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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000291-WC

JAMES BRADLEY JOHNSON, JR. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-78063

JAMES JOHNSON,
D/B/A JOHNSON MASONRY;
KENTUCKY EMPLOYERS' MUTUAL INSURANCE;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, James Bradley Johnson, Jr., appeals the June 18, 2013, opinion and order of Administrative Law Judge (ALJ) Grant S.

Roark, the order upon petition for reconsideration signed by same on July 31, 2013, and the final decision of the Kentucky Workers' Compensation Board dated January 17, 2014, affirming the ALJ. On appeal, Johnson argues that the Board was incorrect to affirm the ALJ's finding that workers' compensation coverage was rejected because Johnson asserts that he did not knowingly and voluntarily sign the Form 4 at issue, and because the Form 4 did not comply with the necessary administrative regulations. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Johnson was the proprietor and sole owner of Johnson Masonry, a business which he operated performing his trade as a mason. As the owner of Johnson Masonry, Johnson procured workers' compensation coverage in 2007, but signed a Form 4 specifically excluding himself from coverage. Johnson's application, along with his deposition, indicates that he signed the Form 4 despite his testimony that he did not realize that he was not covered under the business's workers' compensation policy. Johnson acknowledged his understanding that the fewer employees he had covered, the lower his premiums would be. Johnson's policy was renewed with the same exclusions in 2008, 2009, 2010, and 2011.

Below, Jeremy Terry testified by deposition. He is the director of underwriting for Appellee, Kentucky Employers' Mutual Insurance (hereinafter "KEMI"). Terry testified that Johnson's premium was $991.52 based upon Johnson's own representation that he had no employees and that he was excluding himself from coverage. Terry testified that had Johnson not excluded himself the

premium would have been $4,805.00. Johnson's account was audited several times, and in each audit Johnson repeatedly represented that he was not covered.

Johnson sustained severe injuries in a work-related accident on August 10, 2011. He then sought benefits under the workers' compensation act, which KEMI declined to provide based upon its position that Johnson had rejected coverage in light of the foregoing facts. This matter was bifurcated and came before the ALJ for a determination of whether the Form 4 on file with the Department of Workers' Claims ("DWC") precluded his claim for benefits.

Upon review of the record, the arguments of the parties, and the applicable law, the ALJ determined that Johnson knowingly and voluntarily signed the Form 4 and that said rejection was valid and enforceable. In so finding, the ALJ rejected Johnson's argument that his rejection of coverage could not have been made voluntarily because it would be illogical for a sole owner-employer to purchase workers' compensation for his business and then exclude himself. In rejecting that argument, the ALJ noted that Johnson did hire part-time and temporary employees when his workload required it and that those individuals were covered by his policy. Accordingly, the ALJ found that it was logical for Johnson to maintain a policy and exclude himself from coverage, both to be in compliance with the law and to keep his coverage low. The ALJ, upon review of all of the evidence and testimony, found that Johnson knowingly and voluntarily rejected coverage for himself.

Accordingly, the ALJ entered the aforementioned June 18, 2013, opinion and order dismissing Johnson's claim for benefits for lack of jurisdiction. Johnson filed a petition for reconsideration which was denied by the ALJ on July 31, 2013. Johnson then appealed to the Board, which entered a January 17, 2014, order affirming the ALJ. It is from that order that Johnson now appeals to this Court.

On appeal, Johnson argues that the Board incorrectly affirmed the ALJ because his signature on the Form 4 was not knowing or voluntary. He asserts that it would be unreasonable to presume that an owner-employer who is the only full-time employee of his company would pay for coverage only for himself while simultaneously rejecting that coverage. While he acknowledges that he signed the Form 4 rejecting coverage, Johnson now asserts that he did not understand what signing the form meant and, therefore, his rejection was not knowing and voluntary. Johnson also argues that the Board erred in affirming the ALJ because the form that was filed with the Department of Workers' Claims does not comply with the administrative regulations governing the filing of same. He notes that pursuant to Kentucky Administrative Regulations 25:130, rejection of coverage is not effective unless the employer filed the Form 4 with the Department. He also notes that the regulation explicitly states that the Department shall reject a Form 4 which is a photocopy, facsimile, or not an original. He asserts that *sub judice*, the *Form 4* on file with the Department of Workers' Claims is

invalid because it was submitted by KEMI via facsimile. Accordingly, he requests this Court to reverse the decision of the Board.

In response to the arguments made by Johnson, KEMI argues that Johnson knowingly and voluntarily rejected the workers' compensation and that he was not entitled to benefits as a result. KEMI asserts that Johnson's own testimony, the Form 4 itself, the endorsements, the insurance application, and the audit filed in the record all constitute substantial evidence to support the finding of the ALJ that Johnson's rejection of coverage was knowing and voluntary. Concerning Johnson's assertion that the Form 4 on file with the DWC is invalid because it was not submitted by the employer but rather the insurance carrier and that it was invalid because it was submitted by facsimile, KEMI argues that these arguments were not made to the Board below and accordingly are waived.

Prior to addressing the arguments of the parties, we note that when reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). With this in mind, we now turn to the arguments of the parties.

In reviewing the arguments of the parties, we note that Kentucky Revised Statutes (KRS) 342.395 provides that:

> (1) Where an employer is subject to this chapter, then every employee of that employer, as a part of his or her contract of hiring or who may be employed at the time of

> the acceptance of the provisions of this chapter by the employer, shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby unless he or she shall have filed, prior to the injury or incurrence of occupational disease, written notice to the contrary with the employer; and the acceptance shall include all of the provisions of this chapter with respect to traumatic personal injury, silicosis, and any other occupational disease. However, before an employee's written notice of rejection shall be considered effective, the employer shall file the employee's notice of rejection with the Department of Workers' Claims. The commissioner of that department shall not give effect to any rejection of this chapter not voluntarily made by the employee. If an employee withdraws his or her rejection, the employer shall notify the commissioner.
> (2) An employer shall not require an employee to execute a rejection of this chapter as either a condition to obtain employment or a condition to maintain employment. An employer shall not terminate an employee for refusal to execute a rejection of this chapter.
> (3) Until notice to the contrary as specified in subsection (1) of this section is given to the employer, the measure of liability of the employer shall be determined according to the compensation provisions of this chapter. Any employee, may, without prejudice to any existing right or claim, withdraw his election to reject this chapter by filing with the employer a written notice of withdrawal, stating the date when the withdrawal is to become effective. Following the filing of that notice, the status of the party withdrawing shall become the same as if the former election to reject this chapter had not been made, except that withdrawal shall not be effective as to any injury sustained or disease incurred less than one (1) week after the notice is filed.

In Kentucky, there is a presumption of the validity of a signed Form 4 rejection notice on file with the DWC. *Blackstone Mining Company v. Travelers Insurance Company*, 351 S.W.3d 193 (Ky. 2010). Our courts have held that in order for a Form 4 Employee's Notice of Rejection of Workers' Compensation Act

to be enforceable, it must be knowing and voluntary. *Watts v. Newberg*, 920 S.W.2d 59 (Ky. 1996). We believe that such was the case *sub judice.*[1]

Ultimately, this Court is in agreement with the Board that substantial evidence supported the finding of the ALJ that Johnson's rejection of workers' compensation coverage was knowing and voluntary as required by KRS 342.395. Further, we note that the rulings of both the ALJ and the Board are in accordance with KRS 342.012(2), which provides that when an owner has elected to be included as an employee, that inclusion should be accomplished by the issuance of an appropriate endorsement to a workers' compensation insurance policy. Indeed, the statute mandates that a sole proprietor must elect to be covered as an employee, and that he or she must obtain an appropriate endorsement to the workers' compensation insurance policy. *Sub judice*, Johnson did not take the necessary affirmative steps to ensure that as a business owner, he was personally covered under a workers' compensation policy. Accordingly, we believe that the ALJ correctly dismissed his claim, and we affirm the decision of the Board.

Concerning Johnson's arguments that the Form 4 on file with the DWC is invalid because it was not submitted by the employer, but rather by the insurance carrier, and that it was invalid because it was submitted by facsimile, we

[1]Factors considered in the determination that Johnson's rejection was knowing and voluntary include the fact that he signed an application for insurance stating that he was not to be covered, that he participated in an insurance audit with KEMI in which he verified that he knew he was not covered, that Johnson signed a Form 4 rejecting the Act, and that KEMI sent Johnson five years' of workers' compensation insurance policies, all of which contained an endorsement specifically excluding him from coverage. Moreover, Johnson's own income was not included in the calculation of premiums charged to Johnson for workers' compensation coverage to his employees.

note that these arguments were not made before the Board, and have therefore been waived. As we have repeatedly held, an appellate court is without authority to review issues not raised or decided below. *Meyers v. Commonwealth*, 381 S.W.3d 280, 286 (Ky. 2012). Accordingly, we decline to further address these issues herein.

Wherefore, we hereby affirm the January 17, 2014, decision of the Kentucky Workers' Compensation Board, affirming the June 18, 2013, opinion and order of Administrative Law Judge Grant S. Roark dismissing this matter in its entirety.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn Martin Hammond
Pikeville, Kentucky

BRIEF FOR APPELLEES:

W. Barry Lewis
Hazard, Kentucky