

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1215
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-1197

**IN COURT OF APPEALS
DISTRICT III**

BADGER SCAFFOLD, INC.,

PLAINTIFF-APPELLANT,

V.

HARTFORD UNDERWRITERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

BCI INSURANCE SERVICES, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Badger Scaffold, Inc.¹ appeals from a judgment declaring that its worker’s compensation and employer’s liability policy with Hartford Underwriters does not cover injuries suffered by its employee, David Brassard, arising from a scaffold accident that occurred in Michigan. Badger argues that (1) parts two and three of the policy grant coverage; (2) that Hartford is required to pay the amount that Wisconsin worker’s compensation law would have allowed pursuant to *Seiman v. Postorino Sandblasting & Painting Co.*, 314 N.W.2d 736 (Mich. Ct. App. 1981); and (3) that Hartford should be estopped from denying coverage because it breached its duty to defend the Michigan action, it paid on a previous similar claim and it based its premium in part on Brassard’s work even though he was not covered under the policy, resulting in illusory coverage. We reject these arguments and affirm the judgment.

¶2 Although the trial court referred to its decision as a “summary judgment,” the court initially denied summary judgment and, without objection, held an evidentiary hearing to resolve questions of fact. Neither party requested a jury trial and neither party raises an issue on appeal regarding the procedure. Therefore, we conclude the evidentiary hearing amounts to a trial to the court.

¶3 The trial court’s findings of fact will not be disturbed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).² Construction of an unambiguous insurance policy is a question of law that we decide without deference to the trial

¹ The pleadings and the trial court’s judgment refer to the business as “Badgerland Scaffold.” The insurance policy refers to it as “Badger Scaffold, Inc. & Badger Ladder, Inc.” The notice of appeal and other documents filed with this court refer to the business as “Badger Scaffold, Inc.” Because neither party responded to this court’s notification of the caption, we will refer to the business as “Badger Scaffold.”

² All references to the Wisconsin Statutes are to the 1999-2000 version.

court. *See Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998).

¶4 Brassard was hired in Michigan to work at a Michigan construction site for Badger Scaffold, a Wisconsin corporation. He was compensated for his injuries under Michigan worker's compensation law. Part one of Badger's insurance policy with Hartford provides coverage for Wisconsin worker's compensation claims. Nine months before Brassard's injury, Hartford honored a claim that arose out of Michigan (the Anderson claim). The trial court found that Hartford was not aware that the Anderson accident occurred in Michigan.

¶5 Badger argues that part two of the policy provides coverage. Part two is a general employer's liability insurance provision. It explicitly excludes "any obligation imposed by a worker's compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law." The policy defines "worker's compensation law" as ch. 102 of the Wisconsin statutes. Badger argues that this means the Michigan worker's compensation act is not the worker's compensation law under the policy. Badger's argument does not account for all of the language stated in the exclusion, particularly "any similar laws." The unambiguous language of the exclusions to part two precludes coverage for any worker's compensation claims.

¶6 Part three of the policy, which allows expanded coverage in other states, cannot be construed to provide coverage for Brassard's injury. The policy requires Badger to notify Hartford within thirty days of the effective date of the policy if it seeks coverage in any state other than Wisconsin. Badger argues that, although it did not specifically notify Hartford that it desired additional coverage in Michigan, Hartford knew within thirty days of the effective date of the policy

that Badger did work in Michigan for two reasons: (1) the Anderson claim arose from a Michigan injury; and (2) Hartford's auditors reviewed Badger's payroll records and should have known from that review that Badger had a Michigan construction site. Badger's contention that Hartford knew the Anderson claim arose out of a Michigan accident depends on the memory of Badger's general manager, Peter Petitjean, who testified that he informed Hartford of the location of Anderson's accident when he initially reported the accident. Petitjean's testimony was impeached by several Hartford documents that indicate the Anderson accident occurred in Wisconsin. Badger produced no documents specifically notifying Hartford that the Anderson injury arose in Michigan. Therefore, the trial court's finding that Badger did not inform Hartford that it conducted business in Michigan is not clearly erroneous.

¶7 Likewise, Hartford's audit of Badger's payroll records did not necessarily inform Hartford of Badger's Michigan activities. The nature, purpose and scope of the audit was merely to determine the amount of Badger's insurance premium that based the rate on each \$100 of payroll. The record suggests no reason for the auditor to focus on the place of employment while performing this one hour per year examination of Badger's records. Because the finding is not clearly erroneous that Badger failed to notify Hartford within thirty days of the effective date of the policy that it conducted Michigan operations, part three of the policy does not extend coverage to a Michigan worker's compensation claim.

¶8 Badger argues that *Seiman* obligates Hartford to pay whatever amount Wisconsin worker's compensation law would have allowed. That argument results from a misreading of *Seiman* where the worker was considered

by his employer to be a Wisconsin employee.³ Nonetheless, he requested worker's compensation in Michigan. The court concluded that the insurer should pay the amount it would have had to pay if he had made the claim in Wisconsin.⁴ The *Seiman* court stressed the "fortuity that the proceedings were brought in Michigan." *Seiman*, 314 N.W.2d at 740.

In Brassard's case, his claim was brought in Michigan of necessity, as there was no basis for recovery under Wisconsin worker's compensation law. Because Brassard was hired in Michigan and never worked for Badger in Wisconsin, he was not eligible for Wisconsin worker's compensation. If he had made his claim in Wisconsin, he would have recovered nothing. The *Seiman* rule, that the insurer was liable to the employer for the portion of the benefits as would be payable under Wisconsin compensation law, would afford Badger no relief because Brassard was not entitled to any Wisconsin worker's compensation.

¶9 Badger has not established that Hartford should be estopped from denying coverage. The burden is on the party asserting estoppel to prove each of the elements by clear and convincing evidence. *See St. Paul Ramsey Medical Center v. DHSS*, 186 Wis. 2d 37, 47, 519 N.W.2d 681 (Ct. App. 1994). The elements of estoppel are (1) action or nonaction by the person against whom

³ In *Seiman v. Postorino Sandblasting & Painting Co.*, 314 N.W.2d 736 (Mich. Ct. App. 1981) the opinion does not indicate where the workman was hired or whether he ever worked in Wisconsin,

⁴ The court adopted the rationale stated in *Weinberg v. State Workmen's Ins. Fund*, 81 A.2d 906 (Pa. 1951), in which a New Jersey resident who was hired in New Jersey was injured in Pennsylvania. The worker could have sought workers' compensation in either the State where the injury occurred or the state where she was hired. Because she could have elected to file the claim in Pennsylvania, the court concluded that the insurer for Pennsylvania workers' compensation would be required to pay the amount Pennsylvania would have allowed even though the claim was made in New Jersey.

estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person's detriment. *See id.*

¶10 Badger contends that Hartford is estopped from denying coverage because it breached its duty to defend Badger in the Michigan worker's compensation proceedings. An obligation to pay the entire judgment or settlement is the automatic consequence of finding a breach of the duty to defend. *See Radke v. Firemen's Fund Ins. Co.*, 217 Wis. 2d 39, 47, 577 N.W.2d 336 (Ct. App. 1998). The duty to defend is broader than the duty to indemnify, and an insurer must defend if a claim is "fairly debatable." *See U.S. Fire Ins. Co. v. Green Bay Pkg. Inc.*, 66 F. Supp. 2d 987, 995 (E.D. Wis. 1999). Here, however, coverage is not fairly debatable and Hartford did not breach any duty to defend because there was no duty to defend. The policy unambiguously requires a defense only for worker's compensation claims in Wisconsin. Neither the language of the policy nor a reasonable reading of *Seiman* would support any claim for coverage of Brassard's Michigan worker's compensation claim.⁵

¶11 Badger next argues that Hartford should be estopped from denying coverage because it honored the Anderson claim. The trial court's finding that Hartford did not know the Anderson claim was a Michigan worker's compensation claim is not clearly erroneous and defeats Badger's estoppel argument.

⁵ In reaching this conclusion, we do not rely on arguments made in Hartford's sur-reply brief. Badger requested that we strike that brief. We need not act on the motion because our ruling would be the same regardless of whether we consider Hartford's additional arguments.

¶12 Badger next argues that Hartford should be estopped from denying coverage because its auditors should have known from the payroll records that Badger Scaffold employees worked in Michigan. We are unpersuaded. Even if the auditors knew that Brassard worked in Michigan, that fact alone would not establish the need for additional insurance coverage. Under WIS. STAT. § 102.03(5), Wisconsin worker's compensation law applies to a worker injured in Michigan if the worker was hired in Wisconsin or did substantial work in Wisconsin. Badger could not reasonably rely on the auditor to determine whether Badger needed additional coverage in Michigan. Therefore, the trial court correctly concluded that estoppel could not be based on Badger's reliance on the auditor.

¶13 Finally, Badger argues that the policy provides illusory coverage because Hartford accepted a premium based in part on Brassard's employment and, therefore, Hartford should be estopped from denying coverage. The amount of the premium was determined by including all of Badger's employees regardless of whether their worker's compensation claims could arise in Wisconsin. That does not render the coverage illusory. Illusory coverage results when the insured pays a premium for coverage that he would never receive. Badger would be covered under this policy for injuries that are covered by Wisconsin worker's compensation law. If Brassard had been injured in Wisconsin or primarily employed in Wisconsin or had been hired in Wisconsin to work in Michigan, this policy would have covered his worker's compensation claims. Therefore, it is not true that this policy could not have resulted in coverage under any circumstances.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

