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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001712-WC

MICHELLE RAHLA — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-01147

MEDICAL CENTER AT
BOWLING GREEN;
HON. JEANIE OWEN MILLER, ALJ;
AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Michelle Rahla seeks review of an opinion of the Workers' Compensation Board entered September 6, 2013. The Board affirmed the opinion and order of the Administrative Law Judge (ALJ) which found that

Rahla did not meet the statutory definition of an employee and therefore dismissed her claim for workers' compensation benefits. The issue before us is one of law – whether injuries sustained by job candidates during preemployment activities are compensable under Kentucky's workers' compensation scheme? The Board answered in the negative. We agree and affirm.

On February 1, 2012, Rahla received a contingent job offer from The Medical Center at Bowling Green. The offer was contingent upon Rahla successfully completing a physical examination and a substance-abuse screening. Rahla underwent the physical examination on February 3, 2012. As part of the examination, Rahla was required to lift weights ranging from 10 to 61 pounds. While lifting the last (and heaviest) weight, Rahla felt pain in her neck, arms, and shoulder. She would later state that she did not initially report the pain for fear of losing her job offer. Rahla officially began her employment with the Medical Center on February 27, 2012. Sometime thereafter, Rahla sought medical treatment and was informed that she would need surgery to correct her neck injury.

Rahla filed a Form 101 seeking compensation for the February 3, 2012 injury. Rahla claimed she sustained the injury while performing pre-job placement as an employee of the Medical Center. The Medical Center denied Rahla's claim on the ground that she was not an employee at the time of her injury. The claim was bifurcated on the issue of work-relatedness and, on March 21, 2013, the ALJ issued an opinion and order dismissing Rahla's claim. In that opinion and order, the ALJ found Rahla, at the time of her February 3, 2012 injury, was not in

the service of, under any contract of hire with, or performing any service in the trade, business, profession, or occupation of, the Medical Center.

Rahla appealed to the Board, which affirmed the ALJ in an opinion rendered on September 6, 2013. The Board's opinion agreed with the ALJ's conclusion that Rahla failed to meet the definition of an employee under Kentucky's Workers' Compensation Act, and was therefore not entitled to benefits. This appeal followed.

Our function when reviewing a decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The material facts in this case are not in dispute. Instead, this matter involves the interpretation of Kentucky Revised Statutes (KRS) 342.640, and its application to the facts of this case. The interpretation to be given a statute is a question of law. *Justice v. Kimper Volunteer Fire Dep't*, 379 S.W.3d 804, 807 (Ky. App. 2012). We owe the Board's interpretation no deference; our review is *de novo*. *Id.*

Rahla argues that the Board erred as a matter of law in finding her injuries noncompensable. Specifically, Rahla contends the Board's narrow construction of KRS 342.640 is contrary to the legislative intent and runs afoul of established precedent.

KRS 342.640 identifies those individuals who constitute employees under Kentucky's Workers' Compensation Act. That definition includes, in relevant part, "[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).

In support of her position that she qualifies as an "employee" under KRS 342.640(4), Rahla relies upon the decision of the Kentucky Supreme Court in *Hubbard v. Henry*, 231 S.W.3d 124 (Ky. 2007). That reliance is misplaced. In that case, Henry, a timber cutter, agreed to work for Hubbard, a logging company, on a trial basis to demonstrate his timber-cutting prowess; Henry would receive no pay for his labors unless Hubbard was satisfied with his work. Henry was injured by a falling tree during the trial period. Hubbard ultimately paid some money to Henry, but did not say it was payment for work.

The Court held Henry qualified as an employee under KRS 342.640(4). *Hubbard*, 231 S.W.3d at 130. The Court explained that KRS 342.640(4) "protects workers who are injured while performing work in the course of an employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the circumstances indicate that the work was performed with no expectation of payment[.]" *Id.* at 130. In concluding that the evidence compelled a finding that Henry qualified as an employee under KRS 32.640(4), the Court noted that, at the time of Henry's injury, he was harvesting timber in the course of Hubbard's logging business. The Court further emphasized

that Hubbard benefitted from Henry's work, despite the contingent nature of his employment; Hubbard expressed no dissatisfaction with Henry's work; and Hubbard did not indicate it would not have hired Henry if he had not been injured. *Id.*

Like the Board, we find *Hubbard* distinguishable from the facts of this case. Unlike the claimant in *Hubbard*, Rahla was not performing work which benefitted the Medical Center at the time of her injury. As succinctly stated by the ALJ, during the physical examination Rahla "produced no product, completed no task, and did not in any way benefit" KDMC. (R. at 166). Likewise, Rahla neither received nor expected compensation for any of her time spent at the February 3, 2012 examination.

Rahla argues that the compensability of a tryout period, as extended in *Hubbard*, should be extended even further to include preemployment physical exams. We are not persuaded. Rahla offers no case law to support a broadened interpretation of KRS 342.640. Furthermore, we disagree that the intent of the workers' compensation laws would be furthered by including those persons who are, in essence, still within the application phase of their employment. The facts of *Hubbard* are unique in that the claimant was performing a task from which both the employer and the claimant benefitted, despite the lack of a formal employment agreement. Rahla's physical examination offered no direct benefit to the employer; that is to say her physical was a not a "service in the course of the trade, business, profession, or occupation of an employer[.]" KRS 342.640(4). Nor is it

an act which produces compensation to the claimant. *Hubbard* is clear that the "[t]he essence of compensation protection is the restoration of a part of wages which are assumed to have existed." *Hubbard*, 231 S.W.3d at 129 (citing *Kentucky Farm and Power Equipment Dealers Ass'n, Inc. v. Fulkerson Bros., Inc.*, 631 S.W.2d 633, 635 (Ky. 1982)). No such assumption can be made based on a preemployment, qualifying physical examination. While we are sympathetic to Rahla and the circumstances of her injury, we find her arguments to extend compensation unconvincing. We therefore hold that the Board did not err when it affirmed the ALJ's dismissal.

For the foregoing reasons, we affirm the Board's September 6, 2013 opinion.

ALL CONCUR.

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BRIEF FOR APPELLEE, THE MEDICAL CENTER AT BOWLING GREEN:

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