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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000771-WC

ABEL VERDON CONSTRUCTION
AND ACUITY INSURANCE APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01591

MIGUEL A. RIVERA;
HON. OTTO DANIEL WOLFF,
ADMINISTRATIVE LAW JUDGE;
CABINET FOR HEALTH AND FAMILY SERVICES;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: Abel Verdon Construction (Verdon) and Acuity Insurance appeal the March 27, 2009 opinion of the Workers' Compensation Board (Board)

affirming the portions of the Administrative Law Judge's (ALJ) opinion which found Miguel A. Rivera was an employee of Verdon and awarded him benefits based on a finding of permanent partial impairment and temporary total disability. The Board's opinion also remanded the matter to the ALJ for reconsideration of whether Rivera is entitled to an increase in his award amount due to a safety violation committed by the employer. For the following reasons, we affirm in part and reverse in part.

Facts and procedure

Rivera, then a fifteen-year-old undocumented immigrant, worked on one of Verdon's construction sites picking up trash for approximately two weeks. He had been hired by a distant cousin, Margarito Villa Martinez (Villa), who was responsible for hiring Verdon's workers and distributing their pay. All workers, including Rivera, were paid in cash. Rivera was injured on July 8, 2005, when, while carrying a piece of plywood to other workers, he fell through a hole in the second floor of a home still under construction. The hole existed to allow for construction of stairs from the first floor to the second. There is no evidence the hole was covered or guarded in any way. The parties disagree as to whether the first layer of flooring on the second level had been installed at the time of Rivera's accident.

As a result of the accident, Rivera sustained extensive injuries. He was comatose and required hospitalization for approximately two months. He has undergone physical, occupational, and speech therapy, and has not returned to

work, though he has returned to high school. At school he attends special education classes for most of the day and is experiencing difficulty learning English. Rivera complains of numerous difficulties with balance, coordination, eye sight, and cognition as a result of the fall. He incurred $113,500 in medical expenses during his recovery, all of which were paid by the Cabinet for Health and Family Services.

Following a hearing, the ALJ awarded Rivera benefits in an opinion rendered September 7, 2008, based on conclusions that Rivera was an employee of Verdon and that his injuries constituted permanent partial disability and temporary total disability. The Board affirmed the ALJ's holdings with one exception in an order dated March 27, 2009. This appeal followed. On appeal, Verdon and Acuity first assert Kentucky Revised Statutes (KRS) Chapter 342, the Workers' Compensation Act, is preempted by federal law to the extent that it awards benefits to illegal aliens for injuries incurred at work. Verdon and Acuity also allege the Board erred in (1) remanding the issue of a safety violation to the ALJ; (2) sustaining the ALJ's finding that Rivera was an employee of Verdon; (3) sustaining the ALJ's finding that Rivera established an average weekly wage; and (4) sustaining the ALJ's award of temporary total disability benefits.

KRS 342.285 establishes the Board's standard of review of an ALJ's decision:

> The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on

> questions of fact, its review being limited to determining whether or not:
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> (a) The administrative law judge acted without or in excess of his powers;
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> (b) The order, decision, or award was procured by fraud;
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> (c) The order, decision, or award is not in conformity to the provisions of this chapter;
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> (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
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> (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

KRS 342.285(2). Likewise, we may only reverse findings of fact of the Board and the ALJ if they were clearly erroneous. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). When an ALJ resolves an issue of fact against a claimant who has the burden of proof, on appeal the claimant "must show that the evidence was such that the finding against him was unreasonable," but "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Id.* Our review of questions of law, however, is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

KRS Chapter 342 is not preempted by federal immigration law

Verdon and Acuity first argue KRS Chapter 342 is preempted by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1342a *et seq.*, to the extent that the Kentucky law permits benefit payments to aliens illegally employed in Kentucky. KRS 342.640(1), in relevant part, defines an employee for purposes of Workers' Compensation benefits as "[e]very person . . . whether lawfully or unlawfully employed, in the service of an employer[.]"[1] IRCA makes it unlawful to employ an alien who is either in the country illegally or in the country legally but not authorized to work, or to hire any employee without obtaining documentation demonstrating it is legal for the employee to engage in such work. 8 U.S.C. § 1324a(1). IRCA also makes it illegal to falsify documents for the purpose of obtaining unauthorized employment. 8 U.S.C. § 1324c(a). Although IRCA's preemption clause does not explicitly nullify state workers' compensation statutes, Verdon and Acuity argue the statutory scheme impliedly preempts the Kentucky law. Verdon and Acuity contend the Kentucky law so conflicts with federal immigration law that it undermines IRCA's purpose and should be deemed invalid pursuant to the principle of conflict preemption.[2]

[1] Neither the ALJ nor the Board ruled on this matter, citing lack of authority to do so. Both the ALJ and the Board, however, did note Verdon and Acuity raised this matter and therefore properly preserved it for appeal.

[2] A number of employers have raised this argument under the workers' compensation laws of other states without success. *See Amoah v. Mallah Management, LLC*, 866 N.Y.S.2d 797, 800 (N.Y. App. Div. 2008)(finding "there is no conflict between IRCA and state laws requiring maintenance of a safe work place," and ruling New York's Workers' Compensation Law not preempted by IRCA); *Economy Packing Company v. Illinois Workers' Compensation Commission*, 901 N.E.2d 915 (Ill.App. 2008); *Design Kitchen and Baths v. Lagos,* 882 A.2d 817 (Md. 2005); *Coma Corporation v. Kansas Dept. of Labor*, 154 P.3d 1080 (Kan. 2007) (holding the employer did not rebut the presumption that the state's laws were not preempted by IRCA); *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) ("[T]he Immigration Reform Act does not preempt, either expressly or impliedly, the authority of the states to award workers'

Conflict preemption may be invoked to invalidate a state law when it is impossible to comply with both the state law and a federal law, or when state laws create obstacles to the accomplishment of federal objectives. *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Verdon and Acuity contend KRS Chapter 342, which permits payment of workers' compensation benefits even to illegally hired employees, frustrates IRCA's purpose because it encourages violations of IRCA's prohibition against employing undocumented aliens.

While Congress possesses the exclusive power to regulate immigration, "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). Police powers are not easily preempted:

> [T]he historic police powers of the state are not preempted in the absence of the clear and manifest purpose of Congress to do so. The United States Supreme Court has stated that it is reluctant to interpret a federal statute in such a way as to find preemption of subjects traditionally governed by state law. Determination of whether a federal statute preempts a state cause of action depends on the purpose of Congress in enacting the federal statute. Congressional intent is the touchstone of all preemption analysis.

Wright v. General Elec. Co., 242 S.W.3d 674, 678 (Ky. App. 2007) (internal citations and quotations omitted).

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compensation benefits to undocumented aliens."); *Continental PET Technologies v. Palacias,* 604 S.E.2d 627 (Ga.App. 2004) (holding "federal law does not preempt Georgia law on the question of whether or not an illegal alien may receive workers' compensation benefits[.]").

The Supreme Court has recognized a state's right to establish workers' compensation statutes as a proper exercise of police power even when those statutes initially appear to encroach upon Congress's exclusive authority to regulate immigration. *DeCanas*, 424 U.S. at 354-56. "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration[.]" *Id.* at 355. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples." *Id. at 356.* Our analysis must begin, therefore, with a presumption that the state law is not preempted. *Chicanos por la Causa v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009).

In support of its position contrary to this presumption, Verdon and Acuity rely upon *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), which found the NLRB's award of back pay to an undocumented alien for the employer's violation of labor laws impermissible because the practice "trivializes the immigration laws . . . [and] condones and encourages future violations." *Hoffman Plastic*, 535 U.S. at 150. The employer in *Hoffman Plastic* fired employees who had supported unionization efforts in the workplace in contravention of the National Labor Relations Act (NLRA). The claimant was an undocumented alien. The Court reasoned that the award of back pay to an undocumented immigrant was improper because it obstructed the purposes of IRCA. Those purposes included denying

"employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States." *Id. at 138.*

However, the holding in *Hoffman Plastics* was limited to actions brought by the NLRB to enforce the National Labor Relations Act (NLRA). *See, e.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067-69, 1073 (9th Cir.2004) (questioning whether *Hoffman Plastic's* prohibition of NLRB-authorized back pay awards prohibits district courts from awarding back pay under Title VII, and stating that even if it did, that case still did not make immigration status relevant to determining Title VII violations); *Flores v. Amigon*, 233 F.Supp.2d 462, 464 (E.D.N.Y. 2002) (holding that *Hoffman Plastics* did not preclude ban on discovery into plaintiff's immigration status in FLSA action); *Zeng Liu v. Donna Karan Int'l, Inc*., 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002)(same). The decision in *Hoffman Plastics* not to allow the illegal alien worker back pay under the NLRA for any of the time after his alleged wrongful firing, thereby preventing the equivalent of the continued illegal employment of an illegal immigrant, *Hoffman Plastics* at 150-51, is in harmony with the IRCA's policy – *i.e.*, to deter employers from hiring undocumented aliens and thus indirectly discouraging illegal aliens from coming to this country anticipating employment. *See* H.R. Rep. No. 99-682 [I], 99th Cong. 2d Sess., at 46, reprinted in 1986 U.S.C.C.A.N. at 5650. Those policy issues simply do not apply in this case. *See Hoffman Plastics* at 150-51. Rather, the policy of workers' compensation laws is to protect the health and safety of the labor force and it was "not the intention of [IRCA] to undermine or diminish in any

way labor protections in existing law[.]" H.R. Rep. 99-682 [I], 99th Cong. 2d Sess., at 58, reprinted in 1986 U.S.C.C.A.N. at 5662.

Likewise, we are not persuaded that aliens, upon learning of Kentucky's Workers' Compensation scheme, will become motivated to enter the country illegally and seek work in the Commonwealth in order to take advantage of the benefits of KRS Chapter 342. In fact, the opposite is more likely. Were we to find that KRS Chapter 342 is preempted by IRCA, we might well be adding incentive to the hiring of illegal aliens, and then taking away the incentive incorporated in Chapter 342 to maintain a safe workplace. The sanctions contemplated in IRCA, beginning at only $250 for hiring an illegal alien, may seem a reasonable price to pay for avoiding liability for a serious injury such as Mr. Rivera's.[3]

In sum, we do not find that Kentucky's Workers' Compensation Act creates an obstacle to IRCA's purposes. KRS Chapter 342 is not designed to condone or reward illegal employment in Kentucky; instead, the goal is to promote

[3] The Illinois Appellate Court similarly reasoned, "we do not believe that eligibility for workers' compensation benefits in the event of a work-related accident can realistically be described as an incentive for undocumented aliens to unlawfully enter the United States. Rather, excluding undocumented aliens from receiving certain workers' compensation benefits would relieve employers from providing benefits to such employees, thereby contravening the purpose of the IRCA by creating a financial incentive for employers to hire undocumented workers." *Economy Packing*, 901 N.E.2d at 923. The New York Supreme Court, Appellate Division, found it "unlikely that denying wage-replacement benefits to injured unauthorized workers will deter illegal aliens from violating IRCA in order to obtain employment[.]" *Amoah*, 866 N.Y.S.2d at 800. Maryland's highest court believed, "without the protection of the [workers' compensation] statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers." *Design Kitchen,* 882 A.2d at 826.

the safety of all workers in Kentucky and to hold employers – and not taxpayers – financially responsible for injuries occurring in their workplaces. *Ratliff v. Redmon*, 396 S.W.2d 320 (Ky. 1965). The underlying rationale for the Act is that when employers are made responsible for the losses of injured employees, those employers will be encouraged to create safer work environments, no matter the identity or status of their employees.

The Board improperly reversed the ALJ's refusal to certify an expert

The ALJ refused to certify Ralph Wirth as an expert and discounted his testimony as a result. Rivera presented Wirth's testimony by deposition for the purpose of establishing that Verdon committed an intentional safety violation of state and federal occupational safety regulations,[4] which qualified Rivera for a thirty percent increase in the award.

Specifically, the ALJ did not believe Wirth's experience qualified him to be an expert on occupational safety matters and also pointed to what the ALJ perceived to be Wirth's lack of familiarity with Kentucky occupational safety law and the facts of Rivera's case. The ALJ made no findings regarding Rivera's claim that a safety violation existed which contributed to Rivera's injury. The Board reversed

the ALJ's determination that Wirth was not an expert.

[4] Wirth cited 29 Code of Federal Regulations § 1926.501(b)(13) and 803 Kentucky Administrative Regulation 2:412, both of which address fall protection requirements.

The Kentucky Rules of Evidence (KRE) apply in all Workers' Compensation proceedings before an ALJ except where explicitly amended by statute or regulation. 803 KAR 25:010, Section 14(1). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." KRE 702. "Any lack of specialized training goes only to the weight, not to the competency, of the evidence." *Washington v. Goodman,* 830 S.W.2d 398, 400 (Ky. App. 1992).

An ALJ's decisions regarding the admission or exclusion of evidence will be reviewed for abuse of discretion. *Searcy v. Three Point Coal, Inc.*, 134 S.W.2d 228, 231(Ky. 1939). "[I]t is within the discretion of the [fact finder] to decide as to the qualification of witnesses[.]" *Lee v. Butler*, 605 S.W.2d 20, 21 (Ky. App. 1979).

Here, the ALJ was simply not persuaded that Wirth's experience and education made him an authority on occupational safety regulations. As the ALJ noted, Wirth did express uncertainty as to which regulations applied at the time of the accident and as to what exactly had transpired in the moments leading to Rivera's fall. Those facts, combined with experience the ALJ believed was not directly related to the subject on which Wirth purported to testify, justified the decision not to qualify Wirth as an expert. Furthermore, the Board showed no deference to the ALJ's determination. Board members merely disagreed with the

ALJ's interpretation of the evidence and substituted their judgment for that of the fact finder. Given the deference the Board is required to give the fact finder's determinations of the admissibility of expert testimony, it was inappropriate to reverse the ALJ's determination of this matter. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993).

The Board properly remanded the issue of penalty to the ALJ

After concluding Wirth should have been qualified as an expert, the Board remanded the matter with instructions that the ALJ consider Wirth's testimony and make additional findings as to whether a safety violation occurred which would entitle Rivera to an increased award pursuant to *Chaney v. Dags Branch Coal Company,* 244 S.W.3d 95 (Ky. 2008). We note, however, that expert testimony is not necessary under *Chaney v. Dags Branch Coal Co.* That opinion enunciated the law as follows: "An employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require; thus, its intent is inferred from the failure to comply. If the violation 'in any degree' causes a work-related accident, KRS 342.165(1) applies." *Chaney*, 244 S.W.3d at 96-97. The Board remanded the matter to the ALJ to make findings of fact under this standard. Doing so requires that the ALJ determine: (1) whether there was a violation of state or federal workplace safety statutes or regulations at the time of Rivera's injury; and (2) if so, whether such violation caused Rivera's accident in any degree. Because the ALJ made no findings on this matter and instead simply dismissed the testimony of Rivera's purported expert witness –

which was not essential to the determination – the Board's decision to remand for additional findings was proper. The ALJ did not apply the appropriate law to the facts of the case, and we affirm the Board's decision in this regard.

The Board correctly affirmed the ALJ's determination that an employer/employee relationship existed between Verdon and Rivera.

The ALJ used the factors delineated in *Ratliff, supra,* and *Chambers v. Wooten's IGA Foodliner,* 436 S.W.2d 265 (Ky. App. 1969), to conclude Rivera was an employee of Verdon at the time of the injury. Quoting Larson's *Workmen's Compensation Law*, volume 1, page 624, the Court in *Ratliff* identified nine factors in determining whether a worker is an employee or an independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
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> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

> (h) whether or not the work is a part of the regular business of the employer; and
>
> (i) whether or not the parties believe they are creating the relationship of master and servant.

Ratliff, 396 S.W.2d at 324-25 (quotations omitted). Of those nine, the four most significant factors are "the nature of the work as related to the business generally carried on by the alleged employer, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the true intentions of the parties." *Chambers*, 436 S.W.2d at 266.

The Board concluded the ALJ's findings of fact on these matters were not clearly erroneous and affirmed the conclusion that an employer/employee relationship existed. We are also required to review this matter to determine whether the ALJ's conclusions were clearly erroneous.

The ALJ found the tasks Rivera performed were within the scope of Verdon's business and did not require any special skill. He also determined the purported employer controlled the details of Rivera's work to a great extent, including when and where to work and precisely which tasks to perform. While the ALJ did not make a finding regarding the intent of the parties, he concluded doing so was unnecessary because the other three factors weighed so strongly in favor of an employment relationship.

Although there was some evidence which tended to show there was not an employer-employee relationship, the ALJ's decision on this matter was supported by substantial evidence and was therefore not clearly erroneous. That

evidence included Rivera's testimony that he was paid in cash by the day and that he received his instructions from another employee named Abelardo. Villa testified that Rivera's job duties included picking up trash and various scraps around the construction site, and sometimes delivering items to the other construction workers; that the tasks Rivera performed, including sweeping and picking up trash, were necessary on construction sites; that before Rivera had been hired to clean the construction site, the skilled workers had all been required to help perform those tasks; that Villa was in charge of hiring people for Verdon; that Villa informed the owner, Mr. Verdon, how much money he needed to pay the other workers; and that Mr. Verdon provided that amount for Villa to distribute. Taken as a whole, this constituted substantial evidence that an employer/employee relationship existed. The Board properly affirmed the ALJ on this matter.

Rivera established an average weekly wage

Verdon and Acuity next argue the Board improperly affirmed the finding of the ALJ that Rivera had established an average weekly wage. On this matter, Rivera testified he had worked for Verdon for the two weeks prior to the injury, the first week working three days and the next week working four. He also testified he was paid fifty dollars per day of work. Villa could not remember precisely how many days Rivera had worked in the weeks preceding the injury, but thought Rivera had worked three days the first week and two the second week; he testified Rivera was paid seven to eight dollars per hour.

KRS 342.140 provides instructions for determining an employee's average weekly wage:

> If . . . [t]he wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury[.]

KRS 342.140(1)(d) When an employee has been working for the employer less than thirteen weeks, "his average weekly wage shall be computed under paragraph (d) . . . taking the wages for that purpose to be the amount he would have earned had he been so employed by the employer . . . and had [he] worked, when work was available to other employees in a similar occupation." The ALJ determined, based upon the testimony of Rivera and Villa, that Rivera received $50 per day of work and that he would have worked three days per week had he been able to do so.[5] Accordingly, the ALJ found Rivera's average weekly wage was $150 and calculated his benefits correspondingly. The Board affirmed this finding, concluding it was not clearly erroneous. We agree.

Although there was no documentation of Rivera's wages or the wages of any of Verdon's employees, and the testimony regarding the exact amount Rivera was paid conflicted, there was nevertheless sufficient evidence to support the ALJ's finding on this matter. Rivera testified he received $50 per day. It was

[5] Verdon presented no evidence of wages paid to Rivera or to any employee.

within the ALJ's sound discretion to choose whether to believe that over Villa's testimony Rivera was paid $7-8 per hour. Furthermore, given the testimony regarding the number of days per week Rivera worked, the ALJ's conclusion that he would have averaged three days per week in the thirteen weeks preceding the injury was sound. We cannot say the ALJ's conclusion was unreasonable.

The award of temporary total disability payments was proper

Verdon and Acuity's final argument is that it was improper for the ALJ to find Rivera was temporarily disabled from July 8, 2005, to December 20, 2006. Verdon and Acuity cite a lack of medical records definitively stating how long Rivera was temporarily totally disabled and claims this amounts to a failure to meet his burden.

Temporary total disability is "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). The ALJ reviewed numerous medical records which described Rivera's injuries, his prognosis, and the treatments he had received. When Verdon completed its status report filed April 24, 2006 (Trial Record p.40), it admitted "The Plaintiff (Rivera) is not at MMI at this time." At least until that date, then, Verdon agreed Rivera was totally temporarily disabled.

Further, a report following an independent medical examination conducted by Dr. Robert F. Sexton dated December 20, 2006, conveyed Dr. Sexton's opinion that Rivera had suffered 44% permanent impairment to the whole

body. Dr. Sexton did not expressly state that Rivera had achieved maximum medical improvement, but it is implicit in his report. For the doctor to be able to assess permanent impairment, any temporary impairment must have ended. While our review of the record reveals no medical records which explicitly mark December 20, 2006, as Rivera's date of maximum medical improvement, it was within the province of the ALJ to determine such a date from all the evidence.

Conclusion

KRS Chapter 342 is not preempted by federal immigration law to the extent it permits any form of compensation for undocumented aliens. Additionally, the Board properly reversed and remanded the case to the ALJ for the purpose of reconsidering whether Verdon should have been assessed a penalty, though the Board improperly reversed the ALJ's refusal to qualify Rivera's witness on the issue as an expert. Finally, the Board properly affirmed the ALJ's decision with respect to the employer/employee relationship, Rivera's average weekly wage, and his total temporary disability because the ALJ's decision was based upon substantial evidence. Accordingly, we affirm in part and reverse in part.

KELLER, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS.

BRIEF FOR APPELLANTS: NO BRIEF FOR APPELLEES

Michael J. Schulte
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