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Workmen's Compensation - Claimant Entitled to Penalties and Attorney Fees as Insured - Direct Action

Charles W. Darnall Jr.

WORKMEN'S COMPENSATION—CLAIMANT ENTITLED TO PENALTIES AND ATTORNEY FEES AS INSURED—DIRECT ACTION

Plaintiff employee sued his employer's compensation insurance carrier alleging total and permanent disability. He further claimed benefits under R.S. 22:658, which provides that an insurer shall pay claims due an insured within sixty days after receipt of satisfactory proofs of loss, and that the arbitrary refusal to make such payment will subject insurer to payment of penalties and attorney's fees to the *insured*. *Held*, R.S. 23:1162, a part of the Employer's Liability Act, provides that a workmen's compensation policy shall be construed as a direct obligation to the person entitled to compensation, enforceable in his name. Therefore the employee is constituted, for all intents and purposes, the *insured* under the policy, and as such is entitled to penalties and attorney's fees under R.S. 22:658. *Wright v. National Surety Corporation*, 221 La. 486, 59 So. 2d 695 (1952).

Another recent case interpreting R.S. 22:658 is one decided by Judge Wright of the United States District Court for the Eastern District of Louisiana. Plaintiffs injured in a highway accident filed suit in federal court against the tortfeasor's liability insurance carrier for damages, and in addition claimed penalties and attorney's fees under R.S. 22:658. Defendant filed a motion to strike all allegations from plaintiffs' complaint relating to their demand for penalties and attorney's fees. The theory of this motion was that plaintiffs were not the *insured* under the automobile liability policy. *Held*, that the case was governed by *Erie Railroad Company v. Tompkins*.[1] The "direct action" statute, R.S. 22:655, gave plaintiffs a direct cause of action against defendant insurer. Therefore, by analogy to the *Wright* decision, plaintiffs here are, for all intents and purposes, the *insured* under the automobile liability policy, and hence are entitled to the benefits of R.S. 22:658. *Theriot v. Maryland Casualty Company*, United States District Court, Eastern District of Louisiana, New Orleans Division, unreported case, Docket Number 3622 (December 1952).

This note is devoted to an analysis of the validity of the two

1. 304 U.S. 64 (1938). The *Erie* case makes it mandatory for the federal court in diversity of citizenship cases involving non-federal matters to examine the entire body of the state law and render a decision which it believes that the state court would render under the circumstances.

holdings, and to a discussion of secondary problems which the cases raise.[2]

As is suggested by Justice LeBlanc's dissent in the *Wright* case, it is doubtful that the Legislature, in enacting Act 195 of 1948, Section 14:48,[3] intended that its provisions should extend to persons other than holders of contractual rights under insurance policies. This is supported by the tenor of statutes which preceded it,[4] and by the general use in Chapter 14 of the word *insured* as apparently synonymous with *policyholder*. It is further supported by the retention in the 1948 act of the term "proofs of loss." These instruments, which are normally submitted by a policyholder to his insurer setting out the detailed amount of an insured loss, are foreign to workmen's compensation or liability insurance claims.[5]

It is conceded that the statute in question is ambiguous. It applies to "All insurers issuing *any type of contract other than* . . ."[6] life, and health and accident, but it names the *insured* as the person to whom payment of claims and penalties shall be made. (Italics supplied.) How can the two ideas be reconciled in workmen's compensation and liability claims where it is the *claimant*, and not the *insured*, to whom claims are payable? If the claimant is not entitled to the penalties, then who is? Confronted with this ambiguity, and possibly influenced by the doctrine of liberal construction applicable to the workmen's compensation law,[7] our Supreme Court resolved the question in the *Wright* case in favor of the injured employee. This is in keeping with the obvious purpose of the insurance statute to force prompt settlement of just insurance claims. The justice done by this particular decision is unquestioned, but the act

2. For a discussion of the total and permanent disability aspect of the *Wright* case, see The Work of the Louisiana Supreme Court for the 1951-1952 Term, 13 LOUISIANA LAW REVIEW 283 (1953).

3. La. R.S. 1950, 22:658.

4. La. Act 168 of 1908; La. Act 59 of 1921.

5. " 'Proofs of loss' in insurance parlance are the more or less formal evidences given the company by insured or claimant under the policy of the occurrence of the loss, the particulars thereof, and the data necessary to enable the company to determine its liability and the amount thereof." 33 C.J. § 648.

No "proofs of loss," in this generally accepted meaning of the term, are submitted to insurers by compensation or liability claimants.

6. La. R.S. 1950, 22:658.

7. Doyle v. Penton Lumber Co., 56 So. 2d 774 (La. App. 1952); Blackwell v. Wimberly, 53 So. 2d 814 (La. App. 1951); Hebert v. Gates, 50 So. 2d 859 (La. App. 1951); Archibald v. Employers' Liability Assur. Corp., 202 La. 89, 11 So. 2d 492 (1942); Brownfield v. Southern Amusement Co., 196 La. 74, 198 So. 656 (1940); Jones v. Hunsicker, 188 La. 468, 177 So. 576 (1937).

which was here given a liberal interpretation is part of the insurance code, not the workmen's compensation law. In the writer's opinion, the Legislature's failure to clarify the position of the compensation claimant in R.S. 22:658 renders the *Wright* decision unjustifiable because it extends the meaning of the language of a penal statute.[8]

Under the doctrine of *Erie Railroad Company v. Tompkins*,[9] it is the duty of the federal court in diversity of citizenship cases to apply the law as declared by the courts of the state where the case is tried. In the absence of any precedent, it became the federal judge's duty in the *Theriot* case to "read the state court's mind"[10] to determine how that court would handle the question. On the other hand, the state courts are in no way bound by this federal decision.

In the *Wright* decision our Supreme Court relied heavily upon the language of R.S. 23:1162 referring to the relationship between the compensation insurer and the injured employee, particularly the phrase "a direct obligation by the insurer to the person entitled to compensation, enforceable in his name." This strong argument was not available to the federal court in the *Theriot* case, which cites R.S. 22:655, the "direct action" statute, as being analogous to 23:1162, the provision in the workmen's compensation statute relied upon by the Louisiana Supreme Court in the *Wright* case. In the opinion of the writer, the wording of R.S. 22:655 does not support this contention. R.S. 22:655 provides in part that, "The injured person . . . shall have a right of direct action against the insurer . . . in the parish where . . . the *insured* has his domicile, and said action may be brought against the insurer alone or against both the *insured* and the insurer, jointly and in solido." (Italics supplied.) It appears that a clearer distinction is made here than in R.S. 23:1162 between the claimant and the *insured*. The distinction seems even sharper when one considers the different nature of the two types of insurance involved. Although it is obvious that

8. It is settled that penalties in civil actions are not favored by the courts and should not be imposed except in cases which are clear and free from doubt. Puchner v. Employers' Liability Assur. Corp., 198 La. 921, 5 So. 2d 288 (1942); Madison v. Prudential Ins. Co. of America, 190 La. 103, 181 So. 871 (1938); Turner v. Metropolitan Life Ins. Co., 189 La. 342, 179 So. 448 (1938); Crowe v. Equitable Life Assurance Soc., 179 La. 444, 154 So. 52 (1934).

9. 304 U.S. 64 (1938).

10. Theriot v. Maryland Casualty Co., U.S. District Court, Eastern District of Louisiana, New Orleans Division, unreported case, Docket No. 3622 (December 1952).

both are purchased primarily for the protection of the policyholder, it appears equally obvious that the employee is very closely related to the compensation insurance contract and enjoys the position of immediate beneficiary to a vastly greater degree than does the claimant under a public liability policy.

Further argument in opposition to the *Theriot* holding is found in the fact that the legislature, at its 1952 session, amended R.S. 22:658 so that it would expressly include workmen's compensation claimants but did not mention other types of claimants.[11] The silence of the Legislature as regards liability insurance claimants would seem to indicate an intention not to extend the provisions of the statute to liability claimants. Adding to this the strong dissents of Justices LeBlanc and Hamiter in the *Wright* case, the writer does not believe it unreasonable to suppose that when the occasion arises our Supreme Court will decline to follow the reasoning of the *Theriot* opinion.[12]

The manner of computation of the percentage of loss penalty deserves brief discussion here. The language of R.S. 22:658 presents a difficulty when applied to workmen's compensation claims. In the *Wright* case the court awarded the twelve per cent damages on the amount of compensation *then due*. This has the effect of putting a premium on delay. If this system is employed, then every week that litigation is continued, whether by insurer or employee, additional penalty benefits accrue. Since the penalty is assessable "on the total amount of the loss,"[13] or "the difference between the amount paid or tendered and the amount found to be due,"[14] it is submitted that another method of computation is possible—the courts could base the penalty on the total amount of compensation awarded, present and future, less credit for the amount paid or tendered. In this manner the premium on delay would be eliminated.

The quesiton of what constitutes "arbitrary refusal" to pay a workmen's compensation claim was not really answered by the *Wright* case. There the court had little difficulty in applying

11. La. Act 417 of 1952, § 1 (introduced May 12, 1952, several weeks subsequent to the *Wright* decision) amended La. R.S. 1950, 22:658 to include "any employee under Chapter 10 of Title 23 of the Revised Statutes of 1950."

12. A comparison of the instant cases to those of other jurisdictions was found to be impractical for the reason that no other state has comparable statutory provisions.

13. La. R.S. 1950, 22:658. It appears from the jurisprudence that this term has been assumed without discussion to mean that amount which the court finds to be the total sum due the insured as a result of the loss.

14. La. R.S. 1950, 22:658.

the penalty statute; benefits apparently were discontinued in the face of medical information indicating that the claimant was still partially, if not totally disabled. A real solution to this problem must, of course, await future decisions. For the present we may look for possible answers in the jurisprudence surrounding the insurance penalty statutes.[15] In the comparatively few pertinent cases, we find that the courts have refused penalties where health and accident insurers discontinued or denied benefits in reliance on the report of a reputable physician,[16] even where such reports were in conflict with others submitted by the claimant's doctors.[17] However, delay of the insurer in having the claimant examined has been held to exclude the case from the general rule.[18]

In other cases insurers have been penalized or excused, depending on whether or not they relied on a previous appellate court decision determining the point of law in question.[19] Testing an issue not previously decided has been held a valid excuse for refusal to pay a claim.[20] Delay in payment of a claim due to an erroneous conclusion by independent adjusters (representing the insurer) has resulted in penalties awarded the insured.[21] It is submitted that these precedents could be appropriately applied to workmen's compensation cases.

Charles W. Darnall, Jr.

15. La. R.S. 1950, 22:656, 657, 658.

16. Link v. New York Life Ins. Co., 194 So. 118 (La. App. 1940); Pearson v. Prudential Ins. Co. of America, 214 La. 220, 36 So. 2d 763 (1948); Augustine v. First National Life Ins. Co., 141 So. 473 (La. App. 1932); Strauss v. New York Life Ins. Co., 204 La. 202, 15 So. 2d 61 (1943).

17. Turner v. Metropolitan Life Ins. Co., 189 La. 342, 179 So. 448 (1938).

18. Sanchez v. National Life and Accident Ins. Co. of Nashville, Tenn., 1 So. 2d 129 (La. App. 1941).

19. Stern v. New York Life Ins. Co., 186 La. 381, 172 So. 426 (1937); Craten v. Aetna Life Ins. Co. of Hartford, Conn., 186 La. 757, 173 So. 306 (1937).

20. Miley v. Fireside Mutual Ins. Co., 200 So. 505 (La. App. 1941); Smith v. Washington National Ins. Co., 178 So. 691 (La. App. 1937); Hickman v. Pan-American Life Ins. Co., 186 La. 997, 173 So. 742 (1937).

21. Sims v. National Casualty Co., 43 So. 2d 26 (La. App. 1949).