

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001886-MR

HARRIS TRANSPORT COMPANY
and GULF INSURANCE COMPANY

APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM JENNINGS, JUDGE
ACTION NO. 98-CI-00589

ROBERT HOLLIS and
WILSON TRANSPORTATION SERVICES, INC.

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Harris Transport Company and Gulf Insurance Company appeal from a Madison Circuit Court judgment enforcing a Workers' Compensation Board award to Robert W. Hollis.

Hollis was employed as a truck driver for Wilson Transportation Services, Inc.¹ Wilson Transportation, which owned at least four semi-tractor trailer trucks, but had no Interstate

¹ Wilson Transportation was a defendant in the proceedings below and is named as an appellee in this appeal.

Commerce Commission operating authority, permanently leased its equipment and drivers to Harris Transport.

On July 19, 1993, Hollis injured his back when he slipped and fell against a stack of pallets following a delivery to the Rand-McNally facility in Richmond, Kentucky. Hollis was eventually diagnosed with a herniated disc and underwent two surgical procedures. Thereafter, Hollis filed a workers' compensation claim. Hollis's immediate employer, Wilson Transportation, did not have workers' compensation coverage. Harris Transport, likewise, did not have workers' compensation coverage applicable to Hollis. However, Harris Transport did have a liability policy with Gulf Insurance which covered any liability it incurred as a result of the accident.²

The controversy in this case stems from an occupation accident insurance policy maintained on Hollis through Fidelity Security Life Insurance Company. It is unclear from the record who paid the premiums on the policy;³ however, it is undisputed that the policy was not a workers' compensation policy. It is also undisputed that, pursuant to the policy, Fidelity Security paid to, or on behalf of, Hollis \$52,590.15 in medical expenses incurred by

² Apparently, the policy also covered Wilson Transportation. The February 28, 1997, Administrative Law Judge's order includes the statement: "Also stipulated was insurance coverage by Gulf Insurance Company for the liability of Harris [Transport] and/or [Wilson Transportation] for an award of benefits to the extent of its coverage limits."

³ In his June 25, 1998, complaint, Hollis states that "the premiums . . . were paid by the Plaintiff and not his employer." However, in his February 25, 1999, affidavit, Hollis stated, "Premiums for the Occupational Accident Insurance Policy were paid by my employer which would have been either by Wilson Transportation and/or Harris Transport Company."

Hollis as a result of the accident. The payments from Fidelity Security were made to Hollis prior to the workers' compensation award at issue herein.

In his circuit court complaint, Hollis presented uncontradicted evidence that Fidelity Security has advised him that it intends to file a lien asserting an interest against his workers' compensation benefits for all sums paid by Fidelity Security which should have been paid by workers' compensation, and, moreover, that it intends to enforce all of its rights, including the right to bring suit against Hollis, to seek recovery on the lien interest. The unrefuted circuit court evidence is that Hollis intends to use any recovery in the present case to settle the Fidelity Security claim.

On May 31, 1996, the ALJ entered an opinion and order finding that although Wilson Transportation was an employer liable for any benefits due to Hollis, because Wilson Transportation had failed to secure workers' compensation insurance coverage, Harris Transportation had up-the-ladder contractor liability under Kentucky Revised Statutes (KRS) 342.610(2).⁴ The order was not

⁴ Ky. Rev. Stat. (KRS) 342.610 provides that:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

- (a) To have work performed consisting of the removal,
(continued...)

appealed pursuant to KRS 342.285. On February 28, 1997, the ALJ entered an order awarding Hollis workers' compensation disability and medical benefits. This order was likewise not appealed. The February 28 order included the provision that:

The Plaintiff shall further recover of [sic] the defendant-employer and/or its insurance carrier, for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during the disability.

It is uncontested that the amounts ordered to be paid in this paragraph overlap with, and duplicate, amounts previously paid to, or on behalf of, Hollis under the Fidelity Security policy.

Neither Harris Transport, Gulf Insurance, nor Wilson Transportation paid the medical expenses as mandated by the February 28, 1997, order, and on June 25, 1998, Hollis filed a complaint in Madison Circuit Court pursuant to KRS 342.305 seeking to enforce the medical payment provision of the February 28, 1997, order. The complaint alleged that defendants Harris Transport,

⁴(...continued)

excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or

(b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person

shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

Gulf Insurance and Wilson Transportation had failed and refused to pay Hollis any portion of the \$52,590.15 in medical expenses previously paid under the Fidelity Security policy. On July 16, 1999, the trial court granted Hollis judgment against Harris Transport and Gulf Insurance.⁵ This appeal followed.

First, the appellants argue that KRS 342.700(2) prohibits an employee from making a double recovery for workers' compensation benefits and medical payments from an up-the-ladder contractor. The appellants allege that since Hollis recovered \$52,590.15 in medical payments under the Fidelity Security policy, any workers' compensation payments for the same services compensated under the Fidelity Security policy would amount to the type of double recovery prohibited under KRS 342.700(2).

Paragraph 13 of the ALJ's May 31, 1996, order bases Harris Transport's liability upon up-the-ladder liability under KRS 342.610(2). Harris Transport was liable under this provision only because Wilson Transportation had failed to procure workers' compensation insurance. KRS 342.700(2), on the other hand, may impose liability upon a contractor regardless of whether the primary employer has workers' compensation coverage if the provisions of the statute are met. The statute provides that:

A principal contractor, intermediate, or subcontractor shall be 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

⁵ It is unclear why judgment was not granted against Wilson Transportation.

contract, to the same extent as the immediate employer. Any principal, intermediate, or subcontractor who pays the compensation may recover the amount paid from any subordinate contractor through whom he has been rendered liable under this section. Every claim to compensation under this subsection shall in the first instance be presented to and instituted against the immediate employer, but the proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal or intermediate contractor nor shall the claim be barred by limitations, if the claim is filed against the principal or intermediate contractor within one (1) year after a final unappealed order has been rendered by an arbitrator or administrative law judge determining that immediate employer has insufficient security to pay the full and maximum benefits that could be determined to be due him under this chapter. The collection of full compensation from one employer shall bar recovery by the employee against any other. But he shall not collect from all a total compensation in excess of the amount for which his immediate employer is liable. This subsection shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management.

Harris Transport's liability is not based upon this statute and no mention is made in the ALJ's May 31, 1996, order of KRS 342.700. The statute limits its application to those "cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management." It was not determined in the proceedings below that Harris Transport could be found liable under this provision. By its terms, the statute does not have a general application to all instances of contractor liability. Harris Transport did not appeal the May 31, 1996, order, and we are bound by the ALJ's finding that its liability is based upon KRS 342.610. Absent a determination that KRS 342.700(2) is applicable to the facts of this case, we discern no basis for us to apply the double recovery provision of KRS 342.700(2) in our review of this case. If Harris Transport interprets KRS 342.700(2) such that its double recovery provisions apply to the facts of this case, it should have raised the issue with the ALJ and/or appealed her order so as to challenge the award insofar as it required payment of medical expenses previously paid by Fidelity Security.

Next, the appellants argue the provisions of KRS 342.610(2) only require a contractor to make payments to the extent that the employer had not secured for payment of compensation as required by KRS Chapter 342. KRS 342.610(2) provides, in pertinent part, that:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor

unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter.

As we understand the appellants' position, they contend that the Fidelity Security payments made to, or on behalf of, Hollis constitute "compensation as provided for in [Chapter 342]."

The proceedings before the ALJ resolved this issue. The ALJ determined that Wilson Transportation did not, at the time of Hollis' injury, have workers' compensation coverage as defined in KRS Chapter 342. It was further decided that the Fidelity Security policy was not coverage as defined in KRS Chapter 342. Accordingly, KRS 342.610(2) is not applicable to the facts of this case.

Next, the appellants contend that under the provisions of KRS 342.700(2), Hollis must first claim compensation and institute an action against his immediate employer, Wilson Transportation, before an action can be maintained against the appellants. For the same reasons that we identified in the appellants' first argument, which likewise referenced KRS 342.700(2), the appellants' liability was not based upon this statute, but, rather, was based upon KRS 342.610(2). KRS 342.700(2) does not apply to liability determinations other than to determinations under KRS 342.700(2).

Next, the appellants claim that pursuant to KRS 342.020(1), Hollis has no statutory right to directly collect medical expenses or benefits from an employer or an employer's workers' compensation carrier. The February 28, 1997, ALJ order specifically provided for an award for medical expenses. KRS

342.020(1) provides that "[t]he employer, insurer, or payment obligor acting on behalf of the employer, shall make all payments for services rendered to an employee directly to the provider of the services within thirty (30) days of receipt of a statement for services."⁶ However, in this case, the medical expenses have already been paid under the Fidelity Security policy. The statute clearly contemplates the situation of contemporaneous payment of current billings and clearly was not intended to excuse liability of the employer when, because of contested workers' compensation proceedings, the employee himself, or a collateral source on the employee's behalf, timely paid billings for medical services. The medical care suppliers have been paid and the February 28, 1997, order provides for an award of medical expenses to Hollis. It follows that Hollis is entitled to receive direct payments of the medical benefits from the appellants. Thereafter, according to the uncontested Circuit Court proceedings, Hollis will settle the claim of Fidelity Security for its payments of the medical supplier billings.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

G. Phil Williams
WILLIAMS, WAGONER & NEVITT
Louisville, Kentucky

BRIEF FOR APPELLEE
ROBERT W. HOLLIS:

A. Andrew Draut
WEBER & ROSE, P.S.C.
Louisville, Kentucky

⁶ Emphasis supplied.

