

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000684-WC

JIMMY HOLLIS, D/B/A  
ABNER'S GIFTS AND SPORTS CARDS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-01746

THE ESTATE OF VERONICA ROTHWELL,  
BY PATTI OSBORNE, ADMINISTRATRIX;  
PATRICIA ANN THOMAS, CONSERVATOR  
FOR DYLAN CLARK ROTHWELL AND  
DALTON EUGENE ROTHWELL; UNINSURED  
EMPLOYER'S FUND; HON. MARCEL SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: This is an appeal from a decision of the Workers'

Compensation Board (hereinafter Board) which affirmed an Opinion and Award in

which the Administrative Law Judge (hereinafter ALJ) found that Veronica Rothwell was operating within the scope of her employment with Abner's Gifts and Sports Cards (hereinafter Abner's Gifts) when she was killed on November 13, 2004. Abner's Gifts was owned by Jimmy Hollis who appeals arguing that Ms. Rothwell was not his employee. Patti Osborne, Ms. Rothwell's mother and administratrix of her estate, as well as Patricia Ann Thomas, conservator for Ms. Rothwell's children, argue that the ALJ and Board were correct in finding that Ms. Rothwell was employed at Abner's Gifts when she was killed. We hold that there was substantial evidence to support the finding that Ms. Rothwell was employed at Abner's Gifts and affirm the ALJ's award of workers' compensation benefits.

At the time of Ms. Rothwell's death, Abner's Gifts was owned by her boyfriend, Mr. Hollis. The murder took place while Ms. Rothwell was appraising a sports card that the assailants brought to the store. Their actual intention was to rob the store.

Ms. Rothwell and Mr. Hollis were living together at all times pertinent to this case. In fact, had Ms. Rothwell not been murdered, they were to be married in a few weeks.

In finding that Ms. Rothwell was acting as an employee of Abner's Gifts, the ALJ held that there was an implied contract of hire between Ms. Rothwell and Mr. Hollis and, therefore, there was an employer/employee relationship between the two. An implied contract is one that the parties intended, either by tacit understanding or by the assumption that it existed. *See Black's Law*

*Dictionary*, 7<sup>th</sup> Ed. It is a contract that is “neither oral nor written - but rather, implied in fact, based on the parties’ actions.” *Hammond v. Heritage Communications, Inc.*, 756 S.W.2d 152, 154 (Ky. App. 1988).

To establish an implied contract, “the evidence must disclose an actual agreement or meeting of the minds although not expressed and such is implied or presumed from the acts or circumstances which according to the ordinary course of dealing and the common understanding of men shows a mutual intent to contract.” *Rider v. Combs*, 256 S.W.2d 749, 749 (Ky. 1953).

In affirming the ALJ, the Board stated that the following findings support the ALJ’s holding:

1. Ms. Osborne testified Mr. Hollis told her he bought Abner’s Gifts for Ms. Rothwell, that Rothwell enjoyed working there, and that the store was going to be Rothwell’s to run.

2. Mr. Hollis admitted that Ms. Rothwell was authorized to transact business on his behalf at Abner’s Gifts.

3. Mr. and Mrs. Hastings, the previous owners, testified Ms. Rothwell helped Mr. Hollis stock items on the shelves at the store.

4. Mr. Hastings testified he provided Mr. Hollis and Ms. Rothwell training, advice, and suggestions concerning the operation of Abner’s Gifts.

5. Mr. Hastings stated he provided instruction to Ms. Rothwell in particular on how to value baseball cards sold at the store.

6. Mrs. Hastings stated regular store hours were from 8 a.m. to 6 p.m. and another witness testified that on the day of the murder, Mr. Hollis left Ms. Rothwell at the store by herself at 3 p.m.

7. Ms. Rothwell's death certificate lists her time of death as 6 p.m. and her usual occupation as a clerk at Abner's Gifts.

8. That Ms. Rothwell had a reasonable expectation of being compensated by Mr. Hollis from the proceeds of the store in light of Mr. Hollis' testimony that he had authorized her to write checks from his bank account and had written her checks in the past.

On appeal, Mr. Hollis argues that the ALJ ignored much of the evidence that related to Ms. Rothwell's lack of employment at Abner's gifts, that the Plaintiff/Appellees did not satisfy their burden of proof that there was substantial evidence to prove employment, and that he was denied due process when he was not allowed to depose Dale Rothwell, Ms. Rothwell's ex-husband.

The standard of review on appeal is whether there is substantial evidence in the record to support the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Additionally, the ALJ, as the fact-finder,

has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence. *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985); *Kentucky Carbon Corp. v. Dotson*, Ky.App., 573 S.W.2d 368 (1978). The fact-finder has the sole authority to judge the weight to be afforded the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, Ky., 560 S.W.2d 15, 16 (1977).

*Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999).

With the standard of review as it is and the deference we must give to the ALJ's factual findings, we hold that there was substantial evidence to support this case's outcome. The evidence listed by the Board and set forth above show the substantial amount of evidence in support of the finding of an implied contract of employment. While another ALJ could have found differently, this one found that Ms. Rothwell was employed by Mr. Hollis and had substantial evidence supporting this finding. As such, we affirm.

Mr. Hollis' other argument is that he was denied due process when he was not allowed to depose Mr. Rothwell. We find it to have no merit. Early in the case, Mr. Rothwell was a party and designated as the "next friend" to the children.

It was later discovered that because Mr. Rothwell was an Ohio resident, an in-state conservator was required. The Honorable Patricia Ann Thomas was appointed conservator for Rothwell's minor children. She was substituted as claimant and pursued this claim.

Mr. Hollis sought and received an order compelling Mr. Rothwell to appear at Mr. Hollis' attorney's office for a deposition. When Mr. Rothwell was replaced by the conservator, the order was rescinded. Mr. Hollis now contends that he was not allowed to depose Mr. Rothwell. This is not true. Mr. Hollis' attorney could have traveled to Ohio to depose Mr. Rothwell, or taken the deposition by telephone, but did not. There is no evidence of record that Mr. Hollis was precluded from deposing Mr. Rothwell.

For the above reasons we affirm the holdings of the ALJ and Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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FOR DYLAN CLARK ROTHWELL  
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ROTHWELL:

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