

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001901-WC

KENTUCKY EMPLOYERS' MUTUAL INSURANCE

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-69707

J & R MINING, INC.; EARL REED, JR., DECEASED;
BARBARA SUE REED; STEPHANIE HAMMONS,
ADMINISTRATRIX OF THE ESTATE OF EARL REED, JR.;
UNINSURED EMPLOYERS' FUND;
HONORABLE HOWARD E. FRASIER, JR., ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

★ ★ ★ ★ ★

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Kentucky Employers' Mutual Insurance (KEMI) seeks review of a decision of the Workers' Compensation Board affirming an Administrative Law Judge's (ALJ's) opinion awarding death benefits to the estate of Earl Reed, Jr. We affirm.

¹ Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Earl Reed, Jr. (Mr. Reed) and his wife, Barbara Sue Reed (Mrs. Reed), were co-owners of J & R Mining, Inc. Mr. Reed served as the corporation's president and treasurer while Mrs. Reed was the vice-president and secretary.

In 2001, J & R Mining, Inc. purchased a workers' compensation insurance policy with KEMI. J & R Mining, Inc. renewed its policy annually, and the policy was in effect when Mr. Reed suffered a fatal work accident on November 9, 2004.

Mr. Reed's estate filed for workers' compensation benefits following his death. In a bifurcated proceeding, the ALJ first considered the contested issues of coverage under the Workers' Compensation Act and coverage under KEMI's insurance policy.

KEMI submitted the deposition of its underwriting supervisor, Scott Marks, and the estate submitted the deposition of Mrs. Reed. First, KEMI contended Mr. Reed was not covered under the Act because he was an owner of the company rather than an employee. KEMI next asserted that Mr. Reed signed a policy endorsement excluding himself and Mrs. Reed from coverage under the insurance policy. KEMI also introduced Mr. Reed's policy endorsement excluding coverage, allegedly signed by him. KEMI pointed out that J & R Mining, Inc. benefited from lower premiums because the policy excluded the Reeds. In turn, Mrs. Reed testified that she and her husband believed the KEMI policy included them. She also introduced evidence of Mr. Reed's

signature, which did not match the signature on KEMI's endorsement.²

The ALJ rejected both of KEMI's arguments and concluded that Mr. Reed was an employee pursuant to the Act at the time of his death and that the policy endorsement did not exclude coverage. The ALJ issued a separate opinion on March 22, 2007, awarding death benefits to Mr. Reed's estate and survivor benefits to Mrs. Reed.

KEMI appealed to the Board. In a well-reasoned decision, the Board affirmed the ALJ's opinion and award. This petition for review followed.

When this Court reviews a decision of the Board, our function "is to correct the Board only where [we] perceive[] 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 Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky.1992).

I. The Insurance Policy

In its petition, KEMI does not vigorously contest the Board's finding that Mr. Reed was an employee pursuant to the Act. Indeed, Kentucky Revised Statutes (KRS) 342.640 plainly states:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:

* * *

² The ALJ compared Mr. Reed's handwriting samples with the KEMI contracts and concluded the signatures were not the same.

(2) Every executive officer of a corporation[.]

Accordingly, Mr. Reed was an "employee" of J & R Mining, Inc. subject to the Act. However, KEMI contends the estate was not entitled to workers' compensation benefits because the policy endorsement specifically excluded Mr. Reed from coverage.³ KEMI relies on its interpretation of KRS 342.012. The statute states in part:

(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.**

* * *

(2) When an owner, owners, qualified partners, or qualified members of a limited liability company have elected to be included as employees, **this inclusion shall be accomplished by the issuance of an appropriate endorsement to a workers' compensation insurance policy.**

KEMI contends that KRS 342.012(2) allows executive officers who are also owners of the corporation to decline coverage under the Act by executing an insurance policy endorsement.

³ KEMI states: "[T]he National Council on Compensation Insurance . . . promulgated the insurance policy endorsement, No. WC 00 03 08, entitled 'Sole Proprietor, Partners, Officers and Other Exclusion Endorsement,' found in each of the four policies issued in this case."

We disagree with KEMI's theory. We "must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997). Here, the plain language of KRS 342.012(2) provides protection under the Act to business owners who execute an insurance policy endorsement. "We 'ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.'" *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (quoting *Flying J Travel Plaza v. Commonwealth of Ky., Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 347 (Ky.1996)). The statute is unambiguous and clearly does not allow an executive officer (an "employee" under the Act) to withdraw from the Act because he is an owner of the corporation. In light of the plain meaning of the statute, we conclude that KRS 342.012 is inapplicable to the case at bar.

Furthermore, we acknowledge KEMI's basic contention that it was free to enter into a contractual agreement with J & R Mining, Inc. However, "the legislature has determined that an employer's entire liability for workers' compensation benefits must be secured as a matter of public policy." *AIG/AIU Ins. Co. v. South Akers Mining Co., LLC*, 192 S.W.3d 687, 688 (Ky.2006) (citing KRS 342.340(1); KRS 342.365; and KRS 342.375). Here, J & R Mining, Inc. had a contract for workers' compensation insurance covering its employees. Mr. Reed, pursuant to KRS

342.640(2) was an employee covered by the Act. "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" ⁴ KRS 342.375; See also *South Akers Mining Co.*, 192 S.W.3d at 688.

Pursuant to the Act, KEMI's insurance policy covered all of J & R Mining, Inc.'s employees, including Mr. Reed. We conclude that KEMI, as J & R Mining, Inc.'s insurer, is liable for the workers' compensation benefits owed to Mr. Reed's estate and widow.

II. Rejection of the Act

KEMI next contends that the Board misconstrued the statutory requirements for an employee to reject the Act.

Pursuant to KRS 342.640(2), as an executive officer, Mr. Reed was an employee under the Act. As such, KRS 342.395 governs rejection of coverage by an employee:

(1) Where an employer is subject to this chapter, then every employee of that employer, as a part of his contract of hiring or who may be employed at the time of the acceptance of the provisions of this chapter by the employer, shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby **unless he shall have filed, prior to the injury or incurrence of occupational disease, written notice to the contrary with the employer; and the acceptance shall include all of the provisions of this chapter with respect to traumatic personal injury, silicosis, and any other occupational disease. However, before an employee's written notice of**

⁴ KRS 342.640 is not listed as an exception to coverage.

rejection shall be considered effective, the employer shall file the employee's notice of rejection with the Office of Workers' Claims.

The executive director of that office shall not give effect to any rejection of this chapter not voluntarily made by the employee. If an employee withdraws his rejection, the employer shall notify the executive director.

Furthermore, 803 Kentucky Administrative Regulations (KAR) 25:130 § 1 sets forth the proper procedure for an employee to file a rejection notice with the Office of Workers' Claims. The employee must submit a Form 4 ("Employee's Notice of Rejection of Workers' Compensation Act"), to his employer. The Form 4 must be notarized, and the employer must file it with the Office of Workers' Claims. Similarly, if an employee wants to cancel his rejection of the Act, the regulation requires filing a Form 5 ("Written Notice of Withdrawal of Form 4 Rejection Notice"). 803 KAR 25:130 § 2.

KEMI asserts that Mr. Reed, as an executive officer/owner was not required to file a Form 4 to exclude himself from the Act. KEMI contends the statutory procedures governing Form 4 rejection of the Act protect "innocent employees," rather than individuals like Mr. Reed, who benefited from lower insurance premiums by rejecting coverage. KEMI further opines that the insurance industry will suffer if executive officer/owners are free to reject the Act with a Form 4 and unilaterally rescind their rejection by filing a Form 5 without notice to the insurer. We disagree.

We reiterate that we are obligated to interpret the statute according to its plain meaning. *Ratliff*, 955 S.W.2d at 925. KRS 342.395 does not draw a distinction between so-called "innocent employees" and executive officers who are "employees" pursuant to KRS 342.640(2). We conclude that for any employee, including executive officers/owners, to validly reject the Act, KRS 342.395 and 803 KAR 25:130 § 1 must be satisfied. Likewise, we are not persuaded that this interpretation of the statute unduly burdens the insurance industry.

III. The Insurance Contract

KEMI next argues that its insurance contract and Mr. Reed's alleged waiver were not void as against public policy.

We reiterate that, pursuant to KRS 342.375, a contract for workers' compensation insurance must cover the employer's entire liability. We are not persuaded that KEMI's policy endorsement, promulgated by the National Council on Compensation Insurance, circumvented the clear requirements of Kentucky's Workers' Compensation Act.

IV. Conclusion

Finally, we note that the Uninsured Employers' Fund (UEF), a named Appellee, filed a brief in this matter. However, the ALJ's June 26, 2006, order dismissed the UEF as a party to this action. Nevertheless, we need not reach the UEF's

arguments in light of our conclusion that KEMI is liable as a matter of law.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Lewis and Lewis Law Offices
Hazard, Kentucky

BRIEF FOR APPELLEES

SUE REED AND STEPHANIE
HAMMONS, ADMINISTRATRIX OF THE
ESTATE OF EARL REED, JR.:

J. Robert Stansbury
Law Offices of J. Robert
Stansbury
London, Kentucky

BRIEF FOR APPELLEE

UNINSURED EMPLOYERS' FUND:

Gregory D. Stumbo
Attorney General of Kentucky

Dana C. Stinson
Assistant Attorney General
Frankfort, Kentucky