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

UNINSURED EMPLOYERS' FUND — PETITIONER

v.

UNINSURED EMPLOYERS' FUND
PETITION FOR REHEARING AND/OR
TO MODIFY OPINION

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,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been mailed to the following on this the 6th day of May, 2013: 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. Janes, 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 petitions for rehearing in the above case pursuant to KRCP 76.32 for the reason that the Opinion does not address Kentucky's statutory modification of the common law doctrine of "loaned servant" in the context of employee leasing. Alternatively, the UEF petitions for modification of the opinion to depublish it, as publication does not serve to clarify the law regarding employee leasing consistently with the legislature's statutory regulation of the practice. Instead of serving the self-enforcement principle of Workers Compensation law, the opinion permits insured leasing companies to shift liability to Kentucky's governmental Uninsured Employers' Fund while profiting from collecting premiums without exposure.

ARGUMENT

This Court's opinion relies 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." However, nothing in the opinion addresses or interprets KRS 342.615, which the Kentucky legislature adopted in 1996 to specifically modify the common law doctrine of "loaned servant" with regard to employee leasing companies. Professor Larson, upon whom the Opinion heavily relies, specifically noted that this common law doctrine in the context of companies furnishing labor a) represents the closest of cases; and b) is often modified by statute:

> The closest cases are those in which the business of the general employer consists largely of the very process of furnishing equipment and employees to others [footnote omitted]...
> If, however, the general employer merely arranges for labor without heavy equipment, the majority of the cases hold that the worker becomes the employee of the special employer, although there is substantial contra authority [footnote omitted]...Incidentally, most of these cases arose in the contest of summary judgment motions against injured workers who were attempting to sue the borrowing employer in tort. [footnote omitted] Note, finally that some jurisdictions may address this whole question by statute. [footnote omitted] (emphasis added).

Larson's Workers' Compensation Law Section 67.05[3]. Nowhere in the Court's opinion is any discussion regarding KRS 342.615, the statute which addresses this issue.

The Court instead cites 342.640(1) in support of the requirement of employee knowledge of his employment relationship. That statute, however, imposes a "knowledge" requirement only upon the employer ("if employed with the knowledge, actual or constructive, of the employer"). Further, the statute contemplates that employment relationships may be ambiguous but nonetheless are "covered employment" for Workers Compensation purposes if they involve employment in the service of "an employer" even under an "implied" contract of hire.

Additionally, the Opinion cites Rice v. Conley, 414 S.W.2d 138, 141 (Ky. 1967) in support of the requirement that the employee know he is employed by the leasing company. First, it should be noted that Rice predates KRS 342.615 by nearly thirty (30) years. The Opinion contains no discussion of the degree to which the statutory language of KRS 342.615 is consistent with, and thus extends or incorporates Rice's

principle. Nor does the Opinion factually discuss how the holding in Rice[1] is affected when KRS 342.615 expressly permits such a shift in liability. KRS 342.615(4).

The purpose of the holding in Rice is ostensibly to protect the employee. That purpose is served under KRS 342.615(4) by providing that the hiring employer (lessee) is required to either maintain workers compensation insurance or ensure that the leasing company (lessor) maintain such insurance. In fact, nothing in the statute adopted 29 years after Rice requires specific knowledge by the employee of the nature of the contractual relationship between his hiring employer and the leasing company. A "leased employee" is one who is "performing services for a lessee [Four Star] under an employee leasing arrangement." KRS 342.615(1)(c). An "employee leasing arrangement" is an arrangement by contract "or otherwise" whereby a lessee [Four Star] obtains all or some of its workers from an employee leasing company [Beacon] and "any other arrangement which involves allocation of employment responsibilities among two (2) or more entities" [Beacon and Better] and is not a "temporary help service" separately defined. KRS 342.615(1)(d) (emphasis added).

Thus, the statute contemplates that an "employee leasing arrangement" may be a convenient method used by employers solely to suit the lessee'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

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[1] I.e., that the hiring employer in a co-employment relationship was the liable employer because the loaned servant doctrine exists "for the protection of the employee and not for the purpose of allowing a bona fide employer to shift his responsibility to a fellow employer under whom he might be operating" Rice at 141.

and maintain the required insurance policy.") Accordingly, it is not essential to protect the employee by requiring 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.

The opinion in this case does not "protect" Mr. Hoskins from having an employer "thrust" on him. Rather, it protects an insurance carrier which has the opportunity to assess it risks and collect premiums by allowing it to avoid payment where the employee does not have intimate knowledge of the business relationship authorized by the Kentucky legislature specifically for the purpose of "the allocation of employment responsibilities among two (2) or more entities." Very few employees in such situations have such knowledge. The legislature did not contemplate that such knowledge by the employee was a necessary precondition to allocating coverage responsibilities between business entities supplying labor, despite Rice having been decided 29 years prior.

The Opinion of this Court does not even discuss the tension between the common law doctrine applied in Rice and the statute, let alone provide guidance to employers who serve as lessees in such arrangements and now are subject to exposure as deemed "uninsured" employers if any injured employee does not have a complete understanding of the relationship between the lessee company and the lessor company. In fact, leasing companies under the Opinion of the Court have an incentive to obfuscate the nature of their relationship with the employee in order to reduce their risk of exposure and shift liability to the Commonwealth's Uninsured Employers' Fund

even in cases where Workers Compensation insurance exists to cover the very risk incurred at the location known to the carrier. By paying fewer claims, the premium will remain low.

Because of the erroneous reliance on the common law doctrine of "loaned servant" requirement of knowledge of the employment relationship on the part of the employee in employee leasing situations, the Opinion glosses over the issue of whether substantial evidence supported the ALJ's finding of a leasing agreement between Beacon and Better, and Better and Four Star based upon "oral testimony provided by the companies' owners and expert witnesses" (Opinion at p. 6) and Better's issuance of Hoskins' paychecks. Obviously, if not for the Court's conclusion that no employment relationship under the common law loaned servant doctrine could legally exist between Hoskins and Beacon, substantial evidence as recited by the Court does exist for an ALJ as trier of fact to conclude based on credibility that such an "employee leasing arrangement" (distinct from common law employment) as defined by KRS 342.615(1)(d) is established in this case.

The existence of a statutory "employee leasing arrangement" as distinguished from common law employment relationships, also changes the analysis of whether KEMI knew that it was insuring the risk that Hoskins, employed at 2305 Ralph Avenue Suite 1, Louisville, Kentucky and insured by virtue of an "employee leasing arrangement" between Four Star, Better and Beacon through KEMI, was in fact an injured employee covered by the policy which specifically acknowledged the type of risk (injury to leased trucking employees) likely to be incurred at that location. The

underwriting record clearly reflects KEMI's knowledge that Beacon had no offices in Kentucky and only had a presence through its lessee clients in Kentucky. Nonetheless, from the outset KEMI elected to describe the Schedule of Named Insureds and Workplaces not as Beacon Enterprises through Rush Trucking at 3001 Chamberlin, Louisville, KY but merely as Beacon Enterprises at that location.

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 testimony by 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 either 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 that the addition of a separate business location at which Beacon was insured for leasing employees had no legal significance, or whether the policy provisions were in truth 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.

Here, 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.

Nonetheless, the Opinion permits an insurance carrier to escape liability and imposes that liability on the Commonwealth fund for uninsured employers, designed to protect injured workers of truly uninsured employers.

Because an "employee leasing arrangement" defined by statute is different than common law employment under the "loaned servant" doctrine, and because sworn testimony determined credible by the ALJ and corroborated by paystubs are substantial evidence upon which the ALJ could find the existence of an "employee leasing arrangement", the UEF did not intend to "oversimplify" the Board's improper reliance on the failure to file EL-1 and EL-2 forms to absolve KEMI of liability.

Rather, as the Opinion itself notes the Board improperly engaged in weighing the evidence when it "did find the argument persuasive that KEMI did not know Beacon was allegedly leasing employees to Four Star because proper EL-1 and EL-2 forms were not filed..." Opinion at p. 7. Such a finding of fact is the function not

of the Board but of the ALJ. Whether the failure to file proper EL-1 and EL-2 forms is more persuasive than the documentary evidence including the KEMI underwriting file and the sworn testimony considered by the ALJ from "the companies' owners and expert witnesses" and KEMI's representatives, is quintessentially a factual inquiry into the appropriate weight to afford conflicting evidence, which is the province of the ALJ and not the Board or any reviewing Court.

Because the Opinion relies erroneously on the common law analysis of loaned servant employment relationships without discussion of its statutory modification in the employee leasing arrangement context, the Opinion must be modified to address the legal effect of failure to file proper EL-1 and EL-2 forms.

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 repeatedly insured and which fails to comply with the regulations. Such a consequence would be akin to denying coverage to an injured roofer because her employer operated illegally in hiring an undocumented alien, or rendering "uninsured" an injured worker whose employer illegally conducted business within Kentucky by failing to obtain proper construction or mining permits.

KEMI essentially seeks to remedy an unregistered 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. KEMI did not refuse to renew until proper EL-1 and EL-2 forms identified its specific risk. No testimony from KEMI's representative appears in the record to support the Board's factual finding that KEMI mistakenly understood the second address to be an alternate location for Rush Trucking operations.

CONCLUSION

Because the Opinion does not discuss how the statutory provisions for "employee leasing arrangements" relate to the pre-statutory caselaw regarding common law "loaned servant" employment, the Opinion does not clarify the law in

any meaningful way which would be served by designation for publication. Further, since the lack of such discussion gives no guidance to employers who are lessees of employees whom they directly hired and share employment responsibilities for employee benefits with an employee leasing company which carries workers compensation coverage, the Opinion gives the impression that despite compliance with Kentucky's statute, those employee lessees are nonetheless uninsured and exposed to liability.

Accordingly, the UEF seeks rehearing of the opinion of the Court issued on April 25, 2013. Alternatively, the UEF seeks modification of the opinion designating it not for publication.

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