Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2014

CLAIM NO. 201178063

JAMES BRADLEY JOHNSON, JR. PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

JAMES JOHNSON D/B/A JOHNSON MASONRY,
KENTUCKY EMPLOYERS' MUTUAL INSURANCE,
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. James Bradley Johnson ("Johnson") seeks review of the June 18, 2013, opinion and order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") finding his claim against James Johnson D/B/A Johnson Masonry ("Johnson Masonry") and Kentucky Employer's Mutual Insurance ("KEMI") is barred for lack of jurisdiction

because of his filing of a Form 4 Employee's Rejection of Workers' Compensation Act ("Form 4"). Johnson also appeals from the July 31, 2013 order denying his petition for reconsideration.

On appeal, Johnson argues the ALJ's dismissal of his claim for lack of jurisdiction is erroneous based upon the unreported case from the Kentucky Court of Appeals, "No. 2009-CA-2060-WC KEMI vs. Shelby Lee Decker; Shelby Lee Decker, d/b/a Shelby Lee Decker Trucking; Ragland's Quarry and/or Scotty's Contracting and Stone, LLC." Interestingly, he fails to cite the decision rendered by the Kentucky Supreme Court on April 21, 2011 on the same case, also designated not to be published. He also argues pursuant to KRS 342.375, KEMI was statutorily required to provide coverage for the injuries he sustained on August 10, 2011. Because there was no requirement for KEMI to provide coverage for Johnson, and because he had never elected to be covered by the workers' compensation insurance policy pursuant to KRS 342.012(1), and in fact executed a Form 4, we affirm.

Johnson filed a Form 101 on May 2, 2012 for injuries sustained on August 10, 2011 when a wall from which he was removing bricks collapsed, causing him to fall in excess of thirty feet. He was also struck by several

bricks and scaffolding. As a result of the accident, Johnson sustained multiple spinal fractures, and has been rendered a quadriplegic. It is undisputed Johnson sustained significant injuries resulting from this accident. Since his medical condition is not at issue, the medical testimony will not be reviewed.

Johnson testified by deposition on August 30, 2012. He is a high school graduate with specialized training in welding. He had worked as a mason for fourteen years prior to the accident. He operated Johnson Masonry as a sole proprietorship, and hired employees as needed. He stated he usually had one employee, but in this instance had two because he needed someone to operate a forklift.

Johnson had been contacted by Morton Construction to remove exterior brick from a bank building in Whitesburg, Kentucky. At the time of the accident, he was working on scaffolding. He had removed three bricks and noted they had been improperly installed. The wall gave way causing him to fall resulting in him being covered with bricks and scaffolding.

Johnson first purchased worker’s compensation insurance in 2007. He acknowledged his signature was on the application for insurance, as well as on the Form 4.

Jeremy Lynn Terry ("Terry"), director of underwriting for KEMI, testified by deposition on October 22, 2012. He stated his job entails monitoring the day-to-day operations of the underwriting department. He noted Johnson had first applied for workers' compensation coverage for Johnson Masonry by application submitted January 4, 2007. The policy was effective from January 5, 2007 through January 2008. Terry noted the policy reflected an endorsement noting Johnson was a sole proprietor and excluded from the Kentucky Workers' Compensation Act. He also stated Johnson executed a Form 4 which was filed with the Kentucky Department of Workers' Claims.

Terry stated Johnson renewed the policy on four occasions with the last policy period ending January 22, 2012. Each of the four subsequent renewals contained an endorsement indicating Johnson was excluded from coverage. He also testified Johnson's wages were not included in calculating the policy premium. He stated payroll is the primary rating base for setting the policy premium. He stated the lower the payroll, the lower the premium. Terry stated the policy premium during the last coverage period was $991.52, and if Johnson's wages were included, the premium would have been $4,805.28. He stated only one

audit was performed. This took place after the end of the first policy period. He stated there is no requirement to do so annually, and because no claims were filed, no follow up audit was performed.

KEMI filed copies of all policies, including the one in effect on the date of injury. The policies all include the endorsement excluding Johnson from coverage. It also introduced a copy of the Form 4 which had been filed with the Kentucky Department of Workers' Claims.

A Benefit Review Conference Order dated September 4, 2012, stated, "Proof open 60 days, after which any party may move to submit the claim on the record."

On January 3, 2013, the ALJ entered an order dismissing the claim because Johnson had rejected coverage as evidenced by executing the Form 4. Johnson filed a petition for reconsideration. On February 25, 2013, the ALJ entered an order setting aside his previous order, and provided KEMI additional proof time. On March 11, 2013, KEMI filed a petition for reconsideration requesting the February 25, 2013 order be set aside, and the January 3, 2013 order reinstated. On March 26, 2013, the ALJ entered an order granting twenty days for the parties to file proof or arguments demonstrating dismissal of the claim was not compelled. Johnson filed a petition for reconsideration on

April 2, 2013. The ALJ entered an order on April 19, 2013 which states as follows:

> The threshold issue of whether plaintiff is barred from bringing this workers' compensation claim due to the Form 4 on file is bifurcated from other issues and is submitted for a decision on the record on that issue.

He granted the parties twenty days to submit briefs regarding the bifurcated issue.

On June 18, 2013, the ALJ rendered an opinion and order dismissing Johnson's claim for lack of jurisdiction. He noted the Form 4 signed by Johnson was validly on file with the Kentucky Department of Workers' Claims. Because Johnson had rejected coverage under the Act, the ALJ determined he could not pursue a workers' compensation claim.

Johnson filed a petition for reconsideration on July 13, 2013 arguing the ALJ erred in dismissing his claim because he was the only full-time employee. In support of his petition, he relied upon Shelby, supra. The petition for reconsideration was denied by order entered July 31, 2013.

As the claimant in a workers' compensation proceeding, Johnson had the burden of proving each of the essential elements of his cause of action Burton v. Foster

Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since he was unsuccessful before the ALJ, the question on appeal is whether a finding in his favor is compelled. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as

to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

First we note there is no real dispute as to whether a valid Form 4 was filed with the Kentucky Department of Workers' Claims. A certified copy was filed as evidence which sufficiently supports the ALJ's determination the Form 4 was appropriately filed. Johnson filed no evidence to disprove the filing was genuine, or not perfected. Based upon this filing, a contrary result is not compelled.

On appeal, Johnson argues pursuant to Shelby, supra, he was unable to properly reject the Kentucky Workers' Compensation Act by the filing of a Form 4. We disagree since Shelby, supra is distinguishable from the case *sub judice*. Shelby operated a truck as an independent contractor for which hauled material for Ragland Quarry. Unlike Johnson, Shelby had no other employees, either part-time or full-time. Ragland Quarry required Shelby to purchase liability and worker's compensation insurance, and had agents from the agency it utilized to discuss the requirement. Johnson filed no evidence demonstrating his employees who were on the jobsite with him at the time of the accident were not covered by the policy. Therefore,

unlike Shelby, Johnson failed to demonstrate the policy provided no benefit.

Even if the Form 4 had not been filed, Johnson was not covered by the policy issued by KEMI. KRS 342.012 (1) & (2) state 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. Nothing in this section shall be construed to limit the responsibilities of the owners, partners, or members of a limited liability company to provide coverage for their employees, nonqualified partners, or nonquailified members, if any, required under this chapter.
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> **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.**
> (Emphasis added)

Statutorily, an affirmative act is required for a business owner to be covered under the workers' compensation policy for his or her business. The owner must file an election to be covered and an endorsement must be issued to the insurance policy under the provisions of KRS 342.012(1) and (2). Here, the endorsement clearly indicates Johnson was excluded from the policy during all five coverage periods. It is also noted the premium charged did not include Johnson's wages for purposes of calculating the premium. Johnson had an affirmative responsibility to seek an election, or obtain an endorsement to the policy in order to be covered. He failed to do so. Without taking the necessary steps to secure coverage, as a matter of law, Johnson was not covered by the worker's compensation insurance policy with KEMI.

In this instance, a Form 4 bearing Johnson's signature was filed with the Kentucky Department of Worker's Claims. Johnson made no election to be covered by the policy. The policy premiums were calculated without utilizing Johnson's pay. Each of the five policies issued contained an endorsement indicating Johnson was excluded from coverage. Finally, there is no evidence Johnson's employees were not covered by the policies in effect.

Legally and factually there is simply no basis to support Johnson's argument he was covered by the worker's compensation insurance policy in effect for Johnson Masonry at the time of the accident. We therefore affirm the ALJ's decision.

Accordingly, the June 18, 2013, opinion and order and the July 31, 2013, order denying Johnson's petition for reconsideration by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON GLENN M HAMMOND
P O BOX 1109
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON W BARRY LEWIS
P O BOX 800
HAZARD, KY 41702

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202