RENDERED: MARCH 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001076-WC

TRYON TRUCKING, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-00873

RANDY MEDLIN;
HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
DAVID O. GRIFFITH;
DAVID O. GRIFFITH D/B/A DAVID GRIFFITH TRUCKING;
DAVID E. GRIFFITH, D/B/A DAVID GRIFFITH TRUCKING;
ORLA L. SMITH, D/B/A O.L. SMITH TRUCKING;
UNINSURED EMPLOYERS' FUND; AND
MIKRON INDUSTRIES, INC.

APPELLEES

AND NO. 2018-CA-001085-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-00873

RANDY MEDLIN;
TRYON TRUCKING, INC.;
DAVID O. GRIFFITH;
DAVID E. GRIFFITH;
ORLA L. SMITH D/B/A O.L. TRUCKING;
MIKRON INDUSTRIES, INC.;
HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; THOMPSON AND COMBS, JUDGES.

CLAYTON, CHIEF JUDGE: Tryon Trucking, Inc. ("Tryon") and the Uninsured Employer's Fund ("UEF") petition for review of a Workers' Compensation Board ("Board") opinion affirming in part, vacating in part, and remanding the opinion and order of the Administrative Law Judge ("ALJ") for further findings of fact.

In Tryon's appeal, it argues that the portion of the ALJ's opinion and order finding that Tryon was not an "up-the-ladder" employer pursuant to Kentucky Revised Statutes (KRS) 342.610(2) was based on substantial evidence and, accordingly, the Board erred when it remanded the decision to the ALJ with a request for further findings of fact rather than affirming the ALJ's decision.

In the UEF's appeal, it argues that the Board erred in affirming the portion of the ALJ's opinion finding that Mikron Industries, Inc. ("Mikron") was

not an "up-the-ladder" employer pursuant to KRS 342.610(2), alleging that Mikron was able to avoid up-the-ladder responsibility under the statute by choosing to subcontract their delivery responsibilities.

In an order dated September 19, 2018, this Court consolidated the above-styled cases for consideration by this panel. Finding no error, we affirm as to both Appeal No. 2018-CA-001076-WC and Appeal No. 2018-CA-0001085-WC.

BACKGROUND

On April 18, 2014, Randy Medlin filed a Form 101 Application for Resolution of Injury Claim ("Form 101") with the Department of Workers' Claims ("Department"). As part of the Form 101, Medlin alleged that, on July 25, 2013, he suffered the following work-related injuries in a motor vehicle accident while driving a tractor-trailer: "Crush injury to left leg; Lacerations to right leg, right hand, right wrist, head, back, hips, right ear; hearing loss – left ear; fractured right cheekbone; severe blood loss; post-traumatic stress disorder." The Form 101 further alleged that Medlin's employers at that time were David O. Griffith d/b/a David Griffith Trucking, David E. Griffith d/b/a David Griffith Trucking, Orla L. Smith d/b/a O.L. Smith Trucking, and Tryon. Medlin indicated that he was operating a tractor owned by David O. Griffith and leased to Tryon and a semi-trailer owned by Orla L. Smith, as well as hauling a load of materials pursuant to

an employer's contract with Tryon. Medlin added the UEF as a party as well. Medlin eventually added Mikron, the owner of the materials that Medlin was transporting, as a party as the litigation proceeded. Each alleged employer contended that Medlin was either not their employee at the time of the accident or that he was driving as an independent contractor.

The Department initially assigned the claim to ALJ Otto Wolff. Tryon filed a motion requesting that ALJ Wolff resolve whether any of the defendants were Medlin's employer before the claim proceeded any further. ALJ Wolff's January 11, 2016 Interlocutory Opinion and Order ("Interlocutory Order") stated the following findings of fact: Medlin was an employee and not an independent contractor on the day of the accident; David O. Griffith ("David O.") was Medlin's employer and did not have workers' compensation insurance coverage when the accident occurred; and the facts did not support a finding that either Tryon or Mikron was a statutory "up-the-ladder" employer under KRS 342.610(2). ALJ Wolff cited extensively to the unpublished case *Com., Uninsured Employers' Fund v. Ritchie*, No. 2012-SC-00746-WC, 2014 WL 1118201 (Ky. Mar. 20, 2014)[1] in support of his conclusion that neither Tryon nor Mikron had up-the-ladder responsibility as an employer.

[1] This case is cited pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

ALJ Wolff further found that David O. was liable for payment of Medlin's workers' compensation benefits, and that if David O. either did not pay the benefits or filed bankruptcy, the UEF, pursuant to KRS 342.760, was liable to pay Medlin's benefits. The UEF filed a petition for reconsideration, which was overruled by ALJ Wolff in an undated order issued in April 2016.

Thereafter, newly-assigned ALJ Brent Dye conducted a hearing on the merits of Medlin's entitlement to benefits under the Workers' Compensation Act and issued an opinion, award and order on October 30, 2017. In that opinion, ALJ Dye determined that, pursuant to *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 867 (Ky. App. 2009), there was no new evidence, fraud, or mistake that would require him to modify ALJ Wolff's findings concerning the lack of any up-the-ladder liability on the part of Tryon or Mikron. The UEF again filed a petition for reconsideration, which was denied by ALJ Dye on November 27, 2017.

Upon the UEF's appeal to the Board, the Board rendered an opinion on June 22, 2018, affirming in part, vacating in part, and remanding certain issues back to the ALJ to make further findings of fact. Regarding the alleged up-the-ladder liability of Tryon, the Board found that, with respect to Tryon, there were numerous differences between the *Ritchie* case and the current case that had not been examined by either of the ALJs. Specifically, the Board felt that ALJ Wolff's statement that "[t]he facts and working relationships in this claim are almost

identical to the facts and working relationships" in *Ritchie* was "a mistake of fact with respect to Tryon that compels a second look by ALJ Dye." The Board vacated the portions of the Interlocutory Order and Judge Dye's October 30, 2017 order which found that Tryon was not an up-the-ladder contractor and that dismissed Tryon as a party from the case. On remand, the Board directed ALJ Dye to "fully address the distinctions between *Ritchie* and the case *sub judice* with respect to Tryon in the context of a renewed analysis of Tryon's up-the-ladder liability pursuant to KRS 342.610(2)."

With regard to the alleged up-the-ladder liability of Mikron, the Board affirmed the earlier ALJ decisions and found that substantial evidence existed to support the conclusion that Mikron was not an up-the-ladder employer under the facts presented in this case. The Board cited the similarities between the facts in *Ritchie* and this case regarding Mikron.

Both Tryon and the UEF filed petitions for review by this Court. Upon Medlin's motion, the two cases were consolidated by order of this Court. Further facts will be developed as required to address the specific issues presented.

ANALYSIS

a. Standard of Review

The ALJ has sole discretion "to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky.

1993). To reverse the decision of the ALJ, it must be shown that there was no substantial evidence of probative value to support the ALJ's decision, or "evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). When this Court reviews a decision of the Board, our role is to correct the Board only if we believe it "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).

b. <u>Tryon</u>

Tryon argues that the ALJ's opinion was based on substantial evidence and, accordingly, should have been affirmed by the Board. Tryon further argues that the Board exceeded their authority by vacating and remanding to the ALJ for further findings of fact. The applicable statute regarding up-the-ladder employers is KRS 342.610(2), which states the following:

> A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. 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.

Therefore, to be liable for Medlin's work injuries as an up-the-ladder employer, KRS 342.610(2) mandates that Tryon must have contracted with Medlin's employer, David O., to have work performed of a kind which "is a regular or recurrent part" of their trade or business. *See id*.

The Kentucky Supreme Court has defined the phrase "regular or recurrent," stating:

> Work of a kind that is a "regular or recurrent part of the work of the trade, business, occupation, or profession" of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in business, improve or expand its business, or remain or become more competitive in the market. It is work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees.

General Elec. Co. v. Cain, 236 S.W.3d 579, 588 (Ky. 2007) (internal citations omitted).

In this case, Tryon has failed to persuade us how the Board has committed reversible error in concluding that further factual findings and analysis were required. While the ALJ is the finder of fact and the Board is prohibited from substituting its judgment for that of the ALJ regarding the weight of the evidence on questions of fact, this Court has plainly stated that "the Workers' Compensation Board has the absolute discretion to request further findings of fact from an ALJ." *Campbell v. Hauler's Inc.*, 320 S.W.3d 707, 708 (Ky. App. 2010).

Here, as noted by the Board, the ALJ failed to analyze significant factual differences that existed between this case and the *Ritchie* case, such as the fact that there was no evidence that the comparable party in *Ritchie* "leased, owned or operated any trucks for use in transportation or was physically responsible for the actual shipping and delivery of goods and merchandise other than through contacting a broker," while the evidence in the case *sub judice* indicated that Tryon had leased the truck involved in the accident at issue. *Ritchie*, at *2. These factual differences are significant and go to the heart of the analysis of the contested issue of whether Tryon met the "regular or recurrent" statutory requirement under KRS 342.610(2). The ALJ's failure to analyze such factual differences could reasonably have led the Board to believe that the ALJ had the mistaken belief that the facts in *Ritchie* were more closely aligned to the facts in this case than they in actuality were. As in *Campbell*, "[w]ithout additional findings of fact by the ALJ, the Board

and this Court are unable to afford meaningful review of the basis for the ALJ's conclusion" regarding Tryon's up-the-ladder liability. *Campbell*, 320 S.W.3d at 711. Consequently, "the Board declined to address the substantial evidence question and, instead, remanded the matter to the ALJ for additional findings." *Id*. As previously stated, our reviewing function is to correct the Board only where we find that it has "committed an error in assessing the evidence so flagrant as to cause gross injustice." *Kelly*, 827 S.W.2d at 688. We find no such error here and, therefore, we affirm the Board in Appeal No. 2018-CA-001076-WC.

c. <u>Mikron</u>

The UEF argues that the Board erred in finding that Mikron was not Medlin's up-the-ladder employer and has escaped up-the-ladder responsibility because they chose to subcontract their delivery responsibilities to another party. Specifically, the UEF argues that product shipment was a regular and recurrent part of Mikron's business, and that, even though Mikron did not own any trucks or employ drivers to deliver its product, Mikron could not conduct its business without either hiring its own employees to provide transportation services or to contract with a subcontractor to provide such services.

We again note that an ALJ's decision must be affirmed if it is supported by substantial evidence. *Francis*, 708 S.W.2d at 643. Here, the Board pointed out that in the *Ritchie* case, the comparable party to Mikron - Image Point -

was a manufacturer of goods who contracted with other parties to arrange for the delivery of its products. As with Mikron, Image Point did not own any trucks or employ anyone to deliver its products and depended on independent shipping companies to transport their product. *Ritchie*, at *1. Moreover, "while shipping was regular and recurring, there is no evidence that Image Point, or a similar business, would use or be expected to use its own employees to perform that task." *Id.* at *4. Therefore, the Board found that, because the evidence indicated that Mikron similarly did not own or lease any trucks, it outsourced its shipping needs to other parties, and it would not be expected to use its own employees to ship its product, then substantial evidence supported the Interlocutory Order's finding that Mikron was not an up-the-ladder employer of Medlin at the time of the accident.

Again, we cannot say that the Board made a flagrant error in finding that substantial evidence supported the Interlocutory Order concerning Mikron. We agree that the evidence pointed to the conclusion that Mikron functioned in a virtually identical manner as did Image Point in the *Ritchie* case, it did not own or lease any of its own trucks, and would not have been expected to use its own employees to perform the actual shipping of its product. Therefore, we can discern no error by the Board and affirm the Board's decision in Appeal No. 2018-CA-001085-WC.

ALL CONCUR.

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