

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M. Diane Koken,
Insurance Commissioner of the
Commonwealth of Pennsylvania,
Plaintiff

v.

Reliance Insurance Company,
Defendant

No. 269 M.D. 2001

2005 AUG 23 A 11:23

In Re: In the Matter of Jason Wells, Proof of Claim Number 1914249;
Insured: Builders Transport.

MEMORANDUM OPINION AND ORDER

We consider the exceptions and objections filed by Jason Wells (Wells) to the Proposed Findings of Fact and Recommendations made by Referee G. Alan Bailey, Esq., after his conference with Wells and the Liquidator and upon consideration of the briefs of the parties and certain supplemental findings by the Referee. We affirm Referee Bailey.

Wells was injured in an automobile accident on May 22, 1997 when his vehicle was struck by a tractor-trailer owned by Builders Transport (Builders). Wells sued Builders and, on April 11, 2000 the United States District Court for the Eastern district of Texas, Beaumont Division, entered judgment for Wells against Builders in the amount of \$417,771.00, plus interest and court costs. At the time of Wells' accident Builders was insured by Reliance under a multi-state commercial automobile policy that provided excess coverage only, with a self-insured retention (SIR) of \$1,000,000.00.

Wells submitted a timely proof of claim in this matter on April 11, 2002. The Liquidator issued a notice of determination of Wells' claim on September 16, 2004 in which the claim was assigned a priority level of (b) and a value of \$0.00 as the Liquidator determined that there was no coverage under the policy because the claim did not exceed the SIR amount. Wells filed an objection to the notice of determination in which he alleged that Reliance was liable for the payment of his claim because the SIR was deleted during the relevant policy period and that the SIR was rendered ineffective by the existence of the uniform motor carrier endorsement (MCS90) and the Texas Form "F" endorsement. At the conference in this matter Reliance submitted the affidavits of Michael Guthrie, who negotiated the original policy with Reliance on behalf of Builders, and Robert Ruggiero who negotiated the policy for Reliance. Both men stated that the intent of the policy and the premium charged was to provide excess, not primary coverage. Both men stated that the endorsements eliminating the SIR were unintentionally and mistakenly included with the policy and that neither Builders nor Reliance ever treated or considered the policy as anything other than an excess policy. The statements made in these affidavits were undisputed. The Referee issued Findings of Fact and Conclusions of Law in which he recommended that the claim priority level of (b) and the claim value of \$.00 be approved.

Wells, after securing new counsel, filed exceptions and objections to the Referee's recommendation in which he asserted that the Liquidator's only defense, a claim of mutual mistake in the creation of policy NKA 115248, must fail because there exists, at best, a unilateral

mistake in that the affidavits of Messrs Guthrie and Ruggiero are rendered irrelevant because Guthrie's affidavit refers to Reliance Policy number NKA 115249 and the policy at issue in this matter is actually NKA 115248, and in which he also contended that the federal MCS-90 and Texas Form "F" endorsements rendered the policy a primary policy.

On July, 13, 2005, the Court remanded this matter to Referee Bailey with instructions to resolve the inconsistency in the affidavits. Referee Bailey filed Supplemental Findings of Fact and Conclusions of Law in which his pertinent findings are 1) that NKA 115248 is the applicable policy; 2) that he incorrectly referenced policy NKA 115249 in his original recommendation and amended that reference; 3) that the Ruggiero affidavit referenced the correct policy number and should be accepted; 4) that the Guthrie affidavit referenced the incorrect policy number and should be rejected. In his Supplemental Findings, Referee Bailey rejects Wells' claim that the Liquidator's case rested on a unilateral mistake. Instead, the Referee focused on the conduct of parties in relying on Builders' Annual Reports, submitted as exhibits by the Liquidator and undisputed by Wells, which treat the Reliance policy as an excess policy, the fact that Builders' Annual Reports record the fact that Builders received a certificate of self-insurance from the state, and the fact that the premium charged for the policy was consistent with excess, not primary coverage.

The Referee also rejected Wells' claim that the federal MCS 90 Endorsement, required by 49 C.F.R. §387.303, Federal Motor Carrier Safety Regulations (MCS Regulations) and the Texas Form "F" Endorsement, similar in form to that required by a number of states, attached to the policy

somehow converted it to a primary policy. The MCS Regulations establish certain minimum coverage amounts that must be maintained by motor carriers to protect third parties. The Texas Form "F" Endorsement is a similar, state-required statement of financial responsibility. Wells relies on *T.H.E. Insurance Company v Larson Intermodal Services, Inc.*, 242 F.3d 667 (5th Cir. 2001) for the proposition that the MCS-90 endorsement would change Reliance's policy in this matter from excess to primary. In *Larson*, a motor carrier and liability carrier brought an action against a trucking company for reimbursement of amounts paid in a settlement of personal injury claims with a third party.¹ The insurer argued that its right to reimbursement rose from the MCS-90 endorsement and that the court needed only to look to federal law to resolve the matter. The court rejected this argument, holding that the obligations imposed under the MCS-90 were triggered only when there was no coverage under the policy and that the MCS-90 did not impose a duty to defend on an insurer where such a duty would not have existed otherwise. After reviewing the applicable law cited by Wells and the Referee we agree with the Referee's conclusion in his original Recommendation that there is no support in statute or case law to justify a fundamental change in the contractual terms of a policy whereby an excess insurer under a self-insured retention policy becomes a primary insurer.

In his Supplemental Findings of Fact and Conclusions of Law Referee Bailey concludes that Reliance policy NKA115248 is the applicable policy, that it is an excess policy requiring Builders to insure the first

¹ We note that the facts of *Larson* are not identical with those of the case at bar which concerns a dispute between an insurer and a third party.

\$1,000,000.00, and recommends that the Notice of Determination that establishes a priority of (b) and a value of \$0.0 be affirmed and that Wells' objection be denied. We agree with Referee Bailey's Findings and Conclusions and, accordingly, we enter the following order,

ORDER

AND NOW, this nd 23 day of August 2005, upon consideration of Jason Wells' objection to the Liquidator's Notice of Determination to Proof of Claim 1914294, the Liquidator's response thereto and Referee Bailey's original Recommendation and his Supplemental Findings of Fact and Conclusions of Law, the Referee's recommendation is ACCEPTED, Jason Wells' Objections are DENIED and the Liquidators' assignment of a priority level of (b) and a value of \$0.0 to Wells' Proof of Claim are AFFIRMED.


JAMES GARDNER COLINS, Judge