IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-14-10 ElliA Grau++, D.C.

2009-SC-000785-WC

ANTHONY J. TULO — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-000954-WC
WORKERS' COMPENSATION BOARD NO. 07-00254

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits having concluded that he was not Troy Dore's employee and that his injury occurred outside the scope of his employment with Roger Dore. The Workers' Compensation Board and the Court of Appeals affirmed.

This appeal by the claimant raises two issues. First, he asserts that the ALJ erred by considering "employment relationship" to be synonymous with the course and scope of employment, which was not preserved as a contested

issue. Second, he argues that the ALJ exceeded her authority by deciding the latter issue and dismissing the claim as a consequence.

We affirm because the ALJ did not exceed her authority or base the decision to dismiss on an uncontested issue. The claimant was not working as Roger Dore's employee at the time of the injury although he had done so previously. No employment relationship existed for the purpose of this claim because his injury occurred while he worked in a joint venture with Troy Dore, work that had no relationship to Roger Dore or D & D Logging.

The claimant sustained a catastrophic spinal cord injury on December 30, 2006 when he was struck in the head by a limb while logging with Troy Dore and Bradley Thomas on the Ken Morris property. His application for benefits named Roger Dore and Troy Dore, d/b/a D & D Logging, as defendants. The Uninsured Employers' Fund (UEF) was joined because the Dores had no workers' compensation coverage. The claimant alleged that he lived with Roger Dore's daughter in an apartment located at Roger's residence; that Roger hired him to work in his logging business for $10.00 per hour; and that the injury occurred while he was performing work for Roger.

When deposed by the UEF in July 2007, Roger Dore testified that he and his son, Troy Dore, had operated D & D Logging for about four years. Roger testified that they were partners but that they were not registered as a partnership and had no formal written agreement. Roger explained that he cut the logs and that Troy owned a skidder and used it to remove them. They

divided the profits about equally. Roger testified that he had no employees but that he did use subcontractors to remove trees around houses or other buildings, work he would not do "without a professional."

A contract between Roger and Hopkins Hardwood was made part of the record at Roger's deposition. It indicated that Roger agreed to cut, skid, and haul timber from the Morris property for an agreed price. The agreement expired thirty days after November 20, 2006. Roger testified that it could be extended by agreement of the parties but that he did not intend to do so because it had not been profitable. He also testified that no work was performed after Christmas of 2006.

The UEF joined Hopkins Hardwood as a defendant with potential up-the-ladder liability. After a conference with the parties, the ALJ granted the UEF's motion to bifurcate the claim and overruled Hopkins Hardwood's motion to be dismissed. The order gave the parties 60 days to develop proof and submit a position paper concerning the claimant's status as an employee of either Roger or Troy and concerning the up-the-ladder liability of Hopkins Hardwood or any other entity.

The parties took and submitted additional depositions concerning the existence of an employment relationship between the claimant and Roger and/or Troy as well as whether the injury occurred within the scope and course of employment with either of them. The claimant failed to object to any of the evidence. He also failed to submit a position paper.

Contrary to his previous deposition, Roger testified that Troy had nothing to do with his business and that he operated as an independent contractor. He stated that Troy did not help him get the Hopkins Hardwood contract. He also stated that his own business did not involve firewood.

Troy testified that D & D Logging referred to a previous arrangement that his father had with a man named Bobby Duke and that Roger left the name on the truck after the arrangement ended. Troy stated that he worked under the name Troy Dore Logging and sold cedar posts and firewood. He stated that he and the claimant were cutting firewood together on the Ken Morris property when the claimant was injured. They had hoped to sell the wood in order to earn some extra money for a New Year's party. They agreed to deduct the truck expenses from the proceeds and divide any profit equally.

Bradley Thomas testified that he had never worked for Roger, who was his second or third cousin, and had never worked in the woods with him or Troy or the claimant. He had on one occasion helped Troy and the claimant deliver firewood but was not paid to do so. He stated that he was not present when the claimant's injury occurred. Conversations with Roger's daughter led him to think that the claimant was working for Roger.

Susan Dore, Roger's former wife, testified that she had no children with him and no ownership interest in D & D Logging. She did, however, continue to live in his household after the divorce and was paid to do his bookkeeping. She stated that Roger had no employees, only agreements with subcontractors.

She also stated that D & D Logging had completed the Hopkins Hardwood contract sometime before Christmas. She did not know for certain what the claimant was doing on the property where his injury occurred. She stated that Roger was working elsewhere at the time of the injury.

The ALJ found the testimony from all of the witnesses other than Bradley Thomas and Susan Dore to be "less than the full truth." Noting that Roger did not work at the site where the claimant was injured on December 30, 2006, the ALJ determined that the claimant and Troy were there "as a joint venture, to collect firewood to sell." The ALJ concluded:

> For the reasons stated above, it is my finding that Plaintiff had been working for Roger Dore for four days after Christmas, but that he was not working for him on the Saturday when the accident occurred. Therefore, I find that Plaintiff was outside the scope of his employment with Roger Dore 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.

The claimant notes that the ALJ bifurcated the claim to consider only two issues, employment relationship and up-the-ladder liability. Noting also that 803 KAR 25:010, §§ 13(11) and (14) limit the contested issues to those listed on the Benefit Review Conference memorandum, he asserts that the ALJ exceeded her authority by addressing the scope of employment, an issue that the parties failed to list. He argues that the ALJ erred by considering "employment relationship" to be synonymous with "arising out of and in the

course of employment" and by basing the decision to dismiss on the latter issue. We disagree.

KRS 342.0011(1) requires a compensable injury to "[arise] out of and in the course of employment." The claimant states correctly that the words "arising out of" refer to the cause or source of the accident producing harm to the worker;[1] whereas, the words "in the course of" refer to the time, place, and circumstances of the accident.[2] He also states correctly that the existence of an employment relationship is a threshold requirement for workers' compensation liability.[3] He fails to consider, however, that KRS 342.640 premises the existence of such a relationship not only on the fact that the injured worker was employed "under any contract of hire"[4] but also on the fact that the worker was "performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury."[5]

Roger asserted that he had no employees and that the claimant was not his employee. Although the ALJ found that the claimant worked "for Roger Dore for four days after Christmas," the ALJ also found that he "was not working for [Roger] on the Saturday when the accident occurred" but was engaged in a joint venture with Troy. In other words, the ALJ found that he

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[1] *Stapleton v. Fork Junction Coal Co.*, 247 S.W.2d 372 (Ky. 1952).

[2] *Id.*

[3] *Kentucky Farm & Power Equipment Dealers Association, Inc. v. Fulkerson Brothers, Inc.*, 631 S.W.2d 633, 635 (Ky. 1982); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004).

[4] KRS 342.640(1).

[5] KRS 342.640(4).

was not an employee for the purpose of a claim against Roger and D & D Logging because he was not performing service for the business at the time of the injury. As a consequence, Hopkins Hardwood had no up-the-ladder liability.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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