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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 21, 2010

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2009-SC-000808-WC

DATE 11-12-10 EIR Growth P.C.

KENTUCKY EMPLOYERS' MUTUAL
INSURANCE (KEMI)

APPELLANT

ON APPEAL FROM COURT OF APPEALS

V. CASE NOS. 2008-CA-000647-WC AND 2008-CA-000959-WC
WORKERS' COMPENSATION BOARD NO. 05-01707

TAYLOR CONTRACTING/TAYLOR READY MIX, LLC;
CHRISTOPHER WATTS;
UNINSURED EMPLOYERS FUND;
HONORABLE ANDREW F. MANNO,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Affirming a decision by the Workers' Compensation Board, the Court of Appeals determined that an Administrative Law Judge (ALJ) failed to make the findings required by the court's previous order of remand¹ and remanded the matter again. The court directed the ALJ to reconsider whether Kentucky Employers' Mutual Insurance (KEMI) properly exercised its right to cancel coverage for Taylor Contracting/Taylor Ready Mix, LLC (Taylor) for late

¹ *Taylor Contracting/Taylor Ready Mix, LLC v. Watts* (2007-CA-000026-WC, rendered June 29, 2007).

payment of premiums and, as ordered previously, to base the decision on additional findings concerning the parties' understanding when entering into the contract. KEMI appeals the decision, asserting that the ALJ complied adequately with the previous order of remand.

We affirm. The Court of Appeals did not err when it found that the ALJ failed to comply with the June 29, 2007 order and remanded again with instructions to do so. The ALJ failed to focus on the parties' mutual understanding when entering into the contract, as ordered, and focused instead on their subsequent course of dealing.

Taylor procured a workers' compensation insurance policy from KEMI for the period from November 1, 2004 through November 1, 2005 at an annual premium of \$23,988.11. The application required Taylor to pay the premium in ten installments (one installment of 25% of the premium, followed by three installments of 8.34% and then six installments of 8.33%). The payment plan listed on the application was as follows:

11/02/2004	\$5,997.03
01/02/2005	\$2,000.61
02/02/2005	\$2,000.61
03/02/2005	\$2,000.61
04/02/2005	\$1,998.21
05/02/2005	\$1,998.21
06/02/2005	\$1,998.21
07/02/2005	\$1,998.21
08/02/2005	\$1,998.21
09/02/2005	\$1,998.20

Neither the policy nor any attachment set a schedule for premium payments.

Taylor paid the first installment on November 1, 2004. KEMI began to mail monthly invoices to Taylor on December 2, 2004 and typically required payment within twenty-five days after the invoice date or considered an installment to be past-due. The following chart summarizes the particulars concerning the invoicing and payment of each installment, which differ in some respects from the payment plan stated on the application for insurance:

Installment Number	Invoice Date	Installment Amount	Due Date per Invoice	Date Received
1	----	\$5,997.03	----	11/01/04
2	12/02/04	\$2,000.61	12/27/04	12/28/04
3	01/03/05	\$2,000.61	01/28/05	02/04/05 *
4	02/02/05	\$2,000.61	Upon Receipt	03/04/05
5	03/02/05	\$1,998.21	Upon Receipt	03/28/05
6	04/04/05	\$1,998.21	04/29/05	05/03/05
7	05/02/05	\$1,998.21	Upon Receipt	06/07/05 **
8	06/02/05	\$1,998.21	Upon Receipt	07/18/05 ***
9	07/05/05	\$1,998.21	Upon Receipt	08/25/05 ****
10	08/02/05	\$1,998.21	Upon Receipt	09/22/05

- * Notice sent 02/03/05 that policy would be canceled if payment not received by 02/21/05.
- ** Notice sent 06/02/05 that policy would be canceled if payment not received by 06/20/05.
- *** Notice sent 07/05/05 that policy would be canceled if payment not received by 07/23/05.
- **** Notice sent 08/05/05 that policy would be canceled if payment not received by 08/23/05.

Although Taylor paid nine installments by August 25, 2005 and paid the tenth on September 22, 2005, it paid most of the installments after the due date stated on KEMI's invoice. When that occurred, KEMI's subsequent invoice generally listed the due date for the next invoice as being "upon receipt." On three occasions, February 3, June 2, and July 5, 2005, KEMI notified Taylor that the policy would be canceled for non-payment unless payment was

received by a stated date. KEMI withdrew the notices after receiving Taylor's third, seventh, and eighth installment payments before the respective cancellation dates.

At issue presently is KEMI's August 5, 2005 notice of its intent to cancel the policy if Taylor did not pay \$1,998.21 by August 23, 2005, presumably for the installment that was invoiced first on July 5, 2005 and then on August 2, 2005 as being past-due. KEMI received payment on August 25, 2005, after it had canceled the policy.² KEMI sent Taylor an invoice on September 2, 2005, which indicated that the "Current Balance" was \$1,998.20, presumably for the tenth and final installment, which was invoiced first on August 2, 2005. An October 2, 2005 invoice indicated that payment was received and listed no outstanding balance.

The ALJ bifurcated the claim and determined ultimately that Taylor did not have workers' compensation insurance coverage when Christopher Watts was injured on September 19, 2005; that KEMI canceled its policy for late payment of premiums; and that it gave proper notice of cancellation as required by statute. The Board affirmed, after which Taylor appealed.

The Court of Appeals determined in an opinion rendered on June 27, 2007 that KEMI complied with the notice of cancellation requirement but also determined that the ALJ erred by failing to address whether the contract

² The record indicates that the employer notified the Office of Workers' Claims of the lapse in coverage. See KRS 342.340(2).

entitled KEMI to cancel the insurance policy.³ Noting that the contract and its attachments were silent concerning the due date for premium payments and that Taylor paid all premiums within the coverage period, the court determined that the ALJ must consider extrinsic evidence on remand⁴ and construe the contract based on the parties' mutual understanding⁵ and reasonable expectations⁶ at the time they entered into it. More specifically, the court directed the ALJ to determine "whether KEMI properly exercised its contractual right to cancel the policy," including "the parties' reasonable understanding of when premium payments were due."

The ALJ determined on remand that the payment stubs sent by KEMI controlled the payment schedule and included the due date, noting that Taylor knew the due dates but consistently made late payments and also failed to make timely payment of past-due premiums. The ALJ noted more specifically that Taylor owed both a past-due premium of \$1,998.21 as well as a new installment of \$1,998.21 on August 2, 2005. Yet, despite KEMI's August 5, 2005 notice indicating that the policy would be canceled for non-payment if

³ See *Goodin v. General Accident Fire & Life Assurance Corp.*, 450 S.W.2d 252 (Ky. 1970) (policy may be canceled only upon strict compliance with contract provisions authorizing cancellation).

⁴ See *Frear v. P. T. A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (court may consider extrinsic evidence as to parties' intentions when entering contract to resolve contractual ambiguity).

⁵ *Nationwide Mutual Insurance Co. v. Nolan*, 10 S.W. 3d 129, 131-32 (Ky. 1999) (insurance policy should be interpreted according to parties' mutual understanding when entering into the contract).

⁶ *Woodson v. Manhattan Life Ins. Co. of New York*, 743 S.W.2d 835, 839 (Ky. 1987) (ambiguous terms in insurance contract are to be construed against drafter and in favor of insured's reasonable expectations).

\$1,998.21 was not paid by August 23, 2005, Taylor failed to do so. Finding that Taylor knew payments were due when it received KEMI's statements, the ALJ concluded that the parties understood the statements to control the due date for each payment; that Taylor failed to pay past-due premiums before the cancellation date; and that KEMI properly canceled Taylor's policy.

The Court of Appeals did not err when it determined that the ALJ failed to comply with its directions of June 29, 2007. The ALJ's analysis focused not on the parties' mutual understanding when entering into the contract, as directed, but on their subsequent course of dealing. We conclude, therefore, that the ALJ failed to comply with the previous order of remand and that this matter must be remanded again for the ALJ to do so.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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