STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THE BEACON MUTUAL INSURANCE CO.	)	
	)	
VS.	)	W.C.C. 2002-06494
	)	
NORTHEAST BUILDERS/PETER MARSHALL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came before the court on a notice of contest alleging that Peter Marshall d/b/a Northeast Builders did not have an existing workers' compensation policy with Beacon Mutual Insurance Company (hereinafter Beacon) when his employee, Wayne Heilborn, suffered a work-related injury. The matter is presently before the Appellate Division pursuant to Beacon's appeal from the decision and decree of the trial judge finding Beacon is estopped from denying coverage to the employer and his injured employee. After conducting a careful review of the record in this matter and considering the arguments of both parties, we affirm the ultimate determination of the trial judge and deny and dismiss the insurer's appeal.

There are four (4) additional matters arising out of this injury which are pending before the court. W.C.C. No. 2002-02482 is an original petition filed by the employee against the employer as insured by Beacon alleging a closed period of disability resulting from an injury he sustained on October 1, 2001 while working for Northeast Builders. W.C.C. No. 2002-04755 is a petition to review filed by the employee against the employer as insured by Beacon requesting specific compensation for scarring and loss of use resulting from the injury. W.C.C. No. 2002-

08335 is a petition to review filed by the employee against the employer as insured by Beacon alleging a second period of incapacity. W.C.C. No. 2003-06531 is an original petition filed by the employee against Mr. Marshall and Northeast Builders as a self-insured employer, but otherwise containing the same allegations as in W.C.C. No. 2002-02482. After rendering his decision in the matter presently before the panel, the trial judge granted the three (3) petitions naming Beacon as the employer's insurer, and denied W.C.C. No. 2003-06531 as against Mr. Marshall and Northeast Builders as a self-insured employer. All four (4) matters were subsequently appealed and have been stayed pending the resolution of this coverage dispute.

The employer had sporadically been insured by Beacon for a number of years. Records of the Souza Insurance Agency were admitted into evidence and document the history of the employer's intermittent insurance coverage with Beacon. Mr. Marshall obtained at least four (4) policies with Beacon since 1998, all of which were cancelled prematurely due to the employer's failure to abide by policy conditions. The first of these was policy number 19915 which was effective October 28, 1998. The policy was cancelled as of March 24, 1999 due to non-payment of the premium. The second was policy number 24146, which was intended to be in effect from May 13, 1999 until May 13, 2000, but was cancelled on November 5, 1999 when the employer failed to pay his premium. The third was policy number 26579, effective from July 6, 2000 to July 6, 2001, but cancelled on October 23, 2000. A copy of an e-mail communication between the Souza Insurance Agency and Beacon indicates that in order to reinstate the policy, the employer would have to resubmit an application with full payment of the premium and the employer would need to cooperate with the audit department of Beacon. The final policy was number 27284, effective from December 1, 2000 until December 1, 2001, but again cancelled prematurely on July 25, 2001. The records contain a copy of a check from Mr. Marshall dated

December 1, 2000 for Five Thousand Eight Hundred Five and 00/100 ($5,805.00) Dollars, representing payment for a full year's premium. For reasons we will discuss in due course, this policy would eventually be reinstated by Beacon so as to cover the date of Mr. Heilborn's injury.

In August of 2001, the employer, a subcontractor, had recently bid on a job which required proof of workers' compensation insurance. Before beginning the job, scheduled for September or October of 2001, the employer contacted the Souza Insurance Agency, his insurance agent, to obtain proof of insurance. The employer testified that he was then informed, for the first time, that his policy had lapsed. With the assistance of the Souza Insurance Agency, he began the process of procuring a new policy. However, as the testimony presented at trial demonstrates, there is little agreement as to the events that would follow. What is undisputed is that Mr. Heilborn alleges he suffered a work-related injury on October 1, 2001 while working for Mr. Marshall.

Marge Guillet, an underwriter at Beacon, testified at trial that Beacon's records showed the earlier policies had been cancelled due to a number of non-compliance issues, including failing to submit to audits and make premium payments. Ms. Guillet testified that the Souza Agency contacted her on September 6, 2001 about procuring an insurance policy for the employer. She told the agency that his prior policy needed to be audited before he would receive a reinstated or new policy. On September 10, 2001, an application for insurance along with a check for Five Thousand Eight Hundred Five and 00/100 ($5,805.00) Dollars, representing the estimated annual premium, was sent to Beacon by the Souza Agency on behalf of the employer. Ms. Guillet stated there were no specific instructions as to how the money was to be allocated. Subsequently, at least three (3) attempts to audit the employer's business were unsuccessful, despite requests by phone, in writing, and with the assistance of the Souza Agency.

On September 26, 2001, Ms. Guillet faxed a correspondence to the Souza Agency informing them that the employer had failed to comply with their audit request and coverage was being denied. Additionally, she told them, she was applying a portion of the premium deposit, Two Thousand Seven Hundred Five and 00/100 ($2,705.00) Dollars, to the amount owed on his prior policy. The agency was told that the balance of the deposit would be returned to the employer. This was memorialized in a correspondence from Ms. Guillet to Roy Souza Jr., the principal of the Souza Agency, which stated that Beacon was "declining the submission and applying $2,705 from the deposit premium on the outstanding balance on policy #27284." (Pet. Ex. 2, 9/26/01 correspondence.) Ms. Guillet testified that one of the Souza Agency's employees, Debra St. John, stated she would inform the employer that his application had been denied.

Ms. Guillet subsequently received a call from Ms. St. John on October 3, 2001. She testified that Ms. St. John stated there had been a work-related injury and inquired as to whether there was a policy in effect.[1] Ms. Guillet informed her that no policy had been issued for the employer. On October 9, 2001, Ms. St. John e-mailed Ms. Guillet confirming that there was no coverage and asking whether the balance of the premium payment had been sent to the employer. Ms. Guillet responded that she had requested a return of premium on October 2, 2001, but had been out of work ill for the prior week and would be sending out the refund immediately.

Roy Souza, Jr., the owner of Souza Insurance Agency, testified at trial that he had been the employer's insurance agent since 1998. The September 10, 2001 application for insurance was the most recent one submitted by the agency for the employer. Mr. Souza testified he was aware of prior problems with the employer's policies, so he contacted Beacon's underwriting department before accepting a premium payment from the employer. He testified that Ms.

[1] Ms. St. John would later testify that she did not learn of Mr. Heilborn's injury until October 9, 2001. However, this discrepancy is immaterial to the ultimate issue in this case.

Guillet told him on September 10, 2001 that in order to procure insurance, the employer would need to file a new application, pay his annual premium in full and comply with current and future audits. Mr. Souza believed these to be requirements of, but *not* prerequisites to, the issuance of a new policy. He anticipated that a policy would be in place once the application was submitted and the check cashed. At this point, Mr. Souza believed the employer would soon have an active policy and told him as much. However, he did acknowledge that he has no authority to bind Beacon contractually.

On September 26, 2001, Mr. Souza received a correspondence from Ms. Guillet rejecting the application due to the employer's failure to submit to an audit. He testified that he, or someone from his office, contacted the employer after receiving this notice and told him his application was denied and he would not be receiving a full refund of the premium deposit because of money owed on prior policies. Mr. Souza described this as "an uncomfortable situation because we received permission to accept this application and having the relationship with -- a professional relationship, it was -- I felt I was put on the hot seat … I felt I failed [the employer], you know, in his requirements." (Tr. at 63.) Mr. Souza assured the employer that he would attempt to find a reasonable resolution to this problem.

Mr. Souza testified that Beacon never made any representations that the tendered premium payment would be applied to amounts due on prior policies when accepting the deposit; however, he acknowledged that this was a common practice. In his experience though, once the money was applied to past due amounts, he would expect the policy would still be issued and anything owed on the new policy would then be billed out.

Throughout this process, the Souza Agency had access to Beacon's computer systems, where the status of the pending application had been displayed. Mr. Souza testified that the

application's status in the system was in an "ambiguous state; [it] was not active nor was it cancelled." (Tr. at 102.) No policy number was ever assigned to the prospective policy.

After the employer reported the work-related injury suffered by Mr. Heilborn on October 1, 2001, the agency again checked with Beacon to confirm no policy had been issued. Mr. Souza testified this was necessitated by "the unusualness of the entire application process." (Tr. at 107.) He cited the ambiguous state of the policy in Beacon's computer system and the fact that after the policy was declined, Beacon failed to immediately return the employer's premium payment, the balance of which was withheld for nearly a month.

The deposition testimony of Debra St. John, an employee of the Souza Insurance Agency, was introduced into evidence, as well as the Souza Agency's records. Ms. St. John testified that she assisted the employer in his attempts to obtain a new insurance policy. She stated that an application was sent to Beacon on September 10, 2001. If the policy was accepted, she anticipated the insurance policy would go into effect on September 11, 2001. Ms. St. John explained that the employer had obtained his earlier insurance policies by simply paying a deposit for the premium, after which the policy would be issued.

On this occasion, however, Ms. St. John testified that Beacon was requiring that the employer comply with an audit before any policy would be issued. On cross-examination, she admitted that she was not privy to the conversation between Mr. Souza and Ms. Guillet regarding any audit requirement. It was her understanding that the policy was denied because Mr. Marshall failed to comply with earlier audit attempts. On September 26, 2001, Ms. St. John received a faxed communication from Ms. Guillet informing her that the employer's application for insurance had been declined. Ms. St. John testified that she immediately called and spoke with the employer, relaying this information to him. She also testified that she told the employer

that a portion of his deposit was being used to pay for his past due debt with Beacon. Ms. St. John stated that the money provided with the application was only intended as payment of the premium for the new policy.

Ms. St. John did not speak with the employer again until October 9, 2001, when he inquired as to whether he had insurance coverage because his employee had been injured. Throughout the day, Ms. St. John had a number of communications with Ms. Guillet, eventually confirming that the employer did not have an active insurance policy. While acknowledging she received notice of the denial on September 26, 2001, Ms. St. John testified that she was not absolutely certain there was no policy in place until October 9, 2001.

Lastly, Peter Marshall testified at trial. He stated that he did not become aware of the lapse in his previous policy until he spoke with the Souza Agency in August of 2001. He was then told by the agency that he would only receive coverage from Beacon if he paid the full year's premium in advance. He testified that this had not been required on his earlier policies. He expounded that when the earlier policies would lapse he would simply pay what was owed on the policy and it would be reinstated. Nonetheless, he provided the Souza Agency with a check for the full premium and was under the impression that he would have coverage within one (1) or two (2) days. He testified that he was not aware of any money owed on the earlier policies.

Throughout this process, Mr. Marshall only had contact with the Souza Agency. He testified that he was never told of any conditions that he would need to satisfy before receiving the policy, aside from paying the premium in full. He also stated that he only found out that the new policy application had been denied when he called the Souza Agency to report his employee's work-related injury. He stated that he did not recall any conversations taking place between him and any representative of the agency after his application was submitted and before

his employee was injured. Eventually, Mr. Marshall received a portion of his premium payment from Beacon.

On June 11, 2002, the trial judge entered a pretrial order in W.C.C. No. 2002-02482 finding the employee was entitled to benefits for his injury and listing Beacon as the employer's insurance company. Thirteen (13) days later, on June 24, 2002, Beacon issued a notice of reinstatement to the employer for policy number 27284. The reinstatement was effective retroactively to July 25, 2001, the day it was initially cancelled. The original effective dates of this policy were December 1, 2000 to December 1, 2001. This time period encompassed the date of the employee's injury, October 1, 2001. An internal record from Beacon explained that its underwriting department had been notified of a court decision ordering Beacon to reinstate the policy back to July, thus covering the October injury. It also notes that the department had authorization to reinstate the policy, but that Beacon was appealing the court decision. On September 17, 2002, Beacon filed this petition alleging that it was not liable for Mr. Heilborn's injury because the employer did not have an active workers' compensation insurance policy with Beacon on the date of injury.

The employer's attorney inquired as to Mr. Souza's understanding of the reinstatement notification. Mr. Souza testified that he did not know why the policy was reinstated. This line of questioning was objected to by Beacon's attorney, leading to the following exchange with the court:

> Q: So as a license [sic] professional insurance agent with a number of years that you've be [sic] functioning as an insurance agent for fifteen years, would you say that with this notice of reinstatement that a claim arising on October 1, 2001 would be covered by this policy 27284?
>
> Mr. Hornstein: Objection.

> The Court: Hold on. Go ahead, Mr. Hornstein.
>
> Mr. Hornstein: Because, Judge, you entered a pretrial order on 2/10/2002 which mandated coverage which would predate the issuance of this reinstatement.
>
> The Court: So all this about reinstatement happened after the Pretrial Order?
>
> Mr. Hornstein: Correct.
>
> The Court: All right. Sustain the objection. Now, I get it. So what happened here, I wasn't aware until just now after the issuance of my Pretrial Order, they went back and gave him the policy?
>
> Mr. Hornstein: Reinstated this old policy, correct.

(Tr. at 113-14.)[2] There appears to have been no further explanation as to why the policy was reinstated to cover Mr. Heilborn's injury.

After reviewing the evidence, the trial judge found that Beacon was equitably estopped from denying coverage for this injury. He opined that Beacon's "confusing and misleading" actions in accepting money from the employer but rejecting his policy application induced the employer's reliance and led him to believe that he had an active policy. (Decision at 13.) In relying on this belief, the employer failed to procure alternative coverage or abandon the job plans altogether. The employer then suffered a detriment when his employee was injured and there was no workers' compensation coverage. Consequently, the trial judge denied Beacon's petition in which it alleged it was not liable for the employee's injury.

Beacon filed a claim of appeal from the trial judge's decision in which it presses two (2) fundamental arguments. First, Beacon contends that the trial judge improperly applied the doctrine of equitable estoppel to the circumstances of this case. Second, it argues that the

[2] We believe Mr. Hornstein is referring to the pretrial order entered on June 11, 2002 in W.C.C. No. 2002-02484; we have no record of a pretrial order entered on February 2, 2002.

employer's application for insurance was properly rejected because acceptance was contingent on two (2) conditions, and the employer only met one (1) of them.

We review the trial judge's decision in accordance with R.I.G.L. § 28-35-28(b) which requires that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We may only undertake a *de novo* review of the record if we find that the trial judge was clearly wrong or misconceived or overlooked material evidence. Blecha v. Wells Fargo-Guard Company Serv., 610 A.2d 98, 102 (R.I. 1992). With this in mind, we find that the trial judge was correct in his ultimate determination that this injury was covered by an insurance agreement between Beacon and the employer; however, the trial judge's application of the equitable estoppel doctrine was in error and coverage was actually conferred under the reinstated policy. Accordingly, we need not address Beacon's second argument as to whether the employer complied with the requirements to obtain a new policy.

Under the equitable estoppel doctrine an insurer may be estopped from denying the existence of insurance coverage when the insured demonstrates "(1) that he was misled by the acts or statements of the insurer or its agent; (2) reliance by the insured on those representations; (3) that such reliance was reasonable; and (4) detriment or prejudice suffered by the insured based on the reliance." General Accident Insurance Co. of America v. American National Fireproofing, Inc., 716 A.2d 751, 755 (R.I. 1998) (quoting Dumenric v. Union Oil Co. of California, 238 Ill.App.3d 208, 179 Ill. Dec.398, 606 N.E.2d 230, 233 (1992)); *see also* Shea v. Gamco, 81 R.I. 12, 17, 98 A.2d 864, 867 (1953) (explaining that Rhode Island's Workers' Compensation Act "follows the course of equity in certain aspects of its proceedings."). While we agree with the trial judge that Beacon's handling of the employer's insurance application was inconsistent, and at times misleading, we find that the doctrine of equitable estoppel is

inapplicable to this case because the employer's reliance on these representations was unreasonable.[3]

The Souza Agency and Beacon agree that some form of notice of the application denial was provided to the agency. Further, the agency was also told that a portion of the premium payment was being applied to satisfy the amount the employer owed Beacon. Under Rhode Island law, notice to an agent "is notice to his principal as to matters within the actual or apparent scope of the agent's authority." American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 111 R.I. 415, 422, 303 A.2d 121, 125 (1973). In the insurance context, "an insurance agent who is empowered merely to solicit or accept applications for insurance is the agent of the applicant and not the agent of the company." Paul Revere Life Ins. Co. v. Fish, 910 F.Supp. 58, 64 (D.R.I. 1996) (citing Ferla v. Commercial Cas. Ins. Co., 74 R.I. 190, 59 A.2d 714, 716 (1948)).

The Souza Agency did not have authority to bind Beacon to an insurance policy and thus acted as the employer's, and not Beacon's, agent throughout this process. Beacon's notice to the Souza Agency constituted sufficient notice to the employer that his policy application was denied. *See* American Underwriting Corp., 111 R.I. at 422, 303 A.2d at 125. The employer testified in direct contradiction to Mr. Souza's and Ms. St. John's recollection of the events and stated that the Souza Agency never notified him of the application denial. If true, it stands to reason that the Souza Agency failed its client and forcing Beacon to recognize this non-existent policy lays the blame at the feet of the wrong party. Under the circumstances presented in this

[3] The Michigan Appellate Court encountered a nearly identical situation in St. Paul Fire & Marine Ins. Co. v. Ingall, 228 Mich. App. 101, 577 N.W. 2d 188 (1998), and found the claim was not covered. In Ingall, the insurer denied a policy application and used the premium deposit to satisfy a past due amount. Notice was given to the insurance agent and memorialized in a letter. The court reasoned that the insurer had not misled the insured into believing coverage existed. However, the evidence in Ingall proved direct notice to the insured. Whether such direct notice was provided is disputed in this case.

matter, we find that the doctrine of equitable estoppel cannot be applied to compel Beacon to provide coverage for Mr. Heilborn's injury on October 1, 2001.

Because we find the trial judge's application of the equitable estoppel doctrine was clearly wrong, we must now undertake a *de novo* review of the evidence and substitute our judgment for that of the trial judge. *See* Vaz, 679 A.2d at 881. After doing so, we find that Beacon waived its right to deny coverage for this injury when it reinstated policy number 27284 without taking further action.

An insured "seeking to establish coverage bears the burden of proving a prima facie case, including but not limited to the existence and validity of a policy …." Insurance Co. of N. Am. v. Kayser-Roth Corp., 770 A.2d 403, 416-17 (R.I. 2001) (quoting General Accident Ins. Co. of Am. v. American Nat'l Fireproofing, Inc., 716 A.2d 751, 757 (R.I. 1998)). Here, the employer must prove that a valid policy exists which provides coverage for the October 1, 2001 injury. We find that this burden has been met.

A pretrial order was entered by the court in W.C.C. No. 2002-02482 on June 11, 2002, finding the employee was entitled to workers' compensation benefits as a result of a work-related injury and naming the Beacon Mutual Insurance Company as the employer's insurer. Less than two (2) weeks later, Beacon reinstated policy number 27284 to its original effective dates, December 1, 2000 through December 1, 2001, thus encompassing the date of the injury. A Notice of Reinstatement dated June 24, 2002 was included in the records of the Souza Agency which were introduced into evidence by Beacon's attorney. (*See* Pet. Ex. 2.) The notice also indicates that a copy was sent to the employer. Coverage was not disputed until a Notice of Contest petition was heard by the court on September 27, 2002, more than three (3) months after the policy was reinstated.

Rhode Island law recognizes two (2) ways in which an insurer may retain their right to contest coverage over a claim. *See* Conanicut Marine Servs., Inc. v. Insurance Co. of N. Am., 511 A.2d 967, 971 n.10 (R.I. 1986). First, the insurer may defend a claim under an agreement reserving its right to contest coverage in the future. Id. A valid reservation of this right will likely avoid a finding that it has been waived. *See, e.g.,* Textron, Inc. v. Liberty Mut. Ins. Co., 639 A.2d 1358, 1363 n.4 (R.I. 1994). Alternatively, an insurer also may seek a declaratory judgment to resolve any questions of coverage. Conanicut Marine Servs., Inc., 511 A.2d at 971 n.10.

A waiver is "the voluntary intentional relinquishment of a known right," resulting from "action or nonaction." Haxton's of Riverside, Inc., 488 A.2d 723, 725 (R.I. 1985) (quoting Pacheco v. Nationwide Mutual Insurance Co., 114 R.I. 575, 577, 337 A.2d 240, 242 (1975)). A determination as to "whether a party has voluntarily relinquished a known right is one of fact." Id. In Imperial Casualty and Indemnity Co., 888 A.2d 957 (R.I. 2005), the Rhode Island Supreme Court found an insurer waived its right to deny coverage where an inordinate amount of time passed between its reservation of rights letter and its request for a deductible payment to cover a disputed claim. 888 A.2d at 964. Similarly, an insurer who accepts a premium payment after becoming aware of the insured's breach of the policy conditions may not deny coverage based on that breach. Milkman v. United Mut. Ins. Co., 20 R.I. 10, 13, 36 A. 1121, 1122 (1897).

On the unique facts of this case, we find that Beacon has waived its right to deny coverage for Mr. Heilborn's work-related injury. After rejecting the employer's application for a new policy, Beacon applied a portion of the employer's tendered check to policy number 27284. This same policy would later be reinstated to cover this claim. Beacon offered no evidence demonstrating that it took steps to reserve its right to subsequently deny coverage. The only

insight into Beacon's motivation in reinstating the policy was provided by its internal notes referring to a court decision ordering the company to reinstate this policy. No such order has been brought to the court's attention. When the employer's counsel attempted to clarify the reinstatement of this policy, Beacon's counsel objected but nonetheless entered proof of the reinstatement into evidence. Our review on appeal is limited to the record made before the trial judge and we lack authority to enlarge or amend it. Whittaker v. Health-Tex, Inc., 440 A.2d 122, 124 n.2 (R.I. 1982). On the evidence before us, it is clear that Beacon issued a policy which covers the date of this injury and never took steps to reserve its right to dispute coverage. Accordingly, Beacon has waived that right and Mr. Heilborn's injury is covered under policy number 27284.

After our thorough review of the record and careful consideration of the parties' arguments, the insurer's appeal is denied and the ultimate determination of the trial judge denying Beacon's petition is affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Ricci, and Hardman, JJ., concur.

ENTER:

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Olsson, J.

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Ricci, J.

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Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THE BEACON MUTUAL INSURANCE CO.)
)
VS.) W.C.C. 2002-06494
)
NORTHEAST BUILDERS/PETER MARSHALL)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner, The Beacon Mutual Insurance Co., and upon consideration thereof, the appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on September 6, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Ricci, J.

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Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to James T. Hornstein, Esq., and Hagop S. Jawharjian, Esq., on

_____