

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

**BOARD NO.:** 033171-05

Garth A. Findlay

Claimant

Garth A. Findlay d/b/a/ Jog Construction Co.

Employer

Liberty Mutual Insurance Co.

Insurer

### **REVIEWING BOARD DECISION**

(Judges Koziol, McCarthy and Fabricant)

### **APPEARANCES**

Harry J. Silverman, Esq., for the claimant at hearing and on appeal

Edward A. Gottlieb, Esq., for the claimant on brief

Dennis M. Maher, Esq., for the insurer at hearing and on brief

Robert Barry, Esq., for the insurer at oral argument

**KOZIOL, J.** This case concerns the operation and effect of St. 2002, c. 169, which amended § 1(4) of Chapter 152, so as to provide sole proprietors who purchase workers' compensation coverage for their businesses, the option of being covered as an "employee" under the Act for their own work-related injuries. The sole proprietor of Jog Construction Company, Garth Findlay, asserts that an administrative judge erred in determining that he was not an employee under § 1(4), either expressly or by operation of estoppel, and in denying and dismissing his claim for weekly workers' compensation benefits. For the reasons that follow, we affirm that decision.

It is undisputed that on September 29, 2005, Findlay severely cut his left minor hand with a saw while he was working as a self-employed carpenter/repairman, doing business as Jog Construction Company. After the accident, Findlay's claim for workers' compensation benefits was denied by the insurer on the ground, among others, that there was no coverage for his injury. Because liability was contested on the threshold issue of coverage, the judge bifurcated the proceeding, making the coverage question the sole issue before him at the hearing.

Findlay first purchased a policy of workers' compensation insurance in the Commonwealth in 2001. (Dec. 5.) He did so because the real estate management company that managed the properties where he worked required that he obtain a workers' compensation policy. (Dec. 5.) At that time, no provision under Massachusetts law allowed Findlay, a sole proprietor, to be considered an "employee" under the Act. Ryder's Case, 341 Mass. 661, 665 (1961)("The compensation act cannot be supposed to have contemplated any such combination of employer and employee status in one person."); Chute v. Charles Chute Painting Co., 11 Mass. Workers' Comp. Rep. 239 (1997). Findlay purchased the 2001 policy through his insurance broker, Metro West Insurance Agency. (Dec. 5.) The policy was assigned to the insurer, Liberty Mutual Insurance Company (Liberty), through the assigned risk pool.<sup>1</sup> (Dec. 5.); See G.L. c. 152, §65A(1). Because

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<sup>1</sup> "The [assigned risk] pool, which is administered by the Workers' Compensation Rating and Inspection Bureau (WCRIB), was established to be a source of workers' compensation insurance for employers who are unable to obtain coverage from the voluntary market. [] When an employer is approved by WCRIB for pool coverage, WCRIB assigns a private insurer in the Massachusetts market to issue the policy, collect the premiums, pay the claims and generally service the policy. For its trouble, the assigned carrier receives a percentage of the premium collected as a servicing fee, but the ultimate liability for claims is borne by the pool. To be eligible for pool coverage, an employer must demonstrate that it has been rejected for coverage by two insurers in the voluntary market and that it owes no outstanding premiums. *The employer also must provide WCRIB with accurate underwriting data, such as information about its payroll, employee job classifications, and other business interests, so that WCRIB can assess the risk and compute an appropriate premium.*" Commonwealth v. Gall, 58 Mass. App. Ct. 278, 281 (2003)(emphasis supplied).

Findlay's insurance broker testified that Findlay reapplied for coverage through the WCRIB in August of 2005. Once again, WCRIB assigned the policy to Liberty. (Tr. 75-76.)

there was no payroll of covered employees, the premium for the policy was the minimum.<sup>2</sup> (Dec. 5.)

On October 23, 2002, c. 169 of St. 2002, became effective, amending § 1(4) of the Act so as to provide sole proprietors with the option of being covered as an "employee" under the Act. Section 1(4) now reads, in pertinent part, "[f]or the purpose of this chapter, a sole proprietor at his option . . . shall be an employee. A sole proprietor . . . may elect coverage by securing insurance with a carrier." This statutory change clearly does not make such coverage mandatory. Moreover, as evident in this case, some sole proprietors purchased workers' compensation insurance in order to be eligible to obtain and work on certain contracts, even though coverage for their own injuries was a legal impossibility. Accordingly, specific rules were promulgated in order to effectuate this marked departure from the long established rule. Those rules appear in 452 Code Mass. Regs. §§ 8.07(1)-(4), and read in pertinent part:

- If a sole proprietor . . . wants to be covered as an employee under a workers' compensation policy, he/she must submit a written request directly to the carrier when a policy is in place or is going to be issued through the voluntary market or to the duly authorized rating organization established by M. G. L. c. 152, § 52C if the policy is going to be assigned through the assigned risk pool. The sole proprietor . . . must reaffirm in writing their right of inclusion as an employee on their workers' compensation policy to the insurance carrier annually and prior to the renewal date of the policy.
- The effective date of coverage for the sole proprietor . . . shall be either
  - the next policy effective date following the carrier's receipt of a written request from the sole proprietor . . ., or
  - the day following the carrier's receipt of a written request that the election for coverage be made effective mid-term.

All such written requests must be on company letterhead and signed by the sole proprietor. . . .

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<sup>2</sup> Despite being twice audited by Liberty since he first purchased workers' compensation insurance in 2001, Findlay never reported that any wages were paid to anyone, indicating instead that Jog Construction had no employees. (Tr. 53-54.)

- [] If a sole proprietor . . . obtains a workers['] compensation insurance policy without specifically electing coverage as described in 452 CMR 8.07 for the sole proprietor . . . , the sole proprietor . . . shall not be covered under that policy.

It is undisputed that Findlay never complied with, or even attempted to perform, any of the steps set forth in §§ 8.07(2) or (3). Thus, by operation of 452 Code Mass. Regs. § 8.07(4), Findlay, as sole proprietor of Jog Construction, "shall not be covered under that policy." Findlay now argues that the regulation should not be applied because it imposes a burden upon sole proprietors exceeding the requirements of § 1(4) of the Act; however, the argument is waived because it is raised for the first time on appeal. Whittle v. Limoliner, Inc., 22 Mass. Workers' Comp. Rep. 51, 52 (2008).

The parties stipulated that Liberty did not send notices to Findlay or to others regarding the statutory change. (Dec. 4.) Findlay argues Liberty should be estopped from denying coverage because it had a duty to provide him with notice of his potential rights to coverage and/or offer coverage under the policy. Because Findlay was not an "employee" under § 1(4) of the Act, the judge properly ruled that he lacked jurisdiction to consider Findlay's claim that coverage exists in this case based upon the operation of the doctrine of equitable estoppel. "[F]ull performance of the conditions of the workers' compensation act are essential prerequisites to the jurisdiction of the Board, . . . its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed, by express consent, or waived by acts of estoppel." Hayes' Case, 348 Mass. 447, 453 (1965)(rejecting claimant's argument that the insurer was estopped to deny recovery because claimant was not an "employee" under the act); Chute, supra. at 242 (1997)(same result in case where, unlike here, sole proprietor paid insurance premiums based in part upon his own salary). Accordingly, we affirm the judge's decision denying and dismissing the claim.

So ordered.

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Catherine Watson Koziol  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

Garth A. Findlay  
Board No. 033171-05

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Bernard W. Fabricant  
Administrative Law Judge

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