

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 24, 2014

CLAIM NO. 201101375

TIN MAN MANUFACTURING, INC.

PETITIONER

VS.

APPEAL FROM HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE

CHARLES BURTON; O'NEIL DISHON dba
ALL SEASONS CONTRACTORS; CHRIS CALDWELL
dba ABSOLUTE STEEL BUILDINGS; JIM BRANSTETTER;
UEF
and HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

RECHTER, Member. Tin Man Manufacturing, Inc. ("Tin Man")
appeals from the 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 ("ALJ"). Tin Man argues the ALJ erred in finding Charles Burton was its employee, that Tin Man has up-the-ladder liability, and that Tin Man has liability under the joint enterprise/joint venture theory. Tin Man further argues it is legally impossible to be simultaneously liable under all three theories. We vacate and remand.

This appeal concerns Tin Man's liability for Burton's injuries, and a significant amount of evidence was submitted on the issue of its relationship to various other persons and business entities. It is beneficial to first identify the numerous parties involved.

Charles Burton, the claimant, was injured while working on a construction site. Chris Caldwell hired Burton to perform this construction work. Caldwell is the owner of Absolute Metal Building Systems, LLC ("Absolute"). At the time of the injury, Caldwell was also an independent, commission-based salesperson for Tin Man. The site where Burton sustained his injury is owned by Chris Campbell. Caldwell had also hired a subcontractor for the Campbell project, Jim Branstetter. Branstetter directed Burton on a day-to-day basis.

Tin Man manufactures metal roofing and wooden trusses. Campbell's project involved the construction of a metal pole barn manufactured by Tin Man. O'Neil Dishon is the Vice-President and an owner of Tin Man. Additionally, Dishon is a part owner of All Seasons Contractors ("All Seasons"), a company that primarily installs vinyl siding and gutters, but occasionally performs general contracting work.

Burton initially filed his claim against Absolute on October 18, 2011 alleging injuries to multiple body parts as a result of a fall on May 31, 2011. Because Absolute was uninsured at the time of the injury, the Uninsured Employers' Fund filed a motion to join Tin Man, Dishon dba All Seasons Contractors, Caldwell dba Absolute, and Branstetter as additional parties. Those parties were joined by order dated February 23, 2012.

The evidence established Dishon hired Caldwell as an in-house salesperson for Tin Man, earning a salary plus commission. Later, Caldwell was moved to an independent sales position, earning only a commission based on paid invoices. Around this time, Caldwell formed Absolute, a company which sells and installs pole barn packages and metal buildings. Once he had identified a customer's needs, Caldwell obtained a price from Tin Man for the materials and

add the cost of the installation, to offer the customer one fixed price. Tin Man's price to Absolute was solely for the cost of materials, and did not include the cost for labor, equipment or other materials needed for the installation of the building. In fact, Tin Man did not share in the profit from the construction of the buildings.

After forming Absolute, Caldwell placed an ad on Craig's List seeking contractors. Burton responded and was contacted by Caldwell. Branstetter also responded. Caldwell contracted with Branstetter to erect a building in Anderson County for Dave Disponett. In preparing for the job, Caldwell learned he needed to provide proof of workers' compensation insurance in order to obtain a building permit. The evidence was conflicted as to how Caldwell provided proof of insurance to obtain the permit, although there is no dispute the permit was in fact issued. The proof of insurance certificate listed Tin Man as the policyholder and All Seasons as the insured.

According to Caldwell, he discussed the insurance problem with Dishon, who offered the use of equipment and insurance through either Tin Man or All Seasons. Dishon then sent Caldwell the insurance certificate, who gave it to Branstetter. Branstetter then obtained the proper permit.

Dishon denied any such arrangement existed. He stated he was contacted directly by Disponett, who was concerned because Caldwell had submitted an expired insurance certificate. Dishon attempted to resolve the conflict, ostensibly because Tin Man had not yet been paid for Disponett's building package. Not wanting to see the deal fall through, Dishon stated he agreed with Caldwell that All Seasons would perform the construction work on the Disponett job. For that reason, proof of insurance listing All Seasons as the insured was submitted for the building permit. However, All Seasons never actually performed any work on the Disponett project.

Caldwell continued to use the insurance certificate provided by Dishon, which allowed he and Branstetter to continue constructing buildings. Later, Branstetter's usual employees left the state, and Caldwell put him in touch with Burton. At his first job assignment, Burton worked directly for Caldwell. However, at later jobs, including the job for Chris Campbell, Burton was supervised by Branstetter.

Campbell owns Cands, Incorporated, a trucking company. He contacted Absolute to construct a building. Caldwell, in turn, called Dishon with the request and to obtain a price for the building package from Tin Man.

Caldwell then added in the cost of construction and labor, and quoted Campbell a total price.

The Campbell job also required Caldwell to provide proof of insurance to obtain the building permit. Caldwell testified he "turned in" the same Tin Man policy certificate used on the Disponett job, because Dishon had agreed to this arrangement when he was working on buildings using Tin Man materials. Campbell testified he understood Caldwell had a "deal" with Tin Man and that his crew was covered by its workers' compensation policy. Again, Dishon denied this alleged arrangement.

Issues arose on the Campbell project after Tin Man had delivered the materials. Caldwell believed Tin Man had delivered the wrong trusses, and he contacted Dishon about the problem. In a series of letters, Caldwell expressed to Dishon that he would obtain trusses from another manufacturer if the appropriate materials were not provided. Dishon replied to Caldwell that he had "loaned you insurance and everything else to get these jobs out of my yard." Ultimately, Caldwell obtained trusses from another manufacturer. It was during the installation of Campbell's building that Burton was injured.

The case was bifurcated on the issue of employment relationship and up-the-ladder liability. Generally, the

ALJ believed Tin Man reaped a financial benefit when Caldwell sold its building packages and, for this reason, Dishon promised Caldwell that he could sometimes use equipment owned by Tin Man or All Seasons and rely on Dishon's insurance policy. The ALJ found Dishon's testimony less than credible, particularly his claim he was unaware Caldwell used Tin Man's insurance policy certificate to obtain a building permit on the Disponett job. In the July 31, 2013 Opinion and Order, the ALJ assessed Dishon's motives as such:

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.

In the July 31, 2013 Opinion and Order, the ALJ began his analysis with the finding that Burton was not directly employed by Tin Man or All Seasons. Rather, he determined Caldwell was acting as a general contractor in retaining the services of Branstetter, Burton, and a few other men who helped erect the building for Campbell.

However, the ALJ concluded Burton is an employee of Tin Man under the "up-the-ladder" theory of liability. Referencing KRS 342.610(2), the ALJ concluded Tin Man engaged in the construction of buildings as a regular and

recurrent part of their business to the extent that it partnered, through Dishon, in supporting the active construction of Caldwell's buildings. Recognizing there was no contractual relationship between Tin Man and Caldwell for the construction of the buildings, the ALJ pointed to conversations between Caldwell and Dishon which illustrated their mutual understanding "that the volume of Tin Man sales would be increased by selling a comprehensive package that would include construction of the buildings. Dishon apparently embraced this concept as a way to increase his profits by selling more materials." For this reason, the ALJ discredited Dishon's claim he was unaware Caldwell had again provided Tin Man's proof of insurance for the Campbell project. Rather, the ALJ concluded Dishon purposefully participated in the fraud in order to allow Campbell to continue constructing buildings, and thereby increase Tin Man's sales.

The ALJ next concluded Tin Man is responsible under the joint venture or joint enterprise theory of liability. The ALJ set forth the four elements required to establish a joint enterprise as outlined in Roethke v. Sanger, 68 S.W.3d 352 (Ky. 2001) and found each of the elements had been satisfied. The elements include (1) an agreement, express 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.

Considering the factors in reverse order, the ALJ found the element of an equal right to a voice in the direction of the enterprise was satisfied because Tin Man had input into the construction of the buildings that incorporated components it sold. The ALJ acknowledged Tin Man had no hands-on involvement in the construction, but Dishon had loaned or promised to loan equipment, allowed his workers' compensation insurance to be used and, in the Disponett deal, offered to use his contracting entity to do the actual construction. The ALJ determined the community of pecuniary interest element was satisfied because "Tin Man's share in profits was the profit it made on supplying the materials for a 'turn key' project, of which its materials [were] but one component." The ALJ concluded the common purpose element was satisfied because Caldwell received a commission on the sales of the Tin Man products. Additionally, Dishon "had a captive market because Caldwell could not operate without his insurance." The ALJ further stated the financial incentive was to ensure that Caldwell's projects sold, so that more materials could be sold for the

next project. Finally, the ALJ found the express or implied agreement element was satisfied by Dishon's offer to provide equipment and workers' compensation insurance. The ALJ specifically found Tin Man was, at the very least, complicit in a scheme to provide fraudulent proof of insurance to Anderson County authorities to acquire the permit for the Campbell job.

By subsequent order dated April 7, 2014, the ALJ reaffirmed his prior holdings, and also found Burton was "an employee of both Caldwell and Tin Man under [KRS 342.640(1) and (4)]." Analyzing the factors enumerated in Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), the ALJ rejected the claim Burton was an independent contractor. As to who exactly employed Burton, the ALJ reasoned:

The evidence shows [Burton] was hired by Caldwell and supervised by Branstetter. The relationship between Caldwell and Tin Man Manufacturing, Inc. has been addressed elsewhere. [Burton] was an employee and is entitled to compensation under the Act.

Accordingly, the ALJ held Tin Man is a real party in interest, and would have an obligation to pay any benefits awarded along with Caldwell.

Tin Man filed a petition for reconsideration that included essentially the same arguments raised on appeal. The petition was denied by order dated September 9, 2013.

On appeal, Tin Man argues the ALJ erred in concluding that it has up-the-ladder liability, that Burton is its employee, and that it engaged in a joint venture with Caldwell. Emphasizing an inherent inconsistency in these findings, it contends it cannot be simultaneously liable under all three theories. As explained herein, we remand this case to the ALJ for clarification of the ultimate holding.

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.

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.

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.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON RONALD J POHL
271 W SHORT ST #100
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENTS:

HON JACKSON W WATTS
131 MORGAN ST
VERSAILLES, KY 40383

HON W BARRY LEWIS
PO BOX 800
HAZARD, KY 41702

UNINSURED EMPLOYERS FUND
1024 CAPTIAL CNTR DR, STE 200
FRANKFORT, KY 40601

ADMINISTRATIVE LAW JUDGE:

HON STEVEN BOLTON
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601