1967

Employers Mutual Liability Insurance Company Of Wisconsin v. The Industrial Commission Of Utah, Et Al : Plaintiffs Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION OF UTAH, ET AL

Defendant.

Case No. 10921

PLAINTIFF'S BRIEF

APPEAL FROM ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

CLYDE, MECHAM & PRATT
FRANK J. ALLEN
Attorneys for Plaintiff

LEON M. FRAZIER
160 East Center Street
Provo, Utah
Attorney for Applicant, Phillip E. Russon

EUGENE W. HANSEN
Newhouse Building
Salt Lake City, Utah
Attorney for A-1 Quality Glass Company

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NATURE OF THE CASE

This is a review of proceedings before the Industrial Commission of Utah culminating in an order by the Commission that Plaintiff pay benefits as provided by the Utah Workmen's Compensation Act by reason of fatal injury sustained by Phillip H. Russon on January 19, 1966, in the course of his employment with A-1 Quality Glass Co., herein called A-1.

STATEMENT OF FACTS

There is no question as to the employment status of the deceased (i. e. he was an employee of A-1) or as to his having been in the course of his employment when fatally injured on January 19, 1966. The only issue relates to coverage, it being Plaintiff's contention that the compensation policy on which Plaintiff's responsibility must be predicated was validly cancelled for statutory reasons and in statutory manner before the accident.

Sometime prior to October 19, 1965, A-1 requested Plaintiff to recalculate the premium ($422.05) which had been billed for the policy year beginning September 26, 1965 (R-30, 84). On October 19, 1965, Plaintiff sent A-1 an amended billing (R-82) which shows a $161.15 premium reduction based on employee reclassification and an "amount due" of $260.90 (i. e. the $422.05 originally billed less the $161.15 credit for reclassification reduction).

On December 3, 1965, Plaintiff, having by then received no part of the premium even as reduced, mailed notices of cancellation (R-91) to A-1 and the Commission's Compensation Division. There is some question, since the Commission's stamping is defective (R-72) about when the Commission's copy was received, but it was certainly received by December 15, 1965 (R-78). There is no question about when A-1 received its notice. Mrs. Horton of A-1 signed a receipt on December 7, 1965 (R-55) and dispatched a check in the amount of $161.15 ($99.75 less than the premium due) on December 8, 1966 (R-87).

On December 30, 1965 (15 days before the end of the statutory 30-day period which must expire after notice of cancellation before the cancellation can be effective) Plaintiff sent A-1 a statement of account showing the amount which remained to be paid in order to reinstate the policy (R-88). Previously (R-56) Mr. Larson had telephoned Mrs. Horton and advised her that the payment of December 8, 1965 was deficient, and an additional $99.75 would have to be sent to "reinstate the policy." By January 14, 1966 (when 30 days after the effective date of the notice of cancellation, as stated on its face, had elapsed), no additional payment had been made. A-1 did send Plaintiff a check for $99.75 after the fatal accident of January 19, 1966. The check was dated January 30 and received by Plaintiff, as indicated by the time stamp on the back, on February 21. The $161.15 payment was never returned to A-1 because year-end audit revealed that A-1 was more than $161.15 in arrears on its 1964-65 premium (R-93).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order of this Court annulling the award herein as against Plaintiff and declaring the Commission's finding that A-1 had compensation coverage with Plaintiff on January 19, 1967, to be against the law and the evidence.

ARGUMENT

POINT I

PLAINTIFF MORE THAN COMPLIED WITH THE LETTER OF THE LAW IN EFFECTING THE CANCELLATION OF THE POLICY HEREIN. THERE ARE NO EQUITABLE PRINCIPLES WHICH SHOULD APPLY TO VITIATE THE CANCELLATION.

It should be noted at the outset that there is no question about Wendy Russon's being entitled to receive the benefits our compensation act provides for surviving dependents. The only issue is whether those benefits should be paid by A-1 or Plaintiff. The principle that the compensation act should be liberally construed for workmen has no application to the contest between these corporations.

The compensation act imposes direct responsibility on *employers,* not on insurance carriers. Section 35-1-46 UCA requires every employer to secure compensation to its employees *"by insuring and keeping insured."* The statutes *do* give an employer ample protection against the possibility that its coverage will expire without its knowledge. Section 31-19-14 permits cancellation only for nonpayment of premium and then *only upon 30 days written notice* by the carrier to the employer and the Commission.

The statutes (31-19-14) require every authorized compensation carrier to accept every application for compensation coverage made to it. They do not, how-

ever, require that the other customers of an authorized carrier must assume the obligations of an employer who makes application and refuses to pay premiums. The basic concept of insurance is that all of the insured assume the risk of each of the insured by contributing to a common fund. The one who fails to contribute must lose his protection. Carriers are therefore given by statute a means of cancelling the policy of an insured who will not pay premiums.

In the instant case, Plaintiff more than complied with the letter and spirit of the act. It originally billed for 1965-66 premiums on Sept. 25, 1965. When question was raised as to the amount of the premium, plaintiff reviewed the work history of A-1's employees, reclassified them and billed again, at the reduced rate, on October 19, 1965. A-1 failed to pay even the reduced premium by December 3, 1965, so Plaintiff resorted to the statutory procedure for extricating itself and conserving its reserves for those who had contributed to them.

Plaintiff did *more* than give 30 days notice of cancellation. On December 3, it mailed a notice which had an effective date of December 15, and thus commenced on December 15 the 30-day period during which the premium had to be paid to reinstate the policy. A-1 still failed to pay the premium; it paid only about 60% of the amount due. Before Christmas, Mr. Larson advised A-1 by telephone that the remainder must be paid (R-56). On December 30, Plaintiff sent A-1 a final premium statement clearly expressing the premium deficiency (R-88).

A-1 failed to respond. January 14 (the thirtieth day after the effective date of the notice) came and went. *The cancellation was statutorily effected.*

There is no principle of equity which should apply to excuse an employer from failure to satisfy its statutory obligation under the circumstances of this case. More than statutory notice was given. Telephone communication beyond statutory demand was initiated by Plaintiff so that A-1 would be fully apprised of the consequences of its continuing failure. To impose obligation on the insurance carrier under these circumstances indicates a misapprehension as to the source of insurance company funds.

POINT II

PART PAYMENT OF PREMIUM DOES NOT REINSTATE AN INSURANCE POLICY.

We would emphasize at the outset that most of the cases herein cited involve life insurance policy forfeitures under circumstances where the law recognizes the insured to be under a disadvantage. The insurer designs the provisions of the insurance policy which may be almost unintelligible to the insured. The insurer is a giant corporation and the insured may be a totally uneducated, even illiterate, individual. The provisions for forfeiture are often contained in the contract only, there being no statutory protection for the insured, and may work a forfeiture without notice or grace period.

The doctrines of these cases apply, we believe, with much greater force in the instant situation where the

entity asserting coverage is itself a corporation of some size, has a statutory obligation to maintain coverage and is protected against any possibility that a forfeiture will occur without its knowledge by a statutory provision that 30 days' notice of forfeiture must be given. The policy is a standard compensation policy, (there can be no contention that it was treacherously designed by the carrier) and the parties to the insurance contract are essentially equals. The significant difference between the instant situation and the usual insurance situation is simply this: Here, the law (Section 46) *imposes on the insured an obligation to insure and keep insured* and, inferentially, to be aware of the performance necessary to satisfy that obligation and the consequences of failure. The onus is not placed on insurance companies by the legislature, it is placed on employers.

The issue we see in this case is one which frequently arises. Couch comments on the specific situation which confronts us and cites numerous cases in support of his conclusions. In quoting, we retain the footnote numbers from the original text to indicate the depth of the author's research. We do not, however, include the author's footnotes. At page 331 of Volume 6, Couch on Insurance 2nd, the following statement appears as a part of Section 32.111:

> "The obligation to pay the premium when due is ordinarily an indivisible obligation to pay the entire premium, so that a forfeiture is not prevented by part payment thereof:[5] This means that a part payment will not keep the policy in force for even such a proportionate part of the new

period as the sum bears to the whole premium due.[6]

The parties may of course agree that the insurer shall accept the part payment as effective to keep the policy in force for the period covered by the full premium which was due.[7] Where part payment is tendered, the insurer may accept such payment, reserving the right to forfeit the policy if the balance is not paid, particularly where notice is given limiting the time of payment of the balance."[8]

The standard reference works take the same position with reference to the effect of a partial payment of premium. The Corpus Juris statement (45 CJS 195, Insurance, Section 473 (5)) is as follows:

"In the absence of an agreement to the contrary, a partial payment of a premium due at a particular time is of no effect. So, where, under the terms of a premium note, the company is entitled to collect premiums as far as earned, the acceptance of a payment on the note which is less than the earned premium at the time the policy is forfeited will not keep the policy alive."

The American Jurisprudence comment is Section 509 of the Insurance treatise (29 Am. Jur. 825). There is an annotation at 92 ALR 712.

The general proposition that a part payment of premium, even if retained pending payment of the balance before forfeiture date, does not reactivate a policy is well entrenched in our case. The U. S. Supreme Court has itself expressed this view in *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 33 S. Ct. 523. In *Young* v.

Mutual Trust Life Insurance Company, 54 N.D. 600; 210 N.W. 177; 53 A.L.R. 910, the defendant company retained a dividend, which was less than the amount of a premium installment due, beyond the grace period. During the grace period, the insured had indicated his desire that the dividend be applied against the premium. The company therefore held money of the insured which constituted a part payment of the dividend by their mutual understanding. Nevertheless, said the Court, failure to pay the balance within the garce period worked a forfeiture of the policy; there was no pro rata extension.

In the field of compensation insurance, the New York Supreme Court Appellate Division very recently (April, 1964) considered a case where the carrier had received full payment of the current year's premium, but the insured had failed to respond to a demand for a $48.50 premium deficiency for the previous year revealed by a year-end payroll audit. In *Taylor* v. *1765 - 1763 Realty Corp.*, 248 N.Y. Supp. 2nd 926, it was held that a cancellation based on failure to pay that previous year's premium deficiency was effective. A similar result, upholding cancellation in the face of claimed part payment of premium, was reached in *Greaves* v. *Perez Iron Works*, 176 So. 2nd 205 (June, 1965). We have found no cases where a part payment of premium extends a policy except where that policy specifically provides for it (as it does at bar) or where the elements of estoppel are present.

POINT III

THE ELEMENTS OF ESTOPPEL ARE NOT PRESENT HERE.

The only conduct of the Plaintiff in this case to which A-1 has pointed as an indication of Plaintiff's willingness to waive any right to full payment and to extend credit for unpaid premium balance is the transmittal of the December 30th statement. A-1 contends that somehow, by giving a final written reminder that additional premium was due, Plaintiff waived its right to terminate coverage on January 14, the end of the grace period, if the premium balance was not sooner forthcoming. The mere sending of a statement during the grace period can hardly be interpreted as a waiver or promise to extend credit. In *Ellerbeck* v. *Continental Casualty Company*, 63 U. 530; 227 Pac. 805, this Court had occasion to comment on the argument that the sending of statements constituted a representation that credit was being extended. The Court disposed of the argument with this language:

> "It cannot be reasonably contended that the mere sending of statements on the first of each month for 2 months after the payment was due was such a recognition of the existence of the insurance and waiver of payment that the policy remained in force an indefinite time after the date of sending the last statement."

POINT IV

THE COMMISSION ERRED IN FAILING TO MAKE FINDINGS OR ADOPT CONCLUSIONS FROM WHICH ITS THEORY OF LIABILITY COULD BE DETERMINED.

The Commission made a finding in this case that A-1 was "covered with workmen's compensation insurance" by Plaintiff on January 19, 1966. It made no findings or conclusions with reference to the receipt of the cancellation notice, the effect of part payment of premium or as to any Plaintiff conduct which could be interpreted as estoppel. Since Plaintiff cannot determine, from the findings and conclusions, what the Commission's theory of liability is, Plaintiff is at a severe disadvantage in attempting to present fully the authorities on the issue the Commission may have found determinative.

Plaintiff has assumed, for this review, that the Commission concluded a part payment of premium extends a compensation policy for a pro rata portion of the policy year. The law does not, however, contemplate that the parties must speculate about the theory of liability. The statutory requirement that findings and conclusions be stated has no significance if the Commission fails to disclose what it considers to be the dispositive issues.

CONCLUSION

Plaintiff clearly filed its cancellation notice at a time when A-1 was two months delinquent in premium payment. Plaintiff had statutory right to cancel and exercised that right in a manner consistent with the insurance policy and the law before the accident occurred which is the basis of this claim. If the Commission has jurisdiction to order an insurance carrier, and not just the employer, to pay compensation, it has found carrier liability in this case against the law and in abuse of its administrative authority.

Respectfully submitted,

CLYDE, MECHAM & PRATT
FRANK J. ALLEN

Attorneys for Plaintiff