

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001185-WC

UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00207

STEVEN¹ R. COLLINS; PEOPLEASE
CORPORATION; GENE R. TOMLIN
TRUCKING AND BROKERAGE, INC.;
GRIMES ENTERPRISES II, LLC.; MAVERICK
TUBE CORPORATION; HON. LAWRENCE F.
SMITH, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

¹ This is the name that is listed on the petition for review. In many of the administrative pleadings and in the prior appeal, the name also appears as Stephen.

MAZE, JUDGE: The Uninsured Employers' Fund (UEF) petitions for review from a June 13, 2013 opinion and order by the Workers' Compensation Board (Board) which vacated its prior opinion and order following a decision by this Court in an earlier appeal. The UEF argues that the doctrine of law of the case precluded the Board from taking any action after this Court dismissed the earlier appeal based upon lack of jurisdiction. Although we agree that the doctrine of law of the case applies, we conclude that the prior panel of this Court palpably erred in dismissing the petition for review, rather than simply vacating the Board's decision and remanding with directions to dismiss the appeal from the ALJ. Since the Board actually took this action, we will deem the error to be corrected and affirm the Board's order.

The facts and procedural history of this matter are set forth in detail in the prior opinion by this Court. *PeopLease Corp. v. Grimes Enterprises, II, Inc.*, No. 2012-CA-000890-WC, 2013 WL 1363508 (Ky. App. 2013). For purposes of this appeal, the following facts are relevant: The employee, Steven R. Collins, worked as an over-the-road truck driver for Grimes Enterprises II, LLC, a heavy-haul trucking company based in West Virginia. Maverick Tube Corporation contracted with Tomlin Trucking to deliver a load of its merchandise from Arkansas to Pennsylvania. Tomlin Trucking then contacted Grimes Enterprises to undertake that delivery.

Tomlin Trucking is a freight broker located in Missouri. It has no employees of its own, but leases its employees from PeopLease. PeopLease

manages the payroll, taxes, and benefit packages of those employees, and also provides workers' compensation insurance to those employees. However, the parties agree that Collins was an employee of Grimes Enterprises and was not an employee of Tomlin Trucking—leased or otherwise.

On February 16, 2004, Collins was driving into Kentucky from Arkansas with a load of steel products manufactured by Maverick Tube Corporation en route to the final destination in Pennsylvania. He sustained severe injuries as a result of an accident which occurred in Kentucky. After the accident, Collins filed a workers' compensation claim in West Virginia, the home state of his employer, Grimes Enterprises. At the time, West Virginia law required workers' compensation benefits to be provided exclusively through a state-administered program (making West Virginia a "monopolistic" state for purposes of workers' compensation coverage). As a result of his claim filed with the West Virginia Workers' Compensation Commission, Collins received an award of temporary total disability benefits, permanent partial disability benefits, rehabilitation benefits, and medical benefits paid directly through the state agency.

On February 13, 2006, Collins filed an application for resolution of injury claim with the Kentucky Department of Workers' Claims. But since Grimes Enterprises did not have a Kentucky workers' compensation policy and was only covered under West Virginia's monopolistic insurance system, the Department characterized Grimes Enterprises as "uninsured". The UEF was joined and

asserted claims against Grimes Enterprises, Tomlin Trucking, PeopLease and Maverick Tube.

Eventually, the ALJ determined that, while Grimes Enterprises was covered under West Virginia's monopolistic system, the State of West Virginia could not be compelled to pay benefits under Kentucky law. Nevertheless, the ALJ concluded that Grimes Enterprises must be deemed insured for purposes of Kentucky law. Based on this unusual circumstance, the ALJ found that the UEF would be responsible for payment of Collins' Kentucky claim. However, since Grimes Enterprises was "insured," the ALJ further concluded that the UEF could not assert claims for recovery against Grimes Enterprises, nor could it assert up-the-ladder claims against Tomlin Trucking, PeopLease, and Maverick Tube. Subsequently, the ALJ awarded benefits to Collins, subject to a set-off for the amounts which he had already received in West Virginia.

The UEF appealed from this determination, and Tomlin Trucking asserted a protective cross-appeal. On appeal, the Board affirmed in part, reversed in part, and remanded. The Board concluded that Grimes Enterprises was uninsured, and thus the ALJ erred by determining that the provisions of KRS 342.670(3) were applicable. The Board further concluded that Tomlin Trucking and PeopLease were subject to up-the-ladder liability pursuant to the provisions of KRS 342.610(2), and that PeopLease's workers' compensation policy encompassed Collins. Finally, the Board determined that the ALJ's award was

defective because it failed to include any explanation for the award calculations and to identify which defendant was liable.

PeopLease filed a petition for review from this order to this Court. This Court concluded that, since Grimes Enterprises properly secured payment for workers' compensation benefits under West Virginia's monopolistic system, it must be deemed to be insured for purposes of Kentucky law. *PeopLease*, 2013 WL 1363508 at 6. Thus, there can be no up-the-ladder liability under KRS 342.610(2). This Court further held that the matter involved a contractual issue as to liability between the insurer and the employer, and jurisdiction of that matter lies only in circuit court. *Id.*, citing *Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287 (Ky. 2001). Based upon this conclusion, this Court dismissed the appeal, holding that "the Board erred *ab initio* by assuming jurisdiction over the matter." *Id.*

After this Court's decision became final, the Board took the matter up again. Although the Board disagreed with this Court's conclusions on the jurisdictional question, the Board recognized that it was bound by this Court's holding. However, the Board also noted that the Court of Appeals' order did not vacate or reverse the Board's decision; it only dismissed the petition for review. Nevertheless, the Board concluded that it was bound by the Court of Appeals' holding that it lacked jurisdiction over the original appeal from the ALJ to the Board. Consequently, the Board vacated its prior opinion and dismissed the appeal and cross-appeal.

In this second petition for review, the UEF argues that the Board was precluded from reopening this matter under the doctrine of law of the case. “A final decision of this Court, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. . . . It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.” *Ellison v. Commonwealth*, 994 S.W.2d 939, 940 (Ky. 1999), quoting *Martin v. Frasure*, 352 S.W.2d 817, 818 (Ky. 1962).

In its prior opinion, this Court only dismissed PeopLease’s petition for review from the Board to this Court. While this Court also stated that the Board lacked jurisdiction over the matter, the Court did not direct the Board to vacate its decision. Since this Court’s decision was not modified or appealed further, the literal effect of this Court’s order was to leave the Board’s opinion and order in place. As a result, the UEF argues that the Board had no authority to modify or vacate its own prior order.

In the alternative, the UEF requests that this Court correct the situation created by the prior panel’s order by providing proper direction to the Board. In *Gossett v. Commonwealth*, 441 S.W.2d 117 (Ky. 1969), Kentucky’s then-highest court established a narrow exception to the law-of-the-case doctrine.

Where the law of the case rule is applicable, it has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous. *White v. Commonwealth*, Ky., 360 S.W.2d 198.

The purpose of the rule is to prevent vexatiously long litigation and indefinite postponement of final judgment.

The application of the rule must be viewed in the light of its purpose, and it has been held that where extension of its effect will result in the very evil which its existence is intended to prevent without correcting any error that has prejudiced a litigant's substantial rights, the extension will not be applied. *Saylor v. Commonwealth*, 243 Ky. 79, 47 S.W.2d 736.

Gossett, 441 S.W.2d at 118-19.

The circumstances of this petition for review are precisely those warranting application of this exception, particularly since the issue of subject-matter jurisdiction can be raised at any time. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005). Respectfully, we conclude that the prior panel of this Court mischaracterized the controlling issue as involving the subject-matter jurisdiction of the Board to consider the *appeal* from the ALJ's opinion and award, rather than whether the Board had jurisdiction over the particular issue presented. *See Milby v. Wright*, 952 S.W.2d 202, 205 (Ky. 1997).

In this case, the threshold question of jurisdiction is whether Grimes Enterprises should be considered as "insured" or "uninsured" for purposes of KRS 342.670(3). We conclude that the Board had jurisdiction to review the threshold issue, but the outcome of that issue determined the Board's jurisdiction to proceed further. In the first appeal, the prior panel of this Court found as a matter of law that Grimes Enterprises must be deemed to be insured for purposes of KRS 342.670(3). Since the only remaining issue involved the contractual issue of

liability between the employer and the insurer, the Board would have been compelled to dismiss the appeal at that point, because jurisdiction for such claims lies only in the circuit court.

The proper remedy would have been for this Court to vacate the Board's contrary decision and remand with directions to dismiss the appeal. The Board correctly recognized that this is what the Court of Appeals intended by its prior order, and took those steps. In the interest of judicial economy, we will simply affirm the Board's most recent order and consider this matter to be finally resolved.

Accordingly, the June 12, 2013 opinion and order by the Workers' Compensation Board is affirmed.

ALL CONCUR.

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