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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001556-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00493

DARLENE CROWDER; PULASKI FRANCHISES, INC.; EUGENE DAVIS; JAMES DICK; QFA ROYALTIES, LLC; HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: The Uninsured Employers' Fund (UEF) appeals a judgment of an Administrative Law Judge (ALJ) and an affirming opinion of the Workers'

Compensation Board (Board) that respectively determined appellees Eugene Davis, James Dick, and QFA Royalties, LLC, bore no responsibility for reimbursing the UEF for workers' compensation benefits it paid to Darlene Crowder (the claimant in this matter) relating to injuries Crowder sustained in the course and scope of her employment with Pulaski Franchises, Inc. The UEF now presents the same arguments to this Court as it did the Board, described in further detail below.

"The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). With that said, we have reviewed the Board's affirming opinion in this matter; we have found no error in its understanding of the facts, analyses of the legal issues presented, or resolution of the arguments raised by the UEF; and, we therefore affirm and adopt the Board's opinion in this matter. The Board's opinion provides in relevant part as follows:

> Crowder was injured while employed at a Quiznos restaurant in Somerset. The issues on appeal concern liability, and for this reason we do not summarize the medical evidence. However, a brief overview of the involved parties in beneficial. QFA is the corporate franchisor of Quiznos sandwich shops. The franchise agreement for the Somerset restaurant was granted to Davis and Dick, individually. Davis and Dick later formed a Kentucky corporation called Pulaski Franchises, Inc. ("Pulaski"). The bank account

exclusively used by the Quiznos restaurant in Somerset was in Pulaski's name.

Crowder testified "Tyler Hibbard"[FN], the manager of the restaurant, asked her if she would be interested in working there.

> [FN] Crowder refers to the manager as Tyler Hibbard, while Dick and Davis refer to this person as Tyler Hilbert. For purposes of this opinion, we refer to him as "Hilbert".

A few days later, she interviewed with Hilbert and Davis. She was hired as a manager and began working on April 3, 2010. She was injured on April 15, 2010 when she struck her eye on the corner of a metal rack.

Dick testified he was involved only as an investor and had no role in the operation of the business. Davis approached him about investing in a Quiznos franchise because the two had previously owned businesses together. Dick's regular occupation was as a funeral director. It was his understanding Davis would run the day-to-day operations of the business.

Davis testified he initially was responsible for the day-to-day operation of the business until he hired Tyler Hilbert as general store manager. Hilbert then had the responsibility of hiring and firing employees, issuing paychecks, evaluating employee performance, purchasing insurance and paying bills. Payments for food products, sales and unemployment taxes, royalty payments to QFA, and payroll were written on the Pulaski checking account. Davis indicated he was not aware the restaurant's workers' compensation insurance policy had been cancelled in February 2010, two months before Crowder's injury. In fact, he learned of the cancellation after the accident.

Lori Christensen, litigation paralegal for QFA, testified it is an entity created for the purpose of entering into franchise agreements and collecting royalties. It does not operate restaurants. At one time, Quiznos planned to

open 600 corporate restaurants, and a separate entity, Quiznos Operating Company ("QOC"), was created to operate those restaurants. However, this plan did not fully come to fruition and only about 100 stores were opened. Christensen indicated many of these restaurants have since closed, though she did not give an exact number.

QFA provided guidance to franchisees through the operating handbook, but did not get involved in the day-to-day operation of the restaurant. A copy of the agreement was attached as an exhibit to the deposition. Davis and Dick signed the agreement as individuals rather than signing in the section for corporations, limited liability companies or partnerships. Christensen was not aware of the lapse in workers' compensation insurance until after Crowder's injury.

ALJ [Allison] Jones issued an Interlocutory Opinion and order on December 6, 2012 on the bifurcated issues of whether QFA had liability under KRS 342.610(2), the identity of the employer (Davis and Dick, or Pulaski), and whether QFA can be held liable if it did not have a written agreement with Crowder's employer. ALJ Jones found QFA is in the business of granting and overseeing franchise agreements, and that making and selling sandwiches to customers is not a regular and recurrent part of its business. She noted that while QFA provided very detailed guidelines for how to assemble sandwiches, display menu items, manage books, procure insurance, and numerous other details for operating a successful restaurant, it was not itself in the business of operating or managing stores. In this regard, the ALJ reasoned, QFA's role vis-à-vis the franchisee was virtually indistinguishable from that in Doctors' Associates, Inc. v. Uninsured Employers' Fund, 364 S.W.3d 88 (Ky. 2011). Furthermore, even if she relied on the fact QOC actually operated restaurants, the ALJ concluded the UEF failed to sufficiently connect QFA and QOC to prove they were the same entity for purposes of the Act. Accordingly, ALJ Jones ruled QFA does not have up-the-ladder liability and dismissed it as a party defendant. Next, based upon bank records and the testimony of Crowder,

Davis and Dick, the ALJ determined Pulaski was Crowder's employer and, therefore, dismissed Davis and Dick as party defendants.

The UEF filed a petition for reconsideration seeking additional findings of fact and conclusions of law on the question of whether Davis, Dick and Pulaski were involved in a joint venture. In a January 30, 2013 Order, ALJ Jones noted the only evidence the UEF cited in support of its argument was the fact Davis and Dick did not formally transfer the franchise license to Pulaski. Citing Huff v. Rosenberg, 496 S.W.2d 352 (Ky. 1973), the ALJ enumerated the element[s] essential to a joint enterprise: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. Further, subsequent appellate decisions clarified all four elements must be satisfied before the doctrine can be applied.

ALJ Jones determined the UEF failed to satisfy the first, third and fourth elements. Regarding the first element, the ALJ determined there was not an express or implied agreement between Davis, Dick and Pulaski to jointly operate the store. Rather, the ALJ found Dick and Davis intended for Pulaski to own and operate the franchise as a corporation. The ALJ accepted Davis' testimony that he and Dick made a mistake in signing the franchise agreement as individuals and intended to purchase it in the corporation's name. As to the third element, the ALJ noted the evidence indicated the profits of the store were deposited in the Pulaski account, were designated and treated as corporate profits and were not shared with Davis and Dick. Further, Pulaski paid salaries and royalties from the corporate account. Finally, regarding the fourth element, the ALJ noted Dick never had a role in the operation of the store and Davis was involved only in the initial operation until the general manager was hired to run it. Accordingly, the ALJ found the evidence did not support application of the joint venture doctrine.

The case was reassigned to ALJ Allen who rendered his Opinion, Order and Award on April 22, 2014 finding Crowder sustained a permanent partial disability as a result of the work injury. Finding no reason to alter, amend or vacate ALJ Jones' findings that Pulaski was the employer and that Davis, Dick and QFA had no liability, he adopted those conclusions.

On appeal, the UEF argues Davis and Dick are individually liable for the award because they signed the franchise agreement in their individual capacities and never transferred the agreement to Pulaski. Contrary to ALJ Jones' conclusion otherwise, it contends there was no "mistake" in signing in their individual capacities, because Pulaski was not chartered until a week after the agreement was signed. The UEF asserts Davis and Dick were clearly acting in concert with Pulaski in operating the sandwich shop, and the arrangement must be viewed as a joint venture or partnership.

ALJ Jones' determination that the UEF failed to satisfy the factors necessary to establish a joint venture, subsequently adopted by ALJ Allen, is supported by the record. As noted by the ALJ, the UEF was required to prove each of the four elements set forth in Huff v. Rosenberg, id. In the absence of any one element, it is within the ALJ's authority to find that no joint enterprise was undertaken. Here, ALJ Jones determined the UEF failed to satisfy three of the four elements. She specifically found Davis and Dick intended to have Pulaski own and operate the franchise as a corporation, a conclusion which is supported by their testimony to this effect. Their testimony established Dick was never involved in the operation of the restaurant and Davis only had a role in the initial operation until Hilbert was hired as general manager. At that point, Davis and Dick did not control the day-to-day management of the franchise. Profits from the franchise were deposited in the Pulaski account and treated as a corporate asset. The ALJ could reasonably conclude there was no joint enterprise based upon the evidence applied to the elements enunciated in Huff v. Rosenberg.

The UEF next argues the Board should impose up-the-ladder liability upon QFA as a matter of law. The UEF acknowledges Doctors' Associates, Inc., id., is on point, but seeks to distinguish the factual circumstances of this case. The UEF is correct in its reading of Doctors' Associates, Inc., which clarifies Chapter 342 does not automatically preclude imposition of up-the-ladder liability upon a franchisor, and the mere payment of royalties is not determinative of the relationship. Rather, Doctors' Associates, Inc. makes clear the arrangement between a prospective contractor and a prospective subcontractor must be viewed realistically in light of the business being conducted and services rendered.

The UEF seeks to distinguish Doctors' Associates, Inc. from the relationship between QFA and Pulaski, Davis and Dick, by highlighting the degree of specificity in the franchise agreement and the operation manual. Indeed, the operating manual, which a QFA franchisee is required to follow, guides nearly every aspect of a restaurant's operation. Thus, the UEF argues, QFA must be realistically viewed as participating in the day-to-day operations of the business.

Because the UEF was unsuccessful in its burden of proof regarding the issues of QFA's up-the-ladder liability, the question on appeal is whether, upon consideration of the whole record, the evidence compels a finding in its favor. 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D. Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, the ALJ 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. 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 [the] ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). It must be shown that there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

KRS 342.610(2)(b) provides that a person who contracts with another to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor and such other person a subcontractor. This section was enacted to discourage owners and contractors from hiring financially irresponsible subcontractors and thus, eliminate workers' compensation liability. Tom Ballard Co. v. Blevins, 614 S.W.2d 247 (Ky. App. 1980); Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986).

We agree with the ALJ that the situation here is virtually indistinguishable from that presented in Doctors' Associates, Inc. v. Uninsured Employers' Fund, id. The Kentucky Supreme Court noted cases must be analyzed individually based upon the particulars of the relationship at issue. Doctors' Associates, Inc. was not involved in the daily operation of the Subway restaurant. It was in the business of developing franchises for the purpose of securing royalties, rather than actually operating sandwich shops. Based on this finding, the Court held the franchisee did not perform a regular or recurrent part of Doctors' Associates, Inc.'s business.

Here, Christensen's testimony established QFA was in the franchising business and it did not operate any restaurants. The purpose of its business is to secure royalties rather than actually operate sandwich shops. It is essentially a service provider to restaurants and is not in the business of making and selling sandwiches. While QOC, a separate and distinct entity, had operated corporate restaurants, the ALJ determined the UEF failed to prove a connection between the entities sufficient to

> establish they should be treated as the same entity for purposes of the Act. The ALJ's determination QFA does not have liability pursuant to KRS 342.610(2) is based on substantial evidence and a correct interpretation of applicable law.

As noted, we find no error with the Board's opinion with respect to the April 22, 2014 opinion, order and award rendered by Hon. J. Gregory Allen, ALJ (incorporating former ALJ Jones' interlocutory opinion rendered December 6, 2012 and her order of January 30, 2013). We therefore AFFIRM.

ALL CONCUR.

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