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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002060-WC

KENTUCKY EMPLOYERS' MUTUAL INSURANCE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00410

SHELBY LEE DECKER;
SHELBY LEE DECKER, D/B/A
SHELBY LEE DECKER TRUCKING;
RAGLAND'S QUARRY AND/OR SCOTTY'S
CONTRACTING & STONE, LLC; HON.
CHRIS DAVIS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: Kentucky Employers' Mutual Insurance ("KEMI") petitions us to review an opinion of the Workers' Compensation Board ("Board") entered October 7, 2009, reversing the portion of the Administrative Law Judge's ("ALJ") opinion, holding that Shelby Lee Decker was not covered by a workers' compensation policy purchased by him in October 2006. With regard to the February 26, 2009 opinion of the ALJ, the Board affirmed in part, reversed in part, and remanded to the ALJ. For the reasons stated herein, we affirm the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in January 1999, Shelby Lee Decker hauled rock and lime for Ragland's Quarry (now Scotty's Contracting & Stone, LLC). He was a one-man trucking operation and owned his dump truck but he was not incorporated or a member of a limited partnership. Starting in 2006, Scotty's Contracting & Stone, LLC ("Scotty's") mandated that its contract haulers procure both liability and workers' compensation coverage. Although these haulers were considered to be independent contractors by Scotty's, it knew that it might have potential workers' compensation liability for the haulers and their employees under KRS 342.700(2), which delineates the so-called "up-the-ladder" liability.

Scotty's made arrangements for its haulers to acquire insurance by hosting a meeting for them with a representative of Scotty's insurance agency, Curneal & Hignite Insurance Company ("Curneal & Hignite"). Decker attended this meeting. He testified that the agent, who met with the drivers, knew that most

of the drivers had only one truck and were the sole drivers of their trucks. After Decker relayed the relevant information to the agent, the paperwork was filled out for him. Then, the Curneal & Hignite representative forwarded Decker's application to KEMI where it was received and approved. Decker maintains that he believed the workers' compensation policy covered him, never said that he did not want coverage, and was unaware that the policy supposedly excluded him from coverage as a business owner.

In October 2007, Decker received a mail audit about the policy. Decker testified that he took it to Scotty's and asked it what it meant. A secretary at Scotty's filled it out for him and mailed it to KEMI. Further, he stated that he received $300 or $400 back from the insurance company. He understood the rebate was because he had no accidents during the first year he was insured. Decker paid KEMI approximately $800 for the first year of workers' compensation coverage and approximately $745 to renew his workers' compensation policy for the second year of coverage.

On November 9, 2007, Decker had a delivery to make for Scotty's. According to Decker, Scotty's required all drivers to clean off their trucks and tarp their loads before making a delivery. As he was preparing his truck, he fell off and shattered his hip in three places. Thereafter, Decker was required to undergo surgery for the placement of a steel plate and six screws in his broken hip. To date, he has not been able to work and receives Social Security disability benefits. Decker was also forced to sell his truck to pay bills.

On May 20, 2008, the ALJ sustained KEMI's motion to bifurcate the issues. The ALJ initially determined whether Decker was excluded from coverage under the workers' compensation policy. The issues to be addressed at the first hearing were whether Decker was an independent contractor, whether he had workers' compensation coverage, and whether KEMI workers' compensation policy was applicable.

The hearing was held on March 24, 2009, with the ALJ's opinion issued on May 5, 2009. The ALJ determined that Decker was not covered by the KEMI policy and that Decker was an independent contractor. The ALJ found that Decker had been required, as a condition of his work with Scotty's, to obtain workers' compensation insurance for employees. Additionally, the ALJ determined that Decker elected not to be individually covered. The ALJ concluded that the policy issued by KEMI was unambiguous and clearly excluded Decker from coverage since he was a business owner. Further, the ALJ determined that Decker was an independent contractor of Scotty's and, therefore, not entitled to workers' compensation through its policy. He dismissed the claim against Scotty's.

Then, Decker filed an appeal with the Board rather than a petition for reconsideration. On October 7, 2009, the Board affirmed the ALJ's decision in part and reversed in part. The Board affirmed the portion of the decision that found Decker was an independent contractor for Scotty's. The Board, however, reversed as a matter of law the portion of the ALJ's opinion that held Decker was

not covered by the KEMI policy, which he had purchased. The Board reasoned that the KEMI policy provided coverage to Decker as well as any employee he might hire. KEMI appeals from that decision.

On appeal, KEMI states that the primary issue is whether the Board exceeded its authority and its scope of review in reversing a portion of the ALJ's decision. It argues that the power and authority of the ALJ and the Board are defined by statute. Because Decker did not file a petition for reconsideration, KEMI maintains that, according to KRS 342.285(1), the findings of the ALJ are conclusive and binding on all questions of fact. Consequently, KEMI contends that in order to reverse the decision of the ALJ, it must be shown that there is no substantial evidence of probative value to support the ALJ's decision. It then goes on to outline the facts that provided substantial evidence for the ALJ's opinion.

Conversely, Decker adopts the decision of the Board as its own. He strenuously claims that KEMI cannot charge Decker $1,600 for workers' compensation insurance and, as soon as he is injured, inform him that he never had any coverage. Moreover, Decker believes that the appeal is frivolous and requests attorney fees under KRS 342.310.

In addition to KEMI's and Decker's briefs, Scotty's filed an appellee brief. It reminds us that the Board affirmed the portion of the ALJ's decision wherein Decker was found to be an independent contractor for Scotty's rather than an employee. Scotty's maintains that this issue is res judicata. The Board in its opinion affirmed that portion of the ALJ's opinion, which found Decker to be an

independent contractor. And KEMI does not dispute the ALJ or the Board's decision that Decker was an independent contractor for Scotty's. Therefore, this issue is not under review.

STANDARD OF REVIEW

When reviewing one of the Board's decisions, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). "It is well settled that a reviewing [body] may not substitute its judgment for that of [an administrative] board as a finder of fact." *Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418, 421 (Ky. 1985); KRS 342.285. "The substantial evidence test pertains [only] to questions of fact, not questions of law[.]" *Brown By and Through Brown v. Young Women's Christian Ass'n.*, 729 S.W.2d 190, 192 (Ky. App. 1987). "An erroneous application of the law by an administrative board or by the circuit court is clearly reviewable by this Court. Also, where an administrative body has misapplied the legal effect of the facts, courts are not bound to accept the legal conclusions of the administrative body." *Abuzant v. Shelter Ins. Co.*, 977 S.W.2d 259, 260-61(Ky. App. 1998).

ANALYSIS

It is undisputed that Decker failed to file a petition for reconsideration. Hence, based on KRS 342.285(1), the ALJ's opinion and order "shall be conclusive and binding as to all questions of fact[.]" KEMI is correct in this

proposition. But contrary to KEMI assertion that the Board overstepped its authority by considering the issue of Decker's coverage under the KEMI policy, we note that the Board is not bound by the ALJ's rulings on the law. In fact, not only is the Board not bound by the ALJ's rulings of law, but also it is not bound by the ALJ's rulings on questions regarding application of the law to the facts. *Brown*, 729 S.W.2d at 190. Further support for the Board's authority in cases where a petition for reconsideration is not filed but the issue is legal is found in *Brasch-Barry General Contractors v. Jones*, 175 S.W.3d 81, 83 (Ky. 2005). Therein, the Kentucky Supreme Court stated:

> Pursuant to our interpretation of KRS 342.285 and the plain language contained therein, issues regarding questions of law need not be preserved pursuant to a petition for reconsideration, but rather, may be appealed directly to the Board.

With regard to whether the issue reviewed by the Board was a legal one, we again find guidance from the Kentucky Supreme Court. The Court explained in *Whittaker v. Reeder*, 30 S.W.3d 138 (Ky. 2000), that it is the Board's province on appeal to ensure that ALJ decisions are in conformity with Chapter 342 (the Workers' Compensation Act) and that such determinations constitute questions of law and not fact. *Id.* at 144. Here, we deem that the issue of whether Decker was covered under the workers' compensation purchased by him is a legal one, and as such, the Board did not overstep its authority when it reviewed this issue as a legal one. And, we too, review the matter as a question of law.

The coverage of business owners under the workers' compensation act is found in KRS 342.012.

> (1) For the purposes of this chapter, an owner or owners of a business, including qualified partners of a partnership owning a business, or qualified members of a limited liability company, whether or not employing any other person to perform a service for hire, shall be included within the meaning of the term employee if the owner, owners, qualified partners, or qualified members of a limited liability company elect to come under the provisions of this chapter and provide the insurance required thereunder. Nothing in this section shall be construed to limit the responsibilities of the owners, partners, or members of a limited liability company to provide coverage for their employees, nonqualified partners, or nonqualified members, if any, required under this chapter.

In other words, if Decker elected to be covered under this policy as an employee or as a business owner, according to statutory provisions, he is covered. Our review reveals that, as a matter of law, Decker did elect to come under the provisions of this chapter and be covered as an employee under the KEMI workers' compensation policy. We concur with the Board's assessment of the situation.

Here, the facts are undisputed – Decker deliberately and undeniably purchased workers' compensation insurance for his business and, thus, for himself. He was the sole owner **and** employee of a one-man trucking business. It is unreasonable to assume that Decker would pay substantial premiums to KEMI in exchange for nothing. Moreover, Scotty's is disingenuous to insist that Decker comply with a statutory obligation to provide workers' compensation coverage for his employees when they knew that he was one-person operation.

Obviously, as the Board noted in its decision, there is a disconnect between the on-site Curneal & Hignite Insurance agents' version of events and the Curneal & Hignite agent who transmitted Decker's policy to KEMI. But it is undeniable that the agent who transmitted the application to KEMI never spoke to Decker. The agents at Scotty's meeting for the haulers did not transmit the application to KEMI. Decker cannot be held accountable for the insurance agency's failure to properly handle his insurance application and endorsement. KRS 342.012(2).

Further bolstering the Board's decision that Decker should prevail herein are the many ambiguities in the insurance policy and inconsistencies in the paperwork. The Board in its opinion extensively outlines the numerous discrepancies in the contract and the paperwork. Questions regarding the existence of ambiguity in a contract are legal in nature and, as such, we as well as the Board are authorized to review de novo the ALJ's decision. *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (Ky. App. 2002). Given the evidence on the record in the case, we agree with the Board that Decker has demonstrated that numerous inconsistencies existed and, further, should prevail in this case on that issue. It is not necessary to address the Board's comment that equitable estoppel must apply to this issue and we decline to do so.

Finally, and most significantly, by statute, it is required that every workers' compensation insurance contract cover an employer's entire liability.

> Every policy or contract of workers' compensation insurance under this chapter, issued or delivered in this state, shall cover the entire liability of the employer for compensation to each employee subject to this chapter, except as otherwise provided in KRS 216.2960, 342.020, 342.345, or 342.352.

KRS 342.375. Thus, since Decker was an employee of his operation, the workers' compensation policy covered him. Further, the procedure for opting out of workers' compensation coverage is explained in *Kentucky Employers' Mut. Ins. v. J & R Mining, Inc.*, 279 S.W.3d 513 (Ky. 2009), another case involving KEMI. In *J & R Mining,* the Kentucky Supreme Court discussed whether an officer of a corporation is considered an employee for workers' compensation purposes when the endorsement indicates that this person opted out. While the issue of whether a corporate officer is an employee is not pertinent in this case, the Supreme Court does explicate therein the procedure for opting out of workers' compensation insurance. The procedure to opt out of Chapter 342's protection is found in KRS 342.395(1) and 803 Kentucky Administrative Regulations (KAR) 25:130 Section 1. In essence, a person must file with the employer, prior to injury or occurrence of occupational disease, a written notice of rejection for all provisions of the insurance. And before an employee's written notice of rejection shall be considered effective, the employer must file it with the Office of Workers' Claims. With regard to endorsements, *J & R Mining* states "[t]he endorsement simply is not enough, by itself, to comply with KRS 342.395(1) and 803 KAR 25:130, § 1." *Id.* at 515. Thus, although it is virtually impossible to discern from the evidence what

Decker's endorsement actually stated, clearly it is not relevant. Decker never opted out of workers' compensation coverage.

Lastly, we consider Decker's request for attorney fees under KRS 342.310. Decker's counsel considers this appeal to be a frivolous one. We recognize that workers' compensation is a fertile ground for frivolous appeals, but we note that in this particular case that the ALJ ruled differently than the Board. Therefore, given that two administrative bodies for workers' compensation disagreed, we do not find that KEMI's appeal is frivolous and refrain from awarding attorney fees.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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