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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000279-WC

JOURNEY OPERATING, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-05-00151 & WC-06-00341

ZURICH AMERICAN INSURANCE COMPANY;
ANGELA JEFFERS, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF PATRICK
JEFFERS, DECEASED; SUSIE BELL, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE ESTATE
OF WILLIAM BELL, DECEASED; MYERS
COMPLETION, INC.; HON. DONNA H. TERRY,
CHIEF ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING

** ** *

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: This appeal requires an examination of the authority of a Workers' Compensation Administrative Law Judge to reopen a final decision to prevent an insurer from carrying out a constructive fraud on the tribunal. As KRS 342.125 provides authority for reopening in such circumstances, we reverse the Workers' Compensation Board (Board) and reinstate the decision of the Chief Administrative Law Judge (CALJ).

The tragic facts giving rise to these proceedings occurred when Patrick Jeffers and William Bell suffered fatal injuries in a work-related accident while providing service on a well in Bulan, Kentucky. Jeffers and Bell, Tennessee residents, were employed by Myers Completion, Inc. (Myers), a Tennessee corporation that provides general maintenance for oil and gas wells primarily in Kentucky and Tennessee. Journey Operating, LLC, (Journey) a Kentucky corporation, had contracted with Myers to service the well in question.

Upon the deaths of Jeffers and Bell, the employer's, Myers, workers' compensation insurance carrier, Zurich American Insurance Company (Zurich), commenced payment of benefits to the estates and families of Jeffers and Bell pursuant to Tennessee workers' compensation law. Because Jeffers and Bell were residents of Tennessee and were employed by Myers, Zurich determined that Tennessee benefits were due pursuant to its policy.

Despite Zurich's payment of Tennessee benefits, the decedents' widows also sought benefits under Kentucky workers' compensation law. Zurich denied the Kentucky benefits claim. As explained in the final administrative order,

“Zurich-American admit[ted] its liability for payments made pursuant to Tennessee law but contests its liability for any additional benefits under the Kentucky Workers’ Compensation Act.” Journey Operating, the Kentucky corporate well operator, and its workers’ compensation insurance carrier were also named as parties due to Journey’s status as an up-the-ladder employer in the event coverage was unavailable from the direct employer. KRS 342.610(2)(b).

After hearing the evidence, the CALJ determined that the decedents’ widows were entitled to benefits under Kentucky Workers’ Compensation law. Upon concluding that Zurich’s policy did not provide benefits under Kentucky law, the CALJ determined that “in the absence of compensation secured by Myers, Journey is a deemed contractor pursuant to KRS 342.610(2)(b) and is liable for compensation for the . . . injury.” The CALJ further found that “while Journey’s workers’ compensation carrier shall be responsible for payment of income benefits provided in KRS 342.750(6), it shall be entitled to a credit for benefits paid and owing under the Tennessee policy issued to Myers by Zurich-American or its subsidiary.”

Journey petitioned for reconsideration of the ruling and for specificity as to the monetary credit to which it was entitled by virtue of benefits paid under the Tennessee policy. Denying the petition, the CALJ stated, “the amounts of payments under the Tennessee policy will change and vary with time as children become emancipated or in the event of a remarriage. The award provides a credit

for benefits paid and owing and this provides sufficient protection and explanation of Journey's rights and responsibilities."

Although a party to the Kentucky proceeding, Zurich did not object to language in the CALJ's order that acknowledged Zurich's admission of liability for benefits under Tennessee law, nor did it object to the corresponding finding that Zurich was liable for payment of benefits under Tennessee law under the terms of its policy. And, although the reconsideration order referenced continuing benefit payments under the Tennessee policy and noted that Journey's credit for these amounts was protected by the language "paid and owing" in the original ruling, Zurich did not object or raise any issues before the CALJ or the Board with respect to its continuing liability for benefits under Tennessee law. The Board affirmed the administrative decision and the case became final.

Despite all of the foregoing, upon finality of the Board's decision, Zurich terminated payment of benefits in reliance upon an election of remedies doctrine in Tennessee law. Journey then filed a motion to reopen, relying in part on *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993), a case in which an ALJ was held to have properly reopened a case after having limited benefits to 425 weeks when the law in effect at the time of the injury provided for lifetime benefits. Even though *res judicata* applied in the *Wheatley* case, reopening was held proper pursuant to KRS 342.125 because of the mistake. As with mistake, fraud is a ground for reopening under KRS 342.125, and on that basis, Journey's motion was granted, and the CALJ deemed Zurich's actions to have been a

constructive fraud. The CALJ determined that Zurich was estopped from terminating benefits, reiterated that Journey was entitled to a credit for amounts that Zurich paid or was obligated to pay, and further directed Zurich to continue payments pursuant to the Tennessee policy.

Zurich appealed to the Board from that decision, arguing that the CALJ had neither authority to reopen nor jurisdiction to decide the issues raised. The Board agreed and reversed the decision accordingly. This appeal followed.

At the outset, we observe that KRS 342.125 provides that “[u]pon motion by any party or upon an administrative law judge’s own motion, an administrative law judge may reopen and review any award or order on any of the following grounds: (a) Fraud; . . . (c) Mistake[.]” The CALJ found that reopening was proper on the basis of both mistake and fraud. Specifically, the ruling upon reopening reiterated that “[a]t all times during the underlying claim litigation, Myers and Zurich continued to pay benefits under Zurich’s Tennessee policy and, through [several] witnesses, represented that benefits were due and owing . . . under the Tennessee policy and were being paid pursuant to that obligation.” The ruling also cited to the numerous references in the original ruling that confirmed or resulted from these representations, and specifically noted that despite the certainty in the original CALJ ruling as to Zurich’s liability for continuing payments, Zurich failed to object or appeal. We note that the same evidence that constituted constructive fraud also supported the CALJ’s finding of equitable estoppel. Based on its statements and conduct, Zurich was equitably estopped from terminating

benefits because it not only concealed its intention to do so but also made affirmative representations to the contrary.

Although the Board accepted Zurich's contention that the CALJ lacked authority to reopen and to order continued payment of benefits, we deem the CALJ's reasoning to be superior. In reversing the decision on reopening, the Board pointed out that the CALJ had initially determined that Myers/Zurich was not liable for benefits pursuant to Kentucky law; therefore, it reasoned that the CALJ had no authority to order the Tennessee payments on reopening. However, if Zurich believed that its payments under Tennessee law were not required or were not within the CALJ's jurisdiction, it had a duty to object to the CALJ's initial ruling, and to the ruling denying reconsideration, as both clearly considered and affirmed Zurich's ongoing liability under Tennessee law. Instead, Zurich neither objected before the CALJ nor raised the issue on appeal to the Board.

For its decision, the Board relied on *Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284 (Ky. 2001). In *Custard*, the Kentucky Supreme Court explained that where a dispute is solely between insurance carriers and does not affect the rights of an employee in a pending claim, jurisdiction lies with the circuit court, not the ALJ, because issues of subrogation or reimbursement do not involve provisions of KRS Chapter 342. In the instant case, however, far more was at issue in the reopening determination as the decision affected liability for future payments to the widows. It was not simply a "settling up" between insurers for benefits already paid. Nor was the reopening a straightforward enforcement of the

initial ruling that would have been appropriate for circuit court. Instead, as the CALJ concluded, the reopening did not arise from a mere attempt to enforce the prior judgment but was necessary to determine whether Zurich had committed constructive fraud in the original proceeding. The critical distinction is that none of the authorities relied upon by Zurich or the Board contained elements of fraud.

It is fundamental that an administrative or judicial decision-maker must have authority to protect the integrity of the proceeding. With respect to Kentucky courts, this principle was boldly articulated in *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 453 (Ky. 1996), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004):

Once the trial judge had reason to believe that there was some absence of accuracy in its judgment so that the judgment did not properly conform to the true facts of the case, the trial judge had a duty, as well as a right, to investigate by means of a hearing to determine that the judgment accurately reflected the truth. The trial judge has inherent power to execute this responsibility.

KRS 342.125 similarly authorizes a Workers' Compensation ALJ to act in protection of the verity of the administrative proceeding. In workers' compensation cases, insurers occupy a pivotal role and when they engage in duplicitous conduct, it must be discovered and corrected. Where an ALJ believes that fraud has infected the proceeding, the statute grants authority to reopen for the very purpose of finding the facts and formulating remedies where fraudulent conduct is found. The CALJ appropriately utilized statutory authority in the instant case.

Accordingly, we reverse the Workers' Compensation Board and
reinstate the administrative decision on reopening in its entirety.

ALL CONCUR.

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