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(SUPREME COURT FILE NO. 2006-SC-000750-WC)

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000792-WC

BOBBY HUBBARD D/B/A
B & H LOGGING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00285

TERRY WADE HENRY; UNINSURED EMPLOYERS' FUND; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Bobby Hubbard, d/b/a B&H Logging, petitions for review of an opinion of the Kentucky Workers' Compensation Board, which reversed and remanded an opinion and order of an

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Administrative Law Judge (the ALJ). The appellee, Terry Wade Henry, was injured while cutting some timber on a trial basis for Hubbard. The ALJ held that Henry was not entitled to workers' compensation benefits. The Board disagreed. The only issue on appeal is whether the Board correctly determined that Henry was indeed Hubbard's employee for purposes of Workers' Compensation coverage.

The ALJ's opinion contains a thorough recitation of facts, which the Board adopted. The facts of this case are not in dispute, and we will summarize only those pertinent to this appeal.

Hubbard is a licensed master logger who owns and operates B&H Logging. He negotiates leases with landowners to harvest their timber. Hubbard usually employs four workers, and their duties include operating a bulldozer, cutting down the trees, and loading the timber onto a truck for removal. He enters into written employment contracts with his workers and pays them in cash at the end of each week.

In November 2004, Hubbard placed an ad in a local newspaper for someone who was experienced in cutting timber and operating a bulldozer. At that time, Henry had approximately ten-years' experience at both functions. He responded to the ad, and the two men met the next day to discuss the job. Henry informed Hubbard that he was willing to work for him on a trial

basis for a couple of days. Henry proposed that if Hubbard was not satisfied with his work, Hubbard would not owe him anything. Hubbard was impressed by Henry's willingness to enter into this arrangement. Hubbard and Henry had no other agreement. Although Henry had wanted some idea of what his potential wages would be, Hubbard refused to discuss money until he had determined whether Henry was qualified for the job. He testified that he did not ask Henry to sign an employment contract at that time because he did not know if he would be capable of performing the job.

When they arrived at the job site, Henry received a saw and other equipment from Kenny Farmer, who worked for Hubbard. After observing Henry cutting trees for about fifteen minutes, Hubbard then asked Farmer for his opinion. Farmer stated that he thought Henry might be "all right" and that he would continue to watch him. Hubbard soon departed from the job site and left Farmer in charge.

Henry continued to cut timber. Farmer took him aside to demonstrate a different technique of cutting. During the demonstration, a branch fell and struck Henry on the head, critically injuring him. After his release from intensive care, he spent more than a year in a rehabilitative hospital. On February 16, 2005, he filed an application for benefits with the Kentucky Department of Workers' Claims.

After reviewing the evidence and conducting a hearing, the ALJ found that Hubbard had not hired Henry and that Henry had been present on the job site solely on a trial basis. Because there was no contract for hire, the ALJ concluded that there was no employer-employee relationship between Henry and Hubbard. Thus, he dismissed the claim.

On review, the Board rejected the conclusion of the ALJ. It emphasized the broad language of KRS 342.640(4), which defines employees subject to the provisions of the Workers' Compensation Act as "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury[.]" KRS 342.640(4).

The Board reasoned that KRS 342.640(4) does not specifically require a formal contract to hire in order for a person to qualify as an employee: "[f]or coverage to occur all that is required is that an employee for hire be performing services on behalf of an employer for hire at the moment of injury." It elaborated as follows:

> In this instance, it is undisputed that B&H is a logging company in the business of harvesting timber for profit. At the time of the accident, Henry was harvesting timber at a job site B&H controlled, pursuant to the instructions of the company's owner . . . . In assessing employment relationship, none of the other facts of this case matter. At the moment Henry experienced a harmful change to the human organism he was "performing service in the course of the

trade, business, profession, or occupation" of B&H.

Hubbard has challenged the Board's holding on two grounds: first, that Commonwealth of Kentucky, Bd. of Educ. v. Smith, 759 S.W.2d 56 (Ky. 1988), requires a contract for hire as the underlying basis of an employer-employee relationship; second, even if a contract for hire is not required, the term "service for an employer for hire" (as used in that opinion) necessarily implies that a specific wage or rate of pay for the service must have been negotiated and agreed upon between the parties. "The essence of compensation protection is the restoration of a part of wages which are assumed to have existed." Kentucky Farm and Power Equipment Dealers Assoc., Inc. v. Fulkerson Bros., Inc., 631 S.W.2d 633, 635 (Ky. 1982).

The appellate function of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent or when it has committed an error in assessing the evidence so flagrant as to result in a gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

Hubbard contends that Henry is not eligible for workers' compensation benefits because he did not have an employment contract; nor did he have an agreed-upon wage in

order to qualify as a remunerated employee. Nevertheless, Henry cut the timber for Hubbard with the **expectation** that he would be paid if he performed the work satisfactorily.

Henry's situation is clearly distinguishable from that of the injured claimant in Fulkerson, supra, a case cited by both Hubbard and Henry. Fulkerson involved an unpaid officer of a non-profit trade organization **who never expected any payment** for his services. At issue was the proper interpretation of KRS 342.640(2), which provides coverage for "[e]very executive officer of a corporation." In analyzing whether Fulkerson was an employee as contemplated by that statute, the Kentucky Supreme Court reasoned that employees include not only those who receive -- but also those who **expect to receive** -- payment for services rendered:

> Compensation decisions uniformly exclude from the definition of "employees" workers who neither receive nor **expect to receive** any kind of pay for their services. . . . [T]he essence of compensation protection is the restoration of a part of the wages which are assumed to have existed. In this [Fulkerson's] case, no compensation by the association existed (**nor was any ever contemplated**), and therefore, no benefits can be awarded.

Fulkerson, 631 S.W.2d at 635. (Emphasis added.) By contrast, Henry and Hubbard had agreed that Henry would be paid for his work if it proved to be satisfactory.

Hubbard's second argument is that the agreement with Henry could not qualify as service for an employer for hire under the holding in Smith, supra, 759 S.W.2d at 58. He cites Smith as authority for a requirement that there be a precise wage or rate of pay. However, we find no such requirement either in Smith or in KRS 342.640(4). We agree with the reasoning in an older case from the Supreme Court of New York, which succinctly and aptly addressed this very issue:

> A tryout is for the benefit of the employer, as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the [workers' compensation] statute. The fact that wages are not fixed is not of great consequence for the law would imply a reasonable wage for the type of work performed.

Smith v. Venezian Lamp Co., 5 A.D.2d 12, 14 (N.Y. App. Div. 1957).

Finally, we note with approval the Board's cogent analysis of KRS 342.640(4) as representing a codification of the following principle expressed in Larson's Workers' Compensation Law, Desk Edition, § 26.02 [6]:

> Since workers' compensation law is primarily interested in the question when the risks of the employment begin to operate, it is appropriate, quite apart from the strict contract situation, to hold that an injury during a try-out period is covered, when that injury flows directly from employment activities or conditions.

We affirm the opinion of the Kentucky Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Glenn L. Greene, Jr. Harlan, Kentucky	R. Scott Wilder Richmond, Kentucky