

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2007-CA-000699-MR
AND
NO. 2007-CA-000736-MR

KENTUCKY ASSOCIATED GENERAL
CONTRACTORS SELF-INSURANCE
FUND (KAGC), AS ADMINISTERED
BY LADEGAST AND HEFFNER
CLAIMS SERVICE, INC.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL
v.
FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 07-CI-90021

MUSIC CONSTRUCTION, INC. APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

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BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: This appeal and cross-appeal come from an order dismissing a complaint for failure to state a claim for which relief could be granted. Kentucky Associated General Contractors Self-Insurance Fund, hereinafter Kentucky Associated, appeals the dismissal of their complaint. Music Construction, Inc., cross-appeals to supply an additional basis to affirm the dismissal of the complaint. We hold that the action of the circuit court was proper. The issue in this case has already been addressed by the Kentucky Supreme Court case *AIG/AIU Insurance Co. v. South Acres Mining Co., LLC*, 192 S.W.3d 687 (Ky. 2006).

Music Construction was insured by Kentucky Associated for workers' compensation purposes when one of its employees, Donnie Thacker, was injured while on the job. Mr. Thacker filed a claim for workers' compensation benefits. As part of that claim, he argued he was entitled to a 30% increase in his benefits because Music Construction intentionally failed to comply with appropriate safety laws and regulations. This 30% increase is authorized by KRS 342.165.

Mr. Thacker was awarded the 30% increase in benefits at the conclusion of his workers' compensation case. An issue arose during that proceeding regarding payment of the 30% increase. The contract between Music Construction and Kentucky Associated contained a clause that stated Music Construction was responsible for any workers' compensation payments that were awarded as a result of a failure to comply with health or safety laws. Additionally,

the contract provided that if Kentucky Associated was directed to make these payments, Music Construction was required to reimburse the insurance company.

While Mr. Thacker's case was being litigated, this same issue came before the Kentucky Supreme Court in *AIG/AIU Insurance Co. v. South Acres Mining Co., LLC, supra*. The Supreme Court held that, under the provisions of the Workers' Compensation Act, a workers' compensation insurance policy must cover the employer's entire liability for workers' compensation benefits. The Court specifically held that the employer's liability included the KRS 342.165 increase in benefits.

Based on *AIG/AIU*, Kentucky Associated paid the increased benefits. It then demanded reimbursement from Music Construction pursuant to the contract. Music Construction refused and Kentucky Associated brought the instant action.

We agree with the circuit court's holding that the *AIG/AIU* case is dispositive of this issue and prevents Kentucky Associated from bringing a breach of contract claim against Music Construction. The contractual provision at issue in the *AIG/AIU* case is identical to the one at issue in this case. Both contracts provided that "If we make any payments in excess of the benefits regularly provided by the workers' compensation law on your behalf, you will reimburse us promptly." To require Music Construction to repay the increase in benefits awarded here would be antithetical to the *AIG/AIU* holding. The Kentucky

Supreme Court held that “the employer’s insurance carrier is liable for any increase in benefits under KRS 342.165(1) despite a contractual term to the contrary.” *AIG/AIU* at 689.

The Supreme Court reasoned that:

[c]onsistent with the principle that workers’ compensation benefits are a cost of production, the carrier is free to consider the amount of compensation it has paid on an employer’s behalf when assessing the risk and deciding whether to continue to offer coverage after the policy expires and, if so, at what rate.

Id. While Kentucky Associated cannot recover on a contractual basis, it can consider the award in determining Music Construction’s future premiums or cut its losses by no longer providing it with coverage.

“The court should not grant [a motion to dismiss for failure to state a claim] unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). We find that based on the holding in *AIG/AIU*, it would be impossible for Kentucky Associated to prevail on its complaint. For the above stated reasons, we affirm the trial court’s dismissal of Kentucky Associated’s complaint.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT/
CROSS-APPELLEE:

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Louisville, Kentucky

BRIEFS FOR APPELLEE/
CROSS-APPELLANT:

Elaina L. Holmes
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NO ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT