OPINION ENTERED: September 20, 2012

CLAIM NO. 201101151

FRANK J. CROUCHER PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

CROUCHER EXCAVATING, INC.
KENTUCKY EMPLOYERS' MUTUAL INSURANCE
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Frank J. Croucher ("Croucher") appeals from the Opinion and Order dated March 30, 2012, by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") dismissing his claim for benefits after determining Croucher knowingly and voluntarily rejected workers' compensation coverage. Croucher failed to file a petition for reconsideration.

The Form 101 alleges on December 4, 2010, while working for his company Croucher Excavating, Inc. ("Croucher Excavating"), Croucher sustained a crush injury to his left hand. The injury is described as follows: "Plaintiff was in the process of repairing a 10,000 pound skid steer. It suddenly slipped off the jack and crushed his left hand." The Form 101 stated Croucher is the "president and sole officer and shareholder of Croucher Excavating, Inc."

The January 12, 2012, Benefit Review Conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730, including multipliers, average weekly wage, unpaid or contested medical expenses, credit for salary continuation, TTD." The remaining contested issues are as follows:

> 1) whether P's signing of Notice of Rejection was given knowingly and voluntarily 2) whether KEMI's endorsement excluding w/c coverage for a corporate officer is consistent with KRS 342.640 3) whether KEMI's Notice of Rejection was obtained in compliance with 803 KAR 25:130 4) [Is there coverage??] 5) Rejection

Under the heading of "Other Matters" is the following: "Parties acknowledge the P signed a Form 4 (Notice of Rejection) which was filed with the Dept. of w/c."

The primary issue on appeal is whether Croucher's Form 4 rejection was knowing and voluntary. Based upon Croucher's testimony at the final hearing and other evidence in the record, the ALJ determined Croucher's Form 4 rejection of workers' compensation coverage by Kentucky Employers' Mutual Insurance ("KEMI"), was knowingly and voluntarily executed. As the details regarding Croucher's injury and medical treatment are not relevant, we will not discuss the evidence relating to either.

Croucher was deposed on October 24, 2011. Croucher is the sole owner of Croucher Excavating. Croucher currently has one employee who has been with him for the past two to three years. Before that, Croucher hired employees as needed. Croucher testified as follows:

> Q: Is it a deal where as long as you could hold it yourself you did it; but if you got into a situation that you needed a [sic] extra hand, you would call someone to come in? Is that how it worked?
>
> A: Pretty much, yes, sir.

Regarding his alleged rejection of workers' compensation coverage, Croucher testified as follows:

> Q: Okay. When you filed for workers' comp coverage in 2005, do you remember executing a Form 4, which was a rejection of the workers' comp act?

A: Well, I- I remember signing some papers there with the company, yes, ma'am.

Q: Your attorney has provided you...

A: Yes, ma'am.

Q: ...with a copy, as well. Is that your signature on this document?

A: Yes, ma'am, it is.

Counsel for KEMI: Okay. And I will attach a copy of that as KEMI Exhibit One.

Q: Did you ever execute a Form 5 rescinding this rejection?

A: No, ma'am, not...

Q: Did you understand that when you excluded yourself from the workers' comp coverage that it also reduced the amount of premiums that you were going to pay?

A: They...

Counsel for Croucher: There was only one employee, him. It didn't reduce it.

Counsel for KEMI: He's testified he did have employees.
Counsel for Croucher: Not then.

A: Not at the time, no, ma'am.

Counsel for Croucher: Not then.
A: Not at the time.

Counsel for Croucher: Not in 2005.

A: Just here recently.

Q: Did you understand that by excluding yourself it was reducing your premium?

> Counsel for Croucher: I'd object to the question because it didn't reduce the premium.

A: The lady told me I had to sign this just to get the- the coverage. I just- I was the only body at the time. I didn't have no [sic] employees back in '05.

Q: Who was the lady that told you you had to sign that form?

A: This Dianna Highland.

...

Q: Was there any reason Ms. Highland gave you that you would have had to complete this form?

A: She said- yeah, she- she said I had to sign it, I mean, just due to the fact that she sold me coverage.

Q: So that what?

A: She said I had to sign it for the- the get coverage. She said me being the president of the corporation I wouldn't be covered or something, though.

Q: Did she discuss with you that by signing this as a corporate officer you were agreeing not to be covered?

A: I'm not going to say yes or no, ma'am. I mean, I wouldn't lie to you intentionally, because I don't know.

> She- I think- I mean, she may have covered it, yes, ma'am.
> Q: She- I'm sorry. You're not saying yes or not she did or did not tell you that? Is that what you're saying?
>
> A: It's been- been six years ago. I couldn't give you a [sic] honest answer I guess I should say.
>
> Q: During the time that you've had your business have you been operating under the impression that you were or were not covered?
>
> A: I thought I was covered.

Later, in his deposition, Croucher testified as follows:

> Q: First of all, when you went in to talk to Ms. Highland, did you realize you were being- that you- that your insurance was being placed through KEMI?
>
> A: Yes, I did.
>
> Q: Alright. Did she tell you about any endorsements that KEMI had on its policies concerning its officers of corporations?
>
> A: No, sir.
>
> Q: Alright. Did she- in particular, did she tell you that it contained an endorsement that excluded officers from corporations?
>
> A: Yeah, that was why she told me I had to sign, yeah.
>
> Q: Okay. Confirming that there was this endorsement. Is that correct?

A: Yes, sir.

Q: Okay. Now, you signed it, again, looks like on December 6th of 2005?

A: Yes, sir.

Q: Have you had to renew your policy each year?

A: I have, yes, sir.

Q: Alright. Has it remained with KEMI during that entire time?

A: Yes, sir.

Q: And, again, as Ms. Lewis asked you, you've had to submit- I assume when you- when you get renewed that you have to submit who's going to be insured under there. Is that correct?

A: Yes, sir.

Q: And have you included yourself when disclosing payroll and...

A: Yes, sir. Yeah.

Q: Okay. And have they asked you to sign rejection forms each year that you've renewed?

A: No, sir, they have not.

Q: Okay. On this particular form back in 2005 you list the number of employees as one.

A: Yes, sir, that was me.

Q: That was you. So, if she wasn't selling you coverage to cover yourself, then who was she selling coverage for?

A: I don't know.

Regarding the coverage issue, at the January 27, 2012, final hearing, Croucher testified as follows:

> Q: Now, this is what's known as a Form 4, for people in workers' compensation.
>
> A: Yes, sir.
>
> Q: And it's an Employee's Notice of Rejection of Workers' Compensation. Now, first of all, let me ask, is this your signature at the bottom?
>
> A: Yes, sir, it is.
>
> Q: And you acknowledge the receipt and filing of the rejection form; is that correct?
>
> A: Yes, sir.
>
> Q: Okay. Now, let's back up a little bit and get some context. The date of that is 12/6/2005; is that right?
>
> A: Yes, sir, it is.

Croucher testified to the events occurring within his business in 2005 which caused him to secure a workers' compensation policy. Croucher testified that in 2005, he "was experiencing a little growth and had to have workman's comp." Croucher testified that in 2005, "[w]e had the opportunity to do some subdivisions," and the job required a certificate of workers' compensation coverage. As to what was explained to him at the time he acquired workers' compensation coverage, Croucher testified as follows:

Q: When you applied on this occasion, what did she tell you about the policy?

A: She just gave me all this information and said I need to sign- I had to sign this to basically get coverage put into effect.

Q: All right. How many people worked for Croucher Excavating at the time?

A: You know, at the time, I don't even know if I had any or not. Maybe one or two. I can't say. It says one here, so I'm going to base it- I'm going to say at that time it was clear.

Q: I'm sorry?

A: Here on the paperwork it says one, so, you know, at the time, it's probably so. It'll fluctuate.

Q: All right. And what did she tell you about officers of corporations?

A: She said we wasn't [sic] covered.

Q: All right. And did you need this coverage to get the work?

A: Yes, sir, I had to have it.

Q: All right. And in order to get the work, did you have to have a workers' compensation policy?

A: Yes, sir, I did.

Q: And did Ms. Highland say that it was required of you to sign this sheet in order to get that coverage?

A: Yes, sir, she did.

Q: All right. So I guess the logical combination is that, if you didn't sign

> that, you wouldn't get coverage, and if you didn't get coverage, you wouldn't work.
>
> A: Wouldn't work. Yes, sir.

Regarding the significance of the rejection form he executed, Croucher testified as follows:

> Q: And are you aware that the way KEMI calculates your premium is based on your number of employees and your payroll?
>
> A: Yes, sir.
>
> Q: So you were aware that the more employees you have, the more payroll you have, the more premium you have to pay?
>
> A: Yes, sir.
>
> Q: Okay. And were you aware that if your personal earnings were included in that formula, you would have to pay more money for your premiums?
>
> A: Yes, sir.
>
> Q: And I'm going to show you a copy of that document that was previously marked as Exhibit 1, just to avoid the court reporter from have to-
>
> [text omitted]
>
> Q: That document, which was marked as Plaintiff's Exhibit 1, the very title, up at the top, says Employee's Notice of Rejection of Workers' Compensation Act. You were aware of signing that document?
>
> A: Yes, sir.

Q: And down in the middle it has letters- or language, in all caps, which states- the document speaks for itself, but it clearly states that you reject coverage of the Kentucky Workers' Compensation Act.

A: Yes, sir.

Q: And you signed that document.

A: I did.

Q: So did you know then, by rejecting the Act, and signing this document, you were able to obtain your policy of workers' compensation insurance for less money?

[text omitted]

A: No, I didn't. I mean, I didn't put the equation together as far as that determining factor, no, sir.

Q: But you did know that the less payroll you have, the less premium you have to pay for workers' compensation insurance.

A: When I got my policy at the time, no, I did not. I paid something up-front and then I got an audit the following year.

Q: When you signed that Form 4, which has been introduced into the record as Plaintiff's Exhibit 1, did you read that form?

A: I did, yes, sir.

Q: Did you understand it?

A: Yes, sir.

Q: So you don't dispute that you executed the proper form that the department requires to reject the Act?

A: No, I mean I signed what Dianna told me I needed to sign.

Q: And just so the record's absolutely clear, you can read.

A: Decent, yeah.

Q: Thank you. And you had the opportunity to read that document before you signed it?

A: Yes, sir.

Q: And so you understood what you were doing when you did sign it.

A: Yes, sir.

Q: And then your policy was placed, as your attorney asked you, after you applied back in 2005?

A: I'm sorry?

Q: Your policy was placed, for your corporation, back in 2005?

A: Yes, sir.

Q: And that's the way it went in 2006, 2007, 2008, 2009, all the way through your injury date, with KEMI?

A: Yes, sir.

Q: Did you ever read your policy, before your hand injury occurred?

A: No, I can't say I did.

Q: Is it fair to say you did not think you were covered under that policy?

A: I thought I was.

Q: Okay. But you did sign the Form 4, rejecting the Act.

A: Yes, sir, but I had been turning wages in on myself, you know, was paying premium on me, so I thought I was covered.

Q: It's your testimony that you did turn in your personal earnings to Kentucky Employers' Mutual Insurance through audits?

A: Once we started having to do federal wage reports, yes, sir, I did.

Q: That was after your hand injury occurred, wasn't it?

A: No, sir, it was not. I started the job in October in Corbin, and at that point, we started doing federal wage reports, and I started taking out unemployment on myself and everything.

Q: October of 2010?

A: Yes, sir.

Q: But before you started doing that, you had no reason to think you were covered under your own policy.

A: No, sir, because I hadn't turned no [sic] premium in on myself.

Q: Did you ever make KEMI aware that you wanted to be covered under your policy, before your hand injury occurred?

A: No, sir.

Q: You don't have any paperwork or documentary evidence that would prove

that you wrote them or contacted them and said I want to be covered? Nothing like that exists?

A: Just where I paid on my wages. And I'm still paying on my wages.

Q: But you didn't do that until after your hand injury occurred.

A: No, sir, you're wrong.

Q: Okay.

A: I done [sic] it when I started a job where it required federal wage reports.

[text omitted]

Q: So you generally averaged drawing $500 per week for your earnings?

A: Yeah. If the company didn't make more than that, then, no, I didn't get it. But typically I'd average it at that, yes, sir.

Q: And is it your testimony that you turned in all that payroll to Kentucky Employer's Mutual Insurance?

A: No, sir. Not prior to the federal reports, no, sir.

Q: Okay. So you started turning that in after the federal work started?

A: Yes, sir.

Q: But according to that fax script from your company, that wasn't until May 11 of 2011?

A: I don't know what the date is, but once again, I started putting myself on federal reports in October.

ALJ: When would you have turned the October report in to the federal government?

A: Your Honor, I turned it in at the end of the- well, we actually had to turn federal report in to the company we was [sic] working for, which was [sic] general contractor. I had to turn those in every week. So we started turning those in prior to the accident, if that's what you're asking.

ALJ: When was the first time that one of those reports was turned in to KEMI, if you know?

A: Well, KEMI don't get the federal wage reports. Those goes [sic] to HUD, which is who we was [sic] working for. This, I'm assuming, is what you're asking about, shows goes to KEMI, that was turned in- this is my unemployment worksheet, where I paid unemployment on myself, that turns in at the end of each quarter, which would have been the end of the fourth quarter 2010.

ALJ: So it wouldn't have been until January of 2011?

A: Yes, sir. Yes.

ALJ: And that would be the earliest that you placed KEMI on notice that you were receiving a salary?

A: Yes, sir.

ALJ: So January of '11.

A: Yes, sir.

ALJ: Okay.

Q: Which was, of course, after your hand injury occurred.

A: Yes, sir.

Croucher testified that he has had three years of college.

Attached to the transcript are various documents. Defendant's Exhibit 1 is Croucher's workers' compensation policy. Also attached are various endorsements for the policy period spanning December 7, 2009 through December 7, 2010. One of the endorsements clearly indicates Joey Croucher, president, is an individual excluded from coverage from December 7, 2009, through December 7, 2010.[1]

Plaintiff's Exhibit 1 is a Form 4, Employee's Notice of Rejection of Worker's Compensation dated December 6, 2005, signed by Frank Croucher and notarized on December 6, 2005.

Plaintiff's Exhibit 2 is the insurance quote which indicates throughout that Joey Croucher, president and officer, was not covered.

[1] The record indicates Frank Joey Croucher also went by Joey Croucher.

In the March 30, 2012, Opinion and Order, the ALJ set forth the following summary of the evidence:

> Plaintiff, Frank J. Croucher, testified by deposition on October 24, 2011 and at the hearing on January 27, 2012. Mr. Croucher is 42 years old. He completed high school and attended Eastern Kentucky University for three years. He majored in Biology. Mr. Croucher owns a general excavating company with backhoes and dozers and still actively works in the business. Prior to owning the excavating company he worked on a cabinet assembly line at Vender Manufacturing, hung and finished drywall as a subcontractor, delivered pizzas for Mario's Pizza, and worked as a bag boy at Food Town. Mr. Croucher indicated he started paying himself $10.00 to $12.00 per hour and working 20 to 30 hours a week in December 2010, just before this incident.
>
> Mr. Croucher testified he was working on a Caterpillar bobcat to replace a torsion bar on December 4, 2010. He indicated this was his piece of equipment. He stated that he had it jacked up with some six-by-six wood under it for safety. He jacked the machine up off the wood and reached to pull one (of the pieces of wood) out, when it slipped off of a jack and fell on his left non-dominant hand. He stated that his entire hand from his knuckles out was trapped between the chassis of the machine and the six-by-six. He stated that he had to put the jack back under it and jack it back up to get it off his hand. Mr. Croucher stated that his middle finger was mangled and was only held by a little bit of skin and his left ring finger was split from end to end. He stated that his fiancé took him to the

emergency room. He was sent to UK Hospital, where they stitched up his ring finger and tried to reattach his middle finger. He was sent home after a few hours. Mr. Croucher stated that he went to Dr. Wong, an orthopedic surgeon, who amputated his ring finger. Mr. Croucher indicated he was seen in Dr. Wong's office twice and went to physical therapy for three months. He stated that the physical therapy seemed to help. He is no longer seeing a physician and only takes a lot of Advil for the aches and pains. He stated his left hand is super sensitive.

Mr. Croucher indicated he was off work for a couple of months. He stated that he can't run a dozer anymore, but can "make-do" on the excavator/trackhoe. He indicated that he is still working and stated that he gets a lot of job offers or a lot of opportunities to bid, but he is not confident to bid the big work.

Mr. Croucher indicated his company, Croucher Excavating, Inc., is an S Corporation. He stated that he started the company in 1994 and thought he incorporated it in 2005. He stated that he owns 100% of the shares. Mr. Croucher indicated he signed a Form 4 rejecting workers' comp coverage in 2005. He stated that Dianna Highland, at Davis and Associates, told him he had to sign this just to get coverage. Mr. Croucher stated that Ms. Highland told him that by being the president of the corporation, he could not be covered. He acknowledges that he never executed a Form 5 rescinding the rejection. Mr. Croucher indicated he did not have any employees in 2005 and he was the only employee. Mr. Croucher stated that Davis and Associates was bought out or acquired and is now

called Commercial Insurance Group. Mr. Croucher says that he thought he was covered. He indicated Commercial Insurance Group is now his agent and stated that he had been with Commercial Insurance Group for three or four years. He indicated that he was not told he had to sign a rejection form. Mr. Croucher indicated he did not have any other type of insurance at the time.

Plaintiff stated that Raymond Pointer had been with him for three years. He thought his premiums were based on the employees who worked for him and the income they receive. He indicated that he included his name and the money he was paid.

At the hearing Mr. Croucher stated that he had an opportunity to do some subdivisions in 2005. He testified that he was dealing with Tom Foley, a developer in Richmond, and was required to have workers' comp for the job. He indicated a certificate of coverage was required so he went to Davis & Associates to get the insurance. He stated that he talked to Dianna Highland and always dealt with her. He stated that she gave him the statements he needed to get everything up and going. He stated that she told him he had to sign to get his coverage into effect. Mr. Croucher indicated the number of employees working for him fluctuated between one and two, but at that time he only had one. Mr. Croucher testified Ms. Highland told him officers of corporations were not covered and he would not be covered. He indicated that he needed the workers' compensation policy to get the work. Mr. Croucher verified that he is known as both Frank Croucher and Joey Croucher.

> Mr. Croucher testified he received an endorsement to the policy each year and it listed him as an excluded individual. He indicated that he provides KEMI with a copy of his quarterly reports and they [sic] base their audit and adjust his premiums upon the reports. Mr. Croucher stated he listed himself as an employee with his gross wages and had to pay premiums on himself after he was audited in the last quarter of 2010. Mr. Croucher indicated he was aware that the more employees he had, and if he included his personal earnings in that formula, he would have to pay more money for his premiums.
>
> Mr. Croucher stated that he signed what Dianna told him he needed to sign. He indicated that he read the Form 4, understood it, and signed it. However, he stated that he thought he was covered because he was turning in his wages and paying premium on himself when he started the job in Corbin in October 2010. He stated that he started doing federal wage reports, taking out unemployment on himself, and "everything." Mr. Croucher indicated he had no reason to think he was covered under his own policy before he started doing that because he had not turned in premium on himself. He acknowledged that he did not make KEMI aware that he wanted to be covered under his policy.

The ALJ set forth the following findings of fact and conclusions of law:

> The threshold issue in this claim is the determination of whether or not there is an effective rejection of coverage. In making a determination,

it was agreed at the Benefit Review Conference that the sub-issues included whether or not the plaintiff's signing of the notice of rejection was given knowingly and voluntarily; whether KEMI's endorsement, excluding workers' compensation coverage for the owner and corporate officer, Frank J. Croucher, is consistent with KRS 342.640; and whether KEMI's notice of rejection was obtained in compliance with 803 KAR 25:130.

For all of the reasons set forth hereinbelow, the ALJ finds that Mr. Croucher's rejection of coverage was effective and that on December 4, 2010, no workers' compensation coverage existed under which Mr. Croucher can claim any workers' compensation benefits for his work-related injury to his left hand. The brief filed on behalf of KEMI, provides a well-written roadmap which discusses each of the pertinent factors leading to the inescapable conclusion that Mr. Croucher executed an effective rejection of coverage. The Plaintiff has made two arguments which, if proven, might provide arguable positions, but the ALJ is not convinced that either argument is sufficient to overcome the rejection of coverage. Plaintiff's arguments will be considered a little later herein.

The Plaintiff, Frank J. Croucher, was President and owner of all outstanding shares of the corporation, Croucher Excavating, Inc., at all times in question herein. On December 4, 2010, he sustained a hand injury when his left hand was caught between a skid steer and a block of wood, resulting in crushing injuries to the hand. On the accident date and at all other relevant times herein, Kentucky Employers'

Mutual Insurance (hereinafter "KEMI") had in effect for policy number 343037 issued to Croucher Excavating, Inc. an endorsement entitled "WC 00 03 08 02", which endorsement excluded Frank Joey Croucher, the claimant herein from coverage. On the date of the accident a valid Form 4 for Mr. Croucher was on file at the Department for Workers' Claims. Pursuant to the endorsement, and the effective rejection, the policy of insurance did not provide coverage for the claims made herein by Mr. Croucher and his claim for benefits must be dismissed.

Pursuant to KRS 342.395, any employee may opt to reject workers' compensation coverage. The statute provides that an employee is deemed to have accepted the provisions of the Act unless the employee has executed a written notice of rejection and has not withdrawn such election. Kentucky law has long provided that an employee's rejection of workers' compensation benefits must be voluntary and must be knowing, that is, 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) at page 61. The Plaintiff argues that KEMI cannot rely upon the notice of rejection, because it was neither voluntary nor knowledgeable under KRS 342.395 and Tri-Gem Coal Co. v. Whitaker, 661 S.W.2d 785 (Ky. 1983). The ALJ notes that Tri-Gem, supra, does not really provide any specific guidelines for determination of whether a rejection is voluntarily made. The decision must be made based upon the circumstances of each individual case. The circumstances in the case of Mr. Croucher do not warrant the invalidation of the rejection in this

ALJ's opinion. It is undisputed that an appropriate rejection form was executed by Mr. Croucher and that the form was properly filed with the Department of Workers' Claims. At the formal hearing held on January 27, 2012, Mr. Croucher acknowledged he has three years of college education; that he was the President, registered agent, and sole owner of the corporation; that he had signed the Form 4 (rejection notice) on December 6, 2005; that he understood the content of the Form 4; and that he was aware that he was rejecting workers' compensation coverage when he signed the form. Mr. Croucher commendably acknowledged all of these facts and verified under oath that he readily understood the contents of the rejection and the effects thereof. He was aware that he had rejected insurance coverage and he was further aware that the rejection of coverage resulted in a lesser insurance premium for his company to pay. Although Mr. Croucher testified that he does not believe he ever read the entire policy, he acknowledged that he had an opportunity to read, and did read, the Form 4 (rejection notice) prior to signing it. He was not misled as to its terms and he clearly understood the effect of the document. It is the law in Kentucky that a person who signs a contract is presumed to know its contents, and if he has an opportunity to read the contract which he signs he is bound by its provisions, unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud. Clark v. Brewer, 329 S.W.2d 384 (Ky. 1959). In the case at hand, the ALJ does not even have to rely upon a presumption of knowledge, because Mr. Croucher has honestly answered that he had read and understood the document.

The Defendant, KEMI, has argued that substantial weight must be accorded to the signed Form 4 executed by the plaintiff. Pursuant to KRS 342.012(2), an owner of a business electing coverage must do so through "issuance of an appropriate endorsement to a workers' compensation insurance policy." In the case at bar, there is no dispute that Frank Joey Croucher was the owner of Croucher Excavating, Inc. There is no dispute that this policy contained an endorsement excluding him from coverage. As Defendant has argued, there is a presumption of validity of signed rejection notices on file with the Department of Workers' Claims and without that, the Department of Workers' Claims could not be considered as a reliable source of information as to who is and is not covered under the Workers' Compensation Act of Kentucky.

The Plaintiff has raised the issue as to whether the Form 4 which he executed as [sic] consistent with KRS 342.640. Mr. Croucher argues that when he obtained his policy of workers' compensation insurance for the company, he was told that he, as owner of the company, had to reject coverage in order to obtain the policy. He argues that KEMI, as an "insurer of last resort" under KRS 342.801 and 342.803, should not be permitted to require an owner to reject coverage in order to obtain coverage for other employees of the company. Aside from Mr. Croucher's testimony that he was handed the rejection form and told that he must sign it, there is no evidence in the record of this claim to substantiate that such conversation occurred between Mr. Croucher and his agent, Diana, or that his understanding of the conversation was accurate. Whereas,

the ALJ does not really doubt the word of Mr. Croucher, having found him to be credible throughout this matter, but does have questions as to whether or not Mr. Croucher and his agent understood and comprehended the conversation in the same manner. Mr. Croucher testified as to his understanding, but no further evidence was introduced. In order for the ALJ to set aside the written documents (the rejection form and the endorsements), more substantial evidence would have to exist to support a finding that Mr. Croucher was given no choice but to reject coverage. Further, it is noted that several years elapsed between the time the rejection was executed and the work-related injury occurred. Mr. Croucher had adequate time to challenge or withdraw the rejection if he believed that he was forced to sign it. KRS 342.640 considers every executive officer of a corporation to be an employee and it makes no exception for shareholders or owners of the business. However, like any other employee, an individual may opt out of coverage under the Act. In this case, Mr. Croucher clearly opted out from coverage and an endorsement was issued by KEMI under which coverage was not provided to Mr. Croucher. The endorsement was consistent with the terms of the rejection form.

The policy of insurance was first issued in 2005. Audits were done which clearly indicated Mr. Croucher was not covered in 2007 and 2009.

Plaintiff further argues that KEMI is estopped from denying coverage where the insurance premium was based upon wages paid to Mr. Croucher as an employee. The Plaintiff argues that he was charged premiums based upon his own

salary being included. The Defendant responds that KEMI never charged premiums based on the plaintiff's earnings prior to the relevant accident. The only evidence in this claim is that an audit completed for the fourth quarter of 2010 does reflect the inclusion of wages of Mr. Croucher and presumably billed the company for a premium based upon the audit. The evidence does not indicate precisely when the audit was performed, but one would assume that a fourth quarter audit was done after the fourth quarter ended, which would have been on December 31, 2010. The work-related injury occurred on December 4, 2010. Thus, as of the date of the injury, there is no evidence that the company had in fact paid any premiums based upon an inclusion of Mr. Croucher's wages. In fact, there is no evidence that the company paid a premium based upon the fourth quarter 2010 audit.

In interpreting an insurance contract, a judge's goal is to ascertain and carry out the original intention of the parties according to the terms of the policy. Hendrix v. Fireman's Fund Insurance Company, 823 S.W.2d 937 (Ky. App. 1991). In this case, both parties understood that Mr. Croucher was rejecting coverage and that he did not have workers' compensation insurance coverage for any injury which he himself might suffer. He was also aware that his premiums would be lower by not including himself under the policy. An owner of a company is uniquely positioned to make the entrepreneurial decision to either purchase coverage for himself and then include the cost of the premium in the cost of the goods or services provided by his company, or as in this case, to assume the financial risk of failing to

> provide that coverage. This entrepreneurial decision is a right granted to Kentucky business owners by KRS 342.012.
>
> After considering all of the arguments raised by both parties herein, the ALJ finds that pursuant to the plaintiff's knowing, intentional rejection of coverage and the issuance by KEMI of an endorsement excluding Mr. Croucher from coverage, the rejection of coverage by plaintiff was effective and Mr. Croucher was legally excluded from coverage herein. His claim for benefits must be dismissed.

On appeal, Croucher's first argument is as follows:

> KRS §342.395 sets out the parameters and conditions under which an employee may reject the provisions of the Workers' Compensation Act. It is presumed that coverage is accepted unless a written rejection notice is filed with the Department of Workers' Claims. The statute also makes clear that no effect shall be given to 'any rejection of this chapter not voluntarily made by the employee'. (Emphasis Added)
>
> ...
>
> Relying upon language found in the case of Kelly Mountain Lumber vs. Meade, 208 KY. Unpub. LEXIS 21 (KY. 2008)(Appendix 11), both KEMI and the ALJ sought to characterize Mr. Croucher as a worker who prefers to be an entrepreneur rather than an employee. They describe his execution of the rejection form as an 'entrepreneurial decision' between the various options available. [footnote omitted].

> However, the Courts do not allow either entrepreneurs or their insurers great leeway when negotiating their rights and obligations in a workers' compensation context. Both most [sic] ensure that the victims of work-related accidents are compensated and that the workers' ongoing needs are met without becoming dependent upon public assistance. [citation omitted].

Pertaining to the coverage of business owners, KRS 342.012 reads, in relevant part, as follows:

> (1) For the purposes of this chapter, an owner or owners of a business, including qualified partners of a partnership owning a business, or qualified members of a limited liability company, whether or not employing any other person to perform a service for hire, shall be included within the meaning of the term employee if the owner, owners, qualified partners, or qualified members of a limited liability company elect to come under the provisions of this chapter and provide the insurance required thereunder.
>
> (2) When an owner, owners, qualified partners, or qualified members of a limited liability company have elected to be included as employees, this inclusion shall be accomplished by the issuance of an appropriate endorsement to a workers compensation insurance policy.

However, as Croucher is also the president of Croucher Excavating, KRS 342.640 is relevant and provides as follows:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under KRS 342.650:

(2) Every executive officer of a corporation;

KRS 342.395 provides as follows:

(1) Where an employer is subject to this chapter, then every employee of that employer, as a part of his contract of hiring or who may be employed at the time of the acceptance of the provisions of this chapter by the employer, shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby unless he shall have filed, prior to the injury or incurrence of occupational disease, written notice to the contrary with the employer; and the acceptance shall include all of the provisions of this chapter with respect to traumatic personal injury, silicosis, and any other occupational disease. However, before an employee's written notice of rejection shall be considered effective, the employer shall file the employee's notice of rejection with the Office of Workers' Claims. The executive director of that office shall not give effect to any rejection of this chapter not voluntarily made by the employee. If an employee withdraws his rejection, the employer shall notify the executive director.

(2) An employer shall not require an employee to execute a rejection of this chapter as either a condition to obtain employment or a condition to maintain employment. An employer shall not terminate an employee for refusal to execute a rejection of this chapter.

> (3) Until notice to the contrary as specified in subsection (1) of this section is given to the employer, the measure of liability of the employer shall be determined according to the compensation provisions of this chapter. Any employee, may, without prejudice to any existing right or claim, withdraw his election to reject this chapter by filing with the employer a written notice of withdrawal, stating the date when the withdrawal is to become effective. Following the filing of that notice, the status of the party withdrawing shall become the same as if the former election to reject this chapter had not been made, except that withdrawal shall not be effective as to any injury sustained or disease incurred less than one (1) week after the notice is filed.

803 KAR 25:130 § 1, the administrative regulation enabling KRS 342.395, further provides:

> (1) If an employee chooses to reject the provisions of KRS Chapter 342, the employee shall file a Form No. 4, Employee's Notice of Rejection of Workers' Compensation Act with his employer.
>
> (2) The notice shall:
>
> (a) Be on an original form obtained from the Department of Workers' Claims;
>
> (b) Contain the following information:
>
> 1. Employer data;
>
> 2. Employee data;

> 3. Employer's Workers' Compensation Insurance data;
>
> 4. Employee's notarized signature; and
>
> 5. Employer's acknowledgment of receipt and filing with the Department of Workers' Claims; and
>
> (c) Be effective when the department has received the fully completed Form No. 4.
>
> (3) The employer shall file each Form No. 4 with the department immediately upon receipt of the form from the employee.
>
> (4) Each employer shall:
>
> (a) Keep on file a copy of each Form No. 4 signed by a current employee; and
>
> (b) Make those records available for inspection upon request by a representative of the department. (Emphasis added.)

KRS 342.395 is frequently referred to as the "opt-out" provision of the Act. It provides the ability to reject participation and to pursue common law remedies in the courts. See McLain v. Dana Corp., 16 S.W.3d 320 (Ky. App. 1999); see also Tri-Gem Coal Co. v. Whitaker, 661 S.W.2d 785 (Ky. App. 1983). While few reported cases have dealt with KRS 342.395, whether a rejection was knowingly and voluntarily executed was the central issue in Karst

Robbins Machine Shop v. Caudill, 779 S.W.2d 207 (Ky. 1989). In that case, the claimant who was functionally illiterate; executed a Form 4, Notice of Rejection. The Supreme Court, in affirming the Court of Appeals' determination to remand the case to the Board for additional findings on the issue of voluntariness, held that while an individual is generally accountable for documents which he executes, such may be overcome by "proof of illiteracy and a lack of knowledge regarding the document to be signed." Id. at 208. The Court equated voluntary rejection with "a substantial understanding of the nature of the action and its consequences." Id. at 209.

In the more recent case of Watts v. Newberg, 920 S.W.2d 59 (Ky. 1996), the court was again faced with the question of what constitutes a valid rejection. In that case, the claimant was offered the opportunity to either take a 20% cut in pay and maintain Kentucky workers' compensation benefits or accept substitute insurance benefits with no decrease in wages. Watts was injured and filed for workers' compensation benefits. The employer raised as a defense Watts' rejection of the Act. The court, in holding that the rejection was not voluntary, stated as follows:

We do not agree with the Court of Appeals that the Board erred in substituting its judgment for that of the ALJ, as the facts presented by this case do not support the ALJ's conclusion that claimant's rejection was voluntary. We do agree with the Board's view and hold that the choice presented to claimant of rejecting coverage under Kentucky's worker's compensation laws or taking a 20 percent cut in pay was both inherently coercive and against public policy. Requiring a worker to choose whether to take a cut in pay and keep workers' compensation benefits or choose to reject statutory coverage and substitute lesser benefits in order to keep the same wages is not a substantial or meaningful choice, so that such rejection can be considered voluntary. *Cf. Tri–Gem Coal Co. v. Whitaker,* Ky.App., 661 S.W.2d 785 (1983).

KRS 342.395 and *Karst Robbins, supra,* provide that for a rejection to be voluntary, a worker must have a substantial understanding of the nature of the action and its consequences. The evidence in this case shows that claimant did not have a substantial understanding of the effect of his rejection, as he understood that the substitute coverage offered by the employer was just as good as coverage under the Workers' Compensation Act. Moreover, as KRS 342.340 mandates that the employer bear the responsibility for paying for workers' compensation insurance coverage, the plan offered by the employer herein is violative of such requirement. The choice given to claimant of taking a 20 percent reduction in wages in exchange for workers' compensation coverage, had the effect of requiring him to pay part of

> the costs for his own coverage. Such scheme violates KRS 342.340. *Tri-Gem, supra.*

Id. at 62.

Although Croucher did not file a petition for reconsideration, on questions of law, or mixed questions of law and fact such as in the case *sub judice*, this Board's standard of review is *de novo*. *See* Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). "When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991).

Croucher was 100% owner of Croucher Excavating. However, the record also indicates Croucher was the president of Croucher Excavating at the time of the December 4, 2010, injury and, thus, an "employee" pursuant to KRS 342.640(2). Consequently, in order for Croucher to be excluded from the KEMI workers' compensation policy, he was required to sign a Form 4, Rejection of Coverage. Croucher did so, and the ALJ determined his rejection was knowing and voluntary based upon the evidence in the record

and Croucher's unambiguous testimony at the final hearing regarding his reading and understanding of the Form 4.

Croucher's testimony at the final hearing along with the above-cited Form 4, endorsements, and insurance quote filed in the record constitute substantial evidence in support of the ALJ's determination Croucher's election was knowingly and voluntarily executed. As noted by the ALJ in the March 30, 2012, opinion and order, Croucher had three years of college. Croucher testified he can read. Croucher acknowledged that he had an opportunity to read the Form 4 before signing it and understood it. As stated by the Court in Karst Robbins Machine Shop v. Caudill, supra, a rejection is knowing and voluntary if it comes with "a substantial understanding of the nature of the action and its consequences." Id. at 209. In addition, Croucher testified that he was not turning in his payroll records until after the federal work started in 2010. Unfortunately there is no documentary evidence in the record to substantiate Croucher's testimony regarding his payroll records submitted in 2010. Croucher's testimony regarding who was covered by the policy in 2005 is ambiguous at best. In his deposition, Croucher testified that his business had only one employee- himself. Therefore, the coverage was meant for him. However, at the

final hearing, Croucher testified that he might have had one or two people working for him in 2005. Croucher also testified that he was aware that the endorsement excluded him as an officer of the corporation and he had no reason to think he was covered by the policy. The ALJ determined Croucher's rejection was knowingly and voluntarily executed, and the record does not compel a different result.

While we acknowledge documents filed by KEMI are in the record indicating Croucher submitted his wages during the final quarter of 2010 for purposes of *unemployment insurance*, this is not determinative of the issue of whether Croucher submitted his earnings for purposes of *workers' compensation insurance* premiums. In light of the fact the audit for calendar year 2010 is not in the record, this Board has no means to confirm the validity of Croucher's testimony on this issue. We also note it is also possible Croucher has confused what he did for purposes of unemployment insurance with what he did for purposes of workers' compensation insurance. Having said this, we do find it suspicious that this audit, the most pertinent of all the audits, is noticeably absent from KEMI's filings.

Croucher's second argument is as follows:

> In the Opinion and Order, the ALJ found that the audit completed for the fourth quarter of 2010, did reflect the inclusion of Mr. Croucher's wages. He also assumed that the company had been billed for a premium based upon that audit. This was confirmed by Mr. Croucher who was certain that the increased premium had been paid (TH pp.27-28)
>
> Nevertheless, the Administrative Law Judge refused to give this any significance as there was no proof that KEMI charged premiums based upon Mr. Croucher's earnings prior to the relevant accident. Still the equitable doctrine of estoppel should prevent KEMI from denying coverage where it actually received a premium no matter what point in time.
>
> A similar situation was presented in the case of Taylor Contracting vs. Watts, 2007 Ky. App. Unpub. LEXIS 123 (2007) (Appendix 13). In that case, KEMI sought to deny coverage based upon non-payment of premium. However, the proof showed KEMI it routinely accepted late payments including one made after a worker's injury date. The case was ultimately remanded to the ALJ to determine the insurer had properly exercised its contractual right to cancel the policy.
>
> Similarly, KEMI would have been required to tender any increased premium received based upon Mr. Croucher's wages if it sought to rely upon its defense of no coverage. No such tender was made and, as a result, its defense was lost.

On this issue, the ALJ determined as follows:

> Plaintiff further argues that KEMI is estopped from denying coverage where the insurance premium was based upon wages paid to Mr. Croucher as an employee. The Plaintiff argues that he was charged premiums based upon his own salary being included. The Defendant responds that KEMI never charged premiums based on the plaintiff's earnings prior to the relevant accident. The only evidence in this claim is that an audit completed for the fourth quarter of 2010 does reflect the inclusion of wages of Mr. Croucher and presumably billed the company for a premium based upon the audit. The evidence does not indicate precisely when the audit was performed, but one would assume that a fourth quarter audit was done after the fourth quarter ended, which would have been on December 31, 2010. The work-related injury occurred on December 4, 2010. Thus, as of the date of the injury, there is no evidence that the company had in fact paid any premiums based upon an inclusion of Mr. Croucher's wages. In fact, there is no evidence that the company paid a premium based upon the fourth quarter 2010 audit.

As the issue of whether KEMI charged premiums based upon Croucher's earnings prior to the December 4, 2010, accident is a purely factual inquiry and Croucher failed to file a petition for reconsideration challenging the ALJ's findings, the ALJ's findings on this issue must stand.

The audit for calendar year 2010, referred to by the ALJ, is not in the record. There is *testimonial* evidence from Croucher and a representation by his attorney

about what was paid during the fourth quarter of 2010, but there is no supportive documentary evidence. The following exchange between counsel and the ALJ regarding the audits reflects the lack of such documents:

> Counsel for Croucher: You didn't give us one for 2008/2009. You didn't give us one for 2009/2010. You didn't give us one that would have been prepared for this year, reassessing his audit for last year.
>
> Counsel for KEMI: Those are all that exist.
>
> Counsel for Croucher: Okay. Are you saying there was no audit done for the year 2010?
>
> Counsel for KEMI: Yes, but it was- it was-
>
> Counsel for Croucher: (interrupting) Then where is it?
>
> Counsel for KEMI: Okay. Hold on just a second.
>
> ALJ: I think that was at the point at which you commented about how slowly we were moving.
>
> Counsel for KEMI: I apologize. When you say audit-
>
> Counsel for Croucher: (interrupting) This sheet. This form. (indicating) It's the same form for every year. Except you didn't give us the one for the applicable year.
>
> Counsel for KEMI: One was not done for 2010. The only thing that exists is-
>
> Croucher: (interrupting) Yes, it was.
>
> Counsel for Croucher: Yes, it was.

> Croucher: Because I done [sic] one for 2011, too. I paid you-all a premium the last two years.
>
> Counsel for KEMI: Well, I do not have it. I do not see that in my file materials.
>
> Counsel for Croucher: Well, when there's missing evidence, you usually have to presume that it does- did charge him a premium for that year, and he made a big point of saying how there was no coverage on those years. If there's missing evidence, particularly applicable for that year, I believe the missing evidence rule says-
>
> Counsel for KEMI: (interrupting) Well, there's no missing evidence at all.
>
> Counsel for Croucher: Well, where is it?
>
> Counsel for KEMI: All the documents-
>
> Counsel for Croucher: (interrupting) Oh, no. There is an audit form, believe me, for each year.
>
> Counsel for KEMI: Not in my file materials.
>
> ALJ: Let me see the last one.
>
> Counsel for Croucher: Sure, Judge. I mean, he made a point of pointing out those for all those years, but not for the year when the accident occurred.

Concerning the estoppel argument, Croucher has not demonstrated the doctrine of equitable estoppel is applicable here. A party asserting equitable estoppel must show the following elements:

> (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment. [citations omitted.] Hinshaw at 173.

As Croucher has failed to introduce evidence satisfying the elements of equitable estoppel in this case, the ALJ's Opinion and Order dated March 30, 2012, must remain undisturbed.

Accordingly, the March 30, 2012, Opinion and Order is **AFFIRMED**.

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