Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 11, 2021

CLAIM NO. 202000322

JAMES RAY FOLEY PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

PEGASUS TRANSPORT/
CRST INTERNATIONAL, and its insurer
IDEMNITY INSURANCE OF NORTH AMERICA, and
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

BORDERS, Member. James Ray Foley ("Foley") appeals from the January 8, 2021 Opinion and Order and the February 23, 2021 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). The ALJ dismissed Foley's claim, finding no employment relationship existed between Foley

and Pegasus Transport/CRST International ("Pegasus") at the time of his accident. On appeal, Foley argues the ALJ erred in failing to find an employment relationship existed and in failing to recognize Foley performed services benefitting Pegasus. Finding no error, we affirm.

Foley filed a Form 101 alleging injuries to multiple body parts sustained in a motor vehicle accident ("MVA") on March 11, 2018. The claim was bifurcated on the issues of jurisdiction and the employment relationship.

Foley testified by deposition on June 18, 2020, and at the hearing held November 9, 2020. Foley first learned of a job opening with Pegasus as a truck driver through the internet. He called a recruiter and completed an application online on March 7, 2018. He also completed a W-2 and other forms online. He spoke with a recruiter several times. He also had a drug screen in Corbin, Kentucky. He received materials through the mail from Pegasus, which he completed and returned. Foley believed he was hired on March 7, 2018, and all that remained was to pick up his truck in Louisville. He was supposed to complete any other procedures on March 12, 2018 in Louisville. He was not provided a specific route, but was told he was going to be driving in the southeast and his truck was to be a Freightliner Centurion with a box trailer. He believed the only remaining employment step was to complete a road test for Pegasus in Louisville.

Pegasus rented a vehicle for Foley to drive to Louisville. Foley picked up the rental vehicle on March 10, 2018. He was involved in a MVA on March 11, 2018 when returning home from fueling the rental vehicle. The accident occurred when he attempted to answer his cell phone. He ran into the back of a commercial

bus that had stopped at a railroad track. He suffered significant injuries to his hip, neck, and back as well as a traumatic brain injury.

At the Final Hearing, Foley testified when he applied for the truck-driving job with Pegasus, he was told the requirements were a CDL, work experience, and no prior moving violations. He spoke with several recruiters and was told that he met the requirements for the job and a vehicle would be rented for him to drive to Louisville to get his tractor-trailer. It was his understanding he was hired at that time. He believed he had been hired because Pegasus rented the vehicle for him to come to Louisville. He was told the vehicle was provided so his personal vehicle would not be stranded in Louisville when he started working. It was his understanding that the only requirement left to be completed was a road test as he had undergone a drug test near his home. His job would consist of driving a Freightliner truck on routes in the southeastern states. It was his understanding he would only be in Louisville one day to take the road test and then begin work driving a truck. He was not aware of any type of orientation he would be required to undergo.

Scott Lachut ("Lachut"), the safety manager for Pegasus, testified by deposition on July 10, 2020. He evaluates all applicants and brings new hires in for orientation and testing. He testified a driver candidate initially completes an application online. The applications are screened and, if the candidate meets initial minimum requirements, the application is routed to him. Pegasus provides transportation to Louisville where initial drug testing is performed on site, a road test is administered, and other final in-person steps are completed. The candidate then

undergoes two days of orientation. Once initial requirements are met, the recruiters run motor vehicle record checks, criminal background checks, CDL checks, and perform other confirmatory steps to complete the hiring process. The initial requirements include a CDL, one year of experience, no moving violations in three years, and no accidents in five years.

Lachut stated Foley met the minimum initial requirements. The recruiter then coordinated bringing him to Louisville, which included renting a vehicle, reserving a Louisville hotel room, and scheduling a drug test at the Pegasus headquarters. A road test was to be administered and additional matters regarding HR, safety, and recruiting would then be addressed. Lachut stated a rental vehicle is provided to the candidate so a personal vehicle would not be sitting in the Pegasus lot.

The orientation process in Louisville typically takes three or four days. The drug test is administered on site, and the chain of custody of the sample is regulated by DOT. While waiting for the drug test results, the orientation is performed. Pegasus previously waited until it received the drug test before proceeding with orientation. However, some candidates obtained other employment during the waiting period. Now, the initial paperwork is completed and the road test is performed on Monday after the drug test. On Tuesday and half a day on Wednesday, candidates are in classes and payroll paperwork is completed. Once a negative DOT drug test result is received, the candidate is placed in the driver dispatch software system, given a driver code, and is considered hired. A negative drug screed in required for hiring. Other federal requirements, including obtaining a

motor vehicle record in the candidate's state, and background checks are performed prior to hiring. Pegasus considers a candidate hired if a negative drug test result is returned, and the applicant is given a driver code. The date the driver code is entered into the Pegasus system is the hire date. Successful candidates receive $80 orientation pay. Foley met the initial requirements, was invited to Louisville for further consideration, was provided a rental vehicle, and a hotel reservation was made. However, he never arrived in Louisville due to the MVA. When Foley did not arrive in Louisville, Pegasus closed his file and considered other candidates.

Lachut was informed of Foley's MVA on March 11, 2018. Lachut stated Foley had not been hired by Pegasus at the time of the MVA. Lachut admitted Pegasus allowed Foley to drive the rental car while in Louisville. With the exception of the road test, non-employees are not allowed to drive commercial vehicles. Pegasus paid for the rental vehicle. The purpose of renting a vehicle for a candidate was to make Pegasus an attractive potential employer. Pegasus did not do an in-house investigation of Foley's MVA, as he was not a Pegasus driver. Lachut recalled one other incident of a candidate involved in an accident while traveling to Louisville to undergo orientation and training.

An OSHA report completed by Pegasus dated March 15, 2018 was attached as an exhibit to Lachut's deposition, identifying Foley under the category "injured employee." In the "employee information" section, Foley's employment status is described as a "regular full-time employee" with a hire date of "03/07/2018." This report describes the occurrence of the MVA. Lachut stated that someone in the worker's compensation department completed the report and he

disagreed with the notations regarding the hire date designation, and the designation as a regular/full-time employee.

Copies of e-mails between Pegasus personnel and Lachut were attached as exhibits to his deposition. On March 12, 2018, Jodi Stephenson ("Stephenson") requested that Lachut provide Foley's birth date, hire date, and home address. Lachut responded that he did not know what hire date to use "because he never got here to start the hiring process." Lachut confirmed he believed Stephenson completed the OSHA report. Since Foley did not have a driver code, she asked Lachut for Foley's name, as she had to fill in blanks when preparing the form.

The ALJ's findings relevant to this appeal are as follows:

> Whether an employee and employer have entered into an employment relationship under the Kentucky Workers' Compensation Act is determined by reference to KRS 342.640 which states as follows:
>
> The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:
>
> > (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied … whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;
> > 4) Every person performing services in the course of the trade, business, profession, or occupation of an employer at the time of the injury.

Therefore, in order for Plaintiff to be found to be an employee of the Defendant, he must qualify under one of the above provisions.

KRS 342.650(1) requires that a contract of hire exist between Plaintiff and Defendant in order to support a finding that an employment relationship exists between the parties and as such, the primary inquiry in this claim is whether the parties had established or created a contract of hire by the time Plaintiff's motor vehicle accident occurred on March 11, 2018. Plaintiff asserts that he was told over the phone by recruiters for the Defendant that he had been hired following their receipt and review of his online application, that any further hiring process steps were mere formalities, and as such Plaintiff had a legitimate belief that he had been hired and was an employee. Plaintiff supports this argument by referencing emails between Defendant personnel on March 7, 2018 that stated "This driver (James Foley) is ready to come to work March 12 class, has 7+ years experience", as well as the OSHA incident report which identified Plaintiff as an "injured employee", described him as a "regular/full-time employee" , and stated his hire date was "3/7/18", as well as by the provision of the rental car by the Defendant to the Plaintiff for transportation to Louisville to begin work.

However, Defendant asserts that while Plaintiff had initiated the hiring process by applying online and had progressed through the process by meeting the initial/minimum qualifications of possession of a CDL, sufficient experience, and a clean driving record, he merely qualified for the next step in the hiring process of coming to the Defendant's headquarters in Louisville for further hiring procedures including a road test and a drug screen, and since he never made it to Louisville as a result of the motor vehicle accident, he never completed the necessary additional steps in the hiring process and therefore never was officially or formally hired.

After reviewing the testimony regarding this issue, the ALJ concludes that while Plaintiff may have had a reasonable subjective understanding or belief that he had been hired and was an employee, because he never was able to present himself in Louisville to complete the

remainder of the hiring process, the ALJ concludes that an employment relationship between Plaintiff and Defendant in this matter was never created and Plaintiff's claim is dismissed.

In support of this conclusion the ALJ would first note that the Kentucky Supreme Court in M.J. Daly Co. v. Varney, 695 S.W. 2d 400 (Ky.1985) stated as follows in regard to a contract of hire:

> In the past this court has broadly construed the term "employer" to provide coverage within the Act. Notwithstanding, before there is an employer/employee relationship, there must be a contract of hire between the employer and the employee, expressed or implied, containing all elementary ingredients for a contract. Rice v. Conley, 414 S.W. 2d 138 (Ky. 1967).

As such for an employment relationship to be found in this matter there must be sufficient evidence to conclude that a contract of hire had been entered into by the parties. The Supreme Court addressed this issue in Graham v. TSL, LTD., 350 S. W.3d 430 (Ky. 2011) which also involved the hiring of a Kentucky resident truck driver by a trucking company located in Missouri. While the primary question in Graham was whether the claimant's contract of hire was made in Kentucky and therefore jurisdiction in Kentucky was proper, the court addressed the question of when a contract of hire was completed. The claimant asserted that his telephone call from his home in Kentucky to the Defendant in Missouri regarding the job during which an offer and acceptance was allegedly made was sufficient to create a contract of hire, and hence jurisdiction in Kentucky, while the Defendant argued that the contract of hire was not created until Plaintiff presented at the Defendant's headquarters in Missouri for additional hiring procedures such as a road test, a drug test, a physical examination, and payroll paperwork. The Court addressed the requirements necessary for the creation of a contract for hire and noted that the claimant asserted that the contract of hire was made by the telephone call at which time he accepted the Defendant's offer of

employment and that the subsequent activities performed in Missouri were "just a formality", but the Court held as follows:

> "A contract is made at the time the last act necessary for its formation is complete and at the place where that act is performed. Although a contract made by telephone is made in the place where the acceptor speaks his acceptance, the record supports the ALJ's conclusion that the parties' contract was not formed until the claimant completed various requirements in Missouri. Testimony by TSL's Vice President indicated clearly that completing the requirements was a mandatory prerequisite to any contract of hire entered into and approved by TSL. The claimant may have considered himself hired after his telephone conversation with Gage, but such evidence was not so overwhelming as to compel the ALJ to conclude that a contract was formed at that time".

As applied to the facts of this claim, the ALJ is persuaded by the testimony of Scott Lachut that no contract of hire and hence no employment relationship was created prior to Plaintiff's motor vehicle accident as the additional hiring process steps to be undertaken in Louisville including the road test and the on-site drug screen were never performed since Plaintiff never made it to Louisville. His testimony regarding the various steps necessary to complete the hiring process was reasonable and appropriate given the nature of the business and actually was essentially the same as the hiring process described in Graham which caused the ALJ to give his testimony significant weight. Further, the various emails by Defendant personnel support his testimony as they make clear that immediately following Plaintiff's accident they did not believe Plaintiff had been formally hired as he never made it to Louisville for the orientation process. These contemporaneous communications make clear that at no time did Defendant personnel consider Plaintiff to have been formally hired and that he was simply a candidate for

hire, and the Defendant's defense in this claim that there was no employment relationship was established immediately after Plaintiff's injury and was not something that was the product of a litigation strategy formulated after the filing of the instant claim. Plaintiff even admitted that he knew he had to pass the road test before he would be hired and this is further evidence of the necessity of the completion of the hiring process activities to be undertaken in Louisville which Plaintiff never was able to begin much less complete in order for an employment relationship to come into being. As such, the ALJ was persuaded that Scott Lachut's testimony was credible regarding the hiring process and the Plaintiff's inability to complete all of the hiring process steps prior to the motor vehicle injury compels a conclusion that an employment relationship was never created in this claim.

In reaching the above determination the ALJ gave significant consideration to the Plaintiff's subjective belief that he had been hired which was supported by the OSHA report which references him as a regular/full-time employee as well as an injured employee in the report and these references certainly could reflect that the Defendant had in fact made a hiring decision over the phone and did in fact considered Plaintiff to be an employee prior to the motor vehicle accident. However, the ALJ was persuaded by the testimony of Mr. Lachut that the individual that filled out the OSHA report had to fill in prepared forms necessary for the reporting of the motor vehicle accident since it involved a vehicle rented by the Defendant and driven by an employment candidate and ultimately the ALJ concluded the OSHA form did not represent compelling evidence of a decision that the Defendant had hired Plaintiff as an employee on the day of his online application, 3/7/18, or at any time prior to the motor vehicle accident. The ALJ was not convinced that the OSHA report was sufficient to overcome the credible testimony of Mr. Lachut regarding the hiring process requirements and the lack of completion of them by Plaintiff and his testimony was deemed to be more persuasive as to the exact nature of Plaintiff's employment status with the Defendant rather than implications of the OSHA form.

In further support of the determination herein of a lack of an employment relationship between Plaintiff and the Defendant, the ALJ would cite Rahla v. Medical Center at Bowling Green, 483 S.W. 3d 360 (Ky. 2016) in which the Supreme Court held that a claimant who suffered an injury in the course of a pre-employment physical was not yet an employee and therefore was not entitled to workers' compensation coverage. The Court framed the issue as follows: "The sole issue before us today is whether an interpretation barring compensation for former employees injured while completing a condition precedent to employment is consistent with the text of the statute that serves as the basis for Rahla's claim". The Court held that the Defendant's tentative employment offer required completion of a successful physical examination and drug screening prior to formal employment and since the claimant did not successfully complete the physical examination she was not deemed to be an employee. The Court went on to recognize that while Larson's treatise and some other jurisdictions deem it appropriate to treat a pre-employment physical examination as part of the employment, the Court was unwilling to follow that approach and extend workers compensation coverage to that type of condition precedent to employment. The ALJ interprets the Court's decision in Rahla not to extend coverage to a pre-employment physical as indicative of its' belief that coverage should similarly not be extended to other types of situations involving the performance of conditions precedent to employment such as in the instant claim, where the hiring process was not complete as conditions precedent, such as the road test and the drug screen, had yet to be performed.

As noted previously the ALJ believed the Plaintiff was credible and he very well may have subjectively believed he had been hired as he met the initial minimum requirements and was confident that he could pass the road test and the drug test. However, his testimony that he performed the drug test locally was deemed not to be credible especially in light of Scott Lachut's testimony that the Defendant performs drug testing on site as a chain of custody is required based on federal regulations. Nor was his testimony that he filled out W-2s and other payroll paperwork online persuasive either. As such his testimony regarding his subjective belief that he had

> been hired was insufficient to convince the ALJ that an employment relationship had been created prior to the motor vehicle accident.
>
> The Plaintiff also argued that the decision of the Supreme Court in Hubbard v. Henry, 231 S.W. 3d 124 (Ky. 2007) is supportive of a conclusion that an employment relationship should be found herein. That claim involved a Plaintiff who was injured while performing timber cutting work to demonstrate to a prospective logging employer his competence to perform the job and the Court held that since the claimant was performing actual services on behalf of the employer, an employment relationship was found to exist despite the lack of a formal contract for hire. However, that holding does not seem to apply to the instant claim as Plaintiff never performed truck driving work or any other type of service for the Defendant and as such, the ALJ was not persuaded that this case supported Plaintiff's argument that an employment relationship existed herein.
>
> Lastly, as to any implications arising from the fact that the Defendant authorized Plaintiff to rent the vehicle that he was driving when he was involved in the motor vehicle collision in order to drive to the Defendant's place of business in Louisville to complete the hiring process and begin work, the ALJ recognized that this process benefited the Defendant as it gave prospective employees incentive to seek employment with the Defendant in a competitive hiring environment. However, the ALJ concluded that the vehicle rental was nothing more than that, an inducement to apply for work for the Defendant, and not indicative of an employer-employee relationship.
>
> Given the determination herein that there was not an employer-employee relationship at the time of Plaintiff's motor vehicle accident on March 11, 2018, Plaintiff's claim is dismissed.

Foley filed a Petition for Reconsideration making the same arguments he raises on appeal. The ALJ provided the following additional findings on reconsideration, as set forth, *verbatim*:

The Plaintiff first requests reconsideration in regard to whether promissory estoppel can form a basis for a finding that a contract of hire existed between Plaintiff and the Defendant at the time of the injury. Plaintiff argues that events occurred that made Plaintiff believe that he had been promised employment by the Defendant which he relied on to his detriment Essentially Plaintiff argues that because of the assurances of employment made by the Defendant, Plaintiff engaged in activities as part of his subjective belief of employment in which he suffered his injury therefore the promises made by Defendant's personnel to him in the hiring process were sufficient to compel a finding of employment by estoppel. Plaintiff cites UPS v. Rickett, 996 S.W. 2d 464 (Ky. 1999) in support. As noted in the Opinion, there is no dispute in this claim that the Defendant made assurances or promises to Plaintiff that, if he successfully performed them, he would be hired. These promises were to present himself in Louisville on Monday morning for participation in the remainder of the hiring process, perform and pass a road test, pass a drug screen, and complete other paperwork. Plaintiff did not complete any of these requirements as a result of his motor vehicle accident and the ALJ ruled that Plaintiff was not far enough along in the hiring process to be considered an employee as a matter of law, regardless of his subjective belief of same. The UPS case concerned an airline pilot for a UPS contract airline who thought that UPS was going to hire him when it created its own air service so he did not consider other employment, and then he sued UPS when it did not actually hire him. He alleged fraud and detrimental reliance and he prevailed at trial and the jury award was affirmed. However, this case does not seem applicable to the situation herein, as there certainly was no fraud on the part of the Defendant as they were willing to consider hiring Plaintiff provided he presented himself in Louisville and completed the appropriate hiring process requirements. If Plaintiff is arguing that the motor vehicle accident Plaintiff was involved in after fueling the rented vehicle so that he could drive to Louisville for completion of the hiring process constituted detrimental reliance, the ALJ is not convinced. The fact remains, as set forth in the Opinion, that the Kentucky Supreme Court seemed to make clear in Rahla, that injuries that occur during the preliminary

aspects of the hiring process are not deemed to have occurred in the course and scope of employment and that is the exact situation the facts here present. Plaintiff was simply a candidate for hire who never completed the hiring process and as such, he was not injured in the course and scope of his employment as no employment relationship existed at that time. The elements of estoppel were set forth by the Kentucky Court of Appeals in Gray v. Jackson Purchase Prod. Credit, 691 S.W. 2d 904 (Ky. App. 1985), as follows: 1. Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; 2. The estopped party is aware of these facts; 3. These facts are unknown to the other party; 4. The estopped party must act with the intention or expectation his conduct will be acted upon; and 5. The other party in fact relied on this conduct to his detriment. Considering the facts herein in light of these elements, the ALJ concludes that promissory estoppel was not established. The ALJ was not persuaded that at any time did the Defendant represent or conceal material facts, rather the ALJ was persuaded by the testimony of Scott Lachut that Plaintiff was advised of the requirement that he present himself in Louisville for the completion of the hiring process, and the Plaintiff conceded that he was aware of the necessity of completing the road test. The Defendant was at all times willing to hire Plaintiff if he did in fact present himself in Louisville and complete the hiring process, he simply was unable to because of the motor vehicle accident, and it cannot be said that Plaintiff relied on the potential job offer to his detriment. Considering this argument, the ALJ concludes that Plaintiff has failed to establish promissory estoppel as a basis for the finding of an employment relationship.

The Plaintiff also argued that Plaintiff was performing services that benefited the Defendant's business at the time of his injury, and makes reference to Hubbard v. Henry, 231 S.W. 3d 124 (Ky. 2007). However, as noted in the Opinion, the Supreme Court in Hubbard found an employment relationship as the claimant therein was actually performing work activities for the Defendant on a trial basis. At no time was Plaintiff herein performing work for the Defendant and as such, the Plaintiff's Petition on this issue is without basis.

> Lastly Plaintiff argues that Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W. 3d 456 (Ky. 2012) applies to the facts herein. However, that case concerned an admitted employee who was injured on the way back to Kentucky from New York after traveling for work to New York and then staying there for personal reasons for a period of time before returning to Kentucky. The case concerned the going and coming rule which is only applicable to employees and is insufficient to be utilized to establish an employment relationship.
>
> As such, the Plaintiff's Petition for Reconsideration is overruled.

On appeal, Foley argues the ALJ erred in failing to find an employment relationship. Foley contends he was induced and detrimentally relied upon assurances from the Pegasus agents. Foley argues the facts in this claim meet the elements of promissory estoppel set forth in Gray v. Jackson Purchase Production Credit, 681 S.W.2d 904 (Ky. App. 1985). That case establishes that estoppel arises where the promisor through acts, language, or silence, either misrepresented or concealed material facts that were known to that party but unknown to the promisee. The promise must show he reasonably relied on the promise to his detriment.

Foley states recruiters told him he was hired in the March 7, 2018 phone call, and a leased vehicle for him. Foley notes promissory estoppel was found to apply to employment contracts in UPS v. Rickert, 996 S.W.2d 464 (Ky. 1999). In Foley's case, the ALJ relied on Graham v. TSL, LTD, 350 S.W.3d 430 (Ky. 2011) and Rahla v. Medical Center at Bowling Green, 483 S.W.3d 360 (Ky. 2016). Foley argues these cases can be distinguished. He notes Graham addressed jurisdiction, not the requisites for creating a contract for hire under KRS 342.640(1). Foley notes

in Rahla it was clear the applicant knew she had to complete a successful physical examination before she would be hired. Foley contends he was told he was hired by the recruiter, and was not advised of other conditions. He was not told he would have to find his own way home from the Pegasus yard in Louisville if he was not hired. Foley argues the ALJ failed to recognize he was performing services benefitting Pegasus. Foley cites Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007) as recognizing an alternative basis for establishing an employment relationship. Here, the ALJ distinguished the case, stating Foley "never performed truck driving work or any other type of service for the Defendant." Foley observes the ALJ did recognize that the practice of renting vehicles benefited Pegasus.

Foley also contends Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456 (Ky. 2012) is applicable to this claim. There, Mandujano hauled horses to a New York racetrack, and decided to stay there for purely personal reasons. The Supreme Court held a trip is personal if it would have been made without regard to its business purpose. By contrast, the trip is work-related "if it would have been made regardless of the private purpose or made by someone even if it had not coincided with the employee's personal journey." Id. at 462. Foley states he had no reason for renting a vehicle and travelling to Louisville, especially if he had no ride home unless he passed additional testing. It was only at the direction of his employer that these steps were undertaken. Thus, the trip cannot be viewed as personal.

As the claimant in a workers' compensation proceeding, Foley had the burden of proving each of the essential elements of his cause of action. Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find the ALJ did not err in his determination that an employer-employee relationship did not exist at the time of the alleged injury, and the evidence does not compel a contrary result. KRS 342.640 states as follows:

> The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:
>
> (1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied. . . whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;
>
> . . . .
>
> (4) Every person performing services in the course of the trade, business, profession, or occupation of an employer at the time of the injury.

The Kentucky Supreme Court has held an "employee" pursuant to KRS 342.640 must be an employee for hire because "the essence of compensation protection is the restoration of a part of wages which are assumed to have existed." Hubbard v. Henry, supra, (citing Kentucky Farm & Power Equipment Dealers Assoc., Inc. v. Fulkerson Brothers, Inc., 631 S.W.2d 633 (Ky. 1982)). In Hubbard, the Court also stated KRS 342.640(4) does not refer to a contract for hire. It protects workers who are injured while performing work in the course of an employer's business by considering them as employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was performed with no expectation of payment or that the worker was a prisoner.

The Kentucky Supreme Court's decision in Rahla is applicable to this case. In Rahla, the claimant received a written offer for a position contingent upon passing a physical examination and drug screen. Although she completed a physical examination, she alleged she injured her neck during the testing process. The ALJ

found she was not "in the service of, under any contract of hire with, or performing any service in the trade, business, profession, or occupation of" the alleged employer at the time of her injury. The Workers' Compensation Board affirmed the ALJ's ruling, and the Kentucky Court of Appeals agreed Rahla was not an employee when she presented for a physical examination. In affirming the Kentucky Court of Appeals, the Court stated as follows:

> The Kentucky Worker's Compensation Act offers a sweeping understanding of who, precisely, is an "employee" protected under its statutory plan. In addition to covering individuals formally employed or acting under contract, the Act also includes "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury." So under the statutory plan, Rahla potentially qualifies under two scenarios: either she was employed at the time of the examination, or the physical examination conferred some sort of benefit to the Medical Center's business.
>
> Nothing in the record suggests Rahla was employed by the Medical Center when she participated in the physical examination. She received confirmation of her hiring *after* the examination was completed. And her first day of work at the Medical Center occurred three weeks later. It is clear from the Medical Center's tentative offer that a successful physical examination and drug screening was an express condition precedent to formal employment. So Rahla does not qualify as an employee under KRS 342.640(1).
>
> Rahla's claim thus turns on whether completing the physical examination is a "service" in the course of the Medical Center's business. We have expanded on this qualification, holding that the Act "protects workers who are injured while performing work in the course of the employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was

> performed with no expectation of payment." There are two key takeaways from this elaboration in light of Rahla's claim. First, we do not consider the physical examination "work" in furtherance of the Medical Center's business. Rahla offered the Medical Center no material benefit; in fact, she was the primary beneficiary of the examination. It is of no consequence to the Medical Center whether she completed the examination or not.
>
> Second and most critically, we envision no scenario where Rahla could possibly expect payment for the physical examination, even absent the Medical Center's clear statement that passing the physical is prerequisite to official employment. In fact, had she failed the physical examination and the Medical Center declined her employment, we doubt this claim would even exist. No employment relationship existed with the Medical Center when the injury occurred. And we will not go beyond the Act's comprehensive sweep of a qualifying "employee" to a much broader relationship *ex nihilo*. The text of the statute denies her compensation because she was not an employee at the time of her injury.
>
> Id. at 361- 362.

Here, substantial evidence supports the ALJ's finding that Foley was only a potential employee at the time of the MVA. He was in the process of completing additional steps necessary to establish an employer-employee relationship. Foley's testimony establishes at the time of his injury he understood he needed to complete required testing in Louisville as part of the hiring procedure. The ALJ found Lachut's testimony credible that Foley was informed his hiring was contingent on completion of the remaining requirements in Louisville. Foley admitted he was required to take a driving test in Louisville. The ALJ correctly noted the facts in this case are readily distinguished from those in Hubbard. In that case, the potential employee was engaged in cutting timber on a trial basis. He was

performing work that was within the regular course of the employer's business. Here, as noted by the ALJ, Foley was not performing any truck driving work for Pegasus. The facts in the case *sub judice* are more like the situation in Rahla than in Hubbard. Just as the physical examination in Rahla was not considered as "work" in furtherance of the employer's business, we do not consider the travel related to applying for a job as "work" in furtherance of Pegasus's business.

The ALJ specifically noted Foley was a job applicant seeking a position at Pegasus who recognized he was required to complete pre-hire testing procedures in order to be considered for a position at Pegasus. Foley understood his potential hiring by Pegasus was conditioned upon the successful completion of a road test, and he had to successfully complete other pre-conditions in order to be hired. Kentucky law offers a comprehensive definition of qualifying employees which does not encompass Foley's status at the time of his injury. The evidence does not compel a finding that Foley was an employee pursuant to KRS 342.640(1) or (4). Because the ALJ performed the proper analysis, his decision is supported by substantial evidence, and no contrary result is compelled, we affirm.

Lastly, the evidence falls short of compelling a finding that Foley has established the elements necessary for the application of promissory estoppel. The ALJ was faced with conflicting testimony regarding what was communicated to Foley regarding the hiring process. The ALJ found Lachut's testimony more credible than Foley's. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to

compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Pegasus notes Foley picked up the rental truck with a full tank on March 10, 2018, and the accident occurred on March 11, 2018. The accuracy of documents establishing these facts was not disputed. Pegasus notes Foley somehow consumed enough gas to require refueling before leaving for Louisville. Pegasus contends the fact that the tank needed refueling suggests Foley was using the truck for personal purposes. Thus, Pegasus contends the trip to the gas station was a personal errand, necessitated by personal activities. Pegasus concludes, "It is therefore rather disingenuous to claim that this errand was made necessary by Pegasus supplying him a ride to his interview the following day."

Foley contends Pegasus is raising a new issue of whether he was acting outside his employment. We view the inclusion of the argument by Pegasus as a rebuttal to Foley's argument that refueling the truck was in service to Pegasus. The facts noted by Pegasus are in evidence and could be considered regarding whether filling the truck with gas was in service of the employer. The record clearly contains substantial evidence that the trip during which the MVA occurred benefitted Foley. A reasonable inference from the evidence is that Foley had consumed enough gas through personal use of the vehicle to require a fill up before he could complete the trip to Pegasus. Thus, it cannot be said the record compels a finding that the MVA occurred while Foley was providing a service to the employer.

Accordingly, the January 8, 2021 Opinion and Order and the February 23, 2021 Order on Petition for Reconsideration rendered by Hon. Thomas G. Polites, Administrative Law Judge, are hereby **AFFIRMED**.

Finally, Foley requested an oral argument. Having reviewed the record, we conclude an oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

_____
SCOTT BORDERS, MEMBER
WORKERS' COMPENSATION BOARD

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER: **LMS**

HON JOHN F KELLEY
303 S MAIN ST
LONDON, KY 40741

COUNSEL FOR RESPONDENT: **LMS**

HON JOHANNA F ELLISON
300 WEST VINE ST, STE 600
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE: **LMS**

HON THOMAS G POLITES
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601