COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0343

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

A T POLISHING COMPANY AND SHELBY INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND CESARE BOSCO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 BROWN, P.J. In this worker's compensation case, the Labor and Industry Review Commision (LIRC) found that Cesare Bosco sustained

occupational lung disease with a permanent disability rating of 100%. LIRC further found that the injury occurred on the last date of employment, July 22, 1996. Shelby Insurance Company appeals this determination, arguing that the date of disability occurred in 1993 when A T Polishing Company had a different insurer. But Shelby conceded that July 22, 1996, was the date of injury in its answer and did not amend it. Thus, when Shelby attempted to raise the issue before the administrative law judge (ALJ) on the date of the hearing, the ALJ refused to allow it. LIRC agreed. We uphold this determination and will not entertain Shelby's date of injury argument.

¶2 Bosco was employed by A T Polishing from 1987 until November 5, 1996. During 1993, Bosco saw a doctor regarding breathing difficulties. However, he continued working without restriction until his doctor took him off work effective November 6, 1996, due to asthma. Bosco claimed that he was totally disabled and requested expenses for past and future treatment due to this work injury. In his application, Bosco asserted that the date of injury was July 22, 1996. Shelby was the worker's compensation carrier for A T Polishing on this date; therefore, it fell to Shelby to answer. In Shelby's answer, which was never amended, it admitted "[t]he accident or occupational exposure alleged in the application actually occurred on or about the time claimed."

¶3 But on the day of the hearing, Shelby claimed for the first time that the date of injury was in October 1993. The ALJ refused to hear it and LIRC later agreed. LIRC stated that:

> Apart from the medical evidence recited above, the commission could not now find an earlier date of injury [than July of 1996], when a different carrier was on the risk; that carrier was never given any opportunity to present evidence on its behalf because the employer had originally conceded to a July of 1996 date of injury.

¶4 The application of an administrative code provision is a question of law which we may review de novo. *See* ***Klusendorf Chevrolet-Buick*, *Inc. v. LIRC***, 110 Wis. 2d 328, 331, 328 N.W.2d 890 (Ct. App. 1982). However, when LIRC has a history of expertise and familiarity with a particular field of law, we typically defer to a certain extent to its application of the code provision. *See* ***id.*** Thus, we will sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. *See* ***Eaton Corp. v. LIRC***, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985).

¶5 WISCONSIN ADMIN. CODE § DWD 80.08 provides a time deadline for amending applications and answers. It states that "[a]mendment may be made to the application or answer by letter mailed to the department prior to the date the notice of hearing is mailed." ***Id.*** Shelby made no timely amendment to its answer regarding the date of injury as required by this code section. Consequently, LIRC's refusal to allow argument on the issue of date of injury was not only reasonable, it was compelled.

¶6 Moreover, due process requires that parties involved in an administrative proceeding be apprised of the issues involved in the proceeding and be heard. *See* ***Wisconsin Tel. Co. v. DILHR***, 68 Wis. 2d 345, 359, 228 N.W.2d 649 (1975); ***General Elec. Co. v. Wisconsin Employment Relations Bd.***, 3 Wis. 2d 227, 241, 188 N.W.2d 691 (1958). By not making a timely amendment to the answer, Bosco was not apprised of the fact that Shelby wanted to contest the date of injury and Sentry Insurance, the worker's compensation carrier for A T Polishing in 1993, was not made a party to the lawsuit. Therefore, Shelby failed to join the issue and was not free to belatedly claim, prior to the start of the hearing before the ALJ, that July 22, 1996, was not the date of injury.

¶7 Shelby asserts that by holding it to the date of injury stated in its answer, LIRC is actually invoking the doctrine of estoppel to expand insurance coverage that does not exist. To support this argument, Shelby discusses a number of cases holding that plaintiffs cannot use estoppel to create insurance coverage beyond the defendant's insurance contract, including: ***Madgett v. Monroe Company Mutual Tornado Insuranc Co.***, 46 Wis. 2d 708, 176 N.W.2d 708 (1970); ***Artmar, Inc. v. United Fire & Casualty Co.***, 34 Wis. 2d 181, 148 N.W.2d 641 (1967); ***Two Rivers Dredge & Dock Co. v. Maryland Casualty Co.***, 168 Wis. 96, 169 N.W. 291 (1918).

¶8 We give Shelby points for raising a novel argument. But we take away the points because the argument, however novel, has no merit. The elements of estoppel are: (1) action or nonaction; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance by the other; (4) which is to the other's detriment. *See* ***Sanfelippo v. DOR***, 170 Wis. 2d 381, 390, 490 N.W.2d 530 (Ct. App. 1992). In this case there is no estoppel because the elements are not met.

¶9 In all of the cases Shelby discusses, holding that estoppel cannot be used to expand insurance coverage, the fact situations are similar. In those cases, the insurance company or the company's agent was engaged, at that time, in either the business of selling insurance or the business of carrying out its duties and responsibilities accorded under the policy. In other words, the insurer was wearing its insurance business hat, not its litigation hat. *See* ***Madgett***, 46 Wis. 2d at 708; ***Artmar***, 34 Wis. 2d at 181; ***Two Rivers Dredge & Dock***, 168 Wis. at 96. Even a casual reading of the cited cases reveals that they involved an insured who claimed either that the insurer made a promise of coverage to the insured or failed to reveal the nonexistence of certain coverage to the insured. *See* ***id***. The insured,

thinking that coverage was greater than what the contract actually said, allegedly relied on the promise or the failure to reveal and was harmed when an insurance claim was denied. *See* ***id***.

¶10 For example, in ***Madgett***, 46 Wis. 2d at 709, an insurance agent told the plaintiff to fix a building and provide him with a list of damages despite the nonexistence of an insurance contract covering the peril which caused the damage. The plaintiff alleged that the insurer was estopped from relying on the plain meaning of the policy because the action taken by the insurance agent caused the plaintiff to believe that coverage existed and that is why he fixed the building. *See* ***id***. at 709. The plaintiff alleged that his reliance harmed him because the insurance company then denied coverage, leaving him to pay for the damages out of pocket. *See* ***id***.

¶11 In ***Artmar***, 34 Wis. 2d at 184, the insurance company wrote a policy covering only residential property despite the fact that the insurance agent knew that the plaintiff wanted the nonresidential property also insured. The insured alleged that the insurer was estopped from asserting a defense based on the written policy because its agent failed to obtain a policy conforming to the expectations of the insured. *See* ***id***. at 185. The insured allegedly relied on its belief that the policy covered all property and was harmed by the denial of the claim following the destruction of the nonresidential property. *See* ***id***. at 184.

¶12 In ***Two Rivers Dredge & Dock***, 168 Wis. at 99, the insurer failed to inform its insured that the state of Ohio had crafted a worker's compensation law. The law effectively nullified any coverage under the contract for accidents occurring in Ohio. The insured alleged that estoppel existed because the insurance company knew about the worker's compensation law in Ohio, knew the insured

did not know about it and failed to so inform the insured. *See* ***id***. at 99. As a result, the insured continued to rely on its belief that there was no worker's compensation law in Ohio and was harmed when a worker was killed in Ohio and coverage was denied. *See* ***id***.

¶13 Thus, in each of the cases discussed above, the *insurer's action* took place while the insurer or its agent was actually engaged in the business of insurance. Further, the action taken by the company was not just toward the "insured" in the legal sense of a person "considered" to be an insured under the policy. Rather, the action was taken toward that insured who actually had contractual relations with the insurer. The reliance claimed by that insured was that the action caused the insured who entered into the original contract to believe that the contract either provided coverage or provided that coverage was expanded or should have been expanded.

¶14 We have none of that here. Initially, we emphasize the *action* and *nonaction* taken in this case. The action taken was conceding the date of injury in a formal pleading before an administrative agency—the answer. The nonaction was in failing to move to amend the pleadings in a timely manner. Thus, the action could not in any reasonable way be construed as a "promise" of coverage outside the contract nor was it a failure to reveal the nonexistence of coverage to the insured. The next thing we need to point out is that the person who took the action and failed to take action *was not engaged* in the business of selling insurance or carrying out the terms of the policy at the time. In fact, the person who made the concession was not even an employee of the company. The person was a lawyer—a member of the law firm hired by Shelby to litigate the case. In other words, the action taken here was not even the action of the insurer. It was an action taken by the insurer's lawyer. Third, the audience was the ALJ and the

attorney for Bosco, not an insured. If anyone was relying on what Shelby's attorney submitted, it was the ALJ and the attorney, not A T Polishing, and, only in a technical sense, Bosco.

¶15 In sum, there is a difference between Shelby, the seller of insurance, and Shelby, the litigant. In the context of the action taken here, Shelby, through its lawyer, was acting as a litigant. The lawyer's pleading was for the benefit of the ALJ and Bosco's lawyer. It was not an action by the insurer allegedly promising coverage to an insured. Therefore, the facts existing in the cases cited by Shelby are not remotely similar to the facts here.

¶16 There is one more reason why Shelby's argument has no merit. The reason why we have the law as set forth in ***Madgett*** and the rest of the cases cited is to tell insureds that they may not come to Wisconsin courts claiming that the insurer is prohibited from relying upon its policy language because of some action or conduct by the insurer or the agent. Here, however, the claimant has not brought this argument. Bosco has not claimed that the insurer, by its actions, expanded the policy. And Bosco has not asserted that Shelby is prohibited from relying on the policy language. Rather, it is Shelby that claims its own lawyer's pleading was effectively an expansion of coverage and LIRC is at fault for stopping Shelby from erasing the consequences of the lawyer's action. That is not the stuff of estoppel law. Shelby will not be heard to twist estoppel law as a means to avoid the consequences of its pleading errors.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.