OPINION ENTERED: June 15, 2012

CLAIM NO. 201100752

MICHAEL PAUL HOWARD PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

HOWARD'S WEST LIBERTY AUTO PARTS, LLC
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Michael Paul Howard ("Michael Paul") seeks review of the December 16, 2011, opinion and order rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") finding pursuant to KRS 342.012(1), Howard's West Liberty Auto Parts, LLC ("Howard's LLC") workers' compensation policy did not provide coverage for Michael Paul's

injuries. Michael Paul also appeals from the January 20, 2012 order overruling his petition for reconsideration. We affirm.

Howard's LLC operates two NAPA franchise stores selling auto parts and servicing automobiles in West Liberty and Salyersville. At the time of Michael Paul's injuries, the owners of Howard's LLC were Michael Paul and his father Paul Howard ("Paul"), each owning fifty percent of the business. Because the issue on appeal relates to whether Michael Paul was excluded from coverage pursuant to KRS 342.012(1) since he was a member of the LLC, we will not discuss the alleged injury or the medical testimony.

Michael Paul's Form 101 alleges he was injured on November 27, 2009, in a motor vehicle accident while working for Howard's West Liberty Auto Parts, LLC. He identified Federated Mutual ("Federated") as the workers' compensation insurer for Howard's LLC at the time of the accident. Regarding the coverage issue, Michael Paul was deposed on July 19, 2011, and he testified at the October 21, 2011 hearing. Paul also testified at the hearing.

At his deposition, Michael Paul testified he bought all or a portion of the business known as Howard's LLC prior to leaving his previous employment in 2000. Shortly thereafter, his father bought into the business.

Michael Paul testified Howard's LLC provides mechanic services, towing services, and sells NAPA auto parts. Prior to the injury on November 27, 2009, Michael Paul performed eighty percent of the mechanic work. Another employee performed the automotive maintenance work and the remainder of the mechanic work. He testified a second mechanic was hired within a week or two after his motor vehicle accident. Michael Paul was paid $290.00 per week based on a forty hour week at an hourly rate of $7.25. At the time of the injury, Michael Paul was traveling from Salyersville to West Liberty. Although he has worked at the Salyersville store, he primarily works at the West Liberty store. His father operates the Salyersville store. Michael Paul did not know who reported the accident to the insurance company.

At the hearing, Michael Paul testified Howard's LLC is a limited liability company ("LLC"), owned by he and his father. His father owns the building where the West Liberty store is located. Michael Paul is the manager of the West Liberty store and he testified at the time of the motor vehicle accident, he was the "counter person, mechanic, and diagnostic person." In addition to being an auto parts store, the West Liberty store has two mechanic bays where automotive mechanical work is performed.

Michael Paul testified his father, not he, secured insurance policies, including workers' compensation policies for Howard's LLC. However, Michael Paul was directly involved in securing a disability insurance policy through Federated in April 2010. Michael Paul testified the disability policy was obtained so his children would be taken care of in case he was injured and unable to work. He testified he believed he was covered by the workers' compensation insurance policy issued by Federated. He testified no one, including his father, told him he was covered; rather, he just assumed he was.

Michael Paul testified the West Liberty store used contract laborers that do the "mechanical part." He testified at his deposition he had two mechanics at the West Liberty store. He explained Howard's LLC contracted with the individuals to perform the mechanic work. Concerning whether the West Liberty store had employees prior to the motor vehicle accident, Michael Paul testified as follows:

> Q: Okay. So, they're not actual employees of –
>
> A: No.
>
> Q: --West Liberty? Have you had employees at that store—
>
> A: I've got—

> Q: --before?
>
> A: I’ve actually got some employees, Daniel Cook is – he’s an employee that works back and forth at the West Liberty store and the Salyersville store.

Michael Paul acknowledged his father prepares the payroll for both stores and he does not know the total yearly amount paid to the employees.

John Faust (“Faust”), a direct writer for Federated, was deposed on October 10, 2011. He described his job as working “exclusively for the company marketing and advertising their insurance product.” Regarding Federated’s relationship with NAPA, Faust testified his impression is Federated is viewed as the recommended carrier of insurance products.

Faust testified “over the course of time” he stopped by the West Liberty store and asked to speak to the owner. He was referred to Paul as the owner and decision maker. Faust was aware of the father and son relationship between Paul and Michael Paul. Faust testified during the policy period, he learned Paul and Michael Paul were co-owners of the business.

Faust testified his first contact with Paul occurred when he received a telephone call from him on

August 20, 2009, at which time a meeting was scheduled. Faust testified on August 21, 2009, he picked up a check for the “new business” at the Salyersville store. The West Liberty store was not then insured by Federated, however both stores were insured by it on the date of the accident. Concerning the worker’s compensation policy issued to Howard’s LLC, Faust testified he went through the electronic application line by line. No written application was completed and Paul was not given anything to sign afterward. The application included the amount of coverage, classification code for the business, and the payroll. As part of that process, Faust discusses the ownership of the business, and determines whether “the owner wants to be excluded or included.” A copy of the application for the West Liberty store was attached as Exhibit 1 to Faust’s deposition. Faust indicated the document is not referred to as an “application” but rather a “write report.” Faust could not remember whether Michael Paul was present when he completed the write report. All the information for the workers’ compensation policy was supplied by Paul. Faust was unsure whether this occurred in person or over the telephone.

Faust testified the first time he met Michael Paul was when he “did a disability application with him”

which was long after the workers' compensation policies were issued. Faust acknowledged Paul did not produce nor did he request a copy of "the articles for the limited liability company."

The application for the West Liberty store, attached as an exhibit to Faust's deposition, reflects Paul owns one hundred percent of the limited liability corporation. Page 5 of the application reflects under the heading "officers and owners," Paul is the president and owner of one hundred percent of Howard's LLC. Page 14 of the application styled "Driver List," lists Paul as the only driver. Page 15 of the policy reflects only one unit is "driven for the directors, officers, partners, or owners and their resident family members." In addition, page 20 of the application contains the following question: "If a sole proprietorship, are there individuals not listed that are personally insured elsewhere?" "No" was checked.

Also attached as part of Exhibit 1 is a document containing pages numbered 2 through 27. On page 16 of that document under the heading "Owners and Officers", Paul is the only person listed. On that same page, in the section reflecting whether Paul was to be included or excluded from coverage, "E" was inserted.

Faust testified the “premium basis is the payroll.” The projected payroll for the West Liberty store was $15,000.00. A list of employees was not provided. Faust confirmed Paul was excluded from coverage but there was no notation Michael Paul was excluded. He did not know whether there was any language in the body of the policy concerning exclusions of the business owners and officers. Faust testified if the insured is a corporation, there should be an exclusion endorsement in the policy. If the insured is an LLC, the policy does not have “an endorsement for an exclusion.”

The exclusion endorsement for the West Liberty store that was completed for that store when the policy was taken out was attached as Exhibit 2 to Faust’s deposition. It reflects the policy does not cover bodily injury to any person described in the schedule. In the schedule, no names were listed under the heading “partners” and “officers.” However, under the heading “others,” Paul’s name is listed. That endorsement states it is effective as of September 4, 2009. Faust testified he was not told there were any other partners or officers. He did not recall why Paul indicated he wanted to be excluded. Faust testified that when the workers’ compensation policy was

originally purchased, Michael Paul was not listed as excluded from coverage.

Faust was shown a document which he testified is a policy adjustment transaction summary form which he indicated is produced when a policy change is called in by him, an underwriter, or anyone that has the authority. The document was introduced as Exhibit 4 to Faust's deposition.[1] Faust testified the policy adjustment transaction summary form was generated the day of the annual client review on April 16, 2010, reflecting Paul has a fifty percent ownership interest and Michael Paul has a fifty percent ownership interest in the business. Faust testified the change excluding Michael Paul from workers' compensation coverage was effective September 4, 2009. Faust indicated he performed the annual client review with Paul, not Michael Paul. Faust testified the annual client review with Paul involved going over with him each item of the original application.

Faust completes the application and presents "a proposal" at the time he picks up the check. He described the proposal as essentially an illustrated application.

[1] A document with the heading "Annual Client Review," reflecting an effective date of September 4, 2009, and expiration date of September 4, 2010, presented by John Faust was introduced as Exhibit 3. Introduced as Exhibit 4 is the policy adjustment transactions summary.

Faust testified he could not “say from memory” when he went over the illustrated application with Paul he reviewed the ownership of Howard’s LLC. Faust testified he can say that every proposal is exactly the same and every proposal would list excluded owners. During the annual client review, Paul pointed out Michael Paul should have been listed as an owner and an excluded party.

Concerning whether the premium was based on Michael Paul’s wages, Faust testified “when I called in to make the changes I said there was no need to change the payroll because the payroll that he had given me had already taken into account that Michael Paul be excluded from Workers’ Comp.” Faust indicated the premium for the West Liberty store was based on a $15,000.00 payroll and the Salyersville store’s premium was based on a $33,000.00 payroll. Faust did not leave any documents with Paul after he conducted the annual client review on April 16, 2010. He acknowledged that even though the changes based on the policy adjustment transaction summary were noted on April 16, 2010, they were effective on September 4, 2009. Faust testified a document was generated for Paul to sign acknowledging the changes and exclusion. Faust acknowledged the document styled “Annual Client Review,” introduced as

Exhibit 3, did not list Michael Paul as being excluded from coverage.

Faust testified he could not recall when he talked with Michael Paul about the disability policy, but it was delivered to him on May 21, 2010. He could not recall whether one of the reasons Michael Paul wanted a disability policy was because he learned he had "been taken off worker's comp." Faust explained to both Paul and Michael Paul they may want some income protection for Michael Paul since he had been removed from coverage. Faust testified he first learned of Michael Paul's motor vehicle accident approximately a month before his deposition when Paul called asking why Michael Paul's workers' compensation claim had been denied. Faust testified he was not aware a workers' compensation claim had been filed when he was performing the annual client review. Faust initially testified a document was sent to Howard's LLC advising it of the change in coverage and exclusions but later testified he could not "say for sure if anything was mailed out advising changes."[2]

Introduced as "Defendant's Exhibit 1" to Faust's deposition was a "New Business Service Call Form" which

[2] On page 34, Faust testified when anything is changed on the policy something is automatically mailed to the insured from the home office.

Faust testified was generated by a visit to Howard's LLC by Stefanie Pallo ("Pallo"). Faust testified Pallo is an "auditor by trade" who goes onsite to a new business and ensures the information provided in the policy is correct. He testified Pallo ensures the owners are listed or are known so the appropriate exclusions and endorsements are prepared. Faust explained "Defendant's Exhibit 1," establishes Pallo visited Howard's LLC. Faust indicated this exhibit reflects a corrected mailing address and that Michael Paul is the manager of the West Liberty store and is also an LLC member. Faust testified, based on his understanding of Kentucky workers' compensation law, all LLC members are automatically excluded and no endorsement is required. Faust acknowledged he was not aware of this fact in August 2009 when he obtained Howard's LLC's business. Faust testified item J on page 2 of defendant's Exhibit 1 reflects as follows:

> Does the Work Comp policy match the business principals' intent to be included/excluded, yes. Paul and Michael Paul Howard are automatically excluded under the LLC.

Further, the document reflects "Howard Paul and Michael Paul Howard are both excluded" as principals.

Faust testified when he obtained the application from Howard's LLC for both stores, he had no knowledge

Michael Paul was an owner or member of Howard's LLC. When Faust learned Michael Paul was an owner and/or member, he conveyed to either Paul or Michael Paul that Michael Paul was not covered under Kentucky Workers' Compensation Act. Faust testified at the time he learned both men wanted to be excluded from coverage he was unaware Michael Paul had been in a motor vehicle accident on November 27, 2009. Faust did not know whether Pallo had forwarded Exhibit 2, the New Business Service Call Form, to Paul or Michael Paul.

At the hearing, Paul testified he received a call from Faust who stated Howard's LLC would get a discount if it had insurance coverage with Federated. Paul testified he bought a complete package of insurance coverage from Faust including general liability, theft, property, motor vehicle or auto coverage, and workers' compensation. Paul testified Howard's LLC employees were Michael Paul, Gabe Conley, and Nor Bare. He denied discussing any exclusion with Faust at the time he took out the workers' compensation policy. Paul was the only individual listed as being excluded from coverage. It was Paul's intention that the workers' compensation policy provide coverage for all of Howard's LLC's employees, including Michael Paul. Paul testified he was never told there was no workers'

compensation coverage for Michael Paul until a couple of months prior to the hearing. Paul testified he was unaware that Federated had sent someone to perform an audit of Howard's LLC's records. He denied being told after an audit, workers' compensation coverage was not provided for Michael Paul. Paul denied having any contact with Pallo. As far as he knew, Michael Paul's wages were included in the payroll submitted to Federated which was the basis for the coverage.

When asked if Pallo had contact with his bookkeeper, Paul testified "they have notified me as of that." Paul denied ever being told Michael Paul's wages were excluded in calculating the premium. He testified "after this case come up," he was sent a reduction in "Workmen's Comp coverage." Paul testified that the document he received provided no reason for the premium reduction. Paul testified "they said" the premium was reduced after an audit had been performed. Paul testified even though he signed a release allowing Federated to perform an audit, no one contacted him. He explained if he had known Michael Paul was excluded from coverage under the workers' compensation policy, he would have asked for him to have been included. Paul explained he understood upon

paying this premium all of the employees were covered under the workers' compensation policy.

On cross-examination, Paul testified the premium reduction occurred "within the last month or so." He denied keeping copies of the bills from Federated. He stated Howard's LLC pays a monthly premium for all the insurance coverage it has through Federated. Paul could not provide the amount of the workers' compensation premium or the general liability premium. Paul testified he does not keep a copy of his monthly bills. He discards the bills and "keeps [his] check as [his] record." Paul has a copy of all of the different policies issued by Federated. Paul denied ever speaking to Pallo in person. He believed the payroll for Howard's West Liberty Auto Parts in 2010 was $46,000.00 and in 2009 was $29,000.00, which included Michael Paul's wages.

Paul testified when he initially met with Faust, he told him Michael Paul was also an owner of the business. He explained in 2009, Michael Paul was the only employee at the West Liberty store, and the Salyersville store had two employees. Paul testified Howard's LLC's workers' compensation policy only excludes him from coverage. Paul indicated when he initially bought the policy in September 2009, Faust told him Michael Paul was covered.

Pallo's deposition was taken on November 4, 2011. She testified she has been employed by Federated for ten years and her present position is risk appraiser. She testified she audits accounts based on exposure and to ensure Federated receives "the correct premium for the correct exposure." Pallo testified Federated has what is known as "a new business service call" wherein she will introduce herself to the new client and review the policy. Pallo testified that on October 26, 2009, she traveled to Salyersville and met Paul at the smaller store and talked with him in the back room where they sat at a kitchen table. Pallo met with Paul to review the policy, ask a few questions, and complete her report. She transmitted her report on October 30, 2009, four days after the meeting.

On the date she met with Paul, he told her there were two owners of the business, himself and his son. This is reflected in her notes. She testified if that was not true she would not have put it in her notes. She did not recall whether Paul asked any questions; however, she recalled one of the questions she asked regarding the LLC members, was whether it was the intention of the owners to be excluded from the policy. She stated she asked that question because she "did not show that information." Pallo testified Section J on Page 2 of her report confirms

she had that conversation with Paul and the desire of the owners to be excluded.[3] If there had been anything different, she would have noted it for the underwriters to see. Pallo did not meet with Michael Paul. Pallo indicated she reviewed the audit performed by Federated to determine whether Howard's LLC was charged a premium based on Michael Paul's payroll records. She indicated the earnings of both officers were excluded in determining the premium. Pallo explained "there was no exposure that was charged for."

Pallo testified although she reviewed the policy before she visited Paul, she could not recall the exclusions from coverage. Upon reviewing the policy, she testified Paul was the only person listed on the exclusion page. Pallo did not generate a report indicating a change in the workers' compensation coverage reflecting Michael Paul was excluded from coverage. Pallo testified that was not part of her job. Likewise, she did not generate correspondence to Faust or Howard's LLC regarding the exclusion. She was unaware if anything was sent to Michael Paul concerning his exclusion from workers' compensation

[3] The New Business Service Call Form was introduced as Exhibit 1 to Pallo's deposition and Section J reads as follows: "Does the work comp policy match the business principals' intent to be included/excluded? Yes- Paul and Michael Paul Howard are automatically excluded under the LLC."

coverage. Pallo testified she was unaware of the procedure for providing such notice. Likewise, she was unaware of any circumstance under which Federated would give an employee of a business written notice as to whether he or she is covered under the Workers' Compensation Act.

The ALJ entered the following findings of facts and conclusions of law:

> I have carefully considered all of the relevant factors herein. I note that the testimony of both Mr. Paul Howard and the Plaintiff is that they assumed that the Plaintiff was covered by the workers' compensation policy. I also note that the Plaintiff himself has only finished the 11th grade. This fact is relevant because of the established doctrine that in the case of unsophisticated claimants' insurance policies shall be construed liberally, in favor of the claimant.
>
> However, I am [sic] also note the plain language of KRS 342.012(1) which requires members of a LCC to opt into workers' compensation and clearly, beyond any shadow of a doubt, does not require an affirmative opt-out, as with a regular employee. At no time did the Plaintiff execute an opt-in.
>
> Further, it is noted that while the September 4, 2009 forms prepared by Faust only exclude Mr. Howard the October 26, 2009 exclusion of the Plaintiff by Ms. Pallo was still executed prior to the date of injury herein. There can be no reasonable argument that the insurance provider was attempting to defraud the Plaintiff. This is especially true in

that the insurance carrier did not charge, or at the least did not keep, any premiums paid for coverage for the Plaintiff. All of which was done prior to the date of injury herein.

It is further noted that the employer has other employees and that they [sic] are required by law to purchase workers' compensation insurance so it cannot be argued that they [sic] had no reason to purchase coverage if the Plaintiff was not covered.

As for the relative sophistication of the parties I am not persuaded that the Plaintiff, as a business owner, primary operator of at least one store, and supervisor to employees lacks the sophistication to interpret these matters. Further, it is clear that his father conducted all of the negotiations regarding insurance. However, this fact does not, either as a matter of fact or law, indicate the Plaintiff is unsophisticated or should not be bound by his father's negotiations. Simply because they are father-son does not obviate the business relationship. It is not unusual for various members of a partnership or LLC to have various responsibilities. One member of the LLC is bound by the actions taken by another member of the LLC, in furtherance of the LLC's business and in which the first members has acquiesced in the second member's authority to undertake the action.

I do not believe that the aforementioned doctrine if interpreting policies in favor of unsophisticated claimants requires the claimant to have all the knowledge and experience of an

> entire insurance company to avoid being labeled, "unsophisticated."
>
> I find pursuant to the above analysis, KRS 342.012(1) and the fact the carrier had, prior to the date of injury, made it clear the Plaintiff was not covered, that no policy of workers' compensation covers the Plaintiff herein.

Michael Paul filed a petition for reconsideration making a two prong argument. First, he cited to the ALJ's summary of evidence wherein he stated Faust and Paul had completed a written application indicating Paul owned 100% of the business and was excluded from coverage and that Federated had notified Paul that Michael Paul was excluded effective September 4, 2009. Concerning that finding, Michael Paul asserted the records reflect that at no time did Paul tell Faust that he owned 100% of the business.

Next, Michael Paul complained of the following findings of fact and conclusions of law:

> 'I find pursuant to the above analysis, KRS 342.012(1) and the fact that the carrier had, prior to the date of injury, made it clear the plaintiff was not covered, that no policy of workers' compensation covers the plaintiff herein.'

Michael Paul maintained the carrier did not make it clear at any time prior to the date of injury he was not covered. Michael Paul cited to the ALJ's summary of Pallo's

testimony in support of his argument. Michael Paul requested the ALJ reconsider his opinion and order dismissing the claim. Michael Paul asserted the ALJ did not address his argument Faust's statement that he was covered by workers' compensation bound Federated and it cannot now deny coverage. Michael Paul maintained because of Faust's statement Federated is estopped from denying coverage under the cases cited in his brief.

In a January 20, 2012 order, the ALJ denied Michael Paul's petition for reconsideration.

On appeal, Michael Paul again asserts there is no evidence that Paul told Faust he was the sole owner of Howard's LLC. He maintains the Secretary of State's records reflect there are two members of Howard's LLC - Paul and Michael Paul. He posits there was no evidence an error was committed by Paul. Further, there is no evidence Paul represented to Faust that Michael Paul was not a co-owner. Since Faust's testimony establishes he could not remember going over with Paul the ownership of the LLC, there is no evidence Paul ever represented to Faust that Michael Paul was not an owner. Michael Paul also argues the ALJ erred in finding he and Paul assumed Michael Paul was covered by the workers' compensation policy. He posits Faust only verified some of the information with Paul.

Further, the “Partners, Officers and Other Exclusion Endorsement,” only states Paul is to be excluded from coverage. Michael Paul asserts he and his father did not assume he was covered under the workers’ compensation policy because Faust assured Paul that Michael Paul was covered. Rather, Paul relied on Faust’s representation and the endorsement listing only Paul as the person excluded from the policy.

Next, Michael Paul argues the ALJ erred by finding prior to the date of the injury, Federated made it clear Michael Paul was not covered under the workers’ compensation policy. He takes issue with the ALJ’s finding Michael Paul was excluded from coverage on October 26, 2009, by Pallo and the exclusion was executed prior to the date of Michael Paul’s injury. Michael Paul maintains Pallo testified she did not generate a “report, correspondence, or any acknowledgement” for Paul and Howard’s LLC stating there was a change in the workers’ compensation policy excluding coverage for Michael Paul. Likewise, Faust testified he did not know if anything was mailed out notifying Paul and Michael Paul of changes in the coverage. Further, Paul testified he did not receive correspondence from anyone indicating Michael Paul was excluded from coverage. Therefore, Michael Paul argues it

is clear from the testimony of Faust, Pallo, and Paul no notice of a change in the policy coverage excluding Michael Paul was ever delivered. Thus, the ALJ erred in finding that Michael Paul and Paul were notified of that change.

Finally, Michael Paul asserts the ALJ erred in ignoring its argument Federated is estopped from denying coverage based on the statements of Faust. He takes issue with the ALJ's finding that he was required to elect coverage and in this case did not. Michael Paul again complains about the ALJ's determination Pallo's October 26, 2009, exclusion of Michael Paul was executed prior to the date of the injury. Michael Paul asserts Paul testified he told Faust he was the only person to be excluded, and Faust told him Michael Paul was covered and not excluded from coverage by the policy. Michael Paul argues Faust corroborated Paul's testimony on this issue when he testified he knew when his deposition was taken that under Kentucky law all LLC members are automatically excluded and no endorsement is required, but was not aware of that fact in August 2009. Additionally, Exhibit 2 to Faust's deposition, the exclusion page to Howard's LLC policy, reflects only Paul is listed as being excluded from coverage. Further, Paul testified when he contacted Faust

to report Michael Paul's work-related injury in November 2009, Faust again told him Michael Paul was covered.

Michael Paul cites to Investors Heritage Life Ins. Co. v. Colson, 717 S.W. 2d 840 (Ky. App. 1986) for the proposition an insurance company is generally bound by the acts of its agents when done within the apparent scope of his authority. In Investors Heritage Life Ins. Co. v. Colson, supra, the Court of Appeals held the test is whether the insured had notice of the limitations of the agent's authority and in the absence of any notice to the insured of some limitation on the authority of the agent the company is bound by the acts of the agent. Michael Paul also cites Motorists Mut. Ins. Co. v. Davis, 2004 WL 1909425, 1 (Ky. App. August 27, 2004) for the proposition that in the absence of notice to a third party, a principal is bound by the acts of its agent done within the scope of the agent's apparent authority.

As the claimant in a workers' compensation proceeding, Michael Paul 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 regarding the determination he was not covered by a worker's compensation policy issued for the employees of Howard's LLC of which he was co-owner,

the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

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. 200).

Contrary to the views expressed by the dissent, we have made no findings of fact. 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).

Despite both Paul and Michael Paul testifying to the contrary, the facts relevant to disposition of the issues before us on appeal regarding the ALJ's determination are supported by the testimony of both Faust and Pallo which constitute substantial evidence, and a contrary result is not compelled.

KRS 342.012 (1) & (2) states 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.
>
> **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)

As a general rule, a person cannot be both an employer and an employee. Eutsler v. Huff, 222 Ky. 48, 299 S.W.1070 (1927). Thus, in the absence of a statutory provision whose effect is otherwise, a member of a partnership cannot be an employee of such partnership for purposes of workers' compensation coverage, even though the member is engaged in a work incident to the operation of the partnership and receiving wages in addition to his share of the profits. Wallins Creek Lumber Co. v. Blanton, 228 Ky. 649, 15 S.W.2d 465 (1929); 99 C.J.S. *Workers' Compensation* §162.

Long after the decisions rendered in Eutsler, *supra*, and Blanton, *supra*, Kentucky's legislature enacted precisely such a statutory provision in KRS 342.012 which

was subsequently modified to include members of LLC's. Thus, Paul and Michael Paul, as members of the LLC, could have elected to be covered as employees under the Act by securing the appropriate endorsement to a policy of workers' compensation insurance issued to the LLC, but failed to do so. It is undisputed that such an endorsement to the workers' compensation policy purchased was not secured. Rather, the policy provided exactly the opposite.

Based upon Faust's testimony, Paul advised Federated's agent numerous times during the application process he was the sole owner of the LLC. This misinformation, provided either by deceit or mistake, mislead Federated's agent. As the ALJ found, pursuant to KRS 275.140, any statement or representation made by a member concerning the business or affairs of an LLC within the scope of the member's authority shall be evidence against the other members of the LLC. It is clear from the evidence Paul was designated the member of the LLC charged with securing all insurance for the entity except for the disability policy Michael Paul subsequently obtained. Paul secured coverage for the LLC, through providing misinformation, asserting he was the sole owner of the LLC. When it was discovered this was untrue, an adjustment was made in both coverage and the policy premium. It is on

these grounds that the ALJ concluded Michael Paul was not protected under Howard's LLC's worker's compensation policy in effect at the time of the motor vehicle accident. We agree with that conclusion.

In his treatise, Professor Larson states "the only situation in which the insurance would be defeated for all purposes by act of the employer is that in which the insurance is void *ab initio*." Larson's Workers' Compensation Law, §150.02[4] (2012). It is the applicant's responsibility to ensure the information provided in the application is correct. State Farm Mutual Automobile Insurance Company v. Crouch, 706 S.W.2d 203 (Ky. App. 1986).

An affirmative act is required for a member of an LLC to be covered under the LLC's workers' compensation policy. The member 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). At the time the policy was entered into, Paul advised Federated he was the sole owner of the LLC. Paul did not seek to be covered by the policy, and by statute he was therefore excluded. It was later discovered Michael Paul was also a member of the LLC, and therefore as an owner, he was statutorily excluded as a covered employee. Michael Paul, or his father acting

on his behalf, had an affirmative responsibility to seek an election, or obtain a policy endorsement to the policy in order to be covered. This he failed to do. Without taking the necessary steps to secure coverage, as a matter of law, Michael Paul was not covered by the worker's compensation insurance policy issued by Federated to Howard's LLC. We therefore affirm the ALJ's decision.

Accordingly, the December 16, 2011, opinion and order and the January 20, 2012, order ruling on the petition for reconsideration are hereby **AFFIRMED**.

SMITH, MEMBER, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. Because I believe the majority has engaged in fact finding which the ALJ should have conducted, I respectfully dissent. The majority has taken the simplistic approach that this is solely a question of whether substantial evidence exists in the record to support the ALJ's decision. That is not the issue in this case. In rendering his decision, the ALJ did not make any findings regarding the credibility of the witness and apply the applicable law based on what he believes to be the credible testimony. Rather, his determination hinged on the following finding on page 9 of his opinion:

> Further, it is noted that while the September 4, 2009, forms prepared by Faust only exclude Mr. Howard the October 26, 2009, exclusion of the plaintiff by Ms. Pallo was still executed prior to the date of the injury herein and there can be no reasonable argument that the insurance provider was attempting to defraud the plaintiff.

For reasons which will be pointed out later herein, that is not an accurate summary of Pallo's testimony. Nowhere in the body of the ALJ's findings of facts and conclusions of law which begins on page 7 of the opinion and order does the ALJ determine the credibility of the testimony of Faust, Pallo, and Paul.

I submit the ALJ did not have a complete understanding of the facts, and I would vacate the December 16, 2011, opinion and order and the January 26, 2012, order overruling Michael Paul's petition for reconsideration and remand to the ALJ for additional fact-finding and entry of an amended opinion.

In Cook v. Paducah Recapping Service, 694 S.W.2d 684, 689 (Ky. 1985) the Supreme Court stated:

> In the event the decision of the Board was based upon an erroneous understanding of the testimony of Dr. Marrese, we cannot speculate as to what the result might have been had the Board correctly understood the import of his testimony. **The appellant is entitled to**

> **have his claim decided upon the basis of correct findings of basic facts.**

(emphasis added).

I believe the above applies in the case *sub judice*. It is clear the statute and the case law require the ALJ to support his conclusions with **facts drawn from the evidence** in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. Shields v. Pittsburgh and Midway Coal Min. Co., 643 S.W.2d 440, 444 (Ky. App. 1982)(emphasis added). In this case, I believe that was not done and thus remand is necessary.

The ALJ's summary of Faust's testimony is not completely factually accurate. In that summary, the ALJ stated as follows:

> The store in West Liberty was not insured until September 4, 2009. Faust and Paul Howard completed a writer [sic] report or application indicating Paul Howard owned 100% of the business and he was excluded from coverage. Later, Federated Insurance Company notified Paul Howard that Howard was excluded from coverage. The exclusion of Howard was effective as of September 4, 2009.

While Faust testified he and Paul completed the report indicating Paul was the only owner of the business and excluded from coverage, the record does not reflect Federated ever notified Paul or Michael Paul prior to

Michael Paul's injury that Michael Paul was excluded from coverage. Further, the exclusion of Michael Paul was not effective as of September 4, 2009. Faust testified he conducted an annual client review on April 16, 2010, and upon being informed that Michael Paul was an owner he generated the "policy adjustment transaction summary," exhibit four to his deposition, reflecting there was a change in the percentage of ownership to the effect Paul and Michael Paul both owned a fifty percent interest. Faust also inserted the language in the policy adjustment transaction summary indicating that effective September 4, 2009, Michael Paul was excluded from coverage by the workers' compensation policy. *At no time did Federated notify Paul or Michael Paul, that there had been a change in Howard's LLC's policy regarding the percentage of ownership and that Michael Paul was excluded from coverage prior to November 27, 2009, the date Michael Paul was injured.* Rather, what Faust attempted to do on April 16, 2010, was change the policy to reflect Michael Paul was excluded from coverage and then back date the effective date of the change in coverage to September 4, 2009. Faust's testimony reflects he nor Federated sent to Howard's LLC, Paul, or Michael Paul the purported changes as reflected on the policy adjustment transaction summary.

Likewise, the record reflects the policy adjustment transaction summary was never sent by Faust to Howard's LLC, Paul, or Michael Paul. Further, the record does not establish Federated sent a notice of a change in the coverage of the workers' compensation policy to Howard's LLC, Paul, or Michael Paul.

Similarly, the ALJ's summary of Pallo's testimony is not completely factually accurate. Pallo testified after conducting a new business service call which generated a three page "new business service call form," she was unaware of any document being sent to Howard's LLC, Paul, or Michael Paul reflecting Michael Paul was no longer covered by the workers' compensation policy. That form reflected that as a result of her interview, the workers' compensation policy matched the principal's intent to be excluded from coverage.

Pallo testified she transmitted her report to Federated on October 30 stating as follows:

> A: I don't recall if he had any questions, but one of the questions that I ask is regarding the ownership or the LLC members to verify that they – is it their intention to be excluded on the policy since that's the way an LLC operates or did they have – did they wish to be included, because I didn't show that information.

> Q: And do your NBSC notes reflect that you had that conversation with Mr. Paul Howard at some point?
>
> A: Yes.
>
> Q: And what section of the notes are you referring to when you say that?
>
> A: It would have been in the new business service call notes or NBSC and it would have been slightly down the page, where there's a question – actually, it's the second to last question: "Does the work comp policy match the business principal's intent to be included/excluded?" And I answered, "Yes, that Paul and Michael Paul Howard are automatically excluded under the LLC." If there had been anything different, I note that for the underwriter to see and, also, you know, try and verify that the information I have and the information that's – that the – is on the policy is supposed to be correct. That they're supposed to match.

Pallo went on to testify she did not meet with Michael Paul but rather Paul. She acknowledged she did not generate any report indicating there should be a change in the workers' compensation policy reflecting Michael Paul was excluded from coverage. Pallo admitted nothing was sent to Faust, and she did not know the procedure for giving notice to Michael Paul that he was excluded from coverage. *Therefore, the statement of the ALJ that the "exclusion of the Plaintiff Pallo issued by Pallo was executed prior to the date of injury" is factually incorrect.* Pallo filed

her report reflecting both owners of Howard's LLC were to be excluded and did nothing else. She acknowledged nothing was sent by her to Howard's LLC, Paul, or Michael Paul and, more importantly, she did not cause a change to the policy excluding Michael Paul from coverage. The record reflects that on November 17, 2009, the date Michael Paul was injured there had been no change in the policy to the extent that Michael Paul was excluded from coverage by Howard's LLC's workers' compensation policy. Thus, the ALJ's summary of the testimony given by Faust and Pallo is significantly inaccurate. Since there was no exclusion of Michael Paul in Howard's LLC's policy prior to the date of injury, the following finding is erroneous:

> Further, it is noted that while the September 4, 2009 forms prepared by Faust only exclude Mr. Howard the October 26, 2009 exclusion of the Plaintiff by Ms. Pallo was still executed prior to the date of injury herein.

Additionally, the following finding is based on an incorrect understanding of the facts:

> I find pursuant to the above analysis, KRS 342.012(1) and the fact the carrier had, prior to the date of injury, made it clear the Plaintiff was not covered, that no policy of workers' compensation covers the Plaintiff herein.

The above finding is erroneous because prior to the date of injury, Federated had not informed Howard's LLC, Paul, or Michael Paul that Michael Paul was not covered. *In fact, Federated never altered the terms of the original policy in any manner until Faust's attempt on April 16, 2010.* Although Pallo met with Paul before the injury, she did not personally generate or transmit a document which resulted in a change in the policy to the extent Michael Paul was no longer covered under the workers' compensation policy. Clearly, Federated made no such change in the coverage provided by the policy. Additionally, there is nothing in in the record which reflects Howard's LLC, Paul, and/or Michael Paul were ever advised of a change in the workers' compensation coverage prior to Michael Paul's November 27, 2009, work injury. Thus, I believe the ALJ must resolve numerous factual issues in deciding whether Michael Paul was covered by Howard's LLC's workers' compensation policy.

I disagree with the majority's statement on page twenty-seven of the opinion that Paul and Michael Paul could have elected to be covered as employees under the Act by securing the appropriate endorsement through a policy of workers' compensation insurance issued to the LLC but failed to do so. KRS 342.012 reads 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 nonqualified members, if any, required under this chapter.

The statute does not require an endorsement to the policy be issued which lists the member as being covered by the policy. Rather, the endorsement as evidenced by Federated's policy is required in order to show the members who are excluded. I submit that based on Federated's policy, the procedure in this case would be for an endorsement to list both Paul and Michael Paul as excluded *unless* they elected to be covered by the provisions of the workers' compensation policy. Absent such an election by one or both, the endorsement would list one or both individuals as being excluded. Here, on its face, the policy supports Paul's contention that he told Faust that

Michael Paul was to be covered. Thus, Michael Paul was not listed as an excluded individual in the endorsement. Only Paul was listed as an excluded member.

Further, I disagree with the majority's finding that Paul advised Federated's agents numerous times during the application process he was the sole owner of the LLC. Paul's testimony establishes he did not tell Faust that and Faust testified on only one occasion did Paul tell him that he was the only owner of the LLC and that was when he met with Paul and took the relevant information in order to submit the application. Significantly, Faust testified he could not remember whether Paul was present when he completed the policy application. In fact, he testified he was unsure whether he took the information from Paul in person or over the phone. Just as significant is the fact that Paul was not required to sign the application and there was no written application, once it was filled out by Faust, to be given to Paul. Likewise, the majority's statement that this misinformation provided either by deceit, mistake, or misled Federated's agent is blatant fact-finding. As previously noted, the ALJ made no finding as to the credibility of the testimony of Faust, Pallo, and Paul.

I agree with the majority's statement that Paul was designated as the member charged with securing the insurance. However, I disagree with the majorities fact-finding that Paul secured coverage by providing misinformation asserting he was the sole owner of the LLC. In his December 16, 2011, opinion and order and in the order ruling on the petition for reconsideration, the ALJ never made a finding that Paul provided misinformation. The majority's statement that it is on those grounds the ALJ concluded Michael Paul was not protected under Howard's LLC workers' compensation policy in effect at the time of the motor vehicle accident is incorrect. Although the majority states it agrees with that conclusion, the ALJ did not reach that conclusion.

Certainly the testimony of Faust and Paul cannot be reconciled. Faust testified when he filled out the application, Paul told him he was the sole owner and was to be excluded. Faust also testified he had no knowledge that Michael Paul was a member of Howard's LLC. Paul testified he told Faust that Michael Paul was an owner and did not discuss exclusion with Faust when the policy was issued. Paul testified Faust told him when he purchased the workers' compensation policy that Michael Paul was covered. We note Faust's call logs introduced as "Call Activity

Results" reflect only one notation regarding the ownership of Howard's LLC. That notation is dated September 1, 2009, and states "needed to clarify the status of the ownership."

Likewise, Pallo's testimony cannot be reconciled with Paul's testimony. Paul testified he never met with Pallo and therefore could not have confirmed that both he and Michael Paul desired to be excluded from Howard's LLC's workers' compensation policy. The ALJ must determine whom to believe. If he chooses to believe Paul and reject the testimony of Faust and Pallo then Howard's LLC may well have coverage in spite of the fact the ALJ determined Federated was not basing its premium on Michael Paul's payroll records or if it had based the premium on Michael Paul's payroll record that portion of the premium charged based on Michael Paul's earnings was refunded before the injury. In that regard the ALJ determined as follows:

> There can be no reasonable argument that the insurance provider was attempting to defraud the Plaintiff. This is especially true in that the insurance carrier did not charge, or at the least did not keep, any premiums paid for coverage for the Plaintiff. All of which was done prior to the date of injury herein.

Although I acknowledge the testimony of Faust and Pallo and the audit report dated October 15, 2010, covering the policy period in question, filed in the record, supports a

finding the premium for the workers' compensation policy was not based on Michael Paul's earnings, there is no basis for a finding that any premium charged based on Michael Paul's earnings was refunded at any time.

While I agree with the majority's statement that an affirmative act is required by the statute in order for a member of an LLC to be covered under the worker's compensation policy, I disagree with the majority's finding of facts that at the time the policy was in effect Paul advised Federated he was the sole owner of the LLC. A review of the ALJ's opinion and order reveals he made no such finding and this Board has no ability to make that finding.

The majority has no authority to find that it was later discovered Michael Paul was a member of the LLC and therefore as an owner, he was excluded by statute as a covered employee. In making that statement the majority has impermissibly made a finding that they do not believe Paul when he stated he told Faust at the very beginning that he wanted Michael Paul to be covered and Faust told him when he purchased the policy for the LLC that Michael Paul was covered. As previously noted, Faust's call log established he was confused as to the ownership of the LLC. I submit it is significant that Faust was unaware that a

member of the LLC had to affirmatively elect to be covered by the workers' compensation policy. While I agree that Michael Paul or his father, Paul, acting on his behalf, had an affirmative responsibility to seek election and obtain coverage under the workers' compensation policy, I disagree with the majority's finding that Michael Paul or Paul, acting on his behalf, failed to do so. That is a finding of fact that is left solely to the ALJ and the ALJ made no such finding.

Further, should the ALJ choose to believe Paul's testimony, I submit the statute does not prohibit Paul from electing, on Michael Paul's behalf, for him to be covered by Howard's LLC's policy. The language of KRS 342.012(1) does not prohibit Paul from electing to provide coverage for Michael Paul under Howard's LLC's workers' compensation policy. As one of the owners, Paul had the authority to elect to provide coverage for Michael Paul under Howard's LLC's workers' compensation policy. Even the majority concedes that Paul, acting on Michael Paul's behalf, could have elected to bring Michael Paul under the provisions of KRS 342.012 and provide workers' compensation coverage for Michael Paul.

Accordingly, I would vacate the December 16, 2011, opinion and order and the January 26, 2012, order

ruling on the petition for reconsideration and remand the matter to the ALJ for additional fact-finding as set forth in this dissent.

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