Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 7, 2015

CLAIM NO. 201300882

MYRON DOSSETT and
JAMES LINDSEY CLARK PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

JOSEPH WARREN;
WALKER CONSTRUCTION;
UNINSURED EMPLOYERS FUND; and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING & REMANDING

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

ALVEY, Chairman. Myron Dossett ("Dossett") and James Lindsey Clark ("Clark") appeal from the Opinion, Award and Order rendered January 20, 2015, and the order on petition for reconsideration issued on February 23, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ").

In a decision issued December 16, 2013, the ALJ performed an analysis pursuant to Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), and determined Joseph Warren ("Warren") was employed by John Walker ("Walker") d/b/a Walker Construction at the time of the October 1, 2012 accident. In the subsequent January 20, 2015 decision, the ALJ determined Walker had no workers' compensation insurance policy in effect on the date of the injury. She therefore determined Dossett and Clark were liable for payment of permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits, and medical benefits pursuant to the up the ladder provisions contained in KRS 342.610 (2)(b).

On appeal, Dossett and Clark argue the ALJ erred in determining remodeling and renovation work are a regular and recurrent part of their business, therefore imposing up the ladder liability pursuant to KRS 342.610(2)(b). We agree, and the ALJ's determination finding Dossett and Clark liable for benefits to Warren is hereby reversed. The claim is remanded for entry of a proper order dismissing Dossett and Clark as parties to this action.

Warren filed a Form 101 on June 10, 2013 alleging he injured his left hand on October 1, 2012 while employed by Walker in Christian County, Kentucky. At the time of

the accident he was operating a skill saw to cut a board which kicked back causing him to cut his fingers and hand. The Uninsured Employers Fund was joined as a party by order issued July 29, 2013. On September 30, 2013, the claim was bifurcated for a determination of whether Warren was employed by Walker on the date the accident, and whether the accident occurred in the course and scope of his employment. In the decision regarding these bifurcated issues rendered December 16, 2013, the ALJ determined Warren was injured while working for Walker on October 1, 2012.

We will only address the evidence pertaining to the ALJ's determination Dossett and Clark are liable for the payment of Warren's benefits pursuant to the up the ladder provision set forth in KRS 342.610(2)(b).

Warren testified by deposition on September 3, 2013 and April 16, 2014. He also testified at the hearings held on October 22, 2013 and November 19, 2014. The facts pertaining to Warren's employment by Walker are relatively undisputed on appeal. Warren testified he had worked for both Walker Construction, and its sister company, A Line Fencing, also owned by Walker, on and off since 2002. He stated he was paid $12.50 per hour when he worked hourly, and sometimes he was paid by the job. He stated after the

accident he continued to work in a limited capacity for Walker until early January 2013.

On the morning of the accident, Walker took Warren to the Dossett and Clark jobsite. The project was near completion and final tasks were being done to finish the job. Walker asked Warren to cut a block in the kitchen for mounting some cabinets. When Warren attempted to do this, the saw kicked back and injured his left hand and fingers. The accident occurred shortly after Warren's arrival at the Dossett and Clark project. He had worked on the project three or four times in the past.

Warren testified the only work he ever performed at the property owned by Dossett and Clark was through Walker. He was never paid by Dossett or Clark because he worked for Walker. He stated Walker was doing a renovation project for Dossett and Clark and he never observed either of them performing work on the property. Warren had seen Dossett and Clark at the worksite on a few occasions, but neither made any attempt to direct his work. All instruction came from Walker. He further noted neither Dossett nor Clark provided any of the tools necessary for work at the site.

Walker testified by deposition on September 27, 2013 and again on December 4, 2014. He also testified at

the hearing held October 22, 2013. Walker denied Warren was his employee. He stated Warren helped him occasionally but was never an actual employee. He stated on the date of the accident Warren had ridden with him to the Dossett and Clark project, but was supposed to stay in the truck. He stated he did not direct Warren to do any work. He stated Warren had never worked on the Dossett and Clark project. He denied having a punch list to complete on that job, and stated he was not in charge of the project. He stated he had initially started the renovation project on the Dossett and Clark property, but was unable to complete it. James Stoker ("Stoker"), another contractor, completed the job. Walker stated Warren never worked for Stoker.

Stoker testified by deposition on September 17, 2013. He stated he was engaged directly by Dossett and Clark, not Walker, to do the remodeling project. He did not work with Walker, and had no financial arrangement with him. He stated on the date of the accident, he was the only one working on the Dossett and Clark renovation project. He does not know how Warren injured himself. He never knew of Warren working on the project. He took Warren to the hospital after the accident.

Dossett testified by deposition on September 27, 2013, and again on November 7, 2014. He stated he owns an

automobile detailing shop, serves in the Kentucky Legislature, and has a property rental business with Clark. He and Clark purchased a lot in 2008. They contracted with an individual to have three rental units constructed on the lot because neither of them is involved in the construction or remodeling business. In 2012, they purchased an adjacent property upon which there was an existing house. In order to be used as a rental property, the house needed substantial renovation. Neither Dossett nor Clark have ever been involved in plumbing, carpeting, general contracting, or hanging sheet rock, and neither has any expertise in those areas. The rental business has no employees. Other than occasionally mowing, touching up, or changing a light bulb, they do no repair or maintenance work. They hired Walker to renovate or remodel the house so it could be used in the rental business.

Dossett was onsite when Warren's accident occurred, but he did not witness it. He did not know why Warren was on the property. He stated the remodeling project ran from the end of July 2012 through October 2012. At no time did he pay Warren.

Clark testified by deposition on April 21, 2014. Clark is a rural mail carrier for the United States Postal Service. He owns some rental property in partnership with

Dossett. He stated Dossett primarily mows and collects the rent. Clark does the paperwork and pays the bills. He stated Walker was engaged to remodel a house on a lot he and Dossett purchased in 2012. At some point Walker passed the job off to Stoker who did the majority of the work. He stated he and Dossett had never had any employees in the rental business. He further stated neither he nor Dossett know anything about plumbing, or installing floors, carpets and cabinets. Plumbers, electricians and handymen are engaged as the need arises for upkeep and maintenance of the property.

Regarding up the ladder liability of Dossett and Clark pursuant to KRS 342.610(2)(b), the ALJ found as follows:

> Dossett and Clark own and operate a business in which they rent personal residences to individuals. They are responsible for all of the numerous different maintenance activities that were regularly and recurrently performed in order to maintain its business viability. If not performed by contractors, the maintenance work would have to be performed by Dossett or Clark themselves or by hired employees.
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> Thus, as a regular and recurrent part of the normal business operation, Dossett and Clark contracted to hire contractors to do the regular and recurrent care and maintenance on their rental properties. This in turn led to

the hiring of John Walker Construction and/or James Stoker as contractors for the rental properties. Warren was there on one of the rental properties working as an employee of John Walker on the day he suffered his injury. Dossett and/or Clark have "up the ladder" liability for any benefits awarded.

KRS 342.610(2) states as follows:

(2) A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

> (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or
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> (b) To have work performed of a kind which is a **regular or recurrent** part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture. (Emphasis added)

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion 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). To that end, an ALJ may even reject unrebutted medical testimony, so long as he adequately sets forth his rationale for doing so. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

That said, although an ALJ as the finder of fact in a workers' compensation case has broad ranging discretion in choosing to believe parts of the evidence and disbelieve other parts, such discretion is not unfettered. His or her decision must conform to the law and be supported by the facts of the case. It is undisputed on appeal Warren was injured in the course and scope of his employment with Walker. It is further undisputed Dossett and Clark were not and never had been physically engaged in construction or remodeling, nor did they have the expertise to do so. In addition to their other occupations and business ventures which have nothing to do with remodeling or construction, Dossett and Clark were engaged in renting property. Over the course of four years they were involved in one construction project, building the three rental units, and one remodeling project, the house. In both instances, Dossett and Clark hired contractors to perform work because they had neither the expertise nor the employees to do so. Clearly the house renovation, albeit for purposes of improving the property to a rentable condition, was a one-time project. This is a far cry from engaging in construction and remodeling as a "regular and recurrent" part of their business.

In General Electric v. Cain, 236 S.W.3d 579, 586-589 (Ky. 2007), the Kentucky Supreme Court, citing to Daniels v. Louisville Gas & Electric Co., 933 S.W.2d 821, at 824 (Ky. App. 1996), noted as follows:

> Environmental Protection Agency (EPA) had ordered LG & E and other coal-fired utility companies to conduct emissions testing of its coal-fired furnaces on specified occasions. LG & E contracted with an emissions testing company to conduct the tests, and an employee of that company was severely burned while conducting such tests at the LG & E plant. Because the EPA required LG & E to conduct the emissions testing upon the occurrence of specified events, the Court of Appeals held that the emissions tests were a regular or recurrent part of LG & E's business. Id. at 823-24. The holding in Daniels is consistent with the previous holding in Blevins. In Blevins, the work performed by the injured worker became a part of the mining company's business by contract, whereas in Daniels, it became a part of the utility company's business by law.
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> The Court further noted as follows:
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> In Daniels, 933 S.W.2d at 824, the Court of Appeals also formulated definitions of "regular" and "recurrent," viz.:
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>> "Recurrent" simply means occurring again or repeatedly. "Regular" generally means customary or normal, or happening at fixed intervals. However, neither term requires regularity or recurrence with the preciseness of a clock or calendar.

Thus, the court construed "regular" to apply not only to the nature of the owner's business but to the frequency of the occurrence of a need to perform the work in question. As so defined, "regular" and "recurrent" are almost redundant.

Webster's New College Dictionary 928 (1995) defines "recurrent" as "occurring or appearing again or repeatedly," which would apply to, e.g., routine maintenance. It defines "regular" as "customary, usual or normal." Webster's, supra, at 934. Therefore, as used in KRS 342.610(2)(b), "regular" means that the type of work performed is a "customary, usual or normal" part of the premises owner's trade, business, occupation, or profession," including work assumed by contract or required by law. "Recurrent" means that the work is repeated, though not "with the preciseness of a clock." Daniels, 933 S.W.2d at 824.

. . .

Guidance for determining the work of a business is found in Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 70.06[3] (2006), which states:

> [T]he test must be relative, not absolute, since a job of construction or repair that would be a nonrecurring and extraordinary undertaking for a small business might well for a large plant be routine activity which it normally expects to cope with through its own employed staff. Ordinarily construction work, such as building a factory

> structure, installing a conveyor system, moving laboratory equipment, putting in new partitions, making electrical installations, road widening, excavating, replacing a heating system, inspecting elevators, changing the pipes, putting in a septic tank, bricking up the windows, replacing the floor, building a fence, building a canopy for a small grocery store, or replacing shoe racks, would be considered outside the trade or business of a manufacturing or mercantile establishment. But if the defendant is a business which by its size and nature is accustomed to carrying on a more or less ongoing program of construction, replacement, and maintenance, perhaps even having 'a "construction division," or which can be shown to have handled its own construction in the past, a job of construction delegated to a contractor will be brought within the statute, (footnotes omitted.)

The treatise notes that, "with a surprising degree of harmony," the courts agree on a general rule of thumb that a statute deeming a contractor to be an employer "covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees." Larson's, supra, at § 70.06[1].

The test is relative, not absolute. Factors relevant to the "work of the ... business," include its nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the

> independent contractor is hired to perform. Larson's, supra, at §70.06[5]. Employees of contractors hired to perform major or specialized demolition, construction, or renovation projects generally are not a premises owner's statutory employees unless the owner or the owners of similar businesses would normally expect or be expected to handle such projects with employees. Employees of contractors hired to perform routine repairs or maintenance that the owner or owners of similar businesses would normally be expected to handle with employees generally are viewed as being statutory employees. Whether a project is customized to the premises owner's needs is irrelevant.

We acknowledge the purpose of KRS 342.610 is "to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits." Id. However, in this instance, there is absolutely no evidence the house renovation project was either a regular or recurrent part of Dossett and Clark's business. The evidence has established they were in the property rental, not construction or renovation business. There is a significant difference between completely remodeling a house, and merely moving, weed eating, or changing an occasional light bulb, which the evidence establishes was

the extent of the physical activity engaged in by Dossett and Clark.

In Cain, supra, at 558, the Kentucky Supreme Court instructed the factors relevant to making the determination include the contracting business's "nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform." Even if an alleged contractor may never perform the job the subcontractor is hired to do with its own employees, it is still a contractor pursuant to KRS 342.610(2)(b) if the job is one that is usually a regular or recurrent part of its trade or occupation. *See* Fireman's Fund Ins. co. v. Sherman & Fletcher, 705 S.W.2d 459, 462 (Ky. 1986).

In an unreported decision, cited for guidance, not authority, the Kentucky Supreme Court held in Com., Uninsured Employers' Fund v. Old Taylor Partners, LLC, 2012 WL 664227 (Ky. December 20, 2012), (citing to General Electric v. Cain, supra), as follows:

> Cain provides a proper analysis of what KRS 342.610(2)(b) requires to determine what is a "regular and recurrent part of the work of the trade, business, occupation, or profession" of a contractor. It states that:
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> > [w]ork of a kind that is a regular and recurrent part of the work of

> the trade, business, occupation, or profession of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in the business, improve or expand its business, or remain or become more competitive in the market. It is work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees.

Applying this analysis to Old Taylor Partners leads to the conclusion that demolishing warehouses for salvage is not a “regular or recurring” part of their business. The record reflects that there were approximately twenty-seven buildings located at the Old Taylor Distillery and only those two warehouses (which purportedly were in advanced stages of decay) were slated for demolition. The demolition of two out of twenty-seven buildings can hardly be considered something which occurs with such regularity that it becomes a “customary, usual, or normal” element of Old Taylor Partners' business. It is also undisputed that Old Taylor Partners had no employees or the means to undertake demolishing the warehouses on its own. Indeed it would be illogical for Old Taylor Partners to employ individuals and purchase equipment to perform demolition when only two warehouses were slated to be removed. Additionally, the demolition of the warehouses was only one of four ways the investment group intended to

> make money. Just because those other ventures have been unsuccessful does not make the demolition of the warehouses a primary focus of Old Taylor Partners.

Likewise in Com., Uninsured Employers' Fund v. Colwell, 2014 WL 4656801 (Ky. September 18, 2014), again cited as guidance, not authority, the Kentucky Supreme Court reiterated general contracting work was not a regular or recurrent part of the property owner's trade, business, occupation, or profession, and thus, was not "contractor" subject to "up the ladder" liability for workers' compensation benefits paid to employee of the uninsured electrician subcontractor. The Kentucky Supreme Court held in order for the property owner to have been liable, pursuant to General Electric v. Cain, supra, the type of work engaged in by a subcontractor must have been work which was a regular and recurrent part of his trade or business. The Court determined because the work Colwell was performing was not part of the regular and recurrent work performed in the property owner's business, he was not liable.

In the case *sub judice*, the evidence fails to support the ALJ's determination Warren was engaged in an activity which was a regular and recurrent part of Dossett and Clark's business. The evidence clearly establishes

Dossett and Clark were involved in the property rental business, had no employees, and were not involved in ongoing or repeated renovation or construction projects. For the foregoing reasons, the ALJ's determination Dossett and Clark are responsible for payment of benefits to Warren pursuant to KRS 342.610(2)(b) is erroneous, we reverse. This claim is remanded to the ALJ to enter a proper order dismissing Dossett and Clark from this action.

Accordingly, the opinions rendered by Hon. Jane Rice Williams, Administrative Law Judge, on January 20, 2015, as well as the order on reconsideration entered February 23, 2015, are hereby **REVERSED.** This claim is **REMANDED** to the ALJ for entry of an order dismissing Dossett and Clark as directed above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

RECHTER, Member. I concur in result only. While I believe this claim should be remanded to the ALJ, I do not agree with the direction to dismiss the claim against Dossett and Clark. In the January 20, 2015 Opinion, Award and Order, the ALJ made the factual finding that "Dossett and Clark contracted to hire contractors to do the regular and recurrent care and maintenance on their rental properties.

This in turn led to the hiring of John Walker Construction and/or James Stoker as contractors for the rental properties." Significantly, no party petitioned for reconsideration of this factual finding. The majority has cited ample evidence in the record which refutes it, and supports the conclusion Walker was hired to make capital improvements to Dossett and Clark's business. However, this testimony was not summarized or referenced in the ALJ's opinion.

The question of whether the work being performed by Warren and Walker was a regular and recurrent part of Dossett and Clark's business is a mixed question of law and fact. Though the legal conclusions to be drawn from the facts is a question of law which this Board may consider *de novo*, the weight to be afforded the testimony and the inferences to be drawn from the evidence is a decision for the fact-finder. I feel the majority has strayed too far into the realm of fact-finding. I would remand this claim to the ALJ for further findings of fact and an analysis of up-the-ladder liability pursuant to the legal authority cited in the majority opinion.

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