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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000069-WC

JSE, INC., D/B/A PERMA STAFF II — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-01378

PATRICIA AHART; LINDA CROWE;
JOHN HARRIS, DECEASED;
SUSAN MUELLER, EXECUTRIX OF
THE ESTATE OF JOHN HARRIS;
WHALER'S CATCH CATERING, AND/OR
WHALER'S CATCH RESTAURANTS OF
PADUCAH, LTD; UNINSURED EMPLOYERS' FUND;
KENTUCKY EMPLOYERS' MUTUAL INSURANCE;
HON. GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

AND

NO. 2018-CA-000079-WC

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE — CROSS-APPELLANT

v.

CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-01378

PATRICIA AHART; LINDA CROWE;
JSE, INC., D/B/A PERMA STAFF II;
JOHN HARRIS, DECEASED;
SUSAN MUELLER, EXECUTRIX OF
THE ESTATE OF JOHN W. HARRIS;
WHALER'S CATCH CATERING, AND/OR
WHALER'S CATCH RESTAURANTS OF
PADUCAH, LTD; UNINSURED EMPLOYERS' FUND;
HON. GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: JSE, Inc., d/b/a Perma Staff II (Perma Staff) and Kentucky Employers' Mutual Insurance (KEMI) filed petitions for review from an opinion and order of the Workers' Compensation Board affirming an order[1] of the administrative law judge (ALJ) wherein the ALJ found as follows: (1) Patricia Ahart was an employee of Perma Staff and Whaler's Catch Restaurants of Paducah, LTD (Whaler's) at the time she sustained a work-related injury; (2)

[1] The order was interlocutory but became final upon entry of the ALJ's final opinion and award.

KEMI was the at-risk insurer at the time of Ahart's injury; and (3) Ahart's claim against Perma Staff was not barred by the statute of limitations. We conclude that the ALJ's factual findings were supported by substantial evidence and the ALJ correctly applied the applicable law. We affirm.

On September 25, 2011, Ahart sustained multiple head and brain injuries when she fell through an open, unguarded trapdoor in the floor while working as a server at a catering event held at the Whaler's restaurant. The issues on appeal do not concern the extent or duration of Ahart's injuries, but only the liability of the appellants for those injuries and, therefore, our discussion of the facts is limited.

At the center of this dispute is a contract executed in February 1992, entered into between Perma Staff, an employee leasing company, and Whaler's. The contract was entitled, "Agreement for Human Resources Management" (the contract). The terms of the contract were not changed prior to Ahart's accident.

Pursuant to the contract's terms, Whaler's paid $200 per week for Perma Staff's services. Under the terms of the contract between Perma Staff and Whaler's, all individuals assigned to Whaler's to fill job positions were employees of Perma Staff and Perma Staff was required to provide workers' compensation coverage. Additionally, the contract provided Perma Staff had the sole responsibility for recruiting, training, evaluating, replacing, supervising,

disciplining, and terminating all individuals assigned to fill Whaler's job positions. However, under Section 2(a) of the contract, Perma Staff could designate on-site supervisors from its employees to fill Whaler's job positions under the direct supervision of the Perma Staff district manager. Although Perma Staff reserved the right to determine if an individual could fill a position, there was no express provision requiring that any individual hired by a Whaler's on-site supervisor sign up with Perma Staff. Further terms of the contract will be discussed as necessary.

In addition to the contract, the ALJ considered extensive testimony before finding that Ahart was an employee of Perma Staff and Whaler's at the time of her injury. We have considered that same evidence and summarize that which is most important.

Prior to her work injury, Ahart worked as a finance clerk for Western Baptist Hospital and at Whaler's, where she cooked and served catering events. She also occasionally bartended at the restaurant when other workers were absent. She testified that Linda Crowe,[2] director of catering at Whaler's, called her to work on an as-needed basis. Crowe paid Ahart in cash following catering jobs, but Ahart could not recall whether she reported those amounts on her income taxes. She did not receive a paycheck from Perma Staff.

[2] Crowe is also referred to at times in the record as Linda Curtis. For consistency, we refer to her as Crowe.

John Harris, who owned Whaler's, testified by deposition on July 14, 2019.[3] He testified that Whaler's catering department is not a separate corporate entity from the restaurant operation and he did not maintain separate bank accounts or bookkeeping for the catering department and the restaurant.

In addition to his ownership of Whaler's, on the date of Ahart's accident, Harris was a Perma Staff employee and had been for over twenty years. Harris was designated as Perma Staff's on-site supervisor for Whaler's. He testified that he, and other workers he chose, decided who to hire and fire. As the Perma Staff on-site supervisor, Harris was responsible for developing policies and procedures related to bringing people to work as Perma Staff employees at Whaler's, and the Whaler's managers were in charge of interviewing, processing, and training potential waitstaff. Harris was paid a salary as a Perma Staff employee and restaurant workers were issued paychecks from Perma Staff.

Harris testified that Crowe was a Perma Staff employee and was the catering director for Whaler's. She had no ownership interest in Whaler's and did not operate or own her own catering business. He further testified that Crowe had authority to hire and fire employees as a Perma Staff employee. He acknowledged

[3] Harris died in October prior to the hearings in this matter. Although Ahart was permitted to revive that action against Susan Mueller, executrix of the Estate of John Harris, the ALJ later dismissed Harris, ruling that the motion to revive and substitute was procedurally barred. Ahart appealed that ruling to the Board and the Board remanded after being unable to find in the record that the ALJ had ruled on Ahart's petition for reconsideration. Ahart did not cross-appeal and, therefore, that part of the Board's opinion and order is not at issue.

that Crowe brought in temporary help as needed and those workers were paid in cash. Although Crowe was initially paid a salary for her work as catering director, her pay was later based on commissions and bonuses. Perma Staff issued paychecks to Crowe for her bonuses and her commission for catering was paid by checks written by Harris and issued through Whaler's. Crowe's commission earnings were not subject to withholding and she was issued a Form 1099 by Whaler's.

Harris testified that the majority of catering customers paid Whaler's directly but sometimes paid Crowe directly. Those checks were cashed by either Harris or Crowe. The money from the catering operation went back to Whaler's for expenses.

Harris was generally aware that new employees were required to complete Perma Staff paperwork at Perma Staff or Whaler's. However, he understood that all individuals who worked on Whaler's premises were Perma Staff employees regardless of their position, how they were paid, or what paperwork was completed. He believed that all workers at Whaler's were covered by the KEMI workers' compensation policy obtained by Perma Staff.

On September 25, 2011, Crowe notified Harris of Ahart's work accident. Harris recalled he notified Perma Staff of the accident within one week by telephone.

Crowe testified she became catering director for Whaler's in the late 1990s after she had worked at the restaurant as a waitress. She understood that she was an employee of Perma Staff and testified she had no ownership interest in Whaler's. Until her pay was based on commission, she received a weekly check issued by Perma Staff. After becoming catering director, she continued to receive paychecks from Perma Staff reflecting bonuses, benefits, and withholdings. Crowe's 2011 tax records reflect she was issued a W-2 by Perma Staff and a Form 1099 from Whaler's in nonemployee compensation.

Crowe testified that beginning in either 2005 or 2008, Harris requested she obtain a City of Paducah business license but did not know why he made such a request. She did not operate a catering business outside her work with Whaler's or own any catering equipment or supplies.

Crowe testified she rarely communicated with Perma Staff and she did not receive instruction from Perma Staff regarding her catering work. She requested potential employees, including Ahart, to sign up with Perma Staff, but it was not a condition of employment. She testified that Ahart and others did not want to sign up with Perma Staff because they did not want to report their earnings for tax purposes. Crowe explained Ahart worked for Whaler's on an as-needed basis and was paid in cash on an hourly basis, typically from funds provided by Harris on Whaler's behalf.

On Sunday, September 25, 2011, Crowe called Ahart to work a catering event. Because the restaurant is closed on Sunday, Crowe obtained permission from Harris to use a building on the same property as the restaurant and to open the restaurant for food preparation and drinks.

Joseph Eaton is the president and co-owner of Perma Staff. He testified that Perma Staff is an employee leasing company providing payroll services, insurance coverage, including workers' compensation, various reporting of taxes and employment, and benefit administration. He testified that Perma Staff and Whaler's are co-employers in that Perma Staff is responsible for the paperwork and Whaler's/Harris is involved in the day-to-day operations.

Eaton testified that at all relevant times, Harris was a Perma Staff employee and paid a salary on a weekly basis. As an on-site manager, Harris had authority to bring in other managers, including Crowe. Eaton agreed that the contract between Perma Staff and Whaler's did not expressly require that individuals assigned to work at Whaler's complete any application with Perma Staff but stated that was the understanding of the managers at Whaler's.

Eaton was unaware of the commission split between Crowe and Harris/Whaler's from the catering profits. He was also unaware that Crowe hired Ahart to occasionally help with catering events. Although Eaton acknowledged that Ahart was injured while working on Whaler's premises, he claimed she was

not a Perma Staff employee because she did not complete the application paperwork at the Perma Staff office.

Jack Hawkins is the vice president and co-owner of Perma Staff and was in charge of payroll. He testified that typically Whaler's employees faxed their timesheet to Perma Staff. He was unsure whether those timesheets included catering hours.

After Hawkins became aware of Ahart's injury, he discovered she was not in the computer system. Hawkins informed Harris and Perma Staff's insurance agent that Ahart was not a Perma Staff employee. On January 11, 2012, KEMI sent a letter to counsel for Whaler's stating that Ahart was not a Perma Staff employee.

Jeremy Terry, the director of underwriting for KEMI, testified that the policy identifying Perma Staff as the policyholder in effect on September 24, 2011, only provided coverage for leased employees but acknowledged there was no language in the policy distinguishing between leased and non-leased employees. In the schedule of named insureds and in places in the KEMI policy, Whaler's is included.

Terry explained that KEMI provides a premium estimate at the beginning of a policy period. Because it is impossible for KEMI to receive a premium reflecting the dollar-for-dollar weekly or monthly payroll being paid by

Perma Staff to its employees assigned to Whaler's, KEMI checks the payroll at the end of the policy period in an audit and then decides whether a credit or additional charge is appropriate. During the policy period, KEMI did not require the policyholder to provide it with a roster of employees, verification of the number of employees assigned to its clients, or a signed enrollment form by each employee. The policyholder was not required to report when an employee was hired or fired or whether the employee is temporary or permanent.

Pam Younts conducted an audit for KEMI of Perma Staff's accounts. She testified that the KEMI policy issued to Perma Staff was based on payroll and other remuneration. Perma Staff was due a credit for premium overpayments due to the inclusion of tips reported by Whaler's on an incorrect entry line. She testified that no effort was made to obtain documents or information not provided by Perma Staff, including whether their clients made cash payments.

KEMI provided Whaler's with a document, through Perma Staff, to post in the restaurant as proof of coverage and notice to employees regarding the reporting of work-related injuries. This notice listed KEMI as the workers' compensation carrier for Whaler's.

David Piper, the enforcement branch manager of the security and enforcement division of the Kentucky Department of Workers' Claims (DWC) testified that he did an insurance coverage search for multiple defendants in this

case. A document produced by the DWC indicated that Perma Staff had workers' compensation coverage through KEMI and that Perma Staff is an employee leasing company. He testified that the DWC was aware Perma Staff was sending workers to Whaler's. Although Whaler's obtained workers' compensation coverage after Ahart's injury, there was no record of any coverage prior to that date.

In addition to the substantive issue of the identification of Ahart's employer, also raised is whether Ahart's claim against Perma Staff was timely filed. Consequently, certain procedural matters are important.

In her Form 101, Ahart identified Harris, Whaler's Catch Catering and/or Whaler's Catch Restaurants of Paducah, LTD, KEMI, and the Uninsured Employers' Fund (UEF) as defendants. The UEF was joined because Whaler's did not have a separate policy of workers' compensation coverage in effect on September 25, 2011. Perma Staff was not identified as a defendant.

On December 5, 2013, Ahart filed a motion to amend her Form 101 to name Crowe and Perma Staff as additional defendants. After the ALJ denied the motion because Ahart failed to serve it on the parties to be joined, she renewed her motion on February 17, 2014, which was granted on March 17, 2014. The claim was bifurcated on the issues of the responsible employer and the statute of limitations.

The issues argued by Perma Staff and KEMI concern the findings of the ALJ in an interlocutory order. In that order, the ALJ found that the catering department was part of Whaler's, and that Ahart was working as a "temporary employee" of Whaler's on the date of her accident. He determined that as an employee of Whaler's, Ahart was covered under the KEMI policy regardless of whether she signed up with Perma Staff. The ALJ noted that the KEMI policy did not state it covered only leased employees and specifically listed Whaler's as a named insured. He further noted that the Commissioner of the DWC certified that KEMI provided workers' compensation coverage for Whaler's on September 25, 2011, and, under Kentucky Revised Statutes (KRS) 342.375, any policy of insurance covers all employees of the insured. Because Ahart was an employee of Whaler's at the time of her accident, she was covered under the KEMI policy.

While the ALJ believed the issue was resolved by the KEMI policy and KRS 342.375, he continued to explain why Ahart was deemed an employee of both Whaler's and Perma Staff stating:

> [T]he ALJ is also persuaded that [Ahart] was an employee of Perma Staff II at the time of her injury. In reaching this conclusion, it is noted that Joseph Eaton testified in his deposition that Perma Staff II and Whaler's Catch Restaurants were "co-employers" of the restaurant's employees.

The ALJ also noted that the Perma Staff and Whaler's contract allowed Harris to hire help as needed and that managers, including Crowe, could act on Harris's

behalf. The ALJ further rejected KEMI's argument that Whaler's never paid a premium for coverage for Ahart noting that there was evidence that there was an overcharge for workers' compensation coverage.

The ALJ denied Perma Staff's and KEMI's petitions for reconsideration. In that order, the ALJ made further findings as to the issues addressed in its prior order and addressed Perma Staff's argument that Ahart's claim against Perma Staff is barred by the statute of limitations. The ALJ began by noting that whether the claim against Perma Staff was timely had no relevance on the liability of KEMI because he found Ahart was an employee of its insured, Whaler's. However, the ALJ addressed the issue should it have relevance on appeal or for the financial dealings among Whaler's, Perma Staff, and KEMI.

The ALJ found that naming Harris in the original Form 101 was sufficient under the two-year statute of limitations in KRS 342.185. Additionally, the ALJ noted that Ahart named KEMI as a defendant in the original action and notice of the claim could be imputed to Perma Staff. Finally, the ALJ found that due to her injuries, Ahart was possibly mentally incapacitated at the time she filed her original application for benefits and when she moved to amend the claim to include Perma Staff. Finally, the ALJ rejected Perma Staff's argument that Crowe was an independent contractor and Ahart was her employee.

Subsequently, the ALJ determined that Ahart is permanently and totally disabled, and awarded disability benefits and medical benefits. Following the entry of that opinion and award, Perma Staff and KEMI appealed to the Board. Ahart cross-appealed arguing that the ALJ erred in dismissing Harris's executrix as a party. The Board was unable to locate an order resolving Ahart's petition for reconsideration in the record. The Board affirmed the ALJ opinion, award, and order except that it remanded the matter for the ALJ to address Ahart's petition for reconsideration. These appeals followed.

Our Supreme Court has explained that the "standard of review in workers' compensation claims differs depending on whether we are reviewing questions of law or questions of fact." *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 270 (Ky. 2018). The reviewing court is not bound by "an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo.*" *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (citations omitted). "The ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence." *LKLP CAC Inc. v. Fleming*, 520 S.W.3d 382, 386 (Ky. 2017) (citation omitted). With our standard of review stated, we address the issues.

Numerous issues are presented by Perma Staff and KEMI, and some are worthier of detailed discussion than others. We can readily dispose of their argument that Crowe was an independent contractor and employed Ahart.

Whether an individual is "an independent contractor is a question of law if the facts below are substantially undisputed, and is a question of fact if the facts are disputed." *Uninsured Employers' Fund v. Garland,* 805 S.W.2d 116, 117 (Ky. 1991) (citation omitted). We are required to "give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled." *Id*. The factors to be considered in determining whether an individual is acting as an employee or independent contractor 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 v. Wooten's IGA Foodliner*, 436 S.W.2d 265, 266 (Ky. 1969).

Harris testified he incorporated Whaler's Catch Restaurants of Paducah, LTD in 1991, and it contained a catering department. The catering department does not maintain separate bank accounts or business books from the restaurant. He testified the catering work performed by Crowe was for Whaler's while Crowe served as an employee of Perma Staff and the net income from that

work went to Whaler's. The employees of Whaler's regularly performed catering duties, the restaurant was used to prepare food, the restaurant's van was used in the catering operation, and expenses from the catering business were paid from Whaler's funds. Additionally, Hawkins testified that Crowe was an employee of Perma Staff. There was more than sufficient evidence to find that Crowe was not Ahart's employer.

While there has been much dispute as to the identity of Ahart's employer, there is no dispute that Perma Staff is an employee leasing company. Those companies are addressed in KRS 342.615(1), which provides in part:

> (a) "Employee leasing company" or "lessor" means an entity that grants a written lease to a lessee pursuant to an employee leasing arrangement;
>
> (b) "Lessee" means an employer that obtains all or part of its workforce from another entity through an employee leasing arrangement;
>
> (c) "Leased employee" means a person performing services for a lessee under an employee leasing arrangement; [and]
>
> (d) "Employee leasing arrangement" means an arrangement under contract or otherwise whereby the lessee leases all or some of its workers from an employee leasing company. Employee leasing arrangements include, but are not limited to, full-service employee leasing arrangements, long-term temporary arrangements, and any other arrangement which involves the allocation of employment responsibilities among two (2) or more entities. For purposes of this section,

> "employee leasing arrangement" does not include arrangements to provide temporary workers[.]

KRS 342.615(4) addresses the responsibility for workers' compensation coverage in an employee leasing arrangement. It provides that a lessee may fulfill its statutory responsibility to secure benefits for leased employees "by contracting with an employee leasing company to purchase and maintain the required insurance policy."

There have been few opportunities for our appellate courts to address employee leasing companies, but it did so in a string of three cases all involving a claim filed by Julian Hoskins. A brief factual background of Hoskins's claim is helpful.[4]

Hoskins applied for a job as a truck driver with Four Star Transportation, Inc. and was hired by Four Star's terminal manager. After training and testing, Hoskins began driving trucks marked with Four Star's signage and he was unaware that any other entity purported to be his employer.

Better Integrated Services, Inc. was an employee leasing company serving trucking companies, and Four Star contracted for it to provide workers' compensation insurance for Four Star's workforce. Because of its contract with Better Integrated, Four Star did not carry a separate policy of workers'

[4] The facts are recited in depth in the three opinions issued by our Supreme Court. For our purposes, we have recited only a portion of those facts as background.

compensation insurance. The employment arrangement was complicated because Better Integrated "leased" Hoskins's employment responsibilities to its affiliated company who secured workers' compensation coverage through KEMI.

In *Kentucky Uninsured Employers' Fund v. Hoskins*, 440 S.W.3d 370 (Ky. 2013) (*Hoskins I*), the Court discussed whether, under the loaned servant doctrine, Hoskins could be an employee of the employee leasing company when he was not aware of the leasing arrangement. The Court held that Hoskins was not an employee of the employee leasing company because he did not enter into a contract for hire with that entity. *Id*. at 373.

Our Supreme Court granted a rehearing in *Hoskins I* which resulted in its opinion in *Kentucky Uninsured Employers' Fund v. Hoskins*, 449 S.W.3d 753 (Ky. 2014) (*Hoskins II*), which superseded *Hoskins I*. The Court concluded that "an 'employee leasing arrangement' as defined by KRS 342.615 differs substantially from a loaned servant situation, and therefore the common law principle of the loaned servant doctrine that a servant may not be considered an employee of an employer of whom he has no knowledge does not apply[.]" *Id.* at 755. The Court's opinion on rehearing was based on the fundamental differences between an employer who loans an employee and an employee leasing company. The Court explained as follows:

> Employee leasing companies, as contemplated in KRS [342].615, operate on a fundamentally different

> premise and perform a fundamentally different service. Significantly, they generally do not provide workers to employers who need workers. KRS 342.615(1)(d) expressly provides, "For purposes of this section, 'employee leasing arrangements' do not include arrangements to provide temporary workers." Instead, employee leasing companies provide employers with a menu of administrative employee-related services, such as payroll management, employee health insurance coverage, unemployment insurance, workers' compensation coverage, savings and retirement plans, and other human resource needs. By securing the services of an employee leasing company, an employer is relieved of the burden and expense of handling those tasks with in-house administrative personnel. In effect, the employer outsources to the employee leasing company certain administrative tasks associated with the management of the client's existing workforce. For a fee paid by an employer . . . the employee leasing company assumes responsibility for the agreed-upon services by becoming, for bookkeeping purposes, the "employer" of the client's workforce, which is then "leased" back to the client, [w]ho is designated as the "lessee" in the arrangement.

Id. at 760. The Court continued to explain that employee leasing companies do not, as their name suggests, actually lease employees:

> The term "employee leasing company" is, perhaps, a confusing misnomer because employee leasing companies do not provide workers in the way that a car leasing company provides cars. In the typical employee leasing arrangement, the "lessee" employer, like any conventional employer, hires, trains, and oversees the performance of its existing workforce. The workers . . . do not physically move from the workplace of the leasing company to the workplace of the lessee-employer. Instead, the worker remains as he was: a part of the lessee's existing workforce. He continues to labor for the

> employer who hired him, and that employer continues to oversee his day-to-day routine. Unlike contract labor providers and temporary employee services, employee leasing companies . . . do not send workers to employers that need workers; they provide administrative services for employers who have an existing workforce and prefer to outsource the administrative tasks associated with maintaining their workforce.

Id. Because the Court of Appeals based its opinion upon Hoskins's lack of knowledge, the case was remanded to the Court of Appeals for further consideration of the unaddressed issues raised by the parties. *Id.* at 763. After remand, the Supreme Court rendered its third opinion in the *Hoskins* case. *Uninsured Employers' Fund v. Hoskins*, No. 2015-SC-000637-WC, 2017 WL 6380219 (Ky. Dec. 14, 2017) (unpublished) (*Hoskins III*).

In *Hoskins III*, issued four days prior to the Board's opinion in this case, the Court held that although Hoskins's lack of knowledge of the employee leasing arrangement did not preclude him from being a leased employee, the facts compelled a finding that Hoskins was not an employee of the employee leasing company. It emphasized that "there was no written documentation in the form of employee leasing contracts, assignments, payroll, or tax records to prove otherwise." *Id.* at *4. The contract between Perma Staff and Whaler's compels a different conclusion than reached in *Hoskins III*.

The contract expressly states that Perma Staff "is an independent contractor and all individuals assigned to Client to fill the Job Function Positions

are employees of Perma Staff II[.]" The contract then provides that "Perma Staff II may designate on-site supervisors from among its employees assigned to fill Client's Job Function Positions. These supervisors shall direct operational and administrative matters related to services provided by Perma Staff II employees[.]" Ahart was assigned by Harris and Crowe to fill a job position at Whaler's. Although Perma Staff argues that Harris and Crowe did not have authority to hire employees of Perma Staff, the contract states otherwise.

Much is made of the fact that Ahart never signed any paperwork at Perma Staff's offices. However, there is nothing in the contract between Perma Staff and Whaler's that requires any individual assigned to fill a position at Whaler's to sign up at Perma Staff's office to be a Perma Staff employee. Again, the contract contradicts that there was such a requirement stating, "all individuals assigned to [Whaler's] to fill the Job Function Positions are employees of Perma Staff II." Moreover, Eaton testified he considered the relationship between his company and clients as being "co-employers." We agree that the contract and the testimony constitute substantial evidence to support the ALJ's conclusion that Harris and Crowe had authority to hire Ahart who then became an employee of Perma Staff. This is so even if Ahart intentionally did not sign up with Perma Staff to avoid reporting her income for tax purposes.

KRS 342.640(1) does not alter the provisions of the contract between Perma Staff and Whaler's. That statute provides that the following employees are subject to the provisions of Chapter 342: "1) Every person . . . employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer[.]" In *Hoskins II*, the Court commented that "[t]he obvious purpose of that phrase is to assure that the employer has actual or constructive knowledge of the employment relationship, lest he be unfairly charged with workers' compensation liability that, because of his lack of knowledge, he had no ability or opportunity to insure." *Hoskins II*, 449 S.W.3d at 762.

Certainly, Perma Staff was free to make it a provision of the contract with Whaler's that it must have actual knowledge of any individual working for Whaler's. However, what it agreed upon was just the opposite. The contract authorized any on-site supervisor to hire individuals without further authorization from any Perma Staff owner or officer. As indicated in the testimony, it is not unusual for food service providers to hire workers on an as-needed basis and that Perma Staff was aware that individuals were hired to work at Whaler's on that basis.

The ALJ found that Ahart was an employee of Whaler's and Perma Staff. There is no inconsistency in that finding. In fact, in a true employee leasing arrangement the leasing company and the lessee are co-employers, the former providing administrative services and the latter managing the day-to-day operations. KRS 342.615(1)(d) states that employee leasing arrangements include any "arrangement which involves the allocation of employment responsibilities among two (2) or more entities."

We also reject the argument that the ALJ's reference to Ahart as a temporary employee precludes a finding that she could be a Perma Staff employee because KRS 342.615(1)(d) excludes temporary workers from its purview. The argument is that because under KRS 342.615(5) a temporary help service is the employer of a temporary worker, the ALJ's statement that Ahart was a "temporary worker" precludes a finding that Whaler's and Perma Staff were both Ahart's employer.

Properly, the Board noted that a "temporary employee" is defined by statute as a worker furnished to an entity to substitute for a permanent staff employee on leave or to meet seasonal short-term workloads for a finite period of time. KRS 342.615(1)(e). We agree with the Board that Ahart simply did not meet the definition of a temporary employee as she was not furnished to an entity

by a temporary help service. The ALJ's reference to her as such was not a finding of fact but only a means of referring to her as a worker who worked on an as-needed basis.

The ALJ did not err in finding that KEMI was the at-risk insurer on September 25, 2011. The Commissioner certified Whaler's had workers' compensation insurance in Kentucky on the alleged injury date of September 25, 2011. KRS 342.375 provides that "[e]very policy or contract of workers' compensation insurance . . . shall cover the entire liability of the employer for compensation to each employee subject to this chapter[.]" The KEMI policy identifies the policyholder as Perma Staff and the policy period was from October 18, 2010 to October 18, 2011. It included several endorsements, including one entitled, "Schedule Of Named Insured And Work Places." The endorsement listed Perma Staff and its business address as well as over twenty-five other businesses, including "Perma Staff II, Whaler's Catch Restaurant, 123 N 2nd St. Paducah KY 42001." The policy states that it includes the information page and all endorsements and schedules. Under Section F titled, "Locations," the policy states "this policy covers all of our workplaces in the Commonwealth of Kentucky unless you have other insurance or are self-insured for such workplaces. . . ." Importantly, there is no distinction made between leased versus non-leased employees or indication that KEMI must be aware of an individual worker. To the

contrary, the testimony was that KEMI does not require a roster of employees for its insured reflecting termination, new hires, or changes in its workforce. Moreover, although Younts testified that turnover is high in the restaurant business, temporary fill-in help is needed, and some KEMI policyholders pay their employees in cash from time to time, KEMI's audit process did not include a method for determining whether cash payments were made to workers. While KEMI would like to rewrite the policy and exclude Ahart as an employee of its insured, it is not now permitted to do so.

Finally, we address whether the claim against Perma Staff is barred by the statute of limitations. KRS 342.185(1) provides:

> Except as provided in subsections (2) and (3) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself or herself for compensation.

Ahart filed a Form 101 on September 5, 2013, alleging a work-related accident on September 25, 2011. Perma Staff argues that Ahart could not amend her Form 101 to include Perma Staff as a party more than two years after the date of her accident and, therefore, it is time-barred. There is no dispute that Ahart filed a timely Form

101. The question is whether she could join Perma Staff as a defendant after the expiration of the statute of limitations. 803 Kentucky Administrative Regulations (KAR) 25:010 Section 2 subsection 3 provides in part:

> (a) All persons shall be joined as defendants against whom the ultimate right to relief pursuant to KRS Chapter 342 may exist, whether jointly, severally, or in the alternative. An administrative law judge shall order, upon a proper showing, that a party be joined or dismissed.
>
> (b) Joinder shall be sought by motion as soon as practicable after legal grounds for joinder are known. Notice of joinder and a copy of the claim file shall be served in the manner ordered by the administrative law judge.

We agree with the Board that the ALJ acted within his discretion in granting Ahart's motion to join Perma Staff as a party. As the Board pointed out, and as evidenced by the voluminous record, the issue as to who was Ahart's employer was complex. Moreover, Whaler's, KEMI, and the UEF filed their Form 111s, yet none of those defendants discussed Perma Staff. Further confusing the employer issue, KEMI moved to dismiss itself as a party stating the Commissioner of the DWC certified Whaler's was uninsured at the time of Ahart's injury. However, on November 8, 2013, KEMI moved to pass its motion to dismiss it as a party acknowledging it had misread the certification and disclosing its contractual relationship with Perma Staff. Shortly thereafter, Ahart filed her motion to join

Perma Staff as a defendant on December 5, 2013. Given the facts presented, we agree with the ALJ and the Board that Perma Staff was properly joined as a party.

For the reasons stated, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT JSE, INC., D/B/A PERMA STAFF II:

James G. Fogle
Louisville, Kentucky

BRIEF FOR APPELLANT KENTUCKY EMPLOYERS' MUTUAL INSURANCE:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE PATRICIA AHART:

David V. Oakes
Paducah, Kentucky

BRIEF FOR APPELLEE LINDA CROWE:

Laurie Goetz Kemp
New Albany, Indiana

BRIEF FOR APPELLEE JOHN HARRIS, DECEASED:

Jonathan Freed
Paducah, Kentucky

BRIEF FOR APPELLEE WHALER'S CATCH CATERING AND/OR WHALER'S CATCH RESTAURANTS OF PADUCAH, LTD:

Samuel J. Bach
Henderson, Kentucky

BRIEF FOR APPELLEE
UNINSURED EMPLOYERS' FUND:

C.D. Batson
Frankfort, Kentucky