COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
APPEAL NO. 2009 - SC – 000015-D

BLACKSTONE MINING COMPANY — APPELLANT

APPEAL FROM PIKE CIRCUIT COURT
CIVIL ACTION NO. 97-CI-00684

vs.

DISCRETIONARY REVIEW FROM KENTUCKY COURT OF APPEALS
CASE NO. 2007-CA-001610

TRAVELERS INSURANCE CO. — APPELLEE

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BRIEF FOR APPELLEE, TRAVELERS INSURANCE CO.

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Respectfully Submitted,

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of the foregoing have been served on the following named persons by mail, postage pre-paid, this the 14 day of October, 2009, to wit: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Judge Eddy Coleman, Pike Circuit Court, 172 Division Street, Pikeville, KY 41501; Frederick G. Irtz, II, P.O. Box 22777, Lexington, KY 40522. The undersigned counsel further certifies that the record on Appeal was not withdrawn by the Appellee.

William K Burnham

William K. Burnham

I. INTRODUCTION

This is a contract case in which the Appellant appeals from a Court's finding of fact and monetary judgment. The Court of Appeals correctly held that Appellant, Blackstone Mining Co., had failed to meet its burden of proof that rejections of workers' compensation were voluntary as to all rejecting employees.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral arguments would be helpful in this matter. The issues of this case are complex and can best be argued before the Court.

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Appellant, Blackstone Mining Company, Inc., (hereinafter "Blackstone") was a private company that provided supervisory employees to coal mines. In 1992, Appellant applied for and was issued a workers compensation policy by Appellee, Travelers Insurance Co. which became effective on August 29, 1992. The policy was renewed and reissued effective August 29, 1993. At various times throughout the policy period, twenty-two (22) of the thirty (30) employees covered filed rejection notices pursuant to KRS 342, the Worker's Compensation Act of Kentucky. Additionally, at various times throughout the policy period, twenty-one (21) of thirty (30) employees were elevated to the status of officer. Eleven (11) employees were named Vice President of Production, eight (8) employees became Vice Presidents of Production, one (1) employee was named Vice President of Personnel Production and one (1) employee was named a Vice President of Purchasing/Inventory.

An audit was conducted by a representative of Appellee, Travelers Insurance Co. (hereinafter "Travelers") which found that the Blackstone failed to pay the requisite premiums in the amount of $474,870.00, for the policy periods of August 29, 1992 through and including August 29, 1994.

B. NATURE OF THE PROCEEDINGS

Appellee filed suit to recover the unpaid premiums in the amount of $474,870.00. An answer was filed by the Appellant on August 22, 1997. On January 24, 1999, Appellant filed an Amended Answer and Counterclaim, for the first time asserting that Blackstone had overpaid premiums in the amount of $45,125.00. On September 17, 2002, Blackstone filed an Amended Counterclaim asserting overpayment of premiums in the amount of $120,681.25, for the 1992-1994 policy periods. On or about October, 2002, Appellant and Appellee both filed Motions for Summary Judgment which were heard on November 15, 2002. On August 2, 2004, the Pike Circuit Court entered an Order denying Appellee's Motion for Summary Judgment and Granting Appellant's Motion for Summary Judgment. This Order was not final and Appealable.

A trial was set for January 20, 2005. Based on the Court's earlier non-appealable Order, the parties agreed to submit proposed findings of fact and conclusions of law for the Court's consideration. As of March 7, 2005, both parties' filings were submitted to the Court. On May 24, 2007, the Pike Circuit Court entered Findings of Fact and Conclusions of Law in favor of Appellant. This Order was made final and Appealable. On May 31, 2007, Appellant filed a Motion to Amend Judgment to award pre-judgment interest and attorney's fees. On July 9, 2007, the Pike Circuit Court entered an Amended Judgment awarding Appellant pre-judgment interest of 8% on the total of $117,861.25. Appellee appealed the Orders of August 2, 2004, May 24, 2007 and July 9, 2007.

On October 7, 2008, oral arguments were heard before the Kentucky Court of Appeals. Ten (10) days later, on October 17, 2008, the Court of Appeals issued its opinion vacating the Judgment of the Pike Circuit Court and remanding the case back to the Trial Court for additional proceedings to determine whether each individual worker voluntarily rejected workers compensation coverage. On November 5, 2008, Appellant filed a Petition for Re-Hearing which was denied on December 12, 2008. A Motion for Discretionary Review followed and was granted by this Court.

V. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY HELD THAT BLACKSTONE MINING CARRIED THE BURDEN OF PROOF ON ITS COUNTERCLAIM

I. *Standard of Review*

Under CR 56, Summary Judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). To be entitled to summary judgment as a matter of law upon a claim or counterclaim, movant must produce sufficient evidence to sustain his burden of proof upon said claim or counterclaim. CR 56.01. The Court of Appeals further held that to prevail upon its counterclaim, Blackstone Mining carried the burden of proving that all twenty-three (23) of its employees voluntarily rejected workers' compensation coverage. Blackstone clearly did not meet this burden.

II. *Blackstone Mining failed to meet its Burden of Proof*

Pursuant to CR 43.01, Blackstone must prove that the rejections were voluntary to prevail on their counterclaim. Civil Rule 43.01(1) states "the party holding the affirmative of an issue must produce the evidence to prove it." In order for a rejection to be valid there must be evidence, entered by Appellant, demonstrating that each of the twenty-three (23) rejecting employees possessed a substantial understanding of the nature of the action (rejection of coverage) and its consequences. Karst Robbins Machine Shop, Inc. v. Caudill, 779 S.W.2d 207 (Ky. 1989). Blackstone did not meet this burden. Blackstone submitted evidence of the reasoning for Howard Thacker's rejection. It further submitted evidence in support of Raymond Strawser's rejection. It did not enter any evidence in support of the remaining employees' rejections and whether those employees possessed a substantial understanding of the nature of their actions and the consequences. The Court of Appeals correctly recognized that this evidence was sufficient only to establish the knowledge and understanding of Thacker and Strawser, but not the Blackstone Mining employees en masse.

Appellant has argued that Appellee, Travelers, waived its right to challenge the sufficiency of the evidence for summary judgment by filing a Motion for Summary Judgment. Appellee can find no law to support this contention, and Appellant cites to none. The simple fact of the matter is, the only evidence of record concerned the actions of only two (2) employees of Blackstone Mining. The Court of Appeals correctly held that the actions of the two (2) employees could not be imputed to the remaining employees and further evidence was

necessary. As the Court of Appeals ruled, there was absolutely no evidence on record concerning the actions of the remaining twenty-one (21) employees and therefore the Trial Court was in error when in granted summary judgment as it applied to the remaining employees.

III. *In the Alternative, Blackstone Employees rejection of Workers Compensation Coverage was invalid*

In Kentucky, Workers Compensation is afforded almost sacrosanct protection. It is fundamental that an employee should get the relief to which the law entitles him. Turner v. Elkhorn Min. Co. v. O'Bryan, 414 S.W.2d 410 (Ky. 1967). It is powerful legislation abolishing virtually all common law regarding tortuous liability in the employment relationship – including most special defenses. Morrison v. Carbide & Carbob Chemicals Corp., 129 S.W.2d 547 (Ky. 1939). The laws are designed fundamentally for the benefit of the workers, Messers v. Drees, 382 S.W.2d 209 (Ky. 1964), and must be liberally construed. Staton v. Reynolds Metals Co., 58 F.Supp. 657 (D.C.Ky. 1945).

When Blackstone Mining applied for insurance, only one officer was designated. On December 1992, a special meeting of the Blackstone Board of Directors, fourteen (14) additional "officers" were named. These designations are especially suspect given that Blackstone Mining was in the business of brokering its employees to other mining companies and these officers had no corporate responsibilities. Additionally, Harold Thacker, one of the "officers" was

not even aware that he was in officer. Deposition of Harold Thacker, September 15, 1999, p. 20.

Additionally the "opt-out" notices signed by the "officers" are invalid. Appellee acknowledges that the statutes do allow any employee to opt-out of workers compensation coverage. However, since those statutes give employers and employees rights not afforded by the common law, certain requirements must be observed and courts must enforce these statutory obligations and interpose lesser requirements. Reliford v. Eastern Coal Corp., 149 F.Supp. 778 (D.C. Ky. 1957). The opt-out statute reflects this jealously guarded birthright of every Kentucky worker, KRS 342.395 deems that, unless expressly opted out of, every employee is considered covered by workers compensation.

In order for an election to be voluntary, a worker "must have a substantial understanding of the nature of the action and its consequences." Watts v. Newberg, 920 S.W.2d 59 (Ky. 1996). In construing whether a worker's rejection was voluntary, it has been noted by the Attorney General's Office, in opinion OAG 77-257, "that it would be highly unusual for every employee to reject the act." See Exhibit 1. Though not binding, the Attorney General's Opinion is substantially relevant in light of a practice that has developed whereby "certain small mine operators have submitted to the Workmen's Compensation Board so-called 'Form 4 Rejection Notices' for all their employees and have simultaneously asked that the Department of Labor certify to the Department of Mines and

Minerals that the said minor is in compliance with the Workmen's Compensation Act so as to permit the issuance of the applied for permit." Id.

This is exactly what has happened here. In an effort to avoid payment of worker's compensation premiums, employees of Blackstone were elevated to officers and then "voluntarily" rejected their statutory right to workers compensation insurance. Appellant allegedly provided a substitute "General Disability Policy" underwritten by Massachusetts Mutual Insurance Company. According to Harold Thacker in his deposition taken on September 15, 1999, it was his understanding that the Massachusetts Mutual policy was offered because the workers compensation premiums were too high. Deposition of Harold Thacker, September 15, 1999, p. 17. As noted by the Attorney General this is highly unusual and based on the circumstances in the instant case should invalidate the rejections. While admittedly not every worker rejected compensation coverage, 23 out of 30 employees did so. It is extremely suspect when nearly 77% of employees waive their rights.

B. IN THE EVENT THIS COURT REVERSES THE HOLDING OF THE COURT OF APPEALS, THE TRIAL COURT ERRED IN ACCEPTING APPELLEES FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DENYING JUDGMENT TO APPELLANT FOR UNPAID INSURANCE PREMIUMS AND GRANTING JUDGMENT TO APPELLEE FOR OVERPAYMENT OF PREMIUMS

I. The Trial Court incorrectly ruled that Plaintiff did not owe Black Lung Premiums

At the Hearing before the Trial Court on January 20, 2005, both parties stipulated that if the Court's Order of August, 2004 was accepted the only remaining issue

was whether Appellee was still responsible for Black Lung premiums. KRS 342.395 applies only to Kentucky workers compensation premiums, and not to Federal Black Lung Premiums. Under general principles of statutory construction, a court must not be guided by a single sentence of a statute, but must look to the provisions of the whole statute and its object and policy. County of Harlan v. Appalachian Regional Healthcare, Inc., 85 S.W.3d 607 (Ky. 2002). Therefore, a rejection of workers compensation coverage does not constitute a rejection of Federal Black Lung Coverage.

Although Appellant contended that the employees/officers of Blackstone were provided with a "General Disability Policy" issued by Massachusetts Mutual Insurance, this policy does not provide coverage for Federal Black Lung. Exhibit 3. Where the terms of an insurance policy are clear and unambiguous, the policy will be enforced as issued. Kemper National Insurance Companies v. Heaven Hill Distilleries, 82 S.W.3d 869 (Ky. 1992). Therefore, absent a provision providing Black Lung coverage, the Massachusetts Mutual policy cannot be construed to satisfy the Federal Statute.

Pursuant to the Code of Federal Regulations, each coal mine operator must obtain insurance coverage to pay benefits required by the act. The insurance must be provided by a company, association, person or fund, which is authorized under the law of any state to insure workmen's compensation. 20 CFR 726.202, Exhibit 2. There is no evidence on the record that Massachusetts Mutual is authorized under the laws of Kentucky to provide workers

compensation insurance. Additionally, Section 423 of the Federal Coal Mine Safety and Health Act of 1977 requires all owners and operators of Coal Mines to provide insurance to compensate employees for disability resulting from pneumoconiosis (Black Lung Disease) either through self-insurance or a commercial carrier. Appellant provided this coverage and is therefore entitled to collect the premiums.

The Federal Coal Mine Health and Safety Act of 1977 does not provide a method of opting out of coverage. In construing a statute, all parts and enactments should be considered together and undue importance should not be given to any single or isolated portion. Armstrong's Inc. v. Iowa Dept. of Revenue, 320 N.W.2d 623 (Iowa, 1982), Therefore there can be no rejection of the Black Lung coverage and the provider of that insurance in the instant case, Appellee, Travelers Insurance Co. is entitled to collect the premiums.

II. The Trial Court should not have assessed pre-judgment interest.

There is no Kentucky Statute that entitles Appellant to pre-judgment interest. Instead, at the Trial Court level, Appellant relied on Nucor Corporation v. General Electric, 812 S.W.2d 136 (Ky. 1991). Since Nucor, there have been a number of cases that have further refined when pre-judgment interest is an appropriate remedy. In Wittmer v. Jones, 864 S.W.2d 885 (Ky. 1993), the court was asked to consider whether pre-judgment interest was appropriate on a liquidated claim. The Court ruled that pre-judgment interest is only appropriate when there is an undisputed claim in a liquidated amount. Id. at 891. The Court

further ruled, "Interest should not be required except for a claim which is for a liquidated amount, **and** which is not disputed in good faith (emphasis added.)" Id. There is no question in the instant case that Appellee has, in good faith, disputed Appellant's claim. In fact, it was Appellee who originally brought suit.

The Appellate Court again considered the award of pre-judgment interest in Owensboro Mercy Health System v. Payne. 24 S.W.3d 675 (Ky.App. 2000). Again the Court ruled that pre-judgment interest is not appropriate when the damages are disputed in good faith. This view was also upheld in an unpublished opinion, Denzik v. Denzik, WL 3107110 (Ky. App. 2006)(*cited pursuant to KRCP 76.28(c).)* According to the Denzik court "interest should not be required except for a claim which is for a liquidated amount, and which is not disputed in good faith." Id. at 3. Appellee Travelers has in good faith disputed any amount is owed to Appellant Blackstone and therefore the award of prejudgment interest was not appropriate.

VI. CONCLUSION

In August, 2004, the Trial Court erroneously granted summary judgment to the Appellant. On October 10, 2008, the Court of Appeals vacated the granting of summary judgment by the Pike Circuit Court and remanded the matter to the trial court for additional proceedings concerning the voluntariness of the rejections of the remaining Blackstone employees. This is the correct decision in light of the evidence in the record. Appellant entered no evidence into the

records concerning the knowledge and understanding of the remaining Blackstone employees who were never deposed and from whom no affidavits were entered in the record. Instead, Appellant sought to apply the knowledge and reasoning of Mr. Thacker and Mr. Strawser to the all of the other employees.

In the event this court is inclined to reverse the finding of the Court of Appeals, the actions of Blackstone Mining were a blatant attempt to circumvent the sacrosanct protection offered by KRS 342.395. The actions of making the majority of employees' officers, and having them sign Form 4 rejection notices was improper and was a clear attempt to avoid paying for workers compensation insurance.

Further, judgment should have been entered on behalf of Appellee for unpaid federal black lung insurance premiums. Federal Black Lung premiums are not covered by KRS 342.395 and therefore, if Appellant's employees' rejection of Kentucky Workers Compensation were valid, which this Appellee vehemently denies, then they do not constitute a waiver of Federal Black Lung benefits. Additionally the substitute policy provided by Appellant to its employees contains no provisions for Black Lung coverage, thereby exposing Travelers to liability and entitling it to collect its premiums for Black Lung coverage.

Finally, Appellee, Travelers, has in good faith disputed that Appellant is entitled to any recovery in this matter. Accordingly, Appellant is not entitled to pre-judgment interest and the Trial Court erred by awarding same.

WHEREFORE, based on the foregoing, this Court is respectfully requested to affirm the decision of the Court of Appeals and return this matter to the Pike Circuit Court for entry of Judgment for Appellee.

Respectfully Submitted,

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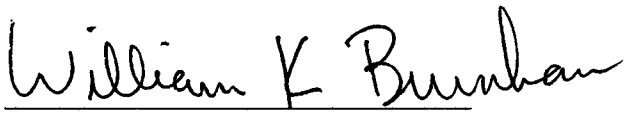

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