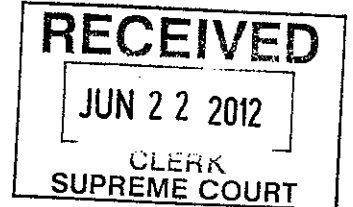


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-SC-000008
WCB NO. 2008-96697

UNINSURED EMPLOYERS FUND

PETITIONER

v. **UNINSURED EMPLOYERS' FUND**
REPLY BRIEF



JULIAN HOSKINS;
FOUR STAR TRANSPORTATION, INC.;
BETTER INTEGRATED SERVICES, INC.;
BEACON ENTERPRISES, INC.;
KENTUCKY EMPLOYERS' MUTUAL INSURANCE;
WORKERS COMPENSATION BOARD;
And HON. R. SCOTT BORDERS, ALJ

RESPONDENTS

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

Dennis M. Stutsman
Assistant Attorney General
Uninsured Employers' Fund
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204
502-696-5321

CERTIFICATE OF SERVICE

This is to certify that the foregoing has been mailed to the following on this the 22nd day of June, 2012: Workers Compensation Board, Department of Workers' Claims, 657 Chamberlin Ave., Frankfort, KY 40601; Honorable Barry Lewis, P. O. Box 800, Hazard, KY 41702, Four Star Transportation, 2305 Ralph St., Ste. 1, Louisville, KY 40216; Honorable R. Scott Borders, Administrative Law Judge, 8120 Dream Street, Florence, KY 41042; Honorable Terrance J. James, P. O. Box 52, Hopkinsville, KY 42241-0052; and Honorable Alan Rubin, 231 South Fifth St., Ste. 200, Louisville, KY 40202.

Dennis M. Stutsman
Assistant Attorney General

STATEMENT OF PURPOSE

The UEF hereby files its brief replying to factual and legal issues addressed by Appellee KEMI in its brief.

ARGUMENT

KEMI essentially seeks to remedy an unlawful employee leasing arrangement by imposing remedies for such an arrangement which the Kentucky legislature and the Kentucky Department of Workers Claims have not seen fit to provide in either statute or promulgated regulation. In doing so, KEMI attempts to justify the Board decision excluding competent evidence upon which the ALJ relied in order to create a fictional absence of substantial evidence to make it appear that the Board was not merely usurping the fact finding authority of the ALJ.

From the outset of KEMI's relationship with Beacon, KEMI understood that Beacon was an out of state employee leasing company, providing employees to Kentucky trucking employer clients. KEMI wrote the initial policy of coverage without requiring proof of a previously filed EL-2, as evidenced by KEMI's return of such EL-2 after writing the policy with instructions that it be filed with the Department of Workers Claims and not KEMI. KEMI subsequently obtained information that Beacon had two new clients in Louisville, both trucking companies, and subsequently renewed the policy covering Beacon at a separate Louisville address from that of its original client, Rush Trucking--an address which is the actual address from which Four Star Trucking operated.

The Board, reweighing the evidence, concluded that KEMI must have believed that the second address was merely a second address of Rush Trucking. The record contains no shred of evidence, even from the testimony of Jeremy Terry, that KEMI ever operated under this hypothetical belief. Instead, KEMI's own assertion through Terry is that KEMI never insured "locations" but instead insured entities only. This assertion in and of itself is not factually probative of whether KEMI at the time it reissued the policy and before it received any claims from any Four Star workers knew that it was insuring Beacon leasing employees to only one or two separate trucking company clients. Further, the ALJ as fact finder was entitled to resolve the factual issue raised regarding whether to believe KEMI's after the fact assertion the addition of a separate business location at which Beacon was insured for leasing employees had no legal significance or whether the documentary policy provisions were in response to KEMI's audit finding that its insured had two additional trucking company clients operating in Louisville. Whether to believe Terry's testimony and what weight to place on the policy language and underwriter's file are solely within the discretion of the ALJ.

KEMI asserts in its brief at p. 14 that the testimony of the Manzos regarding the business relationships between Better, Beacon and Four Star "is neither credible nor probative nor supported by any documentary evidence." Credibility is the province of the ALJ, not the Board or reviewing courts. The testimony is certainly probative and supported by documentary evidence. Hoskins' pay stubs reflected they were issued by BIS consistent with Better Integrated Services, and consistent with the

testimony of the Manzos and the documentary evidence of leasing arrangements.

KEMI, the Board and the Court of Appeals rely heavily on the issue of the factual knowledge of the employee that the employee is hired first by the leasing company, borrowing from the common law doctrine of "loaned servanthood." That doctrine has been statutorily modified to specifically address two separate and distinct situations: temporary employment agencies and employee leasing companies. A temporary agency certainly serves the interest of the unemployed employee seeking work s/he cannot otherwise locate on his/her own. Thus, it makes sense that s/he would knowingly be hired by the temporary agency before being assigned/loaned to another employer.

However, the statute contemplates that employee leasing may also be a convenient method used by employers solely to suit the employer's need for personnel payroll, benefits, and workers compensation coverage. KRS 342.615(4) ("A lessee may fulfill that responsibility by contracting with an employee leasing company to purchase and maintain the required insurance policy.") Thus, it is not essential that in employee leasing situations, the employee must have knowledge of the details of the employment relationship between the various business entities employing him and their arrangements to provide benefits and workers compensation insurance coverage.

This case is not unlike cases in which an employer hires an illegal alien who subsequently becomes injured. The illegal nature of the employment under federal law does not render the injury outside the scope of coverage by Kentucky's

Workers Compensation Act¹, nor does it relieve the employer's insurance carrier of its obligation to pay the claim. Similarly, where the insured has underrepresented its payroll or the nature of the work of its employees, the carrier's remedy is to audit and recover from the employer the underassessed premium and/or benefits paid to an injured worker whose job risks were not disclosed by her employer.

Here, likewise, KEMI upon knowledge that its insured, Beacon, had two additional trucking clients in Louisville, might have elected not to renew coverage until satisfactory disclosure or compliance with Kentucky's regulatory requirements had been made by Beacon. It did not so choose. At the time of the injury in this case, Kentucky's regulatory scheme for employee leasing companies limited the remedy for inadequate compliance to a) permitting the carrier to refuse to renew coverage until adequate disclosure to assess the risk is made; and b) imposition of fines by the Commissioner. KEMI potentially had additional remedies of recouping additional unpaid premiums for underreported payroll and/or its benefits paid on this claim from its insured through independent action.

The UEF neither asserts that defendants complied with Kentucky's employee leasing regulations, nor that such activity should be without consequence, despite KEMI's assertion in its brief at p. 16. However, the consequence has been prescribed by DWC and does not include voiding coverage for an employee leasing company which KEMI repeated insured and which fails to comply with the regulations.

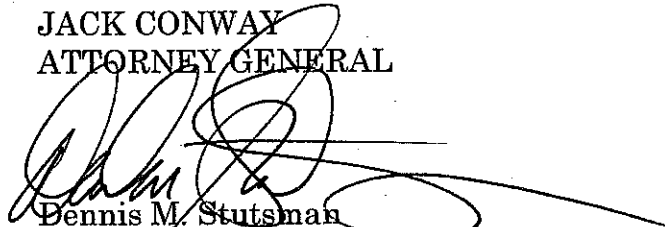
¹ Verdon v. Rivera, 348 S.W.3d 749 (Ky.2011). KRS 342.640(1) provides workers' compensation coverage without regard to the legality of the employment relationship.

Such a consequence would be akin to denying coverage to an injured roofer because her employer operated illegally in hiring an undocumented alien, or render "uninsured" an injured worker whose employer illegally conducted business within Kentucky by failing to obtain proper construction or mining permits.

Accordingly, the UEF seeks reversal of the opinion of the Court of Appeals and Board, and reinstatement of the decision of the Administrative Law Judge.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

A large, stylized handwritten signature in black ink, appearing to read "Dennis M. Stutsman", is written over the typed name and extends across the contact information.

Dennis M. Stutsman
Assistant Attorney General
Uninsured Employers' Fund
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204
(502) 696-5321
(502) 573-8346 Facsimile