

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 22, 2020

CLAIM NO. 201801235

RICKY HAMM, JR.

PETITIONER

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

JAMES HAMM D/B/A
HAMM GENERAL CONTRACTORS;
UNINSURED EMPLOYERS' FUND; AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Ricky Hamm ("Hamm") appeals from the Opinion and Order rendered January 17, 2020 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ found Hamm failed to establish he was employed by Hamm General Contracting on the date of injury and dismissed his claim. Hamm also appeals from the February 10, 2020 Order on petition for reconsideration.

On appeal, Hamm argues the ALJ failed to address the contested issue of up-the-ladder liability in the order on reconsideration. Hamm also asserts the parties stipulated at the Benefit Review Conference (“BRC”) that an employment relationship existed and Hamm sustained a work-related injury on May 15, 2017. Therefore, he argues the ALJ was compelled to find in his favor on the issue of whether there was an employment relationship. We vacate and remand for additional findings of fact and an analysis addressing the contested issue of up-the-ladder liability.

Hamm filed a Form 101 asserting he injured his left eye on May 15, 2017 while employed by Hamm General Contracting as a construction laborer. Hamm alleged he was operating a saw when a piece of the guard struck him in the left eye. The Form 104 indicates Hamm worked for Hamm General Contracting as a laborer “off and on” from 1994 to 2017. The Uninsured Employers’ Fund (UEF”) was joined as a party since Hamm General Contracting did not have a workers’ compensation insurance policy in effect at the time of the alleged injury.

In support of his claim, Hamm filed the June 6, 2017 treatment note from Helderman and Jacobs Vision Center. It noted that, “about 2½ weeks ago pt. using chop saw, blade hit guard and shattered it a piece hit him in the eye. He thought it came out. Couple days later was grinding concrete and something went in eye, but he thought it came out. A couple days later eye became red, and watering a lot, and painful.”

The UEF and Hamm General Contracting filed Form 111s denying the claim. Both parties asserted Hamm was not employed by Hamm General

Contracting at the time of the alleged injury. The claim was subsequently bifurcated on the issue of employment relationship by order dated December 17, 2018.

Hamm filed the Kentucky Department of Workers' Claims Investigative Report dated September 17, 2018. The investigator noted he contacted James Hamm ("James"), the owner of Hamm General Contracting (and Hamm's uncle), on August 28, 2018 by telephone. At that time, James advised Hamm had not worked for him in over two years. The next day, the investigator called Hamm who reported he was working for his uncle on May 15, 2017 at a residence in Paris, Kentucky owned by Greg Spivey ("Spivey"). Hamm described the May 15, 2017 work accident and stated Jason Prater ("Prater") witnessed the incident. The investigator spoke with Spivey on September 4, 2018, who verified he hired Hamm General Contracting to hang crown molding and that they were at his residence on May 15, 2017. The investigator spoke with James again on September 10, 2018. At this time, James advised he was working for himself at the time of the alleged incident. He advised all of the jobs were contracted to subcontractors. The investigator noted James stated that if Hamm was working at the Spivey jobsite, it was as a subcontractor. James asserted he had a subcontractor agreement with Hamm. James did not know anyone by the name of Prater. The investigator spoke with Prater on September 10, 2018. Prater reported he was working for James the day Hamm was injured and witnessed the accident.

Prater testified by deposition on October 11, 2019. He asserted he worked for Hamm General Contracting for approximately three or four weeks. Prater testified he worked with Hamm on a job located in Paris, Kentucky and

witnessed the May 15, 2017 accident. On the day of the accident, he and Hamm were hanging crown molding. Prater stated he did not subcontract any work from Hamm General Contracting or James. Prater considered himself an employee of Hamm General Contracting and was paid by the hour in cash.

A hearing was held on November 19, 2019. The ALJ reiterated, “The sole issue to be decided in this bifurcated matter is the issue of the employment/relationship of the plaintiff.” Hamm, Kevin Hall (“Hall”), Dakota Middleton (“Middleton”), Clayton Loy (“Loy”) and James testified at the hearing.

Hamm testified he worked for Hamm General Contracting “off and on pretty much since I was about 15 or so” performing carpentry work. The company performed construction and remodeling work. He testified that James, the owner of Hamm General Contracting, is his uncle. Hamm testified he had been working for Hamm General Contracting for about three or four months in 2017 at the time of the May 2017 injury. At the time of the injury, Hamm had been working on the Spivey jobsite in Paris, Kentucky for several days remodeling the residence. Prior to the accident, Hamm had painted. Hamm testified that on May 15, 2017, he and Prater were hanging crown molding. As he was cutting a board with a saw, the blade hit the guard causing it to shatter. A piece of the guard struck his left eye. Hamm stated he reported the accident to James the same day.

Hamm testified he was paid in cash by James on an hourly basis, and taxes were not deducted from his pay. Hamm testified James directed and controlled the work he performed, and provided the tools and materials necessary to complete the job, including a chop saw, nail gun, air compressor, and wood. Hamm insisted

he did not subcontract or bid the crown molding work from James. Hamm did not speak with Spivey about any aspect of the remodeling job. Hamm believes he was an employee of Hamm General Contracting at the time of his injury.

Hamm acknowledged he did at times bid on jobs from James, but-not on the job being performed at the time of the May 2017 accident. Subsequent to the Spivey job, Hamm testified he bid on the Bud Wells job. He paid his own employees, Hall and Chad Reynolds, in cash. He admitted he was a subcontractor on that job, but he did not obtain workers' compensation insurance or have a business license. Hamm could not recall how long he worked on the Spivey job after the work accident and did not remember when he began working the Bud Wells job. Hamm could not recall an incident where he was riding in a car with Middleton and Middleton's father, and had burned his eye with a cigarette.

James testified he is a general contractor and is in the construction business. He contracted with Spivey to perform residential remodeling work for approximately \$30,000. The Spivey job entailed remodeling a residential home in Paris, Kentucky and took approximately seven months to complete. James testified he had already been working on the Spivey job for about one or two months when Hamm began working on it. Hamm performed framing and some drywall work. James stated Hamm worked for a couple of weeks and then he "ended up firing him." Thereafter, James estimated he worked on the Spivey job for another month or so. Once the Spivey job was completed, James went to the Bud Wells job. James testified he let Hamm bid on work at the Bud Wells job. James testified it was his

common practice to let workers bid on specific parts of the job. James did not recall Prater being at the Spivey jobsite.

On cross-examination, James testified as follows regarding the professional relationship between he and his nephew:

Q: And in terms of the carpentry work, you hired your nephew to do some carpentry work there?

A: I briefly brought him in at the beginning, yes.

Q: And he was an employee at the time?

A: No, I paid him by the job. . . . I bring him in to bid jobs.

Q: So you're saying that he bid on what kind of work there?

A: Depends on what it was. That - - whenever he come in, it's probably framing or maybe doing some drywall because usually that's what he does.

Q: So you got the job from Mr. Spivey and then you looked around to find some people to do the work, to bid on the work?

A: To get help, yes, I do.

Q: So the price is already set when you do - - ask people to do the bidding?

A: Yes.

Q: And do you also pay people by the hour to work on your jobs?

A: No.

Q: It's all bid out?

A: It's all bid out.

....

Q: You expect us to believe that all these individuals that came in and did the painting, you're saying you had the painters bid, the carpenters bid - -

A: (Interrupting) Yes.

Q: - - the floors bid - -

A: (Interrupting) Yes.

Q: - - the plumbers bid, everybody did a bid?

A: Yes.

Q: And they all you - - and you ask - - and they all had workers' compensation coverage?

A: I don't know that.

Q: You didn't ask?

A: No. . . . most of them would sign a document to me that they're responsible for their own insurance and own taxes.

Q: You were the general contractor on this job, correct?

A: Yes.

James stated he provided the wood for the framing on the Spivey job, and he left his tools on the job site for any of the workers to use. James was unable to locate the subcontracting agreement with Hamm. James acknowledged he did not carry workers' compensation insurance in May 2017 because he could not afford it. James asserts Hamm told him he had insurance when he bid on the work, but did not state what kind of insurance it was.

Hall testified he is a construction laborer and he worked on the Spivey job for a few weeks. Hall stated James had hired him to clean and perform any necessary job tasks and paid him by the job. Hall testified he did not see either

Hamm or Prater at the Spivey jobsite. Hall testified that Hamm hired him to work on the Bud Wells job after the Spivey job, and he was paid in cash. Hall testified Hamm told him about an incident where ash flew into his eye in the car while they were working at the Bud Wells job.

Middleton testified he worked for his father, who is now deceased. Middleton and his dad performed flooring and tile work on the Spivey job, which was one of the last jobs to be performed. Middleton stated his father contracted with James to get the job. Middleton estimated he worked at the Spivey jobsite for approximately one month before going to the Bud Wells job. Middleton testified he did not see Hamm or Prater during the time he worked at the Spivey job. Middleton could not recall if the trim carpentry or construction work had been completed by the time he and his father performed flooring work on the Spivey job. Middleton acknowledged flooring work typically occurs near the end of a construction remodeling job.

Middleton testified he met Hamm on the Bud Wells job, and his father occasionally gave rides to Hamm. Middleton testified that during one such ride, he witnessed a cigarette hitting Hamm in the eye after he attempted to flick it out the window.

Loy testified he is a construction laborer, and was brought in to perform sanding and painting on the Spivey job. He estimated he worked on the Spivey job for a couple of weeks. During this time, Loy testified he did not see or meet either Hamm or Prater. Loy testified he went to the Bud Wells job after the

Spivey job. He testified he worked for Hamm at the Bud Wells job, and did sanding and painting. Hamm paid him in cash on a weekly basis.

A BRC was held on November 19, 2019. The following stipulation was entered: “2. An employment relationship existed between the plaintiff and defendant-employer at all times herein relevant. yes. 3. Plaintiff sustained a work-related injury or injuries on: 5/15/17.” The BRC also noted the claim was “Bifurcated on the issue of employment relationship.” After the hearing, the BRC was amended to include “up-the-ladder” liability per KRS 342.700(2) as a contested issue based upon the testimony elicited at the hearing.

In the January 17, 2020 opinion, the ALJ made the follow findings of fact and conclusions of law *verbatim* in dismissing the claim:

Employment Relationship

10. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker’s compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App. 1979).

11. The Plaintiff has asserted that he was an employee of Hamm General Contracting on the “Spivey” job and that he injured while working there while installing crown molding on May 15, 2017.

12. The proof provided to support this allegation is the testimony of the Plaintiff and of Jason Prater. The ALJ finds that the Plaintiff’s credibility in this matter is questionable at best and Jason Prater denied being aware of the exact date at the final hearing.

13. The evidence presented by the Defendant included the testimony of Kevin Hall, Dakota Middleton, Clayton Loy, and James Hamm. All of these witnesses contradicted the Plaintiff’s self-serving

testimony and calls into question whether the Plaintiff was even present at the Spivey job on May 15, 2017.

14. Mr. Loy testified that he was present on the Spivey job for the last two weeks and that he never saw the Plaintiff during that time frame and actually did not even meet the Plaintiff until after the Spivey job had ended.

15. Mr. Middleton testified that he was present on the Spivey job for the last month and that he never saw the Plaintiff there.

16. James Hamm testified that the Plaintiff was terminated at least thirty days prior to the end of the Spivey job and that he never alerted him about an eye injury.

17. The ALJ finds that the Plaintiff has failed to establish with credible evidence that he was an employee of Hamm Contracting on the date of injury.

Hamm filed a petition for reconsideration requesting additional findings of fact regarding whether he was an employee of Hamm General Contracting. Hamm requested additional findings of fact and conclusions of law as to whether he was an employee or a subcontractor for James on the Spivey job, and to address whether Hamm General Contracting was an up-the-ladder employer pursuant to KRS 342.700(2). Hamm noted this was added as a contested issue after the hearing based on James' testimony asserting he was a general contractor and Hamm was a subcontractor.

The ALJ stated as follows in the February 10, 2020 Order:

This matter is before the ALJ upon the Petition for Reconsideration filed by the Plaintiff seeking additional findings regarding the conclusion that the Plaintiff failed to credibly

establish an employment relationship on the date of injury. The Plaintiff cites to the deposition testimony of James Hamm who denied that the Plaintiff was ever an employee and did not establish any relationship on the date of injury claimed. The ALJ therefore declines to disturb the Opinion and Order issued on January 17, 2020.

On appeal, Hamm argues the ALJ failed to address the contested issue of up-the-ladder immunity pursuant to KRS 342.700(2). Hamm noted James acknowledged he worked on the Spivey job and he insisted Hamm bid on the job. After the hearing, Hamm moved to amend the BRC Order to include the issue of up-the-ladder liability based upon James' testimony. The motion was granted by the ALJ on January 2, 2020. Hamm notes the ALJ did not address this issue in the Opinion or Order on petition for reconsideration despite the fact he had requested additional findings on this issue. Hamm also argues the stipulations contained in the BRC Order compel findings of an employment relationship and that he sustained a work related injury on May 15, 2017.

We begin by noting the ALJ granted Hamm's motion to bifurcate this claim on the issue of employment relationship in an order dated December 17, 2018. The November 19, 2019 BRC Order similarly reflects the claim was bifurcated on the issue of employment relationship. Subsequent to the hearing, Hamm moved to add up-the-ladder liability pursuant to KRS 342.700(2) as a contested issue based upon James' hearing testimony that Hamm was a subcontractor and that he bid on jobs at the time of the Spivey job. The ALJ granted the motion to add the contested issue on January 2, 2020.

In the Opinion, the ALJ noted the testimony of Hall, Middleton, Loy, and James contradicted Hamm's self-serving testimony and calls into question whether Hamm was even present at the Spivey job on May 15, 2017. The ALJ found Hamm "failed to establish with credible evidence that he was an employee of Hamm Contracting on the date of injury" and dismissed his claim. On appeal, Hamm does not challenge the ALJ's finding he was not an employee of Hamm General Contracting at the time of the work injury. However, the ALJ made no analysis or findings of fact regarding the issue of up-the-ladder liability pursuant to KRS 342.700(2). Likewise, the ALJ did not make any additional findings or determinations in the Order on petition for consideration despite Hamm's request for additional findings regarding whether he was subcontractor on the Spivey job, and whether Hamm General Contracting was an up-the-ladder employer pursuant to KRS 342.700(2).

Therefore, we vacate and remand for additional analysis and findings of fact addressing up-the-ladder liability in light of the fact the claim was bifurcated on the issue of employment relationship and the added issue of up-the-ladder liability. We also note Hamm requested additional findings of fact on the issue of up-the-ladder liability pursuant to KRS 342.700(2) in his petition for reconsideration.

We find no merit in Hamm's assertion the ALJ was compelled to find the existence of an employment relationship and that he sustained a work-related injury on May 15, 2017. The claim was clearly bifurcated on the issue of employment relationship and the evidence of record only addressed this issue. We acknowledge the November 19, 2019 BRC Order notes an employment relationship

existed between the plaintiff and defendant-employer at all relevant times, and that Hamm sustained a work-related injury on May 15, 2017. However, in the same BRC Order, it is also noted the claim was “Bifurcated on the issue of employment relationship.” The ALJ reiterated at the hearing that, “the sole issue to be decided in this bifurcated matter is the issue of the employment/relationship of the plaintiff.” Therefore, we find the ALJ was not compelled to find the existence of an employment relationship and that Hamm sustained a work-related injury on May 15, 2017. However, the ALJ is required to address Hamm’s request for additional findings, and is directed to address his request on remand. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The evidence must support any determination by the ALJ after performing the appropriate analysis.

Accordingly, the January 17, 2020 Opinion and Order, and the February 10, 2020 Order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** for additional findings addressing the contested issue of up-the-ladder liability.

ALL CONCUR.

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