

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 27, 2014

CLAIM NO. 201300413

LAURA LYNN BOWMAN

PETITIONER

VS.

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

MANCHESTER MEMORIAL HOSPITAL  
and HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, and RECHTER, Member.

**RECHTER, Member.** Laura Lynn Bowman ("Bowman") appeals from the October 23, 2013 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), dismissing her claim against Manchester Memorial Hospital ("Manchester"). The ALJ determined Bowman was not an

employee at the time of the alleged injury, which occurred during a physical examination. On appeal, Bowman argues the ALJ erred in dismissing the claim because she accepted an offer of employment prior to the alleged injury. Finding no error, we affirm.

Bowman filed her application on March 15, 2013 alleging she sustained an injury to her back on October 31, 2012 during a physical examination which required repetitive lifting. She had received an offer of employment from Manchester by letter dated October 29, 2012, and was scheduled to start work on November 13, 2012. She accepted the offer of employment on October 30, 2012.

The physical examination was a required component of the hiring process. Bowman stated she was asked to pick up a fifty pound box ten times, then place a weighted box on a shelf at different heights and carry the box. She also had to push and pull a weighted sled. Bowman testified she experienced back pain during the examination, but thought she was only having muscle pain. Fearing she would fail the examination and lose the job, she voiced no complaints. Rather, she completed the physical examination in pain. Bowman underwent kyphoplasty surgery on November 7, 2012, followed by physical therapy.

Having passed the physical examination, she began work at Manchester on November 13 or 14, 2012. During the first week, she shadowed another nurse. During her second week, Bowman was instructed in a classroom and had no physical demands placed upon her. In her third week, she worked on the floor and realized she was unable to perform the necessary tasks. Bowman admitted she did not report her injury or recent surgery until her third week of work, and was not paid for attending the physical evaluation.

The October 29, 2012 letter offering employment was introduced. Relevant portions are as follows:

We are pleased to offer you employment in the position of REGISTERED NURSE EMERGENCY DEPT with Manchester Memorial Hospital and look forward to your joining our team. We trust that your employment with Manchester Memorial Hospital will provide you with opportunities for professional and personal growth.

Should you accept our offer of employment, you will commence work on November 13, 2012, subject to your satisfactory completion of all standard hiring requirements and procedures, including: verification of all employment/personal references and a criminal background check, verification of licensure (where appropriate), fulfillment of health assessment procedures and successful completion of testing for the illegal use of drugs. Please report to Abbie Burnette, HR Assistant in order to complete your

pre-employment procedures, as noted above.

On your first day of employment, please report to Jeff Joiner in the EMERGENCY ROOM which is located at Manchester Memorial Hospital.

Though significant medical evidence was submitted, concerning both the alleged injury and Bowman's prior history of back problems, it is irrelevant to the ALJ's ultimate conclusion Bowman was not Manchester's employee at the time of the physical and therefore will not be summarized herein. In concluding no employment relationship existed, the ALJ relied upon the clear language of the October 29, 2012 letter, which communicated an "offer" of employment expressly contingent upon the satisfactory completion of all standard hiring requirements and procedures. The ALJ also took into consideration Bowman's testimony indicating she understood the contingent nature of the employment offer, and was not paid for her time or travel to the physical evaluation or other required screenings. Additionally, the ALJ stated his reliance upon Graham v. TSL, LTD., 350 S.W.3d 430 (Ky. 2011), a factually similar case in which the Kentucky Supreme Court concluded an offer of employment was not finalized until the claimant had successfully completed certain training programs and evaluations.

Bowman appeals, arguing the ALJ erred in concluding no employment relationship existed. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Bowman was unsuccessful in satisfying her burden of proof regarding the employment relationship, 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).

We find the ALJ did not err in determining no employer-employee relationship existed at the time of the alleged October 31, 2012 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 (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.

In David Honaker v. Duro Bag Manufacturing Co., 851 S.W.2d 481 (Ky. 1993), the claimant admitted he had his cousin take a pre-employment physical for him. In applying for a job with the employer, the claimant signed a "consent and authorization of pre-employment physical," which stated

he must pass the pre-employment physical before he could be considered for a position with the company. The claimant's misrepresentation was not discovered until he sustained a work-related injury to his back. The Court ultimately concluded there was no employer/employee relationship because there was no contract for hire between the claimant and the company by stating as follows:

In *M.J. Daly Co. v. Varney*, Ky., 695 S.W.2d 400 (1985), the Court noted that KRS 342.640(1) codifies the requirement that an employee must have a contract of hire, expressed or implied, in order to be deemed an employee for purposes of coverage under the Act. "[B]efore there is an employer/employee relationship, there must be a contract of hire, expressed or implied, containing all elementary ingredients for a contract." *Id.* at 402, citing *Rice v. Conley*, Ky., 414 S.W.2d 138 (1967).

We agree with the ALJ, Board, and Court of Appeals that the "contract of hire" mentioned in KRS 342.640(1) refers to a valid contract. The physical examination was a clear and unambiguous condition precedent which had to be performed before the agreement of the parties became a binding contract. 17A Am.Jur.2d § 34 (1991). Citing *A.L. Pickens Co. v. Youngstown Sheet and Tube Co.*, 650 F.2d 118 (6th Cir.1981), claimant argues that conditions precedent are not favored. However, that decision specifies that courts will not construe stipulations to be precedent unless "required to do so by plain, unambiguous language or by necessary implication." *Id.* at 121. In

the case at bar, the pre-employment physical was required by plain and unambiguous language *before* employment was to be considered.  
Id. at 483.

The Court rejected the claimant's argument that, because he was able to perform work for seven months, the purpose of the pre-employment physical, i.e., to determine capability, was fulfilled. The Court refused to determine the validity of the employment contract retrospectively, particularly because it was not based upon the employee's subsequent capability to perform work. Id. at 484.

We find no error in the ALJ's determination Bowman did not prove she met the definition of an "employee" at the time of her alleged injury pursuant to KRS 342.640. It is undisputed Bowman received a conditional offer of employment on October 29, 2012, which unambiguously states the offer is

...subject to your satisfactory completion of all standard hiring requirements and procedures, including: verification of all employment/personal references and a criminal background check, verification of licensure (where appropriate), fulfillment of health assessment procedures and successful completion of testing for the illegal use of drugs.

Bowman testified she injured her back when she underwent the evaluation on October 31, 2012. She admitted

she had only received the contingency letter prior to the physical examination. Moreover, Bowman misrepresented her condition during the examination in order to pass the examination and secure employment. The examination was a condition precedent to her hiring, and she acknowledged she would not have been hired if she had revealed the injury to the examiner.

It is also undisputed Bowman was not compensated for her time spent during the October 31, 2012 assessment. Testimony from Rita Collett of Manchester established Bowman's actual hire date was November 14, 2012, two weeks after the October 31, 2012 physical examination. The record contained substantial evidence supporting the ALJ's finding Bowman was not Manchester's employee when she was allegedly injured.

Though Bowman also testified she believed she was hired when she responded to the October 29, 2012 letter, this evidence does not compel a finding Bowman was an employee pursuant to KRS 342.640. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000)(mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal). Substantial evidence indicates, at the time of the October 31, 2012 injury, Bowman was neither in the service of, under any contract of hire with, nor performed any service

in the trade, business, profession or occupation of  
Manchester.

Accordingly, the October 23, 2013 Opinion, Award  
and Order rendered by Hon. Steven G. Bolton, Administrative  
Law Judge is **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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