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# Carter v. Associated Petroleum Carriers

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# CASE COMMENT

## CARTER V. ASSOCIATED PETROLEUM CARRIERS

E. F. Duncan, doing business as Duncan Oil Company, hauled oil products under a lease with Associated Petroleum Carriers, which contained a provision requiring Duncan to indemnify Associated for claims and awards made under the Workmen's Compensation Act. Accordingly, Duncan, whose business had only two employees and therefore did not come under the Workmen's Compensation Act by operation of law, on October 3, 1955 contacted J. M. Hiers, of Hiers-Clarkson Insurance Co., a registered agent for Iowa Mutual Insurance Co., and applied for the necessary insurance coverage on an Iowa Mutual blank furnished by Hiers, discussed with Hiers the terms of the coverage, and paid Hiers one-half of the annual premium. Hiers represented that he was acting as the agent for the Iowa Mutual Co., accepted the premium in that capacity, and stated that the coverage was effective immediately. The following day, Hiers deposited Duncan's check. Relying upon the arrangement with Hiers, Duncan informed his employees, including the deceased, that they were covered as of that time by workmen's compensation. On October 5, Brady R. Carter, an employee, was killed in an accident concededly arising out of and in the course of his employment.

Upon being notified, Hiers immediately went to the scene of the accident with Duncan, and later employed one Lynch to make an investigation. Meanwhile, Duncan informed the deceased's wife that deceased was covered by workmen's compensation. On October 9 or 10, Lynch advised Duncan that he represented Iowa Mutual, and that Carter's widow would be paid. Subsequently, Iowa Mutual denied liability and attempted to return the premium, which Duncan refused to accept.

At a hearing before the single commissioner, Hiers stated that he had received a letter from Defendant's southern office dated October 6 refusing Duncan's application, but there was no showing that Duncan or any other party of interest was informed of the letter. It does appear however that when Associated requested evidence of insurance from Duncan, Hiers at Duncan's request advised Associated on October 12:

> The application has been received. . . . However, the policy has not been issued up to this date, and we are, therefore, unable to give you a formal certificate of insurance. We will immediately advise you upon further information from our Southern Division Office.
>
> . . . .
>
> This application was processed in our offices on October 3, 1955 and payment received on the same day.

The South Carolina Industrial Commission allowed recovery under the Workmen's Compensation Act and the award was affirmed by the Common Pleas Court of York County. The Supreme Court of South Carolina reversed, holding the judgment void for lack of jurisdiction of the Industrial Commission, Justices Taylor and Moss dissenting.[1]

This comment concludes that the decision incorrectly resolved the issues involved and that this represents an unfortunate, and perhaps unintentional, departure from the Court's well-established prior holdings interpreting the Act liberally in furtherance of its remedial purposes.

In prescribing the method by which an exempt employer, such as Duncan, may come under the Act, Section 72-109 of the Code provides:

> Employers exempted may waive exemption. Any person employing employees in the State and exempted from the mandatory provisions of this article may come in under the terms of this title and receive the benefits and be subject to the liabilities of this title by filing with the Commission a written notice of his desire to be subject to the terms and provisions of this title. Any such person shall come under the provisions of this title and be affected thereby thirty days after the date of such notice.[2]

In considering the application of this election section we must, of course, bear in mind the intent of the legislature and the previous decisions of the South Carolina Supreme Court. Previous rulings of the Court have held that the Act should be given a liberal construction in furtherance of the purposes for which it was designed;[3] that compensation laws constitute a form of social legislation and were enacted pri-

1. Carter v. Associated Petroleum Carriers, 235 S. C. 80, 110 S. E. 2d 8 (1959).
2. CODE OF LAWS OF SOUTH CAROLINA § 72-109 (1952).
3. Alewine v. Tobin Quarries, 206 S. C. 103, 33 S. E. 2d 81 (1945).

marily for the benefit, protection, and welfare of the working man and his dependents;[4] and that it is the established law of this State that any reasonable doubt as to the construction of the workmen's compensation law must be resolved in favor of the claimant.[5]

In *Yeomans v. Anheuser-Busch, Inc.*[6] the South Carolina Court held in 1941 that substantial, rather than exact, compliance with Section 72-109 would suffice to bring an exempt employer under the Act. There, an exempt employer purchased workmen's compensation insurance and the carrier notified the Industrial Commission, which assigned code numbers to the employer and the insurance company. The Court overruled contentions that the employer had not filed "written notice" of intent to come under the Act.

It would seem, keeping in mind the basic purpose of the Act, that the logical extension of the aforementioned rulings would allow recovery in the instant case. The majority of the Court, however, found two principal difficulties: first, that Duncan had not substantially complied with the Act, and secondly, that even if he had, there could be no coverage until the lapse of thirty days.[7]

In considering whether Duncan had elected to come under the Act, the majority quoted extensively from *Eaves v. Contract Trucking Co.*,[8] a 1951 New Mexico case. There the employer had purchased an insurance bond and filed it with the clerk of court, but had not given "written notice" to the clerk as required by the New Mexico election provision. The New Mexico Court refused recovery on the grounds that the employer had not complied with the statute. The *Eaves* case is so similar to the *Yeomans* case in this respect that the two holdings seem plainly inconsistent and the South Carolina Court seems to have abandoned its previous liberal interpretation in favor of the more restricted view of the New Mexico Court.

The *Eaves* decision which was quoted by the South Carolina Court states:[9]

4. Cokeley v. Robert Lee, Inc., 197 S. C. 157, 14 S. E. 2d 899 (1941).
5. Ham v. Mullins Lumber Co., 193 S. C. 66, 7 S. E. 2d 712 (1940).
6. Yeomans v. Anheuser-Busch, Inc., 198 S. C. 65, 15 S. E. 2d 833, 136 A. L. R. 894 (1941).
7. Carter v. Associated Petroleum Carriers, *supra* note 1.
8. Eaves v. Contract Trucking Co., 55 N. M. 463, 235 P. 2d 530 (1951).
9. Carter v. Associated Petroleum Carriers, 235 S. C. 80 at 83, 110 S. E. 2d 8 at 10 (1959).

> The Legislature did not leave room for doubt by merely saying an employer could elect to become subject to the Act. It stated he could elect by doing certain, definite and prescribed things in a specific way and limited his election to be made by the doing of such specific acts in the prescribed manner.

Any persuasive effect this reasoning had on the South Carolina Court becomes even more interesting when it is noted that the New Mexico Court in 1953 expressly overruled the *Eaves* case and abandoned the rationale above in favor of the liberal South Carolina view of the *Yeomans* case.

In *Garrison v. Bonfield,* the New Mexico Court again had under consideration their election provision which is similar to the South Carolina section. In this case the employer had purchased an insurance bond but had *not* filed it with the clerk of court, nor had he given "written notice". In reversing a dismissal by the lower court, the New Mexico Court said:[10]

> The appellees strongly rely upon our decision in Eaves v. Contract Trucking Company, 55 N. M. 463, 235 P. 2d 530, where we squarely held the failure of the employer in a non-hazardous occupation to file a written election in the office of the clerk of the district Court rendered the employer and his insurer immune to action under the act, although the bond was actually filed, basing the decision upon the wording of the act and the case of Keeney v. Beasman, 1936, 169 Md. 582, 182 Atl. 566, 103 A. L. R. 1515, and making reference to the case of Lester v. Auto Haulaway Co., 1932, 260 Mich. 216, 244 N. W. 219. A majority including the writer, believe the holding in the Eaves case was too strict and that the decision should have gone the other way in accordance with the rationale of *Yeomans v. Anheuser-Busch,* (1941, 198 S. C. 65, 15 S. E. 2d 833, 136 A. L. R. 894).
>
> . . . .
>
> It is easy to see the trial court was controlled by our holding in the Eaves case, supra, which we have overruled in this opinion.

It appears, then, that the South Carolina majority departed from their own sound rationale in the *Yeomans* case in favor of the more restricted view of the *Eaves* case apparently unaware that the New Mexico Court had already overruled

10. Garrison v. Bonfield, 57 N. M. 533, 260 P. 2d 718 at 720 (1953).

that case in favor of the more liberal South Carolina reasoning expressed in the *Yeomans* case.

The other case seemingly persuasive with the majority, which the Court called "strikingly similar", was the Kentucky case of *Cody v. Combs*.[11] In that case the claimant, a widow, had reached an agreement with the employer that she was entitled to workmen's compensation benefits under a policy the employer had acquired some three months before the death of her husband. However, the insurance company intervened on the grounds that there had been no election to come under the act.

The Supreme Court of Kentucky refused to allow recovery saying that the statute applies only where both the employer and employee have accepted the provisions of the Workmen's Compensation Act in the manner prescribed by the Act. In the *Cody* case, however, the Kentucky Court was dealing with a statute which required an affirmative act on the part of the employee, *i.e.*, signing a register of acceptance,[12] while in the instant case the South Carolina Court was dealing with a provision which requires nothing affirmative on the part of the employee. In South Carolina an employee is presumed to have accepted upon the election of the employer unless he gives written notice that he does not wish to come under the Act.[13] In addition to the important difference between the statutes, the fact that the Legislature of Kentucky subsequently amended the election provision to *include* employees unless they filed written notice to be *excluded*,[14] indicates that the *Cody* case was not a desirable result in the judgment of the Legislature.

Returning to the principal case, the majority pointed out that even if the act of the employer in securing insurance and informing his employees accordingly was considered an election, such election was not effective for thirty days.[15] It is suggested, though, that a logical extension of *Yeomans*, having in mind the basic remedial purposes of the Workmen's Compensation Act, would render Section 72-109 directory rather than mandatory. Concerning this question, the dissenting opinion stated:

11. Cody v. Combs, 302 Ky. 596, 194 S. W. 2d 525 (1946).
12. *Ibid.*
13. Kennerly v. Ocmulgee, 206 S. C. 481, 34 S. E. 2d 793 (1945).
14. Wells v. Jefferson County, 255 S. W. 2d 462 (Ky. 1953).
15. Carter v. Associated Petroleum Carriers, 235 S. C. 80, 110 S. E. 2d 8 (1959).

> The term "may" as used in the permissive part of Section 72-109, Code of Laws of South Carolina, 1952, gives the employer a right to come in. The use of the word "shall" only applies where the positive action of written notice is given timely effect as will be seen by an analysis of said section. . . . The thirty day provision of the above quoted section provides a manner in which the employer, if he makes an election to come under the act, may have his election become effective thirty days after giving of the notice without further ado on his part, or that of his employee, and should the employee acquiesce in the employer's election for thirty days after the notice, the employee, not having given notice to the contrary, would be bound by the election which he has not protested. There is nothing, however, in the act to prohibit the contracting parties from coming under the provisions of the act at an earlier time or immediately if it be desired. Were this not so, an employer would be required to wait the full thirty days before the act would become effective and at the same time pay premiums on insurance coverage which would be non-existent because of the thirty day waiting period, as the policy, when issued, bears the date of application.[16]

With deference to the majority, it is suggested that the interpretation of the minority is the better view. As pointed out by Justice Taylor in the dissent, such an interpretation is reasonably within the wording of section and would be advantageous to employers as well as employees. In addition, it seems highly improbable that the Legislature, designing an act for the benefit of employers and employees, would word it so as to make it impossible for the principals to take advantage of the Act without waiting thirty days. The minority view would allow immediate coverage where immediate coverage was the intent of the parties.

In cases where an employee had not indicated acceptance and the thirty day period of acquiescence had not passed, the employee would be entitled to use his common law remedies. Obviously the employee would not lose his right to reject coverage.

A valid argument against the foregoing result is that in certain situations an employee would virtually have an election of remedies for the thirty day period. The majority

16. *Id.* at 93, 110 S. E. 2d at 16.

view, however, contains the greater evil of requiring both the employer and the employee to be without the protection of the Act *in all cases* for thirty days, although the employer has purchased compensation insurance, and all the involved parties desire immediate inclusion under Section 72-109. In this situation the employee has his common law remedies though both he and the employer intended to accept the Workmen's Compensation Act and the insurance was purchased in good faith. Clearly the benefit of any "twilight zone" should accrue to the employer or employee.

In disposing of claimant's contention that estoppel should be invoked, the majority points out that the prevailing rule is that the Industrial Commission cannot acquire jurisdiction by estoppel, or by agreement, waiver or conduct of the parties.[17] However, in some jurisdictions estoppel is a basis for preventing an insurer's escape from liability under the workmen's compensation acts. Thus, the Kentucky Court, on the ground of estoppel has held an employer liable although he had not filed the required written notice and, hence, did not come under the statute.[18] The New Mexico Court held that the issue of estoppel in workmen's compensation cases is a fact question for the fact-finding body.[19] Although the South Carolina Supreme Court had not previously decided the precise question, in *Ham v. Mullins Lumber Company,*[20] it adopted with approval the circuit judge's decision which, in rejecting the defendant's contention that its non-compliance with the Workmen's Compensation Act avoided any liability under that statute, declared: "Under these facts, defendants are clearly and completely estopped to deny liability, and I so hold." If estoppel may operate to prevent injustice in workmen's compensation cases, the instant case is an obvious candidate for application of that doctrine! As Mr. Justice Taylor noted for the dissent:

> Under the circumstances of this case, I am convinced that Iowa Mutual Insurance Company is estopped from denying liability by questioning the jurisdiction of the commission and thereby being advantaged by reason of the fact that the employer did not formally file written

17. Carter v. Associated Petroleum Carriers, *supra* note 15.
18. L. E. Marks Co. v. Moore, 251 Ky. 63, 64 S. W. 2d 426 (1933).
19. Garrison v. Bonfield, 57 N. M. 533, 260 P. 2d 718 (1953).
20. Ham v. Mullins Lumber Co., 193 S. C. 66 at 88, 7 S. E. 2d 712 at 722 (1940).

notice with the commission within the two days after arranging for coverage.[21]

## CONCLUSION

The South Carolina Court has repeatedly held that any reasonable doubt as to exclusion or inclusion of workers must be resolved in favor of inclusion.[22] Further, the *Eaves—Garrison* sequence of decisions in New Mexico is a striking illustration of an appellate court consciously substituting a broader for a more restrictive interpretation of statutory coverage in recognition of the superior South Carolina rationale. As was pointed out previously, the strictness of the *Cody* case was legislatively overruled in Kentucky in favor of a presumption that the employee is included unless he gives written notice otherwise. Consequently, even before these decisions were referred to in the instant case, they had been overruled for a more liberal view in their own jurisdictions.

Although the case of *Miller v. Aetna Life* was distinguished from the instant case by the South Carolina majority, the position of the Montana Court that the rules of the Commission were for the benefit of the employer, the employees, and the industrial commission and not for the benefit of the insurer, seems well-taken.[23]

To prevent insurers from escaping liability after accepting premiums, we have seen different courts use different approaches. New York has adopted what we may term "legislative estoppel" in some instances, stating in the act that under certain conditions the carrier is estopped to deny liability.[24] Such action should not be necessary under the South Carolina Act, however, as the highly respected jurist, Learned Hand, noted in *Guiseppi v. Walling*, ". . . [T]here is no surer way to misread any document than to read it literally."[25]

In summation, it is believed that the instant decision is an unfortunate departure from prior sound decisions of the South Carolina Supreme Court, and it is to be hoped that the decision will be expressly overruled or limited to its facts, and the sequence of South Carolina cases liberally interpreting

21. Carter v. Associated Petroleum Carriers, 235 S. C. 80 at 94, 110 S. E. 2d 8 at 16 (1959).
22. Ham v. Mullins Lumber Co., 193 S. C. 66, 7 S. E. 2d 712 (1940); Cokeley v. Robert Lee, Inc., 197 S. C. 157, 14 S. E. 2d 899 (1941); Horton v. Baruch, 217 S. C. 48, 59 S. E. 2d 545 (1950).
23. Miller v. Aetna Life Ins. Co., 101 Mont. 212, 53 P. 2d 704 (1936).
24. N. Y. Workman's Compensation Law § 55 (McKinney 1946).
25. 144 F. 2d 608 at 624 (2d Cir. 1944).

coverage of the Workmen's Compensation Act followed hereafter.[26]

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26. For an excellent discussion of the existence of an oral contract of insurance between the employer and the carrier, see Mr. Justice Taylor's dissent. Carter v. Associated Petroleum Carriers, 235 S. C. 80 at 91, 110 S. E. 2d 8 at 14 (1959).