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**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY**

2009-SC-000015-D

BLACKSTONE MINING COMPANY

APPELLANT

APPEAL FROM THE PIKE CIRCUIT COURT
DIVISION I

v.

HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION N^o 97 CI - 00684

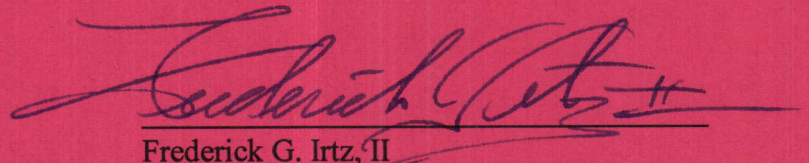
THE TRAVELERS INSURANCE COMPANY

APPELLEE

**BRIEF FOR APPELLANT
BLACKSTONE MINING COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief for Appellant was served by mailing, postage prepaid, to Hon. Eddy Coleman, Judge, Pike Circuit Court, 172 Division Street, Pikeville, Kentucky 41501 and to Hon. Ronald G. Sheffer and Hon. William K. Burnham, Sheffer Law Firm, PLLC, 101 South Fifth Street, Suite 1600, Louisville, Kentucky 40202 on August 17, 2009. The Record on Appeal has not been removed by Appellant from the Office of the Clerk.



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INTRODUCTION

The trial court determined that a number of Blackstone Mining's employees properly rejected workers' compensation insurance coverage and granted it a summary judgment for a premium refund from Travelers Insurance. The Court of Appeals, however, determined that Blackstone Mining had failed to meet its burden of proving that its employees voluntarily rejected workers' compensation coverage and remanded the case back to the trial court for further proceedings.

STATEMENT CONCERNING ORAL ARGUMENT

Because this case contains an issue of first impression and of importance to Kentucky employers, employees, and insurers, oral argument may be helpful to the Court, and Blackstone Mining therefore requests an oral argument.

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Blackstone Mining Company, Inc. ("Blackstone Mining"), Appellant, purchased two worker's compensation insurance policies from Travelers Insurance Company ("Travelers"), Appellee. The first policy period began on August 29, 1992 and ended on August 28, 1993, the second policy period began on August 29, 1993 and ended on August 28, 1994. After the conclusion of the second policy period, an agent of Travelers visited Blackstone Mining to conduct an audit of Blackstone Mining's books. The auditor claimed that fourteen of Blackstone Mining's employees had been omitted from the policies and that Blackstone Mining therefore owed Travelers an additional \$474,870.00 in workers compensation premiums. Blackstone Mining, however, believed it had overpaid the premiums to Travelers and that it was entitled to a refund of \$120,861.25. The correct figure depends entirely on the validity of the notices of rejection of workers' compensation coverage that Blackstone Mining's employees had executed and filed with the Department of Workers' Claims pursuant to KRS 342.395.¹

II. THE LITIGATION

Travelers filed suit against Blackstone Mining on May 2, 1997, seeking to recover the additional premiums that it claimed were due. Blackstone Mining, in turn, filed a counterclaim for overpayment of the premiums.

¹

Please see Appendix #5 for a letter from the Department of Workers Claims, dated May 29, 2002. [Record on Appeal 175-183].

During the discovery process, Travelers requested to take the deposition of Blackstone Mining's President, its office secretary, and one of its employees who had signed a rejection of workers' compensation insurance coverage. Travelers presumably deemed this employee to be representative of all of the employees that had rejected coverage because all the subject employees had received the same information and representations concerning the availability of alternate insurance coverage.² Travelers then proceeded to depose Raymond Strawser, President of Blackstone Mining; Vanessa Stamper, office secretary at Blackstone Mining; and, Dean Thacker, one of Blackstone Mining's employees. Mr. Strawser's deposition was taken two times. Travelers elected not to depose any additional employees of Blackstone Mining.

On October 30, 2002, more than five years after initiating the lawsuit, Travelers filed a motion for summary judgment with the trial court. [Record on Appeal (hereinafter "RA") 144-147]. On November 21, 2002, Blackstone Mining filed a separate motion for summary judgment with the trial court. [RA 175-183]. In the cross-motions for summary judgment, both Blackstone Mining and Travelers represented to the trial court that all material facts were before the court and that the case was appropriately postured for summary judgment because the only justiciable issue was solely a question of law. On August 3, 2004, the trial court entered its order denying Travelers' motion and granting Blackstone Mining's motion, while reserving damages as an undecided issue of fact. [RA 220, Appendix Tab #2].

²

The employees of Blackstone Mining who rejected workers' compensation coverage instead elected insurance coverage that was provided, and paid for, by Blackstone Mining under a policy issued by Mass Mutual Insurance Company.

After the Court's 2004 decision, Travelers then asserted that even if it was not entitled to the workers compensation premiums, it was entitled to a pneumoconiosis (Black Lung) premium because that coverage was not included in the workers compensation premium. Blackstone Mining and Travelers stipulated as to the amount to be recovered by the successful party [RA 263, Appendix Tab #6], and the Court ordered that each party submit briefs as to the issue of law and a proposed judgment.³ On May 24, 2007, the trial court entered judgment in favor of Blackstone Mining [RA 295 - 302, Appendix Tab #3]. The Judgment was amended to include prejudgment interest [335 - 336, Appendix Tab #4]. Travelers then appealed.

ARGUMENT Nº 1

I. Summary Judgment Was Properly Granted to Blackstone

A. Standard for Review

The well-settled standard of review on appeal when a trial judge grants a motion for summary judgment is whether the trial judge correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 9 (Ky. App. 2006) (citing *Steelvest*); *see also* CR 56.03. In examining a motion for summary judgment, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary

³ The court's written docket sheet [RA 263] and the Bench Clerk's video log are located at Appendix Tab #6. The Bench Clerk's video log contains the following notations, first, at 09:17:48, "Parties agree on figures;" second, at 09:21:09 "Blackstone would owe Federal Black Lung \$32,801.00 and 9,478.00;" and third, at 09:22:52 "Blackstone believes they are entitled to a refund of \$26,768.51 and \$94,091.74.

judgment” and “all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 780 (Ky. 1991). Summary judgment should therefore be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* Once the moving party meets its initial burden of demonstrating that no genuine issue of material fact exists, the burden then shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001)(citing *Steelvest*).

B. The Undisputed Facts Supported Blackstone Mining's Position

Both Travelers and Blackstone Mining advised the trial court that all facts necessary for a judgment were in the record and before the Court. The trial court specifically asked counsel for the parties if an oral argument was desired. Counsel for both Travelers and Blackstone Mining said no. As a result of discovery, Travelers was aware of the circumstances surrounding the information supplied to Blackstone Mining's employees by Mass Mutual Insurance.⁴ And, even though other employees were available for deposition, Travelers elected only to depose one employee of Blackstone Mining (Mr. Thacker), as Travelers apparently deemed this employee to be representative of all the employees who had rejected workers' compensation insurance coverage in favor of the policy issued by Mass

⁴

The depositions of Mr. Strawser and Mr. Thacker are not numbered within the record on appeal but is instead contained in the documents within the record labeled “Filed Sep.” by the circuit court clerk. Reference to these documents hereinafter have the designation “FS” in order to distinguish them from the documents which were numbered by the clerk and which bear the designation “RA” herein. Second Straswer Deposition at 40 - 42, 45 - 47, 50, 51, 53, 54, 57, and 58. Thacker Deposition at 16, 24 - 28.

Mutual. As noted by the Court of Appeals, both Mr. Thacker and Mr. Strawser testified unequivocally that Blackstone Mining's employees had voluntarily signed rejections of workers' compensation insurance and that such rejections were executed with full knowledge of the consequences and without coercion from Blackstone Mining. Also as noted by the Court of Appeals, "Thacker testified that he believed the Mass Mutual Policy provided him better coverage than workers' compensation coverage. He stated that he understood the policy provisions and was not coerced to reject worker's compensation coverage by Blackstone Mining."⁵

While Traveler's memorandum of law to the trial court does say that "the Court should make a finding that the rejection was not voluntary,"⁶ Travelers provided no affidavits or other evidence to the trial court which would even intimate that the rejections were not voluntarily and knowingly executed. All the evidence supports the uncontroverted fact that the rejections were voluntarily executed and each employee believed he would receive better insurance coverage by rejecting Travelers workers' compensation coverage.

As chronicled by the Court of Appeals in *Jong v. Leitchfield Deposit Bank*, 254 S.W.3d 817, 820, (Ky. App. 2007):

[T]he party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006), quoting *Steelvast, supra*, 807 S.W.2d at 481 (citations omitted). Similarly, this court has stated that a party opposing a motion for summary judgment must present "some affirmative evidence showing that there is a genuine issue of material fact for trial." *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004), quoting *Steelvast* at

⁵Court of Appeals Opinion at page 5.

⁶RA 125 - 143.

482. The trial court's focus should be on what is of record rather than what might be presented at trial. *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724 (Ky. 1999).

This Court also held, "The inquiry should be whether, from the evidence of record, facts exist which should make it possible for the non-moving party to prevail." *Welch*, at 730. Travelers failed to produce a scintilla of affirmative evidence to support its position that the rejections were involuntarily made (coerced) or that the rejecting employees did not know the consequences of their acts. Quite simply, the record in this case, including the deposition testimony taken by the parties and documentary evidence, completely fails to controvert either Blackstone Mining's position or the validity of the rejections executed by Blackstone Mining's employees. The trial court therefore appropriately granted summary judgment in favor of Blackstone Mining while reserving the issue of the amount of damages. *See* CR 56.03.

II. A Party Challenging the Validity of a Rejection of Worker's Compensation Insurance Coverage Has the Burden of Proving That Allegation.

A. How an Employee Rejects Workers' Compensation Coverage.

Under Kentucky's Workers' Compensation Act (the "Act"), every employee is presumed to have accepted the provisions of the Act and to be bound thereby. KRS 342.395. An employee, however, may opt out of the protections afforded by the Act if he or she files "written notice to the contrary with the employer" prior to the injury or incurrence of occupational disease. KRS 342.395(1). Before such notice of rejection is considered effective, the employer is required to file the employee's notice of rejection with the Office

of Workers' Claims. *Id.* The executive director of that office shall not give effect to any rejection of this chapter not voluntarily made by the employee. *Id.*

There is a presumption of accountability attaching to an employee's signature to a rejection of coverage. *Karst Robbins Mach. Shop, Inc. v. Caudill*, 779 S.W.2d 207, 208 (Ky. 1989). Nonetheless, both KRS 342.395 and opinions of this Court provide that "a worker must have a substantial understanding of the nature of the action and its consequences" in order for a rejection to be voluntary. *Watts v. Newberg*, 920 S.W.2d 59, 61 (Ky. 1996) (citations omitted). So, in order to protect the policies underlying the Act, the presumption of validity may be overcome "by convincing proof of illiteracy and a lack of knowledge regarding the document being signed." *Karst*, 779 S.W.2d at 208.

B. Blackstone Mining Met Its Burden, and Travelers Failed to Meet Its Burden

The record reflects that Travelers filed the initial complaint and that Blackstone Mining thereafter filed a counterclaim. Under the Kentucky Rules of Civil Procedure, Travelers would bear the ultimate burden of proof on its initial claim, and Blackstone Mining would bear the ultimate burden of proof on its counterclaim. CR 43.01 states:

- "(1) The party holding the affirmative of an issue must produce the evidence to prove it.
- (2) The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."

As correctly noted by the Court of Appeals, Blackstone Mining "carried the burden of producing evidence sufficient to sustain its counterclaim."

Five years after the filing of the Complaint, the summary judgment motions were filed. During this five year period, the following had occurred: (i) four depositions had been

taken [Mr. Strawser's deposition had been taken two times]; (ii) Travelers elected to take no further depositions; (iii) interrogatories had been served and answered; (iv) requests for production had been served and answered; and, (v) requests for admission had been served and answered. There was no unanswered discovery at the time the motion for summary judgment was filed. Travelers attached five exhibits to its motion but did not include any supporting affidavits. Blackstone Mining attached the affidavit of its president to its motion. Additionally, the supporting depositions of Mr. Thacker and Mr. Strawser were in the record.⁷

Dean Thacker stated in his deposition that, instead of just being covered by insurance while he was working for Blackstone Mining (which were the limits of the policy offered by Travelers), the Mass Mutual policy would cover him 24 hours a day, 7 days a week and every single day of the year, it would also provide a \$500,000.00 life insurance policy plus he would own the policy giving him a cash surrender value as a retirement. [FS, Thacker Deposition at 16, 24, 25]. Mr. Strawser stated in his second deposition that he was also issued a policy identical to Mr. Thacker's but that he no longer had his policy because he cashed it in. [FS, Strawser Second Deposition at 77] As noted by the Court of Appeals:

"Both Strawser and Thacker testified that the rejections for workers' compensation coverage were signed voluntarily and without coercion from Blackstone. Strawser testified that he believed the Mass Mutual Policy provided better protection to his employees for less premiums than workers' compensation coverage. He also stated that the employees were not threatened by Blackstone Mining and were free to keep workers' compensation coverage. Thacker testified that he believed the Mass Mutual Policy provided him better coverage than the Travelers workers' compensation

⁷ Mr. Strawser's first deposition was filed 6-12-1998, his second deposition was filed 5-28-1999. Vanessa Stamper's deposition was filed 5-28-1999. Mr. Stamper's deposition was filed 9-21-1999. All filings contain the note "Filed Sep."

policy. He stated that he understood the policy provisions and was not coerced to reject workers' compensation coverage by Blackstone Mining."⁸

Thus, not only did Blackstone Mining produce a signed rejection of coverage, but the trial court possessed ample basis to conclude that his rejection of workers' compensation was a well-informed, voluntary decision. Likewise, because all the employees received the same information concerning the alternative insurance coverage, the trial court possessed sufficient factual support to conclude that all rejecting employees made the same informed, voluntary decision. The trial court's decision is further supported by the fact that not all of Blackstone Mining's employees rejected workers' compensation coverage. Indeed, as set forth on correspondence from the Office of Workers' Claims, eight of Blackstone Mining's employees did not reject workers' compensation insurance coverage. [RA 175 - 183, Appendix Tab #5, page 2]. The premiums were continuously paid for the non-rejecting employees, and they did not receive any adverse job actions as a result of their decision.

When the above facts are placed in the context of this appeal, the following results become apparent: Blackstone Mining met its burden by producing properly executed rejections of workers' compensation coverage, and these rejections of coverage complied with the requirements of KRS 342.395. The burden then shifted to Travelers to produce evidence that the rejections were not voluntarily made. Indeed, had the matter proceeded to trial, Travelers would have to produce "convincing" evidence that rejections were involuntarily made. *Karst*, 779 S.W.2d at 208.

The Court of Appeals' conclusion that "it was incumbent upon Blackstone Mining to produce evidence proving that each of its twenty-three employees voluntarily rejected

⁸Court of Appeals Opinion at page 5.

workers' compensation coverage" is not supported by the language of KRS 342.395 or by this Court's decision in *Karst Robbins*. Nonetheless, Blackstone Mining went beyond the scope of its burden by providing evidence that its employees' rejections were voluntarily signed. In fact, the only evidence before the trial court unequivocally supports the conclusion that the rejections were voluntarily and knowingly executed. Thus, while Travelers had the burden of producing evidence to support its position that the rejections were involuntarily obtained, it was not able to do so. It was Blackstone Mining that produced evidence concerning the validity of the rejections. And, this uncontroverted evidence supports the validity of the rejections and the trial court's judgment in favor of Blackstone Mining.

CONCLUSION

Each of the parties submitted a motion for summary judgment to the trial court and contemporaneously with those motions agreed that the evidence in the record before the trial court was representative of all the evidence that could be presented. Thereafter, the trial court properly determined that: (1) no issue of fact exists; (2) Blackstone Mining's employees legally made a voluntary and knowing rejection of workers' compensation insurance coverage pursuant to KRS Chapter 342; (3) Blackstone Mining purchased insurance policies for each rejecting employee who rejected coverage under the Act; (4) Blackstone Mining continued the workers' compensation coverage for all non-rejecting employees; and, (5) the amount in controversy having been agreed to by the parties was liquidated. Blackstone Mining therefore met its burden of proof with regard to its claims,

and Travelers failed to produce any affirmative evidence to controvert Blackstone Mining's position.

For the reasons and pursuant to the law stated hereinbefore the opinion of the Court of Appeals should be reversed and the JUDGMENT and AMENDED JUDGMENT of the Pike Circuit Court, should be REINSTATED by this Court.

Respectfully submitted.

August 17, 2009.

A handwritten signature in black ink, appearing to read "Frederick G. Irtz, II", with a stylized flourish at the end.

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