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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001610-MR

THE TRAVELERS INSURANCE
COMPANY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 97-CI-00684

BLACKSTONE MINING
COMPANY, INC.

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: FORMTEXT KELLER AND TAYLOR, JUDGES; GUIDUGLI,
SENIOR JUDGE.

TAYLOR, JUDGE: The Travelers Insurance Company brings this appeal from an August 3, 2004, summary judgment, a May 24, 2007, judgment, and a July 9, 2007, amended judgment of the Pike Circuit Court awarding Blackstone Mining Company, Inc. \$117,861.25, plus interest, as overpayment of premiums on

workers' compensation insurance policies issued by Travelers Insurance. We vacate and remand.

Relevant to this appeal, Travelers Insurance issued two workers' compensation insurance policies to Blackstone Mining covering the time periods of August 29, 1992, through August 29, 1993, and of August 29, 1993, through August 29, 1994. On March 2, 1997, Travelers Insurance filed a complaint against Blackstone Mining alleging that Blackstone owed Travelers \$474,870 in additional premiums for the two workers' compensation insurance policies. Therein, Travelers Insurance contended that Blackstone Mining failed to pay workers' compensation premiums for coverage on fourteen employees. Travelers Insurance admitted that these fourteen employees executed and filed rejection notices of workers' compensation coverage with the Department of Workers' Claims under Kentucky Revised Statutes (KRS) 342.395. However, Travelers Insurance averred that these rejection notices were invalid because the notices were not voluntarily made by the employees as required by KRS 342.395(1). As Blackstone Mining failed to pay premiums for these employees, Travelers Insurance alleged that Blackstone owed Travelers the additional premiums for workers' compensation coverage provided for the employees.

In response, Blackstone Mining filed a counterclaim alleging that it overpaid premiums on the same two workers' compensation insurance policies. Blackstone Mining alleged that twenty-three employees (not fourteen) filed valid rejection notices of workers' compensation coverage under KRS 342.395.

Blackstone Mining pointed out that these twenty-three employees voluntarily rejected workers' compensation coverage in favor of insurance coverage provided by Blackstone, which included disability coverage. The policy was issued by Mass Mutual Insurance Company (Mass Mutual Policy) and the premiums were paid by Blackstone Mining. Because these twenty-three employees rejected workers' compensation coverage, Blackstone Mining alleged it overpaid premiums in the amount of \$120,861 for the workers' compensation policies.

Both Travelers Insurance and Blackstone Mining filed motions for summary judgment. Kentucky Rules of Civil Procedure (CR) 56. On August 3, 2004, the circuit court entered an order granting a partial summary judgment in favor of Blackstone Mining. The court concluded that "no genuine issue of material fact exists that 23 of . . . [Blackstone Mining's] employees voluntarily rejected workers' compensation coverage." However, the court denied summary judgment upon the issue of damages.¹

In lieu of a trial, the parties agreed to submit proposed findings based upon the record to the circuit court regarding the overpayment of premiums by Blackstone Mining. By Findings of Fact, Conclusions of Law and Judgment entered May 24, 2007, the circuit court decided the issue of damages. The circuit court concluded that the Mass Mutual Policy provided coverage for pneumoconiosis (black lung); thus, Blackstone Mining was not obligated to pay premiums under the Federal Black Lung Benefits Act (30 U.S.C. § 901 *et. seq.*)

¹ The August 3, 2004, order was interlocutory in nature as it only resolved alleged liability regarding the claims asserted in the Complaint and Counterclaim.

The court then determined that Travelers Insurance owed Blackstone Mining a refund for workers' compensation premium overpayments in the amount of \$120,861.25. Thereafter, by Amended Judgment entered July 9, 2007, the court reduced the Judgment to \$117,861.25 and awarded prejudgment interest on the judgment at the legal rate of 8 percent for all premium refunds owed. The circuit court further awarded Blackstone Mining its' court costs. This appeal follows.

Travelers Insurance contends that the circuit court erroneously rendered summary judgment by holding that twenty-three of Blackstone Mining's employees voluntarily rejected workers' compensation coverage. For the reasons hereinafter stated, we agree and vacate the summary judgment for Blackstone Mining.

Under KRS 342.395(1), an employee may opt out of workers' compensation coverage by filing a notice of rejection with the Department of Workers' Claims. However, the statute specifically provides that the "executive director of that office shall not give effect to any rejection of this chapter not voluntarily made by the employee." KRS 342.395(1). To constitute a voluntary rejection of workers' compensation coverage, the employee must possess a "substantial understanding of the nature of the action and its consequences." *Karst Robbins Machine Shop, Inc. v. Caudill*, 779 S.W.2d 207, 209 (Ky. 1989).

In the record, there is a deposition from only one of the twenty-three workers, Harold Dean Thacker, who rejected workers' compensation coverage.

Also, the deposition of Blackstone Mining's president, Raymond Strawser, was included in the record.²

Both Strawser and Thacker testified that the rejections for workers' compensation coverage were signed voluntarily and without coercion from Blackstone. Strawser testified that he believed the Mass Mutual Policy provided better protection to his employees for less premiums than workers' compensation coverage. He also stated that the employees were not threatened by Blackstone Mining and were free to keep workers' compensation coverage. Thacker testified that he believed the Mass Mutual Policy provided him better coverage than workers' compensation coverage. He stated that he understood the policy provisions and was not coerced to reject workers' compensation coverage by Blackstone Mining.

Under CR 56, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). To be entitled to summary judgment as a matter of law upon a claim or counterclaim, movant must produce sufficient evidence to sustain his burden of proof upon said claim or counterclaim. CR 56.01. Stated differently, to prevail upon its counterclaim and to be entitled to summary judgment, Blackstone Mining carried the burden of producing evidence sufficient to sustain its counterclaim. CR 43.01. In particular, it was incumbent upon Blackstone Mining to produce evidence

² There was other evidence in the record, but it was irrelevant to the disposition of this appeal.

proving that each of its twenty-three employees voluntarily rejected workers' compensation coverage. And, to prove that such coverage was voluntarily rejected, there must be evidence demonstrating that each of the twenty-three employees possessed a substantial understanding of the nature of the action (rejection of coverage) and its consequences. *See Karst Robbins Machine Shop*, 779 S.W.2d 207. Under CR 56.01, we do not believe it is proper to grant a summary judgment where the movant fails to carry his burden to produce evidence sufficient to sustain his claim or counterclaim on the merits. In such a circumstance, the movant would not be entitled to judgment as a matter of law under CR 56.³

In their depositions, Strawser merely testified concerning the general practice of Blackstone Mining in offering employees coverage under the Mass Mutual Policy, and Thacker primarily testified concerning the circumstances surrounding his rejection of workers' compensation coverage. However, there was a complete lack of evidence demonstrating whether each of the remaining individual employees who rejected coverage possessed a substantial understanding of the nature of the action and its consequences. Most strikingly absent from the record was an affidavit or deposition of any other employee who rejected coverage.

³ We note that our standard of review for the judgment entered on May 24, 2007, as amended on July 9, 2007, would normally be based upon the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure 52.01. Any legal conclusions made thereon would be reviewed under a *de novo* standard. However, since we believe summary judgment was improperly granted by the circuit court in 2004 on the issue of liability, we do not reach the issue of damages in this opinion.

Upon the whole, we conclude that Blackstone Mining failed in its burden of producing evidence that each of the twenty-three employees possessed a substantial understanding of the nature of the action (rejection of coverage) and its consequences and, thus, failed to prove that these employees voluntarily rejected workers' compensation coverage. Consequently, the circuit court erred by rendering summary judgment as a matter of law that all twenty-three employees voluntarily rejected workers' compensation coverage.⁴

Thus, we vacate and remand this case to the circuit court for additional proceedings consistent with this opinion. In so doing, the circuit court shall consider each employee individually and determine whether each employee voluntarily rejected workers' compensation coverage based upon the unique facts of each rejection, and what damages, if any, in the form of premium refund can be allocated to each valid rejection. Simply put, the issue presented upon remand is whether each of the individual employees voluntarily rejected workers' compensation coverage and not whether the twenty-three employees as a group voluntarily rejected workers' compensation coverage. *See Karst Robbins Machine Shop*, 779 S.W.2d 207. And, the evidence presented by Blackstone Mining must prove same and be undisputed before summary disposition would be appropriate. The circuit court may then address the issue of damages, if any.

⁴ We acknowledge that the record is sufficient to support employee Harold Dean Thacker's rejection of workers' compensation coverage. However, we cannot determine what damages, if any, can be allocated to this individual's rejection of coverage.

Considering our disposition of this appeal, we deem any remaining contentions as moot at this time.

For the foregoing reasons, the summary judgment, judgment, and amended judgment of the Pike Circuit Court are vacated and remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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