



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

MEMORANDUM OPINION

Del Pesco, Judge

Plaintiff, Robert C. Pierce (Pierce) filed this action seeking damages for the "bad faith" handling of his workmen's compensation claims by International Insurance Company of Illinois (International). International has moved for Summary Judgment on two grounds; first, that the complaint fails to state a cause of action and secondly, that the evidence does not support a finding that the carrier's conduct was clearly without reasonable justification.

FACTS

Pierce was an employee of Glen Moore Excavating Co. (Glen Moore) on April 6, 1989. Glen Moore was insured by International for workmen's compensation claims at that time. On April 6, 1989, Pierce was injured at work (as later determined) while he and other employees were lifting manhole covers onto a truck. Pierce was seen by Dr. Kotak on April 8, 1989. He was referred by Kotak to Dr. Otto Medinilla for examination on April 18, 1989. Dr. Medinilla recommended that the plaintiff have surgery.

On April 24, 1989, Glen Moore erroneously filed a First Report of Injury with the Pennsylvania Accident Board. A second report was filed with the Delaware Industrial Accident Board (Board) on July 7, 1989.

On May 10, 1989, Pierce's counsel, Sidney Balick, wrote to Glen Moore to notify them that the Board had no First Report of Injury on file, and to request the name of the insurance carrier.

On June 7, 1989, plaintiff was operated on for the injury to his back.

On June 14, 1989, International's counsel (of the firm Heckler & Cattie) wrote to Pierce's counsel requesting medical records and forwarding a medical authorization form for the plaintiff to sign and return.

On June 15, 1989, another letter was written to Glen Moore, by Pierce's counsel seeking the name of the insurance carrier, and to notify Glen Moore that the plaintiff had not been able to work since the accident, and had no income since that time.



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

On June 22, 1989, Pierce's counsel wrote a letter to Crum & Forester (the adjuster for the claim), advising of plaintiff's accident and the surgery, and inquiring about payment of the claim.

Crum & Forester had turned the incident over to Weeks-Worthington & Company, Inc. for investigation to determine if the claim would be denied. A report on June 29, 1989, indicated that their interviews of Pierce's foreman suggested that the incident had not been reported to the employer until April 17, 1989, and there was some question as to the cause of his injuries.

On July 26, 1989, Pierce's counsel filed a petition to Determine Compensation with the Board. There was a teleconference scheduled for August 24, 1989, and a pre-trial conference scheduled for September 15, 1989. As a result, an independent medical examination of the plaintiff was scheduled for February 6, 1990, and the hearing was scheduled for March 29, 1990. ¹

On August 11, 1989, the Board gave Pierce's counsel the name of Glen Moore's insurance carrier. He wrote to them asking why plaintiff had not yet received compensation.

On August 30, 1989, International's counsel replied with a letter requesting all medical information related to the accident, a medical record authorization, and the names of all doctors who had treated plaintiff over the last ten years.

On September 5, 1989, International received a letter in response, with a copy of a note from Dr. Medinilla regarding the surgery, without any reference to any job-related causal connection.

On September 16, 1989, International received Dr. Kotak's medical records for Pierce, with an indication that prior to the accident he had from time-to-time complained about his back.

On September 25, 1989, International received Dr. Medinilla's medical records regarding Pierce. These records indicated that the plaintiff had complained of back trouble for the past two years.

On November 6, 1989, International indicated to plaintiff's counsel that their records showed repeated references to previous, on-going back problems of the plaintiff.

After several further letters between counsel on the subject of the plaintiff's previous back injuries, plaintiff saw Dr. Edelson on February 6, 1990.

A report produced by Dr. Edelson on February 8, 1990, indicated that the injury was caused by the work-related accident, but that the plaintiff would be able to return to work with restrictions. The defendant then offered to settle the matter of compensation. Negotiations followed.

A settlement was finalized on March 30, 1990.



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

ISSUES

Based on these facts, two issues are presented to the Court: first, whether Delaware recognizes a bad faith claim against a workmen's compensation carrier notwithstanding the exclusive remedy provision of the Workmen's Compensation Act; and second, whether the evidence viewed in a light most favorable to the plaintiff shows that the delay in making payments to the plaintiff was clearly without any reasonable justification.

Discussion

19 Del.C. § 2304 provides that:

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

The philosophy of the Act is to provide a scheme for assured compensation for work-related injuries without regard to fault and to relieve employers and employees of the expenses and uncertainties of civil litigation. *Kofron v. Amoco Chemicals Corp.*, Del. Supr., 441 A.2d 226 (1982). In furtherance of this philosophy, the Act includes an exclusive remedy provision providing the employee with compensation under the Act as his exclusive remedy for his work-related injuries. *Mergenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647, 650 (1984).

International relies on the exclusive remedy provision as providing Pierce his only remedy, and contends there is no independent bad faith action available to Pierce.

In determining whether or not the exclusive remedy immunity of the statute applies to the workmen's compensation insurance carrier, as it does to the employer, first look to the definitions included in the statute. 19 Del.C. § 2301. "Employer" is defined at 19 Del C. § 2301(10) ², and "Insurance Carrier" is defined at 19 Del.C. § 2301(13). ³ Under this statute, the insurance carrier is clearly meant to stand in the shoes of the employer.

The scope of the insurer's immunity against a direct claim by employees was examined in *Mergenthaler v. Asbestos Corp. of Amer.*, Del. Super., 534 A.2d 281 (1987). Claimants sought to sue the insurance carriers for their employer, charging them with breaching their contractual obligation to provide safety inspections, advice on safety precautions and safety assurance. Claimants sought compensation for the cancer, asbestosis and other asbestos-related injuries they claimed to have contracted as a result of exposures at work.

The court rejected the claimant's attempt to avoid § 2304 and provided the following analysis:



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

The function of the insurer is to meet the financial obligations imposed on the employer by the Workmen's Compensation Act. It 'insures employers against liability under [that Act] or against liability at common law for accidental injuries to employees'. 19 Del.C. § 2301(13). The insurer is the surety for the employer. *The Bureau of Adult Corrections, et al. v. Dernberger*, Del. Supr., 529 A.2d 245 (1987) (McNeilly J.); *Graham v. Forbes Steel and Wire Co.*, C.A. No. 83C-MR-12, Poppiti, J. (February 22, 1984). Since the prompt payment of worker's compensation is of primary significance to the Workmen's Compensation Law, the insurer's obligation with respect to such payments must be applied as strictly as that of the employer. The same reasoning which binds the insurer to the employer's obligation should also bind the insurer to the same protection against ton litigation which protects the employer.

Mergenthaler, 534 A.2d at 283.

In addition, the Delaware Supreme Court has ruled that an insurance carrier has a duty to act reasonably and in good faith towards its insured, the employer. *Corrado Brothers, Inc. v. Twin City Fire Insurance Co.*, Del. Supr., 562 A.2d 1188 (1989).

Since the insurance carrier enjoys the same immunity as the employer, the question then becomes what actions will lie against the employer beyond the exclusive remedy as provided in the statute. The Delaware Supreme Court had the opportunity to address the issue in *Kofron*. The plaintiffs alleged that their employer had negligently allowed them to be exposed to asbestos and sued for negligence and gross negligence. The Court held that "all employee actions against employers for work-related injuries based on any degree of negligence, from slight to gross, are within the exclusive coverage of the Workmen's Compensation Law and may not be maintained under common law." *Kofron* at 231.

In *Nutt v. A.C. & S., Inc.*, Del. Super., 466 A.2d 18 (1983), plaintiffs contended that the deceit of the employer, in not telling the employees of the asbestos-related diseases they were exposed to at work, gave rise to an independent action against the employer. The Court found that where the deceit, such as concealment of hazards of the workplace, occurs before the physical injury, the deceit is deemed to have merged with the circumstances of employment and is actionable only through workmen's compensation. However, the Court went on to discuss the circumstances which permit piercing the exclusive remedy protection.

Decisions in which the shield of employer immunity has been pierced are helpful in illustrating the type of employer activity which supports a common law tort action. Thus, a separate tort claim is sustainable against an employer who seeks, through collusion with an insurance carrier, to prevent the employee from pursuing a workmen's compensation claim. See e.g., *Broaddus v. Ferndale Fastener Division*, Mich. App., 84 Mich. App. 593, 269 N.W.2d 689 (1978); *Ramey v. General Petroleum Corporation*, Cal. App., 173 Cal. App. 2d 386, 343 P.2d 787 (1959). But, as was noted in *Broaddus*, the claim is limited to the emotional and mental distress occasioned by the wrongful



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

conduct and not the physical injuries which were the basis for the underlying workmen's compensation claim. If the action is essentially a recovery for physical injury, it is barred, even if cast in the form of non-physical tort. 2A Larson, Workmen's Compensation Law, § 68.34(a), pp. 13.61-13.62. Similarly, if the emotional distress is simply a component of an underlying physical injury it would be recoverable only in connection with the workmen's compensation claim. A pure nonphysical tort, however, could be the basis for a separate tort claim. *Battista v. Chrysler Corp.*, Del. Super., 454 A.2d 286 (1982) (defamation); *Pirocchi v. Liberty Mutual Insurance Co.*, E.D. Pa., 365 F. Supp. 277 (1973) (destruction of evidence).

Nutt, 466 A.2d at 22.

The exclusivity of workmen's compensation was reaffirmed in *Mergenthaler v. Asbestos Corp. of America*, Del. Supr., 480 A.2d 647 (1984), which involved claims by asbestos workers and their spouses against employers who allegedly supplied asbestos products to which workers were exposed during the course of their employment. The plaintiffs contended that by failing to advise them of their asbestos related diseases, their employer had deprived them of their opportunity to file claims within the statute of limitations. The Delaware Supreme Court concluded that because the recovery sought was essentially one for physical injuries, the claims were barred by exclusivity provisions of the Workmen's Compensation Law.

In *Mergenthaler*, the Court went on to note that where the employer engages in a distinct act subsequent to the personal injury which is non-physical in nature there could be recovery. As an example, the Court cited *Silkwood v. Kerr-McGee Corp.*, 10th Cir., 667 F. 2d 908 (1981). (Urine sample spilled in plaintiff's apartment had been "spiked" with radioactive materials which could not have been naturally present causing significant damage to claimant's personal property.) *Id.* at 650.

Pierce relies on *Correa v. Pennsylvania Mfrs. Association Ins. Co.*, D. Del., 618 F. Supp 915 (1985) for the proposition that a bad faith claim can be brought against the workmen's compensation insurance carrier for failure to pay benefits.

Correa preceded the Delaware Superior Court's decision in *Mergenthaler v. Asbestos Corp. of Amer.*, 534 A.2d 281 (1987) and the Delaware Supreme Court's decision in *Corrado Brothers, Inc., v. Twin City Fire Insurance Co.*, 562 A.2d 1188 (1989). For reasons previously discussed, those cases make it clear that an insurance carrier enjoys the same immunity as the employer, and the carrier's duty is one of fair dealing toward its insured. Further, Correa is distinguishable on its facts. It involved a compensation claim which had been accepted and where benefits had been paid. Thereafter, certain medical benefits were presented and not paid, causing legal action to be commenced against the plaintiffs. The United States District Court for the District of Delaware, predicting how the Delaware Supreme Court would decide the issue, concluded that the Supreme Court "would recognize the right of an employee to maintain a suit to redress intentional and bad faith conduct by either an employer or the employer's insurance carrier in delaying or terminating worker's compensation benefits,



03/01/95 ROBERT C. PIERCE v. INTERNATIONAL

1995 | Cited 0 times | Superior Court of Delaware | March 1, 1995

notwithstanding the exclusivity provision of the Delaware worker's compensation statute. . ." Id. at 925.

More persuasive is the rational of Kuney v. PMA Ins. Co., Pa. Supr., 525 Pa. 171, 578 A.2d 1285 (1990). In Kuney the claimant sued his employer's insurance carrier alleging that the carrier refused to pay benefits despite its alleged knowledge that he was clearly entitled to compensation. The Supreme Court commented:

Reduced to its essence, the appellee's claim is that the insurance company wrongfully delayed his receipt of compensation benefits. This is clearly a matter pertaining to a workers' compensation claim and must therefore be adjudicated within the framework of the statute, which, as stated above, has specific remedies for such a grievance.

Kuney, 578 A.2d at 1287.

Like the Pennsylvania statute, the Delaware Workmen's Compensation statute, 12 Del C. § 2302, provides a remedy for delay in the payment of benefits.

The defendant's motion for summary judgment on the grounds of the exclusivity provision is GRANTED. The second issue, the reasonableness of the carrier's conduct, is MOOT.

IT IS SO ORDERED.

Judge Susan C. Del Pesco

1. Based on an affidavit supplied by the Board this was determined to be the earliest, and most reasonable schedule they could pursue, due to the schedule of the examining doctor, and the Board's case load.

2. 19 Del.C. § 2301 (10) provides that:

"Employer" includes all those who employ others unless they are excluded from the application of this chapter by any provision of this subchapter, and if the employer is insured, the term shall include the insurer as far as practicable; employer shall also include the governing body for which employable relief recipients are assigned work under §§ 901-905 of Title 31.

3. 19 Del.C. § 2301(13) provides that:

"Insurance carrier means any insurance corporation, mutual association or company or interinsurance exchange which insures employers against liability under this chapter or against liability at common law for accidental injuries to employees.

