RENDERED: March 28, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002296-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-00799

LARRY GREATHOUSE, COMMISSIONER
OF KENTUCKY DEPARTMENT OF WORKERS'
CLAIMS;
DWIGHT LOVAN, CHAIRMAN,
KENTUCKY WORKERS' COMPENSATION BOARD;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
ERIC PORTER, DECEASED, BY
BRIDGET PORTER, MOTHER AND NEXT
FRIEND OF ERICA AND EMMA,
DEPENDENTS OF DECEASED;
OLLIE PEEK; DENNIS TRAVIS; AND
EVERETT MELTON — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. The Uninsured Employers' Fund (UEF) appeals the Workers' Compensation Board's (the Board) opinion entered October 16, 2002, affirming the Administrative Law Judge's (ALJ)

opinion, order and award rendered April 30, 2002. The ALJ ordered the claim against Dennis Travis (Travis) and Everett Melton (Melton) be dismissed and further ordered that the claimants (in this case, Erica Porter and Emma Porter, dependent children of decedent, Eric Porter) shall recover from Ollie Peek (Peek) weekly benefits ($195 each), as well as, death benefits ($25,000). The ALJ's order on reconsideration entered May 30, 2002, also provided the following:

> Additionally, the Court finds Ollie Peek was an uninsured employer and has not otherwise secured the payment of compensation as provided in KRS Chapter 342. Upon the default of Ollie Peek in paying the sums awarded to plaintiffs herein, said sums shall be paid by the Uninsured Employer's Fund.

Having examined the issues, the applicable statues and relevant case law, we affirm.

On appeal, the UEF frames the question of law involved as follows:

> **Whether or Not An Error of Law Has Been Committed by the Administrative Law Judge and the Workers' Compensation Board in Ruling that Dennis Travis Was Not Ollie Peek's Partner or in a Joint Venture with Ollie Peek and Thus Equally Liable for the Award to the Claimant's Representative?**

Having thoroughly reviewed this matter and having determined that the Board's opinion succinctly and properly sets forth the facts in question and the applicable legal standard to be

applied thereto, we adopt the well-written and well-reasoned opinion of Board Member Stanley:

> The ALJ awarded death benefits to the dependent survivors ("Plaintiffs") of decedent Eric Porter ("Porter") after finding that an employment relationship existed between Porter and defendant Ollie Peek ("Peek"), an uninsured employer. The ALJ dismissed the claim against defendants Dennis Travis ("Travis") and Everett Melton ("Melton"), and ordered that benefits be paid by the UEF in the event of default by Peek. On appeal, the UEF contends that a business relationship existed between Peek and Travis in the form of either a partnership or joint venture and, therefore, Travis is jointly and severally liable for the benefits awarded. Our recitation of the facts will be limited to those pertinent to this single, narrow issue.
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> This claim arises out of an accident that occurred on November 2, 1999, when Porter suffered a fatal head injury after being struck by a tree cut down by Peek in the course of his logging operation. Peek and Travis had worked together for a number of years in the logging industry. For two years prior to August of 1999, Peek had been an employee of Travis in the occupation of tree feller. In that capacity, Peek was paid a daily salary by Travis commensurate with his experience and the going rate in the area. In August of 1999, however, Peek purchased his own logging equipment and went into business for himself. He bought a skidder and knuckle boom (or loader), as well as some chain saws. According to Peek, he purchased the saws jointly with Travis and depreciated only his share of that property. According to Travis, the saws, and all other equipment utilized in the cutting and loading of the timber, belonged to Peek alone. Travis owned the truck onto which the logs were loaded and hauled to the

sawmill. After Peek went into business for himself, he would have Travis haul the logs to the mill and the two would share in the proceeds of the sale. The owner of the land from which the timber was harvested would typically receive 50% of the sale proceeds and Travis and Peek would each receive 25%. The mill paid each gentleman his 25% share with a separate check and the two never co-mingled their funds.

Peek was responsible for any expenses associated with the maintenance or repair of his equipment, and did not contribute any money toward the upkeep of Travis's truck. Travis specifically testified that if he blew up the motor in his truck and it cost $2,000 to repair, he would bear that expenses on his own. Peek hired his own employees to assist in the cutting, trimming and loading of the trees onto the truck, at which point Travis would take over and drive the logs to the mill. Like Peek, Travis was free to hire his own help, if needed. Travis did, however, contribute one-half of the wages of Ricky Lindsey ("Lindsey"), Peek's primary tree cutter. Travis did not contribute toward the wages of any of Peek's other employees, including Porter.

Peek had hired Porter just a few weeks before the accident that is the subject of this claim to assist Peek with equipment repair and odd jobs around his farm and in his logging business. From October 1, 1999, through October 28, 1999, Peek wrote five checks to Porter that were noted to be for "wages." Those checks were drawn on a personal account shared by Peek and his wife. Peek confirmed that these were wages paid by him personally to Porter for work performed both on his farm and in the logging business. Testimony was presented from Sandy Wilkins, the child support case worker assigned to Porter's case, and she indicated that Porter had advised her before his death that he was working for Peek

performing odd jobs and was also employed in his logging operation.

Travis had noticed Porter coming around the properties where Peek had been cutting trees in the few weeks preceding the fatal accident. However, Travis thought Porter was just bored and passing the time by visiting with Peek at the job site. Travis was unaware that Peek had employed Porter both on his farm and in the timber operation. Travis did not participate in the hiring of Porter, nor did he pay any wages or other expenses associated with Porter's employment. Travis had no control or authority over Peek's employees, including Porter, or any other aspect of the cutting operation. Likewise, Peek had no say in how Travis transported the logs to the mill.

Although Peek used Travis exclusively to haul the logs he cut to the sawmills, Travis contracted with various other tree cutters in the area to haul their timber under arrangements similar to those he made with Peek. Peek would tell Travis where he would be cutting timber on a given day and Travis would arrive there with his truck to be loaded. Travis explained that it would take approximately fifteen minutes to load the trimmed logs onto the truck, at which point he would leave. Travis was not present during, and did not oversee in any way, the cutting, trimming or skidding of the trees.

Travis and Peek both denied any agreement, either express or implied, to operate as a partnership or joint enterprise. They did not hold themselves out as such to the public. They considered themselves independent contractors *vis-à-vis* one another. They did not share a checking account or otherwise co-mingle their funds. Travis kept a personal checking account and also had a checking account in the name of

his business, “Travis Logging.” Some of the logging jobs were secured by Travis and some by Peek.

The property on which they were working at the time of Porter’s death was owned by Melton, though the testimony is inconsistent as to whether Travis or Peek or both approached Melton, or he approached them to inquire about having some trees cleared. In any event, the claim against Melton as the owner of the property was dismissed, the ALJ having concluded that no employment relationship existed between Porter and Travis and that no business relationship in the nature of a partnership or joint venture existed between Travis and Peek so as to impose liability for workers’ compensation benefits on Travis for injuries sustained by Porter.

The following findings and conclusions by the ALJ are at issue in this appeal by the UEF:

> The next issue for determination is whether or not a partnership agreement existed between the Defendants, Ollie Peak ([sic] and Dennis Travis. The Administrative Law Judge is not persuaded that a partnership arrangement existed. Instead, the Administrative Law Judge is persuaded that pursuant to KRS 342.610(2) that [sic] the Defendants were in fact independent contractors as it relates to their relationship. In this instance the Defendants testified that Dennis Travis owned his own logging truck and hauled logs for various people, but was never involved in the cutting of the timber. Mr. Travis further testified he had no control over the Decedent nor did he have any control over the Defendant, Ollie

> Peak [sic] nor whom Ollie Peak [sic] hired or fired. There was no co-mingling of funds. The parties kept separate checking accounts and both the Defendants, Dennis Travis and Ollie Peak [sic] were paid by separate checks by the lumber mill. Based upon the foregoing, the Administrative Law Judge finds a partnership agreement did not exist between the Defendant, Ollie Peak [sic] and Dennis Travis and they were simply independent contractors.

The UEF relies heavily on the financial arrangement between Peek and Travis to support its argument that the ALJ erred in concluding that the two defendants were not in business together, either as partners or joint venturers. The UEF argues that Peek and Travis equally shared in the profits of the timber sales and that this fact constitutes *prima facie* evidence of a partnership. The UEF's argument in favor of finding a joint venture is based upon essentially these same facts.

It is not material whether the relationship between Peek and Travis was a partnership versus a joint venture. Liability would attach against Travis under either scenario and the legal analysis under both theories is essentially the same, a joint venture being characterized simply as an informal partnership for a limited purpose and duration. Manning v. Owens, Ky., 125 S.W.2d 753 (1939); Jones v. Nickell, et. al., Ky., 179 S.W.2d 195 (1944).

KRS Chapter 362 *eq.seq.*, the Uniform Partnership Act, is the statute governing the formation and operation of partnerships in Kentucky. KRS 362.180 sets forth the rules for determining the existence of a partnership and, as argued by the UEF,

subsection (4) of that statute provides that the receipt of "a share of the profits of a business is prima facie evidence that he is a partner in the business. . . ." The Plaintiffs respond by pointing out that subsection (3) provides that the "sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived." We agree with the Plaintiffs that there was substantial evidence from which the ALJ could conclude in the case *sub judice* that Peek and Travis shared in gross returns but not profits of their business activities.

The UEF notes that Travis paid one-half of the wages of Lindsey, a tree feller who assisted Peek on the cutting side of the operation. This, however, is the only overhead cost apparently shared by the two gentlemen. Weighed against the fact that Travis and Peek shared the expense of Lindsey's wages is a plethora of evidence establishing that Travis and Peek paid their own business expenses, including the cost of maintenance and fuel to keep their equipment operational, from their respective shares of the sale proceeds. Travis and Peek have at all times been paid separately by the sawmill. Subsequent to Porter's death, the sawmill began to withhold sums representing Lindsey's wages before issuing checks to Travis and Peek for their respective 25% share of the proceeds. However, that was not the practice at the time of Porter's death and, even still, the division of that one operating expense does not compel a finding that the monies received by Travis and Peek were "profits" rather than "gross returns."

Moreover, it must not be overlooked that KRS 362.180(4) does no more than create a rebuttable presumption. "Prima facie evidence" will allow the fact-finder to rule

in favor of the party producing that evidence, but does not compel such a result. *See* Black's Law Dictionary (7th ed. 1999). Thus, though we believe there was substantial evidence for the ALJ to conclude that Travis and Peek shared in the gross returns and the net profits of the timber sales, a contrary finding still would not compel the result urged by the UEF. The determination of whether a partnership or joint venture existed is a factual issue that requires the ALJ to consider the totality of the circumstances pertinent thereto.

In this regard, the supreme court has provides some guidance in Roethke v. Sanger, Ky., 68 S.W.2d 352 (2002). In holding that a partnership did not exist, the Roethke court cited the fact that the alleged partners did not share profits, but also considered that they did not co-own any property or the equipment used to perform the work and that each kept the money separately earned by him. Id. at 359. In the case *sub judice*, the evidence establishes that Peek owned the skidder and the loader used to cut the trees and put them on the truck which was owned by Travis individually. The evidence is conflicting as to the ownership of the saws. Peek testified that he owned them jointly with Travis and Travis testified that Peek alone owned the saws. Of course, the ALJ, as fact-finder, has the authority to determine the quality, character, and substance of the evidence, and has the sole authority to judge the weight and inferences to be drawn from that evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993); Miller v. East Kentucky Beverage /Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky.App., 909 S.W.2d 334 (1995). The ALJ may also pick and choose from conflicting evidence. Whittaker v. Rowland, KY., 998 S.W.2d 479 (1999).

In Roethke, supra, as here, it was argued that, if a partnership had not been formed, there was at least a joint enterprise. On that issue, the court stated, "[A] joint enterprise is 'an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses.' Eubanks v. Richardson, Ky., 353 S.W.2d 367, 369 (1962); *see also* Drummy v. Stern, Ky., 269 S.W.2d 198, 199 (1954)." Having concluded that there was no agreement as to the sharing of profits or losses, and that there was no equal right of control with respect to the performance of the work, the Roethke court concluded that the theory of joint enterprise was inapplicable.

The concept of "equal right of control" was taken from a four-pronged test set out by the then court of appeals in Huff v. Rosenberg, Ky., 496 S.W.2d 352 (1973). In addressing the essential elements to impose vicarious tort liability under the doctrine known as "joint venture" or "joint enterprise", the Huff court indicated that the elements include (1) an agreement, express or implied, among the members of the enterprise; (2) a common purpose to be carried out; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, giving an equal right of control. The UEF has pointed out evidence in the record to suggest that the third prong of this test has been satisfied, as Peek and Travis shared in the money paid by the mill for the logs. However, as interpreted by the Roethke court, it is clear that the "community of pecuniary interest" must be in the sharing of profits, not merely of gross proceeds. This is the same verbiage used in KRS 362.180(4), quoted

> above. As we have already concluded, there is substantial evidence in the record from which the ALJ could properly decide that Travis and Peek shared proceeds but not profits from the timber sales.
>
> Moreover, all four elements set forth in Huff, supra, and not merely one of the four as argued by the UEF, must be present in order to find that a partnership or joint enterprise had been established. The first and last of the four elements are clearly lacking under the facts of this case. In the absence of any one element, it is within the ALJ's authority to find that no joint enterprise was undertaken. The ALJ referenced and relied upon testimony from Travis and Peek to conclude there was no agreement between the two respecting the formation of a partnership or joint enterprise; that Travis was not involved in the cutting of timber, but merely transported logs for Peek, and others; and that Travis had no control over Peek or the cutting aspects of the operation, including the hiring and firing of employees to assist with the cutting. It is of no consequence that the record contains some evidence that would support a reversal of the ALJ's opinion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). In that there is substantial evidence of record to support this conclusion that Peek and Travis were independent contractors in relation to one another, we find no error. Special Fund v. Francis, Ky. 708 S.W.2d 641 (1986).
>
> Accordingly, the decision rendered by Hon. R. Scott Borders, Administrative Law Judge, is hereby **AFFIRMED** and the appeal by the Uninsured Employer's Fund is **DISMISSED**.

On appeal, this Court's function is to correct the Board only when the Board has overlooked or misconstrued controlling statutes or precedent or committed error in

assessing the evidence so flagrant as to cause gross injustice. Edwards v. Louisville Ladder, Ky.App., 957 S.W.2d 290 (1997). See also KRS 342.285; KRS 342.290. While another ALJ may have ruled otherwise based upon the conflicting testimony and evidence presented, we cannot say that the ALJ or the Board erred in deciding this case in the matter in which each did. The ALJ's findings in this matter were based on substantial evidence in the record and his findings were not unreasonable. See Lizdo v. Genter Equipment, Ky., 74 S.W.3d 703 (2002); Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60 (2001); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

For the foregoing reasons, the opinion of the Board dismissing the UEF's appeal is affirmed.

ALL CONCUR.

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