RENDERED: AUGUST 8, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-002528-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-95-15471, WC-96-09293, WC-96-80054, WC-96-80056 WC-97-01258, WC-97-01840, WC-97-01866 AND WC-098-00398

RELIANCE NATIONAL INDEMNITY CO.;
FARMERS INSURANCE EXCHANGE;
COLONIAL COAL CO.; ENTERPRISE COAL CO.;
BILL MONT COAL; R.S. MINING, INC.;
QUAD FUELS, INC.; GAMBLE COAL CO;
PHELPS COAL & LAND CO.; JEFFREY BLANKENSHIP;
JOHN CHAPMAN; VINCENT R. JOHNSON;
HOMER RAY PREECE; THOMAS SALMONS;
WAUSAU INSURANCE CO.; COMPETITIVE EDGE
PERSONNEL CO.; SPECIAL FUND;
HON. W. BRUCE COWDEN, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2000-CA-002643-WC

COLONIAL COAL COMPANY — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSTAION BOARD
ACTION NOS. WC-96-80054 AND WC-97-01840

JEFFREY BLANKENSHIP; GAMBLE COAL CO.;
COMPETITIVE EDGE PERSONNEL SERVICES;

RELIANCE NATIONAL INDEMNITY CO;
FARMERS INSURANCE EXCHANGE; SPECIAL FUND;
UNISURED EMPLOYERS' FUND; HON. W. BRUCE
COWDEN, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Uninsured Employers' Fund (UEF) has petitioned for review of an opinion of the Workers' Compensation Board entered on October 4, 2000, in which the Board concluded that Reliance National Indemnity Company (Reliance) and Farmers Insurance Exchange (Farmers) were not responsible for workers' compensation coverage in the claims filed by the employees in this action. The Board also concluded that several "up the ladder" prime contractors, namely Colonial Coal Company, Phelps Coal and Land Company, and Enterprise Coal Company, were liable for the payment of compensation to the employees of their subcontractors pursuant to Kentucky Revised Statutes (KRS) 342.610(2). Colonial Coal Company has filed a cross-petition pertaining to its liability under KRS 342.610(2). Having concluded that the Board did not "overlook or misconstrue controlling statutes or precedent or commit an error in

assessing the evidence so flagrant as to cause gross injustice",[1] we affirm.

In August 1995 James Taylor contacted Gene Eisenmann, an insurance agent employed by Hanafin Bates & Associates, for the purpose of securing workers' compensation insurance for Worldwide Personnel Services (Worldwide).[2] Taylor told Eisenmann that he was a consultant for Worldwide. Taylor explained that Worldwide was located in Jackson, Mississippi and that the company was engaged in the business of employee leasing.[3] Eisenmann forwarded Taylor's request to Cynthia Burks, an underwriter for Reliance. Burks then drafted a retroactive workers' compensation insurance policy for Worldwide. Reliance was listed as the insurance carrier and Worldwide was listed as the insured. The policy was issued to Worldwide on August 1, 1995.[4] Approximately three months later, Worldwide assigned 51% of its stock to Omicron Holdings Corporation (Omicron).[5] Shortly

[1] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

[2] Hanafin Bates & Associates acts as a brokerage firm for Reliance National Indemnity Company, a liability insurer. Hanafin's principle place of business is located in Dallas, Texas. Hanafin is authorized to solicit business and deliver insurance policies on behalf of Reliance.

[3] In particular, Taylor claimed that Worldwide provided certain employee services, such as workers' compensation coverage, to companies at a discounted rate.

[4] Worldwide paid an initial down payment of approximately $250,000.00. Thereafter, Worldwide was required to pay a monthly premium based upon its payroll.

[5] Omicron was owned and operated by Taylor. Omicron was also headquartered in Mississippi.

thereafter, Worldwide requested that Reliance list Omicron as an additional insured on its insurance policy. Omicron represented itself as a holding company with Worldwide as its sole subsidiary. On or about November 10, 1995, Reliance added Omicron to the policy and Worldwide was covered as a subsidiary.[6] Worldwide then informed Reliance that all future business would be conducted under the name of its parent company, Omicron.

In February 1996 Omicron started falling behind on its monthly premium payments to Reliance. Shortly thereafter, Reliance learned that Omicron had engaged in business in Maine, a state that was specifically excluded under its insurance policy.[7] To further complicate matters, Omicron informed Reliance that it had just formed Competitive Edge Personnel Services (CEPS), an employee leasing company.[8] Consequently, Eisenmann, the insurance agent, met with James Roark, the president of CEPS, to discuss Omicron's newly-formed subsidiary. At this time, Roark informed Eisenmann that CEPS intended to enter into "co-employment" arrangements with prospective

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[6] Consequently, Omicron agreed to pay a monthly premium to Reliance, based upon its payroll.

[7] In particular, Omicron entered into an agreement with Combined Management, Inc. (CMI), a Maine corporation engaged in the business of employee leasing, whereby CMI agreed to convey 51% of its outstanding shares to Omicron, thereby becoming a subsidiary of the holding company. See e.g., Combined Management, Inc. v. Reliance National Ins. Co. No. CV-96-101, 1996 Me. Super. Lexis 393 (December 9, 1996).

[8] CEPS was incorporated in Texas. Taylor assumed no official position with CEPS, however, he was hired as a consultant.

clients. Eisenmann advised Roark not to enter into any "co-employment" arrangements as such arrangements were not permissible under Omicron's policy. Roark then assured Eisenmann that CEPS would not participate in any "co-employment" arrangements.

Shortly thereafter, Taylor approached Eisenmann and informed him that CEPS was interested in marketing its services to several coal mines. Eisenmann informed Taylor that Reliance did not write insurance policies for coal mines. Eisenmann confirmed his discussion with Taylor in a written letter addressed to Omicron dated March 28, 1996.[9] Omicron subsequently informed Eisenmann that his services were no longer necessary.

Around the same time that Omicron's relationship with Reliance began to deteriorate, Larry Lineville, an insurance agent in Richmond Kentucky, began contacting various Kentucky coal mining operations on behalf of CEPS. Lineville claimed he could offer the mines workers' compensation insurance at a discounted rate through CEPS.[10] Consequently, several Kentucky coal mines entered into "co-employment" arrangements with CEPS. In summary, CEPS advised the mines to terminate all of their

[9] In the letter, Eisenmann informed Omicron that any new clients or employers in the coal mining industry would not be afforded coverage under its current policy as "the workers compensation program for Omicron [did] not include risks or classifications in the coal mining industry."

[10] According to the record, David Callarman, a CEPS salesman, also met with the mines on behalf of CEPS.

employees, which they did. CEPS then rehired the employees and leased them back to the mines.[11] The alleged purpose of this procedure was to allow CEPS to provide the mines with lower workers' compensation rates for their employees. The mines agreed to pay CEPS a specified sum and in return CEPS agreed to provide the mines with workers' compensation coverage through its policy with Reliance. The mines never relinquished control of their day-to-day operations and they continued to maintain complete control over their former employees. The mines also continued to maintain their own payroll.[12]

In May 1996 Cindy Burks received a telephone call from Libby Simpson, a claims representative for the Kentucky Department of Workers' Claims, concerning a claim filed in Kentucky that involved Gamble Coal Company. Simpson informed Burks that Reliance was listed as the insurance carrier for Gamble Coal. Reliance also learned that coverage notices listing it as the insurance carrier, commonly referred to as WCI-1 forms, had been filed with the Kentucky Department of Workers' Claims for several other Kentucky coal mining operations, namely R.S. Mining, Bill Mont Coal Company, Heath Mining, Pace Mining, Quad Fuel, Hope Mining, Husky Mining, and

[11] CEPS required the employees to sign a "co-employment" agreement.

[12] CEPS never informed Reliance of its "co-employment" arrangements with the mines. Consequently, Omicron, CEPS's parent company, was never billed for any coal mining operations pursuant to its workers' compensation policy with Reliance.

Black Star Mining. Reliance, however, never filed any coverage notices for the mines.[13] Consequently, Reliance began the process of terminating Omicron's coverage.[14]

Undeterred by Omicron's strained relationship with Reliance, Taylor contacted Mike Whitis, a self-employed insurance agent who served as a broker for Farmers Insurance Exchange. Taylor told Whitis that he was a consultant for CEPS and that he was wanting to secure workers' compensation coverage for the firm. Taylor described CEPS as a risk management firm operating out of Texas. Taylor told Whitis that CEPS consisted of 13 employees. He also told Whitis that CEPS was not engaged in the business of employee leasing. Consequently, on May 29, 1996, Whitis faxed an application for workers' compensation coverage to the underwriting department at Farmers. On the application, CEPS was described as a human resource consulting firm that employed a staff of 13 office and sales employees. The application was approved by Farmers and a quote was issued based on the information provided by CEPS. A workers'

[13] In order for CEPS to have obtained workers' compensation coverage for the various coal mines, either CEPS or Omicron would have had to report a material change in its operations to Reliance. This was never done. The name of the underwriter listed on the coverage notices is Gary Trigleth. Trigleth was never employed by Reliance or Hanafin Bates & Associates. Trigleth was, however, employed by CEPS.

[14] As these problems began to surface, Reliance attempted to audit Omicron. Omicron, however, failed to provide the information requested by Reliance in its audit. Omicron's policy with Reliance was canceled effective July 2, 1996. As of July 1, 1996, CEPS had entered into "co-employment" arrangements with over 30 companies across the United States.

compensation insurance policy was issued to CEPS on July 2, 1996. Farmers was listed as the insurance carrier and CEPS was listed as the insured. Farmers made all the appropriate filings with the state of Texas and CEPS began making payments on the policy.

Shortly thereafter, Taylor met with Whitis and offered him $6,000.00 to prepare certificates of insurance that named the mines CEPS had contracted with as certificate holders. Although he was not authorized to do so,[15] Whitis prepared the certificates and forwarded them to Taylor, who then forwarded the certificates to the mines. It appears that the purpose of this scheme was to convince the mine operators that they had workers' compensation coverage through Farmers. After the mines received the certificates of insurance, CEPS started collecting insurance premiums from the mines. CEPS deposited these receipts in a company checking account, which was used to pay the firm's operating expenses. CEPS never informed Farmers of its dealings with the mines. Consequently, CEPS was never billed for any coal mining operations pursuant to its workers' compensation policy with Farmers.

On July 25, 1996, Farmers received notification from the Kentucky Department of Workers' Claims that several coal mine operators in Kentucky were under the impression that they

[15] Whitis had no authority to broaden or extended coverage under the policy.

had insurance coverage from Farmers. Shortly thereafter, Farmers learned that CEPS was engaged in the business of employee leasing. Farmers also learned that Whitis had prepared falsified certificates of insurance. Farmers immediately attempted to cancel CEPS's policy. Taylor, however, managed to thwart the process on two separate occasions.

In the interim, the Commissioner of the Kentucky Department of Workers' Claims, Walter Turner, began to suspect fraud on the part of CEPS. Consequently, a hearing was held on July 30, 1996, for the purpose of addressing the Commissioner's concerns. On August 5, 1996, the Commissioner issued an order in which he concluded that CEPS had failed to demonstrate that workers' compensation coverage existed for the mines listed on the coverage notices filed with the Department of Workers' Claims. Immediately thereafter, CEPS wrote to Farmers requesting cancellation of its coverage effective August 8, 1996. On August 22, 1996, Farmers notified the State of Texas that CEPS's policy had been cancelled due to fraud. Farmers then filed a declaratory judgment action in the State of Texas against CEPS and its principals. In particular, Farmers sought recision of the workers' compensation policy it had issued to

CEPS due to "fraud in the inducement." On February 2, 1998, a Texas state court granted summary judgment in favor of Farmers.[16]

Shortly after Farmers filed suit in Texas, several of the Kentucky coal mines that had contracted with CEPS filed suit in the United States District Court for the Eastern District of Kentucky, alleging fraud and breach of contract. On September 9, 1996, the Court entered its findings of fact and conclusions of law. The Court found that CEPS had accepted premiums from the mines for the purpose of providing them with workers' compensation coverage, which it never provided. On November 20, 1996, the mines entered into a settlement agreement with the president of CEPS, James Roark, whereby Roark agreed to return the premiums to the mines. Around the same time frame, an indictment was issued against James Taylor in the United States District Court for the Northern District of Texas, charging him with several counts of mail fraud, conspiracy to commit mail fraud, wire fraud, and money laundering for his activities in connection with Omicron, Worldwide and CEPS. Taylor was convicted on February 25, 1998.

In the aftermath of this debacle, several coal miners filed workers' compensation claims in Kentucky. Due to the false coverage notices filed by CEPS, Reliance and Farmers were both identified as insurance carriers for the individual coal

[16] The Texas court concluded that the policy issued by Farmers to CEPS was void ab initio due to fraud in the procurement of the contract.

companies involved. Reliance was identified as the insurance carrier on claims filed by John Chapman, an employee of Bill Mont Coal Company, Jeffrey Blankenship, an employee of Gamble Coal Company, and Vincent Johnson, an employee of R.S. Mining. Farmers was identified as the insurance carrier on claims filed by Homer Preece, an employee of Bill Mont Coal Company, and Thomas Salmons, an employee of Quad Fuel. These five claims, as well as several others, were consolidated and the issue of coverage was separated.

After the ALJ considered an incredible amount of evidence, he entered an opinion and order on January 22, 1999, in which he concluded that no coverage had been afforded to the mines through the policies issued by Farmers and Reliance. The ALJ reasoned that the "co-employment" arrangements entered into between CEPS and the various coal companies were a "sham" and, therefore, unenforceable.[17] The ALJ's opinion reads, in relevant part, as follows:

> [I]t is clear that the record does not indicate in any way that an employment relationship existed between [CEPS] and the individual contract mines themselves inasmuch as the factors delineated in

[17] As a preliminary matter, we note that the ALJ correctly asserted jurisdiction over the case. See e.g., Custard Insurance Adjusters, Inc. v. Aldridge, Ky., 57 S.W.3d 284, 287 (2001). "[T]he fact-finder has jurisdiction to decide questions affecting the insurer's obligation to pay workers' compensation benefits on behalf of its insured. Furthermore, having been made a party, an insurer may question whether or not it had issued a valid, outstanding policy that covered the employer at the time of the worker's injury" [citation omitted]. Id. See also Larson's Workers' Compensation Law, Vol. 9 § 92.40 at 92.41 (1997).

> Ratliff v. Redmon, Ky., 396 S,W,2d 320 (1965) can not be met. For example, it is clear that [CEPS] did not exercise control over the details of work. Moreover, the occupation of coal mining is certainly distinct from the purposes of safety consulting and human resources [ ]. The evidence further reveals that it was the coal mines themselves that supplied their own equipment and made the payroll and also paid the insurance. . . . Nor can it be demonstrated that the coal mines were lent employees or were operating under a dual employment doctrine [citations omitted].
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> . . . .
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> [T]he ALJ finds that fraud has been perpetrated upon Farmers Insurance Exchange, Reliance National Indemnity, [ ] and the various coal mines by CEPS and its officers. The co-employer agreements entered into between [CEPS] and the various coal mines are a sham and based on this fact and the finding of fraud, the ALJ specifically finds that no insurance coverage has been afforded under the policies of Farmers Insurance Exchange [and] Reliance National Indemnity, [ ] to the various coal mines in question.

The ALJ further concluded that Farmers was not bound in any way by the actions of Whitis. The ALJ noted that "a principal is never bound where the person dealing with the agent, knows or has reason to know, the agent is exceeding his authority."[18] The ALJ based his decision in large part on several volumes of deposition testimony, which included the

[18] See e.g., Gaines v. Murphy, Ky., 239 S.W.2d 453, 455 (1951). See also 3 Am.Jur.2d, Agency, § 80 (2002). "The principal is not bound, on the basis of either actual or apparent authority, if the third person dealing with the agent knows, or should know, the limitations placed by the principal on the agent's authority and that the agent is exceeding it" [footnote omitted]. Id.

testimony of James Roark, Earl Moore, the comptroller for Colonial Coal Company, Gary Sams, the president of Phelps Coal and Land Company, Walter Turner, Donna Smith, a bookkeeper for Quad Fuel who dealt directly with Lineville, Joanna Benko, an employee of Farmers who dealt with CEPS, Michael Whitis, Gene Eisenmann, and Cynthia Burks. The ALJ also took notice of the conviction of James Taylor in the United States District Court for the Northern District of Texas; the findings of fact and conclusions of law entered in the United States District Court for the Eastern District of Kentucky; and the February 2, 1998, order granting summary judgment in favor of Farmers, which was entered in a Texas state court. The ALJ did not reach the merits in any of the claims.

On February 4, 1999, the UEF filed protective petitions for reconsideration in each of the claims involved. The individual claims then proceeded to the merits, with the finial decision in each case incorporating by reference the opinion and order entered by the ALJ on January 22, 1999. Individual decisions in Blankenship, Johnson, Preece, and Salmons were rendered on September 3, 1999. The ALJ entered orders denying the UEF's petitions for reconsideration in these claims on January 31, 2000. The ALJ also found that certain "up

the ladder" prime contractors, namely Colonial Coal Company,[19] Phelps Coal and Land Company,[20] and Enterprise Coal Company,[21] where liable for the payment of compensation to the employees of their subcontractors pursuant to KRS 342.610(2).[22] Shortly thereafter, the UEF filed notices of appeal with the Workers' Compensation Board in the above-referenced claims. Colonial Coal, Phelps Coal, and Enterprise Coal, all filed cross-appeals. A decision on the merits was rendered in Chapman on June 11, 2000. The ALJ entered an order denying the UEF's petition for reconsideration in Chapman on July 7, 2000.[23] The UEF filed a notice of appeal with the Workers' Compensation Board in Chapman on July 17, 2000. The Board then entered an order consolidating

[19] Colonial Coal Company is the "up the ladder" contactor for Gamble Coal.

[20] Phelps Coal and Land Company is the "up the ladder" contractor for Husky Mining, Quad Fuel, and Black Star Mining.

[21] Enterprise Coal Company is the "up the ladder" contractor for R.S. Mining.

[22] KRS 342.610(2) provides, in relevant part, as follows:

> 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.

[23] As previously discussed, numerous other claims were also filed with the Department of Workers' Claims, however, these claims were dismissed, settled, or otherwise disposed of.

all the claims involved for the purpose of addressing the coverage issue.

On October 4, 2000, the Board entered an opinion affirming the ALJ's decision in respect to the coverage issue. In particular, the Board concluded that an employer/employee relationship was never established between CEPS and the mine employees. The Board's opinion reads, in relevant part, as follows:

> It has been said for compensation to be payable there must be a contract of hire between the alleged employer and its employee. See Rice v. Connelly, Ky., 414 SW2d 138, amended 419 SW2d 769 (1967); Louisville and Jefferson County Air Board vs. Riddle, 301 Ky. 100, 190 S.W.2d 1009 (1946); and Dulaney v. Sebastian's Administrator, 239 Ky. 577, 39 SW2d 1000 (1931). Many factors go into consideration of the employer/employee relationship. An express or implied contract and who has the right to control the work being performed [sic]. See, for example, Partin-Lambdin Lumber Co. vs. Frasure, Ky., 308 SW2d 792 (1958); and New Independent Tobacco Warehouse #3 vs. Latham, Ky., 282 SW2d 846 (1955). According to the testimony and even by way of documentary evidence, many of the Workers involved in this matter, if not all, signed an "employment contract" with CEPS. As an example, one is attached to the deposition of Thomas Salmon ("Salmon"). On its face, one would think that the element of an express or implied contract has been met. However, the coerced entry into a contract does not create the existence of a contractual relationship. . . . Neither the Mines nor the Workers according to their testimony ever believed that they were actual employees of CEPS. Further, in order

> for there to be a semblance of an employment relationship, it would be expected that there be payment of wages. See Salvation Army vs. Matthews, Ky.App., 847 SW2d 751 (1993). While the "co-employer agreements" entered into between CEPS and the Mines indicated that CEPS would hire, fire and pay the employees, it never did so nor does the evidence indicate that it was ever believed that they would do so. The evidence is consistent that throughout, the Mines not only controlled the details of the work, but chose who would work, determined and actually paid the wages, withheld the taxes as an employer, and provided additional employee benefits. . . . While a great deal of deference is granted to the actual wording of a signed, written contract, the very basis of contract law is that there be a "meeting of the minds". As between CEPS and the Workers, the evidence in our opinion, conclusively and as a matter of law establishes no employer/employee relationship.

The Board went on to conclude that the Texas state court judgment granting summary judgment in favor of Farmers was entitled to "full faith and credit." In addition, the Board agreed with the ALJ that Farmers was not bound in any way by the actions of Whitis. As for the cross-appeals filed by Phelps Coal, Colonial Coal, and Enterprise Coal, the Board concluded that the companies were liable for the payment of compensation to the employees of their subcontractors pursuant to KRS 342.610(2). This appeal followed.

The UEF claims the Board erred in concluding that an employer/employee relationship was never established between

CEPS and the mine employees. The UEF argues that an employment relationship was established pursuant to the "co-employment" contracts signed by the mine employees. We disagree. The UEF also claims the Board erred in its determination "that the Texas state court judgment [is] res judicata on the issue of the validity of Farmers' insurance policy with CEPS[.]" We do not reach the merits of this contention as our disposition of this appeal causes this issue to be moot.

In Ratliff, supra, the Supreme Court of Kentucky set forth several relevant factors for the determination of whether an employment relationship has been established under the Workers' Compensation Act. These factors were later refined in Chambers v. Wooten's IGA Foodliner.[24] The Chambers Court found the following four factors to be determinative: (1) the nature of the work as related to the business generally carried on by the alleged employer; (2) the extent of control exercised by the alleged employer; (3) the professional skill of the alleged employee; and (4) the true intent of the parties.[25] Based upon these factors, we cannot hold that the Board erred in assessing the evidence relied upon by the ALJ in determining that an employment relationship was not established between CEPS and the mine workers. A thorough review of the record clearly indicates

[24] Ky., 436 S.W.2d 265 (1969).

[25] Id. at 266.

that the workers never believed that they were employed by CEPS. Likewise, CEPS never intended to enter into a true employment relationship with the mine workers. Moreover, the mines never relinquished control of their day-to-day operations and they continued to maintain complete control over their "former" employees.[26] Furthermore, the individual coal mines provided all of their own equipment and tools. Finally, the nature of the work performed by the mine employees was no more than tangentially related to the work carried on by CEPS.

We acknowledge the fact that the workers involved in this litigation signed an "employment contract" with CEPS. Nevertheless, as the Supreme Court stated in Kentucky Farm & Power Equipment Dealers Assoc., Inc. v. Fulkerson Brothers., Inc.:[27]

> Compensation decisions uniformly exclude from the definition of "employees" workers who neither receive nor expect to receive any kind of pay for their services. The threshold requirement in a compensation claim is that the claimant must be an employee for hire. The essence of compensation protection is the restoration of a part of wages which are assumed to have existed. In this case, no compensation by the association existed (nor was any ever contemplated), and therefore, no benefits can be awarded [citation omitted].

[26] In fact, the mines even continued to maintain their own payroll.

[27] Ky., 631 S.W.2d 633, 635 (1982). See also Salvation Army v. Mathews, Ky.App., 847 S.W.2d 751 (1993).

In the case sub judice, CEPS never paid any wages or any other form of remuneration to the injured workers involved in this litigation. Furthermore, it is clear that CEPS never intended to pay the workers for their services, nor did the workers expect to receive any form of compensation from CEPS. For all intents and purposes, the individual mine operators continued to employ the mine workers. The so-called "employment contracts" were nothing more than a façade. As professor Larson has noted in a similar context:

> It is a truism that the name chosen by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume [footnote omitted].[28]
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> . . . .
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> [T]he contractual designation of the relationship as employment . . . may be so plainly and completely at odds with the undisputed facts that the contractual designation must be disregarded [footnote omitted].[29]

A valid "contract of hire" never existed between CEPS and the mine workers as there was never a "meeting of the minds."[30] The fraud and deception involved in this case militate

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[28] Larson, Workers' Compensation Law, Vol. 3 § 46.30 (1997).

[29] Id. at § 44.32(a).

[30] See M.J. Daly Co. v. Varney, Ky., 695 S.W.2d 400, 402 (1985), overruled on other grounds, U.S. Fidelity & Guaranty Co. v. Technical Minerals, Inc., Ky., 934 S.W.2d 266, 269 (1996). "[B]efore there is an employer/employee relationship, there must be a contract of hire between the employer and employee, expressed or implied, containing all elementary ingredients for a

strongly against a finding of an employment relationship between the mine workers and CEPS. In sum, we agree with the ALJ that the so called "co-employment" arrangements entered into between CEPS and the mines were a "sham" and, therefore, unenforceable. Likewise, an employment relationship was never established between CEPS and the mine employees.

The UEF next argues that the Texas state court judgment entered on February 2, 1998, which concluded that the insurance policy issued by Farmers to CEPS was void ab initio due to fraud in the procurement of the contract, is "void on its face" because it failed to name the UEF as a party. Even if we were inclined to agree with the UEF that the Texas judgment is "void on its face", we hold that this issue is rendered moot in light of our holding that an employment relationship was never established between the mine workers and CEPS. Since reliance on the Texas judgment is not necessary to affirm the Board in the case sub judice, the UEF's rights are not prejudiced in any way by the Texas judgment.

We now turn our attention to the cross-petition filed by Colonial Coal. As previously discussed, the Board concluded that Colonial Coal, Phelps Coal, and Enterprise Coal were liable for the payment of compensation to the employees of their

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contract." Id. (citing Rice v. Conley, Ky., 414 S.W.2d 138 (1967)). It is axiomatic that a "meeting of the minds" is a fundamental prerequisite to a valid contract.

subcontractors pursuant to KRS 342.610(2). Colonial Coal claims the Board's decision is erroneous because the evidence did not demonstrate a knowing participation on its part in CEPS's fraudulent activities. Colonial Coal argues that "the rigid interpretation by the Workers' Compensation Board as to the applicability of KRS 342.610(2) is not warranted" under the facts of the case sub judice.[31]

Colonial Coal appears to fail to recognize that the very purpose of KRS 342.610(2) is to "discourage owners and contractors from hiring fiscally irresponsible subcontractors[.]"[32] Although it did so inadvertently, Gamble Coal[33] participated in a scheme that bypassed the normal approach to obtaining workers' compensation coverage.[34] At the very least, Gamble Coal should have been more careful in obtaining workers' compensation coverage. Thus, while there is no evidence that Gamble Coal played an active role in the fraudulent scheme perpetrated by CEPS, we cannot conclude that its conduct was "fiscally responsible." Moreover, the language

[31] Colonial Coal cites absolutely no authority in support of this contention.

[32] Matthews v. G & B Trucking, Inc., Ky.App., 987 S.W.2d 328, 330 (1998) (citing Tom Ballard Co. v. Blevins, Ky.App., 614 S.W.2d 247, 249 (1980)).

[33] As previously discussed, Colonial Coal Company is the "up the ladder" contactor for Gamble Coal.

[34] The case sub judice is clearly distinguishable from the normal employee leasing situation as Gamble Coal continued to withhold taxes and maintain its own payroll for its employees after the so-called "co-employment" agreements were signed.

of the statute is clear and unambiguous. KRS 342.610(2) provides, in relevant part, as follows:

> 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.

It is undisputed that Colonial Coal subcontracted with Gamble Coal. Consequently, the Board did not err in affirming the ALJ's ruling that Colonial Coal was liable under the statute.

Based upon the foregoing reasons, the opinion of the Workers' Compensation Board entered on October 4, 2000, is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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