IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

MODIFIED: April 23, 2004
RENDERED: April 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-13-04 ELIA Grow, D.C.

2003-SC-0217-WC

MCGARRH TRUCKING, INC., D/B/A HENDERSON EXPRESS — APPELLANT

V. — APPEAL FROM COURT OF APPEALS
2002-CA-1703-WC & 2002-CA-1747-WC
WORKERS' COMPENSATION BOARD NO. 01-0682

TIMOTHY DIETZ; WAUSAU INSURANCE COMPANIES; UNINSURED EMPLOYERS' FUND; HON. J. KEVIN KING, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND — 2003-SC-0253-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

V. — APPEAL FROM COURT OF APPEALS
2002-CA-1703-WC & 2002-CA-1747-WC
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TIMOTHY DIETZ; MCGARRH TRUCKING, INC. D/B/A HENDERSON EXPRESS; HON. J. KEVIN KING, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant was injured in Alabama on June 5, 1998. At that time, the employer had an office in Indiana, and Wausau Insurance Companies (Wausau) provided it with workers' compensation coverage under the Indiana assigned risk pool. The claimant

testified, however, that he was hired at the Henderson, Kentucky, office; that he was dispatched from that office; that he drove in numerous other states; and that he began and ended each trip in Henderson, Kentucky. Concluding that he was hired in Kentucky and that his employment was not principally localized in any state, the Administrative Law Judge (ALJ) determined that Kentucky had jurisdiction over the claim.

The employer was uninsured as a Kentucky employer and, together with the Uninsured Employers' Fund (UEF), maintained that certain provisions in an agreement to settle another claim clearly indicated that Wausau accepted coverage of this claim. Wausau disputed the defendants' interpretation of the agreement and asserted that its policy did not cover a Kentucky claim. Rejecting Wausau's argument, the ALJ determined that the terms of the settlement were unambiguous, that Wausau agreed to cover the present claim, and that the UEF should be dismissed. The Workers' Compensation Board (Board) determined, however, that the ALJ's interpretation of the agreement was clearly erroneous and that the Department of Workers' Claims (Department) lacked jurisdiction to decide the coverage issue on these facts. The Court of Appeals affirmed. Likewise, we affirm.

The claimant was an over-the-road trucker. While in Coosa Pines, Alabama, he sustained a work-related back injury that required medical treatment, including surgery. He testified that at the employer's direction, he led Wausau to believe that he was hired in Indiana and worked from the Indiana office. The subsequent opinion and order indicated that Wausau paid temporary total disability benefits and medical benefits under the Indiana Workers' Compensation Act from June 6, 1998, through March 15, 2001, and no party has disputed the finding. The claimant did not file a formal claim in Indiana, but in May, 2001, he did so in Kentucky. The record indicates that on June 6,

2001, Commissioner Jennings certified that the employer was uninsured and that, accordingly, on June 14, 2001, Chief ALJ Lowther ordered the UEF to be joined as a party. The record also contains documents which indicate that the employer advised the Department that it had coverage with Wausau and that, when contacted by the Department, Wausau responded that its policy was issued through the assigned risk pool, that it provided only Indiana coverage, and that the claimant was receiving Indiana benefits under the policy.

The claim was assigned to ALJ Nanney, after which the employer filed a "Motion to Determine Coverage and Dismiss UEF." Attached to the motion was an April 2, 1999, settlement agreement, approved by ALJ Nanney, concerning insurance coverage in the case of Derriel Sutton v. Henderson Express, UEF and Wausau, Claim No. 98-01549. The employer asserted that the agreement in the Sutton claim resolved the issue of coverage in the present claim as well, with Wausau agreeing to cover the claim. Yet, it failed to serve Wausau with the motion.

On July 27, 2001, ALJ Nanney determined that in the agreement to settle the Sutton claim, Wausau had accepted coverage of the present claim. Therefore, the UEF should be dismissed. The order was served on Wausau, after which counsel entered an appearance on Wausau's behalf, asserted that the Sutton agreement specifically excluded the claimant from coverage, and sought reconsideration of the order with respect to coverage. Although Wausau took avowal testimony and attempted to continue to raise the issue of coverage, ALJ Nanney reaffirmed the finding that the issue had been resolved, noting on October 11, 2001, that the agreement was unambiguous. Following ALJ Nanney's death, the claim was reassigned to ALJ King, who reiterated the finding with respect to coverage, stating as follows:

> The language in the agreement states that Wausau will not provide coverage or a defense for a class of people – those who file claims in the future and who did not reside in Illinois or Indiana at the time their claims arose. However, the agreement excepted the Plaintiff from that class of excluded employees. Leading clearly to the conclusion that the parties intended for the Plaintiff to be a covered employee. [sic]

ALJ King later determined that Kentucky had jurisdiction over the claim, that the claimant was totally disabled, and that Wausau was responsible for his award. Wausau appealed.

Reversing the finding with respect to coverage, the Board rejected an argument that Wausau was required to petition for reconsideration of the award in order to preserve the issue for appeal. The Board noted that although the claimant's injury occurred before Sutton's, he had not sought benefits in Kentucky when the Sutton claim was settled. Yet, the ALJ had effectively concluded that the settlement estopped Wausau from asserting that it did not cover this claim. The Board was convinced that the settlement would bar coverage of the present claim only if it clearly and unambiguously stated that it resolved any potential coverage issues between the employer and Wausau in the event that the claimant were to file a claim under the Kentucky Workers' Compensation Act. Having reviewed the agreement, the Board determined that not only did it fail to clearly express such an intent, paragraph 2 specifically stated that the agreement did not apply to the claimant. Furthermore, although subsequent sections of the agreement acknowledged Wausau's responsibility for workers who resided in Indiana and Illinois, they did not mention the claimant. The Board concluded, therefore, that the ALJ erred by relying on the settlement as the basis for determining that Wausau provided coverage for this claim.

Noting that the employer was uninsured as a Kentucky employer at the time of the claimant's injury and that Wausau's policy was issued under the assigned risk pool

in Indiana, the Board determined that the ALJ lacked jurisdiction to decide whether the Wausau policy provided coverage. Custard Insurance Adjusters, Inc. v. Aldridge, Ky., 57 S.W.3d 284 (2001); Wolfe v. Fidelity & Casualty Insurance Co. of New York, Ky.App., 979 S.W.2d 118 (1998). It concluded, therefore, that the ALJ must set aside the decision on coverage, order the employer to pay the award, and incorporate in the award those provisions of the Act that obligated the UEF to pay in the event that the employer defaulted. This left the employer and UEF free to pursue a civil action against Wausau if warranted. The Court of Appeals affirmed, and these appeals by the employer and UEF followed.

Wausau asserts that both appeals were filed prematurely, before entry of the Court of Appeals' order denying rehearing, and must be dismissed. It asserts that another ground for dismissing the employer's appeal is that its notice of appeal failed to list Wausau as an appellee in the body of the document. We disagree on both counts.

Although the appellants' notices of appeal were filed before entry of the order that denied the UEF's petition for rehearing in the Court of Appeals, a premature notice of appeal relates forward. Whittaker v. Wright, Ky., 969 S.W.2d 209 (1998). Thus, the notices of appeal were deemed to have been filed upon entry of the order. Id. With respect to the second assertion, we note that Wausau was named as an appellee in the caption of the employer's notice of appeal, that it was served with a copy, and that it filed a timely appellee's brief. It is apparent, therefore, that the document was sufficient to make Wausau fully aware that it was an appellee in the matter and that the objective of CR 73.03(1) was met. Contrary to Wausau's assertion, the pleading defect was not fatal. Blackburn v. Blackburn, Ky., 810 S.W.2d 55 (1991).

The appellants maintain that Wausau's failure to petition for reconsideration precluded it from appealing the finding that Wausau agreed to cover this claim. We disagree. KRS 342.281 permits a petition for reconsideration to be filed following an ALJ's decision but specifically limits the ALJ to correcting "errors patently appearing on the face of the award." Contrary to the employer's assertion, this was not an appeal in which Wausau alleged an error that was patent on the face of the opinion or alleged that the ALJ failed to make a required finding of fact. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 337-38 (1985). Contrary to the UEF's assertion, this was not a case such as Mitee Enterprises v. Yates, Ky., 865 S.W.2d 654 (1993), in which a party failed to request necessary findings of fact and failed to bring to the ALJ's attention the fact that the incorrect version of a statute was applied but raised those errors on appeal. The employer's appeal in the present case challenged the ALJ's conclusion of law with respect to the issue of coverage, a matter in which the decision on the merits could not be reversed on reconsideration. Beth-Elkhorn Corporation v. Nash, Ky., 470 S.W.2d 329 (1971). Therefore, a petition for reconsideration would have been futile and was not required.

Paragraph 1 of the disputed agreement acknowledged that Wausau had in effect a workers' compensation liability policy for the employer from December 7, 1997, through October 5, 1998. It also acknowledged the existence of a dispute over whether a defense and indemnification for Sutton's Kentucky claim came within the scope of the policy. Paragraph 2 indicated that the parties sought to settle defense and coverage issues relative to Sutton's claim as well as:

> any future claims that might be asserted against Employer . . . specifically excluding the claim asserted by Tim Dietz arising from an injury occurring on June 5, 1998, in Talladega, Alabama and any future claims that may be

asserted under the policy by any employee of Employer who was a resident of Indiana or Illinois at the time of the claimed injury or exposure.

Paragraph 3 indicates that Wausau tendered to the employer a check to reimburse unearned portions of the premium, the amount of which was calculated by subtracting premiums to cover employees who were residents of Indiana and Illinois. It also indicates that Wausau would have done so regardless of the dispute but that the employer refused to accept the check absent the settlement. Paragraph 4 indicates that in consideration of each other's agreement to forego claims for costs, sanctions, or damages, the remaining parties agreed to release Wausau from liability for Sutton's claim "and any future claim that might be asserted against Employer by any employee of Employer who was not a resident of Indiana or Illinois at the time of the claimed injury or exposure." (Emphasis added). In Paragraph 5, the parties acknowledge the existence of a legitimate dispute over the scope of coverage but indicate that they are entering into the agreement "to facilitate and expedite the delivery of benefits to [Sutton] by avoiding potentially lengthy and expensive litigation over the insurance coverage issue." In Paragraph 6, Sutton agreed to sign the settlement "at the request of the Employer, Wausau and the UEF for the sole purpose of waiving any objection to releasing Wausau from this case," with the employer agreeing "to be primarily responsible for providing any lawful benefits under the Act." Finally, in Paragraph 7, Sutton, the employer and UEF agreed to dismiss with prejudice all claims against Wausau for coverage in the Sutton claim.

The employer and the UEF seek reinstatement of the ALJ's finding that the Sutton settlement was unambiguous. They assert that Wausau agreed to cover the present claim and the claims of any Illinois or Indiana residents and to return a portion

of the premiums the employer had paid. In return, the employer agreed to be responsible for all benefits in the Sutton claim.

In contrast, Wausau asserts that the agreement did not contain a clear and unambiguous expression of an intent to resolve any potential coverage issue should the claimant seek Kentucky benefits. Furthermore, paragraph 2 clearly indicated that the agreement did not pertain to "the claim asserted by Tim Dietz" or to claims by Indiana or Illinois residents because Wausau had acknowledged that it was responsible for Indiana benefits and paid them voluntarily. Wausau maintains, therefore, that the Board's legal conclusion with respect to the effect of the agreement was correct.

It is apparent that the agreement contained no unambiguous statement that Wausau would provide coverage in the event that the claimant were to seek benefits in Kentucky. Likewise it contained no unambiguous statement that Wausau would not provide such coverage. Therefore, we find no error in the Board's conclusion that it was open to construction in light of the facts in existence at the time it was reached.

The claimant was a Kentucky resident when he was injured and remained one when the Sutton claim was settled. Although Wausau was paying him voluntary benefits under the Indiana Act, he had filed no formal claim at the time of the agreement. Paragraph 2 indicated that the agreement settled issues of coverage and defense with respect to the Sutton claim and all future claims that might be asserted against the employer "excluding the claim asserted by Tim Dietz . . . and any future claims . . . by any employee of the Employer who was a resident of Indiana or Illinois." Paragraph 4 indicated that the parties agreed to release Wausau from Sutton's claim and "any future claim . . . by any employee . . . who was not a resident of Indiana or Illinois at the time of the claimed injury or exposure." When Paragraphs 2 and 4 are

read together, it is apparent that the agreement absolved Wausau from liability for the Sutton claim and for any future claim by a McGarrh employee who was not a resident of Indiana or Illinois at the time of injury. It is also apparent that although the claimant was not a resident of Indiana or Illinois, the agreement left unresolved the questions of coverage and defense with respect to his claim. Therefore, the conclusions by ALJs Nanney and King to the contrary were clearly erroneous.

We turn next to the Board's conclusion that the ALJ lacked jurisdiction to determine whether the terms of Wausau's Indiana policy included coverage for a Kentucky claim. As we pointed out in Custard v. Aldridge, supra at 287, KRS 342.325 limits the Department's subject matter jurisdiction. It grants jurisdiction over "all questions arising under this chapter . . . except as otherwise provided in this chapter." Consistent with KRS 342.325, KRS 342.340, KRS 342.360, and KRS 342.365, the court determined in Lawrence Coal Co. v. Boggs, 309 Ky. 646, 650-52, 218 S.W.2d 670, 671-72 (1949), that an insurance carrier could be made a party to a workers' compensation claim; that the fact-finder had jurisdiction to decide questions affecting the insurer's obligation to pay benefits on behalf of its insured; and that, having been made a party, an insurer could question whether or not it had issued a valid, outstanding policy that covered the employer at the time of injury. Likewise, consistent with the Boggs decision, the court determined in Motorists Mutual Insurance Company v. Terry, Ky., 536 S.W.2d (1976), that absent a compelling reason, an insurer could not maintain a separate declaratory judgment action concerning coverage while the underlying workers' compensation claim was in litigation. Although the insurer had obtained an order restraining the Department from considering coverage, it had failed to show that the Department lacked jurisdiction to consider the matter.

The court determined subsequently that where the question at issue concerned the terms of the contractual relationship between a carrier and employer and did not affect the relationship or obligations between either of them and the injured worker, the matter did not arise under Chapter 342. Wolfe v. Fidelity & Casualty Insurance, supra. Likewise, where there was a dispute between two carriers about reimbursement for payments that had already been made under another state's Act and duplicated payments made under the Kentucky Act, resolving the question of reimbursement did not involve a provision of Chapter 342. Therefore, the Department lacked jurisdiction to decide it. Custard v. Aldridge, supra.

In the present case, Wausau issued a policy to the employer for its Indiana office through the Indiana assigned risk pool. It paid voluntary benefits to the claimant under Indiana law, and does not dispute that the policy covers an Indiana claim for the injury. At issue is whether the terms of the Indiana insurance contract also provide coverage for a Kentucky claim. Although a question of coverage is involved, it is a question that arises under the terms of the contract rather than under Chapter 342. For that reason, it does not fall within the subject matter jurisdiction of the Department. Inasmuch as subject matter jurisdiction cannot be conferred by agreement of the parties or by waiver, we find no error in the Board's decision to reach this issue in the interest of judicial economy. See Duncan v. O'Nan, Ky., 451 S.W.626, 631 (1970); Johnson v. Bishop, Ky.App., 587 S.W.2d 284, 285 (1979).

KRS 342.340 requires Kentucky employers to secure the payment of workers' compensation benefits either by purchasing insurance to cover Kentucky claims or by offering proof to the Department of its ability to pay any benefits for which it becomes liable. Although KRS 342.780 permits an injured worker to join the UEF before rendition

of a final award if it appears that the defendant-employer failed to comply with KRS 342.340, it does not alter the fact that the employer bears primary liability for paying benefits. Only if there is a default in the payment of ordered compensation due to the employer's failure to comply with KRS 342.340 does the UEF become responsible for payment under KRS 342.760(4). Davis v. Turner, Ky., 519 S.W.2d 820, 823 (1975). For that reason, although the UEF may be joined based solely on an employer's failure to comply with KRS 342.340, there is no assertable claim against the UEF and, therefore, no requirement to join the UEF unless the employer has defaulted. Yocom v. Campbell, Ky., 536 S.W.2d 470 (1976); Davis v. Comer, Ky., 532 S.W.2d 12, 14(1975).

Contrary to the UEF's assertion, this is not a case such as Uninsured Employers' Fund v. Fox, Ky.App., 862 S.W.2d 902 (1993), in which the worker knew that the employer was insolvent and uninsured before the initial award became final but failed to join the UEF. Here, the UEF was joined as a defendant from the outset on the ground that the employer was not insured as a Kentucky employer. It points to nothing in the record which indicates that the employer was insolvent when the claim was heard and, furthermore, does not allege that the employer was insolvent. In the absence of any evidence that an assertable claim against the UEF existed at that time, the UEF has failed to establish that it was a necessary party to the merits of the claimant's application for benefits. Davis v. Comer, supra, at 14. It was dismissed as a party when the ALJ determined that Wausau covered the claim, and it has argued throughout the entire litigation that Wausau provided coverage. Under the circumstances, it was not entitled to more.

The decision of the Court of Appeals is affirmed.

All concur.

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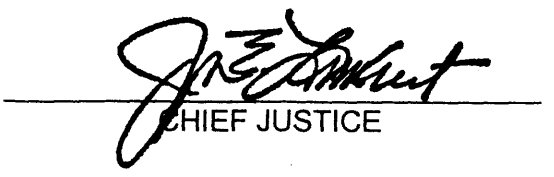
ORDER MODIFYING OPINION ON THE COURT'S OWN MOTION

On the Court's own motion, the Opinion of the Court rendered April 22, 2004, is modified by the substitution of a new first page, hereto attached, in lieu of page one of the Opinion as originally rendered. Said modification does not affect the holding of the Opinion, but is made only to correct a typographical error on page one ("2002-SC-0253-WC" to "2003-SC-0253-WC").

Entered: April 23, 2004.



CHIEF JUSTICE