

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000026-WC

TAYLOR CONTRACTING/TAYLOR
READY MIX, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE
WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01707

CHRISTOPHER WATTS; KENTUCKY
EMPLOYERS' MUTUAL INSURANCE;
HON. ANDREW F. MANNO,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** ** *

BEFORE: ABRAMSON, ACREE AND WINE, JUDGES.

WINE, JUDGE: On September 19, 2005, Christopher Watts was injured during the course of his employment with Taylor Contracting/Taylor Ready Mix, LLC. Taylor Contracting's workers' compensation carrier, Kentucky Employers' Mutual Insurance (KEMI), denied the claim because it had canceled Taylor Contracting's policy prior to

that date. The claim was bifurcated on the issue of whether Taylor Contracting had workers' compensation coverage through KEMI on September 19, 2005, the date of Watts' claimed injury. The Administrative Law Judge (ALJ) determined KEMI had properly given notice of cancellation as required by the contract and by statute. The Board affirmed and this petition for review followed.

Taylor Contracting argues that the ALJ clearly erred in finding that KEMI had given proper notice of the cancellation. However, the ALJ's contrary finding is supported by substantial evidence. We further agree with the ALJ that Taylor Contracting failed to timely raise its estoppel argument. Nonetheless, we agree with Taylor Contracting that the ALJ failed to address whether KEMI properly exercised its right to cancel the policy for late payment of premiums. Since the contract was silent as to the date monthly premium payments were due, extrinsic evidence was necessary to determine whether Taylor Contracting's payments were "late" and whether KEMI properly canceled the policy for this reason. Therefore, we must reverse the Board's order affirming the ALJ and remand this matter to the ALJ for additional factual findings.

Except on the issue of notice, the parties agree on the relevant facts. Taylor Contracting is a construction business located in Huntington, West Virginia, and primarily does business in that state. However, in 2004, Taylor Contracting took over a warehouse in Greenup, Kentucky, and needed to procure Kentucky workers' compensation coverage for that site. Jeanette Taylor, the sole owner of Taylor Contracting, contacted the Putnam Agency, an independent insurance agency also located

in Huntington. On October 27, 2004, the Putnam Agency, on Taylor Contracting's behalf, filed an on-line application for workers' compensation coverage with KEMI.

The policy, as issued by KEMI, provided for workers' compensation coverage at the Greenup location from November 1, 2004, through November 1, 2005. As initially calculated, the annual premium was \$23,988.11. The application required Taylor Contracting to pay the premium in ten installments. The first installment, due immediately, was for 25% of the balance, or \$5,997.03. Taylor Contracting made that payment as required. The application further set out three installments of \$2,000.61, and six installments of \$1,998.20.

The application provided that subsequent installment payments were due on the second of each month beginning in January 2005. However, neither the policy nor any of the attached materials set a schedule for premium payments. Beginning December 2, 2004, KEMI mailed monthly invoices to Taylor Contracting. But these invoices did not set the due date on the second of the month. Rather, it appears that KEMI typically required payment within twenty-five days from the date of the invoice.

The following chart sets out the date of each invoice, the amount of the premium installment, the past-due premium claimed owed as of the invoice date, the total premium claimed owed as of the invoice date, the due date for payment provided on each invoice, and the date KEMI received Taylor Contracting's payment:

Invoice Date	Premium Installment	Past-Due Premium	Total Premium Due	Invoice Due Date	Payment Received (Amount)
N/A	\$5,997.03	\$0	\$5,997.03	N/A	11/01/04 (\$5,997.03)
12/02/04	\$2,000.61	\$0	\$2,000.61	12/27/04	12/28/04 (\$2,000.61)
01/03/05	\$2,000.61	\$0	\$2,000.61	01/28/05	02/04/05 (\$2,000.61)
02/02/05	\$2,000.61	\$2,000.61	\$4,001.22	Upon Receipt	03/04/05 (\$2,000.61)
03/02/05	\$1,998.21	\$2,000.61	\$3,998.21	Upon Receipt	03/28/05 (\$2,000.61)
04/04/05	\$1,998.21	\$0	\$1,998.21	04/29/05	05/03/05 (\$1,998.21)
05/02/05	\$1,998.21	\$1,998.21	\$3,996.42	Upon Receipt	06/07/05 (\$1,998.21)
06/02/05	\$1,998.21	\$1,998.21	\$3,996.42	Upon Receipt	07/18/05 (\$1,998.21)
07/05/05	\$1,998.21	\$1,998.21	\$3,996.42	Upon Receipt	08/25/05 (\$1,998.21)
08/02/05	\$1,998.21	\$1,998.21	\$3,996.42	Upon Receipt	09/22/05 (\$1,998.21)
09/02/05	\$0	\$1,998.21	\$1,998.21	Upon Receipt	N/A
10/03/05	\$0	\$0	\$0	N/A	N/A

As shown above, Taylor Contracting made all nine premium payments by September of 2005, but it frequently made the payments after the due dates on the invoices. Usually, when Taylor Contracting failed to make payments by the next invoice date, KEMI's subsequent invoice showed the account as past due and accelerated the following due date.¹ On February 3, June 2, and July 5, 2005, KEMI automatically generated notices of cancellation for non-payment unless Taylor Contracting submitted its past due payment within 14 days. In each of these months, KEMI withdrew the cancellation notices when it received Taylor Contracting's payment.

On August 5, 2005, KEMI again generated a notice of intent to cancel, informing Taylor Contracting that its coverage would be canceled if payment was not

¹ There were exceptions to this practice, including late payments in December 2004 and March 2005, as demonstrated on the chart above.

received by August 23, 2005. When Taylor Contracting failed to tender its payment by that date, KEMI canceled the policy and provided notice of the lapse in coverage to the Office of Workers' Claims (OWC), as required by KRS 342.340(2).

But after the policy was canceled, KEMI sent two more premium payment notices, on September 2, and October 3, 2005, respectively. The September notice acknowledged that the August payment had been made and the October notice showed no additional balance owing. Neither of these notices indicated that the policy had been canceled. And both Jeannette Taylor and Jack Massie of the Putnam Agency testified that they did not receive the August cancellation notice. After Taylor Contracting filed a claim in September 2005, KEMI notified it that the policy had been canceled as of August 23.

In addressing the issue of coverage, the ALJ focused narrowly on KEMI's compliance with the 14-day cancellation notice required by the policy, and with KRS 342.340(2), which requires a carrier to provide the OWC with notice of a cancellation of a policy. The ALJ rejected Taylor Contracting's and the Putnam Agency's claims that they had not received the cancellation notices, noting that they had received the prior invoices, which were sent to the same addresses. The ALJ further found that KEMI had timely given notice to the OWC that the policy had lapsed. Therefore, the ALJ determined that no coverage was in effect with KEMI as of September 19, 2005. Thereafter, the ALJ denied Taylor Contracting's motion for specific findings of fact and petition for reconsideration based on estoppel. The ALJ determined that his findings

were sufficient and that no party had raised the issue of whether KEMI was estopped to deny coverage.

On appeal, the Board affirmed. The Board concluded that substantial evidence supported the ALJ's finding that KEMI had sent the cancellation notices to Taylor Contracting and the Putnam Agency. The Board agreed with Taylor Contracting that the contract did not require a premium payment by a specific date. But the Board also found that the policy gave KEMI the unambiguous right to cancel for non-payment of premiums. Based on the invoice due dates, the Board determined that Taylor Contracting's payments were late and therefore, that KEMI properly canceled the policy when it received no payment by August 23. Finally, the Board agreed with the ALJ that Taylor Contracting had not raised the issue of estoppel in a timely manner. Nevertheless, the Board opined that KEMI's proper mailing of the cancellation notices precluded any finding of estoppel.

As the ALJ and the Board correctly noted, the ALJ has jurisdiction to address whether an insured had a workers' compensation policy covering a pending claim within the jurisdiction of the administrative body before which the claim was pending. *Custard Insurance Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284 (Ky. 2001); *Motorists Mutual Insurance Company v. Terry*, 536 S.W.2d 472 (Ky. 1976). On factual matters, the ALJ has the sole discretion to determine the quality, character, and substance of the evidence and an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary

party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Where the party with the burden of proof is not successful before the ALJ, the issue on appeal is whether the decision was unreasonable because the overwhelming evidence favored that party. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). But on questions of law, such as the interpretation and construction of an insurance contract, our review is *de novo*. See *Stone v. Kentucky Farm Bureau Mutual Ins. Co.*, 34 S.W.3d 809, 810 (Ky.App. 2000).

On the factual issue, the ALJ found that KEMI properly sent the notices of cancellation to Taylor Contracting and the Putnam Agency. Taylor Contracting argues that this finding was clearly erroneous. We disagree. In *Goodin v. General Accident Fire & Life Assurance Corp.*, 450 S.W.2d 252 (Ky. 1970), the former Court of Appeals held that proof of mailing of cancellation of insurance coverage may be satisfied by showing compliance with business usage, provided such usage embodies sufficient evidentiary safeguards to satisfy the need for protection of an affected party in the particular transaction concerned. *Id.* at 256-57.

Although Jeanette Taylor and Jack Massie both testified that they did not receive the notices, the ALJ found their testimony unconvincing. In particular, the ALJ relied on the testimony of Robert Palmer and Steve Marks, both representatives of KEMI, who testified that cancellation notices were automatically generated by computer on the day after the premium due date. Marks added that KEMI's mail log shows that the

cancellation notices were sent to Taylor Contracting and the Putnam Agency at the addresses listed on the contract. Furthermore, Jeannette Taylor admitted that she had received all of the invoices which KEMI sent to Taylor Contracting's address. The ALJ found this evidence to be sufficient and Taylor Contracting does not argue that additional proof of notice was necessary. Therefore, we cannot find the ALJ's conclusion to be clearly erroneous.

However, Taylor Contracting further argues that the ALJ failed to determine whether KEMI had a right to cancel the policy. Taylor Contracting again notes that the policy did not set out specific dates for payment of premiums. As a result, it contends that the policy is ambiguous and that KEMI's right to cancel for non-payment should be narrowly construed in Taylor Contracting's favor. And since the parties agree that Taylor Contracting made nine consecutive monthly premium payments, Taylor Contracting asserts that it was not in breach and KEMI had no right to cancel the policy.

In response, KEMI argues that this issue was not preserved for review at the benefit review conference or the final hearing. It notes that the only contested issue at that time concerned whether coverage was in effect as of September 19, 2005. However, this matter goes to the heart of the issue. KEMI's right to cancel the policy must arise from the contract. *Goodin*, 450 S.W.2d at 254. If KEMI did not properly invoke that right, then its subsequent compliance with contractual and statutory notice requirements was not effective to terminate coverage.

Estoppel, on the other hand, concerns whether KEMI's conduct precludes it from relying on its otherwise valid cancellation of the policy. *Akers v. Pike County Board of Education*, 171 S.W.3d 740 (Ky. 2005). Since estoppel involves matters outside of the contractual issue of coverage, we agree with the ALJ that Taylor Contracting was required to identify it as a contested issue prior to the final hearing. Therefore, the issue is not properly presented in this petition for review.

In interpreting the language of the insurance contract at issue in this case, we are guided by some basic insurance law principles. Under the reasonable expectations doctrine, ambiguous terms are to be construed against the drafter and in favor of the insured's reasonable expectations. *Woodson v. Manhattan Life Ins. Co of New York*, 743 S.W.2d 835, 839 (Ky. 1987). The policy language will be construed as laymen would understand it. Furthermore, exclusions shall be strictly construed to make insurance effective. *Transport Insurance Co. v. Ford*, 886 S.W.2d 901, 904 (Ky.App. 1994). Finally, where cancellation is authorized by the insurance contract, there can be a cancellation only upon strict compliance with the provisions of the contract. *Goodin*, 450 S.W.2d at 255.

In this case, the ALJ and the Board focused on Part V(B) of the policy, which grants KEMI the unambiguous right to cancel for non-payment of premiums. However, the parties agree that Taylor Contracting paid all premiums required within the coverage period. The issue, then, is whether Taylor Contracting made timely payments. As the Board recognized, the policy and the attached information pages and

endorsements are silent as to a specific date for payment of premiums. Nevertheless, the ALJ and the Board assumed, without question, that the due dates set out on the monthly invoices were controlling to determine timeliness.

Under the specific circumstances of this case, we cannot agree. As the parties concede, the contract is silent as to the due dates for premium payments. It would have been a simple matter for KEMI to include a line in the policy or on the attached information page stating that premium payments were due as provided on the invoices. But KEMI did not include any such language. Indeed, KEMI specifically included an endorsement providing that “[t]he due date for audit and retroactive premiums is the date of billing,” but never addressed when the regular premium installment payments were due.

While the application provided for payments on the second of each month, KEMI’s invoices did not use those dates. Furthermore, there is no indication that the application was attached to the policy when issued, *see* KRS 304.14-100, and KEMI admits that the application was not part of the contract. Deposition of Steve Marks, p. 44. Moreover, the contract specifies that “[t]he terms of this policy may not be changed or waived except by endorsement issued by KEMI.” General Section, Paragraph A.

In adopting the due dates set out on the invoices, the Board implicitly relied on the course of dealing between the parties, noting that “Taylor Contracting’s own evidence revealed they knew the policy contained no specific dates for making payments, but did know payments were due when the statement was received.” Thus, the Board

concluded that Taylor Contracting's failure to make payments by those dates constituted a breach which justified KEMI's termination of the policy.

Insurance policies should be construed according to the parties' mutual understanding at the time they entered into the contract. *Nationwide Mutual Insurance Co. v. Nolan*, 10 S.W.3d 129, 131-32 (Ky. 1999). But since the policy is silent as to when premium payments are due, we must look beyond the contract to determine the parties' understanding. *See Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). Taylor Contracting is a sophisticated business entity, so its understanding of its payment obligations could reasonably include KEMI's regular billing practices. On the other hand, KEMI's invoices set earlier due dates than were indicated on the application. Furthermore, the parties agree that, while premium payments were due monthly, the premium installments did not cover specific monthly periods. Rather, the policy period covered the full year and the total premium was divided into installment payments. Finally, while Taylor Contracting did not consistently make its payments within specified 30-day periods, it did make all required payments during the first nine calendar months of 2005. Thus, Taylor Contracting reasonably could have expected that it complied with its contractual obligations.

Because the ALJ determined as a matter of law that KEMI properly canceled the policy, he did not address the factual issue of whether it was contractually entitled to do so. Therefore, we conclude that this matter must be remanded to the ALJ for additional factual findings. On remand, the ALJ must determine whether KEMI

properly exercised its contractual right to cancel the policy. This factual determination includes the parties' reasonable understanding of when premium payments were due. But since Taylor Contracting did not properly preserve the issue, the ALJ need not address the estoppel argument. If the ALJ determines that KEMI did not properly invoke its right to cancel the policy, then the ALJ must find that Taylor Contracting's coverage was still in effect as of September 19, 2005. But if the ALJ determines that Taylor Contracting failed to make timely payments as required by the parties' mutual understanding of their contractual obligations, then KEMI properly canceled the policy and the ALJ may reinstate his prior finding that coverage had lapsed prior to the injury date.

Accordingly, the December 12, 2006 opinion of the Workers' Compensation Board affirming the ALJ's June 8, 2006 order is reversed, and this matter is remanded for additional factual findings as set forth in this opinion.

ALL CONCUR.

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