RENDERED: JUNE 8, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000167-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-99-01502

GWENDOLYN WILLIAMS;
KED TRUCKING, INC.;
J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 2001-CA-000288-WC

KED TRUCKING, INC. — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-99-01502

GWENDOLYN WILLIAMS;
UNINSURED EMPLOYERS' FUND;
J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

AND: NO. 2001-CA-000314-WC

GWENDOLYN WILLIAMS CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-01502

KED TRUCKING, INC.;
UNINSURED EMPLOYERS' FUND;
J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Uninsured Employers' Fund asks us to review an opinion of the Workers' Compensation Board (Board) rendered January 10, 2001. Appellees, KED Trucking, Inc. and Gwendolyn Williams, file cross-petitions for review. We reverse and remand Petition No. 2001-CA-000167-WC and Cross-Petition No. 2001-CA-000288-WC, and affirm Cross-Petition No. 2001-CA-000314-WC.

On May 17, 1999, Gwendolyn Williams hired on with KED Trucking, Inc. as an over-the-road truck driver. KED Trucking did not provide workers' compensation coverage for its employees. Instead, it provided an accident and health policy. Williams was advised of this arrangement and executed Form 4 which rejected workers' compensation coverage in favor of the health and accident protection.

During the week of June 25, 1999, Williams was hauling a load of aluminum coil. The coil shifted in transit and rendered the tie-downs and booming mechanisms so fast that they were difficult to free upon her destination. Using a crowbar and hammer, she was required to use considerable physical force in loosening the rigging. She claims that she injured her wrist in doing so, resulting in carpel tunnel syndrome. She made a claim under KED Trucking's health and accident policy. Although she was hired in on May 17, 1999, and filled out an application for the health and accident policy on May 19, 1999, the health and accident carrier refused to honor her claim. The carrier claimed that the insurance did not become effective until August 12, 1999, which, of course, was after the date of her alleged injury. Williams thereafter filed her workers' compensation claim implicating the Uninsured Employers' Fund as KED Trucking was an uninsured employer. Kentucky Revised Statutes (KRS) 342.760.

Williams' claim came on for hearing before the Administrative Law Judge (ALJ). On August 18, 2000, the ALJ rendered an Opinion and Order holding that the health and accident carrier's refusal to cover Williams was of no relevance, and that she had voluntarily rejected the act in accordance with her right to do so under KRS 342.395(1). The ALJ perforce ordered that her claim for workers' compensation be denied.

On appeal to the Board, the Board remanded to the ALJ for a determination as to whether the representations made by KED Trucking concerning Williams' rejection of compensation coverage in favor of health and accident coverage was sufficient to estop

KED Trucking from denying compensation coverage. These petitions ensue.

We shall first address an issue raised by Williams. She claims that the Uninsured Employers' Fund's petition is premature inasmuch as the Board's order remanding to the ALJ was interlocutory. We decline to accept this contention on the authority of Davis v. Island Creek Coal Company, Ky., 969 S.W.2d 712 (1998). We, therefore, decide the petitions on the merits.

KRS 342.395(1) provides, in relevant part:

> 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; . . . [B]efore an employee's written notice of rejection shall be considered effective, the employer shall file the employee's notice of rejection with the Department of Workers' Claims. The commissioner of that department shall not give affect to any rejection of this chapter not voluntarily made by the employee. (Emphasis added.)

The question presented is whether Williams made a valid rejection of the Act. The ALJ was of the opinion she did. He specifically found that Williams voluntarily and with full understanding of the effect of her action rejected coverage. He further found that there was no evidence that KED Trucking, Inc. required her to reject coverage as a condition of obtaining employment or a condition to remain employed. The ALJ further

found that the refusal of the health and accident carrier to honor Williams' claim was not relevant.

On appeal to the Board, the matter was remanded. The Board stated as follows:

> In the instant case, if Williams is to prevail, it will not be because she involuntarily rejected the Act, but because pre-employment representations made by KED were so misleading as to prevent Ked [sic] from now relying on her rejection to defeat potential benefits under the Act.
>
> Ever mindful of the ALJ's authority as the fact-finder, we hesitate to emphasize those facts which we, as an appellate body, might view as persuasive. We would simply note that this case clearly lends itself to an estoppel analysis and we **REMAND** this matter to the ALJ for additional findings consistent with the views expressed in this opinion.

We are asked to review this matter from two perspectives. First, may the Board consider matters of estoppel which were not raised before the ALJ? Secondly, assuming matters of estoppel may be considered by the Board, does the record support a finding of estoppel? We answer both in the negative.

The general rule is that estoppel is an equitable remedy that must be pled in order to be available. The rule applies whether estoppel is asserted as a defense or whether it is asserted as part of the cause of action or to preclude a defense.[1] 28 Am. Jur. 2d Estoppel and Waiver §§ 162-164 (2000). This general rule has long been recognized in this jurisdiction. See Stansbury v. Smith, Ky., 424 S.W.2d 571 (1968), Bean v.

[1]Estoppel as a defense is required to be affirmatively pled under Ky. R. Civ. P. 8.03.

Bevins, 287 S.W.2d 627 (1956), J.R. Watkins Co. v. Jordan, 249 Ky. 432, 60 S.W.2d 984 (1933), Bracket v. Modern Botherhood of America, 154 Ky. 340, 157 S.W. 690 (1913).

In view of the foregoing authorities, we are of the opinion the Board erred in remanding this matter to the ALJ for consideration of estoppel. In any event, we view the question of estoppel as rather moot. Our examination of the record convinces us that the principles necessary for estoppel as enunciated in Gray v. Jackson Purchase Production Credit Association, Ky. App., 691 S.W.2d 904 (1985), are not present. We think that the ALJ correctly found that the rejection of workers' compensation was not based upon any job repercussion as was the case in Watts v. Newberg, Ky., 920 S.W.2d 59 (1996), nor can it be based upon any lack of understanding as was the case in Karst Robbins Machine Shop, Inc. v. Caudill, Ky., 779 S.W.2d 207 (1989). The facts established indicate that Williams was a person not only familiar with the workers' compensation law by virtue of prior claims, but clearly understood the difference between accident and health insurance and the benefits to be derived from workers' compensation protection. The record simply does not form a basis for concluding that Williams' employer misled her in any way.

There are, indeed, many reasons why alternative insurance coverage may fail. The coverage may not be timely, the premiums may lapse, or the insurer may become insolvent. In any event, we think it inappropriate that one should have the unqualified privilege of opting-out of workers' compensation and later opting back in when alternate insurance fails.

For the foregoing reasons, the opinion of the Board is affirmed in part, and reversed and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

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