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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000017-WC

ROBERT D. WHEAT — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000588-WC
WORKERS' COMPENSATION NO. 06-01088

KEVIN SWEENEY, D/B/A
KBS HOME IMPROVEMENTS;
MIKE RIGGS CONSTRUCTION;
UNINSURED EMPLOYERS' FUND;
HONORABLE RICHARD JOINER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed Robert Wheat's application for workers' compensation benefits, having found that he was not Kevin Sweeney's employee at the time he was injured. The Workers' Compensation Board and Court of Appeals affirmed the decision. Appealing, Wheat continues to assert that the ALJ erred by rejecting his uncontradicted testimony concerning the establishment of his employment relationship with Sweeney and by failing to consider what he asserts is Sweeney's admission of the relationship.

We affirm. The ALJ found the claimant not to be credible, which provided a reasonable basis for rejecting his testimony regardless of whether it was uncontradicted. Not only did the ALJ interpret Sweeney's testimony reasonably, Sweeney was neither under oath nor testifying when he made the statement that the claimant characterizes as being an admission.

Wheat sought workers' compensation benefits from Sweeney based on a fractured spine, closed head injury, and lacerated spine that he sustained on June 22, 2006, when falling from a ladder at a height of twenty feet. He alleged that Sweeney employed him to help install shingles on a roof and that he was doing so when the injury occurred. Sweeney denied that he employed Wheat and had no workers' compensation insurance.

Wheat was born in 1975; was a high school graduate; and had three years' vocational training in carpentry while in high school. He had worked as a cook, dishwasher, factory laborer, and carpenter and had some previous experience as a roofer. He testified when deposed that the injury occurred his first day on the job, about one-half hour after he began working. He was standing on a ladder, handing shingles to Pat Lyvers, when he fell. Sweeney was working on the other side of the roof.

Wheat stated when cross-examined by the Uninsured Employers' Fund that Lyvers told him Sweeney needed someone to help with roofing and gave him Sweeney's telephone number. He stated that he talked with Sweeney a couple of times and called him on the evening before his accident. Sweeney told him he had a job for someone with experience and that he informed

Sweeney that he had "done roofing for quite a few people." He stated that Sweeney offered to pay him $10.00 per hour and hired him that night.

Wheat testified that he shook hands with Sweeney when he arrived at the job site and introduced himself. Sweeney then instructed him to help Lyvers finish the side of the roof on which he was working when he fell. He stated that Sweeney did not pay him for the time that he worked. He thought Sweeney came to the hospital after the accident but did not see him personally.

Michael Riggs testified that he is a general contractor and does not carry workers' compensation insurance because he subcontracts all of his work. Riggs stated that he contracted with Aaron Rucker of B & R Siding to put a roof on the house where the accident occurred and that Rucker presented a certificate of insurance. Having prohibited his contractors from subcontracting his jobs to others, he contacted Rucker when he saw Sweeney at the job site and was informed that Sweeney was working for Rucker. Riggs knew Sweeney but did not know Wheat and knew nothing personally of Sweeney's relationship to Wheat. He testified that $10.00 was pretty much the standard hourly rate to pay a laborer for roofing initially. The rate for a roofer who proved to be capable might later be increased to $12.00.

Sweeney is the sole proprietor of KBS Home Improvement, a roofing business. He denied that he gave Wheat a job. He testified that Wheat had attempted to reach him by telephone several times before the accident but that he did not return the calls. He thought that Scott Greer had informed him

that Wheat was seeking work and that Lyvers probably mentioned Wheat a time or two.

Sweeney recalled a couple of telephone conversations within a period of five to six weeks in which he told Wheat that he had no work available, but he did not recall talking to Wheat on the day before the accident. He did recall that they spoke at the job site on the day of the accident. He stated that Wheat was sitting in a car when he arrived. He came over and introduced himself to Sweeney, at which point Sweeney was called to the other side of the house to help a co-worker carry a ladder.

Sweeney stated that he and Wheat never finished their conversation; that he was working on the other side of the house when the accident occurred; and that he was not under the impression when they spoke that Wheat thought he was going to get a job. He testified that he went to the hospital after the accident at Rucker's instruction to request a drug test, explaining that he had smelled what he thought was marijuana coming from a car at the job site. He stated that Wheat had called him a couple of times during the month after the accident offering to sell him his pain pills.

Aaron Rucker testified that he had an oral contract with Riggs to put a roof on the house where the accident occurred. He asked Sweeney to do the job because he had another job that also had to be done at that time. Sweeney told him that he had workers' compensation coverage. Rucker testified that he never met Wheat before the accident but requested a drug test because of what he had heard about him in general conversations with friends. He was not

aware that Wheat informed University of Louisville medical personnel that he had smoked marijuana the weekend before the injury and on other occasions.

The ALJ dismissed the claim, reasoning that Wheat and Sweeney had no written contract; that Sweeney denied an employment relationship; and that nothing corroborated Wheat's testimony such as documentation of the telephone calls allegedly made or testimony from a co-worker. Finding Wheat's testimony not to be persuasive, the ALJ pointed to other testimony indicating that the slope of the roof being shingled was too steep for an inexperienced roofer and to testimony that Sweeney had heard rumors about some of Wheat's personal habits, including the use of marijuana. Wheat appealed following the denial of his petition for reconsideration and request for additional findings of fact.

The Board vacated the decision and remanded for further consideration and additional findings of fact. The Board explained that uncontroverted evidence established that a telephone conversation occurred between Wheat and Sweeney shortly before the day of the accident. Moreover, nothing contradicted Wheat's testimony that he informed Sweeney he was an experienced roofer; Sweeney was on the same roof when the accident occurred and accompanied Wheat to the hospital; hospital records listed Sweeney's company as being the employer; and nothing explained Wheat's presence on the ladder except his own testimony. The ALJ dismissed the claim again on remand, however, convinced that Wheat was not a credible witness and failed to prove the existence of an employment relationship.

I. STANDARD OF REVIEW.

An injured worker bears the burden of proving every element of his claim.[1] KRS 342.285 designates the ALJ as the finder of fact. It permits an appeal to the Board but provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and prohibits the Board from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact." Thus, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.[2] The testimony of an interested witness may have some probative value but does not bind an ALJ even if uncontradicted.[3] An 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 party's proof.[4] Even the uncontradicted testimony of an expert witness may be rejected if the ALJ states a reasonable explanation for doing so.[5]

KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"[6] whether the decision "was procured by fraud;"[7] or

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[1] *See Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963).

[2] *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

[3] *Grider Hill Dock, Inc. v. Sloan*, 448 S.W.2d 373 (Ky. 1969).

[4] *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

[5] *Commonwealth v. Workers' Compensation Board of Kentucky*, 697 S.W.2d 540 (Ky. App. 1985).

[6] KRS 342.285(2)(a).

[7] KRS 342.285(2)(b).

whether the decision was erroneous as a matter of law.[8] Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

A party who fails to meet its burden of proof before the ALJ must show that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.[9] Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.[10]

II. WHEAT'S TESTIMONY.

Wheat complains that the ALJ disregarded his uncontradicted testimony, which established the existence of an employer-employee relationship and which Sweeney failed to rebut. He argues that the Board directed the ALJ to "give full credence" to his testimony on remand and that the ALJ failed to do so. We disagree.

Contrary to Wheat's argument, the Board's order remanding the claim for additional consideration did not direct the ALJ to rely on any particular evidence or to reach any particular result. As the Board recognized when remanding the claim, this case amounted to a swearing match between Wheat

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[8] KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

[9] *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

[10] *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

and Sweeney. The ALJ's initial decision failed to provide an adequate rationale for rejecting Wheat's testimony in favor of Sweeney's. The ALJ complied with the Board's order on remand by stating a reasonable basis for concluding that Wheat was not a credible witness and, thus, for failing to rely on his testimony concerning the alleged employment relationship.

Addressing Wheat's credibility, the ALJ noted that he referred to his own testimony that he was an experienced roofer in an attempt to explain why Sweeney would hire him to work on a steep roof. Yet, his deposition testimony revealed that most of his work experience involved building cabinet frames and factory work. His experience as a roofer consisted of working for a roofing company for "a few months" and doing a few jobs for himself, all within a period of about a year. During that year he worked for various companies, most of which had no apparent involvement in roofing. The ALJ noted also that rumors Sweeney heard about Wheat's personal habits and marijuana use, whether true or not, provided a reasonable explanation for the decision not to hire him.

III. SWEENEY'S "ADMISSION."

Wheat's second argument concerns a statement that Sweeney made when deposing him. Sweeney questioned Wheat about his statement that he told Sweeney he was an experienced roofer. The colloquy was as follows:

> Q: You said that you'd previously talked to me about having experience with roofing and yet Pat Lyvers has little experience and I pay him $12.00 an hour, so if you had all of the experience in roofing why would I start you out at $10.00?

A: That was just what I mentioned to you, that was my understanding is what Pat told me that you started most people out at $10.00 an hour and after you seen what they could do, then you would up their pay.

Q: Alright.

A: And that was my understanding because, I mean you know as well as I do our setup was pretty much through Pat by word-of-mouth.

Q: Yeah. True statement, I was on the other side of the house, so how did you know that I was over on the other side of the house?

A: Because that's where you said you all was going because you fixed the vent pipe right there in front of us.

Q: To set the ladder up, correct[?]

A: Yeah.

Wheat asserts that by stating "Yeah. True statement . . ." Sweeney admitted that he hired Wheat to work for $10.00 per hour. Thus, his testimony compelled the ALJ to find an employment relationship. Again, we disagree.

Wheat's argument overlooks the ALJ's authority to draw reasonable inferences from the evidence. It also overlooks the fact that Sweeney was neither testifying nor under oath when making the statement. The ALJ did not view Sweeney's statement as being an admission and noted also that Wheat failed to mention it until his petition for reconsideration. The ALJ interpreted Sweeney's use of the term "true statement" not as an acknowledgement of the truth of Wheat's previous statement but as a reference to the statement that followed, *i.e.*, the statement Sweeney was on the other side of the house when

the accident occurred. Such an interpretation was reasonable under the evidence.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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