RENDERED: NOVEMBER 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000769-WC

RANDY ELLINGTON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-00266

R & J CABINETS; KENTUCKY EMPLOYERS' MUTUAL INSURANCE; HON. JONATHAN WEATHERBY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND STUMBO, JUDGES.

COMBS, JUDGE: Randy Ellington petitions for review of a decision of the Workers' Compensation Board affirming the order of an Administrative Law Judge that had dismissed his application for workers' compensation benefits. The

dismissal was based upon a finding that Ellington was not covered by a workers' compensation insurance policy that he had purchased from Kentucky Employers' Mutual Insurance (KEMI). After our review, we reverse and remand.

Ellington was born in 1959. He completed high school and some vocational training as a marine mechanic. During his career, he worked as a commercial fisherman, woodworker, and carpenter. At the time of his work-related injury in December 2010, Ellington operated his own business, R & J Cabinets, as a sole proprietorship. Although the business had had several employees at the height of the housing boom, Ellington became the sole remaining employee of the business after the economy declined. He worked installing cabinets, countertops, and trim.

As the sole proprietor of the business, Ellington annually purchased workers' compensation insurance through KEMI. There is no dispute between the parties that KEMI issued to "Randy Ellington DBA R & J Cabinets" a workers' compensation insurance policy that remained in effect at the time of Ellington's injury. It is also undisputed that KEMI was aware that Ellington was the company's sole employee when his policy renewed in 2010.

Ellington filed an application for resolution of injury claim in February 2012. KEMI denied coverage. Following a period of discovery, the ALJ conducted a formal hearing. Based upon the evidence presented, the ALJ concluded that the policy was ambiguous with respect to coverage since Ellington was listed as a named insured on the policy but was excluded through a specific policy endorsement. However, the ALJ determined that the "ambiguity should

have been clarified . . . by the specific language of the policy which clearly states that he is not covered and by the individual audit forms that he specifically and individually signed which also clearly indicate that he personally was not covered." Opinion and Order at 13. The ALJ rejected Ellington's petition for reconsideration, and Ellington appealed to the Board.

Before the Board, Ellington argued that the ALJ had erred by failing to construe an ambiguity in KEMI's insurance policy in favor of coverage. The Board concluded that the evidence before the ALJ did not compel a different result and affirmed the ALJ's order dismissing. This petition for review followed.

Ellington contends that the Board erred in affirming the ALJ's dismissal of his claim. He argues that the Board misapplied controlling law that requires that the ambiguity in the policy be construed against KEMI. He contends that it is patently unreasonable to conclude that he lacked coverage since KEMI listed him as a named insured on the policy and assessed him an annual premium.

Upon our review, we reverse the Board only if we conclude that it has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky.1992). The interpretation of an insurance contract, including the existence of an alleged ambiguity, is a legal issue and subject to our review *de novo*. When conducting review *de novo*, we need not defer to the Board's opinion.

Working with an insurance agency in Richmond, Ellington originally submitted an application for workers' compensation insurance through KEMI in

April 2006. According to Jeremy Terry, KEMI's director of underwriting, Ellington was assessed an annual premium based on the value of his business's payroll. Terry also indicated that as a sole proprietor, Ellington was required to pay an additional flat fee for coverage. Throughout the years, Ellington made monthly payments toward the annual premium.

The information pages attached to Ellington's policy each year indicated that the policy applied to the workers' compensation laws of the Commonwealth. The pages also indicated that eleven separate endorsements applied to the policy issued to him by KEMI. Each endorsement was identified by an alpha-numeric code and a brief description. The policy described Ellington's work as "Carpentry – Installation of Cabinet Work or Interior Trim." In a section entitled "CLASS RATING AND MANUAL PREMIUM," **Ellington was identified individually by name and an annual premium was cited.**

Two additional pages, entitled "ENDORSEMENTS," were also provided to Ellington each year. In each of their headings, the pages listed the policy number and its effective date. Each indicated that "Randy Ellington DBA R & J Cabinets" was the policy holder. One of the pages included a schedule that indicated that Randy Ellington, the sole proprietor, **was excluded from coverage**. The other page listed Randy Ellington, individually, **as a named insured**. When Ellington filed his claim, KEMI asserted that its policy did not cover the work-related injury since Ellington was a sole proprietor and had failed to obtain an endorsement that included himself as a covered employee.

The ALJ did not err by finding that KEMI's insurance policy was ambiguous with respect to whether it covered Ellington's work-related injury. The policy referred to Ellington, individually, as the policyholder and contained an endorsement that listed him, individually, as the "named insured" covered by the terms of the policy. However, it also contained an endorsement that excluded him as "sole proprietor." Under the circumstances, the policy could reasonably be interpreted to exclude Ellington in his capacity as the business owner while including him under its coverage in his capacity as its **sole employee**.

Our courts are bound by a longstanding principle requiring policy exclusions to be construed so as to render insurance effective. *State Automobile Mutual Ins. Co. v. Trautwein*, 414 S.W.2d 587 (Ky. 1967). It is hornbook law that a contract is to be construed more strictly against the drafter of the document in case of ambiguity: the rule *contra proferentem*. Kentucky courts have consistently applied this rule of construction. In *Aetna Casualty & Surety Company v. Commonwealth,* 179 S.W.3d 830, 837, our Supreme Court articulated this rule:

> [6] The rule of interpretation known as "the reasonable expectations doctrine" resolves an insurance policy ambiguity in favor of the insured's reasonable expectations. *True v. Raines,* 99 S.W.3d 439,433 (Ky. 2003).
>
> . . .
>
> [7] We believe "an insurance company should not be allowed to collect premiums by stimulating a reasonable expectation of risk protection in the mind of the consumer, and then hide behind a technical definition ***to snatch away the protection which induced the premium***

> ***payment.***" *Moore v. Commonwealth Life Ins. Co.*, 759 S.W.2d 598, 599 (Ky.App.1988)(internal citations omitted. (Emphasis added.)

The ALJ and the Board misconstrued controlling law by failing to interpret the exclusion contained in KEMI's policy strictly against the insurer, which indeed "snatched away" the very coverage for which Ellington indisputably paid.

The opinion of the Workers' Compensation Board is reversed and remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy J. Wilson
Lexington, Kentucky

BRIEF FOR APPELLEE KENTUCKY EMPLOYERS' MUTUAL INSURANCE:

W. Barry Lewis
Hazard, Kentucky