

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000925-MR

A. L. BAUMGARTNER CONSTRUCTION, INC.

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 99-CI-00733

KENTUCKY ASSOCIATED GENERAL  
CONTRACTORS SELF-INSURED'S FUND

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, EMBERTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: This is an appeal by A.L. Baumgartner Construction, Inc. (Baumgartner) involving a workers' compensation insurance fund contract dispute with Kentucky Associated General Contractors Self-Insured's Fund (Fund). This matter concerns whether certain year-end payments made by Baumgartner to its employees should be included in its premium calculation. The trial court determined that the year-end payments were bonuses and should be included in the calculation. The trial court's finding that the year-end payments were bonuses was not clearly erroneous, and, accordingly, we affirm.

A.L. Baumgartner Construction, Inc. is a Boone County, Kentucky, business which manufactures and erects metal buildings. Kentucky Associated General Contractors Self-Insured's Fund (Fund) is a group workers' compensation insurer which provides the group's members with workers' compensation coverage for their employees. Baumgartner was a member of the Fund for eight years, from 1989 through 1997.

All owners, supervisors, and employees of Baumgartner are hourly employees and receive a weekly paycheck in an amount that is based upon an established hourly rate multiplied by the number of hours worked that week. At the end of each fiscal year a determination is made by Baumgartner whether to make additional payments to its employees over and above the weekly paychecks. During both 1996 and 1997 Baumgartner made such year-end payments.

During the eight-year period Baumgartner was a member of the Fund, at the beginning of each business year Baumgartner paid the Fund an initial sum as an advance of that year's workers' compensation insurance premium, and then, at the end of each year, Baumgartner would open its books for the Fund to audit and to determine the final amount due on that year's workers' compensation premium. After the Fund's 1996 and 1997 year-end audit, the Fund advised Baumgartner that it was going to consider the sums of money Baumgartner paid to each of its employees after the close of business years 1996 and 1997 as "bonuses," and therefore subject to being included in computing Baumgartner's workers' compensation insurance premiums for each of those years.

Baumgartner responded, however, that it had always considered the sums to have been paid to all the employees as a "gratuity," and therefore not includable in computing the yearly workers' compensation premium. It is clear that "gratuities" are not includable in the premium calculation whereas "bonuses" are includable.

Based upon Baumgartner's interpretation of the payments, it had paid the Fund \$54,392.42 for its 1996 and 1997 premiums. However, if the year-end payments are bonuses and thereby included in the yearly premium computation, then Baumgartner would be obligated to pay an additional \$24,876.58 in premiums for 1996 and 1997.

On June 29, 1999, Baumgartner filed a declaratory judgment action seeking a declaration of rights that the 1996 and 1997 year-end payments were gratuities and, therefore, not subject to being included in the workers' compensation premiums for those two years. The Fund counterclaimed for additional premiums due, based on the year-end payments being counted as bonuses and thereby included in the premium calculation.

Following discovery, each side moved for entry of a judgment in its favor. The trial court found that the year-end payments were bonuses, not gratuities, and were therefore includable in Baumgartner's workers' compensation insurance premium for 1996 and 1997. This appeal followed.

Baumgartner argues that the trial court erred in concluding that its year-end payments to its employees were bonuses instead of gratuities. We believe and conclude the trial

court's holding that the payments were bonuses was a finding of fact, and not a conclusion of law which would be subject to our de novo review. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule Civil Procedure (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1964). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972); Janakakis-Kostun v. Janakakis, Ky. App., 6 S.W.3d 843, 852 (1999).

It is undisputed that with regard to the contractual agreement between Baumgartner and the Fund, if the year-end payments were bonuses then they were includable in the premium calculation and if the year-end payments were gratuities, then they were not to be included in the calculation. Substantial evidence exists to support the trial court's finding that the year-end payments at issue were bonuses rather than gratuities.

As part of the discovery in this case, Baumgartner provided various business records reflecting its treatment of the year-end payments for various other business purposes. The business records reflected that Baumgartner reported the payments as wages on the W-2's provided to its employees; that Baumgartner withheld taxes on the payments; that it included the payments as

compensation to employees for reporting compensation paid for unemployment tax purposes to the Commonwealth of Kentucky; and finally, that it deducted the payments as wages on its corporate federal income tax returns. No evidence was presented that Baumgartner otherwise treated the bonuses as "gifts" or "gratuities" in any of its business records.

Based upon the uncontested fact that Baumgartner otherwise treated the year-end payments as bonus wages for all other purposes, we cannot say that the trial court was clearly erroneous in concluding that the payments were bonuses for purposes of calculating Baumgartner's premium obligation. The trial court's conclusion is supported by Baumgartner's business records, which as discussed treat the payments as bonus wages for all other purposes.

Baumgartner cites various workers' compensation statutes, treatises, and case authority in support of its position. However, the authorities are cited mainly for the proposition that gratuities paid by an employer are not includable in workers' compensation premiums. That is not the question, but rather the factual determination of whether these year-end payments are to be treated as bonuses or gratuities. We are not persuaded that the authorities cited by Baumgartner establish that the trial court's finding that the year-end payments were bonuses was clearly erroneous.

Baumgartner further contends that the trial court unreasonably relied upon its tax planning practices in concluding that the year-end payments were bonuses. Baumgartner, in fact,

argues that its tax practices are "not relevant in determining whether a sum of money given by an employer to an employee is a 'bonus' or a 'gratuity', even if the sum given by the employer is called by the employer a 'bonus'." In support of its position, Baumgartner cites an unpublished Workers' Compensation Board Opinion.

While there may be instances wherein the treatment of a business payment for tax purposes is not determinative of how the payment is treated in other contexts, we are not thus persuaded in the case sub judice. The trial court properly considered Baumgartner's treatment of the year-end payments in other contexts in making its determination whether the payments were bonuses or gratuities.

Finally, Baumgartner claims that the trial court improperly relied upon the National Council On Compensation Insurance, Inc. (NCCI) Basic Manual in its decision. Baumgartner contends that it was improper to rely upon this manual because it had never been provided with a copy. However, the trial court relied upon the manual only insofar as it states that "gratuities" are not to be used in the premium computation and "bonuses" are. While Baumgartner may not have been provided a copy of the NCCI Basic Manual, it was provided with a document entitled "Fund Facts" which states the same thing. Again, as mentioned there is no dispute regarding this issue, but rather to resolve the question of what the proper classification of what these year-end payments are. The trial court did not rely upon the manual in its classification of the payments as bonuses, and

the trial court's citation of the NCCI Basic Manual was, if in error, harmless error. CR 61.01.

For the foregoing reasons the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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