

IN THE COURT OF APPEALS OF IOWA

No. 9-847 / 09-0040
Filed December 17, 2009

THE TRAVELER'S INDEMNITY COMPANY,
Plaintiff-Appellant,

vs.

D.J. FRANZEN, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Traveler's Indemnity Company appeals from the district court's order
granting D.J. Franzen, Inc.'s motion for summary judgment. **AFFIRMED.**

CeCelia C. Ibson and Laurie J. Wiedenhoff of Smith, Schneider, Stiles &
Serangeli, P.C., Des Moines, for appellant.

Stanley J. Thompson, of Davis Brown Law Firm, Des Moines, for appellee.

Considered by Eisenhauer, P.J., and Potterfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.**I. Background Facts and Proceedings**

In 2003, D.J. Franzen, Inc. (Franzen), an over-the-road trucking company, applied for insurance coverage through the assigned risk plan.¹ The National Council on Compensation Insurance (NCCI), as administrator of Iowa's assigned risk plan, selected Traveler's Indemnity Company (Traveler's) to be Franzen's workers' compensation insurance carrier. On its application, Franzen was required to identify the class code of each employee to be covered under the insurance policy as well as a total number of employees and their total estimated annual payroll. The rate of insurance varies based on the class code of the insured employees and their total payroll. Franzen's application listed seven code 8810 clerical office employees with a total estimated payroll of \$230,000 and zero code 7229 hauling employees (drivers) with a total estimated payroll of zero dollars. Based on this information, Traveler's calculated Franzen's deposit premium to be \$1775.

NCCI prepares reports each year that include data for the insured for the three years prior to the date of the report. NCCI's report dated September 15, 2003, revealed that in the previous three years, Franzen carried workers' compensation insurance for its code 7229 hauling employees in addition to its clerical employees. Franzen informed Traveler's that it had sold all of its trucks, and former 7229 employees were now owner-operators, for whom they were not

¹ The assigned risk plan is a statutory mechanism that serves to make insurance available for employers who are unable to obtain workers' compensation insurance in the traditional insurance market.

required to provide workers' compensation insurance.² A Traveler's underwriter became concerned about the status of Franzen's 7229 employees, especially after discovering Franzen owned a truck leasing company, Heartland Lease Inc.

Traveler's unsuccessfully attempted to obtain Franzen's cooperation in conducting a preliminary audit. On December 13, 2003, Traveler's sent a letter stating that Franzen's policy would be placed in cancellation status effective January 14, 2004. The letter further stated coverage would not be reinstated until Franzen fully cooperated with the preliminary audit. Franzen then provided the requested information.

After reviewing the sample contract between Franzen and its drivers, Joseph Pinto, a Traveler's fraud examiner, noted that "it is apparent that anyone who signs this contract is an owner-operator and not an employee." Traveler's informed Franzen that drivers who had signed a contract would be considered owner-operators, but all other drivers would be considered 7229 employees and included in the workers' compensation policy. Traveler's conducted a second audit in July of 2004 and decided that eight of Franzen's drivers were owner-operators, but the rest of the drivers, some of whom leased trucks from Heartland Lease, were to be included in the insurance policy.

On September 23, 2004, Traveler's issued a premium adjustment notice to Franzen showing that Franzen's total premium due had increased to \$552,436. No workers' compensation claims had been filed during the coverage

² "With some exceptions . . . Iowa employers are required by law to obtain insurance covering their liability for workers' compensation benefits." *Traveler's Indem. Co. v. Comm'r of Ins.*, 767 N.W.2d 646, 647 (Iowa 2009). One such exception is in the case of an independent contractor, who is not considered an employee and may be excluded from the employer's workers' compensation policy. Iowa Code § 85.61(13)(c) (2007).

year. Franzen refused to pay the additional premium, asserting it had no employee drivers, only owner-operators. On November 23, 2004, Traveler's sent a letter declining to revise the audit and advising that an appeal could be directed to NCCI.

Franzen did not appeal or pay the premium due. Therefore, on June 28, 2007, Traveler's filed a petition seeking judgment against Franzen for the amount of the additional premium. On July 29, 2008, Franzen filed a motion for summary judgment asserting all of its drivers were independent contractors and should not have been included in Franzen's workers' compensation premium. Traveler's filed a resistance to Franzen's motion for summary judgment and also filed a cross motion for summary judgment on October 15, 2008. The district court granted Franzen's motion for summary judgment. Traveler's appeals, arguing: (1) it had sole authority to determine Franzen's premium obligation; (2) Franzen's failure to exhaust administrative remedies bars its defense; and (3) the record supports a finding that all but eight of Franzen's drivers were employees.

II. Standard of Review

We review the granting of a summary judgment motion for correction of errors at law. *In re Estate of Renwanz*, 561 N.W.2d 43, 44 (Iowa 1997). Summary judgment is appropriate when the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We review the evidence in the light most favorable to the nonmoving party. *Id.*

III. Administrative Remedies

Traveler's asserts that according to the NCCI manual, Franzen was required to raise any dispute "before the appropriate administrative or regulatory body having jurisdiction over appeals on Plan matters."³ Traveler's contends that because Franzen failed to exhaust available administrative remedies, the district court was barred from hearing Franzen's defenses and should have granted Traveler's motion for summary judgment.

Generally, a prerequisite to an appeal to the district court is that the appealing party must first exhaust all administrative remedies available. *Kloster v. Hormel Foods Corp.*, 612 N.W.2d 772, 775 (Iowa 2000). However, in this case, Traveler's, the plaintiff, brought a suit for money damages against Franzen, the defendant. Thus, Traveler's is essentially arguing that Franzen cannot defend itself in this suit for damages because it failed to dispute the premium amount before the proper administrative agency. The doctrine of exhaustion of administrative remedies is an affirmative defense that cannot be raised by a plaintiff to bar a defendant from presenting a defense in a suit for money damages. See *Jones v. Bock*, 549 U.S. 199, 212-17, 127 S. Ct. 910, 918-22, 166 L. Ed. 2d 798, 810-14 (2007) (holding that failure to exhaust administrative remedies is an affirmative defense). Thus, as the plaintiff in this case, Traveler's cannot prevail on its contention that Franzen failed to exhaust administrative remedies.

³ The NCCI manual states, "Any person affected by the operation of the Plan . . . who may have a dispute . . . may seek a review of the matter by the Plan Administrator."

IV. Determination of Employee Status

Traveler's asserts that, as a matter of contract and of law, it had sole authority to determine which individuals were employees and which individuals were owner-operators. While Traveler's refers to contract terms that indicate it may have authority to determine how an employee's job is classified, Traveler's does not have authority to determine the separate issue of whether certain individuals are employees. Iowa Code section 85.61(13)(c) establishes criteria for determining when an owner-operator is an independent contractor and therefore not an employee. Thus, this issue is properly governed by statute and is not within Traveler's sole authority.

Further, the district court properly determined that Traveler's did not generate a fact question as to whether the drivers at issue were employees or independent contractors. The drivers satisfied the statutory criteria presented in section 85.61(13)(c) and should therefore have been considered independent contractors and excluded from Franzen's workers' compensation insurance policy. Thus, Traveler's was not entitled to a money judgment, and the district court properly granted Franzen's motion for summary judgment.

AFFIRMED.