

In the Matter of the Compensation of
JAMES E. BAUCUM, Claimant
WCB Case No. 02-07087
ORDER ON REVIEW
Daniel M Spencer, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Phillips Polich and Bock. Member Bock concurs. Member Phillips Polich concurs in part and dissents in part.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) found that claimant was a subject worker; and (2) set aside SAIF's denial of claimant's injury claim. In addition, SAIF moves to strike claimant's respondent's "reply" brief. On review, the issues are the motion to strike and subjectivity. We grant the motion to strike and reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact except for the ultimate findings of fact.

CONCLUSIONS OF LAW AND OPINION

Motion to Strike

SAIF has moved to strike claimant's respondent's "reply" brief on the grounds that it is not permitted under OAR 438-011-0020(2). In effect, claimant is attempting to submit a "cross-reply" brief. Because he did not file a cross-request for review, he is not authorized to file a reply to SAIF's reply brief. *See, e.g., Georgina F. Luby*, 51 Van Natta 84 (1999). Accordingly, SAIF's motion to strike is granted.

Subjectivity

In 1999, claimant became a 50 percent owner and vice-president of a muffler shop corporation. The corporation had been insured by SAIF since 1981. Although the corporation had previously employed subject workers, it did not do so after claimant became a partial owner. Claimant and his partner performed work for the corporation. From at least mid-1996 to claimant's entry in the business, the corporate officers did not elect personal workers' compensation coverage. (Ex. 26-3). After claimant's entry in the business, there is no evidence

that SAIF was provided with any written notice that the corporate officers elected personal workers' compensation coverage.

On July 19, 2002, claimant injured his knees and head at work. (Exs. 59, 60). He submitted an "801" form. On August 8, 2002, SAIF denied the claim on the grounds that claimant was not a subject worker at the time of the injury and that neither claimant nor the corporation had purchased or elected personal coverage. (Ex. 65).

The ALJ found no evidence that any written election of coverage was provided to SAIF. Nevertheless, the ALJ found that claimant's telephone conversation with a SAIF representative about two years before the injury was sufficient to put SAIF on actual notice that the corporation had elected workers' compensation for claimant. The ALJ concluded that claimant was insured by SAIF at the time of his injury.

SAIF argues that a written notice of election was required and that the evidence is insufficient to establish that the corporation had elected workers' compensation for claimant. On the other hand, claimant contends that he adequately notified SAIF of his election of coverage. Alternatively, claimant contends that SAIF should be estopped from asserting that no election was made.

Claimant was a corporate officer and partial owner of the corporation. He does not dispute that ORS 656.039 applies to this case. ORS 656.039(1) provides:

"An employer of one or more persons defined as nonsubject workers or not defined as subject workers may elect to make them subject workers. If the employer is or becomes a carrier-insured employer, *the election shall be made by filing written notice thereof with the insurer* with a copy to the Director of the Department of Consumer and Business Services. The effective date of coverage is governed by ORS 656.419 (3). If the employer is or becomes a self-insured employer, the election shall be made by filing written notice thereof with the director, the effective date of coverage to be the date specified in the notice." (Emphasis supplied).

We agree with the ALJ that there is no evidence that any written election of coverage of corporate officers was provided to SAIF. Claimant acknowledges that ORS 656.039(1) refers to a written notice of election, but he contends that the ALJ

correctly determined that the oral communication of election by claimant was sufficient to establish the actual notice required by the statute.

In construing ORS 656.039, our task is to discern legislative intent. ORS 174.020. To do that, we begin by examining the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). In construing statutory language, we are not permitted to omit what has been inserted or insert what has been omitted. ORS 174.010.

ORS 656.039(1) requires the filing of a *written* notice of an election of coverage. The Court of Appeals has determined that the written notice need not be in a specific form. *Quadel Industries v. Luckman*, 95 Or App 612, 616 (1989) (ORS 656.039 does not require an application to the insurer for coverage; it requires only the filing of a notice of election of coverage); *SAIF v. D'Lyn*, 74 Or App 64, 68 (1985) (nothing in ORS 656.039 requires any specific type of form). Nevertheless, the statute requires a *written* notice of election for coverage.

Here, although claimant asserts that the corporation paid insurance premiums to SAIF, payment of premiums alone is not sufficient to constitute “filing written notice” under ORS 656.039(1). *E.g.*, *Tamera A. Forcier*, 47 Van Natta 1640, 1642-43 (1995) (although the claimant occasionally deducted amounts from her own checks for “workers’ compensation,” and reported those deductions to the state, no written notice of election of coverage was filed); *Ronald Sasse*, 42 Van Natta 1828, 1831 (1990) (payment of premiums, absent written notice of election, did not transform an otherwise exempt person into a covered worker).

Claimant relies on the *Sasse* case to argue that “written notice” means “actual notice,” which can be either express or implied. He contends that *Sasse* was consistent with the court’s approach in liberally applying ORS 656.039(1). Claimant’s reliance on *Sasse* is misplaced. In that case, we concluded that the insurer did *not* have actual notice that the employer was seeking to cover nonsubject workers. Furthermore, we declined to infer from the employer’s payroll report, submitted for the purpose of estimating premiums, that the employer made an election of coverage for nonsubject workers in the claimant’s job classification. *Sasse*, 42 Van Natta at 1830-31. Consequently, we concluded that there had been no written notice of election of coverage as required by ORS 656.039(1).

We reach the same conclusion in this case. There is no evidence that any written election of coverage pertaining to claimant was provided to SAIF before

claimant's July 2002 injury. We are not persuaded that written notice of an election was filed pursuant to ORS 656.039(1).

We turn to claimant's argument that SAIF should be estopped from asserting that no election was made. Claimant asserts that he understood that SAIF's acceptance of premiums and payment of dividends indicated the existence of coverage. He also relies on a phone conversation with a SAIF employee in 2000, asserting that he orally communicated the corporation's ongoing election of coverage to SAIF. He contends that his specific communication to SAIF of his intent and belief regarding the election and coverage assured him that both were properly in place. Further, claimant argues that if SAIF's actions had not induced him to rely on the erroneous assumption that coverage existed, he would have taken the additional step of sending written notice to SAIF. He asserts that he refrained from so acting in reliance on SAIF's representations and actions.

Claimant testified that he had a telephone conversation about two years prior to his injury with a SAIF employee after the corporation had received a notice about coverage. (Tr. 45-46). At hearing, claimant explained:

"It's been awhile. I can't remember if I called them or they called me. I think I got a notice maybe in the mail and I called in and they said that they were going to either suspend our coverage or it was suspended. And I talked to this lady. She was pretty nice, and we had a little conversation and she asked a few questions. And she said that we'd been with them for a long time and that she wouldn't have no problem if I'd put a check in the mail, overnight service, to reinstate or to keep it all going. And we did talk about – she asked me if I had any employees and I explained to her –[.]" (Tr. 46).

Later in the hearing, claimant and his attorney engaged in the following colloquy:

"Q. [Claimant's attorney] What did you tell her [the SAIF employee], and what did she say?

"A. [Claimant] Oh, she asked me about the address, and I told her that the address was our bookkeeper in Walla Walla. We were actually physically in Hermiston, and I didn't know if I'd just misplaced it or if it was late, or I don't know what

happened. And she asked us how many employees we had, and I explained to her the situation.

“Q. Meaning what?”

“A. There was just my partner and I, and we drew a check and that it was a corporation and we all three pay taxes and we’re just employees of the place.

“Q. When you say all three, you mean you pay taxes, your partner pays taxes, and the corporation?”

“A. [The corporation] pays taxes. We pay three separate, and she said that we’d been there for a long time, and – and like I said, if I’d put it in the overnight, that she didn’t have any problem with it. So I did what she told me to do.

“Q. And then did your SAIF coverage continue?”

“A. Yes.” (Tr. 48-49).

In *Stovall v. Sally Salmon Seafood*, 306 Or 25, 33 (1988), the Court explained that the “doctrine of estoppel operates to prevent a person from taking a position contrary to that earlier taken; it prevents a person from proving the truth where that is opposed to a false position earlier taken that caused another to rely on the false position and thereby to choose a course of action.” The doctrine of estoppel is only intended to protect those who materially change their position in reliance upon another’s acts or representations. *Id.* at 34.

In *Day v. Advanced M&D Sales, Inc.*, 184 Or App 260, 264-65 (2002), the court explained that for equitable estoppel to apply, there must be (1) a false representation, (2) made with knowledge of the facts, (3) with the intent that the other party rely, (4) when the other party was ignorant of the truth, and (5) the other party must have been induced to rely upon the representation to his or her detriment. Equitable estoppel does not require a fraudulent misrepresentation. *Id.* at 265-66.

Here, SAIF argues that there is no contention that SAIF lied to claimant or that claimant was told that he was personally covered by workers’ compensation

nsurance. We agree.¹ Based on claimant's testimony, SAIF's employee told him that, if the corporation would mail a check via overnight service, the coverage would be reinstated or continued. Claimant also testified that the SAIF employee asked about the number of employees in the corporation. Thus, based on claimant's testimony, the SAIF employee represented that workers' compensation coverage for the *corporation* would continue if it paid the insurance premium. There is no evidence, however, that the SAIF employee made any kind of representation that claimant had elected coverage for himself or that he would be eligible for workers' compensation insurance in the event of an injury. Claimant asserts that "*claimant's* specific communication to SAIF of *his* intent and belief regarding election and coverage assured claimant that both were properly in place." (Claimant's respondent's brief at 3; emphasis supplied). In other words, claimant relies on *his* representation to SAIF and does not explain the nature of SAIF's false representation.

We acknowledge that affirmative misconduct is not a prerequisite to the application of equitable estoppel. *Swift & McCormick Metal Processors Ass'n. v. Durbin*, 117 Or App 605, 608 (1993). Rather, the doctrine may be applied when conduct is "misleading," even if it is innocent. *Id.* Here, however, the evidence is insufficient to establish that the conduct or representations of SAIF approximately two years prior to the injury was false or misleading.

As the party seeking estoppel, claimant must demonstrate not only reliance, but a right to rely upon the representation of the estopped party. *Coos County v. State of Oregon*, 303 Or 173, 181 (1987). Reliance is not justified where a party has knowledge to the contrary of the fact or representation allegedly relied upon. *Id.*

Here, after claimant became a partial owner, SAIF provided instructions to the corporation with the January 15, 2000 payroll report request that defined "non-subject officers" and explained that they were not personally covered unless SAIF received and accepted an application for the optional coverage.² (Ex. 37-2). Later

¹ For purposes of our analysis, we assume, without deciding, that claimant's testimony about the conversation with the SAIF employee was accurate.

² The "Payroll Reporting Instructions by Type of Insured" attached to the January 15, 2000 payroll report explained, in part:

"Non-subject officers are officers who are also directors and who have (1) an ownership of 10 percent or (2) an ownership equal to or greater than the average ownership of all owners. They are not personally covered unless SAIF receives and accepts an application for this optional coverage. Subject officers are officers

payroll requests sent to the corporation included information stating that payroll of officers electing workers' compensation coverage should be included and the pay of exempt officers of corporations should be excluded, unless their coverage had been endorsed. (Exs. 39-2, 41-8, 49-2, 55-3).

Claimant asserts that he relied on SAIF's acceptance of premiums and payment of dividends to indicate the existence of coverage. However, claimant's reliance on that conduct by SAIF to establish that he was personally covered by workers' compensation insurance was inconsistent with written documents SAIF provided to the corporation. Based on those documents, we are not persuaded that claimant had a right to rely on SAIF's conduct of accepting premiums and paying dividends in order to establish that he was personally covered by workers' compensation insurance. In summary, we conclude that claimant has failed to establish the necessary elements of equitable estoppel.

ORDER

The ALJ's order dated January 31, 2003 is reversed. SAIF's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed.

Entered at Salem, Oregon on September 30, 2003

Board Chair Bock concurring.

I agree with the lead opinion that there was no written notice of election of coverage as required by ORS 656.039(1) and that equitable estoppel does not apply. I write separately to address my policy concerns.

I find it troubling that SAIF was unjustly enriched by collecting premiums from the corporation in this case. I acknowledge that SAIF conducted an audit and determined that the corporation is entitled to a credit of \$1,794, but a SAIF employee said that amount had not yet been returned pending the outcome at hearing. (Tr. 28). Despite the fact that SAIF has asserted it will return the amount

working for pay who are not directors and/or substantial owners and they are automatically covered for compensable injuries. Actual earnings are to be included in your payroll reports for non-subject officers whose names appear as a class description and also for subject officers." (Ex. 37-2; underline in original).

it collected for the premiums, SAIF has had the use of that money for a substantial time period.

In this case, it was entirely reasonable for claimant to believe that SAIF's acceptance of premiums and payment of dividends indicated that he was covered by workers' compensation insurance. In addition, claimant assumed that he had coverage based on the telephone conversation with SAIF's employee in 2000. It is entirely possible that SAIF was aware that the corporation had only two employees, both of whom were corporate officers. Why would the corporation need workers' compensation insurance if the only two employees were also corporate officers? It appears that SAIF should have been aware of this situation before claimant's injury brought it to its attention.

The Workers' Compensation Board is a creature of statute and does not have the powers of a court of equity. *Oregon Occupational Safety v. Don Whitaker Logging*, 123 Or App 498, 500-01 (1993), *rev den* 318 Or 326 (1994). We are not authorized to reach a particular result simply because it seems fair. Nevertheless, the concept of estoppel may be applied in workers' compensation cases. *Meier & Frank Co. v. Smith-Sanders*, 115 Or App 159, 163 (1992) (where the employer's act of telling the claimant and her doctor to proceed with surgery caused the claimant to change her position in reliance on employer's conduct, equitable estoppel operated so as to require employer to pay the claimant's expenses of surgery). Here, however, for the reasons discussed in the lead opinion, I do not believe claimant established the necessary requirements for equitable estoppel.

Board Member Phillips Polich, concurring in part and dissenting in part.

Although I agree with the majority that there was no written notice of election of coverage as required by ORS 656.039(1), I disagree with its analysis of equitable estoppel. I respectfully dissent.

I agree with claimant that he rightly assumed that the workers' compensation coverage begun for the corporation in 1981 was ongoing. He understood that SAIF's acceptance of premiums and payment of dividends indicated that he was covered by workers' compensation. Furthermore, claimant's specific communication to SAIF of his intent and belief regarding the election and coverage assured him that both were properly in place. If SAIF's actions had not induced claimant to rely on the erroneous belief that he was covered by workers' compensation insurance, he would have taken the additional step of sending a written notice of election to SAIF.

The majority correctly sets forth the conditions under which estoppel may apply. *See Day v. Advanced M & D Sales, Inc.*, 184 Or App 260, 264 (2002). However, *Day* goes on to explain that estoppel can exist if “the person to be estopped has ‘created a belief of the existence of a state of facts which it would be unconscionable to deny.’” 184 Or App at 266; *Hess v. Seeger*, 55 Or App 746, 762 (1982) (quoting *5 Thompson on Real Property* section 2524, 536, 541 (1979 Replacement)). The law of equitable estoppel does not require that statements or representations be made, but is applicable based on the conduct of the parties involved. *See Day*, 184 Or App at 267. From the facts highlighted above, it is clear that SAIF, or its employee, played a primary role in creating a circumstance in which claimant believed that by the payment, and subsequent acceptance, of premiums that he had “elected” workers compensation coverage for himself. *See generally, John Mulrooney*, 55 Van Natta 2930 (2003).

It is this conduct, not any “misrepresentation” by SAIF, or its employee that triggers the application of equitable estoppel in this case. In *Swift & McCormick Metal Processors Association, Inc. v. Durbin*, 117 Or App 605, 608 (1993), the court explained that the equitable estoppel doctrine may be applied when conduct is “misleading,” even if it is innocent. Claimant spoke with an individual at SAIF whom he understood to have the knowledge to help him solve his problems and questions concerning his workers’ compensation coverage. SAIF chose this individual, not claimant. It is SAIF that should bear any consequences of this “communication,” not claimant.

The majority interprets the subsequent written documents from SAIF in a manner that minimizes claimant’s reliance on the acceptance of premiums and the payment of dividends to indicate the existence of coverage. The language cited by the majority appears to be boilerplate language and not specifically aimed at claimant. Certainly, there is nothing in those subsequent written communications that differed from the initial written communication from SAIF that resulted in the telephone conversation at issue in this case. The bottom line is that claimant relied on the conversation that he had with SAIF’s employee and took no further action to elect coverage based on these subsequent communications because he believed he already had elected such coverage, and was in fact paying for it.

The conduct of all parties in this case leads to the logical conclusion that claimant had workers’ compensation coverage. To deny coverage to a claimant that has paid for the coverage seems “unconscionable” in a system that severely penalizes those that do not pay for workers’ compensation coverage. Claimant by invoking the doctrine of equitable estoppel seeks to prevent SAIF from asserting

there is no coverage, which is what occurs if SAIF is permitted to change its position in a manner inconsistent with its conduct of accepting claimant's premiums and payment of dividends. For these reasons, I agree with claimant that SAIF should be estopped from asserting that he failed to comply with the technicalities of ORS 656.039(1). I dissent.