

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001703-WC

UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-00682

MCGARRH TRUCKING, INC.,
D/B/A HENDERSON EXPRESS;
TIMOTHY DIETZ;
WAUSAU INSURANCE COMPANIES;
HON. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 2002-CA-001747-WC

McGRARRH TRUCKING, INC.
D/B/A HENDERSON EXPRESS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-00682

WAUSAU INSURANCE COMPANIES;
TIMOTHY DIETZ;
HON. KEVIN J. KINGS,
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WORKERS' COMPENSATION BOARD;
AND UNINSURED EMPLOYERS FUND

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BAKER, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. The Uninsured Employers' Fund (hereinafter "UEF") and McGarrh Trucking, Inc., d/b/a Henderson Express (hereinafter "Henderson") have petitioned this Court for review of the Workers' Compensation Board's (hereinafter "the Board") July 17, 2002, opinion reversing and remanding the decision of the Administrative Law Judge (hereinafter "ALJ").¹ Having determined that the Board did not overlook or misconstrue controlling statutes or precedent, or commit a flagrant error in assessing the evidence, we affirm.

The Board in its opinion presented a thorough recitation of the relevant facts in this matter, which we shall adopt:

Timothy Dietz ("Dietz") was an over-the-road truck driver for Henderson, beginning his employment in approximately 1993. In June of 1998 while performing these duties, he sustained an injury to his back pulling nails out of a trailer floor bed while on a trip in Coosa Pines, Alabama. Dietz underwent surgery and additional medical treatment as a result of the injury. Medical benefits and temporary total disability benefits were paid by Wausau

¹ The two Petitions for Review were consolidated by order of the Court on October 2, 2002.

pursuant to the Indiana Workers' Compensation Act.

A claim was filed in Kentucky on May 25, 2001, eventually leading to the decision herein in which the ALJ concluded Dietz had sustained his burden of proof to establish he was totally occupationally disabled, that Kentucky had jurisdiction over the claim and further confirming in his opinion a finding that a previous settlement in another claim involving Henderson and Wausau established insurance coverage provided by Wausau to Henderson for this incident. The issues on appeal do not relate to the ALJ's finding of total occupational disability nor, for that matter, to whether it was appropriate for Kentucky to exercise jurisdiction and the awarding of benefits pursuant to the Kentucky Workers' Compensation Act. The only issue on appeal relates to the question of coverage being afforded to Henderson by Wausau for this claim. We will therefore limit our discussion of the record to the issue of coverage, the previous settlement agreement and the testimony to the extent it is relevant to this issue.

After the filing of this claim, the Commissioner of the Department of Workers' Claims issued a certification that Henderson was uninsured. Therefore, the UEF was notified and named as a party. An investigation by the Department of Workers' Claims Enforcement Section was ordered and Henderson advised the investigator that it had coverage with Wausau. Wausau was contacted and thereafter communicated with the Department of Workers' Claims indicating that it did not have coverage for this injury and the policy issued was a "pool" policy applicable only to the State of Indiana. The Enforcement Section thereafter again certified Henderson as being uninsured. The claim was assigned for litigation purposes to ALJ Nanney.

Not long after the assignment, Henderson filed a motion styled "Motion to Determine Coverage and Dismiss UEF" which motion was filed July 2, 2001. Attached to the motion was a settlement agreement and order approving settlement agreement as to insurance coverage in the case of Derriel Sutton vs. Henderson Express, UEF & Wausau, Claim No. 98-01549. Henderson alleged this settlement agreement resolved the issues of insurance coverage. On July 27, 2001, ALJ Nanney rendered an order concluding coverage did attach to Wausau, that the issue had been resolved in the previous claim, that the language of the agreement established Wausau was accepting coverage for defending Dietz' injury and, finally, dismissing the UEF. Although not significant to this appeal, the UEF asserts it is not technically a party since it was dismissed below. However, since the ALJ's dismissal was interlocutory in nature and, as such, any issue relating to the dismissal of a party in an interlocutory order may be subsequently raised. The UEF having been appropriately named as a respondent to this appeal, it is an appropriate party before this Board.

Throughout the remainder of this action Wausau attempted through various means, including a petition for reconsideration to this original order as well as efforts to resurrect the coverage issue at the benefit review conference but was foreclosed at every turn. Wausau scheduled and apparently took a number of depositions on "avowal" since ALJ Nanney reaffirmed his decision that coverage had been resolved and, therefore, no evidence on this issue was to be presented during the pendency of this claim.

As best we can determine from the record, the depositions of Kelly DeWall, Peter Sewell, Edward Louis Hoffman and Wayne Richard Woodard, which are in the record but

not clearly identified as such, were these depositions taken by avowal.

Underlying the overall circumstances of this matter is that Henderson in late 1997 sought insurance coverage in the State of Indiana. At the time, Henderson identified a location in Evansville, Indiana as being a terminal/dispatch station. Subsequent evidence, however, has established that virtually all of Henderson's activities were conducted out of Henderson, Kentucky. This location was Henderson's primary office, vehicle maintenance location and primary dispatch location. Henderson's over-the-road operation included work in numerous states in the United States. Henderson, when securing coverage in Indiana in 1997, was placed in the assigned risk pool and any coverage was designated to be held by Wausau. Wausau issued a policy in accordance with pool policies in the State of Indiana. At the time of this transaction, Kentucky no longer offered insurance through an assigned risk pool, which had been supplanted by the creation of the Kentucky Employers' Mutual Insurance Authority ("KEMI") by legislative act in 1994. Apparently, during this period at least, Henderson did not seek coverage through KEMI nor any other policy written for a Kentucky employer.

Dietz himself testified that after having reported his injury to McGarrh he was advised that should he be called upon to give a statement to Wausau relating to the claimed injury he should tell them he worked at and was dispatched from the Evansville, Indiana site. According to a copy of the statement submitted for consideration, Dietz, in fact, made such representations. Presumably, it is because of those statements Wausau began paying medical benefits and temporary total disability benefits in accordance with the policy

pursuant to the Indiana Workers' Compensation Act.

While Dietz was receiving temporary total disability, a Kentucky action was prosecuted in the Derriel Sutton claim. Sutton was assigned to ALJ Nanney for a decision on the merits. Based upon the dates in Sutton's claim, it was in litigation prior to Dietz' claim, although Dietz' injury occurred prior to Sutton's alleged injury. Apparently, there were numerous issues raised in the Sutton claim, including questions relating to unearned premiums being reimbursed and whether pursuant to the pool policy issued by Wausau coverage was afforded for other than Indiana and Illinois residents.

Apparently the parties after much discussion, including discussion with ALJ Nanney, reached a resolution as to some of these issues in Sutton. The settlement agreement referred to above was created, signed by the parties and/or their representatives, and approved by ALJ Nanney on April 2, 1999.

For purposes of this decision, the first two paragraphs of that settlement agreement are as follows:

1. Wausau had in force and effect a Workers' Compensation and Employers' Liability Insurance policy for Employer for the period from December 7, 1997 through October 5, 1998, policy number 1918-00-078157, (hereinafter "policy"). On or about August 19, 1998, Plaintiff, an employee of Employer was injured in a motor vehicle accident that occurred in Mayfield, Kentucky. Plaintiff has filed a claim for workers' compensation benefits in Kentucky against Employer, Wausau and UEF,

being claim no. 98-01549.
Employer has deemed defense of and indemnification for this claim from Wausau and a dispute has arisen between Employer and Wausau as to the scope of the coverage provided under the policy.

2. The parties hereto desire to settle all claims for defense and coverage relating to Plaintiff's claim and any future claims that might be asserted against Employer for injuries or occupational diseases claimed by employees of Employer during the policy period set forth above, specifically excluding the claim asserted by Tim Dietz arising from an injury occurring on June 5, 1998 in Talladega, Alabama and any future claims that may be asserted under the policy by any employee of Employer who was a resident of Indiana or Illinois at the time of the claimed injury or exposure.
(Emphasis ours)

The entire settlement agreement is much more extensive than the quoted language but, for purposes of addressing the issue herein, numerical paragraph 2 is of primary significance. Relying upon this language, Henderson moved to determine coverage and ALJ Nanney in his order of July 27, 2001 stated:

It is hereby FOUND that the issue of insurance coverage for this claim was resolved through settlement in the claim of Derriel Sutton vs. Henderson Express, et al., WCB No. 98-01549. A settlement agreement, dated April 2, 1999, signed by counsel for defendant and Wausau Insurance Company, and approved by this

Administrative Law Judge, stipulated that Wausau Insurance Company would cover the claim asserted by Mr. Dietz for the June 5, 1998 injury and any claims asserted by residents of Indiana or Illinois during the relevant coverage period. Thereafter, Wausau Insurance Company continued to pay benefits to Mr. Dietz and otherwise accepted responsibility for benefits. Accordingly, Henderson Express had workers' compensation insurance coverage through Wausau Insurance Company for this alleged injury.

This finding of ALJ Nanney was reaffirmed by ALJ King in his Opinion and Award and in an order on petition for reconsideration.

The Board regarded the issue presented as one of law rather than fact, ultimately holding that the settlement agreement in the Sutton case had no applicability to Dietz' claim and that neither the ALJ nor the Department of Workers' Claims had jurisdiction to determine the issue. The Board remanded the matter, directing the ALJ to set aside the decision on coverage, enter an award directing Henderson to make payment and incorporating the appropriate statutory language obligating the UEF to pay in the event Henderson should default on its payment of the award. However, the Board indicated that this result would not leave either Henderson or the UEF without recourse in the event a valid contract existed between Henderson

and Wausau to cover this injury claim. Both Henderson and the UEF petitioned this Court for review of the Board's decision.

Our standard of review in workers' compensation cases is well settled in the Commonwealth. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court of Kentucky addressed its role and that of the Kentucky Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals 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." Id., at 687-88.

We have thoroughly reviewed the record, the Board's decision, and the parties' arguments, and have determined that the Board reached the proper result in this matter. Accordingly, the Board did not overlook or misconstrue any controlling statutes or precedent, nor did it commit any flagrant error in assessing the evidence.

For the foregoing reasons, the Board's decision reversing and remanding the ALJ's decision is affirmed.

ALL CONCUR.

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