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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-000647-WC[1]
AND
NO. 2008-CA-000959-WC

KENTUCKY EMPLOYERS' MUTUAL INSURANCE — APPELLANT

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

TAYLOR CONTRACTING/TAYLOR READY MIX, LLC; CHRISTOPHER WATTS; UNINSURED EMPLOYERS FUND; ANDREW F. MANNO, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

[1] This opinion addresses two appeals, 2008-CA-000647 and 2008-CA-000959, with identical parties, facts, and issues. It is unclear why two appeals resulted, but the record establishes the Board failed to serve KEMI with a copy of its February 22, 2008, opinion. As a result, the Board withdrew that opinion and reentered the same opinion as of April 18, 2008.

BEFORE: CAPERTON, KELLER AND NICKELL, JUDGES.

NICKELL, JUDGE: Kentucky Employers' Mutual Insurance (KEMI) appeals from an order of the Workers' Compensation Board (Board) reversing and remanding the Administrative Law Judge's (ALJ) opinion that Taylor Contracting/Taylor Ready Mix, LLC (Taylor) did not have workers' compensation insurance through KEMI at the time its employee, Christopher Watts, was injured on September 19, 2005. Upon a thorough review of the record, we affirm the Board's holding that reversal and remand to the ALJ is necessary because the ALJ did not make the findings we directed him to make in a prior opinion.[2]

The sole issue in this appeal is whether KEMI properly canceled workers' compensation insurance for Taylor Contracting/Taylor Ready Mix, LLC (Taylor) due to the late payment of premiums. While the insurance contract stated premium payments were to be made by the second day of the month, monthly invoices sent by KEMI to Taylor typically required payment within twenty-five days of the invoice date. Taylor made the required payments, and KEMI, as a course of practice, accepted them, even though they were often late. On August 5, 2005, KEMI sent a notice of intent to cancel to Taylor saying coverage would be canceled unless payment was received by August 23, 2005. When payment was

[2] *Taylor Contracting/Taylor Ready Mix, LLC v. Watts*, 2007 WL 1893722, No. 2007-CA-000026-WC (rendered June 29, 2007, unpublished).

not received, KEMI canceled the policy and notified the Office of Workers' Claims. However, after canceling the policy, KEMI sent two more premium payment notices to Taylor. The September notice acknowledged receipt of the August premium payment and the October notice did not indicate any balance was due and owing. Neither of these notices mentioned the policy had been canceled. Taylor discovered its policy had been canceled only when it submitted a claim.

The first time we reviewed this matter we reversed and remanded the claim to the Board and directed that the ALJ:

> 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. . . . If the ALJ determines that KEMI did not properly invoke its right to cancel the policy then the ALJ must find that Taylor'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 cancelled the policy and the ALJ may reinstate his prior finding that coverage had lapsed prior to the injury date.

On October 17, 2007, the ALJ issued his order upon remand. It was less than three pages in length and acknowledged this Court had ordered him "to determine whether KEMI properly exercised its contractual right to cancel the policy, including the parties' reasonable understanding of when premium payments were due." The order went on to state,

> this ALJ finds that KEMI properly exercised its contractual right to cancel [Taylor's] policy. Part V (B) of the policy clearly allows KEMI to cancel for non-payment of premiums. [Taylor] was consistently late making payments to KEMI. While it is true [Taylor] eventually made all payments within the policy periods, payments were clearly consistently late. As of August 2, 2005, [Taylor] owed $1,998.21 in past due premium (sic) plus a $1,998.21 installment. [Taylor] was sent a notice of cancellation on August 5, 2005 which indicated the policy would be cancelled for nonpayment on August 23, 2005 if $1,998.21 was not paid. [Taylor] failed to pay the necessary amount prior to August 23, 2005. This ALJ finds that at that point, there was no doubt that [Taylor] was aware that there was (sic) past-due premiums that had not been paid and that KEMI would cancel the policy if payment was not remitted. This ALJ finds that [Taylor] was aware of the necessity to make payment to avoid cancellation. The payment stubs sent by KEMI controlled the payment schedule and included a due date. This ALJ finds that [Taylor] was aware of the due dates yet frequently made payments after the posted due dates. This ALJ finds that [Taylor] failed to make timely payment or (sic) past-due premiums as required. Ms. Taylor testified she knew payments were due when she received the statements. Therefore, this ALJ finds that both [Taylor] and KEMI understood that the statements controlled the dates each payment was due. [Taylor] failed to pay past due premium amounts prior to the cancellation date. Therefore, this ALJ finds that KEMI properly cancelled [Taylor's] policy.

After the ALJ overruled a petition for reconsideration, Taylor appealed to the Board. On February 22, 2008, the Board entered a twenty-four page opinion reversing and remanding the matter to the ALJ to make the findings our original opinion directed him to make.

Because the ALJ failed to follow the directive of our 2007 opinion to make findings regarding the parties' understanding of when premium payments were due under the contract at the time of execution, we affirm the Board's decision reversing and remanding the matter to the ALJ for additional findings consistent with our original instructions. In doing so, we note that the Board, in its opinion, implies that the ALJ must find KEMI could not have properly canceled coverage. To the extent this is what the Board intends, we disagree. In our original opinion, we held the ALJ could determine, after making proper findings of fact, that KEMI had reason to, and did, properly cancel coverage. Therefore, in remanding this matter, we again instruct the ALJ that he or she may determine coverage was properly canceled; however, that determination must be based on what the parties understood at the time the contract was entered. We agree with the Board's implication, if not explicit statement, that the ALJ may be unable to make such a determination based upon the record. However, that determination is the ALJ's to make, *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky.1985), and any mandate by the Board to the contrary is inconsistent with our 2007 opinion which neither party appealed.

Therefore, the Board's opinion, entered on April 18, 2008, is affirmed to the extent that this matter is again remanded to the ALJ for additional findings of fact consistent with our 2007 opinion.

ALL CONCUR.

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