

NO. A07-635

State of Minnesota
In Court of Appeals

PARADIGM ENTERPRISES, INC.,

Plaintiff/ Respondent,

vs.

WESTFIELD NATIONAL INSURANCE CO.,

Defendant/ Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	
I. Appellant Argued Below That This Is a Contract Case Rather Than a Workers' Compensation Case	1
II. The Terms of the Parties' Workers' Compensation Insurance Contract Govern the Scope of Coverage and the Proper Assessment of Premiums	3
Conclusion	7

TABLE OF AUTHORITIES

	Page
Statutes:	
Minn. Stat. § 176.181	5
Cases:	
Minnesota Supreme Court:	
<u>Bobich v. Oja</u> , 104 N.W.2d 19 (Minn. 1960)	5
<u>Kwong v. Depositors Ins. Co.</u> , 627 N.W.2d 52 (Minn. 2001)	4
<u>Lynch v. American Family Mut. Ins. Co.</u> , 626 N.W.2d 182 (Minn. 2001)	5

ARGUMENT

I. Appellant Argued Below That This Is a Contract Case Rather Than a Workers' Compensation Case.

Surprisingly, Respondent states throughout its Brief that Appellant's position "appears to have changed since the summary judgment motion," and that Appellant has "come up with a whole new theory on appeal." (Respondent's Br. at 3; 8.) Respondent argues that Appellant cannot raise its "new" contractual argument to this Court because the argument is being raised on appeal "for the first time." (Id.) Respondent asks this Court not to consider Appellant's "new" theory, effectively asking this Court to address only the statutory argument raised by Respondent in its motion below and in the first part of its Brief. (Id. at 8-9.)

Contrary to Respondent's argument, Appellant's position has not changed. In its opposition to Respondent's summary judgment motion, Appellant correctly stated that it assessed its final premium to Respondent based on "the terms of its insurance contract with Paradigm." (Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. at 6.) And Appellant also stated that the statutory coverage exception in the Workers' Compensation Act, relied upon by Respondent, "does not apply" to the assessment of Appellant's premiums to Respondent. (Id. at 8 (in the section heading).)

Likewise, at the hearing on Respondent's motion, after Respondent argued that this case was governed by the Workers' Compensation Act, Appellant's counsel immediately disputed Respondent's statement, arguing instead that "This is a contract

case * * * governed by the terms and the conditions * * * of the insuring agreement.”
(T.6.)

While Respondent suggests that Appellant somehow conceded that Respondent properly phrased the issue below and then simply disputed Respondent’s definition of “preceding calendar year” (Respondent’s Br. at 3), Appellant instead modified the issue for the trial court and focused its argument on the terms of the parties’ contract. (Appellant’s Br. at 3 (modifying the issue presented to reflect its contractual nature), 6-8 (discussing the requirements of the parties’ contract).) Not until the latter portion of its memorandum did Appellant even refer to the term “preceding calendar year,” then suggesting that if applicable to the contractual 2005 audit for purposes of assessing a final premium, the term “preceding calendar year” would mean either the calendar year 2004 or the 2004 policy period. (Appellant’s Br. at 9.) Indeed, Appellant argued that the term “preceding calendar year,” as referenced in the Act and the Bohlke decision, does not apply to the parties’ contract. (Id. at 8, 9.) But that perhaps inartful discussion appearing late in Appellant’s motion was not the focus of Appellant’s position.

Respondent apparently believes that because the trial court improperly cited to and relied upon the Bohlke case in support of its decision, that Appellant should somehow be required to address that case to explain its position. (Respondent’s Br. at 8 (stating that because Appellant did not cite Bohlke, it “apparently has conceded that * * * Bohlke [is] fatal to its position”).) On the contrary, because Bohlke has nothing to do with this case or with Appellant’s position, there is no need to address it. As stated by Appellant below

(though of course it was unnecessary to spell it out), Bohlke “is not applicable to this case.” (Appellant’s Br. at 9.)

Unlike Appellant, who addressed both its own position (that the parties’ contract governs the outcome) as well as Respondent’s position below, Respondent failed to address Appellant’s position below. Under Respondent’s reasoning, it is Respondent who should be precluded from challenging Appellant’s position for the first time on appeal. But regardless of whether the parties agree on the issue presented or the governing provisions, this Court will decide for itself the relative merits of the parties’ positions.

Appellant’s position in this litigation has not changed. Appellant continues to argue, as it has since Respondent brought its motion, that this case is governed by the terms of the insurance policy between the parties. Therefore, Respondent’s request to this Court that it not consider the only theory ever advanced by Appellant should be denied.

II. The Terms of the Parties’ Workers’ Compensation Insurance Contract Govern the Scope of Coverage and the Proper Assessment of Premiums.

Respondent finally addresses Appellant’s position that the parties’ contract governs the outcome of this case on pages 9-12 of its Brief. Respondent refutes Appellant’s argument on two related grounds: (1) that the policy does not provide “benefits in excess of those provided by the Workers’ Compensation Act”; and (2) that the policy cannot provide greater coverage than the Act. (Respondent’s Br. at 9, 10.)

For its first argument, Respondent points to a provision in the policy that indicates that the policy conforms to the Act, and that any conflicting provisions are changed to conform to the Act. (Id. at 9.) Of course the policy says that. Under the law, a policy cannot conflict with the terms of any statutory provision. Kwong v. Depositors Ins. Co., 627 N.W.2d 52, 55 (Minn. 2001) (holding that insurance policy terms that conflict with Minnesota's No-Fault Act are invalid). But Respondent's position simply begs the question of whether the parties' policy provides greater and better coverage than the minimum coverage required by the Act.

As indicated in Appellant's initial Brief, the policy terms provide the scope of coverage. That discussion of the relevant provisions will not be repeated here, but are found at pages 10-12 of Appellant's Brief. As explained there, the policy provides coverage in excess of (and not in conflict with) the coverage required by the Act.

Respondent then argues that insurance policies cannot offer coverage greater than that required by the Act, implying that the requirements in the Act are maximum rather than minimum requirements. (Respondent's Br. at 10-11.) Appellant agrees that the Act mandates certain coverage requirements that all employers and their insurers must follow. But Respondent argues that if the Act does not require particular coverage, then it "specifically mandates *non*-coverage." (Id. at 10 (emphasis added).) Respondent's conclusion does not logically follow.

Under the rules of logic, if "a = b" and "b = c," then "a necessarily = c." If a statute requires "coverage a" but is silent about "coverage b," and a policy provides "coverage b" that includes "coverage a" as well as additional coverage, then one cannot

say that “a = b.” Nor can one automatically decide, as Respondent suggests, that “coverage b” is improper (at least unless the statute so states). The Workers’ Compensation Act does not say that “coverage b” is improper. The Act says *nothing* about additional coverage beyond its minimum requirements. Indeed, the Act states instead that “[a]ny employer responsible for [workers’] compensation may insure the risk in any manner authorized by law.” Minn. Stat. § 176.181. It certainly would be novel for a court to hold that no insurer can agree to provide better and more comprehensive insurance coverage than is required by the state. But Respondent offers no support for such a novel theory and Appellant is not aware of any such support.

Despite Respondent’s position, Minnesota courts have ruled that absent specific restriction by law, parties to an insurance contract are free to contract as they want. Bobich v. Oja, 104 N.W.2d 19, 24 (Minn. 1960). So as long as the policy contains all coverage required by law, the extent of the coverage is governed by the terms of the insurance contract. Lynch v. American Family Mut. Ins. Co., 626 N.W.2d 182, 185 (Minn. 2001).

Here, Respondent does not suggest that Appellant failed to provide any coverage required by law. Instead, Respondent argues that it should not be compelled to comply with the terms of its insurance policy that go beyond statutory requirements. Yet Respondent fails to offer any support for its position other than the bald assertion that “There is no deviation from the terms of the Act” and that the Act “makes no reference to its prescribed benefits being a ‘minimum’ or ‘floor.’” (Respondent’s Br. at 11.) Respondent does not provide a citation to any case or statute suggesting that the Act

provides a maximum cap on insurance that may be provided. Such a suggestion would shock not only insurers, but also insureds that intentionally choose to insure themselves to the extent they believe will protect their interests.

Respondent refers to an endorsement in the policy identifying a list of officers for whom an election of coverage was made, arguing that this endorsement implies that the absence of Glen and Ron Morken from the list means that the two Morkens were not covered by the policy. Again, Respondent's position is not logical. The purpose of the endorsement is to guarantee workers' compensation coverage to the individuals listed, regardless of whether the employer had payroll hours in excess of 22,880. In years when payroll hours are less than 22,880, then the endorsed individuals are still covered employees. On the other hand, in those same years, the Morkens would be excluded from coverage because they did not elect coverage as indicated by the absence of their names in the endorsement. In years when payroll hours are more than 22,880, then both the endorsed individuals and the Morkens would be covered employees and the endorsement would not be implicated.

For the policy period in question, April 19, 2004 to April 19, 2005, Respondent had payroll hours in excess of 22,880 hours. Thus, *all* employees were covered under the terms of the policy whether they appeared on the referenced endorsement or not. And Appellant's final premium assessed to Respondent reflected that coverage. Respondent is trying to avoid paying for premiums it agreed to pay under the terms of the parties' insurance contract. Respondent's attempt, under the guise of using an inapplicable exception to coverage in the Act as a shield, should be rejected.

CONCLUSION

Because the terms of the parties' insurance contract govern the scope of coverage, which terms are broader than the scope of coverage required under the Workers' Compensation Act, Respondent was required to pay for insurance coverage for the Morkens for the policy period April 19, 2004 to April 19, 2005. Therefore, Appellant/Defendant respectfully requests that the trial court's order granting Respondent's/Plaintiff's motion for summary judgment be reversed, and that Appellant be allowed to collect and retain the workers' compensation premium assessed Respondent pursuant to the parties' contract.

Respectfully submitted,

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