

RENDERED: AUGUST 22, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-001879-WC

BILL HUNTSMAN D/B/A  
HUNTSMAN & SONS PAINTING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-09-01334

JOE MANNING; UNINSURED EMPLOYERS'  
FUND; CHRIS DAVIS, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Bill Huntsman, Sr., d/b/a Huntsman & Sons Painting  
(Huntsman), petitions for review of an opinion of the Workers' Compensation  
Board (Board) affirming the opinion and order of the Administrative Law Judge  
(ALJ). Having reviewed the record, we affirm.

Joe Manning (Manning) began working for Huntsman in July 2008.

Manning mostly worked as a painter, but also performed weather sealing, roof and chimney work, and installed insulation. Huntsman provided Manning with ladders and paint. Huntsman directed Manning's work, advising him on where to go and what type of work to perform at each project. Huntsman was responsible for bidding on jobs.

While Huntsman was out of town, he directed Manning to perform yard work at his private residence. On June 10, 2009, Manning fell ten feet to the ground from a ladder while trimming trees on Huntsman's yard, injuring his right foot. He was taken to the hospital and diagnosed with a fracture. He called Huntsman that day to report the injury.

Manning filed an Application for Resolution of Injury Claim (Application) on November 23, 2009, alleging a work-related injury to his right foot. He named both Huntsman and the Uninsured Employers Fund (UEF) as defendants. The Department of Workers' Claims (Department) issued a scheduling order on December 5, 2009. The scheduling order was sent to all parties, and set a Benefits Review Conference (BRC) for April 13, 2010. In addition, the order required Huntsman to file a Notice of Claim Denial or Acceptance (Form 111) within forty-five days, and specified "all allegations of the application shall be deemed admitted" if he failed to do so. Huntsman did not file a Form 111 within forty-five days of the order.

Huntsman was interviewed by state officials during an investigation. On April 7, 2010, Manning mailed a settlement demand to all parties. Huntsman and his son attended the BRC on April 13, 2010. On April 19, 2010, Manning and the UEF entered a settlement agreement which the ALJ approved on April 28, 2010.

On May 10, 2010, Huntsman filed a petition for reconsideration, which was denied by the ALJ on May 28, 2010. On June 14, 2010, Huntsman filed a motion to reopen and set aside the settlement agreement, arguing it was procured by fraud. The ALJ reopened the claim, abated the settlement agreement, and allowed the parties to take proof.

After numerous motions, extensions, and an interlocutory appeal to the Board, a hearing was held before the ALJ on June 15, 2011. The issues before the ALJ were whether Manning committed fraud, and whether the Department had subject matter jurisdiction. Specifically, Huntsman argued the Department lacked subject matter jurisdiction because Manning was not an employee within the meaning of the Workers' Compensation Act (Act).

The ALJ entered an opinion, order, and award on August 12, 2011, finding the settlement agreement valid and enforceable. The ALJ found Huntsman was fully aware of the pending nature of the claim, and, either willfully or through his own neglect, failed to become an effective party to the claim until after the settlement agreement was entered. The ALJ found Manning did not commit fraud. The ALJ further found Huntsman did not assert defenses by January 29, 2010, as

required by the scheduling order. Therefore, the ALJ found all the defenses, including defenses of independent contractor, employment relationship, and subject matter jurisdiction, were waived. Therefore, the ALJ resolved the matter entirely in Manning's favor.

Huntsman appealed to the Board. On December 28, 2011, the Board entered an opinion and order dismissing the appeal, ruling it was interlocutory. The Board held the ALJ only made a finding regarding the validity of the settlement agreement, and remanded the claim to the ALJ to issue a separate ruling to resolve the claims against Huntsman.

On remand, the ALJ explained because Huntsman waived all defenses, the only possible remaining issue was extent and duration of disability. As Huntsman failed to file a medical examination report, the ALJ found Manning permanently and totally disabled due to the work-related injury, based on proof timely submitted in support of his claim. The ALJ found Huntsman liable for benefits, and the UEF retained the right to recover against Huntsman for sums paid to Manning under the settlement agreement.

Huntsman appealed to the Board. On September 28, 2012, the Board entered an opinion affirming the ALJ's decision and order. The Board held there was substantial evidence to support the ALJ's determination that Manning did not engage in fraud. The Board further affirmed the ALJ's finding that Huntsman made no attempt to defend this claim until after the settlement agreement, and his failure to take affirmative steps to defend this claim was not excused. The Board

held the ALJ did not err in refusing to allow Huntsman to raise defenses, including lack of jurisdiction. This appeal follows.

The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The Board is charged with deciding whether the ALJ's finding “is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” KRS<sup>1</sup> 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). The function of this Court on review is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has erred in assessing the evidence so flagrantly as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

Despite the fact that he was interviewed by state officials and attended the BRC, Huntsman alleges he never knew a claim was being asserted against him until after the settlement agreement was approved. Huntsman claims he believed the investigation, correspondence, and BRC related to his lack of workers' compensation coverage.

On appeal, Huntsman alleges the Department does not have subject matter jurisdiction over this matter. He further argues defects in subject matter jurisdiction can be raised at any time and cannot be waived. Huntsman cites two

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<sup>1</sup> Kentucky Revised Statutes.

grounds to support his subject matter jurisdiction claim. First, he claims Manning's employment falls under the KRS 342.650(2) exemption for coverage under the Act, which provides as follows:

Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or if the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his or her trade, business, or profession.

Huntsman alleges an exemption from the Act because Manning performed simple maintenance and yard work at his private residence, and did not benefit the painting business. Additionally, Huntsman alleges Manning was an independent contractor, not a full-time employee. Huntsman claims Manning does not qualify as an employee under the four primary factors set forth in *Ratliff v. Redmond*, 396 S.W.2d 320 (Ky. 1965).<sup>2</sup> In his responsive brief, Manning argues he was not exempt under KRS 342.650(2) because his employment was performed under the direction and for the benefit of his employer. Further, Manning argues the *Ratliff* factors support a finding that he was not an independent contractor.

The ALJ did not evaluate specific facts regarding the nature of Manning's employment relationship with Huntsman. Rather, because Huntsman waived this issue, the ALJ resolved all matters in favor of Manning, and found

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<sup>2</sup> *Ratliff* sets forth nine factors distinguishing employees from independent contractors. Later, the Supreme Court identified four primary factors: 1.) nature of work as related to business generally carried on by alleged employer; 2.) extent of control exercised by alleged employer; 3.) professional skill of alleged employee; and 4.) true intentions of parties. See *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 818 (Ky. 2001).

Manning sustained a work-related injury during the course of his employment with Huntsman. We affirm.

KRS 342.270(2) requires an employer to file a notice of denial or acceptance within forty-five days of the issuance of notice of the application. Regulation 803 KAR<sup>3</sup> 25:010 Section 5(2)(a) requires a Form 111 to be filed within forty-five days after notice of the scheduling order. Subsection (b) provides if a Form 111 is not filed, all allegations of the application shall be deemed admitted. “These provisions are mandatory. Their purpose is to facilitate the prompt and orderly resolution of workers' compensation claims.” *Gray v. Trimmer*, 172 S.W.3d 236, 240 (Ky. 2005).

As Huntsman correctly notes, defects in subject matter jurisdiction may be raised by the parties or the court at any time and cannot be waived. *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 47 (Ky. 1996). However, while Huntsman may raise subject matter jurisdiction, there are no facts to substantiate his argument. By failing to timely submit a Form 111, Huntsman admitted the facts in Manning’s Application and waived the opportunity to prove the facts and issues to substantiate his allegations. As a result, Huntsman admitted Manning sustained a work-related injury to his right foot during the course of his employment. “[A] judicial admission is conclusive, in that it removes the proposition in question from the field of disputed issue, and may be defined to be a formal act done in the course of judicial proceedings which waives or dispenses

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<sup>3</sup> Kentucky Administrative Regulations.

with the necessity of producing evidence by the opponent and bars the party himself from disputing it.” *Sutherland v. Davis*, 151 S.W.2d 1021, 1024 (Ky. 1941). Because these facts were admitted, we affirm the ALJ and hold the Department had subject matter jurisdiction over this matter.

Relying on *Partin’s Adm’r v. Black Mountain Corp.*, 36 S.W.2d 1 (Ky. 1930), and *Eastern Coal Corp. v. Morris*, 287 S.W.2d 603 (Ky. 1956), Huntsman argues parties cannot stipulate jurisdiction. These cases, however, can be distinguished from the instant matter. The parties in *Partin’s Adm’r* and *Eastern Coal* stipulated they were operating under the provisions of the Act. In both cases, during the course of litigation, the facts revealed the Department did not have subject matter jurisdiction. Therefore, the Court held the stipulation of coverage under the Act was not binding. This stipulation of coverage under the Act can be distinguished from Huntsman’s admission of fact that Manning sustained a work-related injury to his right ankle during the course of his employment. A party is not permitted, as Huntsman alleges, to undo an admission of fact at any stage in the proceedings simply because that fact goes to the question of subject matter jurisdiction.

Lastly, Huntsman argues Manning procured the settlement agreement by fraud by misrepresenting his average weekly wage (AWW). As a result, Huntsman alleges the UEF has no right to recover from him. We disagree.

Manning accurately identified his pay rate as \$16.00 per hour on his Application. The UEF conducted a thorough investigation, including interviewing



witnesses, prior to entering into the settlement agreement. The agreed settlement amount was not based on a particular AWW, but rather, was the product of negotiation between Manning and the UEF. Huntsman's claim that the settlement agreement was fraudulently obtained based on a misrepresentation of Manning's wages is without merit.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

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