

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: NOVEMBER 1, 2011

CLAIM NO. 201000832

DAIRY FARMERS OF AMERICA, INC.

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

EDWARD DEWAYNE WEST (DECEASED),
JOSEPH WEST (ADMINISTRATOR),
JEFF HALE d/b/a HILLSIDE FARMS,
UNINSURED EMPLOYERS' FUND,
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

ALVEY, Chairman. Dairy Farmers of America, Inc. ("DFA") seeks review of the opinion and order rendered July 26, 2011, by Jeanie Owen Miller, Administrative Law Judge ("ALJ"), finding it responsible for payment of benefits to Joseph West, Administrator of the Estate of Edward Dewayne

West ("West"), pursuant to KRS 342.610(2), since the deceased was an employee of Jeff Hale d/b/a Hillside Farms ("Hale"). No petition for reconsideration was filed.

West died due to injuries sustained from a motor vehicle accident which occurred while transporting milk for Hale. On appeal, DFA argues the ALJ erred in finding it responsible for payment of benefits pursuant to KRS 342.610(2) because Hale had no workers' compensation insurance in effect on the date of the injury. We affirm.

There is no dispute West was employed by Hale. Likewise, it is undisputed West died as a result of injuries sustained in a motor vehicle accident while transporting milk in the course of his employment with Hale. It is also undisputed Hale and DFA entered a contract for which Hale transported milk for FDA's clients.

Lanna Hale testified by deposition on November 29, 2010. She is married to Jeff Hale who owned and operated Hillside Farms and Hale's Trucking. Neither business was incorporated, and both were operated from the same location utilizing the same checking account. Taxes for the farm and trucking business were filed jointly. Hale transported raw milk and nothing else. She testified DFA had transportation contracts with the area dairy producers, including Hale, to haul raw milk. She also

testified Hale had previously maintained worker's compensation insurance coverage for its drivers, but no policy was in effect at the time of the accident.

Steven Michael Ericksen ("Ericksen"), area manager for DFA, testified by deposition on May 10, 2011.

He described DFA as a milk marketing cooperative stating:

The primary purpose is to provide marketing security for dairy farmers and to market their raw milk as advantageously as we can to the benefit of our membership, which is the dairy farmer.

. . .

We - - dairy farmers own the cooperative, but keep in mind they are busy producing the milk twice a day or three times a day at the farm, and so the milk hauler plays an integral part in that he's got to be the one to take the trucks to the dairy farm, to accurately weigh and sample the milk, load the milk on his truck, and carry it to a processing plant in order for the milk to be marketed.

DFA provides multiple services to dairy farmers in addition to transporting raw milk. DFA owns no trucks and contracts with outside haulers to provide that service. Transportation of raw milk is a necessary part of the operation. Although referred to as a cooperative, DFA is a corporation owned by individual farmers.

A copy of the contract between DFA and Hale was attached as an exhibit to Ericksen's deposition. The contract states:

DFA is engaged in the collective marketing of the milk produced by its member dairy farmers ("Members"). Hauler is an independent contractor engaged in the business of transporting unprocessed milk in bulk from dairy farms to locations designated by DFA. DFA desires to engage Hauler to perform certain transportation services for designated Members and other milk producers.

. . .

Hauler shall receive from DFA, and DFA only, all instructions, rules and procedures ("instructions") governing or relating to the providing of transportation services hereunder. Hauler shall strictly comply with such instructions. It is contemplated the instructions shall include subjects such as the inspection and sampling of unprocessed milk in the farm bulk tank(s) or silo(s) before loading, time and place for delivery, practices designed to protect public health, policies, and procedures for maintaining good will and patronage between DFA, its members, employees and customers. If Hauler disagrees with any instruction, rule, policy or procedure, Hauler shall immediately communicate such disagreement to DFA. Hauler agrees to fully comply with such instructions until the disagreement is resolved. Failure by Hauler to comply shall constitute a breach of this Agreement.

. . .

Hauler agrees to obtain and maintain in full force and effect policies of insurance covering property damage in an amount not less than \$250,000, cargo insurance in an amount of not less than the market value of a load of unprocessed milk, and public liability insurance in an amount of not less than \$500,000 with respect to any one person and \$1,000,000 with respect to any one accident. Hauler shall also obtain and maintain in full force and effect appropriate workers' compensation insurance and other insurance as may be required by state or local law. Further, Hauler agrees to indemnify and hold DFA harmless from and against any and all claims, demands, lawsuits, losses, damages, costs or expenses of whatsoever nature, arising out of the Hauler's performance or lack of performance under this Agreement.

In the opinion, award and order, pertinent to the issue on appeal, the ALJ found as follows:

Whether there was a contractor relationship between FDA and Hale and the application of KRS 342.610(2) and KRS 342.700(2).

The UEF argues that "up-the-ladder" liability applies for the workers' compensation benefits due to the estate of West as against DFA. The UEF points out that there is no dispute that Hale was under contract with DFA and that the contractual relationship between Hale and DFA provides the basis for DFA assuming the role of the statutory employer per KRS 342.610(2). For the following reasons, I agree.

KRS 342.610 provides in part:

[e]very employer subject to this chapter . . . liable for compensation for injury . . . without regard to fault as a cause of the injury. KRS 342.610(1).

The statute also makes "[a] contractor who subcontracts all or any part of a contract . . . liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter." KRS 342.610(2). The statute further provides "A person who contracts with another . . . [t]o 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." Id.

The purpose of this statute 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. vs. Cain, 236 SW3d 579, 585 (Ky. 2007).

The question of whether a particular contractual relationship satisfies KRS 342.610(2)(b) must be answered on a case-by-case basis, by examining 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]."

Without question FDA contracted with Hale to "have work performed" i.e. the hauling of its members' milk (for which DFA paid Hale directly) to processing plants. The contract specifies the exact details of this work for which DFA paid Hale. Hale, without question, fits the definition of a "subcontractor" as defined under KRS 342.610(2)(a).

Here, the contract between DFA and Hale included not only the payment of services, but the services were specifically described in the contract. These services were not only part of the work DFA performed, but a vital part of its business, i.e. the "collective marketing of the milk produced by its member dairy farmers". The contract specifies that DFA "engaged Hauler to perform certain transportation services for designated members and other milk producers".

The DFA argues essentially because the association performs other tasks for its membership, it is a "mere facilitator of the interest of its membership, a dairy cooperative, and not an entity whose primary interest is the hauling of raw products for profit". However that is not the statutory test. The contract and the relationship between the parties overwhelmingly establishes[sic] that a contractor/subcontractor relationship, as it is defined in the statute, existed between DFA and Hale. DFA contracted with Hale to perform a function that is a regular and recurrent part of DFA's business of marketing its members' products, in

this case, raw milk. Hale was performing work that DFA otherwise would have had to perform for itself and/or contract with other subcontractors (haulers) to perform. Even that possibility is contemplated and provided for in the contract. Therefore, Hale was a subcontractor as defined under KRS 342.610(2)(b).

In Cain, 236 SW3d at 588, supra, the Supreme Court of Kentucky determined the proper analysis KRS 342.610(2)(b) requires to answer[sic] what is a "regular and recurrent part of the work of the trade, business, occupation, or profession" of a contractor. Work of a kind that is a "regular or recurrent part of the work of the trade, business, occupation, or profession" . . . [i]s work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees.

Cain, supra, also instructs 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." 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. vs. Sherman & Fletcher, 705 SW2d 459, 462 (Ky. 1986). The transporting

of milk is a vital and necessary [sic] of DFA's marketing of its members' products. This is made clear in the contract language.

Lastly, it is noted that DFA, as part of its contract with Hale, required Hale to maintain workers compensation coverage on its (Hale's) employees. It can be reasonably assumed that this provision's purposes[sic] was to escape the very situation in which DFA finds itself at present. The question was never ask,[sic] or answered, as to DFA's attempt [sic] enforce that contract provision. However, the statutory language requires the imposition of the coverage requirement be placed upon the contractor unless the subcontractor provides coverage.

For all of the above stated reasons, I find that Dairy Farmers of America was a statutory employer pursuant to KRS 342. 610 et. seq. and therefore liable for payment of the death benefit due the plaintiff pursuant to KRS 342.750.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion 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). To that end, an ALJ may even reject un rebutted medical testimony, so long as he adequately sets forth his rationale for doing so. See Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms, Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof 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 ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

It is without dispute West hauled milk for Hale pursuant to a contract with DFA. Hale paid West to drive a truck, pick up raw milk from various farm locations, and deliver it to the dairy processing facility. Pursuant to the contract, DFA paid Hale to transport and deliver the product, which it described as an integral part of its operation. Hale was required to carry its own policy of worker's compensation insurance pursuant to the contract

with DFA. Hale had no coverage in effect for his employees on the date of the accident. There is no evidence DFA ever followed through to ensure compliance with this contractual requirement.

With regard to up-the-ladder liability, KRS 342.610 provides in pertinent part as follows:

(2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

(a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or

(b) 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 subsection shall not apply to the owner or lessee of land principally used for agriculture.

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. v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986).

Despite Ericksen's testimony that DFA employs no drivers in the region, we do not believe the ALJ erred in determining the transportation of milk was a regular and recurrent part of its business, and finding DFA responsible for the payment of benefits pursuant to KRS 342.610(2). The transportation of raw milk to the processing facility is an integral part of the service DFA provides. We believe the ALJ's finding of up-the-ladder liability is precisely why KRS 342.610(2) was enacted. This fact coupled with the significant control retained by DFA pursuant to the contract constitutes substantial evidence supporting the ALJ's decision.

Accordingly, the opinion and order rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, on July 26, 2011, is hereby **AFFIRMED**.

ALL CONCUR.

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