Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2015

CLAIM NO. 201401225

ROBERT DECKER PETITIONER

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

HENRY PODGURSKY d/b/a/ MODERN WOODWORKING
UNINSURED EMPLOYERS' FUND
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Robert Decker ("Decker") appeals from the January 20, 2015, Opinion and Order and the April 1, 2015, Amended and Reissued Order Overruling the Petition for Reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). In the January 20, 2015, Opinion and Order, the ALJ dismissed Robert Decker's claim for benefits

having determined his claim falls within the KRS 342.650(2) exemption. On appeal, Decker asserts it was error for the ALJ to find the exemption applies.

The Form 101 alleges on March 17, 2014, Decker sustained injuries to his "whole left side, back, hip, leg" while in the employ of Henry Podgursky D/B/A Modern Woodworking ("Podgursky") in the following manner: "I was working and I fell on concrete and injured my whole left side, back, hip, leg." The attached Form 104 indicates Decker was employed by Modern Woodworking from May 1990 through 2014.

The November 4, 2014, Benefit Review Conference ("BRC") Order lists the following contested issues: benefits per KRS 342.730; average weekly wage; unpaid or contested medical expenses; and TTD. Under "other" is listed: "Coverage under the Act, work relationship; PTD."

Decker was deposed on August 19, 2014, and testified regarding the nature of his working relationship with Podgursky as follows:

> Q: What was the nature of the relationship? Did he hire you for a single job or for several jobs?
>
> A: Several jobs.
>
> Q: Okay. And could you give me some examples of those jobs?

> A: Well, he didn't have enough for me at the shop to do. Been doing some of his remodeling, his property.
>
> Q: While you were working at his shop, what were your primary duties?
>
> A: Sanding, stripping, repair, refinishing.

Decker testified that he believes he started working for Podgursky in 1989. As to what happened at the time of his injury, Decker testified as follows:

> Q: Do you remember what you were doing when you were injured?
>
> A: Yes.
>
> Q: Okay. Could you please tell me about that?
>
> A: The exhaust- the roofers came and redid the roof. The exhaust fan that blows the heat out, we always put foam in it to keep it warm in the shop, and they knocked it out. And I put a ladder up there to put the foam back in. All of a sudden the ladder slid, and I turned in the air and fell straight down on my left side.
>
> Q: Okay. Do you know why the ladder fell?
>
> A: I don't know.
>
> Q: Just on a slippery floor, something like that?
>
> A: It's on a concrete floor.
>
> Q: Okay. So let me make sure I have this correct in my mind and for the

record. The roofers had conducted some repairs or some sort of work on the premises?

A: Uh-huh.

Q: And they had knocked out an exhaust fan?

A: The foam out of an exhaust fan.

Q: The foam out of an exhaust fan?

A: Yes.

Q: And you were replacing the foam; is that correct?

A: Yes.

Q: And you were on a ladder and you fell. Do you know how far you fell? Was it a one-story room? You were working up towards the ceiling?

A: It's probably one and half because like the- where the roof is is where the rafters are.

Q: Okay.

A: There wasn't [sic] no floor or nothing there, and you had to go a little bit above that where it peaks up to put the foam in.

Q: You said you landed on the floor. Was the floor-

A: Concrete.

Q: Concrete? Okay. On your left side; is that correct?

A: Yes.

...

> Q: And this job was at Mr. Podgursky's place of business?
>
> A: Yes.
>
> Q: Not at his residence?
>
> A: His workshop.
>
> Q: His workshop?
>
> A: Yep.
>
> Q: Did you and Mr. Podgursky have a written employment contract?
>
> A: No.
>
> Q: Not that you're aware of. And how did he pay you?
>
> A: Cash.
>
> Q: Did he give you a 1099, any tax forms?
>
> A: No.
>
> Q: Did you file taxes for the year?
>
> A: No.

Decker was using tools provided by Podgursky on the day of the accident.

Concerning the types of work he performed for Podgursky, Decker testified:

> A: Remodeling, whatever it takes to refinish furniture.
>
> Q: What primarily was your job?
>
> A: Whatever needed to be done.

> Q: Where did you primarily work?
>
> A: In the shop, his property.
>
> Q: And what did you do when you were in that shop?
>
> A: Work on furniture.
>
> ...
>
> Q: Okay. Did you ever work for him on property not owned by him?
>
> A: Just going to pick up furniture from a customer.
>
> Q: Okay. So the furniture aspect?
>
> A: Yeah.
>
> Q: Not remodeling aspect?
>
> A: No.
>
> Q: Do you know approximately how many hours a week you would normally work?
>
> A: Maybe twenty or twenty-two. It was from 9 to 3 from one to four days a week.
>
> Q: And what was your hourly rate again?
>
> A: Eight and a quarter.

Decker testified at the November 18, 2014, hearing. Decker first started working for Podgursky in 1989. At that time, Podgursky had approximately four to six employees. For about ten years, Decker was the only one working for Podgursky, although "[t]here's some people he gets every now and then."

He clarified what happened on March 17, 2014:

> A: I was putting foam back in the exhaust fan to winterize the shop.
>
> Q: Now, when you say the shop, where is the shop located?
>
> A: On Frankfort Avenue.
>
> Q: And who owns the shop?
>
> A: Hank Podgursky.
>
> Q: And what were you doing that day? Why were you working with this foam?
>
> A: I was putting it back in, so it would get warm back in the shop because we burn wood to keep the shop warm and that's the only way I could get heat back there.

Concerning his work in the shop, Decker testified:

> Q: Okay - now, what do you do in the shop?
>
> A: We refinish furniture.
>
> Q: And what does that involve?
>
> A: All types of chemicals, lifting, sanding, stripping.
>
> Q: What kind of furniture do you normally work on?
>
> A: Just about any.
>
> Q: I'm sorry?
>
> A: Just about any type of furniture.

> Q: Okay- is that the only thing that you've done for Mr. Podgursky or Modern Woodworking?
>
> A: No.
>
> Q: What other things have you done?
>
> A: I do some of his remodeling on his property.
>
> Q: And is that where he lives or rental property?
>
> A: Both.

During the hearing, he recounted the various work activities he performs:

> Q: All right- now, let's go back to some of the things. Now, on the day that you were hurt, the particular job you were doing- you were doing maintenance there on the building?
>
> A: Part of my job - part of doing the job.
>
> Q: And that's what you were doing, poking up the insulation back up around the crack, okay. And when he had you work on some of his other rental properties, would you be doing maintenance on those?
>
> A: Yes.
>
> Q: Okay, and did some other things that maintenance people typically do; you'd walk around and clean up all the cigarette butts and so forth around outside?
>
> A: Yeah, cut his grass...

Decker described the woodworking he performed prior to the work accident.

> Q: When you talk about woodworking, what was the last piece that you worked on for him?
>
> A: Desk chair.
>
> Q: How long ago was that?
>
> A: The day of the accident.
>
> Q: You had worked on a chair before you climbed the ladder?
>
> A: Yes.
>
> Q: What did you do to it?
>
> A: I was taking the clamps off, because I had glued it up the Thursday before.

Decker explained when Podgursky did not have work for him at the woodworking business, he worked on Podgursky’s various properties.

> Q: All right- and if you ever showed up and he didn't have work for you, did you just go home?
>
> A: Yeah, or we went out to some of his [sic] property [sic]. We were working on any one of his properties or we'd go out to his house on the farm and do yard work and anything out there.
>
> Q: Okay- so, you did maintenance out there, too?
>
> A: Yeah.

Q: So, it wasn't like you were just working for this woodworking business that he used to have?

A: I'd say both of them.

Q: Well, he also....

A: He still had customers come in to redo furniture.

Q: How often?

A: There's always something in there about every week.

...

Q: What other kinds of maintenance items would you do for him or on his rental properties?

A: Drywall, build cabinets, very little plumbing, cut grass, clean his pool, move boxes from his wife's work.

Q: So, some things you were doing for him for his home- his personal home, just odd jobs around his house- work around his house?

A: Yeah, some of it.

Q: And then some of them were maintenance around the business down there where you work?

A: Yes.

Q: And some of it was occasional maintenance for his rental properties?

A: Yes.

Q: But, even when you string all these together, you'd only be working, at most, four days a week, part-time?

A: Uh-huh, yes.

Q: So, there was never a point where you worked- say, three continuous weeks, full time?

A: Yes, I worked a lot of times three weeks in a row...

Q: Right- no, but full time- all the days, full time...

A: Forty hours a week - is that what you're talking about?

Q: Right, yeah.

A: No.

Q: It has been years, and that's back when you were...

A: When I first started work...

Q: When he ran the Modern Woodworking with employees and had tax id numbers....

A: Yeah.

Q: Did withholding on your checks and that sort of thing?

A: Yeah.

Q: But, since then, you've never worked for him full time, five days a week, forty hours?

A: No.

Decker clarified that the shop in which he was injured was Podgursky's woodworking shop.

Decker was paid by the hour, and was paid in both cash and checks. In the last two years, however, he was only paid in cash. He did not use his own tools. He always believed Podgursky was his employer.

Podgursky testified Modern Woodworking started in 1976 and ended three years ago.

> Q: And what happened three years ago?
>
> A: I retired.
>
> Q: All right, and in terms of ended it, what did you do to end your business?
>
> A: Well, I have another business called H&W Properties, which basically handles some properties I have. I have rental properties. And we did maintenance on it- all kinds of stuff; collect, cut grass, whatever had to be done. And I still- the woodworking kind of died. I got rid of my tax number and I quit- my business was kind of dying, so I just sort of let it down and just kind of closed it. I still had a few clients that would once in a while call me. But, basically, I didn't advertise. I didn't do anything anymore.

Podgursky’s current business endeavors are:

> A: Well, basically, we- my business kind of died, so basically we just clean up- and maintenance. I have another property at 2214 Frankfort Avenue. I have a couple of apartments and there's a building next door. There's a lot of debris all over the place, and so I'm accommodating them in whatever needs to be done. There's always something breaking down; air

> conditioning, heating, roof leaks, plumbing, stuff like that.

Concerning the type of work Decker performed for him prior to his injury, Podgursky testified:

> Q: All right, now Mr. Decker had indicated that he works for you periodically during the week. Do you have anybody else that either works on a similar schedule as him or more than him?
>
> A: No, he was the only person that if I needed him, he was available. And there was only certain hours he was available. And if he needed to get away to do another job, he could do that. Nothing I was doing was- needed to be done right then and there.
>
> Q: In terms of- is the property that you have on Frankfort Avenue- what does it encompass? He calls it a shop. You called it a warehouse.
>
> A: Well, it's a warehouse. It used to be a shop. He used to work- years ago, for it. Like I said, I had four or five people work for me at a time. And we did refinish, repair and build cabinets. But, as the years have gone by, business got slow, and I had to lay people off. It got to the point where I couldn't afford people full time anymore, and so it just- didn't have any employees.
>
> ...
>
> Q: He talked about doing a chair the other day, before he got hurt. How often would you have anybody actually doing woodworking?

A: Very little, you know- like I said, the only time we had something is when I have an old customer, because I don't advertise in the Yellow Pages. I don't advertise on the internet. But, I've had people for years to call me up. And they'll have something, and I'll just do it. And nothing- I don't do refinishing of anything major. I don't do major stripping. If people call me to build something, I don't- I turn it down. I don't want to mess with it. I'm turning down jobs, because I don't do it anymore. I'm getting too old, and you just don't have the help. And I just decided I didn't want to do it anymore.

...

Q: Did you consider Mr. Decker a regular employee?

A: I- he was just a helper. I considered him a helper, whenever I needed some help. He stated that he did remodeling. Basically, he did odd jobs. He never really- he helped me one time build an island and he hung some drywall on it- you know, basic, little things like that. He didn't go in and actually remodel a whole area. Years ago, we used to do it. But, he would patch walls. He painted. He and his girlfriend once painted an apartment for me. This was just- like I said...

Q: Well, let me ask you this, if you had a bigger job- say, plumbing needed to be redone, what would you do?

A: I would hire a plumber.

Q: Okay- and...

A: He can change- he can change the basic stuff- put a toilet in, but he

couldn't run sewer lines or anything else like that.

Q: What about electrical work, would you have him do- say you had a fuse box that needed to be replaced. What would you do?

A: He wouldn't do that. I wouldn't have him do it. I'd have an electrician- or I knew some electricians that would do it for me.

Q: You'd use contractors?

A: Yes, sir.

Q: But, in terms of just day-to-day maintenance and the jobs you had around your properties, you'd have Mr. Decker do it?

A: Yeah, basically, like I said, the hookah bar has been there for two years, and they stay up late. And in the morning, sometimes you'll see drinks and cigarette butts and trash. And he would come in, in the morning, and pick that up. He'd take the garbage cans outside and put them- for the garbage people to pick up, bring in the empty ones. When it's cold, he did other things.

Q: All right, and he also talked about some work at your personal residence.

A: Basically, he'd cut grass if I needed to cut grass. My son-in-law cuts the grass there. But, once in awhile, if I couldn't get it, he's help me weed eat, some places, and little things like that. It has been years since he has done anything major where I live. I do have a swimming pool, but it's not at my house. It's a rental that I have, and he used to help me clean it, open

> it up, and close it. But, that has been a year- no, not this year or last year...

Podgursky testified that during the last year, Decker worked approximately two to four days a week from about nine to eleven in the morning or noon.

Podgursky has rental property in Frankfort consisting of a tattoo shop, a hookah bar, a jewelry store, and two apartments.

Podgursky testified that when he had employees, he withheld taxes, turned in payroll, and had workers' compensation insurance. Concerning the last time he reported a profit from Modern Woodworking, Podgursky testified as follows:

> A: It's kind of hard to say because Modern Woodworking hasn't made any money, because it doesn't charge- I didn't charge rent or anything else. So, if I made a profit, it would have been $5,000.00 or $6,000.00 a year, maybe less. And it has probably been a year or so before I made anything like that. Usually, I don't even make that much. I do have expenses like the telephone and G&E bills, water bills and stuff like that, that goes out, and that's not even paid by Modern Woodworking. It's paid by H&W Properties.
>
> Q: If you're paying rent, doing all the other things for Modern Woodworking, would it have been a profitable business venture?

> A: No, not really- even at $500.00 a month, it wouldn't pay for the little money I made.

The January 20, 2015, Opinion and Order contains the following findings of fact and conclusions of law:

> 10. Per KRS 342.650(2), the following employees are exempt from coverage under the Act:
>
> Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or if the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his or her, trade business or profession;
>
> 11. Both the Plaintiff and Mr. Podgursky have testified that the Plaintiff never worked in excess of two consecutive days, and that he performed maintenance and repair work at Mr. Podgursky's private residence, former business, and rental properties. It is also undisputed that Mr. Podgursky has no other employees that are subject to the Worker's Compensation Act.
>
> 12. The ALJ finds that the employment of the Plaintiff in this matter fits squarely into the KRS 342.650(2) exemption. The ALJ finds that Mr. Podgursky had ceased doing regular business in the woodworking shop and was primarily involved in owning and maintaining rental property and that the Plaintiff was exclusively involved in repair and maintenance work at the private home of Mr. Podgursky as well as about the premises wherein Mr.

> Podgursky's trade or business is conducted.

In his petition for reconsideration, Decker asserted as follows:

> The Administrative Law Judge erred as a matter of law in finding no employment relationship between Henry Podgursky, d/b/a Modern Woodworking, and the Claimant per KRS 342.650(2)(2) [sic] which the ALJ has too narrowly construed. First of all, the ALJ equates 20 consecutive work days to 20 consecutive days which was in error. Secondly, the ALJ found that the Claimant had ceased doing regular business in the woodworking shop and that is not correct. The testimony of all of the parties was that the Plaintiff was involved in both woodworking repair <u>and</u> in owning and maintaining rental property. There is absolutely no testimony that the Claimant no longer did any type of repair work on wood/furniture in addition to repair and maintenance of the private home of the Employer and at his rental property. Instead of applying KRS 342.650(2) the ALJ should have focused on whether there was an employee/employer relationship pursuant to <u>Ratliff v. Redmon</u> 396 SW2d 320 (Ky, 1965) and found an employee/employer relationship.

Podgursky also filed a petition for reconsideration.

In the April 1, 2015, Amended and Reissued Order Overruling the Petition for Reconsideration, the ALJ determined as follows:

> 1. The ALJ finds that the Plaintiff herein was at times employed on an as needed basis to perform odd jobs for the Defendant but was not ever employed or intended to be employed for more than twenty consecutive work days.
>
> 2. The ALJ further finds that the exemption noted in KRS 342.650(2) is applicable because the Plaintiff was engaged in maintenance and repair type work in or about the premises where the Defendant carried on his trade or profession and the Defendant has no other employees subject to the Worker's Compensation statutes.
>
> 3. The ALJ therefore finds that the Plaintiff was employed for periods not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, and that the employer had no other employees subject to the worker's compensation statutes in or about the premises where his trade business or profession was conducted.
>
> 4. The ALJ therefore finds that the exception applies to the Plaintiff herein and therefore the Opinion and Order dated January 20, 2015, shall remain otherwise unchanged.

On appeal, Decker asserts the ALJ erred in finding Decker fit within the KRS 342.650(2) exception. We

agree and vacate the dismissal of Decker's claim, and remand for a decision on merits of the claim.

KRS 342.650(2) states as follows:

> The following employees are exempt from the coverage of this chapter:
>
> (2) Any person employed, for not exceeding twenty (20) consecutive work days, to do maintenance, repair, remodeling, or similar work in or about the private home of the employer, or it the employer has no other employees subject to this chapter, in or about the premises where that employer carries on his trade, business, or profession.

Decker does not meet the requirement in KRS 342.650(2) that he be ***employed*** for less than twenty consecutive work days. In other words, the exemption created by KRS 342.650(2) does not apply to anyone ***employed*** for greater than twenty consecutive work days. The Form 104 attached to Decker's Form 101 indicates Decker was employed by Modern Woodworking from May 1990 through 2014. The ALJ's interpretation of the exemption articulated in KRS 342.650(2) as applying to an employee who works less than twenty consecutive work days defies the plain wording of this statute and would ultimately exempt most if not all gainfully employed workers in the Commonwealth from coverage under the Kentucky Workers' Compensation Act. "The

most commonly stated rule in statutory interpretation is that the 'plain meaning' of the statute controls." Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). Both Podgursky and Decker testified that at the time of the injury, Decker was working approximately two to four days a week. The record also indicates Decker had been working for Podgursky since 1990, and this start date was never disputed by Podgursky. Therefore, while Decker may have never worked for Podgursky in excess of twenty consecutive days, he was employed by Podgursky for far more than twenty consecutive days. Thus, he does not fall within the plain meaning of KRS 342.650(2) and is not exempt from coverage under the Act.

In addition, the record clearly demonstrates Decker was still performing woodworking for Podgursky at the time of his accident, and woodworking continued to be an ongoing business. While the ALJ determined in the January 20, 2015, Opinion and Order that "Mr. Podgursky had ceased doing regular business in the woodworking shop," both Decker and Podgursky testified Podgursky was still

performing woodworking for clients. As Podgursky testified at the final hearing, he "still had a few clients that would once in awhile call" him. This is consistent with the fact that Podgursky, at the time of hearing, was still doing business as "Modern Woodworking." Notably, Decker testified that he was performing woodworking the day of his accident. Thus, for the ALJ to find, in the January 20, 2015, Opinion and Order, that "Plaintiff was ***exclusively*** involved in repair and maintenance work at the private home of Mr. Podgursky as well as about the premises wherein Mr. Podgursky's trade or business is conducted" is erroneous. (emphasis added). Since the record reveals that on the date of his injury, Decker was still performing woodworking, Decker's situation was not encompassed by the language in KRS 342.650(2) and the exemption it creates does apply in the case *sub judice*.

Accordingly, the dismissal of Decker's claim set forth in the January 20, 2015, Opinion and Order and the April 1, 2015, Amended and Reissued Order Overruling the Petition for Reconsideration is **VACATED**. This claim is **REMANDED** to the ALJ for a decision on the merits of Decker's claim.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON C PATRICK FULTON
1315 HERR LN STE 210
LOUISVILLE KY 40222

COUNSEL FOR RESPONDENT:

HON WILLIAM H JONES
UNINSURED EMPLOYERS FUND
1024 CAPITAL CENTER DR STE 200
FRANKFORT KY 40601

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511