

**STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
 MELBOURNE DISTRICT OFFICE**

Robert J. Bend, Jr.)	
)	
Employee/Claimant)	
)	
vs.)	OJCC No: 09-001760PTT
)	
Shamrock Services,)	Accident Date: 1/15/2008
)	
Employer,)	Presiding Judge: Terlizzese
)	
and)	
)	
Zenith Insurance Company)	
)	
Carrier/Servicing Agent)	
)	

FINAL COMPENSATION ORDER DENYING BENEFITS AGAINST ZENITH

Pursuant to Petitions for Benefits dated January 20, 2009 and July 10, 2009, a final merits hearing was convened by the court on November 17, 2009, and completed on November 18, 2009. Following the close of the hearing, the undersigned announced verbal findings of fact and conclusions of law, which are directly incorporated by reference. The Claimant, Robert Bend, Jr., was represented throughout the proceeding by Bram Scharf, Esquire. The carrier, Zenith Insurance Company, was represented by Rex Hurley, Esquire, Richard Thompson, Esquire, and Arthur J. England, Jr., Esquire. The employer, Amar Prakash d/b/a Shamrock Services, did not appear and was not represented by counsel.

Pursuant to a Joint Motion of the parties, the court entered a Bifurcation Order which was made a part of the record as Judge's Exhibit No. 1. To avoid unnecessary expense and hardship, the issues of indemnity benefits, medical benefits, authorizations, and safety offsets were deferred. The final merits hearing was limited to the compensability of Claimant's claim, and the carrier's defenses of no policy coverage due to misrepresentations by the employer, and the claimant's status as a non-employee or independent contractor. Claimant's issues of compensation, indemnity, costs, attorney's fees, medical benefits, interest, and penalties were held in abeyance pending resolution of the compensability and coverage issue, as were all other defenses listed by the carrier on its Pretrial Stipulation.

The November 17-18 hearing was electronically recorded. All exhibits were marked, relevant documents were admitted into evidence, testimony was taken, and counsel for Claimant and for Zenith presented closing arguments.

The following exhibits were admitted into evidence or marked for identification and reference:

1. Bifurcation Order dated October 28, 2009 (Judge's Exhibit No. 1).
2. Composite of Notice of Hearings, Mediation Notices, and Mediation Orders including the July 20, 2009, Waiver of Time Frames (Judge's Exhibit No. 2).
3. Pretrial Stipulation, and Order approving it, filed October 20, 2009 (Joint Exhibit Number 1).

4. Claimant's deposition dated February 25, 2009, admitted for substantive purposes. (Joint Exhibit Number 2).
5. Claimant's Trial Memorandum filed November 14, 2009 (Claimant Exhibit Number 1, marked for identification and argument purposes only, but not admitted into evidence).
6. Deposition of Tracy Siglin taken June 15, 2009 (Claimant Exhibit Number 2).
7. Amendment to the Pretrial Stipulation adding Steven Boyd as a witness (Carrier Exhibit number 1).
8. Amendment to the Pretrial Stipulation, adding John Weber as a witness (Carrier Exhibit Number 2).
9. Pretrial Amendment and Witness List, dated October 16, 2009 (Carrier Exhibit Number 3).
10. Notice of Denial with Notice of Filing (Carrier Exhibit Number 4).
11. July 15, 2009 Response, to July 10, 2009 Petition for Benefits (Carrier Exhibit Number 5).
12. March 2, 2009 Response, to January 22, 2009 Petition for Benefits (Carrier Exhibit Number 6).
13. Carrier's Trial Memorandum dated November 13, 2009 (Carrier Exhibit Number 7, marked for identification and argument purposes only, not admitted into evidence).

14. July 16, 2009 deposition of John Ayers with attachments (Carrier Exhibit Number 8).
15. Deposition of Steven Boyd taken July 16, 2009 (Carrier Exhibit Number 9).
16. Deposition of Vince Lopresti taken April 16, 2009 (Carrier Exhibit Number 10).
17. Deposition of Amar Prakash taken May 15, 2009, with exhibits (Carrier Exhibit Number 11(a)).
18. Deposition of Amar Prakash taken July 20, 2009, with exhibits (Carrier Exhibit Number 11(b)).
19. Deposition of Tom TenBroeck taken July 16, 2009, with exhibits (Carrier Exhibit Number 12).

The following individuals appeared at trial and testified live:

1. Claimant, Robert Bend, Jr.
2. John Weber, Senior Vice President and Florida Regional Manager of Zenith Insurance Company.

In making my findings of fact and conclusions of law, I have carefully reviewed and considered all of the evidence, reviewed the multiple documentary exhibits, listened to the live testimony of the Claimant and Mr. Weber, and resolved all conflicts in the evidence. The court's findings of fact and conclusions of law are contained in this order, but additional and more

detailed findings of fact and conclusions of law orally provided to the parties at the conclusion of the hearing on November 18, 2009 are also incorporated by reference in this order.

FINDINGS OF FACT

The status of Claimant, Robert Bend, Jr.

1. On January 15, 2008, Claimant was involved in a high speed interstate automobile crash while driving a truck owned by Mr. Prakash, on the way to perform painting work at the Cocoa Beach Post Office, approximately 185 miles from Trenton, Florida. Riding in the truck with Claimant were Tracy Siglin and Thomas Miller, both of whom had worked with by Mr. Prakash or Claimant to assist in painting the interior of the Cocoa Beach Post Office. Mr. Prakash was immediately notified of the accident. Following the accident, neither Claimant nor Mr. Prakash notified Zenith of the accident.

2. Claimant meets many of the statutory and common law indicia of being an independent contractor and a subcontractor. During the period of his service relationship with Mr. Prakash, Claimant signed both an independent contractor agreement and a subcontractor agreement, and admitted in live testimony that he knew he needed an exemption from Workers' Compensation insurance when he began subcontract work for Mr. Prakash.

3. Claimant controlled his hours of work, typically purchased and brought his own tools for the work he performed for Mr. Prakash, and purchased job-required supplies such as tapes, caulking, and plastic. He admitted that his pay was not hourly or salary, but rather on a

per-job basis in amounts which depended on how fast he performed his work, the amounts being paid to helpers, and how much he spent on tools and supplies.

4. Tracy Siglin testified by deposition that she too was hired for subcontract work with Mr. Prakash, and that she signed an independent contractor agreement. I find by clear and convincing evidence from the totality of the evidence, that Mr. Prakash intended to, and was using independent contractors for his painting business, and that he set up his painting business to designate his painters as independent contractors and subcontractors, separate and apart from his insured lawn service business.

5. I find from considering all of the testimony, and totality of circumstances, that the claimant was not in an employee relationship with respect to Mr. Prakash, but rather knowingly and voluntarily was an independent contractor or subcontractor for painting activities. I find, however, that because he was a painter, and therefore in the construction business, and because he did not continue to carry a valid exemption, he could have otherwise potentially been considered a statutory employee.

6. In the alternative, even if the Claimant were proven to have been in an employee/employer relationship, I find that the claimant has failed to carry his burden of proving that he was an employee of Shamrock Services (the lawn service business), as insured by Zenith. I find from the testimony and the totality of the circumstances that the claimant was, if anything, employed through Mr. Prakash with an entity separate from the Shamrock Services (lawn maintenance business) insured by Zenith. Although Zenith initially issued a policy to Shamrock Services, this policy was exclusively for a local lawn maintenance company only, as was shown

through the totality of the testimony and the evidence. I find that the Claimant was employed, if anything, through a separate statewide business entity being run by Mr. Prakash, that provided commercial painting services. Zenith never issued a policy to this separate entity and therefore, I find that the Claimant has not proven that he was an employee of the local Shamrock Services, as insured by Zenith for lawn maintenance activities. In making this finding, I accept the Claimant's testimony that he did not perform any lawn maintenance services during the time that he was engaged in work under Mr. Prakash, and that he never intended to do so.

Fraud in the inducement of the Zenith policy

7. At the time he applied for workers' compensation insurance from Zenith, Mr. Prakash clearly represented in his application that he was engaged in a lawn maintenance business conducted solely within 60 miles of his home base in Trenton, and that he did not use independent contractors or subcontractors who did not have their own workers' compensation insurance or an exemption. Each of these representations was false.

8. On February 11, 2005, Mr. Prakash went to an independent multi-line insurance agency, and completed a workers' compensation application on which he claimed he was operating a local lawn business, had no other businesses, did not travel over 60 miles as a part of his business, and did not use subcontractors or independent contractors.

9. There is no evidence that Mr. Prakash was incompetent at the time, and I find from the clear and conclusive evidence that it is impossible to conclude that he was merely mistaken in describing his business in light of his active painting services and advertisements for painters and construction services prior to February 11, 2005. I find that Mr. Prakash knowingly

intended to deceive Zenith at the time he submitted his application for workers' compensation insurance, or merely intended to secure coverage for his local lawn service company.

10. I find that Zenith has sustained its burden of establishing with clear and convincing evidence that the policy of workers' compensation insurance, it issued to Amar Prakash d/b/a Shamrock Services on February 11, 2005, is void *ab initio* due to multiple knowing and substantial misrepresentations and fraudulent statements made by Mr. Prakash on his application for insurance, and during the course of later renewals and audits. I base this finding on the following specific factual findings.

a. Clear and convincing evidence established that Mr. Prakash was operating and advertising a statewide commercial painting business at the time he applied for the Zenith workers' compensation policy, that he undertook painting jobs more than 60 miles from Trenton, that he had other commercial business activities such as deck building and pressure washing, and that he used multiple subcontractors who did not carry their own workers' compensation insurance or have a current of valid exemption.

i. I find credible the undisputed deposition testimony and exhibits from John Ayers of the Gilchrist County Journal, and from Tom TenBroeck of the Chiefland Citizen which established that, starting in late 2004 and continuing weekly through at least February 2005, Mr. Prakash had placed numerous advertisements offering a painting service. Indeed, on the day before he submitted his application for workers' compensation insurance to Zenith for his local lawn service, at least four ads were

running in the two newspapers indicating that he was operating a painting business and was also seeking painters in “help wanted” ads.

ii. I find credible the undisputed deposition testimony of Vince Lopresti, who testified that at the beginning of 2005 he worked only as a painter for Shamrock Services, and did no lawn service work.

iii. There are multiple conflicting statements by Mr. Prakash, in two depositions, a recorded statement, and examination under oath, as to when his painting business began. I find that he cannot be relied upon to have told the truth as to the start date of his painting business, but that when he was confronted with his advertisements dated February 10, 2005, he admitted that he was operating a painting business which had started before February 11, 2005.

iv. Clear and convincing evidence established that a significant amount of his painting work was performed more than 60 miles from its primary place of business in Trenton, Florida, including locations in Homosassa, Orlando, Inverness, and Cocoa Beach.

v. Tracy Siglin testified that she often traveled over one and one half hours to work for Mr. Prakash/Shamrock, in performing commercial painting endeavors.

vi. Mr. Prakash, Claimant, and Ms. Siglin, all testified that Shamrock Services, or Mr. Prakash’ painting company only used subcontractors and independent contractors for its painting services.

vii. The evidence is undisputed that Mr. Prakash never notified Zenith that his business was regularly being conducted more than 60 miles from Trenton.

viii. The independent and multi-carrier agency chosen by Mr. Prakash for the purchase of workers' compensation insurance for his local lawn service business had no authority to bind Zenith to a risk it does not insure.

b. Clear and convincing evidence established that Zenith would not have underwritten a workers' compensation policy for Mr. Prakash if the true nature of his various and largely separate business pursuits had been disclosed.

i. The undisputed evidence established that Mr. Prakash's application was submitted to Zenith electronically, and would have automatically been rejected if any one of the three critical questions on the application and addendum which were answered with a "no" had been answered truthfully with a "yes."

ii. I find credible the testimony of Mr. Weber that Zenith issues only small value policies which do not involve any of the risks which inhered in Mr. Prakash's construction related business activities, and that Zenith has underwriting guidelines which limit the extent to which it will offer workers' compensation policies in Florida, and which do not include commercial painting.

iii. I find that Zenith thought it was providing workers' compensation insurance for a local lawn maintenance code category of risk, while Mr. Prakash d/b/a Shamrock Services was in fact conducting a wholly different and separate business which had painting and construction risk code categories.

iv. I find credible Mr. Weber's testimony that the misrepresentations by Mr. Prakash in the application process were material, substantial, and significant to Zenith, and that Zenith would never have issued a workers' compensation policy to Mr. Prakash if the true nature of his business activities, their geographical scope, or the use of uninsured and non-exempt contractors and subcontractors had been disclosed when the policy application and addendum were submitted to Zenith on February 11, 2005.

v. I find that Zenith detrimentally relied on the application and addendum submitted by Mr. Prakash for its issuance of a policy of workers' compensation insurance.

c. Clear and convincing evidence established that Mr. Prakash continued his fraud with respect to the risk insured by Zenith throughout the period of policy renewals and audits.

i. Although required by the policy to update his policy, Mr. Prakash at no time advised Zenith of a change in the nature, scope or risk of his business, or that his business was operating over 60 miles from Trenton, Florida, and using independent contractors and subcontractors.

ii. Mr. Prakash's continuing fraud is further evidenced by the undisputed fact that, when Zenith audited the policy in 2006, he advised the auditor that he only had landscapers working for him and listed Mr. Lopresti as a landscaper.

iii. Although Mr. Prakash learned of the accident on the day it happened, Zenith first learned of Claimant's accident in January, 2009. Upon investigation, it learned that the business which had been performed by Shamrock Services from the time

that Mr. Prakash applied for a policy of workers' compensation insurance was not the local lawn maintenance business for which Zenith had issued its policy to Mr. Prakash, and that multiple other representations in his application were false. Zenith promptly canceled the policy based on fraud in the inducement.

CONCLUSIONS OF LAW

1. Section 627.409(a) Florida Statutes (2007), provides that no recovery may be had under any policy of insurance if “the misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.” Section 627.409(b) provides that recovery under the policy will be denied if, had the true facts been known to the insurer, “the insurer in good faith would not have issued the policy.”

2. A misstatement is deemed material if the facts accurately stated might reasonably have influenced the insurer in gauging the risk of the issuing policy. *E.g., Essex Ins. Co., Inc. v. Universal Entm't & Skating Ctr., Inc.*, 665 So. 2d 360 (Fla. 5th DCA 1995); *Singer v. Nationwide Mut. Fire Ins. Co.*, 512 So. 2d 1125 (Fla. 4th DCA 1987).

3. As a matter of law, an insurer is entitled to rely on the accuracy of information contained in an application, and has no duty to make additional inquiry. *Independent Fire Ins. Co. v. Arvidson*, 604 So. 2d 854 (Fla. 4th DCA 1992), *review denied*, 617 So. 2d 318 (Fla. 1993).

4. I conclude that the Zenith policy issued to Mr. Prakash was procured by misrepresentations material to both its acceptance of the risk and to the hazard being assumed.

5. I conclude that Zenith would not have issued its policy of workers' compensation insurance to Mr. Prakash if the true facts as to the multiple businesses conducted by Shamrock Services, its geographical scope, and its use of independent contractors and subcontractors had been known, and that the policy is void *ab initio*.

6. I further conclude that Mr. Prakash's continued failure to correct the misinformation on his application constitutes fraud in the inducement of Zenith's policy renewals.

7. I reject the applicability of section 440.381(6)(a), Florida Statutes (2007), to the facts of this case for the following reasons.

a. Section 440.381(6)(a) provides for a carrier to recover a penalty from an employer who has committed fraud in three very specific and distinct circumstances: where the employer understates or conceals payroll; misrepresents or conceals employee duties so as to avoid proper classification for premium calculations; or misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor.

b. Section 440.381(6)(a) does not purport to address fraudulent statements made to induce a carrier to take a risk it never would have insured for any applicant in the State of Florida. The fact that the legislature has on numerous occasions revisited the workers' compensation law, but has never extended the coverage of section 440.381(6)(a) beyond premium fraud, is indicative of an intent to limit the applicability of that provision to the circumstances there stated.

c. There is no evidence that any of the three circumstances to which section 440.381(6)(a) applies were present or implicated when Mr. Prakash submitted his application

and addendum to Zenith for workers' compensation insurance. The record in this case provides no basis for a determination that Mr. Prakash made misrepresentations on his application in order to obtain a different premium than one which might have been appropriate for additional business lines of painting and construction work. Moreover, Zenith would not have been able to quote or approve a premium for the painting and construction work performed by Shamrock Services, because it did not insure that type of business activity anywhere in the state.

d. Statutes must be interpreted to give effect to their plain meaning. Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990). Were the court to apply section 440.381(6)(a) in this case, it would have to read out of the statute the legislature's very precise terminology about payroll, premium calculations, and experience rating modification factors. This a court may not do. Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992).

e. Where a statute contains an express delineation of its coverage, there is strong inference that no other coverage is intended. The principle of statutory construction known as *expressio unius est exclusio alterius* applies here to preclude an application of the statute to extend the statute's penalty to Mr. Prakash's misrepresentations and concealments of the risk being insured.

f. Were the court to apply section 440.381(6)(a) in this case, it would effectively force Zenith to provide workers' compensation coverage for a class of business or risk it never intended to write, and for a hazard it never knew it was going to insure, and for which it did not offer a premium which could be multiplied by ten as a penalty.

g. The courts may not construe a policy of insurance to create coverage which does not exist for a business activity which the insurer would not have underwritten. General Sec. Ins. Co. v. Barrentine, 829 So. 2d 980, 981-82 (Fla. 1st DCA 2002), *review denied*, 845 So. 2d 889 (Fla. 2003); Universal Underwriters Inc. Co. v. Fallano, 597 So. 2d 818, 819 (Fla. 3d DCA), *review denied*, 602 So. 2d 941 (Fla. 1992).

h. Section 440.381(6)(a) provides no way to redress the harm suffered by Zenith, from the multiple and material misrepresentations which induced it to issue a policy of workers' compensation to Mr. Prakash, for his local lawn service business.

i. This case is like other decisions in which workers' compensation benefits for catastrophic injuries have been denied based on an employer's or carrier's coverage defenses.

8. I reject the applicability of Perkins v. A. Perkins Drywall, 615 So. 2d 187 (Fla. 1st DCA 1993), to the facts of this case for the following reasons.

a. The Perkins decision interpreted section 440.381(6)(a) in the context of an acknowledged premium avoidance and premium reduction scheme by the employer, who had designated his son as a partner rather than an employee.

b. The carrier in Perkins did not contend that the policy issued to the employer company would never have been issued if the true employment status of the owner's son had been told to the company.

c. In Perkins, the court specifically stated that the penalty set out in section 440.381(6)(a) as a penalty for premium avoidance or reduction was created by the legislature for situations such as those in that case.

d. An application of *Perkins* to the facts here would require Zenith to insure a risk it does not write for any company at all.

9. Based on the invalidity *ab initio* of the Zenith policy, I deny Claimant's claim for all workers' compensation benefits requested from Zenith including medical and indemnity benefits, costs, interest, and attorney's fees.

10. In the alternative, even if Zenith provided coverage for the lawn maintenance activities of Shamrock Services on the date of the accident, based on my findings of fact I conclude that the Claimant has not carried his burden of proving that he was an employee of Shamrock Services as insured for lawn maintenance activities at the time of the accident, and thus any injuries would not have been within the course and scope of such employment.

11. Based on the Bifurcation Order and agreement of the parties as to the issues which were to be determined in the final hearing, the court makes no determination at this time with respect to benefits awardable to Claimant from Mr. Prakash d/b/a Shamrock Services or Mr. Prakash individually.

WHEREFORE, it is hereby ordered and adjudged as follows:

1. The workers' compensation policy issued by Zenith Insurance Company to or for Amar Prakash d/b/a Shamrock Services is held to be void *ab initio*;

2. In the alternative, I find that the claimant has failed to prove that he was an employee of Shamrock Services (local lawn service), as insured by Zenith for lawn maintenance activities on the date of the accident.

3. As the prevailing party, Zenith is entitled to reasonable and related taxable court costs, and jurisdiction is retained for determining the amount of such costs if the parties cannot agree;

4. Claimant's claim for compensability from Zenith Insurance Company with respect to the accident which occurred on January 15, 2008, is denied, and his claim is dismissed with prejudice;

5. Claimant's claim and Petitions for Benefits for indemnity, for medical benefits, costs, interest, penalties, and attorney's fees against Zenith are denied, and dismissed with prejudice.

DONE AND ELECTRONICALLY MAILED to all counsel of record on December 2, 2009, in Melbourne, Brevard County, Florida, and by U.S. mail to Amar Prakash, Shamrock Services, P.O. Box 1042, Trenton, FL 32693.



Paul T. Terlizzese
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Melbourne District Office
700 South Babcock Street, Suite 400
Melbourne, Florida 32901
(321) 984-4866
www.jcc.state.fl.us

Bram L. Scharf, Esquire
bscharf@roebucklaw.com

Rex A. Hurley, Esquire
rhurley@hrmcw.com

Richard S. Thompson, Esquire
rthompson2@thezenith.com;
zip@thezenith.com

Arthur J. England, Jr., Esquire
englanda@gtlaw.com