COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 037380-16 026693-16**
William Burrell	Employee
All Pro Piano Movers/Omar Soffan	Employer
Worker's Compensation Trust Fund	Insurer
Mayakaya Corp./d/b/a Royal Academy of Performing Art[1]	Employer
Republic-Franklin (Utica) Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Calliotte, Fabricant and Koziol

This case was heard by Administrative Judge Maher.

APPEARANCES

Robert A. Reardon, Jr., Esq., for the employee
Janice M. Toole, Esq., for the Workers' Compensation Trust Fund
Thomas A. Richard, Esq., for Utica at hearing and on brief
Vincent M. Tentindo, Esq., for Utica[2]
Jacob Morris, Esq., for the employer

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[1] As discussed *infra*, the issue in this case is whether Utica's policy of insurance, issued to Mayakaya Corporation d/b/a Royal Academy of Performing Art, covered piano movers, or whether All Pro Piano Movers was a separate and distinct business, which was uninsured. The employer or insured is not consistently designated throughout the board file, the parties' briefs, and the judge's conference order and hearing decision. For example, the claim against Utica listed the employer as Mayakaya Corporation d/b/a All Pro Piano Movers, although there was no policy with that name. However, by the time of conference, the employer in the claim against Utica was designated simply as All Pro Piano Movers which the judge abandoned by hearing, going back to the original designation. We have used the name on the Utica policy. We note that the Trust Fund's motion to join the employer lists the employer as Omar Soffan d/b/a All Pro Piano Movers, but the judge does not refer to the employer thus. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

[2] Attorney Tentindo filed an appearance for Utica on or about January 17, 2020, after this case had been assigned to a reviewing board panel. However, Attorney John Canniff of that office, indicated by letter of February 3, 2020, that they did not intend to file any motions or other requests on behalf of Utica. Rizzo, supra.

CALLIOTTE, J. Republic-Franklin Insurance Company (Utica) appeals from a decision ordering it to pay the employee a closed period of § 34 temporary total incapacity benefits, and §§ 13 and 30 medical benefits for the same period. Utica makes a number of arguments, centering around its contention that the policy of insurance it issued to Mayakaya Corporation d/b/a Royal Academy for Performing Art did not cover the employee or All Pro Piano Movers, the entity for which he allegedly worked. We affirm the decision.

The employee, thirty-three years old at the time of hearing, worked as a piano mover. (Dec. 7.) He understood his employer was All Pro Piano Movers, owned by Omar Soffan. (Tr. 53.) On August 8, 2016, the employee injured his back moving a piano. (Dec. 8.) He had two back surgeries, the first on August 18, 2016. The employee filed a claim against Utica, to which were joined claims against the Workers' Compensation Trust Fund (Trust Fund), and the employer. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). Following a conference, the judge ordered Utica to pay the employee § 34 temporary total incapacity benefits based on an average weekly wage of $251.29 from February 24, 2017, to date and continuing, but denied the claim for medical benefits under §§ 13 and 30. (Dec. 4.) The employee, Utica and the Trust Fund all appealed to hearing. Id.

At hearing, Utica denied coverage for Mayakaya Corporation d/b/a All Pro Piano Movers, and sought recoupment of payments made pursuant to G. L. c. 152, § 11D. The Trust Fund asserted that Utica was responsible for any benefits due. Both Utica and the Trust Fund raised a number of other issues,[3] which we need not address, since the only issue on appeal involves insurance coverage.

The judge heard testimony from several witnesses addressing the nature of Mayakaya Corporation's business, the extent to which it involved moving pianos, and the

[3] Those issues include liability, disability, causal relationship, § 1(7A), average weekly wage, employer/employee relationship and responsibility for medical treatment. (Dec. 5.)

extent to which such information was provided to the employer's insurance agent.[4] In addition, he admitted as exhibits voluminous documents, including Utica's workers' compensation policy issued to Mayakaya Corporation d/b/a Royal Academy of Performing Art for the relevant time period. (Ex. 12, Utica Policy for Mayakaya 7/24/16-7/24/17.) The articles of organization, which were also admitted, indicate that Mr. Soffan's company was incorporated simply as Mayakaya Corporation. (Ex. 23.) (See Dec. 2-3.)

In his decision, the judge found, "Omar Soffan is the owner of Mayakaya Corporation d/b/a All Pro Piano Moving."[5] (Dec. 7.) Apparently referencing the music school Mr. Soffan operated under the name "Mayakaya Corporation d/b/a Royal Academy for Performing Art,"[6] the judge found, "the school had events and recitals where instruments were moved from the school to the site on the day of the event or recital." (Dec. 7.) With respect to insurance coverage for piano movers, he continued as follows:

> Mr. Soffan credibly testified that he provided information to Nicholas Manero of Manero Insurance Agency regarding his business to include coverage for his moving business and employees. Mr. Manero then obtained coverage for Mayakaya Corporation from Utica Republic Franklin Insurance Company. Utica also had coverage for the moving van. Utica Insurance assigned a risk manager surveyor to view the property and interview the employer. . . . The insurer was also aware that the insured did off-premises recitals to include malls, churches and other arenas. Instruments, pianos and chairs were moved to those venues for performances. Manero Insurance Agency confirmed coverage to the insured for a

[4] Those witnesses included, Gregory Oxford, commercial lines underwriting supervisor for Utica; Nicholas Manero, of Manero Insurance Agency; Omar Soffan, the owner of the alleged employer; and the employee. (Dec. 2.)

[5] This appears to be a scrivener's error, as the company is, in almost all other instances, referred to as "All Pro Piano Movers."

[6] Mr. Soffan testified that he directed the "Royal Academy for Music," and that the Mayakaya Corporation was a music teaching school. (Tr. 119) He further testified that Mayakaya Corporation buys, restores and sells instruments for the school, and for the last three to four years, they have also moved pianos. (Tr. 119-122.) Further, he testified that Mayakaya Corporation owned a truck that said "All Pro Piano Movers" on the side. (Tr. 157-158.)

> move scheduled on June 1, 2015 at an apartment for a piano that Mr. Soffan purchased. Mr. Soffan credibly testified that many of the piano moves were related to his students. He would buy pianos from previous students who were moving away and sell to new students.

(Dec. 8.) In his "Rulings of Law," the judge made the following additional findings regarding "coverage":

> *I find that Utica Republic Franklin Insurance Company had coverage for Mayakaya Corporation and all of the employees including piano movers*. I find Mr. Soffan credible that he provided all relevant information regarding his business including his piano moving requirements. Utica accepted the coverage and had two "risk surveys" in order to establish the correct date to assess their premium charges and coverages. *I find that all of Mayakaya business arrangements were essentially lumped together as a natural connection including the known movement of pianos for recitals and the alleged confusion regarding the movement of pianos in and out of residential locations*. *I find that Mr. Burrell is entitled to coverage because he was engaged in work conducted on behalf of the employer* and should have been included in the policy. The insurer may allege fraud with the employer, mistake with Manero Insurance Agency or a miscalculation of premium based on workers[']classification. All those can be resolved in another forum at a different time.

(Dec. 17; emphasis added.) Finding the employee suffered an industrial injury to his back on August 8, 2016, the judge ordered Utica to pay § 34 benefits, but only until August 18, 2016. The judge found that the industrial accident caused a "temporary exacerbation of his pre-existing chronic lumbar spine condition caused by the work injury." (Dec. 15.) The surgery of August 18, 2016, "was necessary, but not due to the work injury. . . . Instead it was due to his chronic pre-existing lumbar spine condition that had been present for several years. The surgery had already been recommended . . . on at least two prior occasions." (Dec. 15.) The judge ordered §§ 13 and 30 medical benefits for the same closed period, not including the surgery. Id. The judge also allowed the insurer to take credit for any benefits paid and to seek recoupment pursuant to § 11D(3). (Dec. 18.)

Only Utica appeals, alleging that the judge has no authority to interpret an unambiguous workers' compensation policy, which, it maintains, Utica's policy for

Mayakaya is, insofar as it does not indicate coverage for piano movers or All Pro Piano Movers, but for the Royal Academy of Performing Art. Moreover, it argues, "a 'music school' and a 'moving company' are not synonymous with each other, nor have any usual or ordinary connection to each other." (Insurer br. 13.) Utica admits that it was aware of "incidental piano moving," but asserts that fact is irrelevant as the piano moving the employee was doing when injured was not related to the music school but was an unrelated commercial transaction. (Insurer br. 16.) Finally, Utica urges that it is against public policy to retroactively bind coverage based on the employer's testimony. Id. at 16-17.

The Trust Fund counters that the judge clearly has the authority to adjudicate the issue of insurance coverage. In addition, the Trust Fund contends the judge appropriately found that Mr. Soffan operated but one business, Mayakaya Corporation, which involved not just teaching music, but buying, selling and moving pianos, and that Utica's policy of workers' compensation insurance covered that business. We agree with the Trust Fund.

Utica's arguments miss the mark. Its first argument is essentially a challenge to the judge's authority to determine coverage issues. In Merchants Insurance Group v. Spicer, 88 Mass. App. Ct. 262, (2015), the court held, "If a dispute over a claim is based on issues of insurance coverage, 'the DIA has full power to decide such questions of coverage' and the 'parties have no right to try out the issue in a separate proceeding in court.' " Id. at 268, quoting Lee v. International Data Group, 55 Mass. App. Ct. 110, 115-116 (2002), quoting from Locke, Workmen's Compensation § 131 at 136 (2nd ed.)(1981). The administrative judge's power to resolve any "issue arising under this chapter," G. L. c. 152, § 10(1), thus clearly includes interpreting contracts of insurance. Nason, Koziol and Wall, Workers' Compensation (3rd ed. 2003), § 7.13.[7]

[7] The 1981 edition of Locke, supra, has been superseded by Nason, Koziol and Wall, Workers' Compensation (3rd ed. 2003). Section 131 of the 1981 edition is § 7.13 of the 2003 edition. The content in both editions is essentially the same.

However, the judge here does not need to interpret the insurance policy due to the established principle that, "if the [claimant] was, or could be deemed an employee of [the alleged employer], [he] would be covered by [that employer's] workers' compensation policy." Lee, supra. In Lee, the court again cited Locke for the proposition that,

> "When an employer becomes a subscriber, the insurer assumes an obligation as broad as the act toward all employees within the business. The act does not permit an employer to become a subscriber as to one part of its business and to remain a non-subscriber as to the rest of a business which is in substance and effect conducted as one enterprise."

Lee, supra, citing Locke, supra § 126 at 130.[8] See also Employers Mut. Liability Ins. Co. v. Merrimac Mills Co., 325 Mass 676, 680 (1950)("With respect to employees engaged in the same business, or in operations necessary or incidental thereto or connected therewith, an employer is not permitted to insure some and to leave others uninsured"). Furthermore, "[t]he employee has against an insurer all the rights which the [workers'] compensation act gives him, *whatever limitations are written in the policy*." Lee, supra, quoting Stoltz's Case, 325 Mass. 692, 696 (1950)(emphasis added). Thus, whether piano movers are listed as employees on the Mayakaya Corporation policy is not determinative of whether they are covered by such policy. The issue becomes whether the music school and the piano moving business were conducted as "substantially one business." Nason, Koziol and Wall, supra at § 7.8. This is generally a question of fact for the judge, Anderson's Case, 276 Mass. 51, 53-54 (1931), and if there is any evidence to support the judge's finding, it will stand. Phalen's Case, 271 Mass. 371, 372-373 (1930). This is so even if it is a close call, and even if, on the evidence, the judge could have reached a contrary conclusion. See Anderson, supra at 53-54.

Here, the judge found Mr. Soffan was the "owner of Mayakaya Corporation d/b/a All Pro Piano Movers" and that he "directed the employee as to the location and time for piano moves." (Dec. 7.) He credited Mr. Soffan's testimony as to what he paid the

[8] Section 126 of the 1981 edition of Locke, supra, is § 7.08 of the 2003 edition of Nason, Koziol and WSall, supra. Again, the content is essentially the same in both editions.

employee and determined his average weekly wage, based in part on the testimony of another mover. (Dec. 7-8; 16.) The judge found Mr. Soffan's testimony credible that he informed his insurance agent that he desired coverage for his moving business and employees. Further, he found that the insurer knew the insured (Mayakaya Corporation d/b/a/ Royal Academy of Performing Art [Ex. 12]), did off-premises recitals and moved pianos and chairs to those venues for performances. The judge also found the employer's insurance agency confirmed coverage to the insured for a move scheduled on June 1, 2015, at an apartment for a piano that Mr. Soffan purchased.[9] And the judge credited Mr. Soffan's testimony that many of his piano moves were related to his students, and that he would buy and sell pianos to students. (Dec. 8.) The judge concluded that Utica "had coverage for Mayakaya Corporation and all of the employees including piano movers." (Dec. 16.) He further concluded "that all of Mayakaya business arrangements were essentially lumped together as a natural connection including the known movement of pianos for recitals and the alleged confusion regarding the movement of pianos in and out of residential locations." (Dec. 17.) Although this last finding is somewhat unartfully stated, we take it to mean that such moving, even if not directly related to students of the music school, was nonetheless part and parcel of the business of Mayakaya Corporation. We think the judge's findings, insofar as they are based on the evidence, are sufficient to support the inference that piano moving was incidental to the business of Mayakaya

[9] We note that, although the judge made findings on the issues of whether Utica or Mayakaya's insurance agent, Manero, knew that Mayakaya Corporation had employees who moved pianos, those issues are not relevant to the question of whether such employees are covered by Utica's policy of insurance, nor is it relevant that Utica would have charged a higher premium or assessed a different classification had it known. See Phalen, supra at 374 (upholding the Board's finding that the operation of a gravel pit in New Hampshire was part of the business of the employer as a dealer in building materials; it was irrelevant whether the insurer, had it known of the operation of the gravel pit, would have charged a higher premium or assessed a different classification in the policy).

Corporation; in other words, that Mayakaya Corporation operated the music school and piano moving business as essentially one enterprise.[10]

Accordingly, consistent with the principle stated above, that " 'the workers' compensation act does not permit an employer to become a subscriber as to one part of its business and to remain a non-subscriber as to the rest of a business which is in substance and effect conducted as one enterprise,' " Lee, supra, quoting Locke, supra at § 126 at 130, we affirm the decision.

Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee in the amount of $1,705.66, plus necessary expenses.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***April 3, 2020***

[10] The judge correctly stated that any claims Utica may have for "fraud with the employer, mistake with Manero Insurance Agency or a miscalculation of premium based on workers[']classification," (Dec. 17), would be actionable in another forum. See, e.g. Employers Mut. Liability Ins. Co. supra at 681 (insurer entitled to recover premium in contract action for employees not described or rated in policy).