RENDERED: OCTOBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000954-WC

ANTHONY J. TULO; AND
DIANA WENCH (POA APPELLANT) APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-00254

ROGER DORE AND TROY DORE
D/B/A D & D LOGGING;
HOPKINS HARDWOOD, INC.;
UNINSURED EMPLOYERS' FUND;
HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Anthony J. Tulo petitions for the review of an opinion of the Workers' Compensation Board affirming the decision of an Administrative Law

Judge (ALJ) dismissing his claim for benefits. Finding no error in the ALJ's decision or the Board's decision, we affirm.

Roger Dore and Troy Dore operated a loosely organized family enterprise, referred to in the record as D & D Logging. Roger maintained that he and his son, Troy, who was in his mid-twenties, were partners in the business. Troy testified that D & D logging was an arrangement his father originally had with a man named Duke, but when that working agreement failed, his father simply left the D & D logo on the truck. In any event, Roger apparently cut timber and the logs were removed by Troy by means of a skidder that he separately owned. Roger testified that once the logs were delivered to the mill, the profits were divided "about" equally.

The evidence submitted before the ALJ revealed Anthony had been dating and living with Samantha Dore, Roger's youngest daughter, in the northeastern part of the United States when they decided to move to Kentucky. They stayed in an apartment located in the Roger's residence. Both Roger and Troy maintained that Anthony was never hired by Roger. Anthony, on the other hand, testified that Roger hired him at the rate of $10.00 per hour to work in the business and that on December 30, 2006, while logging with Troy and another person, Bradley Thomas, he was struck in the head by a falling tree limb and sustained a catastrophic spinal cord injury.

In February of 2007, Anthony filed an application for the resolution of an injury claim with the Department of Workers' Claims, naming D & D Logging

and the Uninsured Employers' Fund as defendants. Over objection, the Uninsured Employer's Fund (UEF) paid interlocutory income and medical benefits.

When Roger was deposed by the UEF in July of 2007, a contract between Roger and Hopkins Hardwood, Inc. was introduced into the record. According to its terms, Roger contracted with Hopkins to cut, skid, and haul timber from a piece of property located in Nelson County for an agreed price. That contract was dated November 20, 2006, but by its own terms, expired thirty days later. Roger testified the job had not been profitable and that although the written agreement could be extended by mutual consent of the parties, he did not intend to complete the operation and no work was performed after Christmas. On January 9, 2008, the UEF joined Hopkins as an additional defendant on the basis of the contract and potential "up-the-ladder" liability.

On May 2, 2008, the UEF moved to bifurcate Anthony's claim and proceed only on the issue of Anthony's "employment status." In its May 21, 2008 order styled "Order on Motion to Dismiss Hopkins Hardware [sic] and Motion to Cease ILR [Interlocutory Relief] and Bifurcation," the ALJ responded to the UEF's request, stating in relevant part:

> As it concerns the motion by UEF to bifurcate the proceeding in order to attempt to establish up the ladder coverage, same shall be and it is hereby Granted. The parties are given 60 days simultaneously to develop proof to that end and to submit a Position Paper, relative, not only as to whether Plaintiff was in fact an employee under the statute, but also whether there is true up the ladder coverage that could bestow liability on Hopkins Hardwood, or any other entity.

As such, the subsequent proceedings were twofold: (1) to address whether Anthony was an employee of Roger or Troy under the Worker's Compensation statute at the time of his injury; and (2) whether Hopkins would be liable to Anthony if up-the-ladder coverage applied under the circumstances.

Following the ALJ's order, Anthony did not file a position paper on the issues of whether he was an employee under the statute or whether up-the-ladder coverage applied to Hopkins. Moreover, several depositions were taken and testimony was introduced regarding both the existence of an employment relationship between Anthony and Troy and Roger, as well as whether the injury Anthony sustained occurred during the course and scope of that employment. Anthony did not object to any testimony introduced into the record regarding the course and scope of employment.

Troy testified that on the date Anthony was injured, he and Anthony were cutting firewood in the Nelson County property to make extra money that they divided equally after the truck expenses were deducted. According to Troy, the money from the sale of the firewood was to be used to finance a New Years' Eve party he and Anthony were planning.

Bradley Thomas testified he had never worked for Roger, who he identified as a first or second cousin. He stated he had never done any logging but, on one occasion, had helped Troy and Anthony deliver firewood, for which he received no pay. Bradley maintained he was not present when Anthony was

injured and had never worked in the woods with Roger, Troy, or Anthony. Bradley stated, however, he was under the impression that Anthony was working for Roger based on conversations he had with his cousin Samantha, Roger's daughter.

After accurately summarizing all the lay testimony contained in the record, the ALJ was less than satisfied that testimony from Roger, Troy, and Anthony was completely truthful. Nonetheless, after considering Bradley's testimony, the ALJ concluded Roger had hired Anthony to work for him. The ALJ further believed, however, that Roger was not logging on the Nelson County property on the date Anthony was injured; instead, Anthony was cutting firewood with Troy, a joint venture unrelated to Anthony's employment.

On September 26, 2008, the ALJ issued a decision, styled "Opinion and Order on the Bifurcated Issues of Employment Status and Scope of Employment," dismissing Anthony's application for indemnity benefits against Roger and Troy. In relevant part, the ALJ stated:

> I further believe that Roger did not work on the site, where Plaintiff was injured, on December 30, as he had left that job site due to lack of profitability and there would have been no reason why Roger would have had a crew out there on that date, which is substantiated by Susan Dore, who testified that she had to go get Roger at a different place to tell him about the accident. What I also believe, is that Anthony and Troy were out there, as a joint venture, to collect firewood to sell for extra money for the next day's party.

The ALJ concluded by stating, "I find that [Anthony] was outside the scope of his employment with Roger and therefore, there can be no up-the-ladder exposure. Furthermore, I find that no employment relationship existed with Troy and therefore, I must dismiss the entire claim."

As such, the ALJ held that, although Roger had hired Anthony to work in his logging business shortly before the accident, Anthony was injured while he and Troy were involved in a joint venture, collecting firewood for their own account and that Anthony was not working as an employee of Troy. Although Roger and Troy did not maintain a policy of workers' compensation insurance, the ALJ consequently dismissed claims against UEF after determining that Anthony had acted outside the scope of his employment with Roger. Hopkins was also dismissed as a party because the ALJ concluded Anthony was outside the scope of his employment with Roger.

On appeal to the Workers' Compensation Board, relying on 803 KAR 25:010 § 13(11) and (14), Anthony contended that the ALJ acted arbitrarily, capriciously, in excess of her powers, and abused her discretion in determining that Anthony was "outside the course of his employment" when he was injured because the "course and scope" of employment was not specifically listed as a contested issue in the ALJ's May 21, 2008 order. Anthony argued that the contested issues before the ALJ were only limited to whether there was an employment relationship with either Roger or Troy, and whether up-the-ladder liability applied to Hopkins. Thus, Anthony maintained that not allowing him the opportunity, by reopening the

time for proof, to prove he was in the course and scope of his employment would be a denial of procedural due process.

The Board found that the ALJ's decision was reasonable under the evidence, and affirmed. The Board's reasoning is dispositive to this issue:

> The terms "employment relationship" and "course and scope of employment" are not defined, in KRS Chapter 342. "Injury" is defined as:
>
> "[A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." (Emphasis added.)
>
> KRS 342.001(1).
>
> The "arising out of" requirement concerns the origin or causal relationship between the injury and the employment relationship; whereas, the "in the course of" requirement concerns the time, place, and circumstances of the incident resulting in the injury. Stapleton v. Fort Junction Coal Co., 247 S.W.2d 372 (Ky. 1952). Thus, authority holds the term "work-related" is synonymous with the term "arising out of and in the course of employment." See Jackson v. Cowden Manufacturing Co., 578 S.W.2d 259 (Ky. App. 1978). As stated in McCracken County Health Spa v. Henson, 568 S.W.2d 240, 241 (Ky. App. 1977):
>
> "In order for an injury to arise out of employment, there must be a causal relationship between the employment and the injury. If the injury was brought about by reason of some other cause having no relation to the claimant's employment it cannot be said to have arisen out of employment, Hayes Freight Lines v. Burns, Ky., 290 S.W.2d 836 (1956)."

> Here, it is apparent the issue of work-relatedness cannot be redacted from a determination of whether an "employment relationship existed."
>
> KRS 342.640(1) plainly requires a contract of hire to establish employee status. However, KRS 342.640(4) additionally establishes that "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury[,]" constitutes an employee. (Emphasis added.)
>
> In sum, the evidence contained in the record that persuaded the ALJ established that although there may have been a contract of hire between Roger and [Anthony], [Anthony] was not performing a service for Roger , his employer, at the time of the injury. The ALJ ultimately concluded [Anthony]'s injury while gathering firewood with Troy was not work-related, extinguishing the liability of the UEF and any potential liability on the part of Hopkins Hardwood, Inc. The thrust of the ALJ's decision was that while there may have been an employment relationship in the past, no such relationship existed on December 30, 2006, when Anthony was injured. All of the proof submitted by the UEF bearing on work-relatedness was introduced without objection. The issue was fully litigated and there are now no due process implications.
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> ***
>
> [W]e have determined that "work-relatedness" is inextricably intertwined with the issues of "employment relationship" and "up-the-ladder" liability[.]

Before this Court, Anthony substantially repeats the argument he made before the Board. Relying again on 803 KAR 25:010 § 13(11) and (14), Anthony contends that the ALJ acted arbitrarily, capriciously, in excess of her powers, and committed an abuse of discretion in determining that Anthony was "outside the course of his employment" when he was injured because the "course

and scope" of employment was not specifically listed as a contested issue in the ALJ's May 21, 2008 order. In light of The Board's decision, we disagree.

Pursuant to 803 KAR 25:010 § 13, the parties are to prepare "a summary stipulation of all contested and uncontested issues" and "[o]nly contested issues shall be the subject of further proceedings." In *Sidney Coal Co., Inc. / Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710 (Ky. 2007), a similar argument was presented before the Supreme Court regarding this regulation. The parties listed the contested issues as being the "extent and duration" and "overpayment of TTD [Temporary Total Disability]." The employer asserted that the claim should not be remanded to the ALJ for additional findings regarding TTD because the claimant failed to list his entitlement to TTD beyond what the employer paid voluntarily, *i.e.*, underpayment of TTD. However, the Supreme Court held that

> [t]his argument ignores the Board's statement that it has interpreted the regulation consistently and has held that "questions regarding the appropriateness and duration of TTD are encompassed within the question of extent and duration." We are convinced that the Board's interpretation is reasonable. Mindful that the courts give great deference to an administrative agency's interpretation of its own regulations, we find no error in that regard. *See J.B. Blanton Co. v. Lowe*, 415 S.W.2d 376 (Ky. 1967).

Id. at 713-714.

Here, Anthony ignores that the Board addressed 803 KAR 25:010 § 13 and held that "work-relatedness" is inextricably intertwined with the issues of

whether an employer-employee relationship exists under the worker's compensation statute, and "up-the-ladder" liability. As the Supreme Court was convinced that the Board's interpretation of 803 KAR 25:010 § 13 was reasonable in *Sidney*, and because we give great deference to the Board's interpretation of its own regulations, we are convinced that the Board's interpretation 803 KAR 25:010 § 13 was reasonable in the instant case.

Moreover, while Anthony does not specifically raise the issue on appeal, we agree with the Board that there was no violation of procedural due process in this case resulting from the ALJ addressing and relying upon the course and scope of Anthony's employment in its decision. Anthony was given an opportunity to submit a position paper relative to the issue of whether he was an employee under the statute at the time of his injury and had ample opportunity to object to any testimony concerning the course and scope of his employment introduced during the underlying proceedings. He did neither.

For these reasons, the decisions of the ALJ and Worker's Compensation Board are hereby AFFIRMED.

ALL CONCUR.

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