Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 30, 2021

CLAIM NO. 201800295

FEDERATED TRANSPORTATION SERVICES OF THE BLUEGRASS — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

LOUISVILLE CARE MEDICAL TRANSPORT, LLC — RESPONDENT/ CROSS-PETITIONER

and
KEITH GRIFFIN;
UNINSURED EMPLOYERS FUND; and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Federated Transportation Services of the Bluegrass, Inc. ("Federated") appeals from the Interlocutory Opinion and Order on Bifurcated Issues, rendered by Hon. Jeff V. Layson, III, Administrative Law Judge ("ALJ Layson") on August 18, 2019, and from the Opinion, Award and Order rendered by

Hon. Roland Case, Administrative Law Judge ("ALJ") on September 24, 2020. ALJ Layson found Louisville Care Medical Transport ("LCMT") employed Keith Griffin ("Griffin") on January 18, 2018, when another vehicle struck the van he was driving in the course of his work duties. ALJ Layson determined Federated has up-the-ladder liability for payment of any benefits to which Griffin may be entitled. The ALJ adopted ALJ Layson's determinations, and awarded temporary total disability ("TTD") benefits and medical benefits, but dismissed Griffin's claim for permanent partial disability benefits. LCMT cross-appealed from both the interlocutory decision, and from the Opinion, Order and Award. No petitions for reconsideration were filed.

On appeal, Federated argues the ALJ erred in determining it has up-the-ladder liability for Griffin's claim as a deemed employer pursuant to KRS 342.610(2). LCMT argues on cross-appeal that Griffin has never provided notification regarding his civil claim from the motor vehicle accident ("MVA"). LCMT also argues the ALJ erred in finding Griffin was its employee. We affirm on all issues.

Griffin filed a Form 101 on February 22, 2018, alleging injuries to multiple body parts when the van he was driving for LCMT on January 18, 2018 was involved in a MVA. Griffin specifically argued he injured his head, neck, left shoulder, low back, and left knee in that accident. In the Form 104, Griffin alleged he worked as a driver/manager for LCMT from 2015 to 2016, and again from December 2017 to the date of the accident.

Griffin has testified on four occasions. He testified by deposition on May 1, 2018 and again on September 20, 2019. He also testified at the hearings held on June 19, 2019 and August 5, 2020. Griffin was born on February 24, 1961, and is a resident of Louisville, Kentucky. He has a GED, but no specialized vocational training. Griffin testified he worked for LCMT on multiple occasions beginning in 2012, usually leaving that employment due to pay discrepancies. He testified he was supposed to earn $2,500.00 per month during his last employment period with LCMT. He has over 25 years of experience driving for multiple medical transportation companies. He has also delivered newspapers, and worked as a district manager for the Courier-Journal. Immediately prior to his last stint with LCMT, Griffin worked for a company that manufactured seats for Ford vehicles. Griffin testified he had only worked for LCMT for a few weeks at that time of the January 2018 MVA.

Griffin testified his work in medical transportation involved transporting patients to medical appointments and day programs. He worked with lower income individuals with mental and physical limitations. He also transported senior citizens. He testified LCMT drivers receive first aid and CPR training from Federated once per year.

Griffin testified that in addition to driving, he was a manager for LCMT. As a manager, he ensured other drivers arrived at their appointments, and he worked to obtain new business for LCMT. He substituted if another driver failed to make a run. He stated that Salahedin Abdalla ("Abdalla"), LCMT's managing member, directly approached him to return to work at LCMT due to a driver

shortage. He worked for LCMT on four different occasions. When he first drove for LCMT in 2012, he signed an independent contractor agreement, but he refused to sign a rejection of the Kentucky Workers' Compensation Act. He did not sign a new agreement when he last worked for LCMT. He also testified he drove his own vehicle if the assigned company van was inoperative.

Griffin made approximately twenty transports per day, five to six days per week, while working for LCMT. He admitted receiving 1099's instead of W-2's for his earnings at LCMT. Abdalla instructed him to have his telephone turned on by 3:30 a.m. so he could receive assignments. LCMT did not permit Griffin to drive for other companies. LCMT provided the vehicle, which had signage displaying the company telephone number. If he had to drive his own vehicle for a transport, he was required to place magnetized signage on the exterior with the company name and phone number displayed.

Griffin testified Federated communicated with LCMT regarding transportation assignments. Federated has an online portal used for making the assignments. He testified that all of LCMT's assignments came through the Federated portal.

On January 18, 2018, Griffin was on his way to pick up a patient when another vehicle traveling from the opposite direction struck his van head-on. His vehicle airbag deployed, and he briefly lost consciousness. He was taken to the hospital via ambulance, where he treated in the emergency room for pain in his head, neck, left shoulder, low back, and left knee. He was subsequently released, advised to take over-the-counter Ibuprofen, and provided a neck brace. He followed

up with a physician, physical therapy, and a chiropractor over the next few months. He was released from treatment in April 2018. He last saw Dr. Alan Roth on April 26, 2018, and has had no additional treatment since that date.

Griffin never returned to work for LCMT. He later worked briefly for a different medical transportation company. He began working for Christian Care Communities, a nursing home, as a floor technician on August 12, 2019. That job requires stripping and waxing floors, and shampooing rugs. He testified he has a pending lawsuit against the driver of the vehicle that struck him.

Abdalla testified by deposition on April 5, 2019. He operates LCMT from his residence. He started this medical transportation business in 2004. Federated is a broker who contracts with the state. LCMT is a transportation provider who receives assignments from Federated. Federated requires him to carry both commercial liability and workers' compensation insurance. He testified Federated contracts with multiple transportation companies in Jefferson County. Federated is paid through Medicaid. Federated then pays him. Reimbursement is based upon a flat client rate.

Abdalla receives assignments from Federated, and his drivers transport the clients. He testified his drivers are all independent contractors, but wear reflective vests bearing their names, and the company name. His drivers make approximately eighty transports per day. He denied that drivers are prohibited from working for other companies while driving for LCMT. Griffin last drove for him from November 20, 2017 to January 18, 2018. He testified Griffin did not have access to the Federated portal. He also testified Griffin was never a manager.

Abdalla also personally drives transportation vans. He testified his drivers are not permitted to drive their personal vehicles, and all are sent to Federated for training.

Abdalla testified Griffin signed an independent contractor agreement every time he returned to work, although a copy of only one contract was introduced into evidence. Abdalla also testified Griffin signed a written rejection of the Kentucky Workers' Compensation Act, which he delivered to the Kentucky Department of Workers' Claims. Abdalla's affidavit was also filed.

Pam Shepherd ("Shepherd"), Federated's Executive Director, testified by deposition on June 15, 2019. Federated is a transportation company and Medicaid broker in four areas of Kentucky, brokering trips for individuals through its Medicaid caller office. LCMT is a transportation provider that has contracted with Federated for several years. Federated infrequently provides back up to the transportation providers. If a provider cannot make a transport, the job is forwarded to a different provider. On one occasion, Federated completed a transport assigned to LCMT when one of its vans became disabled.

Shepherd testified providers, including LCMT, may send drivers to Federated for training for a fee. She testified Federated has over forty sub-contractors in Jefferson County. Federated chooses the assignments for the sub-contractors, and communicates them through the sub-contractor portal. Sub-contractors are required to carry workers' compensation coverage. Federated has no input on whether providers actually hire drivers, or sub-contract transports.

The claim was bifurcated by Order entered October 4, 2018. At the June 16, 2019 Benefit Review Conference ("BRC"), the issues preserved for ALJ

Layson to initially decide included the employment relationship between Griffin and LCMT/employee, whether Griffin rejected coverage pursuant to the Kentucky Workers' Compensation Act, and whether Federated is the proper up-the-ladder employer.

In the Interlocutory Opinion and Order on Bifurcated Issues, rendered August 18, 2019, ALJ Layson determined Griffin was LCMT's employee on the date of the accident. ALJ Layson thoroughly outlined the factors enumerated in Ratliff v. Redmon, 369 S.W.2d 320 (Ky. 1965), and in particular, those set forth in Chambers v. Wootens IGA Foodliner, 436 S.W.2d 265 (Ky. 1969). After analyzing the required factors, and outlining his findings regarding the facts supporting his analysis, ALJ Layson specifically found as follows:

> As set forth above, all nine of the factors set forth in *Ratliff*, including those afforded primary consideration in *Chambers*, weigh in favor of Mr. Griffin being an employee of LCMT, as opposed to an independent contractor. Based on the foregoing, the Administrative Law Judge finds that there was an employer/employee relationship between LCMT and Mr. Griffin at the time of the work-related injury on January 18, 2018.

ALJ Layson also determined the claim was not barred by Griffin's alleged voluntary rejection of the Kentucky Workers' Compensation Act. He noted LCMT did not file a Special Answer as required for asserting this defense; however, one was filed by Federated. He noted the only attempted filing of a Form 4 (Written Rejection) was in 2012, and it was incomplete. There was no attempted filing of such form in 2017 or 2018. He also noted Griffin did not sign the Form 4. After outlining the statutory requirements set forth in KRS 342.395, and the applicable regulations, the ALJ found *verbatim*, "Based on the foregoing, the Administrative

Law Judge finds that none of the Defendants in this case have carried the burden of proving the affirmative defense that Mr. Griffin voluntary rejected coverage under the Act pursuant to KRS 342.395."

Finally, citing to General Electric Company v. Cain, 236 S.W.3d 579 (Ky. 2007), ALJ Layson found Federated has up-the-ladder liability. He specifically found *verbatim* as follows:

> The testimony from Mr. Abdalla and Ms. Shepherd confirms the that the relationship between Federated and LCMT is that of a contractor and subcontractor. The work which is subcontracted to LCMT, specifically medical transportation services, is a "regular or recurrent part of the work of the trade, business, occupation, or profession" of Federated. Therefore, Federated meets the definition of "up-the-ladder" contractor as set forth in KRS 342.610(2)(b).

No petitions for reconsideration were filed from the interlocutory decision.

Medical evidence was subsequently introduced. It is undisputed that Griffin was injured in the MVA, for which he received medical and chiropractic treatment. He treated with Dr. Gregory Koo of Neuro-Ortho Associates, Dr. Alan Roth with the same group, and Dr. Tom Weichand, D.C. Griffin was released by Dr. Roth on April 26, 2018, and advised to take only over-the-counter Aleve or Ibuprofen for "appropriate soreness". No impairment rating was assessed, and no permanent restrictions were imposed on his activities.

At the BRC held May 13, 2010, the issues preserved included employment relationship, work-relatedness/causation, benefits per KRS 342.730, TTD benefits, unpaid/contested medical benefits, injury as defined, and

"subrogation claim". At the August 5, 2020 hearing, the parties acknowledged the remaining contested issues included Griffin's average weekly wage, whether he has any permanent disability, extent and duration of disability, unpaid medical bills, and up-the-ladder liability.

The ALJ rendered an Opinion, Award and Order on September 24, 2020. The ALJ adopted ALJ Layson's previous determinations. He noted the contested issues preserved for determination included injury as defined by the Act, work-related injury/causation, unpaid or contested medical expenses, permanent income benefits per KRS 342.730, entitlement of TTD benefits, and physical capacity to return to the type of work performed at the time of the injury. The ALJ did not address the "subrogation claim" that was preserved in the BRC Order.

The ALJ determined Griffin was entitled to TTD benefits from the date of the accident until April 26, 2018 when Dr. Roth released him. The ALJ also determined Griffin's average weekly wage was $576.92, yielding a TTD rate of $384.61 per week. The ALJ dismissed Griffin's claim for permanent partial disability benefits. The ALJ additionally determined Griffin is entitled to medical benefits pursuant to KRS 342.020. He specifically found the medical bills Griffin submitted from Louisville Metro EMS, Norton Women's & Children's Hospital, Emergency Medical Associates, Diagnostic X-ray Physicians, Neurology and Neurosurgical Associates are "work-related and compensable and to be paid pursuant to the medical fee schedule." No petitions for reconsideration were filed from the ALJ's decision.

On appeal, Federated argues the ALJ erred in determining it has up-the-ladder liability for Griffin's claim as a deemed employer pursuant to KRS 342.610(2). LCMT argues on cross-appeal that Griffin never provided notification regarding his civil claim from the motor vehicle accident ("MVA"). LCMT also argues the ALJ erred in finding it employed Griffin.

Griffin, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be

shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Again, we note no petitions for reconsideration were filed. Pursuant to KRS 342.285, in the absence of a petition for reconsideration, concerning questions of fact, the Board is limited to a determination of whether substantial evidence in the record supports the ALJ's conclusion. Stated otherwise, where a petition for reconsideration was not filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is any evidence of substance in the record supporting the ALJ's ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Regarding Federated's argument the ALJ erred in determining it has up-the-ladder liability pursuant to KRS 342.610(2), we affirm. It is undisputed Griffin was injured in the course and scope of providing medical transportation at the time of the accident. The ALJ determined Griffin was employed by LCMT at

the time of the accident. He also determined LCMT obtained clients for transportation from Federated. LCMT did not have a workers' compensation insurance policy in effect at the time of the injury.

The purpose of KRS 342.610 is "to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits." General Electric Co. v. Cain, supra. The question of whether a particular contractual relationship satisfies KRS 342.610 requires a case-by-case analysis. The analysis must include an examination as to the specific relationship between the alleged contractor and subcontractor and determining whether, pursuant to that statute, the alleged subcontractor has performed work "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of the contractor." Id.

In Cain, supra, the Kentucky Supreme Court instructed that factors relevant to making the determination include the contracting business's "nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform." Id. at 588. Even if an alleged contractor may never perform the job the subcontractor is hired to do with its own employees, it is still a contractor under KRS 342.610(2)(b) if the job is one that is usually a regular or recurrent part of its trade or occupation. *See* Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 SW2d 459, 462 (Ky. 1986).

KRS 342.610(2)(b) provides a person who contracts with another to have work performed of a kind which is a regular or recurrent part of the work of the

trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor and such other person a subcontractor. This section was enacted to discourage owners and contractors from hiring financially irresponsible subcontractors and thus, eliminate workers' compensation liability. Tom Ballard Co. v. Blevins, 614 S.W.2d 247 (Ky. App. 1980); Fireman's Fund Ins., supra.

Federated contracted with the Commonwealth of Kentucky to provide medical transportation services in specific geographic areas. Federated operates eighty vans for transporting clients pursuant to that contract. Federated additionally contracts with numerous transportation companies to assist with client transportation. Shepherd testified Federated utilizes over 40 sub-contractors to provide transportation services in Jefferson County alone. The evidence establishes Federated is paid for all client transports, and the sub-contractors are paid on a fixed rate for each transport assignment. Federated provides the assignments to each sub-contractor through its portal.

The evidence clearly supports the finding that transportation of clients is part of Federated's regular and recurrent work. Federated contracts with numerous transportation companies for completion of this task. Federated additionally transports clients directly. The relationship between LCMT and Federated falls squarely within the situation contemplated by KRS 342.610(2). Since LCMT did not have valid workers' compensation insurance coverage at the time of the accident, ALJ Layson did not err in finding Federated is responsible for the payment of benefits as the up-the-ladder employer. The ALJ's finding of up-the-

ladder liability is precisely why KRS 342.610(2) was enacted, and this determination shall not be disturbed.

KRS 342.281 specifically provides for the filing of petitions for reconsideration "for the correction of errors patently appearing upon the face of the award, order, or decision." LCMT argues the ALJ erred by failing to address its argument regarding subrogation, specifically that Griffin failed to provide appropriate notice of his pending civil action against the driver of the vehicle which struck the van he was driving on January 18, 2018. However, LCMT did not file a petition for reconsideration advising the ALJ of this error, allowing him the opportunity to address that concern. KRS 342.281 specifically states as follows:

> Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

LCMT failed to properly preserve the issue regarding notice of Griffin's civil action. LCMT was aware of that pending civil action since it filed information from that case before the ALJ. Likewise, we note Griffin testified he had a pending lawsuit regarding the MVA. Since LCMT is aware of that pending action, and apparently has been for some time, we do not perceive any harm. In any

event, since LCMT failed to properly preserve the omission for a determination on that issue, we decline to address it on appeal.

LCMT additionally argues Griffin failed to provide evidence supporting the determination of his average weekly wage. Again, because no petition for reconsideration was filed, we affirm the ALJ's determination.

Regarding LCMT's argument that the ALJ erred in determining Griffin was an employee, not an independent contractor, we also affirm. ALJ Layson examined and thoroughly outlined the factors enumerated in Ratliff v. Redmon, supra, and in particular, those set forth in Chambers v. Wooten's IGA Foodliner, supra. After performing this analysis, ALJ Layson determined Griffin was LCMT's employee, and provided the basis of that finding. Because we determine ALJ Layson performed the appropriate analysis, which was adopted by the ALJ, and his determination is supported by substantial evidence, we affirm.

Accordingly, the Interlocutory Opinion and Order on Bifurcated Issues, rendered by Hon. Jeff V. Layson, III, Administrative Law Judge, on August 18, 2019, and the Opinion, Award and Order rendered by Hon. Roland Case, Administrative Law Judge, on September 24, 2020 are hereby **AFFIRMED**.

ALL CONCUR.

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