Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 15, 2016

CLAIM NO. 201402287

DALENE M. STADLER PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

KELLY SERVICES and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Dalene Stadler ("Stadler") appeals from the Opinion and Order rendered October 1, 2015 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), who found she was not employed by Kelly Services at the time of the February 20, 2014 injury, and dismissed her claim.

Stadler also appeals from the October 30, 2015 order denying her petition for reconsideration.

On appeal, Stadler argues the ALJ erred in dismissing her claim. Stadler argues Rahla v. Medical Center at Bowling Green, 2013-CA-001712, 2014 WL 1400102 (Ky. App., April 11, 2014) is distinguishable because her participation in the workday simulation assessment for a potential position with Toyota Motor Manufacturing Kentucky ("TMMK") benefited Kelly Services.[1] Stadler also argues she falls within the definition of "employee" pursuant to KRS 342.640(4). Because the ALJ's decision is consistent with the holding by the Kentucky Supreme Court in Rahla v. Medical Center at Bowling Green, ___S.W.3d___, 2014-SC-000236, 2016 WL 1068256 (Ky., March 17, 2016) (to be published), and no contrary result is compelled, we affirm.

Stadler filed a Form 101 alleging she injured her right knee and wrist while performing simulation training for a job at TMMK when her right foot became stuck on a rubber mat causing her to fall. The Form 101 lists Kelly Services as her Employer at the time of the accident. Kelly Services filed a Form 111 denying the claim because

[1] The test during which Stadler was injured has been called several different names by the parties, including the job placement test, the simulation training, Day 2, and the production simulation performance assessment. For simplicity, this Board will use the name "workday simulation assessment."

Stadler was not an employee when the injury occurred. Kelly Services explained Stadler was performing the workday simulation assessment, a test required by TMMK to be completed before an applicant can be considered for employment. Subsequently, the ALJ granted Kelly Services' motion to bifurcate regarding the issue of whether Stadler was its' employee on February 20, 2014.

Stadler testified by deposition on February 25, 2015. Stadler stated she became interested in working for TMMK in the summer of 2013. She called TMMK and was told she had to apply through Kelly Services, a temporary employment agency. Stadler called Kelly Services, and was directed to a website to initiate the application process. Stadler provided her personal information and completed two online tests at home on January 6, 2014. Stadler received a phone call to schedule a computerized test to be taken at an off-site location. Stadler agreed and took the test in January 2014 at the Lexington Career Center.

Subsequently, Stadler was notified by Kelly Services she had passed, and could proceed to the workday simulation assessment which was to take place at TMMK on February 20, 2014. Stadler was provided directions and a date and time to take the workday simulation assessment. Stadler and sixteen other applicants arrived at TMMK, and

were greeted by the assessors. The applicants were provided information regarding that day's testing, and were required to complete paperwork and sign waivers. The group was then taken to the testing site. During the workday simulation assessment, Stadler was placed in the Camry simulator. As Stadler stepped out of the stimulator onto flat rubber matting to turn to the trunk area, her foot became stuck causing her to fall. She experienced intense right knee pain and attempted to get up, but immediately fell again injuring her right wrist. Stadler was unable to complete the workday simulation assessment and was taken to the emergency room. If Stadler had successfully completed the application process, she would have started as a temporary employee with Kelly Services for ninety days, and then would have become a full-time TMMK employee.

Stadler provided the following testimony regarding her understanding of the application process, including the workday simulation assessment:

> Q: -- but if I understand you correctly, you recognize that you were going through the prehire testing procedure in order to get on at Toyota?
>
> A: Yes
>
> . . . .
>
> Q: All right. And when you're going through all these procedures, you

understood that to even be considered for a job there you're going to have to pass these tests first?

A: The in-house physical, manual labor part, yes.

Q: Okay. And I guess what they call the workday assessment they have sort of a mock-up of the plant where you would go and try and perform some of the activities they might be having you do on a daily basis just to see how able - - how well able you were to do those?

A: Yes.

Q: Okay. But at the time of that assessment I think they also have a pre-employment physical that they do, a post-offer but pre-employment physical. Did you ever get to that stage?

A: There was never any physical required prior to the inside Toyota test.

Q: Right, but you knew that even if you passed the inside test, the Toyota inside test, you would have a pre-employment physical and a couple more steps before you officially became an employee?

A: If that was explained to us, absolutely, yes, I would have understood that.

. . .

Q: I guess maybe I'm unclear, but, I mean, you knew this was part of the evaluation process?

A: The steps towards hiring?

> Q: Right, right.
>
> A: Yes.
>
> . . . .
>
> Q: Okay. And this is essentially the same sort of process except for this is what you had to go through if you wanted to be considered for a job there?
>
> A: Correct. . .
>
> Q: Right. But I guess the point is you knew you hadn't been hired.
>
> A: Well, correct. None of us had been at that point.

Stadler testified she was not compensated for the testing, and Kelly Services never issued her a badge giving her access to the TMMK plant. At the time of her injury, Stadler had not been informed about wages or benefits, and did not know what position she would have at TMMK if ultimately hired.

Matthew Gray ("Gray"), a regional safety manager for Kelly Services, testified by deposition on May 7, 2015. Kelly Services provides employees to its customers, one of which is TMMK. Gray explained its' customers inform Kelly Services the pay rate for open positions. In turn, Kelly Services provides employees to fill those positions. Kelly Services charges its customers a billing rate, which is

typically higher than the hourly rate quoted for the employee.

Gray oversees all safety activities for three TMMK sites. TMMK requires a specific application and hiring process, which is implemented by Kelly Services. A person interested in working for TMMK first takes two online tests, both of which are "housed by a third-party that administers those evaluations." The third party who administers the two tests is Select Track. Depending on the results of those tests, Select Track emails the applicant to schedule the workday simulation assessment. Gray explained the tests and workday simulation assessment are required by TMMK for their application protocol. Kelly Services implements TMMK's protocol for which it does not receive additional compensation.

The workday simulation assessment during which Stadler was injured is intended to simulate a job at TMMK. The assessment takes approximately five hours to complete. Once applicants arrive at TMMK and check in, assessors review information with them and have them complete paperwork, including a liability waiver. The assessors are neither representatives from Kelly Services or TMMK, but are representatives of a third party called CQPD. The CQPD assessors take the applicants to the assessment area, and

provide them with a series of directions. The assessment area consists of a mock work station, work tables, three sets of a shell of a car, a weight wall and a mock welding station.

No representatives from TMMK or Kelly Services oversee or review the workday simulation assessment. Once the workday simulation assessment is complete, Select Track grades the results. Those scores are then relayed to Kelly Services, who notifies an applicant of the results. The third parties involved, Select Track and CQPD, have contracts with Toyota, not Kelly Services. Gray refused to say whether Kelly Services derived a benefit from providing the workday simulation assessment. The assessment allows Kelly Services to determine who is more physically qualified for a position with TMMK.

If an applicant passes the workday simulation assessment, he or she must go through an interview process, complete employment paperwork, pass a drug screen, and background check. Kelly Services ensures an applicant has a valid Social Security number, and is eligible for employment in the United States. Gray testified: “Then once they complete all that, then they have completed the process, the full process.”

Q: So we know Ms. Stadler had an accident, you know, trying to complete the mockup, never actually got to work there, never went on the line. So did she ever complete your all's employment paperwork?

A: No.

Q: Can you all hire someone without running a background check on their Social Security number to make sure its valid?

A: No.

Q: Can you all hire someone without making sure they are eligible for employment in the United States?

A: No.

Q: Is it your company policy to require them to complete your own employment application before you hire them?

A: Yes.

Q: Had she done any of those steps?

A: No.

Q: Is it fair to say that you all weren't paid anything for Ms. Stadler having been shepherded through the process or participating in it?

A: That's correct.

. . .

Q: Let's say a candidate sales[sic] through all the Toyota requirements, you know, the pre-consideration requirements; and then you all take them in, do a background check on them

> and the person either has a bad criminal record, doesn't have a valid social security number, doesn't pass drug screens, do you all have the right to reject that candidate?
>
> A: Yes, that candidate will be rejected from the hiring process.
>
> Q: Okay. And those are based upon Kelly Services' standards, not anything to do with Toyota?
>
> A: That's correct.

In the Opinion and Order dated October 1, 2015, the ALJ summarized the testimony of Stadler and Gray. The ALJ noted it is undisputed Stadler was a job applicant and wanted to obtain a position at TMMK. Stadler recognized she would be undergoing the pre-hire testing procedures required in order to be considered for a position at TMMK through Kelly Services. The ALJ noted Stadler completed and passed tests on-line and at the Lexington Career Center. She was then notified by e-mail she had an appointment to undergo a pre-employment physical and a mock-up simulation of the types of work tasks she would expect to perform if hired for a position at TMMK. The ALJ noted the following:

> All of this had been explained to her as a prerequisite before any consideration would be made as to hiring her as an employee. Further, and more significantly, she understood

> that she was not going to be paid for participating in this pre-employment assessment process. She acknowledged in her sworn testimony that she knew she hadn't been hired as of the time of her injury in the work simulation module.

The ALJ noted Gray testified Stadler voluntarily participated in TMMK's required pre-placement screening, and she had not even begun the application process for Kelly Services. Kelly Services has an independent employment application process and must determine whether the applicant is legally eligible for employment in the United States. The ALJ found as follows:

> I believe that the recent case of Rahla v. Medical Center at Bowling Green, No. 2013-CA-001712-WC (rendered 4/11/14 –currently on appeal to the Kentucky Supreme Court) is almost directly on point with the case at bar. Rahla sustained an injury while performing pre-job placement for a position as an employee of the Medical Center. In both that case and the present situation, the Court ruled that the pre-employment activities cannot and should not be considered "service in the course of the trade, business profession, or occupation of an employer" as this offers no direct benefit to the alleged employer and no assumption as to wages can be made on a pre-employment qualifying examination.
>
> The distinguishing factor in this case would be Plaintiff's argument that Kelly Services' trade or business is that of providing a work force to employers such as Toyota. Plaintiff

goes on to argue that in this instance, Kelly Services' trade and business also included providing Toyota with the service of carrying out Toyota's required "job placement test." Legally speaking, I believe that ship founders on the shoal of wages. Neither TMMK nor Kelly Services is paying the claimant anything for participating in what is essentially a screening process. That point was made clear in the Plaintiff's testimony, so there is no factual issue.

The Plaintiff in a workers' compensation claim bears the burden of proof and the risk of non-persuasion with respect to every essential element of his claim. Snawder v. Snice, 576 S.W.2d 276 (Ky. App. 1979). Jurisdiction is an essential element of any claim. Without it, the Board is without the authority to award benefits to an employee who has suffered a work-related injury, no matter how strong the claim is on its essential facts. Therefore, the threshold requirement in a compensation claim is that the claimant must be an employee for hire, as the essence of compensation protection is the restoration of a part of wages which are assumed to have existed. Further, compensation services uniformly exclude from the definition of "employees" workers who neither receive nor expect to receive any kind of pay for their services. *Kentucky Farm & Power Equipment Dealers Association v. Fulkerson Bro's, Inc*, 631 S.W.2d 633 (Ky. 1982); *Highland Heights Volunteer Fire Department v. Ellis*, 160 S.W.3d 768 (Ky. 2005).

Here, the Plaintiff testified that she applied for a position with TMMK through the Defendant Kelly Services. She never received any notice, written

or verbal, that characterized Defendant's communication as an "offer" of employment.

After passing some preliminary tests, on February 20, 2014, Ms. Stadler was significantly injured while performed[sic] the "job placement test" for Kelly Services that is required by Toyota. Kelly Services has denied workers' compensation benefits to Stadler on the grounds that she was not an employee of Kelly Services at the time she was performing this "job placement test" which was performed in a structure located on the premises of the Toyota plant in Georgetown, KY. She transported herself to this facility and was not paid by the Defendant for her expenses or time in attending this screening.

KRS 342.640 (1) defines the term "employees" in pertinent part as being, "Every person,… whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied,…" Here, the Plaintiff has the burden of proof to show that she was an "employee for hire" on October 31, 2012.

I think that a case that controls in this instance is Graham v. TSL, LTD, 350 S.W.3d 430 (Ky. 2011).

In Graham, the applicant was recruited over the phone to drive a truck for the prospective employer. However, as a condition of employment, he had to go to Missouri where he took a required driving test, participated in a training program concerning company policies and procedures, and underwent another drug test. The company then

provided him a truck and he began working.

In Graham, as here, the applicant testified that he was “hired” and that the orientation was a mere formality. In both cases, the company provided documentation which notified the prospective employee on its face that there were certain preconditions that had to be met in order to complete the terms of the agreement. Those preconditions were similar in part to those in this case.

The Supreme Court disagreed with Mr. Graham, pointing out in pertinent part that a contract is made at the time the last act necessary for its formation is complete and at the place where that act is performed. Noting that a contract made by telephone is made in the place where the acceptor speaks his acceptance, the court supported the ALJ’s conclusion that the parties’ contract was not formed until the claimant completed various requirements in Missouri. While the claimant may have considered himself hired after his telephone conversation, such evidence was not so overwhelming is[sic] to compel the ALJ to conclude that a contract was formed at that time. (Id. At p. 433).

Here, Ms. Stadler in fact agrees that she understood the Defendant’s offer of employment to be conditional upon the successful completion of her evaluation. Moreover, she admits that she had to complete all of the various preconditions in order to commence work at TMMK. Her argument is that as Kelly Services is in the business of placing temporary employees, by testing she provided a benefit to Kelly because they would get paid if she got approved

> to work at TMK[sic]. Unfortunately the operative word here is "if". The parties' contract was not formed until she completed the various requirements of the pre-employment process. Traugott v. Virginia Transportation, 341 S.W.3d 115 (Ky. 2011). She was injured prior to the completion of those requirements. Therefore, she was not an employee at the time of the injury.

The ALJ concluded the parties' contract would not be formed until Stadler completed various requirements in a pre-employment process. Stadler admitted and failed to prove she was an employee of Kelly Services at the time of her February 20, 2014 injury since there was no contract of employment, and she received no wages for services performed. Therefore, the ALJ denied and dismissed Stadler's claim due to lack of jurisdiction.

Stadler filed a petition for reconsideration making the same arguments she now makes on appeal. In denying the petition, the ALJ stated as follows:

> The second error alleged is that I did not find that Kelly Services received a benefit from the Plaintiff's activities in taking a "job placement test" as part of Kelly Services agreement with Toyota. That argument is also irrelevant and immaterial. Defendant is correct in stating that Kelly Services administered no pre-employment screening for Toyota. Such testing was done by a third party on Toyota's premises. In any event, it makes no difference because the determining factor in the case is the fact that

> Kelly Services paid the Plaintiff no wages. There was no offer of employment and she was not paid, nor did she have a reasonable expectation of being paid for performing the job placement test. Again I find no error patently appearing on the face of the Opinion and Order of October 1, 2015 with regard to this argument.

On appeal, Stadler argues the ALJ's decision should be reversed because it was clearly erroneous based upon the evidence. Stadler first asserts the facts of her claim are distinguishable from those in Rahla v. Medical Center at Bowling Green, supra, and Graham v. TSL, LTD, 350 S.W.3d 430 (Ky. 2011) since Stadler's participation in the workday simulation assessment benefitted Kelly Services. She argues Kelly Services makes money by providing and placing employees with employers and that TMMK required Kelly Services to implement the assessment. Gray indicated if Kelly Services were to discontinue the assessment, the business relationship between it and TMMK would potentially end and cause financial damage to Kelly Services. Stadler argues as follows:

> As such, Kelly Services derived a clear benefit from Stadler's participation in the job placement test. Although her participation in the job placement test may not have been a service in the "trade, business, profession, or occupation" of TMMK, it was certainly a service in the regular business of

> Kelly Services, i.e., the business of job placement.

Stadler argues without applicants like her, Kelly Services' business relationship with TMMK would crumble, regardless of the fact it was not paid directly by TMMK for the assessment and she was not compensated for her participation.

Authority has long established the claimant in a workers' compensation case bears the burden of proving each of the essential elements of her cause of action before the ALJ, including whether she is an employee subject to the provisions of the Kentucky Workers' Compensation Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Stadler was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence 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 weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky.

1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find the ALJ did not err in his determination an employer-employee relationship did not exist at the time of the alleged February 20, 2014 injury, and the evidence does not compel a contrary result. KRS 342.640 states as follows:

> The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:
>
> (1) Every person, including a minor, whether lawfully or unlawfully

> employed, in the service of an employer under any contract of hire or apprenticeship, express or implied. . . whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;
>
> . . . .
>
> (4) Every person performing services in the course of the trade, business, profession, or occupation of an employer at the time of the injury.

The Kentucky Supreme Court has held an "employee" pursuant to KRS 342.640 must be an employee for hire because "the essence of compensation protection is the restoration of a part of wages which are assumed to have existed." Hubbard v. Henry, 231 S.W.3d 124, 129 (Ky. 2007)(citing Kentucky Farm & Power Equipment Dealers Assoc., Inc. v. Fulkerson Brothers, Inc., 631 S.W.2d 633, 635 (Ky. 1982)). The Court also explained KRS 342.640(4) does not refer to a contract for hire in order to protect workers who are injured while performing work in the course of an employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate the work was performed with no expectation of payment or the worker was a prisoner. Id. at 130.

Subsequent to the ALJ's opinion and order on reconsideration, the Kentucky Supreme Court rendered its decision in Michelle Rahla v. Medical Center at Bowling Green, supra, which is applicable to this case. In Rahla, the Claimant received a written offer for a position contingent upon passing a physical examination and drug screen. Although the Claimant was able to complete and pass the physical examination, she alleged she injured her neck during the testing process. The ALJ found at the time of her injury, the Claimant was not "in the service of, under any contract of hire with, or performing any service in the trade, business, profession, or occupation of" the alleged Employer. The Workers' Compensation Board affirmed the ALJ's ruling, and the Kentucky Court of Appeals agreed the Claimant was not an employee when she submitted for a physical examination. In affirming the Kentucky Court of Appeals, the Court stated as follows:

> The Kentucky Worker's Compensation Act offers a sweeping understanding of who, precisely, is an "employee" protected under its statutory plan. In addition to covering individuals formally employed or acting under contract, the Act also includes "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury." So under the statutory plan, Rahla potentially qualifies under two scenarios: either she was employed

at the time of the examination, or the physical examination conferred some sort of benefit to the Medical Center's business.

Nothing in the record suggests Rahla was employed by the Medical Center when she participated in the physical examination. She received confirmation of her hiring *after* the examination was completed. And her first day of work at the Medical Center occurred three weeks later. It is clear from the Medical Center's tentative offer that a successful physical examination and drug screening was an express condition precedent to formal employment. So Rahla does not qualify as an employee under KRS 342.640(1).

Rahla's claim thus turns on whether completing the physical examination is a “service” in the course of the Medical Center's business. We have expanded on this qualification, holding that the Act “protects workers who are injured while performing work in the course of the employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was performed with no expectation of payment.” There are two key takeaways from this elaboration in light of Rahla's claim. First, we do not consider the physical examination “work” in furtherance of the Medical Center's business. Rahla offered the Medical Center no material benefit; in fact, she was the primary beneficiary of the examination. It is of no consequence to the Medical Center whether she completed the examination or not.

Second and most critically, we envision no scenario where Rahla could possibly

expect payment for the physical examination, even absent the Medical Center's clear statement that passing the physical is prerequisite to official employment. In fact, had she failed the physical examination and the Medical Center declined her employment, we doubt this claim would even exist. No employment relationship existed with the Medical Center when the injury occurred. And we will not go beyond the Act's comprehensive sweep of a qualifying "employee" to a much broader relationship *ex nihilo.* The text of the statute denies her compensation because she was not an employee at the time of her injury.

But Rahla offers a number of critiques to rebut what would appear to be the plain meaning of the statute serving as the basis for her claim. Perhaps most persuasively, she suggests this type of claim is found in Larson's Workers' Compensation treatise. Indeed, Larson seems to contemplate that it is "appropriate to treat a pre-employment physical examination as part of the employment" but also recognizes that "some courts have not for a variety of reasons." Larson even directly cited two states—Pennsylvania and North Carolina—that do not follow this approach.[9] This Court holds Larson's treatise in high regard, but Kentucky appears to be among those jurisdictions choosing not to treat this pre-employment examination as employment for purposes of workers' compensation coverage.

The section of Larson's treatise Rahla relies upon in making this claim spends a great deal of time considering try-out periods in the hiring process and its effect on workers' compensation coverage. It is of no coincidence that

the only Kentucky case she cites invokes that particular circumstance. In *Hubbard v. Henry,* an employee agreed to work as a timber cutter on a trial basis, and without pay, to demonstrate his ability to his prospective employer. The employee of course injured himself, but we held he was entitled to workers' compensation coverage despite the lack of a formal employment relationship. This was totally consistent with Larson's statement on try-out period coverage when the "injury flows directly from employment activities or conditions," and the statute's command that an employee is covered if "performing service in the course of the trade, business, profession ... "

While we have endorsed the try-out period approach, we have not taken the same action with regard to pre-employment medical screenings.

Rahla could not point to any Kentucky case law following her approach; instead she frames the issue as one of first impression to this Court. But as the Medical Center correctly points out, that is not the case. In *Honaker v. Duro Bag Manufacturing Co.,* we held that that if employment is contingent upon a pre-employment physical examination, that individual is not covered as "employed" until the examination is completed. The workers' compensation statutes attempt to restore an employee's lost wages—wages that were assumed to have existed at the time of the injury. Without any evidence of an employment relationship between Rahla and the Medical Center, we cannot conclude she was employed at the time of her injury.

> In interpreting statutory commands from the legislature, we cannot derive meaning from what is absent in the text. Whether the legislature intended to cover claims like Rahla's is not our prerogative. And no matter what degree of esteem we hold Larson's contributions to workers' compensation law, we cannot adopt his position when the statute does not. Kentucky law offers a comprehensive definition of qualifying employees and none of them describes Rahla's status at the time of her injury. We must accordingly affirm the lower courts and dismiss her claim.

Here, as in Rahla, nothing in the record suggests Stadler was employed by Kelly Services when she voluntarily participated in the workday simulation assessment on February 20, 2014. In fact, Stadler's own testimony firmly establishes she understood at the time of her injury she was going through the pre-hire procedure, which she had to pass before consideration for a job at TMMK, and she had not yet been hired. Gray provided consistent testimony. It is clear from Gray's testimony, Stadler's potential employment was conditioned upon successful completion of TMMK's pre-hire protocol implemented by Kelly Services, as well as its own application process, neither of which Stadler successfully completed. Simply put, Stadler was never an employee of Kelly Services pursuant to KRS 342.640(1), a fundamental requirement necessary for eligibility of workers' compensation benefits.

KRS 342.640(4) serves to protect workers who are injured while performing work in the course of an employer's business by considering them to be employees despite the lack of a formal contract for hire, *unless the circumstances indicate the work was performed with no expectation of payment*. Hubbard v. Henry, 231 S.W.3d at 129. We do not consider the workday simulation assessment "work" in furtherance of Kelly Services' business. Stadler's participation in the assessment offered no material benefit to Kelly Services and it was not provided compensation for implementing TMMK's pre-hire protocol. There is no evidence to support any theory Stadler expected payment for the workday simulation assessment. We also find Stadler was not engaged in a "try-out period" or "trial basis" similar to the Claimant in Hubbard v. Henry, supra.

In this instance, the ALJ performed the appropriate analysis and rendered a decision supported by substantial evidence. The ALJ specifically noted Stadler was a job applicant, wanted to obtain a position at TMMK, recognized she would be undergoing the pre-hire testing procedures required in order to be considered for a position at TMMK, and was fully aware she would not be compensated for participating in the pre-employment

process. Additionally, the ALJ noted Stadler acknowledged in her sworn testimony she knew she had not been hired as of the time of her injury in the workday simulation assessment, was voluntarily participating in TMMK's required pre-placement screening, and had not even begun the application process for Kelly Services. The ALJ noted Stadler never received any notice, written or verbal, characterizing Kelly Services' communication as an "offer" of employment. Stadler understood her potential hire by Kelly Services was conditioned upon the successful completion of her evaluation, and she had to successfully complete all of the various pre-conditions in order to be considered for employment at TMMK.

Therefore, because the ALJ performed the proper analysis, his decision is supported by substantial evidence, and no contrary result is compelled, we affirm.

Accordingly, the October 1, 2015 Opinion and Order and the October 30, 2015 order on petition for reconsideration by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON LARRY D ASHLOCK
333 WEST VINE ST, STE 1200
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON C PATRICK FULTON
1315 HERR LANE, STE 210
LOUISVILLE, KY 40222

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601