

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 11, 2015

CLAIM NO. 201401272

DAVID PERRY

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

HOMESTEAD FAMILY FARM;
UNINSURED EMPLOYERS' FUND; and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

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

RECHTER, Member. David Perry ("Perry") appeals from the Opinion and Award rendered May 26, 2015 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), dismissing his claim pursuant to the agricultural exemption contained in KRS 342.630(1) and 342.650(5). Perry also appeals from the

July 23, 2015 Order denying his petition for reconsideration.

On appeal, Perry argues a truck driver unloading grain into a storage and drying facility is not engaged in "agriculture" pursuant to the statutory definition found in KRS 342.0011(18). He also argues Homestead Family Farm ("Homestead") is engaged in commercial drying and storing of grain and is therefore not protected by the agricultural exemption. For the reasons set forth herein, we reverse the decision of the ALJ.

Perry filed a Form 101 alleging injuries to his neck, upper back and right arm when the auger he was operating caused him to fall on December 28, 2013. Perry indicated at the time of his injury, he was a truck driver for Homestead, and was required to unload grain with an auger. The Uninsured Employers' Fund ("UEF") was later joined as a party because Homestead was uninsured on the alleged injury date. The claim was bifurcated for a determination of the application of the agriculture exemption.

Perry testified by deposition on September 12, 2014. Perry was born in January 1970 and resides in Willisburg, Kentucky. He completed high school and obtained a commercial driver's license in the early 1990's,

which remained in good standing until 2011. Perry stated he did not renew the license because it was not a requirement for his job with Homestead.

In December 2013, Perry was hired by Homestead as a truck driver to haul grain, and was injured approximately two weeks later on December 28, 2013. Perry understood he was expected to perform other duties for the farm when he was not driving. He testified Homestead grew and harvested grain and soybeans, and then hauled the commodities to customers. As a truck driver, he picked up the grain "in the field" and delivered it to one of three locations: to the riverport in Jeffersonville, Indiana, or to grain bins in Springfield, Kentucky, or Howardstown, Kentucky. After the crops were harvested, Perry drove the truck to the edge of the field and farming machinery blew the grain into his truck to haul to one of these three locations. Throughout his short employment with Homestead, Perry testified he only hauled crops grown on Homestead farms. To his knowledge, all of the equipment was owned by Homestead. Perry believed Homestead was solely engaged in the farming business.

On December 28, 2013, Perry began a long workday at 6:00 a.m., and did not sustain his injury until approximately 11:15 p.m. Perry explained he had been to

Boyle County, Kentucky, where Homestead was harvesting soybeans. He hauled the soybeans to the Springfield facility to unload it into grain bins. Once there, Perry used a grain auger to transfer the soybeans into bins. While attempting to drag the auger under the truck, Perry fell backward onto his back and right shoulder. At the time of the accident, he was earning \$11.50 per hour.

Ashley Reding ("Reding") testified by deposition on September 9, 2014. She has been a general partner with Homestead since 2009, and primarily handles public relations. She is one of seven general partners. Reding testified Homestead grows corn, soybeans and winter wheat which it sells to either grain elevators or distilleries. Homestead is comprised of 25,000 acres. The majority of the land is leased, but some is owned by Homestead. Homestead has 35 to 40 year-round employees, including office staff, equipment operators, and "individuals that haul the grain from the field to the bins or from the bins to the market."

Reding confirmed Perry hauled grain for Homestead. She stated grain haulers also performed other tasks during off-times such as cleaning out the grain bins, repairing buildings, and tending to the sprayers. Reding testified as follows regarding what happens to harvested

grain:

Q: Now, let's go back to the harvesting, okay? I take it that your drivers will be out in the fields wherever the land is leased and the grain is being harvested and the harvester dumps it into a big truck.

A: That's correct.

Q: And at that point what do they do with the grain?

A: It will go to either one of our farm locations, we have one here and one in Springfield with the grain bins on it or we have some satellite bin locations, bins on farms that we lease and there are certain times that it will go straight from the field to - - to market.

Q: Okay.

A: Those are less common, but - -

Q: And when you say - - I'm going to back up, and I'm going to talk about those, okay? I noticed when I pulled in here¹ there are several silos or grain bings [sic] right across the road from the entrance - -

A: Yes.

Q: - - to Homestead Family Farms, I take it that's part of your business?

A: Yes, it is.

Q: And so is that one of the locations where the drivers would bring grain from the fields to be stored?

¹ The transcript indicates the deposition took place at "Homestead Family Farms GP, 7500 Stiles Road, Howardstown, Kentucky."

A: Yes.

Q: And there's another place like this?

A: In Springfield.

Reding explained corn is typically transferred to the grain bins prior to being driven to regional distilleries. Reding also explained the harvested grain does not often go straight from the field to the market because it has to be dried first, testifying as follows:

Q: . . . from the moment the grain is harvested in the field is it ready to go to market or is there something else that has to be done to it like drying or curing or something like that?

A: That's correct. That's why it doesn't happen very often that it goes straight because it does usually have to be dried. When it's harvested it's usually too moist and so it comes here and goes through the dryer before it's put into storage.

Q: Okay. So there is a machine or a process to actually dry it?

A: Yes.

Q: Instead of just letting it sit and
- -

A: Mold and mildew is what it would do if you didn't dry it.

. . .

Q: So would it be safe or accurate to say that primarily, not always, but

primarily the grain is brought to one of these bins, these facilities, it's dried and then it's put into the bin for storage and then later it's taken to the market?

A: Yes, that would be correct.

Q: And the same - - is it correct that the same drivers who pick up the grain from the fields and bring it to the facility here or over in Springfield for drying or storage, are they the same ones that would drive it to market, for example?

A: Sometimes yes and sometimes no. We also contract part of that out because in the busy times of the year, all of our drivers are just going from the fields to the bins.

Q: Okay.

A: And we can't spare drivers to then go also to the distilleries, so we also contract out to have some of the grain hauled.

Reding testified Homestead does not haul or deliver crops from or for other farms; Homestead's drivers only haul grain it grew. Reding testified as follows:

Q: Does Homestead Family Farms have any other income other than from the sale of grain?

A: No.

Q: You just stated that the only grain you hauled is grain that you grew, correct?

A: Correct.

Q: To your knowledge was Mr. Perry actually hauling grain from a field that you had grown wheat into a bin that Homestead Family Farms owns?

A: That is what I was told.

After summarizing the testimony of Perry and Reding, the ALJ made the following analysis in the May 26, 2015 opinion:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicability of the Agricultural Exemption

4. Employers and employees engaged in agricultural work are exempted from compliance with Kentucky's Workers Compensation laws pursuant to KRS 342.630(1) and 342.650(5) respectively.

5. "Agriculture" is defined in pertinent part by KRS 342.0011(18) as "the operation of farm premises, including the planting, cultivation, producing, growing, harvesting, and preparation for market of agricultural or horticultural commodities thereon..., and any work performed as an incident to or in conjunction with the farm operations, including the sale of produce at on-site markets and the processing of produce for sale at on-site markets. It shall not include the commercial processing, packing, drying, storing, or canning of such commodities for market, or making cheese or butter or other dairy products for market."

6. To determine whether parties fall under the agricultural exemption requires looking at how the premises were being used at the time of injury. Activity generally recognized as an

agricultural pursuit should be considered an agricultural use, and exclusions, not inclusions, need to be placed in the definition by the General Assembly. *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44 (Ky. App. 1978)

7. There is no dispute that the Defendant is exclusively involved in the production and sale of grain as stated by Ms. Reding. The assertion by the Plaintiff that the exception for drying and storing applies is without merit because hauling grain to be dried or stored does not constitute storing or drying. The ALJ therefore finds that the Agricultural Exemption applies as the activity performed by the Defendant falls within the plain meaning of the statute that specifically excludes preparation for market of agricultural or horticultural commodities.

Perry filed a petition for reconsideration, arguing the statutory definition of agriculture limits the exemption to those activities which take place on the farm, not the processing of food at an off-site facility. It asserted the intent to limit the exemption to activities occurring on the farm is further demonstrated by the exclusion of drying and storing of commodities for market from the statutory definition of agriculture.

Perry further argued the ALJ committed a patent error in finding at the time of his injury he was hauling grain to be dried. Instead, he was unloading the grain at

a storage and drying facility. He asserted this error prohibits meaningful review of the ALJ's decision, and requested additional findings of fact addressing the issue of whether the unloading of grain at a storage and drying facility is exempt from coverage under the agricultural exemption.

Finally, Perry argued the ALJ erred in finding Homestead is exclusively involved in the production and sale of grain. Rather, this fact is disputed, as Homestead owned and operated many trucks and several drying and storage facilities. Perry asserted these activities are not agricultural because truck driving is not ordinarily an agricultural activity, and the storage and drying of commodities for market is specifically excluded from the definition of agriculture. Perry requested the ALJ make additional findings of fact regarding whether the activities he was engaged in at the time of his injury are specifically excluded from the definition of "agriculture" pursuant to KRS 342.11(18).

In the July 23, 2015 Order denying Perry's petition for reconsideration, the ALJ made the following additional findings of fact:

This matter is before the [ALJ] upon the Plaintiff's Petition for Reconsideration. The Plaintiff has

requested additional findings regarding whether his activities at the time of the injury fall within the applicable exception to the agricultural exemption pursuant to KRS 342.630(1) and 342.650(5). The following additional findings are hereby entered as follows:

1. The Defendant provided testimony from Ashley Reding, who stated that the Defendant's activities consist exclusively of growing corn, soybean, and winter wheat for sale either to grain elevators or distilleries. She further testified that the farm has no other income other than from the sale of grain and the Plaintiff was injured while hauling grain that was grown on the farm to a bin at one of the other properties that is owned or leased by the Defendant.

2. The Plaintiff testified that he was in the process of pulling a grain auger, which shoots grain out of the truck into a grain bin. He stated that he had taken the grain bin from one property owned by the Defendant to another that was either leased or owned by the Defendant.

3. The ALJ finds that the activities of the Plaintiff fall squarely within the plain meaning of the definition of Agriculture found in KRS 342.0011(18) as follows in relevant part:

the operation of farm premises, including the planting, cultivation, producing, growing, harvesting, and preparation for market of agricultural or horticultural commodities thereon, ... and any work performed as an incident to or in conjunction with the

farm operations...

4. The work being performed by the Plaintiff was part of the preparation for market of agricultural commodities or at the very least part of work performed as an incident to or in conjunction with the farm operations. The ALJ therefore declines to disturb the Opinion and Order dated May 26, 2015.

On appeal, Perry asserts the activity he was engaged in at the time of his injury does not fall within the statutory definition of 'agriculture' pursuant to KRS 342.0011(18). First, he claims he was not on farm premises when the injury occurred, as required by the statute. He next maintains the statutory definition of agriculture specifically excludes the commercial drying and storing of grain for market. Finally, Perry argues the legislative purpose of the Act would be violated by extending the agricultural exemption to truck drivers working at a grain storage and drying facility. Perry requests this Board find as a matter of law he was not engaged in agriculture, and reverse the opinion of the ALJ.

We are mindful that, 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). It is not the function of this Board to reassess the weight to be afforded the evidence,

or to identify inferences which could otherwise have been drawn from the record. Whittaker v. Rowland, supra. However, when the issue on appeal solely involves the interpretation of a statute, our review is *de novo*. See Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). Here, the facts are largely undisputed, and Perry has raised only a question regarding the application of the law to those facts.

KRS 342.630(1) states "any person, other than one engaged solely in agriculture" that has one or more employees are employers mandatorily subject to and required to comply with the Workers' Compensation Act. KRS 342.650 provides classes of employees who are exempt from coverage under the Act and includes "Any person employed in agriculture." KRS 342.650(5). KRS 342.0011(18) defines agriculture as follows:

"Agriculture" means the operation of farm premises, including the planting, cultivation, producing, growing, harvesting, and preparation for market of agricultural or horticultural commodities thereon, the raising of livestock for food products and for racing purposes, and poultry thereon, and any work performed as an incident to or in conjunction with the farm operations, including the sale of produce at on-site markets and the processing of produce for sale at on-site markets. It shall not include the commercial processing, packing, drying,

storing, or canning of such commodities
for market

Certainly, there is no dispute Homestead is a company engaged in agriculture. However, it is the nature of the work being performed, not the nature of the employer's business, which directs our analysis and construction of the statute. *Robinson v. Lytle*, 124 S.W.2d 78, 80 (Ky. 1939). See also Com., Uninsured Employers' Fund v. Gussler, 287 S.W.3d 153 (Ky. App. 2008)(claimant's injury, incurred while cutting timber, is compensable, though it occurred on farm premises, because logging was not exempt from statute and not part of the farm's usual operation).

In this case, the testimony is largely uncontested regarding Homestead's operation, and the activity Perry was engaged in at the time of his injury. To facilitate their farming operation, Homestead transferred grain to bins in various locations where it was dried and stored until delivery to distilleries and elevators. Reding testified the grain bins were a part of the farm's business. The grain was dried in order to prevent mold and mildew. Reding testified all land used by Homestead was either leased or owned by it, including that upon which the bins were located. She confirmed

Homestead's income is derived solely from the sale of grain, and it only hauled grain it grew.

Perry was primarily hired to haul grain to the various bins at the Springfield and Howardstown locations, as well as to an elevator located in Jeffersonville, Indiana. His job as a driver included the loading and unloading of the grain with assistance of farming equipment. Perry testified on the day of the accident, he had been at a Homestead farm in Boyle County to load harvested soybeans which he hauled to Springfield to unload into grain bins. He was injured while unloading grain with an auger into one of the bins.

"Agriculture" does not include "the commercial processing, packing, drying, storing or canning of such commodities for market..." KRS 342.0011(18). Perry testified he was injured while unloading soybeans at the Springfield facility for the purposes of drying them prior to sale. There was no evidence presented to dispute this testimony. Based on the plain meaning of the statute, to which we must confine our analysis, we conclude Perry's activities at the time of his injury do not fall within the agricultural exemption as defined by KRS 342.0011(18).

Homestead's arguments to the contrary are unavailing. It claims the work performed by Perry was part

of the harvesting process, and was therefore incident to or in conjunction with farming operations. Homestead is a large, commercial farming operation with the financial capability to own and operate its own off-site drying and storage facility. However, this fact does not direct our analysis. Rather, it is the nature of the employee's activities at the time of the injury. Therefore, based on the uncontradicted testimony regarding Perry's activities at the time he was injured, we conclude, as a matter of law, he was engaged in the commercial drying and storing of agricultural commodities at the time of his injury.

Because of this conclusion, we need not address Perry's further arguments concerning whether he was working "off-site" from the farming premises at the time of his injury, or whether truck drivers are included in the agricultural exemption.

Therefore, the May 26, 2015 Opinion and Award and the July 23, 2015 Order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **REVERSED**. This claim is remanded to the ALJ for further proceedings consistent with this opinion.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

CHAIRMAN, ALVEY. I respectfully dissent. Perry's work, particularly his activities at the time of the accident, fall within the statutory definition of agriculture pursuant to KRS 342.0011(18). Perry was employed by Homestead, a family farming operation with several locations. On the day of the accident, Perry went to a field where a Homestead crop was being harvested. The grain was loaded onto a truck. The crop was then taken to a grain bin. The entirety of the activity from field to storage constitutes nothing more than the harvesting of a crop. As such, this type of activity is precluded from coverage pursuant to the Kentucky Workers' Compensation Act.

KRS 342.630(1) states "any person, other than one engaged solely in agriculture" that has one or more employees are employers mandatorily subject to and required to comply with the Workers' Compensation Act. KRS 342.650 provides classes of employees who are exempt from coverage pursuant to the Act and includes: "Any person employed in agriculture." KRS 342.650(5). KRS 342.0011(18) defines agriculture as follows:

"Agriculture" means the operation of farm premises, including the planting, cultivation, producing, growing, harvesting, and preparation for market

of agricultural or horticultural commodities thereon, the raising of livestock for food products and for racing purposes, and poultry thereon, and any work performed as an incident to or in conjunction with the farm operations, including the sale of produce at on-site markets and the processing of produce for sale at on-site markets. It shall not include the commercial processing, packing, drying, storing, or canning of such commodities for market

Upon review of applicable case law and the statutory authority set forth in KRS Chapter 342, the exclusion contained in KRS 342.650(5) is applicable as the evidence demonstrates the whole character of the employee/employer's work is agricultural, or more specifically, farming.

Based upon the statutory definitions, I believe the ALJ performed a sufficient analysis when viewing the opinion and the order on petition for reconsideration together in dismissing the claim. There is no evidence Homestead was engaged in any activity other than agricultural. Homestead grew, harvested, and sold corn, soybeans and winter wheat. To facilitate their farming operation, Homestead transferred grain to bins in various locations where it was dried and stored until delivery to distilleries and elevators. Reding testified the grain bins were a part of the farm's business. The grain was

dried in order to prevent mold and mildew. Reding testified all land used by Homestead was either leased or owned by it, including that upon which the bins were located. Reding testified Homestead's income is derived solely from the sale of grain, and it only hauled grain it grew.

Perry was primarily hired to haul grain to the various bins, but was also required to perform other farming duties on occasion. Perry testified he hauled to the grain bins at the Springfield and Howardstown locations, as well as to an elevator located in Jeffersonville, Indiana. His job as a driver included the loading and unloading of the grain with assistance of farming equipment. Perry testified on the day of the accident, he had been at a Homestead farm in Boyle County to load harvested soybeans which he hauled to Springfield to unload into grain bins. He was injured while unloading grain with an auger into one of the bins.

The above comprises substantial evidence supporting the ALJ's determination Homestead is exclusively involved in the production and sale of grain. The work performed by Perry was part of the harvesting process, and was therefore part of the farming, or agricultural operation. Reding's testimony confirms Homestead's

activities consisted solely of growing, harvesting and selling grain. All of Perry's job duties were related to performing tasks necessary for growing and selling grain. Based upon testimony from both Perry and Reding, the ALJ did not err in determining Homestead was engaged in agriculture and Perry was at the time of his injury an agricultural employee.

The last sentence of KRS 342.0011(18) is applicable to the case *sub judice*, which states the exemption, "shall not include the commercial processing, packing, drying, storing, or canning of such commodities for market" In this instance, Homestead was involved solely in the growing, harvesting and selling of grain, and was not engaged in the commercial processing, packing, drying, storing, or canning of the grain for market. The last sentence of KRS 3423.0011(18) refers to a business which is engaged primarily or solely in the commercial drying and storing of an agricultural product, and is not applicable to the operations conducted by Homestead.

For the foregoing reasons, I would affirm the ALJ's determinations.

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