

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F704241

TODD T. CLARK (DECEASED), EMPLOYEE	CLAIMANT
SPEEDY HEAVY HAULING, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MARCH 17, 2008

Hearing before Administrative Law Judge O. Milton Fine II on December 20, 2007, in Conway, Faulkner County, Arkansas.

Claimant represented by Mr. James A. Streett and Mr. Alex G. Streett, Attorneys at Law, Russellville, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 20, 2007, the above-captioned claim was heard in Conway, Arkansas. A pre-hearing conference took place on October 22, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1, which I accept. They are the following:

1. The Arkansas Workers' Compensation Commission has preliminary jurisdiction to determine whether it may exercise jurisdiction over this claim.

2. The employee/employer/carrier relationship existed on April 3, 2007, when Claimant was involved in a fatal work-related accident.
3. Misty Clark was appointed special administratrix for Claimant's estate as a result of an order entered on April 20, 2007 in Faulkner County Probate Court Case No. PR 2007-178.
4. Respondents have accepted this claim as compensable and have attempted to pay all workers' compensation benefits; however, Claimant's estate has not accepted payment.
5. All documents attached to Respondents' prehearing questionnaire of August 9, 2007 are authentic and admissible and may be considered by the Commission as exhibits to this matter without further need for introduction by the parties.
6. The documents attached as Exhibit A to their Agreed Stipulations (the "ACORD binder form") is authentic and admissible and may be considered by the Commission as exhibits to this matter without further need for introduction by the parties.

Issues

At the hearing, the parties discussed the issue set forth in Commission Exhibit 1.

The following was litigated:

1. Whether Respondent Speedy Heavy Hauling, Inc., had workers' compensation coverage on its employees on April 3, 2007 in keeping with the Arkansas Workers' Compensation Act.

Contentions

At the hearing, Respondents added one contention concerning whether Claimant has standing to challenge Respondent Speedy Heavy Hauling's insurance agreement with Respondent Liberty Mutual. The contentions now read:

Claimant:

1. The only issue before this Court is the question of whether the Respondent Speedy Heavy Hauling, Inc., had a workers' compensation insurance policy in place at the time of Claimant's death or, by contrast, whether the policy was issued after the incident and made effective retroactively. Respondents are currently attempting to pay benefits to the claimant; however, Respondents to this point have refused and/or failed to provide information documenting when the policy in question was issued.
2. To the extent the policy in question was issued after the Claimant's death and made retroactive to cover the Claimant's death, it is Claimant's position that the Respondents did not have coverage on the date of Claimant's death and were therefore not in compliance with the Workers' Compensation statute at the time of Claimant's death. If this is the case, Claimant asks the Commission to make a finding reflecting the same.
3. Claimant is not aware of any other issues in dispute at this time and believes the parties to be in agreement on all other issues regarding this potential claim.

Respondents:

1. Respondents contend that the death of Stanley Todd Clark is governed by the Arkansas Workers' Compensation Laws, and a valid workers' compensation policy was in place as of April 3, 2007. Respondents have furnished various information to the estate's attorney documenting the existence of a policy as well as the binding confirmation which was in place as of March 29, 2007 and effective April 1, 2007, as well as all of the accompanying documents reveal.
2. Respondents contend that the efforts made by Claimant's estate are simply an effort to avoid the exclusive remedy implications of workers' compensation payments in an effort to instead pursue a civil remedy which would potentially result in a higher "pay day." Nevertheless, the exclusive remedy provisions of the Arkansas Workers' Compensation Law are applicable and binding due to the governing workers' compensation policy which was in place and for which payments have been made, though not accepted by Claimant's estate.
3. Respondents contend that there is no merit whatsoever to the allegations of the Claimant's estate that a workers' compensation policy was not in place. To suggest otherwise would mean that the carrier, Liberty Mutual Insurance Company, would have somehow been working with the insured, Speedy Heavy Hauling, Inc., in a fraudulent manner to "back date" coverage for a known death claim, something which would be obviously illegal and

expensive for Liberty Mutual Insurance Company to ever do if there were not a valid policy in place.

4. Respondents contend that Claimant has no standing to contest whether a valid contract of insurance exists between Respondent Speedy Heavy Hauling, Inc., and Respondent Liberty Mutual Insurance Company.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including reports, documents, and other matters properly before the Commission, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Respondent Speedy Heavy Hauling, Inc., had valid workers' compensation coverage on its employees on April 3, 2007 in keeping with the Arkansas Workers' Compensation Act, and Claimant has failed to prove otherwise.
4. Because of this finding, the question of whether Claimant has standing to challenge the validity of the workers' compensation coverage of Respondent Speedy Heavy Hauling, Inc., is moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

_____ No testimony was offered at the hearing. Counsels presented oral argument. In addition to the prehearing order discussed above, also admitted into evidence in this case

were Joint Exhibit 1, an application for workers' compensation coverage with the agency Thomas J. Sisk & Company, Inc. (hereinafter "Sisk"), consisting of three numbered pages; Joint Exhibit 2, a quote to Respondent Speedy Heavy Hauling, Inc. (hereinafter "Speedy"), for workers' compensation coverage in Arkansas, Montana, New Mexico and Texas from April 1, 2007 to April 1, 2008 by Liberty Mutual Insurance Company, consisting of 11 numbered pages; Joint Exhibit 3, a printout of a series of e-mails from March 27-28, 2007, concerning the obtaining of coverage from Liberty Mutual Insurance Company (hereinafter "Liberty Mutual") for Speedy, consisting of three pages; Joint Exhibit 4, a Commercial Premium Finance Agreement-Promissory Note dated March 27, 2007 and listing Speedy, Sisk and Liberty Mutual as the insured, agent and insurer, respectively, and consisting of two pages; Joint Exhibit 5, a Notice of Acceptance by AFCO dated March 29, 2007 and consisting of one page; Joint Exhibit 6, a Binding Confirmation dated March 29, 2007 by Liberty Mutual for Speedy effective April 1, 2007 to April 1, 2008, consisting of three pages; Joint Exhibit 7, the workers' compensation policy issued to Speedy by Liberty Mutual for the period April 1, 2007 to April 1, 2008 for Arkansas, *inter alia*, consisting of 16 pages; Joint Exhibit 8, copies of checks along with letters dated June 29, 2007 from Claimant's counsel to Liberty Mutual and July 13, 2007 from Claimant's counsel to Respondents' counsel stating that all benefit checks to Claimant will be held uncashed pending of issue before Commission concerning validity of workers' compensation coverage by Speedy, consisting of four pages; Joint Exhibit 9, a blank ACORD Insurance Binder form consisting of two pages; Joint Exhibit 10, a letter dated October 9, 2007 from Sisk to Respondents' counsel concerning the use of ACORD forms; Claimant's Exhibit 1, a post-hearing brief

plus attachments consisting of 30 pages; and Respondents' Exhibit 1, a post-hearing brief consisting of 14 pages.

ADJUDICATION

As the parties have stipulated, Claimant Todd T. Clark was employed by Respondent Speedy on April 3, 2007. That day, he was involved in a fatal work-related accident. Misty Clark was appointed special administratrix for his estate in an order entered on April 20, 2007 in Faulkner County Probate Court No. PR 2007-178. Respondents have accepted the instant claim as compensable and have attempted to compensate Ms. Clark. See Joint Exhibit 8. However, his estate has simply held the checks without cashing them. *Id.*

Claimant's estate, by and through Ms. Clark as special administratrix, sought this hearing on the question of the validity of Respondent Speedy's workers' compensation coverage on the date of Claimant's death. Claimant contends that under Ark. Code Ann. § 11-9-404(a)(1) (Repl. 2002), Respondent Speedy did not have workers' compensation insurance in place in Arkansas on that date. The parties agree that Respondent Speedy was never self-insured nor sought that designation under § 11-9-404(a)(2). Claimant thus argues that his estate should be relieved from the exclusive remedy provision of § 11-9-105.

Respondents, in turn, argue that valid coverage was in place on April 3, 2007. They contend that Joint Exhibit 6 was a valid binder that went into effect on March 29, 2007 and covered Respondent Speedy until the formal policy was issued on April 27, 2007 (Joint Exhibit 7).

Claimant, as the party seeking to show that Respondent Speedy's coverage was invalid on the date of his death, bears the burden of proof here. I must thus determine under Ark. Code Ann. § 11-9-705(a)(3) whether Claimant has met his burden by a preponderance of the evidence. After consideration of the evidence before me, along with the arguments of counsel and in light of the law, I find that the burden has not been met, and that Respondent Speedy had valid coverage on the date of Claimant's death.

Joint Exhibit 1 reflects that on March 6, 2007, an application for workers' compensation insurance was filled out with Sisk, who was listed as the agency. However, the company's name is listed as "To Be Determined," and the locations of the applicant's business are given as Grand Junction, Colorado; Farmington, New Mexico; and Sidney, Montana—no Arkansas location, let alone the one for Respondent Speedy that I take judicial notice is listed in the Commission files as "4055 Seraph DE, Conway, Arkansas 72034-3361." Hence, while Respondents contend that Respondent Speedy submitted this application, I cannot so find based on the facts before me.

I do note, however, that Joint Exhibit 2 reflects that Respondent Speedy received a workers' compensation insurance quote from Respondent Liberty Mutual for Arkansas, Montana, New Mexico and Texas. A handwritten profile at the back of the exhibit states that Colorado was to be covered as well. The policy period was to be from April 1, 2007 to April 1, 2008. However, nothing in this exhibit shows when this document was generated.

Joint Exhibit 3 reflects that Respondent Liberty Mutual and the Sisk agency exchanged a series of e-mails on March 27-28, 2007 that show that Respondent Speedy was seeking to pay its premium. The premium down payment was to be overnighted to

Liberty Mutual at a lockbox at Citibank in Chicago, Illinois. A finance agreement was to be sent as well. The policy number supplied by Liberty Mutual in a March 28, 2008 e-mail was "WC1-641-437274-017"--which I note was the same number listed in the Binding Confirmation (Joint Exhibit 6) and the final policy (Joint Exhibit 7), to be discussed *infra*.

The Commercial Premium Finance Agreement referred to in the e-mail described above was an agreement with AFCO Credit Corporation (Joint Exhibit 4) to finance the \$440,420.00 in workers' compensation premiums Respondent Speedy would pay to Respondent Liberty Mutual. Sisk (by Judith Lodge, a recipient of one of the e-mails in Joint Exhibit 3) and Speedy (by Diane Hoover) both signed the agreement on March 27, 2007. The premiums were to be for a policy for the term of April 1, 2007 to April 1, 2008.

As Joint Exhibit 5 reflects, AFCO issued a Notice of Acceptance on March 29, 2007. It lists the policy number shown above--WC1-641-437274-017. A down payment of \$66,063.00 is listed, with the balance of \$374,357.00 in premiums financed over eight months. The policy was set to go into effect on April 1, 2007. The anticipated check release date was April 2, 2007.

Liberty Mutual on March 29, 2007 issued a Binding Confirmation (Joint Exhibit 6) on March 29, 2007. The effective period is listed as April 1, 2007 to April 1, 2008. Paragraph 1 provides that "This proposal is valid until the program effective date." The premium is estimated to be \$440,515.00. Paragraph 4 states that "[a]ll premiums and surcharges/assessments are due at inception." While Paragraph 7 provides that a Workers' Compensation Location Profile in electronic form must be provided before "by the effective date of the policy, next to this provision are the added words "PRIOR TO BINDING - RECEIVED[.]"

The Binding Confirmation includes coverage in Arkansas, along with Texas, Montana and New Mexico.

Joint Exhibit 7 is the Liberty Mutual policy for Respondent Speedy. The policy period is for April 1, 2007 to April 1, 2008. The term of operation for this document, however, is given as "LAG 04/27/07." The states of coverage are the same as for the Binding Confirmation. The policy number is the same as given before: WC1-641-437274-017.

The evidence above shows that Respondent Speedy, through the Sisk agency, obtained a quote of coverage from Respondent Liberty Mutual that is reflected in Joint Exhibit 2. The e-mails in Joint Exhibit 3 and the Commercial Premium Finance Agreement in Joint Exhibit 4, along with the Notice of Acceptance in Joint Exhibit 5 reflect that the premium down payment was paid to Liberty Mutual on or before March 29, 2007.

Liberty Mutual issued its Binding Confirmation on March 29, 2007. This is clearly a binder under Ark. Code Ann. § 23-79-120(a) (Repl. 2004), which provides:

(a) Binders or other contracts for temporary insurance may be made orally or in writing and shall be deemed to include all the usual terms of the policy as to which the binder was given together with such applicable endorsements as are designated in the binder, except as superceded by the clear and express terms of the binder.

This provision applies to workers' compensation insurance policies. See Ark. Code Ann. § 23-79-102 (Supp. 2007).

Again, by its terms, the Binding Confirmation provided workers' compensation coverage to Respondent Speedy in Arkansas, among other states, as of April 1, 2007. As even Claimant's counsel conceded, and as the above provision shows, if a valid binder was in place on the date of Claimant's death, that was sufficient to provide coverage. See

Union Life Ins. Co. v. Rhinehart, 229 Ark. 388, 315 S.W.2d 920 (1958). Although Claimant argued that the Binding Confirmation was only a rate quotation, that had already been given in Joint Exhibit 2. Claimant had already paid its premium down payment on the policy by the time the Binding Confirmation was issued; another rate quotation would have been unnecessary. See also *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106 (1989)(while payment of the premium is generally a necessary condition for the operation of a policy of insurance, there are exceptions to that, such as the issuance of an oral binder prior to payment of the premium. *Leigh Winham, Inc. v. Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983)). The Binding Confirmation bears a policy number—the same one cited in previous documentation; its obvious intent is to effect coverage pending the issuance of the permanent policy. And while Claimant has made much of the fact that Liberty Mutual's Binding Confirmation was not on the standard ACORD binder form in Joint Exhibit 9, his counsel conceded, and I have found, that nothing in Arkansas law obligated the carrier to use this particular form. Moreover, as Judith Lodge, Account Manager for Sisk, stated in her letter to Respondents' counsel that is Joint Exhibit 10:

The ACORD applications and binder forms are a generic, industry standard group of forms.

An ACORD application was completed for quotation purposes for this account. However, when coverage was bound, Liberty Mutual/Aegis Alliance issued their own binder making issuance of an ACORD binder unnecessary. No ACORD binder was issued for this policy.

Joint Exhibit 6 is a valid binder.

A binder is effective for 90 days or until the policy itself is issued, whichever is shorter. See Ark. Code Ann. § 23-79-120(b). As Joint Exhibits 6 and 7 show, the binder went into effect on April 1, 2007; and the permanent policy was issued on April 27, 2007.

On the date of Claimant's death, April 3, 2007, the binder was still in effect. Hence, under Ark. Code Ann. §§ 11-9-401(a)(1) and 11-9-404(a)(1) (Repl. 2002), Claimant's compensable fatal injury was covered by Respondent Speedy's workers' compensation coverage through Respondent Liberty Mutual, and the exclusive remedy provision of § 11-9-105(a) applies. Because of this finding, the question of whether Claimant has standing to challenge the validity of Respondent Speedy's workers' compensation coverage is moot and will not be addressed.

CONCLUSION

As recounted above, I find that Respondent Speedy had valid workers' compensation coverage on its employees on April 3, 2007 in keeping with the Arkansas Workers' Compensation Act, and Claimant has not proven otherwise.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge