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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001758-WC

UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00504

POPLAR BROOK DEVELOPMENT, LLC;
BARBARA NEGROE; CALVIN BAKER;
BRIAN TERRY; TIMOTHY HANNAH;
UNINSURED EMPLOYERS' FUND;
HONORABLE J. LANDON OVERFIELD, CHIEF
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2014-CA-001794-WC

TIMOTHY HANNAH

APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00504

POPLAR BROOK DEVELOPMENT, LLC.;
BARBARA NEGROE; CALVIN BAKER;
BRIAN TERRY; DR. RINKOO AGGARWAL;
UNINSURED EMPLOYERS' FUND;
HONORABLE J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Timothy Hannah and the Uninsured Employers' Fund (UEF) petition for our review of an opinion of the Workers' Compensation Board (Board) that vacated in part and remanded a decision of the Administrative Law Judge (ALJ). After our review, we affirm in part, vacate in part, and remand.

The ALJ awarded Hannah permanent partial disability benefits based upon a five percent functional impairment rating. On appeal, the Board determined that the ALJ had failed to address in his decision an additional one percent impairment rating assessed by Dr. Timothy Kriss as a result of nerve compression at Hannah's left thigh. The Board remanded this matter to the ALJ and directed him to address this issue and to make a determination with respect to whether Hannah is entitled to an additional award of permanent partial disability benefits and medical benefits for that condition.

Also before the Board was an appeal by the Uninsured Employers' Fund. The UEF concluded that the ALJ erred in determining that Brian Terry – the construction superintendent who had not secured workers' compensation insurance – was Hannah's employer at the time that Hannah sustained a work-related injury. The Board affirmed the ALJ on this issue.

On February 27, 2004, Hannah, who was twenty-eight years of age, fell from a ladder while he was working on the deck of a house that he had been helping to frame. He had no previous experience in homebuilding and was being paid ten dollars per hour as a laborer on the project. He was paid in cash (from which no taxes were withheld) by Calvin Baker. Baker had been hired for the construction project by Brian Terry. Terry, an engineer for General Electric, had agreed to serve as superintendent of construction for a home to be built for Barbara Negroe, his colleague at General Electric. The house was under construction in Oak Forest Estates, a neighborhood being developed in Elizabethtown by Poplar Brook, LLC. Poplar Brook was formed in 2001 by Terry, Negroe, and Robert Tobiason (a third engineering colleague at General Electric) in order to purchase a parcel of wooded property, to improve and subdivide it, and to sell the lots to future homeowners.

Hannah filed an Application for Resolution of Injury Claim on March 10, 2004. Hannah alleged that he injured his lumbar spine when he fell to the ground from the ladder. He identified Baker as his employer. He joined Poplar Brook and the Uninsured Employers' Fund as other defendants. Hannah's employment history included working as a meter-reader, parts inspector, and mason.

On June 28, 2004, the ALJ denied Hannah's motion for interlocutory relief. The ALJ noted that Hannah's medical evidence consisted of a discharge plan from Hardin Memorial Hospital dated March 2, 2004; a medical imaging report (MRI) indicating that Hannah had suffered a mild compression fracture of

the first vertebra of the lumbar spine (L1), which was expected to heal in two to three months; and a return-to-work slip from Dr. Rolando Cheng, an orthopedic surgeon. The return-to-work slip released Hannah to light-duty work on May 20, 2004.

The claim was bifurcated in order to determine the relationship of the parties and Hannah's average weekly wage. On October 21, 2004, the ALJ rendered a decision determining that Terry, individually, was Hannah's employer. Because Terry had not obtained workers' compensation insurance, the ALJ concluded that the UEF was responsible for the payment of benefits.

On December 21, 2004, the ALJ approved an agreed order among the UEF, Hannah, and Terry. Without conceding the liability of any of the defendants, the parties recognized that Terry was in default of the ordered payment of Hannah's temporary total disability (TTD) benefits and medical benefits. The agreement provided that the UEF would pay TTD benefits to Hannah in the amount of \$266.66 per week from the date of the accident until "terminated by order of the [ALJ]." The UEF also agreed to pay any medical expenses necessary for the treatment of Hannah's work-related injury until he reached maximum medical improvement (MMI). The claim was placed in abeyance pending MMI.

Upon his review of inactive cases in July 2006, the ALJ ordered the parties to file a status report of Hannah's condition and to explain why the claim should not be returned to the active docket. Hannah filed a timely status report explaining that he had not reached MMI and that he was continuing to receive temporary total

disability benefits. The UEF submitted a report prepared by Dr. David Shraberg following his independent neuropsychiatric evaluation of Hannah.

In his report, Dr. Shraberg noted that Hannah had essentially been released to work but that he continued to complain of pain. As a result, he had been referred to pain management specialist, Dr. Rinkoo Aggarwal, and was now involved in an extensive pain management regimen. Dr. Shraberg observed that Hannah saw Dr. Aggarwal every month and had been prescribed “fairly massive amounts of narcotics.”

Dr. Shraberg remarked that Dr. Aggarwal had made “what appears to be an extraordinary and naïve leap of faith” by suggesting that Hannah suffered a traumatic brain injury as a result of the fall from the ladder. He reported that Dr. Aggarwal appeared to be “ignorant of [Hannah’s] long-standing history as well as evidence of marked symptom magnification on psychological testing. . . .” He rejected Dr. Aggarwal’s suggestion that Hannah had suffered a brain injury that caused any degree of neurocognitive impairment and described Hannah’s reaction to pain in his left thigh variously as “exaggerated,” “hyperbolic,” and “hysterical.”

Dr. Shraberg indicated that the degree of pain of which Hannah complained and the treatment that he was receiving were “vastly disproportionate” to what would be expected for a mild, lumbar compression fracture. He was convinced that Hannah had reached MMI long before the evaluation and was now suffering the effects of “massive narcotization.” He suggested that Hannah be weaned off the pain medications and that he return to work.

No motion to remove the claim from abeyance was forthcoming. Hannah continued to submit regular status reports indicating that he had not reached MMI, and the UEF continued to pay temporary total disability benefits and medical benefits.

On July 7, 2009, the UEF filed the report of Dr. Timothy Kriss, a neurosurgery specialist, who had conducted an independent medical evaluation of Hannah on May 18, 2009. In his report, Dr. Kriss noted that Hannah had an “interesting” lack of complaints of back pain and/or symptoms at L1 and that his lumbar spine was normal on physical examination. Upon his examination of the MRI scan of February 28, 2004, Dr. Kriss reported that Hannah appeared to have suffered what amounted to an “indentation” in the margin of the L1 cortex rather than a true “compression fracture.” He felt that this “most minimal compression fracture diagnosable” had healed and was completely asymptomatic.

Dr. Kriss noted that Hannah had also suffered an onset of left thigh pain, numbness, and tingling (meralgia paresthetica) associated with his work-related injury which should have completely resolved with weight loss. Dr. Kriss reported that Hannah “has more than his share of symptom magnification” and observed that Hannah’s subjective symptoms were out of proportion to all objective findings. Dr. Kriss also emphatically rejected the notion that Hannah had suffered any form of traumatic brain injury. He suggested that Hannah be “slowly weaned off” the excessive amount of narcotics that he had been prescribed; that

Hannah might benefit from at least one sacroiliac joint and at least one lumbar facet injection to be performed by an interventional pain management specialist.

Dr. Kriss performed a second evaluation of Hannah on September 12, 2012. He again noted that Hannah's condition should improve if he were to lose weight. At this time, he declared that Hannah should have reached MMI on February 27, 2005 – the one-year anniversary of his fall. Dr. Kriss essentially repeated his findings from his 2009 medical evaluation and noted that Hannah should be able to return to work in three months without restrictions.

Hannah continued to file regular status reports indicating that he had not reached MMI. Off-work slips completed by Dr. Aggarwal were attached. The UEF continued to pay temporary total disability benefits and medical benefits.

In July 2011, the UEF filed a motion to join Barbara Negroe as an additional party defendant. After the motion was granted, Negroe filed a motion to have the claim restored to the active docket. She noted that the UEF had had a good faith basis to terminate its payment of temporary total disability benefits to Hannah seven years earlier. The UEF caused liens to be filed against Negroe's Hardin County real estate. Hannah continued to file status reports indicating that he had not reached MMI.

In October 2012, Negroe filed a motion to terminate the payment of temporary total disability benefits. In support of the motion, she resubmitted the report that had been prepared by Dr. Kriss following his independent medical examination of Hannah in May 2009. Negroe also submitted Dr. Kriss's updated,

supplemental report of September 12, 2012, indicating that Hannah had not undergone the suggested injections nor any other treatment aside from refilling the narcotics prescriptions. After his second examination, Dr. Kriss concluded that Hannah had, in fact, reached MMI on February 27, 2005, the one-year anniversary of his fall. He observed that this

one year time frame represents the absolute maximum possible medical timeframe for reaching MMI after a MAJOR or UNSTABLE lumbar compression fracture; Mr. Hannah's L1 fracture is at the extreme other (minimalist) end of the lumbar fracture spectrum, and therefore placing Mr. Hannah at maximum medical improvement on the one-year anniversary of the February 27, 2004 fall represents giving Mr. Hannah the absolute maximum possible 'benefit of the doubt' in terms of time for healing and time to reach MMI.

On November 9, 2012, the ALJ terminated the payment of Hannah's temporary total disability benefits. The ALJ also granted Negroe's motion to dispute medical fees concerning Hannah's extensive narcotic regimen. Dr. Aggarwal was joined as a defendant.

In August 2013, Negroe submitted the second supplemental report prepared by Dr. Kriss. In his report, Dr. Kriss expressed that it was his strongly held medical opinion that the narcotics prescribed to Hannah following his work-related back injury had not been medically necessary and that they were, in fact, medically *unreasonable*. Hannah continued regularly to file off-work slips prepared by Dr. Aggarwal.

A hearing was conducted in January 2014, and the ALJ issued an extensive opinion, award, and order in April 2014. The ALJ confirmed his earlier decision that Hannah had been an employee of Brian Terry at the time that he sustained the work-related injury. The ALJ found that Negroe, Baker, and Poplar Brook were not employers either of Hannah or of Terry and that the UEF was responsible for the payment of the workers' compensation benefits to which Hannah was entitled.

Next, the ALJ found that Hannah had sustained a five percent functional impairment as a result of the compression fracture. He accepted as most credible and convincing the medical evidence provided by Dr. Kriss and found that Hannah had reached MMI on the one-year anniversary of his fall. The ALJ concluded that Hannah's entitlement to temporary total disability benefits should have ended on February 27, 2005. The ALJ rejected the claims of impairment stemming from a traumatic brain injury or a psychological condition resulting from Hannah's fall from the ladder. However, he did not address the nerve compression in Hannah's left thigh.

With respect to the contested medical expenses, the ALJ determined that Hannah's continued use of narcotics was not reasonable and necessary and that his pain management treatment was not compensable. However, the ALJ concluded that Hannah was entitled to a ninety-day weaning period as suggested by Dr. Kriss.

Finally, the ALJ concluded that the UEF was entitled to a dollar-for-dollar credit against the permanent partial disability award for its overpayment of TTD, *i.e.*, the temporary total disability benefits paid to Hannah after February 27, 2005.

On appeal, the Workers' Compensation Board affirmed the ALJ's opinion, award, and order, but it vacated and remanded only for the ALJ to consider the additional one percent impairment rating assessed by Dr. Kriss with respect to the pinched nerve in Hannah's left thigh. The ALJ was also directed to order that the payment of permanent partial disability benefits be suspended during any period for which temporary total disability benefits were awarded. Both Hannah and the UEF filed a petition for review.

When we review a decision of the Workers' Compensation Board, we may reverse only where the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992). We shall consider Hannah's arguments first. Our analysis of the UEF's contentions follows.

In his order of April 16, 2014, the ALJ granted the UEF a dollar-for-dollar credit against the permanent partial disability benefits awarded as a set-off for the temporary total disability benefits that were paid to Hannah after February 27, 2005. Hannah contends that the Board erred by failing to conclude that the UEF was entitled to credit only for the temporary total disability benefits paid after October 19, 2012 – the date upon which the ALJ's order terminating the award of TTD was entered. Hannah argues that regardless of when he reached MMI, the terms of the agreed order entered December 21, 2004, provided that he was entitled to collect temporary total disability benefits until such time *as an order ending them was entered*. We agree.

Under the provisions of Kentucky Revised Statutes (KRS) 342.0011(11)(a), “temporary total disability” refers to “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.” Substantial evidence supports the finding of the ALJ that Hannah reached MMI and that he could return to work on February 27, 2005, the one-year anniversary of his fall.

However, the disputed language of the agreed order prohibited the UEF from terminating its payment of TTD until the ALJ entered an order permitting it to do so. Even though it was later determined that Hannah no longer met the criteria for temporary total disability, the ALJ had not entered an order allowing the UEF to discontinue the payment of benefits until October 19, 2012. The ALJ erred by concluding that the UEF was entitled to a dollar-for-dollar credit against the permanent partial disability benefits as a set-off for the TTD benefits paid after February 27, 2005. The correct operative date for such a dollar-for-dollar credit is October 19, 2012. The Board also erred by affirming the ALJ on this issue. Thus, we vacate this portion of the Board’s order and remand for entry of an appropriate order.

Next, Hannah argues that there was no evidence to support the ALJ’s conclusion that he retains the capacity to return to the type of work that he was performing at the time of his work-related injury. We disagree.

Pursuant to the provisions of KRS 342.285, an ALJ has the sole authority to determine the weight of the evidence introduced by the parties. He is also

permitted to draw every reasonable inference from that evidence. *Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). The ALJ can reject any testimony in whole or in part. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977).

The ALJ found the evidence of Dr. Kriss to be particularly credible. Dr. Kriss emphatically reported again and again that there was “absolutely no physical or medical reason” why Hannah could not return to the workforce, “including his old job as a framing carpenter.”

After an extensive independent medical evaluation, Dr. Timothy Allen, a Board-certified neuropsychiatrist, concluded that Hannah was malingering in order to feign a cognitive disorder. Dr. Allen also placed Hannah at MMI as of February 27, 2005; he indicated that Hannah suffered absolutely no impairment as a result of his work-related injury.

Following a vocational evaluation conducted on August 9, 2013, vocational consultant Ralph Crystal reported that Hannah demonstrated vocational skills and abilities related to using judgment and decision-making; working in dangerous and hazardous conditions; multitasking; and working to set specification and standards. Crystal indicated that Hannah “can perform his past, related, as well as alternative work from a physical standpoint without a loss of employability or earnings capacity.” Additionally, reliable documentary evidence revealed that Hannah remained an avid fisherman and hunter throughout the course of these proceedings.

Substantial evidence supported the ALJ's determination that Hannah was physically capable of performing the work that he had been doing at the time of his injury. The Board did not overlook or misconstrue controlling law or so flagrantly err in evaluating the evidence that it caused a gross injustice by affirming this determination made by the ALJ. *Western Baptist Hosp., supra*.

Next, Hannah contends that the ALJ was required to award permanent partial disability benefits from September 23, 2012 -- the date upon which Dr. Kriss assessed a functional impairment rating. Again, we disagree.

The provisions of KRS 342.730(1)(b)-(d) entitle a partially disabled worker to receive permanent income benefits from the date that the compensable permanent impairment or disability arises. While the degree of impairment remaining at MMI forms the basis for assigning a permanent impairment rating, the impairment deemed to be permanent at MMI actually *arises* when a harmful change in the human organism occurs – in this case on the date of injury. *See Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 836 (Ky. 2009). However, the obligation to pay permanent partial disability benefits is suspended during any period for which TTD benefits are awarded. The Board did not err by summarily rejecting Hannah's argument.

Next, Hannah argues that the ALJ failed to make sufficient findings of fact concerning his psychological condition. In his application for resolution of his claim, Hannah did not allege that he had suffered any psychological injury as a result of his fall from the ladder. However, both Dr. Shraberg and Dr. Allen

concluded independently that Hannah did not suffer any work-related psychological or psychiatric injury. Thus, we conclude that the Board did not err either in its interpretation of the evidence or in its application of the law on this point.

Finally, Hannah contends that the ALJ erred by failing to conclude that he was rendered permanently and totally disabled by his work-related injury. In this proceeding, Hannah bore the burden of proving each of the essential elements of his claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky.App. 1979). Since Hannah failed to persuade the ALJ that he was permanently and totally disabled, the question on appeal was whether the evidence compelled such a finding. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). As summarized above, it did not. Consequently, the Board did not err by affirming the decision of the ALJ.

The UEF argues that the Board misconstrued controlling law or so flagrantly erred in evaluating the evidence that it caused a gross injustice by failing to determine Hannah's employer to be: Poplar Brook, or each of the members of Poplar Brook, or Negroe for *purposes of statutory liability*. Our analysis of the issue requires additional discussion of the parties' relationships.

In his deposition, Brian Terry testified that he was an advanced manufacturing engineer by trade and that land development was his hobby. He indicated that he had built a house for himself in Rome, Georgia. He explained that Poplar Brook had been organized by its members only to purchase

undeveloped land and to prepare it for sale as residential building lots. Its three members were Terry, Robert Tobiason, and Barbara Negroe. After Terry identified the real property that would eventually become Oak Forest Estates, Poplar Brook bought it. The land was surveyed and divided into building lots; utilities were installed; roadways built; and street lights were situated.

According to Terry, Negroe, who was living and working in central Mexico, expressed an interest in building a home for herself in Oak Forest Estates. Terry then offered to “help her out.” After Negroe purchased the building lot from Poplar Brook, Terry signed a contract to furnish the materials and to perform or subcontract all of the work to be performed at the property. The contract specifically indicated that Terry would not secure insurance for injury to any subcontractor working on the property. Instead, anyone working at the property was to be required to sign a waiver of responsibility. Terry signed the contract as a member of Poplar Brook. For his services, Terry was to be paid eight percent of the property’s appraised value.

Negroe secured the necessary building permit. As part of the permitting process, Negroe was required to sign an affidavit indicating that all contractors and subcontractors would comply with Kentucky’s workers’ compensation provisions. Negroe signed the affidavit.

Terry hired Calvin Baker to frame the home. Terry opened an account in the name of Poplar Brook at a lumber yard and authorized Baker to purchase the necessary materials. As construction began, Terry regularly submitted invoices to

Negroe. Negroe wrote personal checks to Terry individually, and Terry deposited the funds into his personal bank account. Terry issued personal checks to pay Calvin Baker. Baker paid his crew which included Hannah until he was injured.

The UEF contends that the Board erred by failing to conclude that Poplar Brook was Hannah's statutory employer under the provisions of either KRS 342.610(2) or KRS 342.700(2). However, the UEF bore the burden of proving that Poplar Brook was Hannah's employer. *Doctors' Assocs., Inc. v. UEF*, 364 S.W.3d 88 (Ky. 2011). Since the ALJ found that the UEF had failed to satisfy its burden, the UEF had to convince the Board that the evidence compelled a finding in its favor. *Wolf Creek Collieries, supra*.

The provisions of KRS 342.610(2) permit any person "deemed [a] contractor" to be held liable for the payment of workers' compensation benefits to the employees of a subcontractor who has not secured the payment of the compensation. A person is "deemed" a contractor where the person contracts with another "[t]o have work performed of a kind which is a regular or recurrent part of the work of the . . . business . . . of such person." *Id.*

The ALJ rejected the assertion by the UEF that home construction was a "regular or recurrent part of the work" of Poplar Brook. Since building homes is not typically a regular or recurrent part of the work of the business of land development, we conclude that the Board did not overlook or misconstrue controlling law or so flagrantly err in evaluating the evidence that it caused a gross

injustice by concluding that Poplar Brook was not Hannah's employer pursuant to this provision. *Western Baptist Hosp., supra.*

The provisions of KRS 342.700(2) define "up-the-ladder" liability for contractors and subcontractors. A principal contractor, intermediate, or subcontractor is liable for compensation "to any employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer." *Id.* The UEF argues that Poplar Brook was operating as the principal contractor with respect to the construction of Negroe's home in Oak Forest Estates and that by failing to conclude that Poplar Brook was Hannah's employer, the Board overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it caused a gross injustice by failing to conclude that Poplar Brook was Hannah's employer. *Western Baptist Hospital*, 827 S.W.2d. at 687- 688. We disagree.

The UEF contends that the superintendent agreement between Negroe and Terry bound the members of Poplar Brook because Terry was acting as a representative of Poplar Brook and not individually when he undertook to supervise construction at the site. However, there is scant evidence in the record to support this assertion. There is no evidence to indicate that Terry was authorized to bind Poplar Brook in this manner. Moreover, Terry insisted in his deposition that Poplar Brook was organized solely to purchase and to sell the building lots developed at Oak Forest Estates. Finally, the fee schedule incorporated into the

agreement indicated that payments would be made to Terry -- not to Poplar Brook. Other than Terry's signature and the lumber yard account, there was no indication that Poplar Brook had any rights or responsibilities under the contract. The evidence supports the ALJ's determination that Poplar Brook was not involved in the construction of Negroe's home and could not be held liable as an up-the-ladder employer. The Board did not err by affirming the decision.

In the alternative, the UEF contends that Negroe was the general contractor with respect to the construction of her home and that she must be held responsible for Hannah's compensation. Again, we disagree.

The evidence before the ALJ showed that Negroe had no experience building homes. She did not provide Terry with tools, materials, or workers. Terry was not paid an hourly rate, and taxes were not deducted from the disbursements that Negroe made to him. Negroe did not supervise Terry's work. She was living in Mexico when the project began, and she made construction decisions typically expected of a prospective homeowner. Negroe did not provide tools or materials to any of the subcontractors and did not control or direct their work. She did not pay them, provide them with any benefits, or consider them to be her employees. Negroe testified that three months after Hannah's accident, she hired another builder to replace Terry and that she and her husband became more involved in the project only as a matter of necessity. The Board did not err by affirming the ALJ's determination that Negroe was not Hannah's employer.

As a final alternative, the UEF contends that Poplar Brook and its individual members were acting in a partnership arrangement with respect to Negroe's home and that as a result, the partnership is an up-the-ladder employer. The UEF did not present this argument to the ALJ for consideration. Therefore, it was not properly preserved for our review.

The decision of the Workers' Compensation Board is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANTS:

TIMOTHY HANNAH
Larry Duane Ashlock
Lexington, Kentucky

UNINSURED EMPLOYERS' FUND
Charles D. Batson
Frankfort, Kentucky

BRIEF FOR APPELLEES:

POPLAR BROOK DEVELOPMENT,
LLC
Matthew C. Hess
Elizabethtown, Kentucky

BARBARA NEGROE
Brent Edward Dye
Louisville, Kentucky

CALVIN BAKER
Not represented by council

BRIAN TERRY
Not represented by council

HONORABLE J. LANDON
OVERFIELD, CALJ
James Landon Overfield
Frankfort, Kentucky

WORKERS' COMPENSATION
BOARD
Dwight T. Lovan

Frankfort, Kentucky