Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 6, 2013

CLAIM NO. 201201147

MICHELLE RAHLA PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

MEDICAL CENTER AT BOWLING GREEN
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Michelle Rahla ("Rahla") seeks review of the opinion and order rendered March 21, 2013, by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") dismissing her claim by finding she was not an employee of the Medical Center at Bowling Green ("Medical Center") pursuant to KRS 342.640 at the time of her alleged injury on

February 3, 2012. No petition for reconsideration was filed. The sole issue on appeal is whether Rahla was a covered employee pursuant to KRS 342.640 at the time of her injury.

Rahla filed a Form 101 alleging on February 3, 2012, she injured her neck upon lifting a box "while performing pre-job placement FCE" for the Medical Center. Rahla stated she notified the Medical Center telephonically of her injury on or about March 17, 2012. In the Form 101, Rahla alleged at the time of her injury, she worked as a patient registration clerk for the Medical Center and part-time in cosmetology. In support of her claim, Rahla attached the March 14, 2012 record of Dr. Vaughan Allen, who noted he had previously performed a cervical laminectomy in 2008. He noted Rahla's new complaints of neck pain, weakness and numbness in her left upper extremity after lifting a box a month prior. He noted a MRI revealed either a disc herniation or small tumor at C4-5 and he recommended a myelogram.

The Medical Center filed a Form 111 denying the claim because Rahla was not an employee at the time of the alleged injury since it occurred during a pre-employment physical examination. By order dated December 18, 2012, the ALJ granted Rahla's motion to bifurcate to determine whether

she is subject to the provisions of the Kentucky Workers' Compensation Act.

Rahla testified by deposition on November 21, 2012. She was born on May 22, 1975 and resides in Bowling Green, Kentucky. She confirmed she had received treatment for a previous, non-work-related herniated disc at C4-5, resulting in a laminectomy and discectomy in either 2005 or 2007. As a result of the previous injury, Rahla testified she was off work for approximately three weeks following the surgery and physical therapy, the injury completely resolved, and she was eventually released to return to regular unrestricted work.

Rahla testified she applied online for a "PRN registration clerk" position, and subsequently interviewed with two representatives from the Medical Center. Thereafter, she received a letter from the Medical Center stating she would be considered an employee upon passing a physical examination and drug screen. Rahla was scheduled for the physical examination and drug screen, and in February saw Dr. Chhabra. Rahla testified although she passed the physical examination, Dr. Chhabra determined she required further testing at the physical therapy department due to her previous neck surgery. Later the same week, a

physical therapy assessment was performed at a separate location.

As part of the physical therapy assessment, Rahla was required to lift and carry weighted boxes in increasing increments of ten pounds. During the last round, Rahla lifted and carried a box weighing sixty-one pounds, and experienced a shooting pain in her neck, arms and shoulder, which she rated as a seven on a one-to-ten scale. Despite her symptoms, Rahla completed the assessment and did not inform the evaluator of her neck pain.

Shortly after the physical therapy assessment, Rahla was telephonically notified she was hired by the Medical Center. Rahla attended orientation and training, during which she did not inform anyone of her neck pain because she was unsure of its cause. Rahla also testified she sought medical treatment for her neck symptoms approximately a week after completing the physical therapy assessment with Dr. Joe Allen, who ordered an MRI and referred her to Dr. Vaughan Allen, a neurosurgeon.

The March 5, 2012 new patient medical questionnaire from her first visit with Dr. Vaughn Allen was attached as an exhibit. Rahla reported complaints of neck pain, numbness and tingling in arms, hands and feet, weakness in left arm and leg, headaches and shoulder pain of

approximately three weeks duration. The questionnaire also indicates Rahla indicated “no” to the question of whether she was injured at work. Rahla testified she answered in the negative because she was unsure if her neck injury was legally work-related since it occurred during the pre-employment screening, and also feared losing her job. Dr. Vaughan Allen diagnosed a disc herniation at C5-6 and recommended surgery, eventually performed on March 29, 2012. Rahla testified she informed the Medical Center of her need for surgery, and was subsequently terminated from her employment. During this time, she did not inform anyone with the Medical Center she believed her condition was caused by the February 3, 2012 evaluation.

Vicki Weaver (“Weaver”), the director of employee health services for Commonwealth Health Corporation (“CHC”)[1], testified by deposition on January 23, 2012. Several exhibits were attached to her deposition, including CHC’s written policy regarding applicant selection. The policy reflects several conditions must be completed or met before an applicant can be considered for a position. Weaver testified employment with CHC is contingent upon

[1] The Medical Center is a subsidiary of CHC.

completion of a drug screen and physical examination, which are conducted during the applicant screening process.

Also attached as an exhibit is a February 1, 2012 letter addressed to Rahla from Tonie Loving, human resource specialist, extending a "contingent job offer of employment with [CHC] as PRN Registration Clerk." The letter states:

> This offer is contingent upon successful completion of a physical examination that includes a substance abuse screening. This must be completed prior to your starting work. Your scheduled appointments are: Thursday, February 2, 2012 . . . .

The "Post Offer Screening Preliminary Examination Form" and "Job Description and Performance Evaluation," both dated February 3, 2012, were also attached. The forms are utilized when a physician conducts an examination and refers an applicant to a physical therapist for a more detailed examination due to concerns of the applicant's physical capability. Weaver testified the exam is conducted solely as a part of the screening process to determine whether he or she is a fit applicant for the position. Weaver explained it is within the physician's discretion to send an applicant to the post offer examination. The documents indicate Rahla passed the post offer screening preliminary examination conducted on February 3, 2012. Weaver testified Rahla was not compensated for the time spent at the

examination, nor did she perform any services for CHC prior to that date. Likewise, CHC did not request Rahla perform any services during the exam.

A screen shot of CHC's employee records indicates Rahla was hired on February 27, 2012 and terminated on March 20, 2012. Other exhibits, including a personnel orientation document, employment eligibility forms, Rahla's time cards, and pay stub, further establish the date of hire.

In the March 21, 2013 opinion and order, the ALJ found Rahla was not an employee of the Medical Center at the time of injury, stating as follows:

> The Defendant/employer argues Plaintiff is not a covered employee under KRS 342.640, and therefore her injury is not compensable. The Plaintiff argues she was undergoing what amounts to a "try-out" for her job and should be considered an employee at the time of her injury.
>
> It is fundamental that in order to be covered under Kentucky's Workers' Compensation Act an individual must meet the definition of an "employee" under the Act. KRS 342.640 defines a covered employee in pertinent part as follows:
>
>> The following shall constitute employees subject to the provisions of this Chapter, except as exempted under KRS 342.650:
>>
>> (1) Every person…in the service of an employer under

> any contract of hire or apprenticeship, express or implied.…
>
> (4) Every person performing service in the course of the trade, business, profession or occupation of an employer at the time of the injury.

The facts on their face would indicate Ms. Rahla was not yet employed by the Defendant at the time of her February 3, 2012 neck injury. However, the Plaintiff argues the application of the case Hubbard vs. Henry, 231 SW3d 124 (Ky. 2007).

In Hubbard, the claimant, a timber cutter, agreed to work for Hubbard, a logging company, on a trial basis for a couple of days and to only receive pay if Hubbard was satisfied with his work. Mr. Henry, the claimant, was injured by a falling tree during one of the trial days. Thereafter, Hubbard paid the claimant, but did not say it was payment for work.

The court determined that the claimant was a covered employee under KRS 342.640(4) because he was cutting trees at the time of the injury for Hubbard, thereby performing service in the course of Hubbard's logging business. Id. at 130. The Court appears to rely on the fact that the employer was benefitting from the work Henry was performing – despite the contingent basis of his "employment".

Applying the facts and law of the Hubbard case to the case at bar, Ms. Rahla was undergoing what could be considered a "tryout" for her job – in that she was required to "pass" a physical exam and a substance abuse

> test. However, the critical difference in the case at bar and the Hubbard case was that Plaintiff was not performing "work" which benefitted the employer in any way at the time of her injury. Unlike the claimant in Hubbard, Plaintiff was never paid for any of her time on February 3, 2012. Likewise, she did not expect payment for time spent completing the physical evaluation and substance abuse screening. She produced no product, completed no task, and did not in any way benefit the prospective employer.
>
> Accordingly, I find the case of Hubbard vs. Henry, supra, distinguishable from the facts in this matter and therefore not applicable to Plaintiff's claim.
>
> The evidence and testimony from Plaintiff and Weaver confirm that Plaintiff was not paid for attending the February 3, 2012 physical exam. Plaintiff admits at the time of her alleged injury on February 3, 2012, she had not received any confirmation of employment from the Medical Center.
>
> I find that Plaintiff does not meet the definition of an "employee" under KRS 342.640. At the time of her averred injury, February 3, 2012, she was not in the service of the Medical Center. She was not under any contract of hire with the Medical Center on February 3, 2012 nor was she performing any service in the Medical Center's trade, business, profession or occupation on February 3, 2012.

No petition for reconsideration was filed. On appeal, Rahla argues the evidence compels a finding she was

an employee under "contract for hire" at the time of her injury. Pursuant to KRS 342.640(1) and Honaker v. Duro Bag Manufacturing Co., 851 S.W.2d 481 (1993), Rahla argues she should be considered an employee since she "submitted" to the February 3, 2012 physical examination as a condition precedent to a valid employment contract. Rahla argues the ALJ erred in finding this claim distinguishable from Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007). Like the claimant in Hubbard, Rahla argues she was similarly situated in a "tryout" period during which the Medical Center was determining whether she could satisfactorily perform her job. She asserts "the methods by which the satisfaction may be determined are irrelevant, whether by actually performing the work or being given a physical examination." Therefore, since the claimant in Hubbard was found to be an employee during his tryout period, Rahla should also be considered an employee during her tryout period. Rahla also cites to Larson's Workers' Compensation Law §26.02(6) and Dodson v. Workers' Compensation Div., 210 W.VA. 636, 650 (2001) which support her position injuries sustained during pre-employment physical examinations are compensable.

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 Rahla 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 (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 her determination an employer-employee relationship did not exist at the time of the alleged February 3, 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 at 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 the claimant 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 since 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 since it is not based upon the employee's subsequent capability to perform work. Id. at 484.

We find no error in the ALJ's determination that at the time of her alleged injury, Rahla did not meet the definition of an "employee" pursuant to KRS 342.640. It is undisputed Rahla received a "contingent job offer of employment" on February 1, 2012, which unambiguously states the offer "is contingent upon successful completion of a physical examination that includes a substance abuse screening. This must be completed prior to your starting work." Rahla testified she injured her neck when she underwent the evaluation on February 3, 2012. Rahla admitted she had only received the contingency letter prior to the physical examination. It is also undisputed Rahla was not compensated for her time spent during the February 3, 2012 assessment. Weaver testified CHC did not request, nor did Rahla perform, any services for the company during the examination. The exhibits submitted by the Medical Center establish Rahla's actual hire date was February 27, 2012, over three weeks after the February 3, 2012 physical examination. The above-referenced findings, as noted by the ALJ, establish on its face Rahla was not an employee of the Medical Center when she was allegedly injured.

We further agree Hubbard v. Henry, supra, relied upon by Rahla, is distinguishable from the case *sub judice*. In Hubbard v. Henry, the claimant responded to an ad placed in the newspaper by Hubbard looking for a person experienced in cutting timber. Hubbard wanted to be certain the claimant could perform the job. Therefore, the claimant agreed to work on a trial basis for a couple of days for which he would receive no pay unless Hubbard was satisfied with his work. There, the claimant stated the pay rate discussed was either $10.00 per hour or $100.00 per day. During the first day, the claimant was injured while cutting timber for Hubbard. Hubbard refused to pay claimant for the day he worked. Hubbard gave the claimant money later but did not say it was for payment for the work. Id. at 126.

The Court concluded the evidence compelled a finding the claimant was Hubbard's employee pursuant to KRS 342.640(4) since the claimant cut trees throughout the day of his injury. The work was in the course of Hubbard's business, it was a tryout, and Hubbard would owe Henry nothing and would not be hired if Hubbard was dissatisfied with his work. The Court further noted there was no evidence suggesting Hubbard was dissatisfied with the claimant's work. Id.

As noted by the ALJ, the claimant in Hubbard was cutting timber on a try-out basis at the time of his injury, work which was in the course of the employer's business. In contrast, Rahla was not performing work at the time of her injury which benefited, or was in the course of, the Medical Center's business. Further, the "try-out" work in Hubbard was borne out of a verbal agreement. Here, Rahla was provided a written document clearly stating the offer of employment was "contingent upon successful completion of a physical examination that includes a substance abuse screening." The record also reflects Rahla's date of hire was February 27, 2012, well after the February 3, 2012 physical examination.

Therefore, the evidence does not compel a finding Rahla was an employee pursuant to KRS 342.640. Substantial evidence supports the ALJ's findings that at the time of the February 3, 2012 injury, Rahla was neither in the service of, under any contract of hire with, nor performed any service in the trade, business, profession or occupation of the Medical Center.

Accordingly, the opinion and order rendered March 21, 2013, by Hon. Jeanie Owen Miller, Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

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