Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 3, 2016

CLAIM NO. 201101375

TIN MAN MANUFACTURING, INC. PETITIONER/
CROSS-RESPONDENT

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

CHARLES BURTON; RESPONDENT
O'NEIL DISHON dba RESPONDENT/
ALL SEASONS CONTRACTORS; CROSS-PETITIONER
CHRIS CALDWELL dba ABSOLUTE STEEL BUILDINGS; RESPONDENT
JIM BRANSTETTER; RESPONDENT
UNINSURED EMPLOYERS' FUND; and RESPONDENT
HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENT

AND

O'NEILL DISHON, SHANE ABBOT,
AND DWIGHT DISHON D/B/A PETITIONER/
ALL SEASONS CONTRACTORS CROSS-RESPONDENTS

V.

CHARLES BURTON;
CHRIS CALDWELL DBA ABSOLUTE METAL BUILDING SYSTEMS, LLC;
ABSOLUTE STEEL BUILDINGS;
JIM BRANSTETTER;
UNINSURED EMPLOYERS' FUND RESPONDENTS
TIN MAN MANUFACTURING, INC. RESPONDENT/CROSS-PETITIONER
AND HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
REVERSING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Tin Man Manufacturing, Inc. ("Tin Man") and O'Neil Dishon ("Dishon"), Shane Abbot and Dwight Dishon d/b/a All Seasons Contractors ("All Seasons") appeal from the August 19, 2015 Opinion, Award, and Order on Remand and the October 30, 2015 order denying their petitions for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ").

The ALJ found Tin Man, All Seasons, Chris Caldwell d/b/a Absolute[1] Steel Buildings ("Absolute"), and Jim Branstetter ("Branstetter") were engaged in a joint venture during a project in which Charles Burton ("Burton") was injured. The ALJ awarded Burton temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits, jointly and severally against the members of the joint venture.

On appeal, Tin Man argues the ALJ erred in finding it is liable under the joint venture theory because none of the four required elements outlined in Huff v.

[1] Caldwell testified the assumed legal name is Absolute Metal Building Systems.

Rosenburg, 496 S.W.2d 352 (Ky. 1973) were established. Tin Man also argues the ALJ erred in finding it employed Burton through a joint enterprise. All Seasons argues the ALJ exceeded the scope of the Board's direction on remand by reversing his previous order dismissing it as a party. All Seasons argues it cannot simultaneously be both a statutory employer and engaged in a joint venture. All Seasons also argues the ALJ erred in finding it liable for Burton's injuries under the joint venture theory. Because the evidence does not support the ALJ's determination regarding the existence of a joint venture, or the finding of either Tin Man or All Seasons as Burton's actual or statutory employer, we reverse in part and remand for a determination of Burton's actual employer, and if necessary, a determination of his statutory employer, supported by the evidence of record.

Burton filed a Form 101 naming Absolute as his employer, alleging he sustained injuries to his back, left elbow, pelvis, and left heel on May 31, 2011, when he fell sixteen feet from a roof while working as a builder on a construction site. The Uninsured Employers Fund ("UEF") was joined as a party since Absolute did not have workers' compensation coverage on the day of the accident. The ALJ granted the UEF's motion to join Tin Man, All Seasons, and

Branstetter as parties. The claim was subsequently bifurcated for a determination on the issues of employment relationship and up-the-ladder liability.

At all relevant times, Chris Caldwell ("Caldwell") was Absolute's sole owner, and he simultaneously worked as an independent, commission-based sales representative for Tin Man. The site where Burton sustained his injury is owned by Chris Campbell ("Campbell"), who merely sought to have a building constructed ("the Campbell project"), and who has no ownership interest in any of the entities joined as parties. Dishon is the vice president of Tin Man, which manufactures metal roofing and wooden trusses. Dishon is also part owner of All Seasons, which primarily installs gutters and vinyl siding but occasionally engages in general contracting. Caldwell hired Branstetter as a sub-contractor to erect a metal pole barn building for Campbell. Caldwell also hired Burton to perform construction work. The materials for the building were manufactured and delivered by Tin Man. Burton was working on Campbell's pole barn when he fell off the roof on May 31, 2011.

Burton testified by deposition on January 11, 2012 and April 17, 2012, and also at the hearing held

February 27, 2013. In January 2011, Burton responded by email to an advertisement posted by Caldwell on Craig's List which sought help building pole barns. Caldwell in turn contacted Burton with whom he held several discussions over a period of months. Burton testified Caldwell did not inform him he owned Absolute, but advised he worked for Tin Man selling and constructing buildings. Burton testified Caldwell asked him how to procure workers' compensation coverage. After some delay, Caldwell called Burton asking if he still wanted to work because he had several pending jobs.

The first job began in mid-April 2011, and lasted approximately two weeks. When Burton arrived, the job was already in progress and the building supplies had already been delivered. Burton testified Caldwell told him where to meet Branstetter. Burton brought several helpers with him to the job site. Burton reported to Branstetter every day on the job site. Caldwell was not at the job site on a daily basis. Branstetter paid Burton $15.00 per hour in cash, and tracked the hours worked. Burton stated Branstetter also made direct cash payments to the helpers he brought with him to the job site. Burton did not maintain records of his own hours worked. Once the job was completed, Burton was immediately sent to a second job

site, the Campbell project, located in Anderson County, Kentucky, where he was injured.

The Campbell project, which began the first week of May 2011, consisted of erecting a large pole barn. The same helpers accompanied him to this job site. Prior to Burton's arrival, part of the structure had blown down. When he arrived, the materials were already there, which he assumed were supplied by Tin Man. Burton stated Branstetter, who he assumed took orders from Caldwell, was again his supervisor. Caldwell was only at the Campbell project the first day he was there. As with the first job, Burton stated Branstetter paid him and his workers in cash every two or three days based upon an hourly rate. Burton stated Branstetter wrote down what everyone was owed. Branstetter provided Burton with the cash which he distributed between himself and the helpers. On May 31, 2011, Burton fell from the roof of the structure when the board onto which he was holding came loose.

At the time of the accident, Burton did not know who his employer actually was. Burton never met Campbell, the owners of Tin Man, or the owners of All Seasons. Burton was not involved in the selling or delivery of pole barn packages, and had no contract with Tin Man. Burton stated Caldwell told him he was selling structures for Tin

Man, and was also responsible for the labor to construct their buildings. Prior to beginning his job, Burton conducted an internet search of Caldwell and discovered he also owned Absolute. The advertisement stated Absolute was now selling Tin Man buildings. Most of the tools used by Burton on both jobs were provided by Branstetter, but some were supplied by Caldwell.

Branstetter testified by deposition on January 11, 2012. At the time of the accident, Branstetter was constructing a large pole barn structure for Absolute as a "contractor in hand" for the Campbell project, and he did not personally have a workers' compensation insurance policy covering himself or his helpers. Branstetter had previously contacted Caldwell in March 2011 after learning of the need for people to build pole barns. Caldwell told Branstetter he sold and provided the labor for the construction of pole barns, while Tin Man provided equipment, materials and workers' compensation insurance. However, it is noted Tin Man never actually provided equipment on the Campbell project. Branstetter testified he understood from Caldwell that Tin Man provided workers' compensation coverage if the contractors or subcontractors did not have their own policies.

Branstetter stated there were two crews working on the Campbell project. One crew consisted of Burton and his three workers, and the other consisted of Mark Echerd and his three workers. Branstetter testified Burton worked on a "T and M contract," which stands for time and material. Burton reported to Branstetter the hours and hourly rate for himself and his crew. Branstetter then paid cash to Burton to distribute among himself and his crew. Branstetter additionally provided reimbursement for daily out-of-pocket expenses, which consisted primarily of fuel costs. Branstetter did not track or maintain records of the hours worked by Burton or his crew. For this particular job, Branstetter paid Burton $15.00 per hour. Caldwell rarely visited the work site. Branstetter confirmed Burton fell on May 31, 2011, although he did not witness the fall. Branstetter did not consider Burton to be his employee. Branstetter contacted Caldwell if he needed materials or equipment not on the job site or if a problem arose. Tin Man delivered the materials for the pole barn. There was a dispute regarding the adequacy of the trusses provided by Tin Man for the Campbell project prior to Burton's fall.

Campbell, the property owner, testified by deposition on January 11, 2012. Campbell owns Cands, Inc.,

a trucking company. Campbell stated he saw an advertisement on Craig's List which listed both Absolute and Tin Man. He responded to the advertisement, and talked to Caldwell about building a pole barn for his trucking company. Caldwell provided a quote of $50,000 to $54,000 to complete the job. Campbell paid Caldwell for the project incrementally by check. Campbell stated he never directly made payments to Tin Man, Branstetter, or Burton. Campbell testified Caldwell advised he sold pole barns, and Tin Man provided workers' compensation coverage for the workers. Caldwell provided Campbell a certificate of coverage. Campbell was not on the job site on the day Burton fell.

Dishon testified by deposition on May 21, 2012. He is the vice president of Tin Man and part owner of All Seasons. Tin Man manufactures metal roofing and wooden trusses. All Seasons primarily installs gutters and vinyl siding. All Seasons occasionally installed buildings. All Seasons owns gutter machines, ladders, and other similar tools.

Dishon testified he initially hired Caldwell as an in-house salesman earning $300.00 per week plus 6% commission. Within six months, Caldwell went "strictly to independent salesman" earning an 8% commission based on

paid invoices. Dishon denied he had an arrangement for Caldwell to sell Tin Man buildings and commit to building them for a potential buyer. Likewise, Dishon testified Tin Man was never involved in building construction. Tin Man only received payment for building materials for packages sold by Caldwell, which it then delivered to various job sites.

Dishon testified about a project which occurred prior to the Campbell project, hereinafter referred to as the Disponett project. A customer called Tin Man reporting he was dissatisfied with Caldwell's work since he did not have workers' compensation coverage for the building he was constructing. Tin Man explained to the customer that Caldwell was an independent salesman. Caldwell contacted Dishon asking if All Seasons installed buildings. All Seasons agreed to install the building for Absolute for this particular customer and provided the required insurance coverage. Dishon provided the certificate of coverage for All Seasons to Caldwell. According to Dishon, Caldwell later called to inform him he decided to use Branstetter instead of All Seasons to construct the building. Dishon's testimony indicates Caldwell continued to use All Seasons' workers' compensation coverage without his permission. Ultimately, All Seasons performed no jobs

for Absolute. All Seasons was neither involved in, nor received any financial gain from the Campbell project.

When Campbell contacted him regarding construction of a pole barn, Caldwell contacted Tin Man requesting a building design and price. Dishon stated he never directly talked to Campbell. The Tin Man building package was sold to Campbell by Caldwell. Tin Man delivered the materials and was paid onsite by Caldwell in the amount of $14,000 to $17,000. No Tin Man equipment was used on the Campbell project except for the trucks used to haul the materials to the job site. Tin Man did not provide technical assistance for the construction of buildings. Dishon denied Caldwell contacted him requesting use of All Seasons' workers' compensation coverage. Likewise, he denied a deal existed with Caldwell for Tin Man to provide equipment and workers' compensation coverage on any job which it was required. Dishon testified he never gave Caldwell permission to use All Seasons' certificate of insurance, and assumed he obtained the certificates through the Disponett project.

Dishon later discovered Caldwell had been advertising under both Absolute and Tin Man without his permission. Dishon acknowledged Caldwell had business cards with Tin Man on the front and Absolute Steel on the

back. Caldwell was identified as a sales representative for Tin Man and a sales specialist for Absolute. Tin Man stopped doing business with Caldwell in June 2011.

A document dated May 13, 2011 was entered as an exhibit. The document contained Tin Man's letterhead. It was written by Dishon, and addressed to Absolute. The letter outlined the dispute between Caldwell and Dishon over the adequacy of the trusses provided by Tin Man. Within the body of the letter, after explaining Tin Man's trusses are engineered and stamped, Dishon stated, "I have loaned you insurance and everything else to get these jobs out of my yard." At the deposition, Dishon explained he had meant to be sarcastic when he said he had "loaned" Caldwell insurance. He explained Caldwell did not think Dishon was aware he had proceeded to use All Seasons' workers' compensation coverage on the Disponett project, and had written the letter "just to prove that he used my insurance."

Caldwell testified by deposition on January 11, 2012 and on December 7, 2012. At the time of Burton's accident, Caldwell was the "sole proprietor" of Absolute, which sells pole barn packages and steel buildings. Absolute did not construct buildings and did not have workers' compensation coverage.

Caldwell was also an “independent contractor” for Tin Man, selling its building packages for which he received a commission based on the invoice price. Once Caldwell identified a customer’s needs, he obtained a price from Tin Man for the materials. He then offered the customer one fixed price which included the cost of materials quoted by Tin Man, as well as the cost for installation, labor, and other miscellaneous expenses. Caldwell testified Tin Man sold the materials, and did not directly participate in its construction. Likewise, Tin Man did not share in the profit from the construction of the buildings. Caldwell arranged for the construction of the buildings by contacting various contractors. Tin Man delivered the materials and contractors constructed the buildings. Caldwell stated he coordinated with Dishon on the buildings, and worked with him on the deliveries since Tin Man manufactured the building packages. Caldwell received a 1099 from Tin Man for taxation purposes for the commissions he received from selling the packages. Caldwell testified Dishon was aware he advertised jointly under Absolute and Tin Man, because Dishon’s son printed the business cards containing both business names.

The Disponett project was the first job Caldwell arranged to be constructed which required proof of workers’

compensation insurance in order to obtain a building permit in Anderson County. Once Caldwell discovered his contractors did not carry the appropriate insurance, he contacted Dishon who advised he could use All Seasons' workers' compensation coverage, as well as Tin Man's equipment, as long as he continued to sell Tin Man building packages. Dishon then sent Caldwell the insurance certificates, which he forwarded to Branstetter for filing with Anderson County to obtain the proper permits. Tin Man did not charge additional amounts for Caldwell to use All Seasons' insurance. Caldwell denied Dishon ever objected to him using All Seasons' insurance for the Disponett project.

A certificate of insurance was introduced as an exhibit. The certificate was for workers' compensation and employers' liability insurance, and is dated February 23, 2011. It identifies All Seasons as the "Insured" and Tin Man as the "Certificate Holder". Caldwell continued to use the insurance certificate provided by Dishon, which allowed he and Branstetter to continue constructing buildings in Anderson County.

Caldwell testified Burton contacted him a couple of months prior to his accident and told him he had experience with building pole barns and he had a crew to

assist with the construction. He did not recall a discussion regarding the procurement of workers' compensation coverage. Caldwell also testified Branstetter had been referred to him to use as a contractor to build structures. He contacted Branstetter and mentioned to him Burton also had a crew. There is no written agreement regarding the employment relationship between him and Tin Man, or between him and Branstetter.

At some point, Campbell responded to an advertisement, and contacted Caldwell requesting the price of a large building package. Caldwell then contacted Tin Man to request a price estimate for the building package materials. The quote for the materials was approximately $22,000.00, which included Caldwell's commission. Caldwell then provided Campbell a total estimate price of approximately $48,000.00. Tin Man delivered the materials, but did not construct the pole barn. Campbell paid Caldwell incrementally by check as phases of the project were completed. Some of the checks were made payable to Tin Man and some were made payable to Caldwell. Caldwell estimated the labor cost for the Campbell project was approximately $7,200.00. Caldwell paid Branstetter by check for the Campbell project. Those funds came from the Aboslute business account from funds Campbell paid

Caldwell. In addition to money paid to Branstetter, Caldwell paid Tin Man for the materials. Caldwell did not pay Burton. Caldwell recalled Dishon visited the job site on one occasion to discuss the allegation of deficient trusses with Branstetter.

Anderson County required proof of insurance for the Campbell project. Caldwell stated Dishon gave him permission to use the same certificate of coverage he used for the Disponett project. Caldwell visited the job site when Tin Man delivered the material for the pole barn, and introduced Branstetter to Campbell. Although he was not at the job site on a daily basis, Caldwell returned to address problems or when various phases of the project were completed. Caldwell did not know what tools Branstetter or Burton brought to the job site. Caldwell was not at the job site when Burton fell. Caldwell assumed Branstetter paid Burton for his work. The Campbell project was the last building he sold for Tin Man.

In the July 31, 2013 Opinion, Award and Order, the ALJ found Caldwell acted as a general contractor in retaining the services of Branstetter, the subcontractor, Burton and other workers to erect the building for Campbell. The ALJ then determined Burton was not directly employed by Tin Man or All Seasons at the time of the

injury. However, the ALJ concluded Burton was Tin Man's statutory employee under the up-the-ladder theory of liability pursuant to KRS 342.610(2)(b). The ALJ next concluded Tin Man is also responsible under the joint venture or joint enterprise theory of liability. By order dated September 9, 2013, the ALJ denied both Burton's and Tin Man's petitions for reconsideration with the exception of amending the title of the opinion to "Opinion and Order."

In a Supplemental Opinion, Award, and Order dated April 7, 2014, the ALJ reaffirmed his prior holdings. The ALJ additionally found Burton "was an employee of both Caldwell and [Tin Man] under these statutes. [Burton] was not an independent contractor." In reaching this conclusion, the ALJ engaged in an analysis pursuant to Radiff v. Redmon, 396 S.W.2d 320 (Ky. 1965) and Uninsured Employers Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). The ALJ awarded indemnity and medical benefits. The ALJ held Tin Man is a real party in interest, and along with Caldwell, was obligated to pay benefits awarded to Burton. Tin Man filed a petition for reconsideration, which was denied by order dated September 9, 2013.

Tin Man then appealed to this Board which vacated and remanded the opinion, supplemental opinion and both

orders on petition for reconsideration in an opinion rendered October 24, 2014. We reasoned as follows:

> We first conclude it is not feasible for Tin Man to be simultaneously liable as an employer, an up-the-ladder employer, and a member of a joint venture. "[A] person who engages another to perform a part of the work which is a recurrent part of his business, trade or occupation is a contractor." Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 462 (Ky. 1986). *If* Tin Man is a contractor, it assumes up-the-ladder liability pursuant to KRS 342.610 and is liable to Caldwell's uninsured employees.
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> A joint venture "rests upon an analogy to the law of partnership. It is something like a partnership for a more limited period of time and a more limited purpose." Huff v. Rosenberg, 496 S.W.2d 352, 355 (Ky. App. 1973). "The law then considers that each is the agent or servant of the others and that the act of any within the scope of the enterprise is to be charged vicariously against the rest." Id. Thus, if Tin Man and Caldwell and/or Absolute have engaged in a joint venture, this factual finding is at odds with the determination Tin Man is a contractor. As a contractor, Tin Man has engaged the services of Caldwell. Under a joint enterprise, the two had acted in concert.
>
> Furthermore, there exist certain inconsistencies in the July 31, 2013 and April 7, 2014 Opinions. In his July 31, 2013 Opinion and Order, the ALJ determined Tin Man is a contractor within the meaning of KRS 342.610(2)(b). Implicit in this

finding is the conclusion that Caldwell is the subcontractor, and Burton is Caldwell's employee. However, the ALJ made the finding Caldwell "acted as a general contractor in retaining the services of Jim Branstetter." If Caldwell is the contractor, then he is simply a purchaser of goods from Tin Man. *See e.g.* Davis v. Ford Motor Co., 244 F.Supp.2d 784 (W.D.Ky. 2003) (constructing KRS 342.610).

Likewise, in his April 7, 2014 Order, the ALJ also determined Burton is the employee of both Caldwell and Tin Man pursuant to KRS 342.640(4). Certainly, the bulk of the ALJ's analysis in the subsequent order concerned Burton's status as an employee versus an independent contractor. When read in conjunction with the July 31, 2013 Order, it is possible to infer the ALJ merely rejected the contention Burton was an independent contractor while reaffirming his prior holding that Caldwell was the employer. However, the ALJ expressly stated Burton was "an employee of both Caldwell and Tin Man under [KRS 342.640(1) and (4)]." These two conclusions are legally inconsistent. It is not possible for Tin Man to, at once, bear liability as both an up-the-ladder contractor and a direct employer.

On remand, the ALJ is requested to clarify his holdings and to identify a single theory of Tin Man's liability, if any. While Tin Man has not appealed the finding that Burton was an employee as opposed to an independent contractor, the ALJ is asked to expressly identify Burton's employer. Tin Man has also raised legitimate questions as to the sufficiency of the evidence supporting the ALJ's conclusions that it is an up-the-ladder

> contractor and that it engaged in a joint venture with Caldwell and/or Absolute. Given our holding herein, and the apparent inconsistencies existing in the two Opinions, we believe meaningful review is not possible and therefore, it would be premature to address these arguments.
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> Accordingly, the ALJ's July 31, 2013 Opinion, Award and Order, the September 9, 2013 Order on petitions for reconsideration, the April 7, 2014 Supplemental Opinion, Award and Order and the May 5, 2014 Order on petitions for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge are hereby **VACATED** and **REMANDED** for entry of an amended opinion consistent with the views expressed herein.

In the August 19, 2015 Opinion, Award, and Order on Remand, the ALJ identified the theory of joint venture, and determined its members were Tin Man, Dishon d/b/a All Seasons, Caldwell d/b/a Absolute, and Branstetter. The ALJ's analysis regarding this employment relationship is as follows:

> The definition of "person" found at KRS 342.0011 (16) includes among other things, a joint venture. In my opinion, Tin Man Manufacturing, Inc., O'Neil Dishon d/b/a All Seasons Contractors, Chris Caldwell d/b/a Absolute Metal Building Systems, and Jim Branstetter, have liability under the joint venture or joint enterprise theory of liability. It is clear that for purposes of complying with Mr. Dishon's directives a joint venture existed between these parties and as a composite entity they

constitute the “employer” for purposes of Mr. Burton’s claim.

A joint venture, sometimes referred to as a “joint enterprise” or a “joint adventure” has been defined as "an informal association of two or more persons, partaking of the nature of a partnership, usually but not always, limited to a single transaction in which the participants combine their money, efforts, skill and knowledge for gain, with each sharing in the expenses and profits or losses.” Roethke v. Sanger, Ky., 68 SW2d 352, 364 (2002); citing Eubanks v. Richardson, Ky., 353 SW2d 367, 369 (1962).

Therein, it was established that there would be four elements required to establish a joint enterprise: 1. An agreement, expressed or implied, among the members of the enterprise; 2. A common purpose to be carried out; 3. A community of pecuniary interest in that purpose among the members; and 4. An equal right to a voice in the direction of the enterprise, giving an equal right of control. Roethke v. Sanger, 68 S.W.3d 352 (Ky. 2002); citing Huff v. Rosenberg, 496 SW2d 352 (Ky,1973).

Each of the four elements required to establish the existence of a joint venture between Tin Man Manufacturing, Inc., O’Neil Dishon d/b/a All Seasons Contractors, Chris Caldwell d/b/a Absolute Metal Building Systems, and Jim Branstetter, have been proven in this case. There is no question that all four of the necessary elements have been established as required under Huff. Taking the required elements in reverse order, the evidence clearly demonstrates that Tin Man Manufacturing and All Seasons Contracting had input into the construction of the buildings

that incorporated the components Tin Man sold, including the sales that were made by Chris Caldwell. Tin Man's principal, Mr. Dishon loaned or promised to loan equipment, allowed his workers compensation insurance to be used (without which the projects could not go forward) and in the Disponett deal was going to use his contracting entity to do the actual construction.

Mr. Caldwell and Mr. Branstetter located, hired, and paid the various employees to work on the buildings. Mr. Caldwell also obtained the materials that were utilized on the jobs through Tin Man. The letters between Mr. Caldwell and Mr. Dishon that were entered into the record demonstrate only that the two were at loggerheads regarding the materials that Tin Man sold for the Campbell construction project, when they proved to be the incorrect size. Mr. Caldwell advised in his letter of May 12, 2011 that he would need to seek an alternative "supplier" unless Tin Man provided the "correct trusses." Apparently Mr. Dishon was displeased with Caldwell's attitude and method of communication, decided that he would not comply, and thereby lost not only the material, but his payment for same and presumably Caldwell's commission. However, this was not a pattern, but a one-time occurrence.

The third requisite element is a community pecuniary interest in the common purpose of the enterprise. The parties must be found to have had an agreement to share profits and losses. The agreement to share losses may be implied from an agreement to share profits, but the agreement to share profits must be express. Roethke v.

Sanger, supra, at 364; citing Drummy v. Stern, Ky., 269 S.W.2d 198, 199 (1954).

Mr. Dishon denied having any financial interest in the construction work that incorporated the building components he sold. Tin Man argues that there has not been any evidence presented to rebut or contradict his testimony. Mr. Caldwell's own testimony, they say, confirms that Tin Man Manufacturing did not receive any of the profits from the construction that incorporated the building components they manufactured, and they never made any type of claim for any portion of those profits. In the words of Mr. Caldwell, "Tin Man didn't want any of that [profit]." As to Mr. Dishon, Mr. Caldwell testified, "[h]e didn't ask for it, he didn't want it." This admission by Mr. Caldwell effectively establishes that the pecuniary interest requirement was not present in prior projects, but that changed when they got involved in Anderson County.

For whatever reason that initiated the sequence of events that ended with Mr. Burton's work-related injury, there were several projects going on in Anderson County almost simultaneously. Not much evidence was heard about the McAlpin project, but having discussed Mr. Dishon's role in the Disponett and Campbell projects, there was some reason why he agreed to use assets controlled by him, and workers compensation insurance paid for by him to support these projects. By the evidence, that reason was to create new sales for his custom-designed buildings through his exclusive relationship with Mr. Caldwell.

By his own testimony, Mr. Dishon didn't get paid until the project was

finished. Mr. Branstetter paid the employees in cash paid to him by the owner, but as the entire deal was apparently a cash transaction, there is no paper trail to show where the money came from or where it went other than the fact that all of the joint adventurers involved were paid only upon successful completion of the project. There is no evidence in the record that any of the joint adventurers got paid when Mr. Dishon and Mr. Caldwell had a parting of the ways over the truss issue, but they certainly had an expectation of payment.

Mr. Dishon argues that neither Tin Man nor he had a pecuniary interest in the project, but the law does not require that joint adventurers share equally in the profits. We know not how much profit was built into the sale of the building, but we do know that in this case neither Tin Man nor Mr. Dishon stood to realize any profit until the project was successfully completed. Mr. Caldwell was entitled to receive his commission, but Mr. Dishon would not have paid him until he himself received payment. We also know Mr. Branstetter had an apparent right to collect payments of unknown amounts directly from the owner of the property to pay the employees and his expectation of being paid $1.50 per square foot upon the completion of the building. Thus, each of the defendants had a pecuniary interest in the successful completion of the project.

The second requisite element to establish a joint venture is a common purpose to be carried out. The record demonstrates that the interests of Mr. Caldwell, Mr. Dishon, Mr. Branstatter [sic] and Tin Man Manufacturing were

aligned. Mr. Caldwell shared a common interest with Tin Man in the sale of Tin Man products by virtue of the fact that Mr. Caldwell was paid strictly on commission for the products he sold. One would think that the two parties' interests clearly diverged with regard to the construction that was performed after the sales were made, but insofar as Mr. Dishon was concerned, he had a captive market because Caldwell could not operate without his insurance. The financial incentive was to insure that Caldwell's projects sold, so that more materials could be sold for the next project.

Finally, the initial requisite element that must be established is an express or implied agreement among the members of the alleged joint venture. Mr. Caldwell acknowledged that he had no written agreement with Tin Man Manufacturing or O'Neil Dishon, or Jim Branstetter, but no written agreement is required. Whitsell v. Porter, 309 Ky. 247, 217 S.W.2d 311(Ky. 1949). Mr. Dishon denied the existence of any express or implied agreement relating to the construction work Mr. Caldwell and his associates performed, but the evidence shows otherwise.

Mr. Caldwell's assertion, accompanied by other evidence, shows that he had an understanding with Mr. Dishon related to the construction work, which in turn establishes a joint venture. Mr. Caldwell's testimony is that Mr. Dishon offered to provide him with equipment and workers' compensation insurance so that he could perform construction work.

Mr. Dishon has vehemently denied Mr. Caldwell's assertion that there was ever any agreement to provide him with

insurance, but then there was in fact an admission that he did.

The letter Mr. Dishon wrote to Mr. Caldwell on May 13, 2011 contains an admission of the existence of the agreement Mr. Caldwell alleges the two parties had regarding insurance coverage. The eighth sentence of the letter reads, “I have loaned you insurance and everything else to get these jobs out of my yard.”

Mr. Dishon disingenuously explained in his testimony that this was an off-hand comment meant to be taken sarcastically based upon a disagreement stemming from an earlier project. Mr. Dishon also provided a letter that he wrote to Mr. Caldwell on May 17, 2011 wherein he detailed Mr. Caldwell’s alleged surreptitious representation to David Disponette[sic] that he was covered by Mr. Dishon’s insurance during that earlier project.

Tin Man argues that Mr. Dishon’s testimony is supported by the fact that Mr. Caldwell used the same Certificate of Insurance (dated 2/23/2011) for the David Disponette[sic] project that he used for all subsequent projects, rather than obtaining updated certificates for each project as would be the expected course of action for such arrangements. Yet Caldwell was so ignorant about workers compensation insurance that he had to ask Charles Burton where and how to obtain it. Mr. Dishon, on the other hand was sophisticated and shrewd enough to agree that an uninsured party could “borrow” his insurance in the first place, an act which he surely knew was illegal. The sly comment in his May 13 letter, unaccompanied by any action to cure the problem, is convincing evidence that he knew exactly what he was doing

and has constructed his group of business entities in such a manner as to both save money and protect him from liability.

Mr. Caldwell acknowledged that the insurance that Mr. Dishon agreed to "loan" him was through another company. The Certificate of Insurance that Mr. Caldwell identified as having been provided to Anderson County for the Christopher Campbell project and subsequently to counsel for the UEF lists Tin Man Manufacturing merely as a certificate holder. The document does not identify Tin Man Manufacturing as the insured or as an additional named insured. Consequently, Tin Man Manufacturing was complicit in a scheme to provide fraudulent proof of insurance to Anderson County authorities in order to acquire a permit for the Campbell job.

This is also proven by the fact that when the participants had a falling out over the trusses, Mr. Dishon complained that he lost money because the trusses had not been paid for, a fact that mitigates against an arm's length transaction between the parties.

The testimony of Mr. Caldwell and Mr. Dishon establishes that Mr. Caldwell worked for Tin Man as a salesman and that Mr. Caldwell understood that he was an independent contractor in his capacity as a salesman. Mr. Caldwell acknowledged that during the relevant period he was only paid by commission on the sales he made, and he further acknowledged that he was issued a Form 1099 by Tin Man for tax reporting purposes. Mr. Caldwell conceded that Tin Man was "more concerned about just selling the materials" and there were not necessarily any expectations on Tin

Man’s part about the construction of the buildings they sold. Yet, Caldwell’s testimony is replete with references to his discussions with Mr. Dishon that the volume of Tin Man sales would be increased by selling a comprehensive package that would include construction of the buildings. Mr. Dishon apparently embraced this concept as a way to increase his profits by selling more materials.

Mr. Dishon testified that Tin Man Manufacturing has never engaged in the construction of buildings. Yet he also testified that when the pecuniary interests of Tin Man were threatened by the displeasure of Mr. Disponett, he not only attempted to have the work performed by another business entity of which he had control, but illegally allowed their insurance coverage to be used to effect that construction.

Mr. Dishon controls separate, but related entities that he has manipulated to his profit. He operates them all out of his pocket, picking and choosing which asset or tool will be of financial benefit to him, while maintaining the fiction of arm’s length dealing. Mr. Caldwell acknowledged that Tin Man never participated in the construction of the buildings they sold. Tin Man Manufacturing did not possess any equipment that would have been necessary for the construction of buildings. But All Seasons Construction did.

According to Caldwell’s sworn testimony, Tin Man never arranged directly for construction. However, they did have workers’ compensation insurance, equipment and all the other requirements necessary to construct. So on this job, “… due to the fact that I was an employee of theirs, even though

I was an independent contractor, I was told that I could utilize equipment, and if we got on a job that, you know, required the turning in insurances, that I could utilize their insurance." Mr. Caldwell was told that by O'Neil Dishon who, along with his wife Charlene Dishon, was the owner of Tin Man Manufacturing.

Consequently, according to Caldwell's testimony he acted as a sort of broker. He would sell the buildings on behalf of Tin Man. He would then secure a contractor and put together a single price for the customer for both the building materials package itself and the actual construction of the building.

Jim Branstetter was hired by Caldwell to do the actual construction. To Mr. Branstetter's knowledge, Caldwell had a business relationship with Tin Man Manufacturing. Tin Man provided the equipment, the material and the workers comp insurance. Caldwell sold the job and after the job was done he got some sort a percentage back from Tin Man. He understood from Caldwell that the workers compensation coverage provided by Tin Man was like a backup insurance in case the contractors didn't have it. On May 31, 2011 Mr. Branstetter did not have workers compensation insurance in the Commonwealth of Kentucky.

With regard to the actual job, Tin Man never brought any equipment on the jobsite to Branstetter's knowledge. Mr. Branstetter actually thought Chris Caldwell provided the equipment, however we know from other testimony that Chris Caldwell didn't have any equipment. Mr. Branstetter personally never saw any proof of workers compensation insurance from Tin Man,

but he knows that it was provided to the Anderson County code office because it was required to do the work.

Mr. Caldwell and Mr. Branstetter each testified to overseeing the work, but neither of them was paid as an employee or as a sub-contractor would be. Each relied on the successful outcome of the project for his share of the profit.

Mr. Caldwell agreed that it was fair to say that he was “essentially” the general contractor, and if Chris Campbell paid Branstetter directly, it would have been pursuant to his (Caldwell’s) approval. However, he gave no testimony that such approval was ever sought or given. I find that he was actually the member of the joint venture who supervised the project, along with Mr. Branstetter.

Mr. Dishon testified that the only portable equipment Tin Man owned were the trucks needed for the delivery of the products they sold. Although Mr. Caldwell initially implied that Tin Man had equipment that could be used for building construction, he subsequently acknowledged that the equipment to which he was referring was owned by All Season’s Contracting, This included a “lull” or forklift owned by Mr. Dishon’s other business. In fact, this was equipment used by Branstetter.

I therefore find that the defendants, as to the enterprise that is the subject matter of this proceeding, were part of a joint venture with regard to the sale and construction of a “pole barn”, the parts for which were manufactured by Tin Man Manufacturing, Inc. and constructed by employees of the joint venture, one of whom is the plaintiff herein, Charles Burton. As such, they are jointly and

> severally liable for any benefits due to Mr. Burton under this chapter.

The ALJ then determined Burton was an employee, not an independent contractor, of the joint venture. In making this determination, the ALJ considered the factors outlined in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965). The ALJ awarded Burton TTD benefits, PPD benefits, and medical benefits against Tin Man, by and through its principal Dishon, Dishon d/b/a All Seasons, Caldwell d/b/a Absolute, and Branstetter, jointly and severally.

Tin Man and Dishon d/b/a All Seasons filed petitions for reconsideration, making essentially the same arguments now raised on appeal. The UEF responded, opposing both petitions. In the October 30, 2015 order denying both petitions, the ALJ stated as follows:

> With regard to the Petition for Reconsideration filed by Tin Man, the defendant first requests further findings as to its involvement as to the construction of "pole barns" and then goes on to re-argue its' case that Tin Man bears no liability. I would love to accommodate the defendant's request, but there are no more findings I can make. In the Opinion, Award and Order on Remand, I wrote 57 pages and explored every fact I could adduce from the evidence. I believe the facts in evidence compelled me to reach the conclusions I reached as regards Tin Man's status with regard to the transaction at issue and I find no error patently appearing on the face of

the Opinion, Award and Order on Remand. Further, I believe this is just a re-argument of the facts by Tin Man.

In paragraphs 4, 5, 6, 7 and 8, Tin Man essentially re-writes its brief arguing the points upon which it believes the Opinion, Award and Order on Remand was in error. Tin Man's allegations of error patently appearing on the face of the Opinion, Award & Order are a disagreement with my interpretation of the evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. *Francis v. Glenmore Distilleries*, 718 S.W.2d 953 (Ky. App. 1986). As I have stated, I am aware of no further facts to be found in the record and I rely on those that I have articulated. Tin Man's argument is really about my interpretation of the law, which I believe to be correct. For that reason, Tin Man's Petition for Reconsideration is **DENIED** and **DISMISSED**.

As to the Petition for Reconsideration by All Seasons, it is argued that All Seasons liability has been waived by virtue of the ALJ's prior opinion. However, by Order of October 24, 2014, the Board vacated and remanded the original decision of the ALJ in its entirety with direction to clarify the business relationships of the parties. Upon reconsideration, it appeared that Mr. O'Neil Dishon through All Seasons had in the past, and with regard to the project at hand was prepared to use its employees, but more importantly allowed its equipment to be used. As well, the workers comp coverage certificate for All Seasons was used to obtain a building permit. On review, I thought they were complicit and part of the joint venture. So, All Season's argument does not convince me that with

> regard to them there is error patently appearing on the face of the Opinion, Award and Order on Remand.
>
> For the foregoing reasons, All Season's Petition for Reconsideration is **DENIED** and **DISMISSED**.

Both Tin Man and All Seasons appeal from the Opinion on Remand and the Order denying the petitions for reconsideration. The UEF also filed a brief in this appeal.

On appeal, Tin Man argues the ALJ erred in finding it is liable under the joint venture theory since none of the four required elements were proven. Tin Man additionally argues the ALJ erred in finding Burton was its' employee through the alleged joint enterprise.

On appeal, All Seasons argues the ALJ exceeded the scope of his authority on remand. It argues the Board, in vacating and remanding the ALJ's decision, requested a clarification of the determinations and to identify a single theory of Tin Man's liability, if any, which he failed to do. Rather, the ALJ changed his belief as to liability for All Seasons and decided for the first time to impose across the board liability against all defendants. By doing this, All Seasons argues the ALJ violated the Board's instructions and exceeded the scope of the remand. Next, All Seasons argues it was not engaged in a joint

venture, and none of the elements necessary to make such determination have been established. The UEF argues the ALJ's determination that Tin Man, All Seasons, Absolute, and Branstetter were engaged in a joint venture is supported by substantial evidence. In the alternative, the UEF argues the ALJ's decision on remand should be affirmed on other grounds since the record supports a finding of an implied oral partnership between the same parties, or that Tin Man is liable under the up-the-ladder liability pursuant to KRS 342.610(2).

We note a joint enterprise is "an informal association of two or more persons, partaking the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill and knowledge for grain, with each sharing in the expenses and profits or losses." Eubank v. Richardson, 353 S.W.2d 367, 369 (Ky. App. 1962). Four elements are required in order for a joint enterprise to be present. They are: 1) an agreement, express or implied, among the members of the group; 2) a common purpose to be carried out by the group; 3) a community of pecuniary interest in that purpose among the members; and 4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. Huff v. Rosenburg, 496

S.W.2d 352, 355 (1973). As to the third element, it is necessary there be a sharing of the profits and losses. Roethke v. Sanger, 68 S.W.3d 352, 364 (Ky. 2001). In the absence of an express agreement, the sharing of losses may sometimes be implied from an express agreement to share profits. A person does not become a member of a partnership or joint adventure by the mere fact that his compensation is measured by the amount of profits earned in the business. Id. (citing to Drummy v. Stern, 296 S.W.2d 198 (Ky. App. 1954). In this instance, on remand, the ALJ determined Tin Man, All Seasons, Absolute, and Branstetter were members of a joint enterprise.

After a thorough review of the record, we cannot say substantial evidence exists in the record to support the ALJ's determination that a joint enterprise existed between its alleged members. We find the third element, a community of pecuniary interest in that purpose among the members, and more specifically a sharing of the losses and profits, is lacking in the case *sub judice*.

All Seasons ultimately did not perform work on the Disponett project for Absolute, did not perform any jobs or contracting work for Absolute, received no financial gain, and had no involvement in the construction of the Campbell project in which Burton was injured.

Caldwell testified Campbell paid him or Absolute for the project. In turn Caldwell paid Tin Man for the materials and Branstetter for the building construction. Branstetter was responsible for paying Burton. Caldwell testified neither he nor Absolute paid All Seasons, which was not involved in the business transaction for the construction of the Campbell building. There is no evidence in the record establishing All Seasons expressly or impliedly agreed to share in the profits and losses of the alleged joint enterprise, or that it actually received any benefit. It appears the only involvement by All Seasons was through the promise allegedly made by its representative, Dishon, allowing Caldwell to use its workers' compensation insurance. It is clear the ALJ found Dishon disingenuous in denying the existence of this agreement. Regardless, even if such agreement did exist, All Seasons still did not share in the profits or losses of the Campbell project, or any other job in which the materials were supplied by Tin Man for which the labor to install the building was arranged by Caldwell.

As with Tin Man, Dishon testified Caldwell was hired to sell metal roofing and wood trusses. Caldwell was paid a commission based on paid invoices only. Dishon

provided the following testimony regarding the payment Tin Man received:

> Q: Did Tin Man ever receive any money for any of the jobs that were performed through Chris Caldwell, other than the money for the building materials?
>
> A: Just the materials.
>
> . . .
>
> Q: Then on the [Campbell project], you delivered the materials without being paid?
>
> A: No, it was actually paid for, too.
>
> Q: Who was paid?
>
> A: He would always pay – we'd split it up in payments, like if he was taking $5,000 – if it was say a $12,000-dollar job, we would take out what we agreed on between us. You know, then we'd say, "Well, we're trying out 5,000-dollar worth of stuff;" he'd write a check for $5,000. When the next load come and it was five more thousand, he'd write another check for 5,000. And when the last load come, he'd write a check for the last load.
>
> Q: So how much did you get paid on the [Campbell project]?
>
> A: Between 14 and 17 thousand maybe. I'm not sure.
>
> Q: So you did get paid on the [Campbell project] - -
>
> A: Yes.

> Q: - - even if you didn't make any money off the job?
>
> A: We just made money off the materials.
>
> . . .
>
> Q: And the materials that you sold through Chris Caldwell for Tin Man Buildings, you were paid on delivery by Chris Caldwell for that material?
>
> A: Yes, never got a check from the owner.

Caldwell provided similar testimony regarding the financial return Tin Man received in general, and specifically on the Campbell project. Campbell agreed to pay a total price of $48,000.00, which he paid to either Caldwell or Branstetter incrementally as phases of the project were completed. Caldwell received a quote from Tin Man of approximately $22,000.00 for its materials package. The labor cost for the building's construction was $7,200.00. Caldwell agreed Tin Man did not receive any additional money from the sales and construction of the pole barns aside from the actual price of the materials. Caldwell testified as follows regarding profits of the building:

> Q: Okay. And your commission came out of that $22,000; is that right?
>
> A: That would probably be right as well.

> Q: Okay. And so whatever was left over, the extra money, if there was money - - if there was a profit to be made, you got some of that or all of it?
>
> A: Right. If there was a profit to be made.
>
> Q: Okay. And Tin Man didn't get any of that; is that right?
>
> A: Tin Man didn't want any of that. O'Neil didn't want any of that. All he wanted was customers and buildings to be sold to get his buildings out there so his business can grow.

Based upon the above testimony, Dishon and Caldwell agreed Tin Man neither agreed to share in the profits or losses, nor actually made a profit, from the alleged joint venture, other than being paid for the materials it supplied. The mere expectation by Tin Man of business growth is not an agreement to share in the losses and profits of the alleged joint venture. Therefore, substantial evidence does not support a finding as to the third element of a joint enterprise. We therefore find it unnecessary to address the remaining elements, since *all* are necessary for the establishment of a joint venture. In this instance, Tin Man was merely a supplier of building materials, not a contractor, employer or joint venture

which would impose liability for payment of benefits to Burton.

Finally, we reject All Seasons' argument the ALJ exceeded the scope of the Board's direction on remand. In our opinion rendered October 24, 2014, we vacated and remanded the July 31, 2013 opinion, the September 9, 2013 order on petitions for reconsideration, and the April 7, 2014 supplemental opinion. Vacating of an opinion is, in essence, rendering it null and void. *Black's Law Dictionary* defines "vacate" in part as, "to nullify or cancel, make void, invalidate". Thus, with regard to a finding that has been vacated, the earlier finding is without force or effect, as if it never existed. Vacating an ALJ's decision is one of the authorized directives available to a reviewing body. *See*, for example, Skelton vs. Roberts, 673 S.W.2d 733 (Ky. App. 1984). Because the Board vacated the opinions and orders in full, the ALJ was free to make different or additional findings on the issue of employment relationship and liability in the opinion on remand.

Therefore, we reverse the ALJ's finding a joint enterprise existed between Tin Man, All Seasons, Absolute, and Branstetter during the Campbell project in which Burton was injured. On remand, the ALJ is directed to identify

Burton's employer at the time of his injury. The ALJ is then directed to determine whether any contractor has up-the-ladder liability pursuant to KRS 342.610(2) and applicable case law.

Accordingly, the August 19, 2015 Opinion, Award, and Order on Remand and the October 30, 2015 Order on the petitions for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **REVERSED.** This claim is **REMANDED** for further proceedings consistent with this Opinion.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

RECHTER, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

RECHTER, Member. I disagree that the evidence establishes Tin Man lacked a pecuniary interest so as to establish a joint venture. Tin Man provided the materials for construction of the pole barns and earned a profit through these sales. Dishon testified he was not paid until the project was finished. Though this testimony was contradicted somewhat, the ALJ was entitled to lend it credence. It was also in Tin Man's financial interest for its building to be erected, in order to expand the business. Tin Man shared in losses as well: Dishon

“loaned” his workers’ compensation certificate on the Disponett project so that he would not have to “eat” the cost of the building, Dishon was never paid for the trusses at the Campbell project.

In most cases, an entity will not be a member of a joint venture by virtue of simply selling goods. However, the circumstances of this case are unique and the ALJ provided a lengthy discussion of the evidence upon which he relied, and the reasonable inferences he drew from the testimony. His assessment of the totality of the evidence supports a finding Tin Man had a pecuniary interest in the project. For that reason, I respectfully dissent.

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