pinned in the little corner, like I am now. The wall - she had me pinned in.

So I said, "Miss June, you're going to have to stop pushing back. Stop pushing back."

So then I was able to lift the chair a little bit and get her off of me by turning the chair a little bit. So once I did that, I was able to get back, and my leg was hurting me, my ankle. I'm like, "Ew. Ew. Ew."

So I took her back to her bedroom because we was getting ready for bed. I took her back to her bedroom. When I put the wheelchair in front of her mother's bed to try to transport her from the wheelchair to the bed, just as soon as I transported her over on the bed and put her feet up, I fell against the headboard of her mother's bed.

And her mother said, "Oh, what are you doing? Are we going to play sing-song again?"

I'm like, "No, we are going to go on and go to bed."

And she said, "Well, make sure my phone is right here," because she always calls her daughter Iva Jeanes all hours of the night.

So I put the **[*10]** phone by her bed because I actually knocked the phone off. When I leaned against the headboard, I knocked the phone off. So I grabbed the phone cord, and I lifted it up, and I put the phone on there.

And by this time, the pain was really shooting in my leg. I thought I had broke my ankle, really.

And I said, "Miss June, let me sit down in this wheelchair for a minute until you calm yourself" - because she always said, "You going to be here? You going to be here? You going to be here?" She was always afraid to be alone, and I would always sit there.

So this particular night, she said, "I'm tired." I said, "Okay. Well, go on and go to sleep. I'll be here."

So the pain is rearing up more and more, and I knew that I couldn't - I tried to get myself back up. I couldn't get myself back up.

So I said, "Miss June, I'm going to take your wheelchair back in the back and wash it and bring it back in the morning." And she said, "Okay."

But actually I rolled myself back in her wheelchair to the back part of the house where I stayed at of the condominium. Okay?

Then I called Iva Jeanes and asked her -- I said - I explained to her what happened. I said, "Do you have an Ace bandage?" [*11]

She said, "I think Mom has got an Ace bandage in the bathroom."

And this is the same bathroom we just came out of. I looked in the bottom of there and found the Ace bandage. I put the Ace bandage on my foot - on my ankle and foot. I rolled myself back to where I was in the other part of the house, and I tried to calm it down. I took two Tylenols. I couldn't get it to calm down. I couldn't get it to calm down.

Mack testified she called Jeanes-Frank on September 28, 2020, about her injury. Mack discussed what she was able to do for Jeanes the day after her injury:

So the next day, I tried ice. Her mother was still asleep.

So I went up front. I went and took her wheelchair - using the wheelchair. Her mother didn't want to get up.

She said, "Okay. I'm not ready to get up." That was her thing. "I'm not ready to get up."

So the morning went on past. Her mother usually gets up between 11:30 and 12:00, sometimes 12:30. So [sic] went back at 12:30 again.

I said, "Are you ready to get up?"

She said, "No." She said, "My back is hurting."

So I asked her, does she want a pain pill.

I gave her a pain pill. I took that wheelchair again, and I went back to the [*12] back part of the house because we have a baby monitor where I stay at; so if her mother wants anything, she'll say, "Cece," and I can go back to the other part of [sic] house and see about her.

This particular day, she didn't want to get up at all. So I kept rolling myself back up there and checking on her. She was asleep.

The mother wanted to get up a little after 4:00 that day because I was like "You're kind of late."

She said, "Yeah, but I'm going to get up for a while."

I got her up with this Ace bandage. I'm limping and still hurting. I remember this day because she said, "Can I have a root beer?" Because she loves root beer.

And I said, "Well, you know, I don't usually give you a root beer this late without eating anything heavy."

Because that morning I gave her coffee and toast. That evening, I gave her a small thing of soup that Miss Iva had put in her deep freeze. I had to unthaw it. She didn't eat a whole lot of it because she was feeling bad that day.

So I said, "Okay. Can you eat the rest of the soup, or do you want me to fix you a sandwich?"

She loved my BLTs [sic] sandwiches; so I fixed her a BLT sandwich, bacon, lettuce, and tomato on toast. I [*13] took it back there to her. To this day, she never got up. I fed her. She pottied. She went back to bed. Everything was in her bed.

I went back [sic] the front part of the house where I was. Later that night, I took the Ace bandage off because I just couldn't stand the pressure no more. Now, this is on the 29th. So I laid on the floor all night long. I'm like, "Okay. Okay. I can't call Iva this time of the morning because she's going to think something happened to Mom," and I didn't want to upset her when it was me.

So I just kept trying to endure the pain, trying to endure the pain. Finally I couldn't endure the pain no more. I called Miss Iva at 7:30 that morning - the next morning. I said, "I didn't mean to wake you up but my ankle is worser (phonetic). I have got to get out of here and go to the hospital."

She said, "Okay."

At Mack's request, Jeanes-Frank called Marian Lay ("Lay") who was her relief. With the use of a wheelchair, she managed to get into her car. When Lay arrived, Mack drove to the University of Louisville Hospital where she was taken into the emergency room. She was treated and released and referred to her family doctor. Her brother came to the emergency [*14] room and transported her home. Three days later, she saw her primary care doctor who referred her to an "orthopedic doctor" who put her in a stabilizer boot and referred her to another orthopedic surgeon. Ultimately, she was informed by the orthopedic surgeon she had tissue and nerve damage and was referred to physical therapy. Mack testified the physical therapy did not help and the orthopedic surgeon told her she would have to live with nerve damage. Her leg, toes, and ankle were still swollen, and she was in constant pain. Although she has been referred to a psychiatrist, "to train [her] to deal with the pain," she has not seen one. She attends pain management.

Mack explained why she considers Jeanes-Frank her boss.

Q: Okay. Let's talk about your relationship with Ms. Frank. Did you consider her your boss?

A: Yes.

Q: Why did you consider her your boss?

A: Because she told me everything to do, and that's what a boss does.

Q: Okay. For example, what would she tell you to do?

A: Like, when she came over to see Mom, if there was something that had to be done - like, sometimes she would say, "Go in there and get the bags of soup that I put in the freezer, and this [*15] is what she'll have. You fix this for her. Make sure Mom gets a shower" because the other woman that relieves me, she couldn't give Mom a shower. She told me, "Give Mom her showers. Make sure Mom had her showers and stuff" when she came.

Q: Okay.

A: "This medication - give Mom this medication. Give Mom that. Give Mom this."

Q: Did she directly supervise your work, though, I mean, other than those times?

A: Only when she was there and needed something done, she would tell me to do it, and I would do it.

Mack testified she used a wheelchair and blood pressure cuff to care for Jeanes. Mack estimated Jeanes was approximately 5'7" and weighed maybe 110 pounds. Mack recounted her activities in the days following her September 28, 2020, injury.

Q: And you testified that you put her to bed, and then you laid down in some pain overnight, correct?

A: After I fell against the headboard, yes. I tried to lay down, but I couldn't.

Q: Okay. Did you come and work a full shift the next day?

A: No, because she didn't want to get out of the bed.

Q: I thought you initially stated in your claim that that - and we're going to get into this some more - that this occurred [*16] on the 28th?

A: Yes.

Q: Okay. So is it your testimony that you did not work full shifts the 29th or the 30th?

A: The 29th I did work a full shift. I just didn't - I still did food and stuff for her and toileting. I did not get her physically out of the bed, no, but I took her her [sic] food, and we put the potty chair beside her bed. So when she wanted to potty, I just transferred her from the potty - from the bed to her potty. Because she could help you. As long as you stood up with her and held onto her, she could physically stand up and turn and sit down and use the bathroom.

Q: Did you work a full shift the 30th?

A: The 30th, yes.

Mack called Jeanes-Frank and advised other caregivers to come in early. Mack acknowledged her signature appears on the Independent Care Provider Form supplied by Genworth Life Insurance Company ("Genworth").

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Q: And this is a form titled "An Independent Care Provider Form From Genworth Life Insurance Company." I'm going to have you take a look at this form and look at the signature on the bottom.

A: Yes.

Q: And that's dated July the 21st, 2020. Is that accurate?

A: Yes.

Q: If we [*17] go up to the top, you're being referred to as an independent care provider. That means working for yourself, correct?

A: Correct. I see that now, yes.

Q: Okay. So there were no tax reporting responsibilities because you were working for yourself, correct?

A: Correct.

Q: Now, when you were getting paid, you were being paid via check drawn off Ms. Jeanes' checking account, correct?

A: Yes.

Q: And you had been told that this was being done via a reimbursement from an insurance policy for long-term care, right?

A: No, I was not told that. And this second page -

Q: Uh-huh.

A: -- it looked like same one that - because I filled out two complete papers, and this second page doesn't look like the top part of what I filled out.

Q: Okay. But you have no other form to counter that?

A: No, and I wish I did because - no, but she was pressing -

Mack initially testified she did not recall signing these documents but later elaborated as follows:

Q: Okay. So you're saying you didn't sign any of those?

A: I'm saying especially this one right here.

Mr. Rich: Which one are you talking about?

Mr. Bolus: Which one?

Mr. Rich: The one with the driver's [*18] license -

³ The Independent Care Provider Form which was supposed to be attached as Exhibit 2 to her deposition was later filed in the record. The document is a two-page document styled "Independent Care Provider Form." Under the heading, Independent Care Provider Information, Cecelia Mack is the Independent Care Provider's Full Name. It also lists her date of birth and states she is not related to Jeanes. Aide is listed as the type of independent care provider. Under type of rate is shift rate of \$ 180.00 a day. The document also lists Jeanes' address, Mack's phone number, the last four numbers of Jeanes' SSN. The second page contains a photocopy of Mack's driver's license with all the information contained on her driver's license written down. The signature of Independent Care Provider is Cecelia Mack with her handwritten name printed thereunder. The form is dated July 21, 2020.

The Witness: With my driver's license on there. On here, somebody else has put my name in there. That's two different signatures. I would have not printed it. You can see it's two different signatures. It says, "sign and print." That's two different signatures.

By Mr. Bolus: I mean, but it would make some sense that somebody would have to actually print your name if, for instance, you just signed it.

A: Okay. When it says "signature" - it says "signature," and then it told me to print my name. If they told me to print my name, I would have printed my name as well.

Q: Okay. But the signature matches the one that you have on your driver's license if you look at it, please.

A: Yes, but the second one that says "name and title, print," that's not my signature.

Q: No, it may not be. I don't know. I'm not going to say one way or another whether it was that you actually did the printing part, but it doesn't matter who does the printed part. That could have been typed in.

A: Okay. This other paper for independent thing, there's a question about my signature as well because it looked like someone has traced over my signature, my last name.

Q: You understand [*19] that you're under oath today, correct?

A: Yes, sir. Yes, I'm under oath. I do understand that fully.

Q: You also understand the penalties for perjury?

A: Yes, I do.

Mack has continued to maintain her CNA certificate. She offered the following as to whether she ever received a W-2 as a caregiver:

Q: As an in-home caregiver, have you ever received W-2 wage reporting?

A: I've always filed my taxes on my own. This is the first time I assumed she did.

Q: Okay. Why did you assume that she did if you hadn't done it before?

A: Because of the paperwork that she gave, and one of these papers that she submitted, one of them was not here that she had me to fill out because it was a W- -- a W--an I-9 form, whatever the form was. I remember that, and it's not in this right here.

Q: You say you filled out a W-9 form?

A: Whatever - a tax form she handed to me on that paper. She printed a copy of it, and she had me to fill it out. It's just not in my presence at this time.

Q: So in all of these other prior jobs, you simply filled out your taxes, and you made the assumption that she was going to withhold despite your other - despite your other things.

You also [*20] don't know how much that you're entitled to earn while drawing SSI, and all of this money appears to be off the books. The one piece of employment that would have - that would have resulted in W-2 wage withholding, which would have been a Jewish Hospital job, you didn't include on your list of prior employers.

Is that an accurate summation of your employment history and sort of tax history on this?

A: Bits and pieces of it is accurate. All of it is not accurate.

Q: What is not accurate?

A: The fact that I didn't remember, at the time that I filled this out, the other jobs that I did.

Mack outlined how often Jeanes-Frank visited her mother and her actions when visiting.

Q: Okay. And how often was Ms. Frank present at the home?

A: Quite frequently. She was there a lot.

Q: Like, what's a lot?

A: In a week's time, she would come like just about every other day or every two days.

Q: About every other day. And how long would she stay?

A: Sometimes she would stay 45 minutes. Sometimes she would stay 30 minutes. Sometimes she would stay 20 minutes. She would stay long enough to do things around the house, take the dog out to potty - her mother's dog out [*21] to potty, check the mail, talk to Mom for a little while. Sometimes she had to go potty, so however long it took her to do that.

Q: So when she would come over to the house, that would be when you would get some requests from her; is that fair to say?

A: You went out, and then you came back in. I didn't hear what you said.

Q: When she would come over to the house, that would be when she would deliver primary requests to you?

A: Yes, if she wanted something done, yes.

Q: Okay. But, otherwise, your time was your own, and you structured it as you saw fit, correct?

A: No, the other times I would be cleaning up, washing the clothes, cleaning the bathroom, sorting clothes to get her mother ready for the week.

Q: But she wasn't standing over you and supervising you as you were exercising those tasks, correct?

A: Sometimes she would be standing there. She wasn't doing nothing else but standing there watching me or saying something - be talking to me about something.

Q: Like what would she talk to you about?

A: If Mom had a doctor appointment, she would say, "Okay. Put it down that we're going to take Mom to this doctor appointment" or "We're going to do this with [*22] Mom" or just anything that was concerning Mom.

Q: Was this consistent with your other caregiving jobs? Was this kind of how it went everywhere?

A: Yes.

Q: Okay. And in terms of things like menus, menu planning, that was really something for you; she would bring over some food every now and then, but most of it was your decision as to - excuse me - what would be and how much would be eaten, correct?

A: No, that's not correct because before - I guess before I got there, the doctor had gave her daughter certain things to try her mother on to keep her eating or weight up - you know, keep her going. And she would bring over - or she would say, "I bought a weight-gaining product for you to use. Give her this. Make this milkshake. Put this in there. Give her this for her bowels because she don't do this" or "Give her this tea." She would bring it and do this. She would just instruct me to do different things for her mother.

Q: It's customary in caregiving, though, that one would be following certain, like, medical protocols, would it not?

A: Yes, but this wouldn't be considered a medical protocol.

Q: Right, a dietary need for a thin, frail woman?

A: No, that wasn't [*23] a dietary need because a dietary need would be fruits, vegetables, meat, try to get her to eat more of the pyramid.

She wanted me to fix things the - to weigh things for - those milkshakes you make up because her mom wasn't really eating a whole lot, but she liked to drink her coffee and her root beer.

And she was like, "Okay. Well, then I want her to get this. Give her this. Give her that."

And, you know, sometimes I would be like, you know, "Why would I be giving her that," to myself, but I did what she told me to do because she was my employer.

Q: So none of your prior caregiving jobs involved people who were going to follow medical suggestions as to appropriate diet for maintenance of weight and general health?

A: They did a better job of it because Ms. Frank's mother, all she wanted to do was sit there and eat candy. Ms. Frank, the daughter, would bring her all the candy, and she would be eating candy and chocolate all day.

When she received a check from Jeanes-Frank, Mack stopped at the Stock Yards Bank, Jeanes' bank, and cashed the check.

On September 28, 2021, Mack filed a Motion to Bifurcate the claim to first resolve the issues of the occurrence of [*24] a work-related injury, whether her condition is traceable to a work-related injury, and whether an employment relationship existed between her and Jeanes-Frank.

On November 29, 2021, Mack's attorney filed a Motion to Withdraw as counsel stating that due to unforeseen circumstances, he would be unable to continue to represent her in the claim.

On December 3, 2021, Mack's counsel filed a Motion to Cancel Hearing and Withdraw Claim asserting that in light of his imminent withdrawal, Mack had requested the hearing scheduled for December 2, 2021, be cancelled and she be permitted to withdraw her claim, without prejudice. On January 4, 2022, Hon. Grant Roark, Administrative Law Judge, to whom the claim had been assigned, entered an Order dismissing Mack's claim without prejudice.

Mack filed another Form 101 against Jeanes-Frank on July 15, 2022, through another attorney alleging the same September 28, 2020, injury. The cause of the injury was listed as "caught in, under or between, NOC." She alleged multiple body parts were injured.

On August 17, 2022, the claim was assigned to Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ Kinney").

On August 30, 2022, Jeanes-Frank [*25] filed a Form 111 denying Mack was employed by her and that Mack failed to provide due and timely notice as some of the reasons for denial of the claim.

On November 9, 2022, Dawn Batainah ("Batainah") was deposed by Jeanes-Frank and testified she currently works on call for a temporary agency caring for the elderly. She has cared for elderly people for approximately 19 years. She took care of Jeanes in Jeanes' home. When she cared for her, Jeanes was unable to stand on her own resulting in Batainah having to pull her up. She also assisted Jeanes in moving from her living room chair to her wheelchair. She was engaged by Jeanes-Frank to perform caregiving for Jeanes who was "fully dependent on the wheelchair and physical help." Batainah used a wheelchair to transport Jeanes to the living room and bathroom. There was a "steep stairway" leading from the living room to the main entrance of the home. Batainah never moved Jeanes up or down those stairs. She considered herself an independent contractor and was paid by direct deposit. During the course of her tenure with Jeanes, she did not regularly sign any forms. Batainah and another lady worked 8-hour shifts on certain days. She was unable [*26] to remember the designated days of the week upon which she worked. She began caring for Jeanes "around October 3, 2020."

While there she did not interact or speak with Mack except for one phone call while at work. Although she did not remember the text of the conversation, Batainah remembered Mack was upset about something. Batainah described Jeanes as an "absolute kind sweetheart" who was "very polite, very friendly, very appreciative." She stopped caring for Jeanes about a month later.⁴

Because Jeanes' physical condition progressively worsened, Jeanes-Frank decided to have additional caregivers stay with her. Batainah recounted the frequency she saw Jeanes-Frank each week:

Q: And how often did you see Ms. Iva Frank?

A: Several times a week. I don't remember how often exactly.

⁴ Presumably, Batainah was referring to a month after she began providing care to Jeanes on October 3, 2020.

Q: So she was coming - was she coming in to help and supervise or was she -

A: No.

Q: -- coming to visit her mother?

A: No - I'm sorry. We were switch - switching shifts.

Q: Okay.

A: She would come in - yeah, she would come in evenings.

Q: Okay. How did -

A: One of us had to be there at all times.

Although she could not specifically [*27] recall, she believed she received a 1099 for her earnings associated with caring for Jeanes. She was not sure whether the 1099 came from Jeanes-Frank or Genworth. Batainah was fully paid. She did not possess a caregiver certification or license. She explained how she obtains this type of work:

A: Okay. Well, when I first started out in this work, and it's - and - and my work is very well rounded from working with disabled adults and work training programs to a private caregiver and other type of group homes, feeding people with eating disorders and such. So my first job was - was being a vocational instructor for elderly disabled adults. And I forgot the question, sorry. Can you repeat that?

A: No, no. I guess - and I appreciate that. That's fine. I didn't want you to go off on tangents anyway.

Q: Let's say since January 1 of 2020?

A: Yes.

Q: How did you get work? How do you get work in today's age?

A: Mostly care.com.

Q: Okay. That's what I wanted because you mentioned that.

A: They do background checks, everything on the person who is looking for the employment. Once you're approved, you - you can set up a profile and have connection with people looking for [*28] your service.

Q: And so they basically provide the service for matching people up. But it's the - whoever's looking for the help, the particular help and a particular qualification, then there's a contact between you and them.

A: Absolutely.

Q: Okay. I get that. I get that. And why you were having trouble, like, for example, remembering employers because there may have been several people that you would work for; is that correct?

A: Yeah.

Q: Okay. And there might be several people during any given week that you might work for?

A: Currently, but through care.com it was a full-time position, private position, caring for a particular person in - in a private home.

On cross-examination, Batainah testified she believed she began working 40-hours per week on October 1, 2020. She was not sure whether she was around Jeanes or Jeanes-Frank in late September of 2020. She was hired by and took directives from Jeanes-Frank. Jeanes-Frank told her when and where she was to work and also informed her when she could leave. Batainah believed Jeanes-Frank verbally communicated the days she was to work. She was not acquainted with Jeanes-Frank prior to caring for Jeanes. Jeanes-Frank [*29] advised her what and when medications were to be given. She left sometime in November 2020. Batainah described her working relationship with Jeanes-Frank:

Q: Did you look to Iva Jeanes-Frank as the person who hired you to provide you with directions and did you consider her to be your employer?

A: Yes, sir.

Q: And then at the end of your job or whatever -

...

A: Well, I - sir, you know, it - it - it - it doesn't seem like a - a very direct question because technically it was her mother who I was caring for and working for.

Jeanes was not able to walk without assistance and could not stand up by herself. Batainah took her to the bathroom and toward the end, Jeanes required a diaper. She estimated Jeanes weighed between 92 and 96 pounds and was approximately 5'6". Batainah normally worked the morning shift which began at approximately 9:00 a.m. At that time, the overnight worker left. After eight hours, Batainah was replaced as the companion. She worked 40-hours, five days a week. Another caregiver covered the times she was not present. At no time did she take Jeanes up and down the stairs in her home either physically or by using the lift available to transport [*30] Jeanes up and down the stairs. While there, she prepared all of Jeanes' meals. She never met Mack and did not know the time period Mack cared for Jeanes. Batainah was unable to recall whether an amount was withheld from her compensation. She described her job assignments as follows:

Q: But you either got your job assignments, when to work, when to be there, when you were working, what days you were leaving, what days you were off, you either got that through text, emails or telephone calls?

A: Actually, I think it was written on paper.

Q: Okay. That's fine. And this isn't a situation where she wanted you to work, and you get to pick when you go to work and when you don't work?

A: No, no.

Q: You had to be there when Ivy Jeanes-Frank told you to be there?

A: Yes.

Q: And you were able to leave when your shift was over?

A: Yes. As - as long as the next - as long as the next person arrived.

Q: That's what I wanted to ask you. There was a coordination -

A: Yeah.

After her first week or two as the caregiver, Jeanes slept in the living room lounge chair. Because Jeanes was not well, she was unable to stay awake. In the afternoon, she moved Jeanes to her [*31] bedroom. At the end of Batainah's employment, Jeanes stayed in her bed most of the day. Jeanes informed her and Jeanes-Frank what she wanted to eat each day.

Batainah has worked as a caregiver when taxes were withheld but only when she worked in a facility. In a private setting, taxes were never withheld from her compensation. She testified there was no agreement as to the length of her employment as Jeanes' caregiver. She explained:

Q: How long you were going to be there? Were you on any kind of specific understanding that you were going to be doing this for any specific number of months or any specific number of years?

A: Absolutely not.

Q: Were you able to adjust your own time at your own - at your own whims or will or needs?

A: No problem at all.

Q: Did you adjust your times at all during your - during your engagement with Ms. Jeanes and Ms. Frank?

A: I didn't need to.

Q: Okay. Did you coordinate things separately with other caregivers while being engaged in that home?

A: We had consistent communication about how - how the person was doing, and we discussed, you know, different conditions.

Q: So who all were you having these communications with?

[*32] A: I don't recall her name. If you say, I might remember it. She was the one who worked second shift while I was employed there.

Q: Was that Ms. Stiles perhaps?

A: I don't remember the name I would only know her by her first name.

Q: Miriam, perhaps?

A: Miriam sounds very familiar.

Jeanes-Frank did not live in Jeanes' home. When Jeanes requested that she perform a task, Batainah was not required to check with Jeanes-Frank. Further, Jeanes-Frank did not instruct her what to avoid or to refrain from certain activities. She did whatever Jeanes wanted. Another worker had been Jeanes' caretaker for more than a year before she began taking care of Jeanes.

Sandra Stiles ("Stiles") was deposed on December 9, 2022. At that time, she was working as an esthetician at a spa in Bowling Green. Commencing in approximately June 2019, she sat with Jeanes in her Louisville home for approximately a year. Stiles described what she did for Jeanes:

Q: Okay. And what were her physical infirmities?

A: Well, when I first got there, she, you know could get around a little bit on her walker. But as she progressed, she was unable to do that, and she would - I would - they - I had [*33] a little, like, a push chair that I would push her around from room to room. And I would have to move from seating positions in her chair, put her to bed, and everything, you know, closer to the time she gradually progressed to that.

Jeanes was thin and weighed approximately 130 pounds and had no strength in her legs. Stiles had no problems caring for Jeanes. While caring for her, Stiles lived in Jeanes' home. She had her own bedroom and bathroom. She was paid weekly as an independent contractor. Stiles explained:

Q: Okay. And how did you account for your hours?

A: It was a - it was a rate paid by the insurance company, and then, a paper was sent to the insurance company. And then, I was there pretty much 24-7, unless I took a day off.

Stiles testified Lay filled in for her occasionally when she needed time off. On occasion, Stiles' aunt filled in for her.

Jeanes was very fond of Max, her dog, who died after Stiles left and when Mack was there. She first met Mack when she came to visit Jeanes. She did not have a lot of interaction with Mack and only saw her when she stopped to see Jeanes. Stiles testified Mack seemed irritated when she visited Jeanes. During [*34] the period Stiles cared for Jeanes, Jeanes-Frank was retired and visited almost daily. When she cared for her, Jeanes had insufficient leg strength to move unassisted into her wheelchair. Because Jeanes could not lift her legs on to the footrest, Stiles had to place her feet on it. She was never aware of Mack's claim she was hurt by some action of Jeanes until she was to be deposed. Stiles believed she last interacted with Mack several months before Jeanes died. Stiles believed Mack killed Max because she hated the dog and refused to walk him. Instead, Mack placed pads all over the floors in the house where the dog was to use the bathroom. Stiles acknowledged she did not see Mack mistreat the dog.

Stiles has an esthetician license and a CPR certification. She has never worked as a caregiver for a company. She believed she began working as a caregiver in Jeanes' home in June 2019 and left in late July or August 2020. Except for previously caring for her grandfather, this was Stiles' first caregiver position. She was offered this position by Jeanes-Frank. She initially filled in as Jeanes' caregiver and then Jeanes-Frank offered her a full-time

position. Stiles estimated she was paid [*35] approximately \$ 1,200.00 per week. She believed Jeanes had insurance which paid for someone to stay with her. Stiles provided the following as to the financial arrangement.

Q: All right. And so, what I want to get to at this point in time is, did you get a check from the insurance company, or were you getting checks from ---

A: No. They sent in - I got checks from - from Grandmother, and the information was sent into the insurance company. They paid Grandmother, and then, Grandmother paid me. 5

Stiles did not have copies of the checks or a check register. She looked to Jeanes-Frank for direction as to her work schedule. Because she lived with Jeanes, Stiles was not on a strict schedule. When she needed to be off, she would contact Lay directly and then inform Jeanes-Frank of the arrangement. She characterized Lay as her "fill-in person." She told Jeanes-Frank when she was taking a day off because doing so was good manners and she wanted her to know about the arrangements for her mother's care. Whenever Lay filled in for Stiles, Jeanes-Frank paid Lay directly. Jeanes-Frank [*36] also signed and delivered Stiles' check. She never received a 1099 nor were taxes withheld from her compensation. Stiles paid taxes on her income.

Lay was also deposed on December 9, 2022. She testified she was Jeanes' full-time caregiver from approximately June 2020 to December 2020. During the first four or five months she cared for Jeanes, she only worked one or two days a week for three or four hours at a time while Stiles was out. She was initially contacted by Stiles' cousin about helping with Jeanes' care. Lay provided the following about her previous caregiving experience:

Q: Did you have any previous caregiving experience?

A: Yes. I did.

Q: Please describe that for us?

A: I was - for over 50 years, I've been in caregiving and licensed practical nurse to a - a CMT [sic] up until of 20 - 2010, I guess, was when I stopped.

Lay believed she was an independent contractor. She was not acquainted with Jeanes or Jeanes-Frank before she began caring for Jeanes. Jeanes-Frank directly deposited her earnings into Lay's checking account. Lay believed she was paid \$ 20.00 per hour. She was required to log her time in a book. She became Jeanes' full time caregiver in [*37] the last of June or first of July 2020. She described Jeanes' physical abilities as follows:

Q: Okay. Tell me about her physical abilities. Could she stand up on her own?

A: No.

Q: Did she have any strength in her legs?

A: Very little.

Q: Was she able to move her fold-up chair with her feet or with her legs?

A: No. No. She couldn't.

Q: Was she able to lift her legs to put them onto any part of the chair? I think there was a footrest.

A: Footrest, yeah. No.

Q: How would her feet come into the footrest?

A: Just, you would have to pick them up and put them on there, the footrest.

Q: Okay. And was this condition - was this condition consistent with how she behaved from the moment that you started caregiving all the way up to the end, or did those abilities deteriorate?

A: They deteriorated over time.

⁵ Stiles referred to Jeanes as "grandmother."

Lay testified none of her interactions with Jeanes were negative or malicious. Most of the time Jeanes could communicate what or when she wanted something. She testified Jeanes' "dog was her life." She and Jeanes-Frank were responsible for taking the dog outside. It was her understanding that Max died as a result of falling down the steep steps [*38] at the condominium.

Lay had very little interaction with Mack who she characterized as "very controlling." She estimated she saw Mack approximately three to four times a month. Lay recounted her concerns about Mack:

Q: Okay. And in the times that you see [sic] her, did she give any indications that she was not doing the job up to the standards that you would have that job done?

A: Yes.

Q: Tell me what that means.

A: Well, with her bathing, you know, she had ways of doing that if she did it. June got - got to be very afraid of her, and so, you know, we would try to - we would try to just let things go until, you know, someone that she - Sandy or I were there, and then, we would take care of her. She didn't --- Cece didn't want her having any visitors, she didn't want Sandy there, and she said we'd rather [sic] never bring another dog in this apartment after Max died.

Q: Did you observe how Cecelia treated Max?

A: Terrible.

Q: What was she doing to Max?

A: She would kick at him and holler at him, you know, and - and poor little dog, he - he was a good little dog. He - he - he was scared to death of her, but -

Q: Okay. And you indicated that Ms. Jeanes [*39] was afraid of Ms. Mack?

A: She was.

Q: Did she express that to you?

A: Yes. She did.

Q: How did she express that to you?

A: She said she was scared of her and that she didn't like her, and I told her she needed to talk to her daughter, and she did.

Q: Okay. Did you observe Ms. Mack ever having difficulty in doing the tasks around the home?

A: Never.

Q: Did you observe anything that led to what Ms. Mack claims is her injury?

A: No. Never.

When Mack left, Lay was not required to work more hours. Lay estimated she last maintained her credentials as a licensed practical nurse and CNA on February 9, 2012. Lay has been involved in caregiving and nursing for 50 years.

⁶Lay believed she began caring for Jeanes full-time as of June 7, 2020. Before then she worked a few hours filling in for Stiles. Her substitutes were Batainah, Bobby Davis ("Davis"), and Mack. Mack was full-time when she started working as one of Jeanes' caregivers. Jeanes-Frank supplied the work schedule and obtained whatever the caregivers needed. Lay considered Jeanes-Frank her boss. Even though Jeanes-Frank visited daily, Lay never informed Jeanes-Frank of Jeanes' [*40] complaints about the other caregivers. She

⁶ Lay believed her certifications stopped as of February 9, 2012, the day she suffered a brain aneurysm and no longer worked in those capacities.

testified Jeanes-Frank fired Mack immediately after the incident which occurred a couple of months before Jeanes died.⁷ Jeanes died shortly after her dog died.

Lay was required to log Jeanes' condition and the care provided in a book. Jeanes-Frank wanted someone with her mother at all times. Jeanes-Frank paid her by direct deposit with no withholding. Lay paid all the taxes on what was earned. She was never paid by cash. On weekends, Lay was always there and predominantly ate whatever Jeanes wanted. Lay was unaware Mack had been injured. She estimated hospice began coming to Jeanes' home three or four months before Jeanes' death.

On the same date of the depositions, Mack filed a Motion to Amend the Form 101 to join the Estate of June Jeanes as a defendant based on Jeanes-Frank's testimony that she paid Mack with funds drawn on Jeanes' account. Jeanes-Frank filed an objection to the motion asserting the estate is not an entity that can be sued in as much as an order of final settlement was entered in Jefferson District Court (Case No. 21-P-001427) on November 23, 2021, at least seven months prior to the claim [*41] being filed. Jeanes-Frank also asserted Mack had made no effort to reopen the Jeanes estate. By Order dated February 17, 2023, ALJ Kinney denied the motion concluding Mack was required to file a separate Form 101.

On January 6, 2023, Jeanes-Frank was deposed by Mack. She testified that at the time of her deposition she was 75 years old and possessed a bachelor's degree in economics. Her mother died on December 7, 2020, at the age of 93.

Jeanes-Frank visited her mother every day. In 2015, when she was diagnosed with cancer and a back injury, her mother began receiving companion care approximately eight hours per day. After the diagnosis, her mother always had a caretaker from 8:00 a.m. to 5:00 p.m. In 2019, her mother slipped and fell down the steps shattering her femur. As a result, Jeanes required assistance getting out of bed, dressing, and in and out of her mobile chair. Her mother did not use a wheelchair but rather a transport chair which Jeanes-Frank described as being narrower, light-weight, and easier to handle. In May 2020, her mother required assistance approximately 75% of the time. Her mother stopped using her walker in June 2020 and would not use oxygen. Jeanes-Frank [*42] provided the following description of Jeanes' memory:

A: She was I would say like 75 percent. Mother was never senile. She had more trouble remembering things at night with sundowners, but she was in - she always knew pretty much what was going on around her. She was rarely confused by what was going on around her.

Q: Would you consider her to have been in sound mind and memory in June and July of 2020 at the time her physical -

A: Yes, Yes.

Q: Okay. So although she was physically declining, her mind was in pretty good shape?

A: Yes. She could not do complex math questions, but she certainly knew the day and what was going on in the world.

Her mother directed the extent of her companion care. Jeanes-Frank was never aware of Mack's injury claim from the time Jeanes' estate was opened until it closed. Further, Mack never informed Jeanes-Frank she had been injured. She recounted what Mack told her when she asked Mack not to return to her mother's residence.

A: She sent me a text the day after I asked her not to return to work, and in that text she said that she had been unfairly let go; that she was going to file an E.E.O.C. suit against me, and that she had been [*43] hurt while working for my mother.

⁷ The incident to which Lay was referring was apparently the death of Jeanes' dog.

Jeanes-Frank testified her mother never said anything to her about Mack being injured. Jeanes-Frank discussed the nature of the records she possessed concerning Mack.

Q: Did you save any records or put together any records concerning this work injury?

A: The only information I have on Ms. Mack was the form that she had to fill out for long-term health care policy which requested her home address, the last four digits of her social security number and a picture of her driver's license. That's the only personnel file I had on Cecelia Mack.

I also had her work records for the time that she worked that I filed with Genworth, that's the long-term health care policy, until the day she stopped working at my mother's residence.

...

A: I have records of the amount of time that she worked every week for my mother. So if she worked Monday, Tuesday, Wednesday and Thursday, I have a record of that, and that is filed with Genworth long-term health care policy.

Jeanes-Frank explained that when Jeanes retired, she purchased a long-term health care policy and paid the premiums even while she was receiving money from Genworth. [*44] ⁸She provided the following as to how the policy was structured.

Q: Okay. So I guess what I'm trying to ask, that was for benefits for your mother, not for Ms. Mack?

A: The wages or the income that each independent contractor was given came from the billing to the Genworth Health Care Policy, so

Q: They weren't being paid to your mother for the care of Ms. Mack. It was paid to your mother for the companion care?

A: Genworth sent a check monthly to my mother. It was made out to her, and this was deposited in the checking account, and all of the pay was issued through my mother's checking account.

Jeanes-Frank ran a criminal background check on Mack. However, she did not inquire whether Mack had any restrictions or limitations preventing her from being able to provide care for her mother. As to who hired the caregivers, Jeanes-Frank testified:

Q: ... I got the impression that you hired them as companion care for your mother?

A: I did not hire them. I interviewed them. I talked to them. The final decision was always my mother's.

Q: And she had the mental abilities and capabilities to make that decision?

A: Most certainly she did. [*45]

Q: Did you have like a trial period where they would come and work a week or a few weeks before you would actually put them into the schedule and hire them?

A: It is very difficult to find an independent contractor who will work 24 hours which is what my mother requested. She did not like large numbers of people caring for her or being in her home.

Prior to hiring Ms. Mack there was an independent contractor that worked there for five days, and then I asked her to please leave. My mother -

Q: Who was that?

A: I'd have to look up her name.

Q: If you don't mind, check on that and give the identification to your attorney, Mr. Bolus.

A: I will do that. She was there like five days. My mother was extremely unhappy with the care, so I asked her if she would please leave, and she did.

⁸ Genworth issued the long-term healthcare policy.

Q: All right. So there would be a trial period and a decision was made whether to hire and to have them take care of doing the companion care; is that a fair statement?

A: My mother always determined whether she wanted to keep them there or not. She knew Marion because Marion had been working with her for over a year. She always made the determination about the people that were working [*46] for her, yes.

Q: And I guess what I'm trying to say, help me out here, I've heard that you were hiring them to be there for 24 hours. That's what you considered?

A: The shifts my mother needed - my mother needed someone to care for her at night because it was not safe for her to be alone at night. She would frequently wake up, be afraid and disoriented and thought nobody was there.

When I helped interview people the question that I asked them was would they be able to spend the night at my mother's condominium.

Frank discussed how the work schedule was coordinated.

Q: The flip question is did the companions tell you what the schedule was?

A: No.

Q: Okay. You're the person that told them ---

A: I mean - hold on. Yes, they did. I'm sorry; I misunderstood you. The companions understood that they needed to work a 24-hour shift. When they started, when they ended, they coordinated between themselves. When Ce-ce started working she told me what days of the week she could work because she was going to school and she was doing physical therapy and some other things. So the days that she worked, she had told me about.

Marion worked the others. She worked four days. [*47] Marion worked three. As to what time they started and finished or anything that they needed to do in between they coordinated themselves but, yes, I knew what their work schedule was.

When one of the caregivers needed to be away from her mother for any reason, a substitute was obtained. Even though Jeanes-Frank coordinated the schedule with the independent contractors, they determined the days they cared for her mother. She kept track of the schedule because she was the one who wrote the checks for the caregiver services. Jeanes-Frank needed to know who was scheduled to work each day. Her mother would call any time there was a problem.

Jeanes-Frank shopped for the items her mother and the independent contractors informed her were needed. These items were paid for by her mother and the independent contractors did not pay for food. She emphasized her mother set the daily menu:

A: My mother was a very picky eater and the independent contractor understood that they were to prepare food or make it available to her based upon what she wanted that day, that hour or whatever. I did not set any menu requirements for my mother at all, no.

Beginning in latter part of 2020, [*48] Jeanes-Frank usually had an independent contractor with her to get her mother in and out of the car and into the doctor's office for appointments. Further, "normally the independent contractors would be with my mother 24/7, but the schedule varied as to who was there." Jeanes-Frank offered the following as to how the caregivers were paid.

Q: Did you receive any payment or any - for your services?

A: No. It is against the rules for Genworth for any relative to be paid for services for somebody else. So a relative could never be issued any payment for services.

...

Q: I wouldn't either. I just wanted to ask you. How did you pay the companions?

A: They were paid by check at the end of every shift that they - or the period of time that they worked. So if they worked three days, I was there to give them their check prior to them leaving the premises.

Q: And talk to me a little bit. How much were you paying? Like per day? Per hour?

A: The flat rate from Genworth was \$ 172 a day, and they were given the full amount for any 24-hour period that they worked.

...

Q: The daily rate was \$ 172 per day?

A: Yes; for a 24-hour period, yes.

Q: And what would you - did [*49] you ever pay anything in excess to that to these companions?

A: There was one time when Cecelia Mack first started working for mother that she did a cleaning job in the house. She ran the vacuums and dusted and polished and did everything. I gave her a check from my mother's accounts for a hundred dollars for housekeeping. Other than that, no. All the checks were issued through my mother's account.

Q: And so what would you pay if it was not a full 24-hour deal? What would you pay per hour?

A: The only the [sic] time - well, there were occasions when Sandy, for example, could have Marion come in and work for four hours. Usually they agreed between themselves how much Marion would get paid.

There were very few occasions when we did not stick to the 24-hour schedule. If they did, then I could deduct hour-by-hour rate off of the \$ 172 and pay the independent contractor from that.

Q: Do you recall what the hourly rate was?

A: Not off the top of my head, no.

Q: Well, if you took \$ 172 and divide it by 24?

A: 24, that gives you the answer.

Q: That gives you \$ 7.29. That's -

A: Yes.

Q: That's the hourly rate?

A: I rarely used an hourly rate.

There [*50] was no withholding from the caregivers' checks nor was a W-2 or 1099 issued to the caregivers. A 1099 was issued to her mother from Genworth which was declared on her income tax return. Jeanes-Frank acknowledged her oversight in failing to issue 1099s to the caregivers. However, she insisted each understood they were independent contractors and were responsible for reporting their wages. She listed her reasons for believing Mack and the others were independent contractors.

Q: Why were they independent contractors?

A: They were not employees. They were people that came in with a certain set of skills. They were responsible for all of their independent things.

They came in and worked. They had a shift rate for 24 hours a day and our responsibilities ended with their come in and going. That was an independent contractor.

Jeanes-Frank learned of Mack upon consulting the care.com website, one of the available resources she used when seeking caretakers or companion care. She contacted Mack who came to her mother's residence to meet with her and her mother. There was no trial period, no guarantee of any duration of work, and no

employee/employer relationship. Even though Jeanes [*51] wanted Mack replaced, Jeanes-Frank explained why Mack continued to care for her mother:

Q: And then why did you continue to work her?

A: She asked me to replace her at about two or three weeks. I continued to search for a replacement for her. I actively looked for people on care.com and that worked with people who worked in the business.

My problem with finding a caregiver to replace Ce-Ce was getting somebody who could work 24 hours. 8 hours, 12 hours was easy. It's the night shift.

I also looked to independent - the agencies who give care for patients. They wanted to run seven or eight different care workers through there in order to meet my mother's 24-hour-a-day schedule. She really was opposed to that idea. So I continued to look for somebody to replace Ce-Ce with at about three weeks. Q: Did you also check with Dawn, Marion and Sandra to fill in?

A: Sandy was unable to return. Dawn I did not know at the time. I got Dawn off of care.com site, and who else did you ask me about?

Q: The other witness, Dawn and Marion and Sandra.

A: Marion was working. Marion worked three days. Ce-Ce worked four days. They were in a schedule. Usually, you know, they agreed to [*52] it. At the beginning Ce-Ce was going to school and to rehab. She needed to work Friday, Saturday, Sunday and Monday. So Marion would work Tuesday, Wednesday, Thursday.

Jeanes-Frank listed the skills she and her mother looked for in caregivers.

Q: Okay. A question I've got for you. If a companion has restrictions or limitations of no lifting, no lifting from the ground to the waist, ground to the knees, ground to above the shoulder, waist to above the shoulder, occasionally only bending one hour a day, twisting and turning, standing only one hour a day, limited seating to two to four hours a day, would those type of restrictions prevent her from being hired by you if your mother was still here as a companion care?

A: She would not have met the requirements to be an independent contractor and work for my mother, no.

Q: Well, meet the requirements of an independent contractor, what does that mean?

A: We were looking for a specific set of skills in order to work for my mother. If someone had presented themselves as having the restrictions you just identified, they would have never been able to fulfill the job requirements.

As a matter of fact, when Ce-Ce did interview, [*53] what we did was have her work with my mother, lifting mother out of bed, lifting mother into the transporter chair, lifting mother to various sites. There was no indication whatsoever that there were restrictions.

On March 8, 2023, Mack filed another Form 101 with the defendant listed as "June Jeans [sic] (dec) C/O Iva Jeanes Frank."

On March 14, 2023, Jeanes-Frank filed records containing the dates and amounts of payment to Mack and various other related records.

On March 29, 2023, ALJ Kinney entered an Order consolidating the claims and transferred the claim to ALJ Rice-Smith "for purposes of consolidation."⁹

On March 31, 2023, "June Jeans [sic] (dec) C/O Iva Jeanes Frank" filed a Form 111 denying the claim.

⁹ ALJ Rice-Smith was the ALJ to whom the claim filed on March 8, 2023, was assigned.

By Order dated July 12, 2023, ALJ Rice-Smith granted Mack's Motion to Consolidate the claim numbers "in order that all claims may be litigated as one."

On October 19, 2023, Mack filed a "Motion to Dismiss June Jeans [sic] (dec)," and a "Motion for Bifurcation, and Submission on the Record." Mack requested Jeanes be dismissed as a party without prejudice, bifurcation on the issue of whether Mack was an employee at the time [*54] of her injury, and submission of the claim without further proof with the parties to file position statements. Mack contended a hearing was not needed. She also asserted that except for checks being issued to her by Jeanes-Frank from Jeanes' account it was unlikely Jeanes would be found to meet the definition of employer.

By Order dated October 31, 2023, ALJ Rice-Smith granted the Motion to Dismiss and Jeanes was dismissed as a party without prejudice. By separate orders of the same date, ALJ Rice-Smith bifurcated the claim for consideration of whether Mack was an employee or an independent contractor. A hearing was waived, and the matter submitted on the record for a decision. Briefs were due on or before November 27, 2023.

Thereafter, the parties submitted position statements.

After summarizing the testimonies of Mack, Batainah, Lay, Stiles, and Jeanes-Frank, in determining Mack was an independent contractor, ALJ Rice-Smith provided the following findings of facts and conclusions of law *verbatim*:

An independent contractor is defined as one who is doing his own work in his own way; that is, he must have some particular task or work he has a right and obligation to complete, [*55] and he must be subject to no control in the details of its doing. *Brewer v. Millich*, 276 S.W.2d 12 (KY 1955). In *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky.1965), the Court of Appeals set forth a nine-factor test for determining whether an employer-employee or an independent contractor relationship exists: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; and (9) whether or not the parties believe they are creating the relationship of master and servant. Subsequently the Court of Appeals refined the test to focus primarily on four factors: (1) the nature of the work as related to the [*56] business generally carried out 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 intention of the parties. *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265, (KY 1969). Nevertheless, each *Ratliff* factor must be considered with the nature of the work in relation to the general business of the alleged employer as the predominant factor. *Husman Snack Foods v. Dillion*, 591 S.W.2d 701 (KY APP 1979). Courts may look behind the labels used in employment contracts to ascertain the actual nature of the relationship. *Brewer v. Millich, supra*. Since *Ratliff v. Redmon, supra*, the employer/independent contractor analysis has evolved into three major principles: (1) that all relevant factors must be considered, particularly the four set for 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 the control factor may be analyzed by looking to the nature of the work in relation to the regular business of the employer. *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116 (KY 1991).

After analyzing the evidence under the principles of *Wooten's IGA Foodliner*, *Garland*, and *Husman Snack Foods*, the ALJ finds the claimant failed to meet her burden of proving that she was an employee. In addition to Mack completing a form indicating she was an independent care provider, the ALJ also finds [*57] that the actual nature of the relationship between Frank and Mack was not one of employer/employee. The nature of the work, the control over details, and the actual intent of the parties are decided in favor of Mack being an independent contractor.

First, the ALJ looks at the nature of the work as related to the business generally carried on by the alleged employer. The nature of the work at question is personal care for an elderly individual, Jeanes. Frank is not operating any type of business, let alone one providing personal care for the elderly. In addition, Batainah and Lay, who both have extensive experience as personal caregivers, testified that when providing personal care for private individuals (like Jeanes) they were never withheld taxes and worked as independent contractors.

Second, the ALJ looks at the extent of control exercised by the alleged employer. Although Frank bought food and household supplies and visited regularly, Mack worked independently. Frank was not there supervising her. She, like the other caregivers, determined what was needed and Frank merely purchased the items. Mack assisted Jeanes in everyday living activities, but she determined how and when [*58] she performed those individual activities. There is no evidence that Frank provided detailed instructions on how to carry out those activities. Mack was in control of the details of those activities. Additionally, although Frank kept track of the work schedule, Stiles, Batainah, and Lay all confirmed they were free to adjust the schedule as needed so long as someone was there with Jeanes. When they started the job, each also informed Frank of the specific days of the week they were available to work. They coordinated any change in coverage among themselves. Finally, there is no evidence that the caregivers were refrained from working for others during their off days.

The third consideration is the professional skill of the alleged employee. The caregivers do not have to be certified or necessarily possess any experience. However, training and experience are a big advantage to obtaining such jobs.

Finally, considered is the true intention of the parties. Despite the Mack's testimony to the contrary, the evidence establishes the parties' intent was to form an independent contractor relationship. Mack signed an independent caregiver form. Although Mack testified that she believed [*59] Frank was cutting her taxes, the amount of her pay checks does not support that belief. Her rate of pay was \$ 180 per day. The amounts of her paychecks reflect amounts for the days worked without any reduction for taxes. It is unrealistic to think Mack received those checks for those amounts and believed she was being cut taxes. The math just does not math.

Based on the foregoing, the ALJ finds that Mack failed to satisfy her burden of proving she was an employee of Frank. Mack signed an independent care provider form, she had autonomy in performing her duties, and she was paid as an independent contractor. The analysis of the factors in *Garland* are consistent with an independent contractor relationship.

Mack's claim against Jeanes-Frank was dismissed.

Mack filed a Petition for Reconsideration on December 26, 2023, asserting the following which is set forth *verbatim*:

Although the subject Order holds that Plaintiff did not meet her burden of proof and persuasion that she was an employee of the Defendant at the time of her asserted work-related injury, Plaintiff requests additional findings and analysis in-order-to take and make a more meaningful appeal. It is respectfully submitted [*60] the assigned ALJ did not analyze each of the "tests" set forth by the controlling case law authorities of Brewer v. Millich, 276 S.W.2d 12 (Ky. 1955); Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965); Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969); and UEF v. Garland, 805 S.W.2d 116 (Ky. 1991). As such, Plaintiff requests an analysis of each "test" provision. Although the Assigned ALJ found some "test" provisions in favor of the Defendant, there was not a fact finding or analysis for each recognized "tests." Proving one is an employee does not require a scoring of all "test" provisions in favor of the employee. Plaintiff requests, therefore, the assigned ALJ to correct such "patent" mistakes.

Plaintiff also submits that the assigned ALJ commits patent error by misinterpreting the controlling case law authorities of Brewer v. Millich, 276 S.W.2d 12 (Ky. 1955); Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965); Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265 (Ky. 1969); and UEF v. Garland, 805 S.W.2d 116 (Ky. 1991). For example, the Plaintiff's pay was per hour not per job. That indicates an "employee" as compared to

an independent contractor. Plaintiff respectfully requests a more detailed analysis within the numerical tests set forth in the controlling case law authorities cited herein.

Because ALJ Rice-Smith was no longer serving as an Administrative Law Judge, the claim was assigned to ALJ O'Bryan who overruled the Petition for Reconsideration by Order dated January 23, 2024, based on the following analysis mandated [*61] by Oufafa v. Taxi, LLC, 664 S.W.3d 592 (Ky. 2023) *verbatim*:

Cecelia Mack filed a petition for reconsideration of the Opinion, Award and Order entered on December 22, 2023, requesting additional findings regarding the prior ALJ's conclusion that she failed to meet her burden of proving she was an employee of Iva Jeanes-Frank at the time she was injured.

Under KRS 342.281, the review of a petition for reconsideration is limited to the "correction of errors patently appearing upon the face of the award, order, or decision." The ALJ is not permitted to change findings of facts or reweigh the evidence. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 520 (Ky. 2003).

After reviewing Mack's petition for reconsideration, I find it is an impermissible re-argument of the merits; therefore, it is denied. However, I am providing additional findings of fact about Mack's status as an independent contractor.

In a workers' compensation proceeding, the claimant has the burden of proving the essential elements of his cause of action. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 928 (Ky. 2002); *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979).

In *Oufafa v. Taxi, LLC*, 664 S.W.3d 592, 599 (Ky. 2023), Kentucky's Supreme Court adopted the **economic realities** test for determining a claimant's employment status. The test has six factors:

1. The permanency of the relationship between the parties,
2. The degree of skill required for the rendering of services, [*62]
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 way the work is performed, and
6. Whether the service rendered is an integral part of the alleged employer's business.

In *Oufafa*, the Court explained the central question in the **economic realities** test is determining "the worker's economic dependence upon the business for which he is laboring." *Id.* Here, the **economic realities** test supports the prior ALJ's finding that Mack was an independent contractor.

As a new legal standard, the **economic realities** test does not have a great body of interpretation in Kentucky case law; however, other jurisdictions have provided instruction for an analysis of the six factors in the test.

Permanency of the relationship between the parties

This factor considers 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). Exclusivity is also a factor when applying this standard.

June Jeanes had part-time caretakers [*63] following a cancer diagnosis in 2015. (Depo Jeanes-Frank 13:22). Her condition deteriorated, and she required full time companionship after she fell and broke her femur in early 2019. (Id. 12:2, 14:3-10). Around June or July of 2019, Jeanes' physical condition deteriorated to the point that her care required her to be lifted and carried more than assisted. (Id. 16:9, 10).

Mack worked in Jeanes' home from September until October 1, 2020. By all indications, Jeanes was a small, frail, 93-year-old woman in declining health at the time Mack began her employment. (Depo. Marion Lay 11:5-

10) (Depo. Mack of May 26, 2021, 37:16, 62:8) (Depo. Jeanes Frank 10:21). The care of Jeanes was the sole purpose of the working arrangement and there were no alternative positions available to Mack upon the demise of Jeanes. This working relationship, by its very nature, was of short and temporary duration. In fact, Jeanes passed away on December 7, 2020, less than four months after Mack started her caretaking position. (Depo. Jeanes-Frank 8:11). The parties did not discuss a trial period and there was no guaranty for the length of Mack's work. (Id 48:10-14).

The short duration of Mack's working relationship [*64] with Jeanes is not the only factor supporting a temporary relation; however, this, coupled with the knowledge of Jeanes' critical condition and the lack of exclusivity of the arrangement, are persuasive evidence of Mack's status as an independent contractor.

Degree of skill required.

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 *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 are indicative of an employer-employee relationship. *Id.* at 1056. Iva Jeanes-Frank, Jeanes' daughter, helped her mother find caretakers. Jeanes-Frank looked primarily for individuals with the physical capacity to perform the work. (Depo. Jeanes-Frank 50:18). Mack was a certified CNA and had worked in the caretaking industry for many years. (Depo. Mack of May 26, 2021, 6:4-8). While the experience was beneficial, it was not necessary.

Mack's duties were unlicensed, unskilled, personal care that required light cleaning, cooking, and medication administration performed without the necessity of prior experience or training. Consequently, the level of skill required tilts in favor of finding an employee/employer relationship. [*65]

Mack's investment

Individuals supplying their own equipment and materials are more likely to be independent contractors and vice versa. Mack's role as a caretaker did not require significant equipment or materials. Mack needed food, medication, and household items to perform her duties. While the caretakers occasionally assessed the need for those items, they were provided by Jeanes-Frank and Jeanes.

Though the evidence is not compelling on either front, since Jeanes and Jeanes-Frank provided the food and medication, there is limited weight in favor of an employer/employee relationship.

Mack's opportunity for profit or loss

The question here is whether Mack had an opportunity for greater profits based on her management and technical skills. *Keller*, 781 F.3d at 812.

Mack had the ability to request additional hours and work more shifts at any time and, in fact, did earn additional funds by cleaning Jeanes' home during her shift. Since Genworth, Jeanes' long-term care insurance, paid Mack and the other caretakers a flat rate per shift, her management and technical skills did not impact her ability to earn more income while working for Jeanes. However, her CNA certification and experience would certainly [*66] be beneficial in obtaining similar positions.

Since there was no exclusivity to their arrangement, this factor does not weigh in favor of either status.

Degree of control

The degree of control Jeanes-Frank had over Mack's performance of her caretaking duties is an integral consideration in determining work status.

Although Jeanes-Frank kept track of the caretakers' time, they made the determination of when they worked and arranged for relief when they needed breaks. (Depo. Jeanes-Frank 36:2-6, 35:1-12). During Mack's short

time, she worked four days per week and Marion Lay worked three days, but specific days and times were reconciled between Lay and Mack without intervention from Jeanes-Frank or Jeanes. (Id. 37:3-7, 13-17).

Sandra Stiles and Dawn Batainah, Jeanes' other caretakers, provided additional insight into the arrangement. Stiles contacted Lay directly to request relief or assistance. (Depo. Sandra Stiles 24:21). Stiles told Jeanes-Frank of the changes or requests, but she did not ask her permission. (Id. 25:22-24). Batainah also explained she did not have a set time she worked, and she was free to adjust her schedule accordingly. (Depo. Dawn Batainah 46:6). [*67] She pointed out that when Jeanes asked for something, she did not have to get permission from Jeanes-Frank to give it to her. (Id. 47:24)

Mack had full discretion in administering her caretaking duties. Jeanes-Frank had very little control and/or supervision over Mack's day-to-day conduct. Jeanes-Frank was in the home of Jeanes, on average, only 20 to 45 minutes in any 48 hours period. (Depo. Mack of May 26, 2021, 48:9-19) During the short time Jeanes-Frank visited her mother, she only provided limited direction about which food to prepare for Jeanes. (Id. 32:15). Although there were certainly expectations of behavior and standards of care, they did not constitute substantial supervision or control by Jeanes-Frank.

Mack and other workers had significant freedom in the timing and performance of their caretaking for Jeanes. Any direction by Jeanes Frank was limited, and the caretakers were largely unsupervised. The degree of control enjoyed by Mack heavily weighs in favor of her independent contractor status.

Mack's role in the business

Finally, the ALJ must weigh whether the services provided by Mack are integral to Jeanes-Frank's business. "The more integral the worker's services [*68] are to the business, then the more likely it is that the parties have an employer-employee relationship." *Keller*, 781 F.3d at 815.

First, it is difficult to find Jeanes-Frank was in the "business" of providing care for her ailing mother. Jeanes purchased a long-term policy with Genworth through prior employment. (Depo. Jeanes-Frank 28:10). Jeanes-Frank paid the caretakers by checks from Jeanes' account, and then Genworth reimbursed Jeanes. (Id. 29:3-6). Jeanes-Frank, a 70-year-old retired woman in poor health, earned no compensation or profit from helping her mother obtain caretakers. Further, her duties stopped after her mother passed away. (Id 41:12-16). She was not in the business of supplying caretaking services. Instead, she was only handling routine tasks related to the caretakers in order to meet her mother's requests and keep her comfortable.

Even if Jeanes-Frank's assistance with her mother's caretaking services was a "business," Mack did not have an integral role in the caretaking operations.

Mack's services, while on shift, were integral to Jeanes' care, but there were replacements to supplement or substitute Mack's duties at any given time. Admittedly, she left her caretaking role [*69] suddenly on October 1, 2020. A replacement was called in and Mack never returned to providing care for Jeanes' after that date. (Depo. Mack of May 26, 2021, 44:15). The ease of which Mack was replaced weighs heavily against a finding that she played an integral role.

Again, Jeanes-Frank was not in the caretaking business, and even if she was, Mack did not play an integral role. Thus, this factor weighs heavily in favor of Mack's status as an independent contractor.

Economic dependence and totality of the circumstances.

The central question to the economic realities test is Mack's economic dependence upon her caretaking duties for Jeanes. While some factors hint at an employer/employee relationship, the predominately persuading factors as applied to Mack are the permanency of the relationship between the parties, the degree of control exercised by Jeanes-Frank, and Mack's role within the "business." The degree of skill required, and Mack's investment hold limited persuasion as her skills served only to assisted her in obtaining the employment and there was no significant material or equipment requirements related to the caretaking. Profit and loss potential could fall on either side of the scale as the pay was set and [*70] limited by Genworth, but Mack could

certainly increase her ability to earn profit by providing caretaking for other individuals or through taking on additional tasks like cleaning.

Using the **economic realities** test, the evidence weighs in favor of Mack's status as an independent contractor. She was in business for herself. She selected the timing and duration of her shifts, determined how she would perform her duties, and had great discretion in her ability to work as much or as little as desired. There was no exclusivity in her arrangement with Jeanes-Frank, and Mack's position was temporary in nature with an imminent and definable end date. Either party was free to terminate the arrangement at any time and there was no expectation of substantially advanced notice for her decision to decline further shifts.

Thus, under an analysis of the controlling factors set forth in *Oufafa*, confirms the prior ALJ's finding that Mack was an independent contractor and not an employee. Thus, Mack's petition for reconsideration is denied.

No Petition for Reconsideration was filed in response to this Order.

On appeal, Mack asserts both ALJs erred by finding she was an independent contractor [*71] as the evidence compelled a finding she was an employee of Jeanes-Frank when the alleged injury occurred. She asserts she was a caregiver for Jeanes and paid by Jeanes-Frank for her services out of Jeanes' bank account. Mack acknowledges Jeanes' long-term-care insurance policy covered the caregiving expenses. Mack cites to *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965); *Chambers v. Wooten's IGA Foodliner*, 436 S.W.2d 265 (Ky. 1969); *UEF v. Garland*, 805 S.W.2d 116 (Ky. 1991); and *Oufafa v. Taxi, LLC, supra*, arguing that in determining whether a worker is an employee or independent contractor, the ALJ should consider; 1) the nature of the work as related to the business generally carried on by the alleged employer; 2) extent of control exercised by the alleged employer; 3) professional skill of the alleged employee; and 4) the true intent of the parties.

Conceding Jeanes-Frank was not clearly engaged in the business of providing healthcare services, Mack argues the testimony establishes she intended to procure home healthcare for her ailing mother. Mack observes the testimony established the services were to be provided 24 hours a day. Mack posits that even though Jeanes-Frank did not operate a healthcare facility, she was savvy enough to hire and manage multiple caregivers at one time and coordinate those efforts. According to Mack, Jeanes-Frank [*72] set the work schedules and provided directions regarding the requisite care. Mack maintains Jeanes-Frank and the caregivers unanimously testified that Jeanes-Frank and Jeanes exercised all control in terms of the healthcare services provided. Further, Jeanes-Frank also provided all tools, medications, food, supplies, and other items necessary for the caregivers to utilize in providing care for Jeanes. Mack contends the caregivers testified they understood and believed Jeanes-Frank was their boss/employer "due to the limited autonomy of their positions."

Mack also argues the true intent of the parties was to enter into an employer/employee relationship as Jeanes-Frank wanted to obtain assistance care for her elderly mother since Jeanes required round-the-clock care. Mack does not dispute Jeanes was of sound mind and was able to direct her caregivers in order for them to meet her needs. In Mack's view, Jeanes-Frank had no intention of allowing the caregivers to exercise any control over their work activities and the primary purpose of the caregivers was to meet Jeanes' needs in the exact manner prescribed by Jeanes-Frank and Jeanes. Mack notes Jeanes-Frank was responsible for providing [*73] the schedule to the caregivers and she failed to provide 1099s to the employees.

Finally, Mack complains that although ALJ O'Bryan provided additional findings in applying the **economic realities** test, she misinterpreted the evidence. She notes ALJ O'Bryan's statement "even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship." Despite that fact, the ALJ found the relationship was not exclusive because Mack was never informed she could not work elsewhere. Mack relies upon her testimony establishing her work schedule dominated her time and rendered her incapable of working for any other clients while working for Jeanes-Frank. Mack maintains ALJ O'Bryan mistakenly found she had a significant amount of control over her work activities and she was an independent contractor. In Mack's view, this was an inaccurate interpretation of the facts because the facts establish Jeanes-

Frank provided all the tools, medications, food, supplies, and other items necessary for the caregivers to provide care to Jeanes. Mack contends the caregivers were rarely left on their own and had minimal control over their activities. Mack seeks [*74] reversal and remand of the claim with a referral to a third ALJ to correct such reversible errors and to enter appropriate findings concerning her status as an employee.

ANALYSIS

As the claimant in a workers' compensation proceeding, Mack had the burden of proving she was Jeanes-Frank's employee on the date of the alleged injury. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mack 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 the findings made by the ALJ 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 [*75] 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 with regard to 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).

Furthermore, in the absence of a Petition for Reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, or incomplete fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Although Mack filed a Petition for Reconsideration requesting additional analysis after ALJ Rice-Smith rendered her decision which was not based [*76] upon by analysis required by Oufafa, supra, she did not file a Petition for Reconsideration after rendition of ALJ O'Bryan's January 23, 2024, Order in which she performed an analysis pursuant to Oufafa and came to the same conclusion as ALJ Rice-Smith that Mack was an independent contractor and not Jeanes-Frank's employee. Thus, our only task on appeal is to determine whether substantial evidence supports ALJ O'Bryan's January 23, 2024, Order.

Because the Kentucky Supreme Court in Oufafa altered the standard/test to be applied in determining whether an individual is an employee or an independent contractor, we will only briefly address ALJ Rice-Smith's decision. In Oufafa, the 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 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 [*77] (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 [*78] 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." [*79] 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.

In her December 22, 2023, decision, ALJ Rice-Smith first looked to the nature of the work as related to the business carried on by the alleged employer, in this case, Jeanes-Frank. ALJ Rice-Smith correctly noted Jeanes-Frank did not operate any type of business and certainly not one providing personal care to the elderly. She also relied upon the testimony of Batainah and Lay that in providing personal care for individuals in a private setting, taxes were never withheld because the caregivers were independent contractors. The record amply supports that finding. Batainah and Lay, who as noted by ALJ Rice-Smith possessed extensive experience as personal caregivers, both testified they considered themselves independent [*80] contractors. Stiles also testified she worked 24/7 by herself as an independent contractor. All three testified taxes were not withheld. Their testimony constitutes substantial evidence concerning ALJ Rice-Smith's resolution of this issue.

ALJ Rice-Smith then looked to the extent of control exercised by Jeanes-Frank. Although Jeanes-Frank bought food and household supplies and visited her mother regularly, ALJ Rice-Smith concluded Mack worked independently as Jeanes-Frank did not supervise her. Rather, Mack was left to determine how she performed the individual activities for Jeanes. In reaching this conclusion, ALJ Rice-Smith was persuaded by the testimony of Stiles, Batainah, and Lay that they were free to adjust the schedule as needed so long as someone was always present with Jeanes. Jeanes-Frank's testimony established the companions coordinated the work schedule and Mack advised her the days she was not free to care for Jeanes. This was because Mack was attending school and had to undergo physical therapy. According to Mack, her schedule was accommodated. Batainah and Stiles confirmed they told Jeanes-Frank when they were taking off and informed her who was to be taking care [*81] of her mother when they were not. ALJ Rice-Smith also found significant there was no evidence the caregivers did not work elsewhere on their off days.

ALJ Rice-Smith considered the professional skill of the caregivers noting they did not have to be certified or possess any particular experience. Notably, Stiles testified this was the first time she had worked as a caregiver.

Finally, ALJ Rice-Smith determined the true intention of the parties. Despite Mack's testimony to the contrary, she found the evidence established the parties' intent was to form an independent contractor relationship. In reaching this conclusion, ALJ Rice-Smith relied upon the records pertaining to Mack's compensation revealing nothing was withheld from her weekly compensation. She was also persuaded by the two-page form styled "Independent Care Provider Form" signed by Mack, which contrary to Mack's testimony, was signed by Mack. ALJ Rice-Smith concluded Mack's belief taxes were withheld was unreasonable in light of the amount of her compensation.

Our review of the testimony and documents introduced leads us to conclude ALJ Rice-Smith's analysis on each factor is supported by substantial evidence and [*82] therefore, we affirm her determination Mack was an independent contractor.

We now address ALJ O'Bryan's January 23, 2024, Order. ALJ O'Bryan provided an in-depth analysis regarding Mack's status utilizing the Oufafa standard. Addressing the permanency of the relationship between the parties, ALJ O'Bryan noted at the beginning of Mack's employment, Jeanes' condition required full companionship notably after she fell and broke her femur in 2019. ALJ O'Bryan found that by June or July 2019, Jeanes' physical condition had "deteriorated to the point that her care required her to be lifted and carried more than assisted."

¹⁰ALJ O'Bryan noted the sole purpose of the working relationship pertained to Jeanes' care, and upon her death the position vanished. In accordance with that conclusion, ALJ O'Bryan noted Jeanes died less than four months after Mack's caretaking responsibilities commenced. Consequently, the short duration of Mack's working relationship along with her knowledge of Jeanes' critical condition and the lack of exclusivity of the arrangement persuaded ALJ O'Bryan to weigh these factors as support for a finding Mack was an independent contractor. The [*83] testimony of all the witnesses, including Mack, firmly establish all were aware their position would be

¹⁰ The reference to June or July 2019 is obviously a typographical error as ALJ O'Bryan meant June or July 2020.

short-lived. When Mack came on board Jeanes was in critical condition and very feeble. The tenor of all caretakers' testimony reflects none of the caregivers would have employment beyond Jeanes' death. The role as caregiver for Jeanes could and would end at any given time due to Jeanes' slow demise. Thus, ALJ O'Bryan concluded the duration of the work relationship was persuasive evidence of an independent contractor relationship.

As to the degree of skill required, ALJ O'Bryan noted that although Mack was a certified CNA and had worked in the caretaking industry, her skill, although beneficial, was unnecessary. Rather, Mack's duties of cleaning, cooking, and medication administration were of an unskilled nature and could be carried out without the necessity of prior experience or training. These factors tilted in favor of the finding an employer/employee relationship. ALJ O'Bryan's finding concerning the degree of skill required is supported by the evidence as there is no question a specialty certification was unnecessary as Stiles and Batainah possessed no type of certification. [*84]

As to Mack's investment, ALJ O'Bryan conceded her role as a caretaker did not require significant equipment or materials. Mack needed food, medication, and household items to perform her duties. She found the caretakers occasionally assessed the need for the items which were provided by Jeanes-Frank and Jeanes. In addressing this factor, ALJ O'Bryan noted since Jeanes and Jeanes-Frank provided the food and medication, there was limited weight in favor of an employer/employee relationship. However, the uncontradicted testimony establishes Jeanes, not Jeanes-Frank, paid for all of the necessary items at the condominium including medications which were requested by the caregivers. This factor did not compel a finding that Jeanes-Frank and Mack were engaged in an employer/employee relationship since the evidence reveals Jeanes', not Jeanes-Frank's, funds were expended to secure the items requested by the caregivers.

Addressing Mack's opportunity for profit and loss, ALJ O'Bryan noted Mack could work additional hours and more shifts. However, since Genworth paid Mack and the other caretakers a flat rate per shift, her management and technical skills did not impact her ability to earn [*85] more income when not working for Jeanes. ALJ O'Bryan relied upon the fact there was no exclusivity in the arrangement preventing Mack from obtaining work elsewhere. Notably, Mack's work records reveal she worked August 28 through 31, 2020, and September 1 through 6, 2020. Mack did not work September 7, 8 or 9, 2020. She worked from September 10 through 13, 2020, and did not work on September 14 through 16. She next worked September 17 through 20, 2020. She was off work September 21 through 26, 2020, and worked from September 27 through 30, 2020. After September 6, 2020, Mack only worked three four-day periods. The testimony unanimously establishes other individuals worked on the dates Mack did not. This is consistent with Jeanes-Frank's testimony that Mack's time as a caregiver was scheduled around her needs. Although not relied upon by ALJ O'Bryan, the testimony of the other caregivers buttresses the finding Mack possessed the time to earn additional compensation from other sources.

In terms of the degree of control Jeanes-Frank had over Mack's performance, ALJ O'Bryan noted the testimony of the caregivers and Jeanes-Frank established the caregivers made the determination when [*86] each worked and would arrange for replacements when needing to be elsewhere. ALJ O'Bryan accurately found that during Mack's short tenure she worked four days a week and Lay worked three days per week with the schedule being set by Mack and Lay without any input from Jeanes-Frank or Jeanes. Relying primarily upon the testimony of Stiles and Batainah, she was persuaded this factor leaned toward an independent contractor status. Stiles testified she contacted Lay to provide relief and/or assistance and always informed Jeanes-Frank when she was taking off and identified her replacement. Stiles did this without seeking permission from Jeanes-Frank. In the same vein, Batainah testified the companions coordinated the work schedule and she could adjust her schedule as needed. Significantly, Batainah testified she cared for and worked for Jeanes not Jeanes-Frank and her actions were directed by what Jeanes wanted. Further, she did not have to seek permission from Jeanes-Frank before she undertook performance of specific tasks.

ALJ O'Bryan's finding Mack had full discretion in administering her duties is amply supported by the testimony of Batainah, Stiles, and Jeanes-Frank. Based on the [*87] testimony of the other caregivers regarding the flexibility they enjoyed in setting their schedule, ALJ O'Bryan reasonably concluded Jeanes-Frank had limited supervisory powers and the caregivers were in large part unsupervised. Consequently, the degree of control enjoyed by Mack

and the lack of control by Jeanes-Frank weighed heavily in favor of independent contractor status. ALJ O'Bryan's finding concerning this issue is firmly supported by substantial evidence.

Regarding Mack's role in the business, ALJ O'Bryan had difficulty finding Jeanes-Frank was in the business of providing care for her ailing mother. Persuasive to her was the testimony from the other caregivers that Jeanes had purchased a long-term care policy from Genworth which was the source of the funds paid to all the caregivers. Also significant was the fact Jeanes-Frank paid the caregivers by checks written on Jeanes' account. Based on the uncontradicted testimony of Jeanes-Frank regarding the policy in effect and the testimony of the caregivers and Jeanes-Frank, ALJ O'Bryan concluded Jeanes-Frank, a retired woman, earned no compensation or profit from helping her mother obtain caretakers. Significantly, Jeanes-Frank [*88] testified the policy prohibited payments to Jeanes' relatives for caretaker services. Based on the evidence, ALJ O'Bryan reasonably concluded Jeanes-Frank was not in the business of supplying caretaking services but served as an administrator handling routine tasks related to her mother's 24-hour care.

ALJ O'Bryan also noted that even though Mack's services were "integral to Jeanes' care," she could be replaced at any time by another caregiver. The testimony of Mack, Lay, Stiles, and Batainah demonstrate they all enjoyed the flexibility of determining when they worked, and as long as they obtained a replacement they were free to leave without Jeanes-Frank's permission. Jeanes-Frank confirmed their testimony by explaining she merely needed to know who was working so she could pay that individual for the time spent caring for her mother. In resolving this issue, ALJ O'Bryan's finding that the ease with which Mack was replaced weighed heavily against a finding she played an integral role in the caretaking business, and this finding is amply supported by testimony of the other caretakers and Jeanes-Frank. Thus, substantial evidence supports ALJ O'Bryan's finding that this factor weighed [*89] heavily in favor of finding Mack was an independent contractor. According to ALJ O'Bryan, the facts Jeanes-Frank was not in the caregiving business and a substitute for Mack could be obtained at any time weighed heavily in favor of finding Mack's status was an independent contractor. Substantial evidence, identified herein, supports ALJ O'Bryan's conclusion concerning this aspect of the analysis.

Finally, in addressing the economic dependence and totality of the circumstances, ALJ O'Bryan stated the central question in the economic realities test is Mack's economic dependence upon her caretaking duties for Jeanes. In addressing this factor, ALJ O'Bryan noted Mack was not prohibited from earning additional sums by providing caretaking services for other individuals or by undertaking additional tasks. Applying this aspect of the analysis, ALJ O'Bryan concluded Mack's status was an independent contractor since she was in business for herself, selected the time and duration of her shifts, determined how she would perform her duties, and had great discretion in her ability to work as much or as little as desired. ALJ O'Bryan was also influenced by the lack of exclusivity in Mack's arrangement [*90] and that Mack's position was temporary in nature. Because Mack had the unilateral ability to terminate the arrangement at any time and there was no expectation she must provide advance notice of her decision not to work further shifts, ALJ O'Bryan concluded Mack was an independent contractor, not an employee. Indeed, the testimony of Batainah, Stiles, Jeanes-Frank, and to a limited extent, Lay, support ALJ O'Bryan's finding the economic realities and economic dependence factors must be resolved in favor of a finding Mack's status was an independent contractor.

In summary, the testimony of Batainah, Stiles, and Lay establish Jeanes-Frank did not possess much supervisory powers and there was no need for certification as a caregiver. The caregivers unanimously testified, that even though they were hired by Jeanes-Frank and took some directives from her, they performed their tasks based on Jeanes' desires. As previously noted, Batainah testified she cared for and worked for Jeanes. The testimony of both Stiles and Lay support Batainah's testimony. More importantly, the three agreed they were able to set the hours they worked as caregivers and had the ability to obtain replacements so [*91] long as Jeanes was cared for by one of the individuals with whom Jeanes was comfortable. Notably, their only obligation to Jeanes-Frank was to notify her when a replacement caregiver for her mother was to be present. The "Independent Care Provider" form, although not entirely dispositive of the issue, establishes Mack was aware that Jeanes and Jeanes-Frank considered her as an independent contractor. Mack's work schedule buttresses this conclusion as she worked intermittently during the period she served as one of Jeanes' caretakers.

Notably, in Oufafa, the Supreme Court referenced the holding in Husman Snack Foods Co. v. Dillion, 591 S.W.2d 701 (Ky. App. 1979) (citing Larson, Workmen's Compensation Laws 43.51 (1978)) elaborating that to serve the purpose of our workers' compensation statutes, the factors set forth in Ratliff v. Redmon, supra, should be construed with an eye toward whether the alleged employee's work formed the basis of the employer's regular business. Id. at 559. Here, there is no question Jeanes-Frank was not in the business of supplying caregivers to those physically infirmed. Rather, the sole purpose of this arrangement was to obtain caregivers for her mother. Stated another way, Jeanes-Frank was retired and was not engaged in a business of any type.

[*92] Finally, we conclude that under the facts in this case, the evidence overwhelmingly demonstrates Jeanes-Frank was not Mack's employer as the evidence establishes the caregivers provided services to Jeanes and Jeanes paid them. The evidence is also clear the caregivers determined the schedule each was to work in order for Jeanes to have 24-hour care. In addition, there is no question the funds used to pay all of the caregivers came from a policy obtained by Jeanes. The documents filed by Jeanes-Frank on March 14, 2023, reflect Jeanes received a Form 1099-LTC for \$ 60,175.00 from Genworth to be used for long-term care and accelerated death benefits. Those funds were Jeanes' and were paid to her caretakers. Jeanes' bank records also establish she paid the caregivers and not Jeanes-Frank. Although Jeanes-Frank may have written the checks, it was Jeanes' money that went to the caregivers. Thus, at most, Jeanes-Frank's role was as a supervisor and not as an employer. Accordingly, as substantial evidence supports both ALJ's decisions and a contrary result is not compelled, this Board must affirm.

Based on the foregoing, the December 22, 2023, "Opinion and Order on Bifurcated Issue" rendered **[*93]** by ALJ Rice-Smith and the January 23, 2024, Order rendered by ALJ O'Bryan are AFFIRMED.

ALL CONCUR.

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