VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

**Feb. 3, 2020**

ALI GHADERI v. A BEST AUTO GLASS INC
UTICA MUTUAL INSURANCE CO., Insurance Carrier
UTICA NATIONAL INSURANCE CO., Claim Administrator
Jurisdiction Claim No. VA02000031760
Claim Administrator File No. 10168952
Date of Injury: January 2, 2019

Ali Ghaderi
Claimant, pro se.[1]

Joseph T. McNally, Jr., Esquire
For the Insurer.[2]

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's July 31, 2019 Opinion denying his claim for benefits on the grounds that he was not an employee as defined in the Virginia Workers' Compensation Act. We AFFIRM.

## I. Material Proceedings

The claimant owns an automotive glass company. He sustained injuries to his left leg and foot and filed a Claim for Benefits on January 8, 2019. Although his company was insured for

[1] Douglas K.W. Landau, Esquire, represented the claimant at the hearing but withdrew per the Commission's September 27, 2019 Order.

[2] At the evidentiary hearing, Attorney McNally clarified that he represented the insurance carrier, not the employer, and that the employer was not represented. (Tr. 5.)

workers' compensation at the time of the injury, the insurer denied the claim, arguing the claimant was not an employee as defined by the Act and was not subject to the policy's coverage.

The subsections of Virginia Code § 65.2-101 provide several definitions of what constitutes an employee. The insurer argued that the claimant, as sole shareholder of a stock corporation, was subject to the provisions of § 65.2-101(1)(n). The subsection requires sole shareholders to affirmatively elect to be covered by a workers' compensation policy in order to be considered an employee. The insurer contended the claimant had not informed it of such an election, and was therefore not covered by the policy. The claimant responded by arguing he was an executive officer as defined by § 65.2-101(1)(h) and was automatically covered by the policy absent a written rejection of coverage filed with the Commission by the insurer.

At the evidentiary hearing, the claimant presented undisputed testimony that he was the only shareholder of 5,000 shares of a stock corporation. The Deputy found that "the claimant, as a sole shareholder of a stock corporation, failed to make an affirmative election of coverage as required by the Act." (Op. 11.) The claim was denied because "the claimant was not covered under the [insurer's] policy at the time of his January 2, 2019 accident, and is not entitled to benefits under the Act." (Op. 12.)

The claimant, appearing pro se, filed a timely request for review by the full Commission. He argues that the Deputy Commissioner erred by finding that he was the "sole shareholder of a stock corporation" rather than an "executive officer." In his written statement, he further argues that when he acquired the policy the insurance agent represented that he would be one of the five covered employees.

The insurer filed motions seeking dismissal of the claimant's request for review and to strike the claimant's written statement on the grounds that the request for review did not include specific assignments of error and the claimant's written statement was not timely. It also argues the allegation that the claimant was informed by the insurance agent that he would be covered by the policy is not based upon evidence developed at the evidentiary hearing and should not be considered on review.

## II. Findings of Fact and Rulings of Law

### A. Insurer's Motions to Dismiss and to Strike

The insurer seeks dismissal of the claim because the claimant did not make specific assignments of error in his written statement. Commission Rule 3.1 states that "[a] request for review should assign as error specific findings of fact and conclusions of law," and that a party's failure to do so "may be deemed by the Commission to be a waiver of the party's right to consideration of that error." The insurer also filed a Motion to Strike the claimant's written statement on the grounds it was untimely.

Although we have considered the insurer's motions, the Commission's rules do not "mandate that a party appealing a deputy's ruling must file a timely written statement or face dismissal. . . . once a request for review has been filed, the commission may 'address any error and correct any decision . . . necessary for just determination of the issues,' even if no written statement has been filed." *Russell Stover Candies v. Alexander*, 30 Va. App. 812, 824-25 (1999) (quoting Va. Workers' Comp. R. 3.1). Considering that the claimant is a pro se litigant, and that his untimely written statement was sufficiently specific for the insurer to prepare a written statement in response, we find that addressing the merits of the claimant's claim would be in the interest of

a "just determination of the issues." *Perrigan v. Clinchfield Coal Co.*, 75 O.W.C. 324, 326 n.1 (Sept. 5, 1996).

B. Additional Evidence

The insurer alleges that the claimant attempted to introduce additional evidence in his written statement and objects to its consideration. The claimant avers in his written statement that the insurer's agent advised him that he would be included as a covered employee, and that because of this representation, he did not contact the insurer to confirm his coverage. At the evidentiary hearing, however, the claimant did not present testimony supporting this allegation. Reggie Jackson, the insurance agent with whom the claimant purportedly had the conversation referenced in his written statement, also testified. No testimony regarding Mr. Jackson's alleged representation was brought forward.

In order to produce evidence supporting his allegations, the claimant must petition to Commission to reopen the record "or receive after-discovered evidence." Va. Workers' Comp. R. 3.3. "[A] party requesting the admission of additional testimony or evidence must be able to conform to the rules prevailing in the Courts of this State for the introduction of after discovered evidence." *Miller v. Dixon Lumber Co.*, 67 O.W.C. 71, 72 (1988). In order for such evidence to be admitted, it must be established that the proffered evidence was discovered after the Deputy Commissioner's hearing, that it could not have been discovered before through the exercise of due diligence, that it is material to the case and not merely cumulative, and its admission at another hearing would lead to a different result. *Chenault v. Blue Roofing, Inc.*, No. 0405-85 (Va. Ct. App. Feb. 12, 1986).

The claimant had ample opportunity to elicit testimony regarding the representations allegedly made by Mr. Jackson at the hearing, where they could have been tested through the process of cross-examination and evaluated for credibility by the finder of fact. He did not do so. As such, there are no grounds for reopening the record to admit additional evidence, and the unsupported allegations in the claimant's written statement may not be considered on review.

C. Claimant's Status as a Covered Employee

At issue in this case is whether the claimant was an employee as defined by the Act and thus covered by the employer's insurance policy. The claimant first argues that he was an executive officer who was automatically subject to the policy absent a rejection of coverage filed with the Commission. In the alternative, he contends that if he was the sole shareholder of a stock corporation he elected to be covered by the policy.

The claimant is the owner of A Best Auto Glass, Inc. The business was incorporated in 2004, and the claimant testified that he is the sole shareholder of all 5,000 shares of stock. During pre-hearing discovery, the insurer requested a copy of the corporation's bylaws, which were not provided by the claimant prior to or at the hearing. Admitted as evidence was a "Officer/Manager Rejection of Coverage" form that was signed by the claimant or his representative. The form states, in pertinent part, that "the undersigned hereby rejects the right to claim workers' compensation benefits for injuries by accident." (Def.'s. Ex. 4.) This form, however, was not filed with the Commission by the insurer.

The Deputy Commissioner found preponderating evidence demonstrated that the claimant was a "shareholder of a stock corporation having only one shareholder" and absent an express election to be covered, did not qualify as an employee. Va. Code § 65.2-101(1)(n). The claimant

argues this was error, and contends that he qualified for coverage as an "executive officer" as defined by § 65.2-101(1)(h). Executive officers are automatically covered by workers' compensation policies acquired by their companies. In order to reject coverage (and avoid being considered an employee for the purpose of determining the Act's jurisdiction), executive officers must inform the insurer of their intention to reject coverage, and the insurer must file a Notice of Rejection with the Commission for it to be effective. *See* § 65.2-300. Because the insurer did not file the rejection of coverage form with the Commission, the claimant argues he was a covered employee at the time of his accident.

The pertinent subsection defines employees as:

> [E]very executive officer, including president, vice president, secretary, treasurer or other officer, **elected or appointed in accordance with the charter and bylaws of a corporation**, municipal or otherwise

Va. Code § 65.2-101(1)(h) (emphasis added).

We do not find preponderating evidence that the claimant was an executive officer at the time of his injury. The claimant did not testify that he was an executive officer, instead stating that he was the "owner" who handled "everything that needs to be handled." (Tr. 74-75.) The only document identifying the claimant as a corporate officer is the Officer/Manager Rejection of Coverage Form. Although it lists the claimant as "President," the bylaws of the corporation were not admitted as evidence, nor did the claimant explain how he was appointed or elected to a position as an executive officer in accordance with the bylaws.

The claimant bears the burden of proving that he is an employee under the Act. *Behrenson v. Whitaker*, 10 Va. App. 364, 366 (1990). Furthermore, it is a well-established principle of law that a workers' compensation claimant may not rise above his own testimony. *See Massie v.*

*Firmstone*, 134 Va. 450, 462 (1922). In the absence of testimony or documentary evidence identifying the claimant as an "officer, elected or appointed in accordance with the charter and bylaws of a corporation," we cannot find that the claimant is an employee under § 65.2-101(1)(h). Because the claimant is not an "executive officer" as defined by the subsection, the insurer's failure to file the signed rejection of coverage form with the Commission has no bearing on his status as an employee.

We agree with the Deputy Commissioner that the claimant is the sole shareholder of a stock corporation and is subject to the provisions of § 65.2-101(1)(n). The subsection defines an "employee" as:

> Any sole proprietor, shareholder of a stock corporation having only one shareholder, member of a limited liability company having only one member, or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business **if the insurer is notified of this election**. Any sole proprietor, shareholder or member or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

*Id.* (emphasis added).

In order for a sole shareholder to be considered an employee the evidence must establish that the claimant "specifically elected to be covered under the policy" and that "he gave express notice to the insurer of his intention to be personally covered." *Whitlock v. Whitlock Mech./Check Servs.*, 25 Va. App. 470, 478 (1997). "The mere presence of the claimant's name on the policy does not relieve him of his affirmative duty to notify the insurer of his election to be included as an employee under the employer's policy." *Parrish v. Media One*, VWC File No. 199-09-41 (May 8, 2001). The claimant must provide "express notice to the insurer of his intention to be personally covered." *Id.*

The claimant argues that he informed the insurer that he wished to be covered by the workers' compensation policy. After reviewing the evidence, we are not persuaded. At the hearing the claimant testified that "I thought that I was covered. I mean, we had coverage for us and we received this, so we thought we were covered." (Tr. 64.) Belying his testimony is his response to an email from the insurer informing him that he had the option to exclude himself from coverage, for which he would receive a discount. (Tr. 74.) The email states "I have sent you the workers compensation form to exclude the owners pay from the policy." (Def.'s. Ex. 2.) The rejection of coverage form was signed and returned to the insurer. Though never filed with the Commission, the claimant's actions no less evince an intention to not be covered under the policy "on the condition that I was supposed to receive a discount." (Tr. 82.)

Testimony taken at the hearing confirmed that the claimant's premium rate was reduced because he rejected coverage. Reggie Jackson, the insurer's agent, testified that the claimant's wages were not factored into calculating the premiums for his business's workers' compensation policy. (Tr. 93.) The agent's testimony was corroborated by Renee Baldwin, a commercial underwriter for the insurer, who stated that "an Officer Exclusion was to apply to this policy" and that the claimant's "remuneration was also excluded for calculating the premium basis." (Def.'s. Ex. 1-7, 1-15.)

The evidence in the record does not preponderate to a finding that the claimant, as sole shareholder of a stock corporation, elected to be covered by his company's workers' compensation policy as required. He was not a covered employee at the time he sustained his injury, and benefits are not available to him under the Act.

## III. Conclusion

The Deputy Commissioner's July 31, 2019 Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

**A BEST AUTO GLASS INC**
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**Interested Parties**

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Paperless

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