Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **September 14, 2018**

CLAIM NO. 201400638

TLC COMPANIES,
AS INSURED BY ZURICH NORTH AMERICA PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

LEONEL CASAS,
LIS LOGISTICS LLC,
UNINSURED EMPLOYERS' FUND,
CARRIERS CONCEPTS,
And HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART
AND REMANDING

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

RECHTER, Member. TLC Companies, as insured by Zurich North America, appeals from the March 18, 2015 and October 28, 2016 Interlocutory Orders, and the

March 19, 2018 Final Opinion, Award and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). In the first interlocutory decision, the ALJ determined Leonel Casas was an employee of LIS Logistics, LLC at the time of the injury and was covered by Zurich for workers' compensation benefits at the time of the injury. On appeal, TLC and Zurich argue the ALJ's decision regarding coverage is not in conformity with the provisions of the Workers' Compensation Act, and ignored an employee leasing agreement between TLC and LIS. For the reasons set forth herein, we reverse in part.

The facts underlying the issue on appeal are largely undisputed. Casas worked as a commercial truck driver and was injured in a motor vehicle accident on October 31, 2013. He worked for LIS, a trucking company. LIS had previously contracted with TLC to provide leased employees, though Casas was not an employee leased by TLC to LIS. TLC secured a policy with Zurich to cover the employees it leased to LIS. The question before the ALJ, and now before this Board, is whether TLC's policy with Zurich covered Casas' injury.

Casas testified he went to LIS to apply for a truck driving position in early October 2013. He was sent to the office of Carrier Concepts, a company not affiliated with either LIS or TLC, where he completed an application. He then was directed to a medical examiner where a drug screen was completed. He was hired by the owner, Gabriel Cardena, and began driving within two or three days. Casas was paid by LIS. He delivered loads from a distribution center in Kentucky to Kroger stores in Tennessee. He was injured on October 31, 2013 in a motor vehicle accident.

Kathleen Clark, Director of Risk Services for TLC, testified TLC is a professional employer organization ("PEO"). It serves as the administrative employer for employees assigned by its clients. TLC performs payroll processing, tax filings, background screening, and unemployment claim processing. Additionally, TLC provides workers' compensation insurance for the assigned employees, and facilitates the handling of any claims.

LIS and TLC signed a service agreement, which Ms. Clark produced and discussed during her deposition. The agreement sets forth certain procedures which LIS must follow in order to assign an employee to TLC. As part of this process, TLC screens, approves, and pays the employee. Section 5Q of the contract contains an exclusivity clause, specifically indicating LIS may not hire, lease, or use any other employee in the categories for which TLC furnishes employees. According to paragraph 4B of the agreement, if LIS fails to submit the individual to TLC for approval and permits the individual to begin working, that person is an employee of LIS and not TLC. LIS acknowledges the responsibility to provide workers' compensation insurance for non-assigned employees.

Casas is not on the list of assigned employees. LIS did not submit him for screening by TLC. TLC previously had screened Casas for a different client, and rejected him based upon a drug related felony on his record.

As part of a Form 101 filing, the Department of Workers' Claims ("DWC") identifies insurance carriers who have provided a notice of coverage for the claimant's employer. The coverage information attached to Casas' Form 101

identifies Zurich as an insurer for TLC. It also indicates Zurich provides "location coverage" for LIS.

The ALJ issued an interlocutory opinion on the bifurcated issue of employment relationship and coverage, first noting LIS failed to participate in the proceedings. The ALJ then rejected the assertion Casas was an independent contractor, concluding he was LIS' employee. She next turned to the issue of insurance coverage, concluding Casas "was covered by Zurich through TLC":

> The ALJ presiding over the case has jurisdiction to make an initial determination regarding the existence and scope of workers' compensation insurance coverage. *Motorist Mutual Insurance Company v. Terry*, 536 S.W. 2d 472 (Ky. 1976)[.] If an insurance company has given public notice that it is affording coverage to a business by filing the appropriate forms with the Workers' Compensation Board, it will be estopped from denying that it insured the employee if a claim is filed before it publically cancels that coverage by filing the appropriate form. *Travelers Insurance Company v. Duvall*, 884 S.W. 2d 665 (Ky. 1994). This estoppel is limited to the workers' compensation proceedings; it does not prevent the insurance company from filing a separate suit in circuit court to recover its payments from the uninsured employer.
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> As often is the case, after all the evidence is reviewed meticulously, the obvious should have been apparent from the start. When the claimant first filed his 101, paperwork from the Kentucky Department of Workers' Claims identified American Zurich Insurance Co as the insurer for LIS Logistics, Inc. for December 31, 2012 through December 31, 2013. This coverage applies to Casas as an employee of LIS Logistics.
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> The issue of coverage addressed in KRS 342.615 where "employee leasing company" is defined does not appear to be on point as a defense. The arguments of the parties have been thoroughly reviewed. The ruling herein may have an impact on TLC but it is simply that

> Casas was an employee of LIS Logistics and LIS Logistics was insured by American Zurich as per the information on record with the Kentucky Department of Workers' Claims. Thus, Casas' work related injury is covered by American Zurich.

TLC and Zurich petitioned for reconsideration, arguing the evidence does not support the determination that every LIS employee was insured by Zurich. In an April 27, 2015 Order on Reconsideration, the ALJ pointed to the records maintained by the DWC and included in Casas' Form 101 filing, which identified Zurich as LIS' carrier. She noted TLC never challenged the validity of the DWC records, which is substantial evidence that Zurich was LIS' carrier on the date of Casas' accident. The ALJ declined to alter the interlocutory decision on the coverage issue.

On appeal, TLC argues the ALJ's decision impermissibly ignores the agreement between LIS and TLC, which is conclusive and determinative of whether TLC's policy with Zurich covered Casas on the date of injury. According to TLC, the ALJ's conclusion rests on the faulty assumption that a certificate of coverage, required by statute between an employee leasing company and its client, necessarily covers all employees. TLC notes KRS 342.615 expressly recognizes that an employee leasing company may not cover every one of the client's employees. In light of this legislative acknowledgment, TLC argues the ALJ cannot rely solely on the certificate of coverage, when contrary evidence establishes it did not cover every employee of LIS. TLC continues by emphasizing the uncontroverted proof confirms Casas was not its employee. The Uninsured Employers' Fund responds that public policy

requires TLC, through Zurich, to indemnify Casas, and that any coverage dispute between TLC and Zurich is properly the subject of a civil action.

KRS 342.340(1) requires an employer to insure and keep insured its liability for workers' compensation. It is the duty of the employer to file proof of insurance covering its complete liability with the DWC. KRS 342.340(2). An employer who chooses to use a PEO may insure the leased employees through procurement of a policy or by contracting with the PEO to provide coverage. KRS 342.615(4). The regulations likewise acknowledge the PEO may secure coverage for the leased employees, but may not be providing coverage for every employee of the employer. 803 KAR 25:230 §4(4) (PEO must file a "listing of the leased employees associated with each lessee…"). As the UEF acknowledges, the record indicates TLC complied with the requirements of the aforementioned statutes and regulations.

Here, it is undisputed that LIS contracted with TLC to supply leased employees and to supply workers' compensation insurance for leased employees. It is also undisputed LIS failed to secure insurance for its other employees. LIS did not submit Casas to TLC to undergo the process to become a leased employee. Moreover, by failing to file a Form 111 or otherwise participate in the litigation, LIS has conceded that Casas was its employee, as indicated on his Form 101. Indeed, the ALJ relied on this proof to conclude Casas was an employee of LIS, not TLC.

It appears the ALJ rested her decision entirely on the theory that Zurich is estopped from denying coverage because the DWC records identified Zurich as LIS' insurer. Estoppel is an equitable remedy often invoked to prevent a party from benefiting from its own misconduct, which has been applied in workers'

compensation claims. Akers vs. Pike County Board of Education, 171 S.W.3d 740 (Ky. 2005). *See also* Smith Coal Co. v. Feltner, 260 S.W.2d 398 (Ky. 1953). It is permitted when the estopped party is aware of material facts that are unknown to the other party and have been engaged in conduct amounting to a misrepresentation or concealment of the material facts. Id. Whether or not estoppel is applicable rests largely on the facts and circumstances of each particular case, and the burden of proof rests on the party asserting it. Byerly Motors, Inc. v. Phillips Petroleum Company, 346 S.W.2d 762 (Ky. 1961).

The ALJ cited Travelers Insurance Co. v. Duvall, 884 S.W. 2d 665 (Ky. 1994), to conclude Zurich is estopped from denying coverage for Casas' injury. Duvall confirms the doctrine of estoppel's general application to workers' compensation claims, but is distinguishable on its facts. In Duvall, a workers' compensation insurance policy lapsed by its own terms prior to the date of the worker's injury, but the Supreme Court determined the policy was still in full force and effect on the date of the injury because the carrier failed to comply with the notice of cancellation requirements of KRS 342.340(2). In so ruling, the Court noted the purpose underlying KRS 342.340(2) is to inform the DWC concerning any cessation in coverage, so that appropriate action may be taken pursuant to KRS 351.175 against the uninsured employer. Id. at 667.

The primary distinction in this claim is that TLC and Zurich complied with all requirements set forth in Chapter 342 and corresponding regulations. No party has identified a statute or regulation with which TLC, as a PEO, failed to comply. Moreover, there has been no showing of improper or misleading conduct

by TLC or Zurich that would support an estoppel defense. It simply complied with the provisions of KRS 342.615 and 803 KAR 25:230 as an employee leasing company, resulting in its policy with Zurich being shown in DWC records as an insurer for LIS. There is no evidence TLC accepted Casas as a leased employee, either through specific agreement or prior course of conduct. Nor is there evidence Casas believed he was an employee of TLC. Further, there is no evidence Zurich received premiums related to Casas' employment.

We conclude the ALJ erred as a matter of law by concluding Zurich is estopped from denying coverage. The DWC records alone do not constitute a sufficient basis for estoppel. Chapter 342 permits a PEO to supply all or part of an employer's workforce. It does not obligate the PEO to provide insurance coverage for all of the employer's workforce. Further, there has been no showing of the requisite improper or misleading conduct on TLC or Zurich's part.

We furthermore reject the UEF's assertion that any dispute between LIS and Zurich regarding coverage must be addressed in a collateral claim in circuit court. Whether insurance coverage extends to the named employer is a matter well within the ALJ's jurisdiction. *See* Uninsured Employers' Fund v. Hoskins, 2017 WL 6380219 (Ky. 2017)(analyzing whether insurer satisfied "burden of proof before the ALJ to establish that [the claimant] was not covered by the workers' compensation policy issued" by insurer to employer"). *See also* Taylor Contracting/Taylor Ready Mix, LLC v. Watts, 2007 WL 1893722 (Ky. App. 2007)(An ALJ "has jurisdiction to address whether an insured had a workers' compensation policy covering a pending

claim within the jurisdiction of the administrative body before which the claim was pending.").

In conclusion, we hold the DWC records, alone, are not a sufficient basis to estop Zurich from denying coverage for Casas' injury. The ALJ has the jurisdiction to determine the extent of coverage, and that issue was preserved by the parties. Though this Board has no fact-finding authority, we are authorized to review the proof submitted in a claim and determine whether the evidence compels a particular finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Upon review of the record in this claim, we conclude the evidence compels a finding that LIS did not have coverage for Casas under TLC's policy with Zurich. Because LIS was not insured by TLC for non-assigned employees, on remand the ALJ must address the responsibility of LIS and the Uninsured Employers Fund as to awarded benefits.

Accordingly, the March 18, 2015 and October 28, 2016 Interlocutory Opinions and the March 19, 2018 Final Opinion, Award and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **REVERSED IN PART.** This claim is **REMANDED** for entry of an amended award in conformity with the views expressed herein.

ALL CONCUR.

DISTRIBUTION: **METHOD**

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