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Commonwealth Of Kentucky
Court Of Appeals

NO. 1999-CA-000033-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

V. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-34076

LEON DORTON; KITE CONTRACTING COMPANY; KITE CONTRACTING CO., INC. HC 82; PUNCHEON BRANCH as insured by Wausau; PUNCHEON BRANCH COAL COMPANY as insured by Liberty Mutual; WAUSAU INSURANCE COMPANY; SPECIAL FUND; RONALD W. MAY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board) affirming an opinion and order of an Administrative Law Judge (ALJ). An ALJ found in another claim that a workers' compensation insurance policy issued by appellee Wausau Insurance Company (Wausau) in favor of appellee Puncheon Branch Coal Company, Inc. (Puncheon Branch), was fraudulently procured and

was void. The principal issue before us is whether the board erred by finding that the doctrine of collateral estoppel precludes appellant Uninsured Employer's Fund (UEF) from relitigating the fraud issue in the instant proceeding. We are of the opinion that the UEF is so precluded and affirm.

In September 1990 one Leon Dorton (Dorton) filed a workers' compensation claim against appellee Kite Contracting Company (Kite) and appellee Special Fund, alleging that he was totally disabled due to coal workers' pneumoconiosis. Kite had no workers' compensation insurance coverage. Consequently, the UEF was joined as a party defendant. Thereafter, the UEF made a motion to join as parties to Dorton's claim both Puncheon Branch as a responsible party pursuant to KRS 342.610(2) and its compensation carrier Wausau.

The Dorton claim was thereafter ordered consolidated with the claims filed against Kite by Jeffery Hall and Charles Bentley. There was identity of party-defendants in all three claims and the same policy issued by Wausau was alleged to provide coverage for the claims. Further, the ALJ stated in the consolidation order that there were "common questions of law and fact including the appropriate employer for payment, if any, the responsible insurance for any claim for benefits, if any, and the validity of a rejection to be covered by the Kentucky Workers' Compensation Act . . . ."

In due course, evidence was adduced that Puncheon Branch was owned by Hattie and Elwood Johnson and that Puncheon Branch had two employees, both security personnel, on its payroll. Puncheon Branch had workers' compensation insurance, procured licenses and permits to mine coal, and contracted for Kite to supply the workers needed to mine its coal properties. Kite was also owned by Hattie and Elwood Johnson. Kite did not obtain workers' compensation insurance, but rather purchased accident insurance. Moreover, its employees executed rejections of coverage under the Workers' Compensation Act.

Eventually, the claims of Hall and Dorton were ordered unconsolidated and in June 1993, the ALJ entered an opinion and award in Hall's claim which stated in part as follows:

> 7. The Administrative Law Judge is persuaded . . . that both fraud and misrepresentations were present in the purchase of the policy of insurance from Wausau and the scheme concocted by the Johnsons (owners of Puncheon Branch Coal Co., Inc. and Kite Contracting Company) was violative of both the statutes and the public policy of the Commonwealth of Kentucky. Had Wausau been apprised of the scheme it would not have issued its policy of workers' compensation insurance to Puncheon Branch Coal Co., Inc. I further find that the action taken by the Johnsons also constituted a fraudulent attempt to avoid paying the correct amount of premiums to Wausau and to thwart the statutes and regulations of the Commonwealth of Kentucky that were enacted for the protection of the general public in the mining of coal and for the protection of workers employed to mine coal. By the adoption of statutes to control the mining of coal and to provide workers' compensation benefits to workers, the Legislature has

> effectively declared it to be the public policy of this state that coal mining should be performed in a manner that will minimize damage or injury to the general public and the environment and that the coal miners who mine the coal will be protected from disability resulting from injury or occupational disease. The scheme concocted by the Johnsons was an effort to circumvent those statutes and regulations in violation of the public policy of the state. As noted by the Board in its Opinion of June 19, 1992, the case of <u>Kelly v. Nussbaum</u>, [218] Ky. [330], 291 S.W. 754 (1926), stands for the proposition "[n]o principle is older or more venerated than that a litigant may never rely upon his own fraud or wrong." Accordingly, I find that the policy of workers' compensation insurance issued by Wausau to Puncheon Branch Coal Co., Inc., was void from its inception.
>
> As Puncheon[8] Branch Coal Co., Inc., and Kite Contracting Company were both uninsured for workers' compensation purposes when [Hall] sustained his injury on December 5, 1989, the Uninsured Employers' Fund shall be responsible for plaintiff's award upon proof that the award cannot be enforced against those defendants.

No appeal was taken by the UEF from the ALJ's opinion and award in <u>Hall</u>.

In September 1994 Wausau filed a motion asking that it be dismissed as a party to Dorton's claim on the ground that the UEF's claim against it in that proceeding was barred by the doctrines of "res judicata, claim preclusion and collateral estoppel." No ruling was made on Wausau's motion. Next, on September 6, 1996, the ALJ approved a settlement agreement in Dorton's claim between the UEF, Puncheon Branch, and the Special Fund. The settlement agreement stated that Dorton was to receive an agreed amount of compensation from Puncheon Branch in a lump sum and from the

Special Fund in weekly payments. The agreement further stated that the "[i]ssue of validity of insurance policy issued by Wausau and coverage are still at issue are reserved as per the agreement between the UEF and Wausau." The latter agreement between the UEF and Wausau, however, was not included in the record of Dorton's claim.

On May 22, 1996, the ALJ entered an order in which he stated that the remaining issue in Dorton's claim related to "the dispute between Wausau Insurance and the Uninsured Employers' Fund as to whether there was a valid policy of insurance in force at the time of plaintiff's injury and applicable to his injury." The order further stated that the UEF and Wausau had 90 days in which to adduce evidence, after which briefs would be submitted and the issue decided.

Neither the UEF nor Wausau submitted additional evidence. On June 6, 1996, Wausau renewed its motion to dismiss arguing that the ALJ's earlier decision in Hall precluded the UEF from seeking to enforce the policy in Dorton's claim. The ALJ denied the motion.

On May 8, 1997, the ALJ rendered an opinion and order in which he found that the workers' compensation insurance policy issued by Wausau to Puncheon Branch "was induced by fraud and was void from its inception." The UEF was ordered to reimburse Wausau for the employer's portion of the Dorton settlement.

On appeal, the board held that the doctrine of collateral estoppel precluded the UEF from relitigating the issue as to the validity of Wausau's policy. This petition for review followed.

First, the UEF contends that the board erred by finding that the doctrine of collateral estoppel precluded it from relitigating the issue as to the validity of the Wausau policy issued to Puncheon Branch. We disagree.

The doctrine of collateral estoppel "prohibits issues which were adjudicated in a previous lawsuit from being relitigated in a subsequent lawsuit." Yeoman v. Commonwealth, Health Policy Board, Ky., 983 S.W.2d 459, 465 n.2 (1998). This jurisdiction has applied the doctrine for many years. See Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970). Commonly referred to as issue preclusion, the elements of the doctrine are set forth in Yeoman, 983 S.W.2d at 465, as follows:

> For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. Restatement (Second) of Judgments § 27 (1982). Second, the issue must have been actually litigated. Id. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Id. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. Id.

Moreover, the party bound by the doctrine must have been given a full and fair opportunity to litigate the issue in the prior

proceeding. Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997). Finally, we note that the decisions of administrative agencies or officers acting in a judicial capacity are entitled to the same preclusive effect as a judgment of a court. Godbey v. University Hosp. of the Albert B. Chandler Medical Center, Inc., Ky. App., 975 S.W.2d 104 (1998).

Here, it is clear that all the elements of collateral estoppel doctrine are met. It is evident that one issue litigated in Hall was whether the workers' compensation insurance policy issued by Wausau to Puncheon Branch was void from its inception due to fraud. The identical issue is present in the instant case. Moreover, the issue as to the validity of the policy was fully litigated in Hall and the UEF was provided with a full and fair opportunity to do so. In fact, initially in Hall, the ALJ concluded that he lacked jurisdiction to determine whether the insurance policy was void. On appeal, that opinion and award was reversed and remanded with directions for the ALJ to make findings in that vein. On remand, the ALJ found that the policy was void, and for reasons which are unclear the UEF did not appeal from that determination. Finally, we also note that the ALJ's decision respecting the policy was necessary to the final decision in Hall. Clearly, therefore, all the elements for applying the doctrine of collateral estoppel herein were met. Hence, we conclude that the board did not err by applying the doctrine and prohibiting the UEF from relitigating the issue as

to the validity of Wausau's policy. Given our decision to this point, UEF's remaining contentions are moot with one exception of the issue in regard to whether KRS 304.14-110 applies to workers' compensation policies. We conclude that it does.

Basically, KRS 304.14-110 prohibits a recovery on an insurance policy if, inter alia, the policy was procured by fraud or misrepresentation. We are unpersuaded by the UEF's contention that the statute does not apply to workers' compensation insurance policies. Indeed, as noted by the board, KRS 304.14-010 plainly states that the provisions of Subtitle 14 of the Insurance Code apply to all insurance contracts except the following:

> (1) Reinsurance.
>
> (2) Policies or contracts not issued for delivery in this state nor delivered in this state.
>
> (3) Wet marine and transportation insurance.

It is within the prerogative of the legislature to determine public policy, see Commonwealth, ex rel. Cowan v. Wilkinson, Ky., 828 S.W.2d 610 (1992), and we perceive no abuse of that discretion in KRS 304.14-110. Moreover, the UEF's reliance on National Ins. Ass'n v. Peach, Ky. App., 926 S.W.2d 859 (1996), is unavailing. In Peach, a panel of this court held that the "provisions of the [Motor Vehicle Reparations Act], coupled with the public policy underlying them, requires that the insurer rather than an innocent third party bear the risk of intentional material

misrepresentations made by an insured." 926 S.W.2d at 863. However, Peach is factually distinguishable from the instant proceeding as therein the rights of an "innocent third party" were at issue. Here, by contrast, the injured worker has received a favorable settlement.

The board's opinion is affirmed.

ALL CONCUR.

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