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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000490-WC

MARTIN REED — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-01137

LINCOLN JONES;
ROBERT DOCKERY PROPERTIES, LLC;
UNINSURED EMPLOYERS' FUND;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER AND MAZE, JUDGES; HENRY,[1] SPECIAL JUDGE.

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

HENRY, SPECIAL JUDGE: Martin Reed petitions for review of an opinion of the Workers' Compensation Board (the Board) affirming a decision by the Administrative Law Judge (ALJ) dismissing Reed's claim. On appeal, Reed argues substantial evidence entitles him to an award of benefits based on his employment relationship with the appellees, Lincoln Jones and Robert Dockery Properties, LLC. For the reasons set forth below, we affirm.

I. BACKGROUND

Reed's claim concerns the nature of the relationships among the parties as summarized by the Board:

> Reed is employed by Motel 6, but finds odd jobs to make extra money. Jones is a property manager who performed maintenance tasks for Robert Dockery Properties, a company owned by Robert Dockery, a California resident. Reed met Jones about 2006 or 2007 when he moved into an apartment building Jones maintained. Reed became acquainted with Jones, and offered to perform odd jobs for extra money. Jones accepted this offer and began giving Reed various tasks such as mowing, trash removal, and lawn maintenance. The jobs were offered intermittently and Reed was paid cash. He injured his wrist on August 19, 2009 while helping Jones move a refrigerator into an apartment owned by Robert Dockery Properties. Reed filed this claim on October 9, 2009.
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> The medical evidence is not pertinent to the issues on appeal. Rather, the dispute relates to the nature of the relationship among Reed, Jones and Robert Dockery Properties. Because neither Jones nor Robert Dockery Properties carried workers' compensation insurance, the

Uninsured Employers' Fund ("UEF") was made a party to the claim.

In a November 25, 2013 Opinion, the ALJ determined Jones was an independent contractor who performed property management services for Robert Dockery Properties. The ALJ further determined Reed was Jones' employee, and therefore Robert Dockery Properties was Reed's up-the-ladder employee. However, the ALJ ultimately dismissed the claim, applying KRS[2] 342.650(2), a provision which exempts from coverage:

> 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 of profession.

Reed and Jones appealed to this Board. In a July 25, 2014 Opinion, we concluded the ALJ's analysis of the employment relationship among Reed, Jones and Robert Dockery Properties was insufficient. On this basis, we vacated the determinations that Reed was Jones' employee, and that Jones was an independent contractor. Because the parties elected to bifurcate the proceedings on select, clearly delineated issues, we further concluded the applicability of KRS 342.650(2) was not properly before the ALJ. We vacated the determination Reed was exempt from coverage.

In an October 21, 2014 Order on remand, the ALJ again determined Reed was Jones' employee, and Jones was an independent contractor performing services for

[2] Kentucky Revised Statutes.

Robert Dockery Properties. After citing [*Ratliff v. Redman*,] 396 S.W.2d 320 (Ky. 1965) and [*Chambers v. Wooten's IGA Foodliner*,] 436 S.W.2d 265 (Ky. 1969), the ALJ provided the following analysis regarding Jones' employment status:

> Mr. Jones testified that he retired in 2002 and became involved in property management. He also stated that he was on-call all the time for the four properties owned by Mr. Dockery and that he performed work for Fred Mack who owned one building and four apartments. The ALJ therefore finds based upon this undisputed testimony of Mr. Jones, that he is involved in the distinct business of property management for off-site property owners.
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> . . . .
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> The ALJ finds that based upon the testimony of Mr. Dockery, who admitted that he managed the property from California and had a business relationship with Jones but was aware that Mr. Jones at times hired others unknown to him to assist, establishes that the kind of occupation, in that locality, is usually done under the direction of the employer or by a specialist without supervision.
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> . . . .
>
> When applying this same test to the relationship between Robert Dockery Properties and Mr. Jones, the ALJ finds based upon the testimony of M[r]. Dockery, that Mr. Jones exercised a substantial amount of control over the work performed and that Robert Dockery Properties was

unaware of the people that Mr. Jones hired or the methods used in the management of the property. The testimony of Mr. Jones was that he was paid thirty dollars per occupied unit and had no direction regarding the manner in which to keep units filled or what to do when a particular unit was vacated. This testimony establishes and the ALJ so finds that Robert Dockery Properties did not maintain any significant control over the details of the work, that Mr. Jones used his own tools and instrumentalities to complete the work, that the method of payment was not consistent with an employment relationship, and Mr. Jones is engaged in a business that involves providing services for others as well as Robert Dockery Properties.

The ALJ also finds based upon the testimony from both parties that the arrangement reached between Mr. Jones and Robert Dockery Properties does not resemble an employment or "master and servant" relationship. Mr. Jones testified that he was on-call all the time for the four properties owned by Mr. Dockery and that he also performed work for Fred Mack who owned one building and four apartments. Mr. Dockery testified that he would not exclusively call Mr. Jones for all his property service needs but often "bid out" jobs that needed to be done. The lack of exclusivity and the method of payment of Mr. Jones support a finding that the relationship between Mr. Jones and Robert Dockery Properties was not one wherein close supervision was the norm or wherein employment was intended.

Based on this analysis, the ALJ concluded Jones was an independent contractor. In the same Order, the ALJ also permitted additional proof time regarding the remaining evidentiary issues, including the applicability of KRS 342.650(2). Robert Dockery Properties had already submitted invoices and checks paid to Jones and to third party "helpers" he had solicited, which Reed relied upon. In an October 27, 2015 Order, the ALJ relied upon this proof to conclude Jones had other employees and, therefore, KRS 342.650(2) did not apply. The UEF petitioned for reconsideration, noting that the invoices were paid by Robert Dockery Properties, not Jones. The petition was denied.

The claim was set for a final hearing. An Agreed Order dated February 24, 2017 was entered, which acknowledged that an issue to be determined was "employment relationship in light of KRS 342.650(2)(20 day rule)". Following the hearing, the ALJ issued a May 30, 2017 Opinion and Order, reversing his prior determination that KRS 342.650(2) did not apply. He explained:

> The Plaintiff has testified that his employment with the Defendant was intermittent and when asked whether he performed regular work for any businesses on a formal basis where he worked regular hours. The Plaintiff proceeded to name a place in J-town doing demolition but did not think to name any Defendant in this matter.
>
> The Plaintiff testified that he ran across Mr. Jones and inquired about any work he could do for him. He then explained that he did some painting which he later added was the most that he had ever earned working for Mr. Jones. When asked about the frequency of his work, he replied that it was just every now and then.

> The ALJ finds based upon the evidence available that the Plaintiff was never employed for any time period longer than twenty days and Mr. Jones had no other employees thus exempting Mr. Reed from coverage. The ALJ notes that invoices for work performed by others on or about these premises have been presented but finds that these invoices were directed to Robert Dockery and not Mr. Jones for whom the Plaintiff worked as found previously. The ALJ is therefore left to conclude that there were no other similarly situated employees placing the Plaintiff squarely in the exemption contemplated in KRS 342.650(2).
>
> The ALJ therefore finds that the Plaintiff has not presented evidence sufficient to show the inapplicability of the exemption listed in KRS 342.650(2) and is therefore exempt from coverage under the Act.

Reed petitioned for reconsideration, arguing that the ALJ impermissibly reversed his finding that KRS 342.650(2) did not apply. The ALJ denied the petition, explaining that his prior determination was based on a mistake of fact: "[T]he invoices cited were not directed to Mr. Jones indicating that the employees referenced were not similarly situated as earlier believed."

Reed then appealed to the Board, arguing:

> [T]he ALJ erred in finding Jones was an independent contractor, and not an employee of Robert Dockery Properties. He also claims the ALJ impermissibly reversed his October 27, 2015 findings regarding the applicability of KRS 342.650(2), and that the ALJ's final determination is not supported by the evidence.

The Board affirmed the order of the ALJ dismissing Reed's claim. This appeal followed.

II. STANDARD OF REVIEW

"The claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of any cause of action[.]" *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621, 628 (Ky. App. 2015) (citations omitted). If the claimant is unsuccessful before the Board,

> his burden on appeal is infinitely greater. It is of no avail . . . to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ, as "fact-finder[,] has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (citations omitted). "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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). "The crux of the inquiry on appeal is whether the

[ALJ's] finding . . . is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) (citing *Special Fund*, 708 S.W.2d at 643).

III. ANALYSIS

On appeal, Reed argues: (1) Jones was an employee of Robert Dockery Properties, LLC, not an independent contractor; (2) the exemption under KRS 342.650(2) does not apply; and (3) Jones had more than one employee.

A. Jones's relationship with Robert Dockery Properties, LLC

First, Reed argues the Board erred in affirming the ALJ's finding that Jones was an independent contractor instead of an employee of Robert Dockery Properties, LLC. We note Reed did not appeal the ALJ's finding that he was an employee of Jones. On remand, the ALJ applied the following nine factors set forth in *Ratliff* to determine the relationship between the parties as required by the Board:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;

> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
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> (f) the length of time for which the person is employed;
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> (g) the method of payment, whether by the time or by the job;
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> (h) whether or not the work is a part of the regular business of the employer; and
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> (i) whether or not the parties believe they are creating the relationship of master and servant.

Ratliff, 396 S.W.2d at 324-25. The ALJ's analysis emphasized the four factors in *Chambers*: "the nature of the work as related to the business generally carried on by the alleged employer, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the true intentions of the parties." *Chambers*, 436 S.W.2d at 266.

The Board affirmed the ALJ's finding that Jones was an independent contractor for the following reasons:

> The ALJ correctly cited the analysis set forth in [*Ratliff*] as applicable to this claim. He considered the nine factors, and placed emphasis on the four predominant factors identified in [*Chambers*]. As evidenced from the ALJ's analysis, set forth above, he was persuaded by several circumstances of the relationship, including Jones' discretion in how to perform his property management tasks, the fact Jones provided the same services to other owners, the method of payment per unit as opposed to hourly or salary, Jones' lack of exclusivity in the completion of

> maintenance and repairs, and the fact Jones used his own vehicle and tools to complete the required duties. Also important is the fact both Jones and Robert Dockery testified to their mutual understanding that Jones was not an employee.
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> Reed's argument on appeal is not that the ALJ failed to consider the required factors, but his assessment of the relevant proof. Reed claims the fact Jones spoke with Robert Dockery nearly every day evidences a high level of control over Jones' work. He also argues property management is not a distinct occupation, but is an expected aspect of property ownership which the property owner typically supervises. He emphasizes Jones' use of Robert Dockery Properties' accounts at Home Depot and Lowe's as evidence Jones did not supply his own instrumentalities and tools. Reed also highlights the fact Jones had regularly performed services for Robert Dockery Properties for over two years, and was paid not hourly, but based on the number of occupied units.
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> Reed has emphasized proof that would support a finding Jones was an employee of Robert Dockery Properties. However, the ALJ identified other evidence and circumstances to support the conclusion Jones was an independent contractor. It is not the function of this Board to re-weigh the proof and reach a different result; that discretion lies exclusively within the ALJ's province. When the evidence can reasonably support differing conclusions, it cannot be said the proof compels a particular result. As such, this Board is without authority to disturb the ALJ's findings.

The Board's role is to determine whether the evidence compels a finding that Jones was an employee of Robert Dockery Properties, LLC, and the Board concluded the evidence before the ALJ did not compel this result. We agree

with the Board's analysis and fail to find that the ALJ or the Board misconstrued controlling precedent or committed an error in assessing the evidence. Thus, we conclude that the ALJ's finding that Jones was an independent contractor was reasonable.

B. KRS 342.650(2) exemption

We address Reed's additional arguments together. Reed takes issue with the ALJ's *sua sponte* reversal of its finding that Reed was not exempt from coverage under KRS 342.650(2), and he argues Jones had more than one employee. The crux of these arguments is that Reed was entitled to coverage for the injury he sustained. KRS 342.650(2) exempts employees from coverage if they perform "maintenance, repair, remodeling, or similar work" and are employed for less than "twenty (20) consecutive work days" *or* "the employer has no other employees[.]"

A recitation of the procedural posture is necessary to frame the basis of Reed's argument. The ALJ's first opinion concluded that Reed was Jones's only employee, and Reed was exempt from workers' compensation coverage. Then, the Board reversed the ALJ's opinion and instructed the ALJ to first address the employment relationships among the parties before ruling on the exemption issue. After ruling Jones was an independent contractor and Reed was Jones's employee, the ALJ allowed the parties to present proof regarding the applicability

of the statutory exemption. Reed submitted invoices, and the ALJ found they indicated that several other laborers performed tasks for Jones like those performed by Reed. Then, the ALJ entered a final order, reversing its ruling on the exemption issue because Reed "was never employed for any time period longer than twenty days," and the "invoices were directed to Robert Dockery and not Mr. Jones for whom [Reed] worked."

On appeal to the Board, Reed argued the ALJ impermissibly reversed its prior ruling because no additional evidence was submitted regarding the exemption issue. Reed further argued the invoices were evidence that other laborers were hired to perform similar tasks, and because Reed was found to be an employee, the other workers must also be employees under the same analysis. The Board upheld the ALJ's finding based on the following reasoning:

> An ALJ may not "reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion, absent a showing of new evidence, fraud, or mistake." [*Bowerman v. Black Equipment Co.*], 297 S.W.3d 858, 867 (Ky. App. 2009). The ALJ characterized his initial determination that Jones had multiple employees, and thus KRS 342.650(2) did not apply, as a mistake of fact. Our review of the evidence supports this characterization.
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> Robert Dockery Properties produced a check dated November 10, 2009 issued to Carlos Diaz in care of Jones. It also produced invoices indicating Jones charged for the use of "helpers", sometimes requesting that checks be issued directly to the third-party "helper". These invoices are dated between June 2009

and December 2009. The invoices were submitted by Jones to Robert Dockery Properties.

In reversing his prior ruling, the ALJ indicated he had made a mistake of fact, erroneously believing the invoices had been submitted to and paid for by Jones, not Robert Dockery Properties. There is simply nothing in the record to dispute the ALJ's assessment of his error as a mistake of fact. The invoices clearly were submitted by Jones to Robert Dockery Properties. For this reason, we cannot conclude the ALJ acted arbitrarily, unreasonably or capriciously in reversing his prior holding. [*Id.*]

Furthermore, we disagree with Reed's assertion the invoices conclusively establish Jones had other employees, which would render KRS 342.650(2) inapplicable. The invoices establish only that Jones intermittently hired other persons to complete work at various properties. The invoices do not establish whether Jones simply sub-contracted out certain types of work for which he did not have the ability to perform himself. The invoices also do not establish whether Jones entered a contract for hire with any of these persons. In fact, the invoices tend to indicate these persons were hired for specific jobs and never performed services on a regular and sustained basis, the hallmark of "work" as defined by KRS 342.0011(34). *See also* KRS[] 342.640 (an employee is one who performs "work" under a contract for hire).

The ALJ acted well within his discretion in concluding there was no evidence Jones had any other employee at the time of Reed's accident. There is little evidence in the record on this issue, and none that would compel a different result. [*Ira A. Watson Department Store v. Hamilton*,] 34 S.W.3d 48 (Ky. 2000). As such, there is no error in the ALJ's determination Reed is exempt from coverage under the Act pursuant to KRS 342.650(2).

We agree the ALJ made a mistake of fact and did not err when it reversed its order on the exemption issue, and Reed was Jones's only employee based on the ALJ's analysis of the invoices. Even if the other workers were employees, the record clearly indicates Jones was never employed for twenty consecutive days. An employee can be exempt from coverage either because he worked less than twenty consecutive days *or* because his employer had no other employees. Both reasons for exemption need not apply. Thus, the Board did not misconstrue precedent and acted reasonably in affirming the ALJ's ultimate finding that the exemption under KRS 342.650(2) applied.

IV. CONCLUSION

For these reasons, we affirm the order of the Board.

ALL CONCUR.

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