OPINION ENTERED: March 19, 2012

CLAIM NO. 200501707

TAYLOR CONTRACTING/TAYLOR READY MIX, LLC PETITIONER

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

CHRISTOPHER WATTS
KENTUCKY EMPLOYERS' MUTUAL INSURANCE
UNINSURED EMPLOYERS' FUND
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Taylor Contracting/Taylor Ready Mix, LLC ("Taylor") appeals the August 16, 2011, "Opinion and Order on Remand" by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") determining "KEMI shall have no financial responsibility for the obligations owed plaintiff by Taylor Contracting and that KEMI is hereby dismissed from this

action." Taylor and the Uninsured Employers' Fund ("UEF") filed petitions for reconsideration which were denied by order dated October 11, 2011. Taylor also appeals the October 11, 2011, order ruling on its petition for reconsideration.

Only those portions of the record pertinent to the narrow issue on appeal will be discussed herein.

Christopher Watts ("Watts") was injured while working for Taylor on September 19, 2005. Taylor filed a motion to bifurcate the claim on January 19, 2006, requesting Hon. Andrew F. Manno, Administrative Law Judge ("ALJ Manno") to determine "whether or not KEMI [sic] had coverage in this case." As a means of providing a factual summary, a portion of this Board's opinion entered December 12, 2006, is set out below:

> This claim was bifurcated on the issue of whether Taylor Contracting had workers' compensation coverage through KEMI on September 19, 2005, the date Watts claimed injury. Evidence in the record on the issue consists of the depositions of Jack Massie, an insurance agent who procured the coverage; Steve Marks, an underwriting supervisor with KEMI; Robert Palmer, the underwriter who wrote the policy in question; and, deposition and hearing testimony of Jeanette Taylor, the sole owner of Taylor Contracting.

Jack Massie ("Massie"), an insurance agent with The Putnam Agency ("Putnam") in Huntington, West Virginia, testified that Putnam is an independent agency. He secured coverage for Taylor Contracting with KEMI for the period from November 1, 2004 through November 1, 2005. Massie testified Taylor Contracting paid either 20% or 25% down and was to make eight or nine installment payments. Massie stated KEMI cancelled the policy in August 2005, but his agency never received a notice of the cancellation from KEMI. He was unaware of the cancellation until sometime after the September 19, 2005 claim had been made. According to Massie, if he had received a cancellation notice his office would have determined the reason for the cancellation and then contacted Taylor Contracting in order to have the policy reinstated or obtain other coverage.

According to Massie, after the cancellation in August 2005, two more premium payment notices were sent to Taylor Contracting. Neither of these notices indicated the policy had been cancelled. The September notice acknowledged the August payment had been made, so Massie believed everything was alright. Massie testified he had received previous intent to cancel notices from KEMI prior to August 2005. He stated the policy was cancelled for non-payment on August 23, 2005 and Taylor Contracting made a late payment on August 25, 2005. Massie felt the policy should have been reinstated on August 25, 2005. Massie testified all required payments were made to KEMI and no payments were refunded.

Robert Palmer ("Palmer"), currently a field representative for

KEMI, testified he was the underwriter who issued the policy to Taylor Contracting. The policy period was for November 1, 2004 through November 1, 2005. He stated he knew Taylor Contracting had been slow in paying installments almost every month. Palmer explained the procedure by which a policy is cancelled for non-payment. If payment is not received within thirty days of the date it is due, a notice of intent to cancel is sent to the policy holder and the insurance agent. The notice of intent gives eighteen days to pay, and if the premium is not paid by the intent to cancel date the policy is cancelled. In other words the policy holder has forty-eight days to pay from the date payment is due. The cancellation notices are generated by computer removing any human factor. Here, the notice of intent to cancel letter gave Taylor Contracting until August 23, 2005 to remit the premium. Because the money was not paid by that date, the policy was cancelled. A late payment was made on August 25, 2005. Statements received in September and October were also paid by Taylor Contracting.

Palmer explained the total amount of the premium was $23,988.11. Twenty-five percent was paid initially and another nine payments were due on a monthly basis. The policy itself did not provide a due date for payment. Palmer further explained the premiums are based on payroll and class codes. Because payroll can fluctuate, the exact premium is not known until the end of the policy period. Therefore, an audit is usually conducted and the policy holder may owe a greater premium or may be entitled to a refund. In this case, an end of policy audit was

never conducted because Taylor Contracting refused.

Palmer testified concerning the payments received by KEMI after cancellation. He testified it was KEMI's policy that money paid was not returned to the policy holder until the final audit was completed. It was not until that time it could be determined whether a policy holder had over or under paid. Palmer explained statements may still be generated after cancellation because the system recognizes money is still owed. In this case, the statement was sent in September because the August premium was due. The October statement was then generated because there was activity on the account the previous month.

Steve Marks ("Marks"), the underwriting supervisor with KEMI, was deposed. He described the application process. Marks indicated Putnam submitted an on-line application on behalf of Taylor Contracting on September 27, 2004. Marks described the information booklet sent to the insured, in which Part 3 discusses cancellation. He stated cancellation notices are sent by KEMI to both the insured and the agent, and KEMI keeps a log of mailings. Notices of cancellation relative to late payment are generated the day after the premium due date. The insured then has thirty days after the statements are mailed to make a payment. As explained by Palmer, if payment is then not made, the intent of cancellation notice is sent giving the policy holder eighteen days to make the payment.

Taylor Contracting made late installment payments until August 2005,

when it failed to make the installment prior to the cancellation date of August 23, 2005. Marks stated notices were sent to Taylor Contracting and Putnam informing them the policy would be cancelled on August 23, 2005 for non-payment of the premium in the amount of $1,998.21. The cancellation notice was then sent when the payment was not received by August 23, 2005. The payment was received on August 25, 2005, two days after the policy was cancelled for non-payment.

Marks testified the statement dated September 2, 2005, was generated for the outstanding balance remaining on the policy. He indicated the payment of $1,998 was received and applied to the outstanding balance for July 2005. The payment made in October 2005 was applied to the August 2005 invoice.

Marks testified it is KEMI's policy that when an insurance policy is cancelled for non-payment of premium, the contract must be rewritten. The policy is not simply reinstated if a late payment is received after a cancellation following the grace period. Marks testified agents were informed of KEMI's practice by a letter in 2003.

Marks also described the audit process and indicated an audit was attempted on Taylor Contracting. The audit was not conducted because Taylor Contracting refused. Marks testified it was not unusual for KEMI to accept payment on outstanding bills after cancellation.

Jeanette Taylor ("Taylor"), owner of Taylor Contracting, testified by deposition and at the hearing. She

testified her business did not require Kentucky workers' compensation coverage since it was based primarily in West Virginia. However, after she took over a warehouse in Kentucky in 2005, she realized she needed Kentucky coverage. Taylor explained that Steel of West Virginia had leased the warehouse and wanted her to provide laborers to load and unload steel. She stated she contacted Massie at Putnam because he already handled her truck coverage. Taylor explained Massie came to her office and wrote the policy which was to provide coverage from November 2004 to November 2005. Taylor testified she made the first couple of payments by check and then went on-line at KEMI.com to make future payments. She made payments for nine months beginning in January 2005. Taylor indicated she had received monthly statements from KEMI but did not recall receiving any cancellation notices. She explained that Massie had faxed notices of intent to cancel to her and she then made the payment and was aware it was late. She testified she was never informed the policy had, in fact, been cancelled. She continued to receive statements and pay premiums.

Taylor explained that when she filed a claim in September 2005, she was made aware that she did not have coverage with KEMI. She first talked to Palmer and informed him she had not received notice of cancellation.

Taylor testified the policy had no specific dates when payments were due. She knew the payments were due when she received a statement. She received a statement on October 3, 2005, which showed a current balance of zero. Taylor stated she received a letter concerning an audit on November 9,

> 2005, but decided not to submit to the audit.
>
> Concerning the payment made on-line on August 25, 2005, Taylor testified she had been informed that if there were [sic] no coverage, a “pop up” box informing her of the cancellation would appear and on-line payment would not be accepted. She testified there was no “pop up” box and she thought she had coverage.
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> The premium payments made to KEMI by Taylor Contracting are as follows:

Due Date	Amount	Date Payment Received
11-01-04	$5,997.03	11-01-04
01-01-05	$2,061.00	12-28-04
02-02-05	$2,061.00	02-04-05
03-04-05	$2,061.00	02-04-05
04-01-05	$1,998.21	03-28-05
05-04-06	$1,998.21	05-03-05
06-01-05	$1,998.21	06-07-06
07-02-05	$1,998.21	07-18-05
08-04-05	$1,998.21	08-25-05
09-02-05	$1,998.21	09-22-05

In the June 8, 2006, "Opinion on Bifurcated Issue," ALJ Manno dismissed KEMI as a party to the claim "since the Defendant-Employer did not have Kentucky workers' compensation insurance coverage as of September 19, 2005." ALJ Manno stated, in part, as follows:

> After a careful review of the evidence, this ALJ finds that Defendant Taylor Contracting/Taylor Ready Mix LLC did not have workers' compensation insurance coverage with KEMI on September 19, 2005. The evidence reveals that the Defendant-Employer was consistently late on its payments and

> had received several intent to cancel notices prior to August 2005. As of the July 5, 2002 invoice date, the insured owed two months worth of premiums. As of the August 2, 2005 invoice, the insured owed two months premium. A notice of intent to cancel the policy was sent on August 5, 2005. Defendant failed to pay the required amount by August 23, 2005 and the policy was cancelled on August 23, 2005. This ALJ agrees with the explanations provided by Mr. Marks and Mr. Palmer. The evidence indicates KEMI mailed cancellation notices and confirmation to the regular address of both the Defendant-Employer and the Putnam Agency. KEMI had no obligation to reinstate the policy once the past-due amounts were paid. As such, there was no coverage in force as of September 19, 2005. Therefore, as no coverage was in effect with KEMI as of September 19, 2005, KEMI will be dismissed as a party to this claim.
>
> This ALJ has no authority to decide the issue of whether KEMI had a duty to defend this claim on behalf of the Defendant-Employer. This question deals with terms of the contractual relationship between KEMI and the Defendant-Employer and does not arise under Chapter 342.

Taylor filed two virtually identical pleadings entitled "Petition for Reconsideration and Motion for Specific Findings of Facts," dated June 12, 2006, and June 15, 2006, which were overruled by order dated July 7, 2006.

Taylor appealed to this Board, making the following arguments:

> I. Taylor fully performed its obligations under the contract and, therefore, is entitled to coverage.
>
> II. The rules of construction of contracts compels a finding of coverage.
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> III. KEMI was estopped from denying coverage.
>
> IV. Taylor Contracting never received notice of intent to cancel or cancellation of policy.

By opinion entered December 12, 2006, this Board affirmed the June 8, 2006, opinion of ALJ Manno stating, in part, as follows:

> On appeal, Taylor Contracting first argues it performed all of the obligations under the contract and paid all of the premiums. Taylor Contracting contends the terms of payment are not part of the insurance contract. In support of this argument, it points to the testimony of Steve Marks, who specifically testified that the terms of payment are not part of the contract itself. Taylor Contracting posits that since there were no contractual terms specifically providing for payment of premiums, it could not have breeched [sic] the contract and KEMI could not cancel. Taylor Contracting argues the rules of construction of contracts compel a finding of coverage and submits that when an insurance policy is susceptible to two interpretations, the insured is entitled to the most favorable interpretation. Taylor Contracting contends that since it paid all the premiums, the contract of insurance "should have been interpreted in a

manner most favorable to the extension of coverage." Taylor Contracting argues the doctrine of reasonable expectations applies, citing Brown v. Indiana Insurance Co., 184 S.W.3d 528 (Ky. 2005), for the proposition that "the insured is entitled to all coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain and clear manifestation of the company's intent to exclude coverage will defeat that expectation." Taylor Contracting believes that if KEMI wanted a specific due date for payments or a time certain for cancellation, it had the duty to put those terms in the contract. Taylor Contracting argues KEMI was estopped from denying coverage since it accepted, and never returned, the premiums in August and September. Taylor Contracting contends an insurer's acceptance of a check for overdue premiums and the retention of the money estops an insurer from denying coverage. Taylor Contracting points out that even though KEMI contended additional premiums might be due, it admitted Taylor Contracting could have owed less than it had already paid. Thus, Taylor Contracting submits its policy might have been paid in full by July and it would not have owed the August premium. Finally, Taylor Contracting contends it never received notice of intent to cancel or the notice of cancellation of the policy.

The thrust of Taylor Contracting's arguments is that its insurance contract did not specifically set out the dates of coverage, all payments pursuant to the agreement were made, the contract of insurance is susceptible to two interpretations, and

Taylor Contracting reasonably expected coverage in September 2005.

The doctrine of reasonable expectations is but a corollary of the rule that ambiguities are constructed against the insurer. Woodson v. Manhattan Life Ins. Co. of New York, 743 S.W.2d 835 (Ky. 1987). The doctrine is an aid in determining whether there is an ambiguity in the policy terms, and if an ambiguity is found to exist, what coverage could reasonably have been expected to have been afforded. Simon v. Continental Ins. Co., 724 S.W.2d 210 (Ky. 1986). In both Simon and Woodson, the courts determined the policies of insurance contained ambiguities. Here, we detect no ambiguity and, for that reason, the doctrine of reasonable expectations has no application. The contract of insurance between KEMI and Taylor Contracting specifically provides in Part 5(B) Premuims [sic]:

> 2. We may cancel this policy. We must mail or deliver to you, not less than 14 days in advance, written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to provide notice. If we cancel, final premium will be calculated pro-rata based on the time the policy was in force. Final premium will not be less than the pro-rata share of the minimum premium.
>
> 3. The policy period will end on the day and hour

> stated in the cancellation notice.
>
> 4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance in this policy are changed by this statement to comply with the law.

Though it is true the policy does not require a premium payment by a specific date, KEMI retained the unambiguous right to cancel for non-payment of premiums. The policy requires written notice of cancellation and further provides the policy period will end on the specific date provided in the notice of cancellation. Taylor Contracting's own evidence revealed they [sic] knew the policy contained no specific dates for making payments, but did know payments were due when the statement was received. The ALJ rejected the evidence that Taylor Contracting and Putnam were not notified of the cancellation. KEMI's actions in notifying the Executive Director of the Office of Workers' Claims that Taylor Contracting's coverage had been cancelled were timely. Contrary to Taylor Contracting's arguments, its failure to remit the premium before August 23, 2005 constituted a breech, justifying cancellation according to the unambiguous terms of the policy.

We agree with the ALJ that findings are not required addressing Taylor Contracting's argument that KEMI was equitably estopped from denying coverage. The ALJ determined this issue was not preserved for his determination. The benefit review conference order and memorandum listed

the contested issue as whether Taylor Contracting had workers' compensation coverage through KEMI on September 19, 2005. 803 KAR 25:010 Section 13(14) provides that "[o]nly contested issues shall be the subject of further proceedings." Thus, it is difficult to disagree with the ALJ and KEMI that the issue of estoppel was not preserved as a contested issue. While the issue of equitable estoppel is arguably a sub-issue of the larger contested issue of whether KEMI was required to afford coverage, we are not prepared to say the ALJ erred as a matter of law. What an ALJ can do and what an ALJ must do are two different things. Here, the ALJ's decision to refuse to address an issue he believed should have been specifically pled is not wholly unreasonable.

That being said, we believe, based on the facts as found by the ALJ, equitable estoppel is inapplicable as a matter of law. In Akers v. Pike County Board of Education, 171 S.W.3d 740 (Ky. 2005), the Kentucky Supreme Court stated:

> Under the doctrine of equitable estoppel, certain conduct by a party is viewed as being so offensive that it precludes the party from later asserting a claim or defense that would otherwise be meritorious. (Citation omitted.) In other words, it serves to offset the benefit that the offending party would otherwise derive from the conduct. (Citation omitted.) An equitable estoppel is permitted when the estopped party is aware of material facts that are

> unknown to the other party and then engages in conduct, such as acts, language or silence, amounting to a representation or concealment of the material facts. The conduct is performed with the intention or expectation that the other party will rely upon it, and the other party does so to its detriment. (Citation omitted.)

Here, the ALJ concluded KEMI complied with all the pertinent regulations notifying the Office of Workers' Claims of the cancellation of its policy of insurance with Taylor Contracting. Further, Taylor Contracting admitted many of its payments were late and not made until a notice of intent to cancel was received. The ALJ determined the notice of intent to cancel and the notice of cancellation were mailed to Taylor Contracting and Putnam, informing both that cancellation would occur on August 23, 2005. Putnam knew that if the policy was cancelled, the tendering of a premium following cancellation would not reinstate the policy. Taylor Contracting refused to comply with KEMI's request for an audit, which of course would have revealed what, if anything, Taylor Contracting owed. We find nothing in the record that would have triggered application of the doctrine of equitable estoppel other than Jeanette Taylor's own testimony and the testimony of Massie, Taylor Contracting's insurance agent, that they did not know the policy had been cancelled – evidence rejected by the ALJ.

In Taylor Contracting/Taylor Ready Mix, LLC v. Watts, No. 2007-CA-000026-WC, 2007 WL 1893722 (Ky. App. 2007), rendered June 29, 2007, Designated Not To Be Published, the Court of Appeals of Kentucky reversed this Board in part and remanded the case for additional factual findings, holding as follows:

> Insurance polices [sic] should be construed according to the parties' mutual understanding at the time they entered into the contract. *Nationwide Mutual Insurance Co. v. Nolan,* 10 S.W.3d 129, 131-32 (Ky.1999). But since the policy is silent as to when premium payments are due, we must look beyond the contract to determine the parties' understanding. *See Frear v. P. T.A. Industries, Inc.,* 103 S.W.3d 99, 106 (Ky.2003). Taylor Contracting is a sophisticated business entity, so its understanding of its payment obligations could reasonably include KEMI's regular billing practices. On the other hand, KEMI's invoices set earlier due dates than were indicated on the application. Furthermore, the parties agree that, while premium payments were due monthly, the premium installments did not cover specific monthly periods. Rather, the policy period covered the full year and the total premium was divided into installment payments. Finally, while Taylor Contracting did not consistently make its payments within specified 30-day periods, it did make all required payments during the first nine calendar months of 2005. Thus, Taylor Contracting reasonably could have expected that it complied with its contractual obligations.

> Because the ALJ determined as a matter of law that KEMI properly canceled the policy, he did not address the factual issue of whether it was contractually entitled to do so. Therefore, we conclude that this matter must be remanded to the ALJ for additional factual findings. On remand, the ALJ must determine whether KEMI properly exercised its contractual right to cancel the policy. This factual determination includes the parties' reasonable understanding of when premium payments were due. But since Taylor Contracting did not properly preserve the issue, the ALJ need not address the estoppel argument. If the ALJ determines that KEMI did not properly invoke its right to cancel the policy, then the ALJ must find that Taylor Contracting's coverage was still in effect as of September 19, 2005. But if the ALJ determines that Taylor Contracting failed to make timely payments as required by the parties' mutual understanding of their contractual obligations, then KEMI properly canceled the policy and the ALJ may reinstate his prior finding that coverage had lapsed prior to the injury date.

Slip Op. at 5.

By order dated August 22, 2007, this Board remanded the case to ALJ Manno "for additional findings of fact and entry of an ORDER in conformity with the opinion of the Court of Appeals."

By order dated October 17, 2007, ALJ Manno set forth the following additional findings:

The next issue to address is whether KEMI properly exercised a contractual right to cancel the policy. The Defendant-Employer argues it had paid the full amount of premium due as of September 22, 2005. It argues there were no terms in the insurance contract as to when payments were due. The Defendant-Employer concludes KEMI had no right to cancel the contract because it had paid all premiums prior to the end of the coverage period.

After careful consideration of the evidence, the ALJ finds that KEMI properly exercised its contractual right to cancel Defendant's policy. Part V (B) of the policy clearly allows KEMI to cancel for non-payment of premiums. The defendant was consistently late making payments to KEMI. While it is true that the Defendant eventually made all payments within the policy periods, payments were clearly consistently late. As of August 2, 2005, The [sic] Defendant owed $1,998.21 in past due premium [sic] plus a $1,998.21 installment. Defendant was sent a notice of cancellation on August 5, 2005 which indicated the policy would be cancelled for nonpayment on August 23, 2005 if $1,998,21 was not paid. Defendant failed to pay the necessary amount prior to August 23, 2005. This ALJ finds that at that point, there was no doubt that Defendant was aware that there was [sic] past-due premiums that had not been paid and that KEMI would cancel the policy if payment was not remitted. This ALJ finds that the Defendant was aware of the necessity to make payment to avoid cancellation. The payments stubs sent by KEMI controlled the payment schedule and included a due date. This ALJ finds that Defendant was aware of the due

> dates yet frequently made payments after the posted due dates. This ALJ finds that the Defendant failed to make timely payment or [sic] past-due premiums as required. Ms. Taylor testified she knew payments were due when she received the statements. Therefore, this ALJ finds that both the Defendant-Employer and KEMI understood that the statements controlled the dates each payment was due. Defendant failed to pay past due premium amounts prior to the cancellation date. Therefore, this ALJ finds that KEMI properly cancelled Defendant's policy.

Taylor filed a petition for reconsideration which was overruled by order dated November 21, 2007. Taylor appealed to this Board, asserting "KEMI did not have a legal basis to cancel the policy and, therefore, coverage should be available." This Board, by opinion entered February 22, 2008, and re-entered April 18, 2008, reversed and remanded the case to ALJ Manno holding, in part, as follows:

> The ALJ, in his order on remand, determined that prior to August 23, 2005, Taylor was aware there were past-due premiums that had not been paid and KEMI would cancel the policy if payment was not remitted. The ALJ found that Taylor was aware of the necessity to make payment to avoid cancellation and "the payment stubs sent by KEMI controlled the payment schedule and included a due date." The ALJ further found "Ms. Taylor testified she knew the payments were due when she received the statements." Thus, the ALJ concluded Taylor and KEMI understood

the statements controlled the dates each payment was due and because Taylor failed to pay past due premium amounts prior to the cancellation date KEMI properly cancelled Taylor's policy.

Since the issue before us relates to the construction and interpretation of an insurance policy and is therefore a question of law, on appeal the decision of the ALJ is subject to de novo review. KMR v. Foremost Insurance Group, 171 S.W. 3d 751 (Ky.App. 2005); Edwards v. Carlisle, 179 S.W. 3d 257 (Ky.App. 2004); 3D Enterprises v. Metro Sewer Systems, 174 S.W. 3d 440 (Ky.2005); MGA Insurance Co. Inc. v. Glass, 131 S.W. 3d 775 (Ky.App. 2004). As the court said in 3D Enterprises v. Metro Sewer Systems, supra:

> "Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to de novo review."
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> Id at p. 448.

In interpreting a contract there are two cardinal principles in performing that task: 1) the contract should be literally construed and all doubts resolved in favor of the insured; and 2) exceptions and exclusions should be strictly construed to make insurance effective. Likewise, we are required to construe clear and unambiguous terms in a contract according to their "plain and ordinary meaning." KMR v. Foremost Insurance Group, supra and MGA Ins. Co. Inc. v. Glass, supra. The primary objective is to effectuate the intention of the parties. Therefore, when no ambiguity

exists in the contract, in our interpretation of the contract, we are required "only to look as far as the four corners of the documents in determining the parties' intentions." 3D Enterprises v. Metro Sewer District, supra.

It is a well settled principle that when interpreting insurance policies "the contract should be literally construed and any doubt as to coverage should be resolved in favor of the insured." MGA Insurance Company Inc. v. Glass, supra. We must also give effect to what the parties expressly agreed upon rather than place a strained interpretation which would be contrary to the intent of the parties. Nationwide Mutual Insurance Company v. Noland, supra.

We do not believe resolution of this issue is as facile as made out by the ALJ in his Order on Remand. The ALJ did not consider the parties understanding at the time of the contract but rather focused on events leading up to the cancellation. As this Board and the ALJ have been instructed by the Court of Appeals, the due dates on the monthly invoices are not controlling to determine timeliness. Further, the language on the invoices/payment stubs, absent an agreement between the parties, does not control the issue of timeliness. The Court instructed that "insurance policies should be construed according to the parties' mutual understanding at the time they entered into the contract." (emphasis added) In this case because the policy was silent as to when premiums were due, the fact finder was instructed to "look beyond the contract to determine the parties' understanding." The Court further

instructed that the important facts on the issue were:

> Taylor Contracting is a sophisticated business entity, so its understanding of its payment obligations could reasonably include KEMI's regular billing practices. On the other hand, KEMI's invoices set earlier due dates than were indicated on the application. Furthermore, the parties agree that, while premium payments were due monthly, the premium installments did not cover specific monthly periods. Rather, the policy period covered the full year and the total premium was divided into installment payments. Finally, while Taylor Contracting did not consistently make its payments within specified 30-day periods, it did make all required payments during the first nine calendar months of 2005. Thus, Taylor Contracting reasonably could have expected that it complied with its contractual obligations.

We conclude the ALJ erred in determining KEMI properly cancelled its policy denying coverage for Watts' work injury occurring on September 19, 2005. First and foremost the policy was silent as to the due date of the premiums and KEMI's invoices set earlier due dates than were indicated on the application. The premium installments did not cover specific monthly periods. While the policy clearly stated KEMI could cancel for

nonpayment of premiums, in this case Taylor paid its entire premium within the coverage period and the time set by the contract, for payment of the premium. This entire issue easily could have been avoided had the due date for the premium been clearly set out in the policy. It was not. Under the reasonable expectations doctrine, ambiguous terms are to be construed against KEMI, the drafter and in favor of the insured, Taylor's, reasonable expectations. Woodson v. Manhattan Life Ins. Co. of New York, 743 S. W. 2d 835, 839 (Ky. 1987). Exclusions shall be strictly construed to make insurance effective. Transport Insurance Co. v. Ford, 886 S.W.2d 901, 904 (Ky. App. 1994). Where cancellation is authorized by the contract, there can be a cancellation only upon strict compliance with the provisions of the contract. Goodin v. General Accident Fire & Life Assurance Corp., 450 S.W.2d 252, 255 (Ky. 1970).

As the Court of Appeals pointed out, although the application provided that subsequent installment payments were due on the 2nd of each month beginning in January of 2005, there was nothing contained in the policy or any attachments thereto, which set a specific schedule for the payment of premiums. Further, when KEMI mailed the invoices to Taylor, the invoices did not set a due date on the 2nd of the month. As the Court of Appeals further pointed out, it appeared KEMI generally required payment within 25 days from the date shown on the invoice. This too, was not a requirement set forth in the contract. Therefore, there was nothing in the contract of insurance specifically designating when each of the installments were due nor was there anything in writing delineating when a

payment became delinquent. KEMI and the ALJ agreed Taylor testified she knew the payments were due when she received the statement although the policy did not have a specific date as to when payments were due. That may be true but the problem with that testimony is that the payments made by Taylor, although not admissible to show estoppel, are admissible to show there was not a reasonable agreement or understanding between the parties as to when premium installment payments were to be paid. This is borne out in Taylor's testimony wherein she acknowledged she received a statement on October 3, 2005, which showed her current balance to be zero. Thus, Taylor could only have interpreted this as meaning she had complied with the policy and timely made all the installment payments by the deadline set forth in the policy of insurance. To go a step further, this also meant Taylor did not believe there was a set time in which she had to make each of the installment payments. Accordingly, we conclude, KEMI did not establish there was an agreement between Taylor and KEMI as to when each premium payment was due. What is clear is that KEMI believed Taylor had to make installment payments by a certain date and Taylor was never sure of that fact. As the Court pointed out in Frear v. P.T.A. Industries, Inc., 103 S.W. 3d 99, 106 (Ky. 2003):

> . . . "in the absence of ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and

without resort to extrinsic evidence.

In the case *sub judice*, the extrinsic evidence showed no meeting of the minds between Taylor and KEMI. Thus, the controlling fact is Taylor made all of her premium payments by the deadline as set forth in the contract of insurance. Further, in the case cited by the Court of Appeals, Goodin v. General Accident Fire & Life Assurance Corp. LTD, 450 S.W. 2d 252 (Ky. 1970) the trial judge made "factual findings which clearly demonstrate that the insurer strictly complied with the contract." Id p 257. Certainly, the facts in Goodin amply support the trial judge's conclusion. In this case, we do not believe there are any facts to justify the ALJ's finding that KEMI properly cancelled Taylor's policy. There is no dispute that while Taylor did not consistently make its payment, it made all the required payments, as required by the contract, during the first 9 calendar months of 2005.

All Taylor was required to do, under the contract of insurance, was pay all the installments during the first 9 calendar months of 2005 and nothing more. KEMI cannot unilaterally add terms to the policy without Taylor's consent. Taylor's testimony does not establish that there was a firm and set agreement\understanding between the parties outside what is written in the contract of insurance. Our conclusion is supported by the fact KEMI accepted the additional payments made after it attempted to cancel the policy. Therefore, we believe KEMI did not have the right and could not cancel the policy of insurance based on any terms contained within the contract of

> insurance, the only agreement reached between the parties.
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> Given the facts of this case, applicable law and the Court of Appeals directive, we believe that ALJ erred in determining Taylor did not have coverage because KEMI properly cancelled its policy. The policy drafted by KEMI was silent as to a due date for premium payment and Taylor complied with the contract as written. As set out above the law requires the contract be given effect.
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> Accordingly the decision of the Administrative Law Judge is **REVERSED** and this matter is **REMANDED** further proceedings in accordance with the opinion expressed herein.

KEMI appealed to the Court of Appeals. In Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor Ready Mix, LLC, Nos. 2008-CA-000647-WC and 2008-CA-00059-WC, 2009 WL 3806146 (Ky. App. 2009), rendered November 13, 2009, Designated Not To Be Published, the Court of Appeals held as follows:

> Because the ALJ failed to follow the directive of our 2007 opinion to make findings regarding the parties' understanding of when premium payments were due under the contract at the time of execution, we affirm the Board's decision reversing and remanding the matter to the ALJ for additional findings consistent with our original instructions. In doing so, we note that the Board, in its opinion, implies that the ALJ must find KEMI could not have properly canceled coverage. To the

> extent this is what the Board intends, we disagree. In our original opinion, we held the ALJ could determine, after making proper findings of fact, that KEMI had reason to, and did, properly cancel coverage. Therefore, in remanding this matter, we again instruct the ALJ that he or she may determine coverage was properly canceled; however, that determination must be based on what the parties understood at the time the contract was entered. We agree with the Board's implication, if not explicit statement, that the ALT [sic] may be unable to make such a determination based upon the record. However, that determination is the ALJ's to make, *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky.1985), and any mandate by the Board to the contrary is inconsistent with our 2007 opinion which neither party appealed.
>
> Therefore, the Board's opinion, entered on April 18, 2008, is affirmed to the extent that this matter is again remanded to the ALJ for additional findings of fact consistent with our 2007 opinion.

Slip Op. at 2.

In Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor Ready Mix, LLC, No. 2009-SC-000808-WC, 2010 WL 4156763 (Ky. 2010), rendered October 21, 2010, Designated Not To Be Published, the Supreme Court affirmed the Court of Appeals, holding as follows:

> The ALJ determined on remand that the payment stubs sent by KEMI controlled the payment schedule and included the

> due date, noting that Taylor knew the due dates but consistently made late payments and also failed to make timely payment of past-due premiums. The ALJ noted more specifically that Taylor owed both a past-due premium of $1,998.21 as well as a new installment of $1,998.21 on August 2, 2005. Yet, despite KEMI's August 5, 2005 notice indicating that the policy would be canceled for non-payment if $1,998.21 was not paid by August 23, 2005, Taylor failed to do so. Finding that Taylor knew payments were due when it received KEMI's statements, the ALJ concluded that the parties understood the statements to control the due date for each payment; that Taylor failed to pay past-due premiums before the cancellation date; and that KEMI properly canceled Taylor's policy.
>
> The Court of Appeals did not err when it determined that the ALJ failed to comply with its directions of June 29, 2007. The ALJ's analysis focused not on the parties' mutual understanding when entering into the contract, as directed, but on their subsequent course of dealing. We conclude, therefore, that the ALJ failed to comply with the previous order of remand and that this matter must be remanded again for the ALJ to do so.
>
> The decision of the Court of Appeals is affirmed.

Slip Op. at 2-3.

By order dated December 2, 2010, this Board remanded the case to the ALJ "for further determination in accordance with the provisions of the Supreme Court and this Board's decisions." By order dated February 25, 2011,

ALJ Hays, to whom the claim was assigned, gave each party thirty (30) days in which to submit written briefs. In the opinion and order dated August 16, 2011, ALJ Hays ruled in favor of KEMI finding as follows:

> The issue before the ALJ is whether KEMI properly exercised its contractual right to cancel the insurance policy in question, based on the parties' reasonable understanding and expectations of when premium payments were due under the contract. This finding is to be based upon the reasonable understanding between the parties at the time the contract was entered into. It is acknowledged by all that the insurance policy contract does not contain within its four corners a schedule of the dates on which premium payments were due. Thus, the ALJ has been directed to look outside the four corners of the contract and to consider extrinsic evidence as to the understanding and intention of the parties as to when the premiums were due.
>
> Based on the testimony of Steve Marks, an underwriting supervisor at Kentucky Employers Mutual Insurance (KEMI), a "Quik App" was submitted on behalf of Taylor Contracting prior to the issuance of coverage. This Quik App was submitted as an application for coverage to KEMI. Mr. Marks verified the Quik App was the application submitted for Taylor Contracting by Putnam Agency on October 27, 2004 and that it would have contained a premium installment plan such as the one set forth on page 10 above. Mr. Marks further testified that as soon as the [sic] 25% of the total premium was paid, the insurance policy would be

issued and would go into effect. This is what occurred in this case. Ms. Jeanette Taylor testified that she had to make an initial down payment of $5,997.03 in November of 2004 and that the policy period was from November of 2004 to November of 2005. The ALJ so finds.

Jeanette Taylor, the owner of Taylor Contracting, testified she was in charge of all financial aspects of the company. The Putnam Agency brought the policy documents to her office and she signed them. She acknowledged that she understood a down payment of 25% of the total premium had to be paid to place the contract in effect (which was done on or about November 1, 2004, in the sum of $5,997.03), after which monthly installments were due, beginning in January of 2005 and extending for a period of nine (9) installments. Ms. Taylor knew the amount of each payment due from the invoices which she received from KEMI. The dates on which the installment payments were due were set forth in the Application. Thus, based on the testimony of Ms. Taylor and of Steve Marks, the ALJ finds that the due dates were listed in the payment plan set forth in the Quick [sic] App (Application); Ms. Taylor knew from the beginning that she had to pay 25% of the total premium at the beginning, after which the remaining premium would be paid in nine (9) monthly installments which were essentially equal; the due dates for each of the monthly payments was set forth on the monthly invoice statements mailed to Taylor Contracting by KEMI; and Ms. Taylor knew the premium due dates from the invoice statements she received. Thus, the ALJ concludes that Taylor Contracting (through its owner, Ms.

Taylor) was fully aware of the terms under which and the dates by which the premium payments were due. The invoices were mailed to Taylor Contracting each month and the invoice clearly contained the date by which the payment was due. If and when Taylor Contracting failed to timely pay a premium installment, a notice of cancellation was mailed the day following the due date. According to the testimony of Mr. Marks, the insurance policy issued to Taylor Contracting contained the following language in Part Five:

> "2. We may cancel this policy. We must mail or deliver to you, not less than 14 days in advance, written notice stating when the cancellation is to take effect……If we cancel, final premium will be calculated pro-rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium."
>
> "3. The policy will end on the day and hour stated in the cancellation notice."

Based on the testimony of Mr. Marks that the policy issued to Taylor Contracting contained the above quoted language and based on the testimony of Ms. Taylor that the premium deposit was paid and the insurance went into effect in November of 2004, the ALJ finds that Taylor was aware of, or should have been aware of, the above quoted language which clearly states that KEMI may cancel the policy and then sets forth the precise procedure for such cancellation. The ALJ finds that the

parties' understanding at the time they entered into the contract was governed by and consistent with the language quoted above. The ALJ does further find that Taylor Contracting knew the specific due dates because they [sic] were shown on the invoices; and that Taylor Contracting knew the policy would be cancelled if the premium was not paid within fourteen (14) days of the written notice of cancellation (as contained in the policy); and that KEMI gave written notice that cancellation would occur if payment was not received within fourteen (14) days thereafter. The ALJ finds this is precisely what occurred in this claim.

With respect to the premium payment which was due on August 4, 2005, when payment was not received by that date, KEMI mailed a notice of cancellation (intent to cancel) on August 5, 2005. A cancellation confirmation letter was then mailed out on August 23, 2005 because payment had not been received by that date. Thus, cancellation of the policy occurred on August 23, 2005, two days before another premium payment was received on August 25, 2005. This cancellation of the policy was consistent with Part Five or Section Five of the policy quoted hereinabove. The procedure employed by KEMI was consistent with the mutual understanding of the parties as of the time the contract was entered into. At no time was the policy of insurance reinstated. Thus, no insurance coverage was available to Taylor on September 19, 2005, the date of the plaintiff's alleged work injury. Thus, the ALJ finds that KEMI complied with the notice of cancellation requirement and procedure as set forth in the policy, that KEMI was entitled to cancel the insurance policy, and

that KEMI had in fact cancelled the insurance coverage prior to the date of the plaintiff's alleged work injury. The procedures for accomplishment of these acts were consistent with the parties' mutual understanding and reasonable expectations at the time they entered into the contract.

As to the defendant's claim that KEMI retained premium payment in excess of the "pro-rata" amount due, the defendant-employer failed to provide the information necessary for KEMI to complete the audit of the actual premium due. Thus, we do not know if Taylor Contracting over paid or under paid for the period of time that the policy was in full force and effect. In any event, this inquiry pertains to what happened "after the fact". This matter is not pertinent to the mutual understanding of the parties as of the time the contract was entered into.

In conclusion, the ALJ finds that the parties had a mutual understanding at the time the insurance policy was entered into that installment payments were to be made on certain specific dates as shown on the Quick [sic] App and as shown on the actual invoices received by the policyholder; that in any event Taylor Contracting knew or by reasonable inference should have known that the specific due dates would be as shown on the invoices mailed to them; that Taylor did not timely make the payments according to the invoice statements; that KEMI properly exercised its right to cancel coverage in accordance with the specific terms of the written policy; and that the coverage was cancelled and was not in effect on the date of the plaintiff's alleged accident and injury herein.

Taylor's first argument on appeal is that "the ALJ's opinion is an [sic] error in finding that the facts show that payments were to be made on 'certain specific dates as shown on the quick [sic] app.'" Taylor asserts Steve Marks' testimony indicates Taylor's premium payments were not due according to the "quick [sic] app." After reciting selected portions of Marks' deposition testimony, Taylor asserts as follows:

> Taylor respectfully argues it is clear that the quick [sic] app was not the terms of the contract and that Mr. Marks admitted that the terms of payment were not a part of any contract. The terms were unilaterally set by KEMI after the fact. Therefore, there is no way Taylor could have had a mutual understanding of when payments were due at the time of entering into the contract.

Taylor also argues the invoices sent out by KEMI are not relevant to the issue the ALJ was asked to address, as the invoices were sent "after the fact."

In the August 16, 2011, “Opinion and Order on Remand,” ALJ Hays determined that both KEMI and Taylor mutually understood, at the time the insurance policy was entered into, that the premium due dates were due according to the "premium installment plan" as set forth on the Quik App. In reaching these conclusions, the ALJ relied upon testimony by Steve Marks ("Marks"), an underwriter

supervisor for KEMI, and Jeanette Taylor ("Jeanette"), owner of Taylor since 1997.

Marks was deposed on March 31, 2006. Marks testified extensively regarding the online application process or Quik App stating as follows:

> Q: Okay. And regarding on-line applications, how would that work? Would they complete that on-line, the agent himself? That would come to KEMI for approval?
>
> A: That is correct. An applicant would go to a producer or their agent and have the agent submit an application via the on-line system on their behalf to KEMI. Then the process would remain the same. It would be reviewed by our underwriting department to make sure that they were eligible for coverage and the terms and conditions and price would be set and if they chose to accept that, then they would submit any additional documents that may be required along with any deposit premium, the deposit premium that would be required.
>
> Q: Okay.
>
> A: And then coverage could start.
>
> Q: Could you tell me, is this a Quik App, that we were talking about? The on-line application?
>
> A: Yes, this is the on-line application.
>
> Q: And is the agency listed on this Quik App Putnam Agency?
>
> A: Yes, it is.

Q: And the applicant's name is Taylor Contracting?

A: That is correct.

Q: So, can I assume that this was the initial application submitted by Putnam on behalf of Taylor for coverage?

A: That is correct.

Q: And that looks like it was submitted on 10/27/04?

A: Yes.

Q: Okay. And it looks like they've got the issue policy box checked.

A: Yes.

Q: So, what is different if they check quote versus issue policy?

A: That allows the underwriting department to know what the intent of the application is, whether or not they just want a price with terms and conditions, or whether or not they intend for the policy to actually be issued.

...

Q: Now, on Page 1 of this application, there is a payment plan listed. And would those be dates that the payments are due to KEMI?

A: That is-- this is a sample installment plan. This is really for informational purposes. That final pricing decisions rest with the underwriting department itself. The pricing that you see here is sample pricing that could be available to them, but ultimately the terms and

> conditions and the final price rest with the underwriting department itself.
>
> Q: Okay. So, who was inputting this information, that box of rating information?
>
> A: That information is input by the agent or the producer on behalf of the applicant.
>
> Q: Okay. So, are these numbers then generated from something else they've entered? How do those get determined?
>
> A: Those are our standard-- what we call our standard rates, using the standard premium that's set forth by NCCI in the state of Kentucky, so these are our standard rates without modification.
>
> Q: Okay. But they could be modified once you review the application and depending on various factors?
>
> A: Yes, that is correct.

Marks testified extensively regarding the invoices KEMI sent to Taylor and the due dates on those invoices. He stated, in part, as follows:

> Q: And are-- let me ask it this way. When are statements mailed to the policyholder relative to premiums due?
>
> A: Statements are generally mailed 30 days prior to the due date.
>
> Q: So, the policyholder will receive a statement. They'll have 30 days to make that payment.
>
> A: That is correct.

Marks testified that the first invoice following Taylor's initial twenty-five percent payment was dated December 2, 2004, for $2,000.61, and that first invoice had a due date of December 27, 2004. Marks testified as follows:

> Q: What were the original terms of the contract, as far as payments goes [sic]?
>
> A: It was set up on a 25 percent deposit and then nine installments.
>
> Q: Nine installments beginning in January of 2005?
>
> A: The first-- the due date of the first installment was 12/27/2004.

Marks acknowledged that the December payment was not indicated on the Quik App. He explained as follows:

> Q: That's different than what's indicated on the Quik App, is that correct?
>
> A: Again, the Quik App is completed by the agent or the producer and sent to KEMI for an application for coverage. The actual terms and conditions of the policy itself are set by KEMI. These are an approximation of what may be possible.
>
> Q: So, the Quik App is not terms of the contract?
>
> A: The Quik App is not terms of the contract.
>
> ...

> Q: One payment was made by Taylor Contracting at the end of December 2004 for a January 5 premium payment?
>
> A: No. A payment was made at the end-- in December of 2004 for an installment that was due on 12/27/2004.
>
> Q: Can you tell me why-- and I understand that this is not binding-- but why in the Quik App is there no payment, as far as the payment plan, there's no payment in December 2004?
>
> A: That is simply a mechanism of an approximation of the due dates for the payments. The actual due date varies slightly due to such things as holidays and weekends, [sic] there's adjustments made to them. So, this is just simply an approximation. The actual due date of that first installment, instead of 1/2/05, as the approximation indicates on the Quik App, was 12/27/2004. Again, very close to the date on the approximation.

Marks testified the policies and procedures regarding the payment of premiums is not written down. Marks' testimony is as follows:

> Q: You also indicated that there were-- that KEMI has standard policies and procedures in regards [sic] to premiums and other matters, is that correct?
>
> A: That is correct.
>
> Q: Where is that? Where would those policies and procedures be located?
>
> A: In regards [sic] to payments themselves?
>
> Q: Yes.

> A: And the making of payments? Those would reside with the underwriting supervisors.
>
> Q: And that would be?
>
> A: That would be me. But they are not specifically written down, if that is your question.

Marks testified that there is nothing in writing in the policy regarding a cancellation of the policy for non-payment. Marks explained as follows:

> Q: I have a couple more, just so I'm clear. You were asked if there were actual written rules or some kind of manual in regards to the cancellation of a policy. Are there, is there?
>
> A: There are written rules about when we can cancel the policy. We use the statutes for that, so we use Kentucky statutes as a guide for cancellation, when you can cancel a policy, and non-payment being one of them. If you're asking me whether or not KEMI has to put down in writing that a policy gets canceled if they don't pay us the premium, no, I think that from an underwriting and a procedural standpoint, everyone understands that if the insured does not pay, then the policy gets canceled. We don't feel the need to actually have to put that in [sic] special procedure, so to speak.
>
> Q: So, no?
>
> A: The answer is no, because there's no need to do that.

Marks testified that the invoice dated September 2, 2005, one of two invoices coming after Taylor's policy was cancelled on August 23, 2005, "only reflects past due amounts that were previously billed to Taylor Contracting prior to the cancellation date." Marks stated as follows:

> The September 2, 2005 statement shows the activity on the account since the previous statement, which was the 8/2/2005 statement. As of the 8/2/2005 statement, the current balance was $3,996.41. The 9/2/2005 statement shows the previous balance, which you can get from the 8/2/2005 statement, minus the payment that had been received of $1,998.21. There were no current charges. So, the current balance which was outstanding from the 8/2/2005 statement is reflected on the 9/2/2005 statement of $1,998.20.

Marks testified Taylor paid its last payment between September 2 and October 3, 2005, and at that point Taylor did not owe any additional premiums under the policy, not counting what might be owed or refunded following an audit.

All of the invoices mailed from KEMI to Taylor Contracting during the November 1, 2004, through November 1, 2005, policy period were attached to Marks' deposition as Exhibit C.

Jeanette was deposed on April 24, 2006. Jeanette testified she received statements in the mail from KEMI,

and she made the first couple of payments by check and then online. Jeanette testified as follows:

> Q: In terms of-- we talked [sic] little bit about payments and that you received the statements. Was there a certain time period that those payments were due? How did you know that other than receiving the statements?
>
> A: I received the statement in the mail. I knew that I had one due each month for nine months.
>
> Q: That would have begun when?
>
> A: In January.
>
> Q: Okay. So you had the initial down payment that was made when you secured the policy and then the statements thereafter beginning in January?
>
> A: Yes.

Jeanette testified she did not receive the notices of cancellation directly but received them from her insurance agent. Jeanette testified she first learned the policy had been cancelled in September, 2005, after she "made the last payment" and "filed a claim."

In Taylor Contracting/Taylor Ready Mix, LLC v. Watts, supra, the Court of Appeals of Kentucky charged ALJ Manno with the task of looking beyond the four corners of the contract "to determine the parties' understanding" as to when premium payments were due. Slip Op. at 5. In Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor

Ready Mix, LLC, supra, the Court of Appeals agreed that ALJ Manno failed to follow its mandate and stated as follows:

> Because the ALJ failed to follow the directive of our 2007 opinion to make findings regarding the parties' understanding of when premium payments were due under the contract at the time of execution, we affirm the Board's decision reversing and remanding the matter to the ALJ for additional findings consistent with our original instructions.

Slip Op. at 2.

In Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor Ready Mix, LLC, supra, the Supreme Court affirmed. Consequently, ALJ Hays was to determine, by looking outside of the four corners of the insurance policy, whether KEMI and Taylor at the time the contract was entered, reached a mutual understanding regarding when the premium payments were due. As the issue on appeal does not concern the *amount* of each premium payment, the *amount* of premium payments actually paid, and the date upon which the premiums were ultimately paid, and as these topics have been discussed at length, this Board will not rehash the alleged lateness of Taylor's payments. *We reiterate the sole issue ALJ Manno was to determine, and by extension ALJ Hays, is whether at the time the contract was entered, the parties reached a mutual understanding as to the due dates*

of the premium payments. Since all parties acknowledge the premium due dates were not included in the actual insurance policy, the ALJ was to determine the parties' understanding by looking outside the four corners of the policy.

Based on Marks' deposition testimony and attachments thereto, as well as the deposition testimony of Jeanette, ALJ Hays determined a mutual understanding of a premium payment schedule was reached via the "payment plan" set forth on the Quik App. We vacate the August 16, 2011, “Opinion and Order on Remand” and remand for additional findings.

The Quik App, dated October 27, 2004, and made Exhibit A to Marks' deposition, sets forth the following "payment plan":

> Ten installments: one at 25 then three
> at 8.34 then six at 8.33
> 11/02/2004 $5,997.03
> 01/02/2005 $2,000.61
> 02/02/2005 $2,000.61
> 03/02/2005 $2,000.61
> 04/02/2005 $1,998.21
> 05/02/2005 $1,998.21
> 06/02/2005 $1,998.21
> 07/02/2005 $1,998.21

08/02/2005 $1,998.21

09/02/2005 $1,998.20

The payment plan on the Quik App does not specify if the dates listed are those upon which invoices are sent or dates upon which payment is due. In reality, according to Marks' deposition testimony and the invoices attached as Exhibit C to Marks' deposition, Taylor was billed pursuant to a schedule that bears no resemblance to the schedule set forth in the Quik App. The schedule of invoice dates and due dates, as set forth on the invoices attached as Exhibit C to Marks' deposition, is as follows:

Invoice date	Due Date
12/02/2004	12/27/2004
1/03/2005	1/28/2005
02/02/2005	UPON RECEIPT
03/02/2005	UPON RECEIPT
04/04/2005	04/29/2005
05/02/2005	UPON RECEIPT
06/02/2005	UPON RECEIPT
07/05/2005	UPON RECEIPT
08/02/2005	UPON RECEIPT
09/02/2005	UPON RECEIPT
10/03/2005	N/A

In fact, the Court of Appeals, in Taylor Contracting/Taylor Ready Mix, LLC v. Watts, supra, noted the discrepancy between the dates on the Quik App and those on the invoices, stating as follows:

> The policy, as issued by KEMI, provided for workers' compensation coverage at the Greenup location from November 1, 2004, through November 1, 2005. As initially calculated, the annual premium was $23,988.11. The application required Taylor Contracting to pay the premium in ten installments. The first installment, due immediately, was for 25% of the balance, or $5,997.03. Taylor Contracting made that payment as required. The application further set out three installments of $2,000.61, and six installments of $1,998.20.
>
> The application provided that subsequent installment payments were due on the second of each month beginning in January 2005. However, neither the policy nor any of the attached materials set a schedule for premium payments. Beginning December 2, 2004, KEMI mailed monthly invoices to Taylor Contracting. ***But these invoices did not set the due date on the second of the month. Rather, it appears that KEMI typically required payment within twenty-five days from the date of the invoice.***

Slip Op. at 1-2. (emphasis added).

A "fundamental tenet of contract law" is "the parties must enter into a meeting of the minds in order to form an enforceable contract." Olshan Foundation Repair and Waterproofing v. Otto, 276 S.W.3d 827, 831 (Ky. App.

2009). ALJ Hays determined the "due dates were listed in the payment plan set forth in the Quick App (Application)" and, consequently, "Taylor Contracting (through its owner, Ms. Taylor) was fully aware of the terms under which and the dates by which the premium payments were due." In other words, by virtue of the "payment plan" in the Quik App, ALJ Hays determined KEMI and Taylor reached a mutual understanding or a meeting of the minds concerning when premium payments were due. However, a review of the "payment plan" set forth on the Quik App and the testimony of Marks and Jeanette reveals there was no meeting of the minds regarding the due dates of premium payments.

A significant indicator of the failure of the parties to reach a meeting of the minds by virtue of the "payment plan" in the Quik App is the fact that the Quik App fails to state whether the listed dates, all set on the second of the month except for December, 2004, are due dates or invoice dates. In fact, Marks was asked directly if the dates listed in the Quik App "payment plan" are due dates, and Marks answered the payment plan is a "sample installment plan." A review of the invoices sent, attached to Marks' deposition as Exhibit C, reveal that while the invoices were dated near the second of each month- although

sometimes dated on the third, fourth, or fifth of the month- payment was due twenty-five days later.

Also, Marks' deposition testimony and the attached invoices indicate after the initial twenty-five percent premium installment payment was made by Taylor in November, 2004, an invoice was sent, dated December 2, 2004, for an premium installment amount of $2,000.61 due on December 27, 2004. *Significantly, the payment plan on the Quik App does not indicate a premium was due in December, 2004*. The first date listed on the Quik App following the November 2, 2004, premium installment payment is January 2, 2005. Indeed, Jeanette testified that in terms of payments, she knew she "had one due each month for nine months" beginning in *January*. However, Marks clearly testified a payment was due on December 27, 2004. When asked about the discrepancy between the invoices and the Quik App regarding a December, 2004, payment, Marks reiterated the Quik App is "simply a mechanism of an approximation of the due dates for the payments." Thus, KEMI's own behavior, via the discrepancy between the Quik App and the invoices regarding a premium payment due in December, 2004, reveals there was no meeting of minds regarding the premium due dates as set forth in the Quik App. Assuming, *arguendo*, Taylor had relied exclusively

upon the dates set forth in the Quik App as due dates, Taylor's first premium installment payment, in the Quik App due January 2, 2005, but in reality due on December 27, 2004, would have been six days late.

Marks' deposition testimony further bolsters our conclusion the Quik App fails to provide a meeting of the minds between KEMI and Taylor regarding the due dates of the premium payments. Marks' deposition testimony establishes the payment plan on the Quik App is wholly irrelevant to the inquiry into a meeting of the minds at the time the contract was executed concerning the due date of the premium installments. Marks testified that while the Quik App is completed by the agent, the "actual terms and conditions of the policy itself are set by KEMI." Marks testified the dates listed in the payment plan on the Quick App were "simply a mechanism of an approximation of the due dates for the payments" and the "actual due date varies." Marks stated the Quik App payment plan "is a sample installment plan" and "ultimately the terms and conditions and the final price rest with the underwriting department itself." He acknowledged the policy regarding cancellation of the insurance policy for non-payment of premiums is not a written policy. Marks also unambiguously testified the Quik App is "not terms of the contract."

Marks' testimony establishes the final price for the insurance policy, the terms and conditions of premium payments, and the schedule of payments involves a wholly unilateral process carried out by KEMI's underwriting department *after the Quik App is completed by the agent and reviewed by KEMI*, and any information in the payment plan on the Quik App is nothing more than a guesstimate. It is clear from Marks' testimony Taylor had no knowledge of nor input into the ultimate payment plan at the time the insurance contract was entered. It is also clear from Marks' testimony that neither Taylor nor KEMI had an understanding as to the total premium for the policy and premium due dates at the time the Quik App was completed. Thus, Marks' testimony firmly establishes there was no meeting of the minds at the time of the contract, by virtue of the payment plan set forth in the Quik App, regarding the total premium for the policy and when premium payments were due.

On remand, ALJ Hays must determine, as mandated twice by the Court of Appeals, once by the Supreme Court, and once by this Board, whether KEMI and Taylor reached a mutual understanding, *at the time the insurance contract was entered*, as to when premium payments were due. In doing so, ALJ Hays must look beyond the four corners of the

insurance contract. *However, ALJ Hays may not rely upon the payment plan set forth on the Quik App since the Quik App has no basis in reality and is irrelevant to this inquiry, as firmly established by Marks' deposition testimony and the invoices.* If the ALJ is unable to find evidence establishing that *at the time the insurance contract was entered* both KEMI and Taylor reached a mutual understanding as to when the premium payments were due, the ALJ must find KEMI did not properly invoke its right to cancel the insurance policy and "Taylor Contracting's coverage was still in effect as of September 19, 2005." Slip Op. at 5. We emphasize Marks clearly testified Taylor paid its final installment payment for the policy between September 2 and October 3, 2005, well before the expiration of the policy on November 1, 2005.

We also emphasize the Court of Appeals, the Supreme Court, and this Board have declared the parties' mutual understanding or lack thereof ***"at the time the contract was entered"*** of when premiums were due provides the only resolution to this issue. Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor Ready Mix, LLC, supra, Slip Op. at 5. (emphasis added). This means the ALJ cannot consider the parties' "subsequent course of dealing"- i.e. invoices with due dates sent after the

policy was entered into- when resolving this issue. Kentucky Employers' Mut. Ins. v. Taylor Contracting/Taylor Ready Mix, LLC, supra, Slip Op. at 3. On remand, in resolving this issue the ALJ shall refrain from relying on the due dates set forth on the invoices, as he did in the August 16, 2011, "Opinion and Order on Remand." The sole issue to be resolved is whether KEMI and Taylor reached a meeting of the minds, *at the time the insurance contract was entered*, regarding when each premium payment was due. While ALJ Hays may look outside the four corners of the insurance policy, as all parties acknowledge the insurance policy does not contain due dates, ALJ Hays may not rely upon the invoices which were sent after the contract was executed. Based upon our ruling herein, ALJ Hays may not rely upon the "payment plan" as set forth in the Quik App.

Taylor's final arguments on appeal are as follows:

> Taylor Contracting fully performed its obligations under the contract and, therefore, is entitled to coverage.
>
> The rules of construction of this contract would favor Taylor Contracting.
>
> The Administrative Law Judge's opinion does not address the parties [sic] mutual understanding at the time of the contract.

By virtue of our ruling herein, Taylor's second and third arguments are rendered moot and outside the scope of what the ALJ was to determine and what this Board can properly review.

Taylor's fourth argument on appeal has been addressed to the extent necessary.

Accordingly, the August 16, 2011, "Opinion and Order on Remand" and October 11, 2011, Order ruling on Taylor’s petition for reconsideration are **VACATED** and this case is **REMANDED** to the ALJ for additional findings consistent with the views expressed in this opinion.

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