

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000588-WC

ROBERT D. WHEAT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-01088

KEVIN SWEENEY, D/B/A KBS
HOME IMPROVEMENTS;
MIKE RIGGS CONSTRUCTION;
UNINSURED EMPLOYERS' FUND;
HON. RICHARD JOINER,
ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,
JUDGES.

PER CURIAM: Robert D. Wheat petitions this Court to review an opinion of the Workers' Compensation Board (Board), entered February 24, 2010, which affirmed the Administrative Law Judge's (ALJ) dismissal of Wheat's claim for benefits. We affirm.

Wheat filed a claim for workers' compensation benefits after falling twenty feet from a ladder. Wheat sustained significant injuries, including spine fractures, closed head injury, and lacerated spleen. In his claim, Wheat alleged that he was employed by Kevin Sweeney, d/b/a KBS Home Improvements, (Sweeney) to install roof shingles on a home when he was injured. Sweeney denied an employee/employer relationship existed. The claim was referred to an ALJ. Following a hearing, the ALJ rendered an opinion and order finding that no employment relationship existed between Wheat and Sweeney. In so finding, the ALJ reasoned:

In this case, the parties did not define their relationship by way of written contract. The next question is whether there was a non-written contract of hire, express or implied. Here, Mr. Wheat believes that he was hired. The putative employer, Kevin Sweeney says that he was not. In looking for corroborating evidence, I find none on behalf of [Wheat]. Documentation could have been provided for the various telephone calls that Mr. Wheat says that he made to Mr. Sweeney. One of the co-workers could have been presented as a witness to the conversation between Mr. Sweeney and Mr. Wheat. Two things jump out in favor of Mr. Sweeney. First, there is testimony in the record that the slope of the roof was too steep to employ a beginner on. Secondly, Mr. Sweeney testified that he had heard rumors about some of Mr. Wheat's personal habits, including marijuana use.

After careful consideration of the testimony herein, the Administrative Law Judge remains unpersuaded by the testimony of [Wheat], and therefore is unable to find that [Wheat] has met his burden of proving that he was working under any contract of hire, express or implied. . . .

Wheat then sought review with the Board. The Board vacated and remanded the ALJ's opinion. In pertinent part, the Board concluded:

Here, the ALJ determined he was unable to find Wheat had met his burden of proving he was working under any contract of hire, express or implied. In so finding, the ALJ was unpersuaded by Wheat's testimony. The evidence in this case reveals the testimony of Wheat and Sweeney elicited more than an honest difference of opinion. The evidence reveals that either one or both was lying under oath as to all or parts of their testimony. Nonetheless, the uncontradicted evidence established that Sweeney and Wheat had a phone conversation shortly before the roofing job began. For that reason, the ALJ's reference to the need for corroborating evidence in the form of cell phone records to establish that the conversation took place was largely irrelevant. The ALJ, in justifying his finding, also concluded in his opinion that the testimony contained in the record indicated the slope of the roof was too steep to employ a beginner on. The ALJ made this finding notwithstanding Wheat's uncontradicted testimony that he informed Sweeney he was in fact an experienced roofer. Wheat showed up at the job the morning the job began and Sweeney was present. In fact, Sweeney was on the same roof with Wheat who was on a ladder handing shingles to a co-worker when the accident occurred. Sweeney accompanied Wheat to the hospital where the hospital records listed KBS Home Improvement, Sweeney's company, as the employer. There is no explanation why Wheat was on the ladder other than Wheat's own testimony. Sweeney offered no other explanation. Under these circumstances, we believe Wheat's petition for reconsideration has merit and he is

entitled to additional findings to justify the ALJ's conclusion. While it was abundantly true Wheat has a substantial financial stake in this claim, it is just as true that Sweeney, as an uninsured employer, has as much financial incentive to fabricate as does Wheat.

Upon remand, the ALJ rendered a second opinion and order again finding that no employment relationship existed between Wheat and Sweeney:

In this case, the parties did not define their relationship by way of written contract. The next question is whether there was a non-written contract of hire, express or implied. Here, Mr. Wheat believes that he was hired. The putative employer, Kevin Sweeney says that he was not. I was not particularly impressed that Mr. Wheat was a credible witness. In looking for corroborating evidence, I find none on behalf of [Wheat]. Two things jump out in favor of Mr. Sweeney. First, there is testimony in the record that the slope of the roof was too steep to employ a beginner on. Mr. Wheat attempts to bolster his position on this point with reference to his own testimony that he was an experienced roofer. In his deposition taken on September 4, 2007, presented as part of [Wheat's] case, Mr. Wheat minimized his roofing experience. He was 31 years old on the date of injury. In his deposition he says that he began working for Wendy's restaurant in high school. He then went to work for a cabinet shop building cabinet frames. He says that he did the same type of work for another employer into 1997. Then he says he worked at several different factories and electroplated car parts. This was done, according to his form 104, until sometime in 2005. From then until June 22, 2006[,] he worked for a few construction contractors, four months of which was building decks, additions on homes, door ways, and "stuff like that" for Buddy Roark. For other contractors, Jean Hatfield and Beau Combs, he did construction, framing, and roofing. When asked specifically about roofing he was asked "Q. I know with what we're talking about today you were roofing, did you do roofing for these--any of these other contractors? A. A few." Thus, according to Mr. Wheat's deposition testimony he was

not an experienced roofer but had had some exposure to roofing. Mr. Wheat did work for one company called Royalty Roofing for "a few months." He also did a few jobs for himself. All of this so-called "roofing" experience took place over a period of approximately one year during which Mr. Wheat worked for several different companies or people, most of which were not identified as being in roofing. I do not believe that Mr. Wheat's experience with roofing supports his claim to be an experienced roofer.

Secondly, Mr. Sweeney testified that he had heard rumors about some of Mr. Wheat's personal habits, including marijuana use. Whether true or not, the rumor is something that Mr. Sweeney could reasonably act upon and would reasonably explain a decision not to hire Mr. Wheat.

The Workers['] Compensation Board, in its decision, finds some significance in the testimony beginning on page 61 of Mr. Wheat's deposition where Mr. Sweeney was conducting cross examination. The exchange is as follows:

Q. You said that you'd previously talked to me about having experience with roofing and yet Pat Liver's has little experience and I pay him \$12 an hour, so if you had all of the experience in roofing why would I start you out at \$10.00?

A. That was just what I mentioned to you, that was my understanding is what Pat told me that you started most people out at \$10 an hour and after you seen what they could do, then you would up their pay.

Q. Alright.

A. And that was my understanding because, I mean you know as well as I do our setup was pretty much through Pat by word-of-mouth.

Q. Yeah. True statement, I was on the other side of the house, so how did you know that I was over on the other side of the house?

A. Because that's where you said you all was going because you fixed the vent pipe right there in front of us. (Deposition of Robert Wheat page 62.)

I do not view this exchange as an admission of any kind. Although it was not addressed until the petition for reconsideration I do not view the use of the term "true statement" in this context to be an acknowledgment of the truth of Mr. Wheat's testimony. I view it as more of a manner of speaking and may well have related to the following phrase, "I was on the other side of the house," rather than an acknowledgment of the truth of the preceding answer. When compared with the direct testimony of Mr. Sweeney, it is clear that Mr. Sweeney's position is that he did not hire Robert Wheat. (Deposition of Kevin Sweeney page 56). I accept that testimony. I decline to accept any inferences to the contrary that may be derived from Mr. Wheat's testimony.

After careful consideration of the testimony herein, the Administrative Law Judge remains unpersuaded by the testimony of [Wheat], and therefore is unable to find that [Wheat] has met his burden of proving that he was working under any contract of hire, express or implied. . . .

Wheat again sought review upon the Board, and the Board affirmed the ALJ's opinion. Our review follows.

Wheat argues that the ALJ's finding that no employment relationship existed between himself and Sweeney lacked sufficient evidence. In particular, Wheat claims that the evidence was uncontradicted that an employment relationship existed and that Sweeney admitted same.

As an appellate court, we will only disturb the Board's opinion when it has overlooked or misconstrued the law or flagrantly erred in evaluating

evidence so as to cause gross injustice. *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). To do so, we must necessarily review the ALJ's opinion. *Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). As fact-finder, it is within the sole province of the ALJ to weigh the credibility and determine the substance of evidence. *Id.* As Wheat carried the burden of proof before the ALJ, Wheat must demonstrate that the record compels a finding in his favor. Our Court, of course, reviews issues of law *de novo*.

In its opinion, the Board specifically addressed Wheat's contentions that insufficient evidence supported the ALJ's finding that no employment relationship existed:

Here, the ALJ on remand found that Wheat failed to meet his burden of proving that he was working under any contract of hire, express or implied pursuant to KRS 342.640(1). The ALJ chose to believe Sweeney who testified that he did not hire Wheat and accepted that testimony as true which is his prerogative. *See Pruitt v. Bugg Brothers*, Ky., 547 S.W.2d 123 (1977).

The ALJ also specifically addressed Wheat's argument wherein Sweeney acknowledged "true statement" during Sweeney's cross-examination of Wheat. In so doing, the ALJ specifically noted he did not view this exchange as being an admission or acknowledgement of the truth of Wheat's previous testimony but viewed it more of a matter of speaking and further viewed it as having been related to the following phrase, "I was on the other side of the house" rather than an acknowledgement of the truth of the preceding answer. Again, this is the ALJ's prerogative and was a reasonable inference to be drawn from this evidence. *Paramount Foods, Inc. v. Burkhardt*, *supra*. In addition, it should be pointed out this exchange took place during Sweeney's own cross-examination of Wheat. Sweeney

was not under oath during Wheat's deposition when the statement at issue was made. Moreover, Sweeney was not testifying when this statement was uttered.

In addition, the ALJ elaborated on his earlier finding in his original opinion and order in which he found significant the slope of the roof was too steep for an employer to employ an inexperienced roofer. He specifically noted that although Wheat attempted to bolster his position where he acknowledged he was an experienced roofer, in the ALJ's review of Wheat's own testimony, Wheat was not an experienced roofer, but only had some exposure in roofing and he only worked for one company, Royalty Roofing, for a few months and also did a few jobs for himself. In analyzing this testimony, the ALJ determined Wheat's roofing experience took place over a period of approximately one year, during which time Wheat worked for several different companies. In interpreting this evidence, the ALJ specifically found he did not believe Wheat's experience with roofing supported his claim he was an experienced roofer. In so finding, the ALJ believed Sweeney's testimony rather than Wheat's testimony on this issue. From the evidence, it was reasonable for the ALJ to conclude Sweeney would have not hired Wheat to work on such a steep roof based on Wheat's inexperience as a roofer.

Finally, the ALJ also found it to be significant Sweeney had heard rumors about Wheat's personal habits, including marijuana use. The ALJ pointed out whether these rumors were true or not, Sweeney could have reasonably acted upon those rumors in deciding not to hire Wheat. Again, this is a reasonable inference which the ALJ could have made from the evidence in believing Sweeney's testimony rather than Wheat's testimony on this issue.

From the above, it is clear the ALJ has provided an adequate explanation in regard to his findings of fact in this matter. Certainly, there is no compelling reason to disturb the ALJ's findings. . . .

We agree with the Board's reasoning and, likewise, conclude that the evidence does not compel a finding of an employee/employer relationship. Accordingly, we hold that the Board did not commit error in affirming the ALJ's dismissal of Wheat's claim.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ben T. Haydon, Jr.
Bardstown, Kentucky

BRIEF FOR APPELLEE MIKE
RIGGS CONSTRUCTION:

Sean P. Lohman
Louisville, Kentucky

BRIEF FOR APPELLEE
UNINSURED
EMPLOYERS' FUND:

Jack Conway
Attorney General of Kentucky

Dennis M. Stutsman
Assistant Attorney General
Frankfort, Kentucky