1-15-1969

Chevron Oil Co. v. Industrial Commission

NO. 23554

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

CHEVRON OIL COMPANY and FIREMAN'S FUND INSURANCE COMPANY,	)	Error to the District Court of the County of Arapahoe State of Colorado
Plaintiffs in Error,	)	
v.	)	
INDUSTRIAL COMMISSION OF COLORADO, LANA J. ROSE, MATTHEW JAMES ROSE, STATE COMPENSATION INSURANCE FUND, and PHOENIX OF HARTFORD INSURANCE COMPANY,	)	HONORABLE WILLIAM B. NAUGLE Judge
Defendants in Error.	)	

ANSWER BRIEF OF DEFENDANT IN ERROR,
STATE COMPENSATION INSURANCE FUND

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ANSWER BRIEF OF DEFENDANT IN ERROR, STATE COMPENSATION INSURANCE FUND

I. STATEMENT OF THE CASE

The statements of the case made by counsel for plaintiffs in error in the opening brief, and by counsel for the defendant in error Phoenix of Hartford Insurance Company in their answer brief, are substantially correct. However, the

defendant in error State Compensation Insurance Fund, which will hereinafter, for the sake of brevity, be referred to as the Fund, feels that a short supplemental statement of the case should be made in order to bring clearly into focus the position of the Fund in the controversy now before the Court.

The part played by the Fund in the rather complicated series of events relating to the affairs of National Coin-Operated Services can be summarized briefly as follows:

Ray Thornberry, vice-president of National Coin-Operated Services, testified among other things that about July 27, 1965, he called the Fund and talked to a man in the Fund, and asked to be bound for workmen's compensation insurance, and he informed the man to whom he talked, whose name he did not get, that the National Coin-Operated Services, Inc., had filling stations and they were thinking about a bowling alley. He was informed that the binder could not be issued over the telephone, but that forms would be sent him, and as soon as they were received by him they were to be returned; that the firm would be covered or bound for coverage as soon as the Fund received the forms (ff. 426-429); and that after that conversation, the National Coin-Operated Services, Inc., did receive

the forms and applications (f. 431). Following this testimony, various exhibits taken from the Fund's Policy File No. 49001 were offered in evidence and marked: as Exhibit 8-A, a letter dated September 23, 1965, from the Fund addressed to the insured; as Exhibit 8-B, a letter of September 7, 1965; as Exhibit 8-C, a letter of July 27 to the insured (all of which were initiated by the Fund); as Exhibit 8-D, a statement of estimated advance premium; as Exhibit 8-E, an application for workmen's compensation insurance, consisting of four pages; as Exhibit 8-F, a copy of the declaration page of Policy No. 49001; as Exhibit 8-G, a form entitled "Application Request," filled out in ink, apparently by the Fund; as Exhibit 9, a copy of four pages of Policy No. 49001 issued by the Fund to National Coin-Operated Services, Inc. (ff. 433-435).

Leo Fallon, an underwriter of the Fund, verified the fact that Mr. Thornberry had called the Fund office on the telephone, requesting workmen's compensation coverage, on or about July 27, 1965; that Mr. Thornberry requested a binder on service stations, and he issued a ten-day binder effective July 28, 1965 (ff. 552-554). The binder, marked Exhibit 8-C, carries a notation thereon

that it would be cancelled if the completed application form for insurance was not returned to the Fund office within ten days (f. 605). Mr. Fallon also testified that he had changed some of the classifications on the application, as he could not associate the classification "service stations" with the name "National Coin-Operated Services, Inc.," and he tried to contact Mr. Thornberry but had failed in doing this (f. 557). Mr. Fallon also identified Exhibits 5 and 6, the same being certified copies of notices sent to the Industrial Commission of Colorado. Copies of these exhibits are found at folio 600. Exhibit 5 is a notice of cancellation sent to the Industrial Commission dated November 4, 1965, advising that the policy issued to National Coin-Operated Services, Inc., had been cancelled effective August 13, 1965, the reason being that it was "cancelled flat." The exhibit shows that the notice was received by the Industrial Commission of Colorado on November 8. Exhibit 6 is a notice addressed to the Industrial Commission of the issuance of Policy No. 49001 for the period August 13, 1965 to August 1, 1966, and that the same was received in the office of the Industrial Commission on August 27, 1965.

In explaining the issuance of the binder, Mr. Fallon testified that the

ten-day binder was issued on July 28, 1965; that a binder gives the policyholder ten days to complete the application and get it back to the Fund office; that the policyholder has coverage during the ten-day period, providing he pays the premiums; that Mr. Thornberry told him over the telephone on July 27 that he wanted to be bound immediately (ff. 564-565). Mr. Thornberry also admitted that the National Coin-Operated Services, Inc., never paid premium to the Fund, for which the company had been billed in the sum of $323, and that the reason it was not paid was that the company was in financial straits (ff. 515, 516). With respect to the letters to the Fund relating to cancellation, Mr. Thornberry acknowledged that National Coin-Operated Services, Inc., received the letter from the Fund dated September 7, 1965 (f. 535), said letter being Exhibit 8-B (f. 604) wherein National Coin-Operated Services, Inc., was notified that the premium of $323 must be paid not later than September 17, 1965, and that he also received the letter dated September 23, 1965 (f. 603) wherein the company was advised that the policy would be cancelled as of its effective date if the premium was not received by October 4, 1965. That letter is Exhibit 8-A.

Thornberry testified (f. 450) that he talked on the telephone to some lady

in the Fund office, whom he did not know, and was told not to worry about the 20-day period; that the company was still covered. He also stated that the premium had never been paid to the Fund, either by him or anyone else to his knowledge (ff. 450, 451). He testified further that to his knowledge no notice of cancellation was ever received from the Fund (ff. 452, 453).

It is the contention of the Fund that the policy which admittedly was issued to National Coin-Operated Services, Inc., never became effective, or, if at any time it was effective, it was cancelled by operation of law prior to the occurrence of the accident to the deceased William Gene Rose, and that the liability of the Fund was terminated prior to the occurrence of the accident on October 24, 1965, by virtue of the provisions of Sections 132 and 133 of the Workmen's Compensation Act (C.R.S. 1963, 81-15-11 and 81-15-12, respectively).

II. SUMMARY OF THE ARGUMENT

A. The policy of workmen's compensation insurance issued the employer National Coin-Operated Services, Inc., in this case never was in effect, for the reason that the premium therefor was never paid by the employer as

required by Section 132, Workmen's Compensation Act (C.R.S. 1963, 81-15-11) and that in any event, it was cancelled by operation of law if it was ever deemed effective, by virtue of Section 133 of the Workmen's Compensation Act (C.R.S. 1963, 81-15-12).

B. That Sections 132 and 133 of the Workmen's Compensation Act, C.R.S. 1963, 81-15-11 and 81-15-12, respectively, even though they apply only to the operation of the Fund, are constitutional.

III. ARGUMENT

A. THE FUND'S POLICY OF INSURANCE ISSUED TO THE NATIONAL COIN-OPERATED SERVICES, INC., NEVER WENT INTO EFFECT FOR THE REASON THAT NO PREMIUM WAS EVER PAID AS REQUIRED BY C.R.S. 1963, 81-15-11, OR IN THE ALTERNATIVE, IF EVER EFFECTIVE, WAS CANCELLED BY OPERATION OF LAW PRIOR TO THE OCCURRENCE OF THE ACCIDENT, PURSUANT TO SECTION 133 OF THE WORKMEN'S COMPENSATION ACT, C.R.S. 1963, 81-15-12.

The policy issued by the Fund on August 13, 1965, never was in effect, or, in the alternative, had been cancelled by operation of law prior to the accident sustained by the deceased, William Gene Rose, and the said Fund had no policy in effect at the time of said accident.

We should like at this point to review briefly some of the sections of the Workmen's Compensation Act which apply generally to the question of insurance coverage, and also some of the sections which, we respectfully submit, specifically bar the imposition of any liability upon the Fund.

First, we call attention to Section 21 of the Workmen's Compensation Act (C.R.S. 1963, 81-5-1) and particularly subsections (1)(a), (b), (c) and (d).

Subsection (a) sets forth the provision that every employer subject to the Act shall secure compensation for employees in one of the three methods thereinafter set forth. Subsection (b) provides for insuring with the Fund. Subsection (c) provides for the insuring and keeping insured and the payment of compensation by any stock or mutual company authorized to write workmen's compensation insurance in Colorado. Subsection (d) provides a method of self-insurance. Subsection (c) also provides that if insurance is effected with a stock or mutual company the employer or insurer shall forthwith file with the Commission, in form prescribed by it, a notice specifying the name of the insured and insurer, the business and place of business of the insured, and the effective and termination dates of the policy. No such notice is

required in the statute of the Fund, presumably because the Fund is administered by the Commission.

Section 22 of the Workmen's Compensation Act, C.R.S. 1963, 81-5-2, provides among other things that every contract for insurance of compensation benefits shall be made subject to all provisions of the Act; and that any provisions in such contract for insurance inconsistent with the provisions of the Act are void.

We next should like to look at several sections of the Workmen's Compensation Act which relate, in our opinion, chiefly if not solely to the Fund, namely those sections contained in Article 15 of Chapter 81, C.R.S. 1963, which comprise Sections 122 through 146 of the Workmen's Compensation Act. That it is clear that these sections apply to the Fund almost exclusively is apparent by perusal of the article and the substance of the sections therein.

Sections 132 and 133 of the Workmen's Compensation Act (C.R.S. 1963, 81-15-11 and 81-15-12) constitute, we respectfully submit, a complete bar to the imposition of any liability of the Fund. These sections read as follows:

"81-15-11. Amendment of rates--distribution to policyholders.-- The commission may amend at any time the

rates for any class or subclass. No contract of insurance between the state compensation insurance fund and any employer shall be in effect until a policy or binder has been actually issued by the commission and the premium therefor paid as and when required by this chapter. After the inspection of the premises of any employer, or after considering the experience of such employer, the commission may quote with respect to his risk a rate higher or lower than that indicated by its manual as applicable to his risk. Not less often than once a year the commission shall tabulate the earned premiums paid by policyholders of the state compensation insurance fund, by classes and subclasses, and shall also tabulate the losses incurred by the fund by classes and subclasses. Should the experience of the fund show a balance to the credit of the policyholders of any class or subclass after the above-mentioned amounts have been credited to the surplus fund, and after payment of all amounts which have fallen due because of operating expenses, injury or death, and after setting aside proper reserves, then the commission shall distribute such credit balance to the policyholders of such classes as have a balance to their credit in proportion to the premium paid by each such policy-holder during the preceding insurance

period and in proportion to the credit balance earned by the class or subclass. In the event any such policyholder fails to renew his policy in the state compensation insurance fund for the period following the period in which said dividends were earned, he shall not be entitled to said credit dividend. In the event an employer actually discontinues business, his policy shall be canceled and the dividend, if any, when ascertained, returned to him.

"81-15-12. Policy canceled, when.--If any employer shall be in arrears for more than twenty days in any payment required to be made by him to the state compensation insurance fund as provided in this chapter, he shall by virtue of such arrearage be in default of such payment and any policy issued to him by said fund shall thereupon be canceled without notice as of the effective or renewal date of said policy. In the event cancellation of policy is made as provided in this section and the state compensation insurance fund is required to make any expenditures for the benefits provided by this chapter for any accident causing injury or death within said twenty-day period, said fund shall be entitled to reimbursement from the employer for all amounts so paid

> which may be collected by said fund in a civil action brought against the employer. The employer shall be primarily liable to any injured employee or the dependents of a killed employee for the payment of the compensation and benefits provided by this chapter during said twenty-day period." (Emphasis supplied.)

It must be remembered that the Fund is a state agency, administered by the Industrial Commission of Colorado. Consequently, since it is a state agency, it was necessary for the general assembly, in drafting the law, to set forth the duties and powers of the Industrial Commission relative to the creation of the Fund. This Court has ruled many times that the Industrial Commission is a mere creature of statute and that its powers and duties and authority are limited by the creative statute and the amendments thereto. See the case of Maryland Company v. Industrial Commission, 116 Colo. 58, 178 P.2d 426, where this Court said, on page 60 of the opinion:

> "The commission is an administrative agency of the state, created by statute, and its jurisdiction, powers, duties and authority are fixed and limited by the creative statute and amendments thereto. It

> cannot exercise any jurisdiction, exert any powers, perform any duties, or assume any authority unless the right so to do is given it by statute. While it often has been held that the commission has a wide latitude in its procedure and determinations, nevertheless it remains a creature of the statute. While the provisions of the Workmen's Compensation Act are to be liberally construed, nevertheless any liberal construction cannot be extended so as to clothe either the commission or reviewing courts with power to read into the statute any provisions which are not contained therein. John Thompson Grocery Stores Co. v. Industrial Commission, 85 Colo. 576, 277 Pac. 789; Tyler v. Hagerman, 88 Colo. 60, 291 Pac. 1033; Colorado Fuel & Iron Co. v. Industrial Commission, 88 Colo. 573, 298 Pac. 955; Cresson Consolidated Gold Mining & Milling Co. v. Industrial Commission, 90 Colo. 353, 9 P.2d 295."

Various sections of Article 15 deal with the creation, administration and control of the Fund, and the creation of an advisory council, the power of the Commission to fix rates, sue and be sued, and other provisions which are necessary to be spelled out in order that the Fund can be operated as a sound insurance organization.

Thus it will be seen that the Commission in administering the Fund is limited by the provisions of Article 15, C.R.S. 1963, which spells out in detail what the Commission can and cannot do.

With these things in mind, then, we take the unqualified position that, inasmuch as one of the two vital conditions set forth in C.R.S. 1963, 81-15-11, namely, that in order to be effective a policy or binder must actually have been issued and the premium paid therefor, was not met (it was undisputed that no premium was ever paid to the Fund by National Coin-Operated Services, Inc.), that the action of the Fund in later cancelling the policy "flat" was the correct procedure. The fact that said formal step was not taken on the 21st day after the policy was issued is immaterial because the policy was void ab initio, when the requirements of Section 81-15-11 are taken into consideration.

In view of this situation, we deem it unnecessary to enter into a lengthy discussion of Rule 3 adopted by the Industrial Commission. Opposing counsel, on page 33 of their brief, have set forth this rule, which requires that every insurance carrier writing compensation or occupational disease coverage shall, within ten days, notify the Commission of the

issuance, cancellation or termination of any such policy. It will be noted, as the Referee stated in his order, that Rule 3 carries no specific notice of ability to exercise any powers of specific performance for failure to comply with specific direction (ff. 631, 632). Continuing, the Referee said:

> "Section 133 (81-15-12) of our Workmen's Compensation Act allows cancellation of any State Compensation Insurance Fund policy as of issuance date without notice when there is a failure to pay a required premium. Therefore, we have by specific statutory authority the privilege lodged in a special class which is part of an even larger class. First, this statutory instruction would certainly prevail over any administrative procedure rule and thus eliminate liability by State Compensation Insurance Fund in this matter." (f. 632)

The Commission adopted this same finding by its order of June 28, 1966, wherein it affirmed the orders of the Referee entered on January 19, 1966, and March 14, 1966 (ff. 832, 833). While the Commission is undoubtedly empowered to make rules which assist in the administration of the Act, it cannot, by the adoption of any rule, contravene express provisions of the

statute, nor specifically can it alter the mandates set forth in Sections 132 and 133, Workmen's Compensation Act, C.R.S. 1963, 81-15-11 and 81-15-12. Opposing counsel have cited many cases relative to the effect of failure to give notice of cancellation of a policy of workmen's compensation insurance, but none of these cases deals with the specific problem in the case at bar, insofar as the Fund is concerned, where the meaning of clear, statutory mandates are concerned. Consequently, the general rules of law announced in these various cases, and in the text of Larson, Workmen's Compensation Law, at paragraph 92.20, do not and cannot govern the situation with respect to the position of the Fund in this case.

Opposing counsel have sought to evade the effect of the mandatory provisions of the statute by laying stress on the testimony of Thornberry concerning his alleged conversation with an unidentified and unidentifiable woman, supposedly an employee of the Fund, who allegedly told him in a telephone conversation to disregard the threat of cancellation and the form notices relating thereto. Counsel seek to find a waiver by the Fund somewhere concealed in this vague and essentially self-serving testimony. Their hope in this regard, however, is blasted by the provisions of the

policy itself. See Condition No. 13 (f. 614), which reads as follows:

> "13. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part of this policy, signed by the chairman of the Industrial Commission and manager of the company."

In Condition No. 16 (f. 614) we find the following:

> "16. Terms of Policy Conformed to Statute--Coverage A: Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law."

In view of these specific provisions of the policy and in view of the further provisions of the Workmen's Compensation Act which are specifically incorporated in the policy, no telephonic assurances by an unidentified person can be seized upon either to effect a waiver or an estoppel or serve to put into effect a policy in any situation where the statutory mandate of payment of premium has not been met.

B. SECTION 133 OF THE WORKMEN'S COMPENSATION ACT (C.R.S. 1963, 81-15-12) IS CONSTITUTIONAL AND CANNOT BE CONSIDERED CLASS LEGISLATION WITHIN THE MEANING OF THE PROVISIONS ALLEGING THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION, AND THAT IT DISCRIMINATES AGAINST PROPERTY AND CONTRACTUAL RIGHTS OF PRIVATE INSURERS.

Counsel for plaintiffs in error also allege that Section 133, Workmen's Compensation Act (C.R.S. 1963, 81-15-12) is in violation of Section 25, Article V, of the Colorado Constitution, in that it constitutes special legislation, which is prohibited by said section of the Constitution. It is interesting to note that opposing counsel did not make a similar attack upon Section 132 (C.R.S. 1963, 81-15-11) which specifically provides that no contract of insurance with the Fund is in effect until the policy or binders have been actually issued and the premium paid. It would seem, therefore, that the question of constitutionality of Section 133 (C.R.S. 1963, 81-15-12) is not really in issue under the facts of this particular case, for the reason that the Fund policy under the provisions of the preceding section never became effective, and the act of cancelling flat was merely an administrative detail to clear the record. In fact

it must be so regarded, as it would be actually unnecessary to cancel a policy which legally was not in existence either at the time the notice was served on the Industrial Commission or at the time of the accident sustained by the deceased in this case.

Lest we be accused of brushing over this matter lightly, however, we desire to point out a few basic propositions which relate to the powers of the Industrial Commission and also have a bearing upon the alleged unconstitutionality of Section 133. As was indicated earlier in this brief, Article 15 of Chapter 81, C.R.S. 1963, relates almost entirely to the Fund, and the provision in the Workmen's Compensation Act that all policies of insurance shall be subject to the provisions of the Workmen's Compensation Act must be construed liberally to mean that all provisions of the Act which have an application to the particular policy in question must be considered a part of the policy; that the sections of the statute relating to the Fund clearly have no bearing upon terms and conditions of a policy issued by a private insurance company. In other words, it would seem that the provisions of the statute which require that all policies be subject to all the provisions of the chapter (Section 22, W.C.A., C.R.S. 1963, 81-5-2) must be construed to mean that

every contract for the insurance of compensation and benefits shall be subject to the provisions of the Act where applicable.

As we previously indicated, Article 15 of the Workmen's Compensation Act actually is the charter and by-laws of the Fund. The question of constitutionality of Section 133 (81-15-12) was raised early in the case, and the Referee, in his order of January 19, 1966, touching on this point, said:

> "First, this statutory instruction would certainly prevail over any administrative procedure rule and thus eliminate liability by State Compensation Insurance Fund in this matter. Secondly, by specific statutory mention of a special class which is part of a general class would not in itself establish a right in one class and deny the same right to remaining members of a general class or private insurance funds. The constitutional question would seem to be involved in statutory preference of one special class over other members of the same class and thus it can be concluded that there was no intention to establish a private and sole privilege in our State Compensation Insurance Fund but that it was merely a pronouncement of general

right that might be exercised by the public fund being created through statutory enactment." (ff. 632, 633)

The Industrial Commission, in its order of June 28, 1966, affirming the order and award of the Referee, in touching upon this point, said:

"Further, we note with interest that Section 21 (81-5-1) Subsections 1 (a) and 1 (b) of our Workmen's Compensation Act imposes no duty upon any insurance company to notify our Commission that a policy for workmen's compensation has been cancelled after said company has once issued an effective policy of workmen's compensation insurance. This also lends further credence that Sections 132 and 133 (81-15-11 and 81-15-12) are legislative statements of general powers that belong to our State Compensation Insurance Fund as it does to other similar insurers in private business." (ff. 831, 832)

These statements, when first brought to the attention of various counsel involved in this case, were understood to mean that Section 133 (81-15-12) applied to private insurance companies as well as the Fund. The wording of the statements made by the Referee and the Commission can be interpreted in two different ways. If it is

interpreted to mean that the Commission held that Section 133 (81-15-12) did in fact apply to the private insurance companies as well as the Fund, we as counsel for the Fund would have to agree that the Commission's finding in that respect was erroneous. As we have heretofore pointed out, the entire Article 15 of Chapter 81 relates to the Fund only, as we interpret it, and we would have to concede that the Commission, if its order is to be interpreted in that manner, was in error in so finding.

However, even if the Commission and the Referee intended to hold that Section 133 (81-15-12) did in fact apply to private insurance companies, such a holding would not vitiate the awards entered in this case but merely place the Referee and the Commission in the position of having arrived at a correct decision on the merits of the case but possibly for the wrong reason.

Fallacious reasoning will not nullify a sound conclusion, Wilkowski v. Industrial Commission, et al., 113 Colo. 46, 50, 154 P.2d 615; Skinner, et al. v. Industrial Commission, et al., 152 Colo. 97, 101, 381 P.2d 253.

On the other hand, the remarks of the Commission and the Referee can also be interpreted to mean that the right to cancel without notice was merely incorporating in the statute for the benefit of the Fund a right which already existed by virtue of private contract between the private insurance carrier and any employer which the carrier desired to insure. After careful consideration of the matter, counsel for the Fund are inclined to believe that the latter interpretation was the one which the Commission actually had in mind in the observations set forth in the two orders mentioned above. In this connection, it must be remembered that a private insurance company, whether stock or mutual, does not have to insure any risk which it chooses not to insure. The arrangement between the carrier and the employer is purely a contractual one, and the employer, on the one hand, is not required to insure his workmen's compensation liability with a private insurance company, and on the other hand, the private insurance company has no obligation to insure every employer who applies to it for insurance. The arrangement is a matter of contract between the two parties. Any agreement which is not contrary to law may be entered into in connection with the issuance of a policy. On

the other hand, there is a very serious question as to whether or not the Fund can refuse to insure any risk that is brought to it. This point has never been definitely passed upon in Colorado. A discussion of this particular point occurs in Volume II Larson, paragraph 92.52, under the heading "State Fund's right to reject" where the following statement is made:

> "It has sometimes been taken for granted that, in states with competitive state funds, or, as in Texas, an employers' insurance association with statutory standing, the fund or association should solve the undesirable-risk problem by acting as residual legatee of risks that private carriers do not want. Arizona, however, has held that the competitive state fund itself may reject applications for insurance 'in employments which would involve hazards and risks of such a nature that it would, in all reasonable probability, result in the State Compensation Insurance Fund's becoming insolvent.' The commission administering the fund should make every effort to handle the risk by re-insurance, and may not arbitrarily refuse insurance to legitimate business. But the business here involed was the making of Western movies, with 'wranglers and stunt men, who notoriously have

bad backs, and . . . who were called upon to take falls from horses,' with actors inexperienced in ranch activities handling horses and cattle, with high-salaried stars being transported into rugged and inaccessible areas over hazardous roads, and with the whole process taking a comparatively short time in which no actuarial basis for insurance could be calculated.

"Monopolistic state funds, however, seem to accept all applications from qualified employers as a matter of routine practice, and the question of their right to reject risks does not appear to have arisen. However, since it is the administrator's duty to preserve the solvency of the fund, there is no reason why Arizona's arguments should apply with any less force because the fund is exclusive."

In discussing whether or not a state fund does have the right to reject a risk, Larson quotes from dictum in the case of Magna Manufacturing Company v. Aetna Casualty & Surety Co., 129 N.J. Eq. 142, 18 A.2d 565 (1941), as follows:

". . . employers who are unable to procure insurance in the ordinary manner by private arrangement with an insurer, present a problem which

> has been solved in a number of states, such as Ohio and New York, by the creation of a state insurance fund."

Larson then points out that in some states the most common approach to the rejected-risk problem is the statutory provision for assignment or apportionment of the rejected risk. However, in Colorado, the assigned risk plan apparently applies only to insurers licensed to write motor vehicle liability, and is limited to that particular situation (see C.R.S. 1963, 72-12-16). The theory that the Fund in Colorado is bound to accept all risks tendered to it, provided the premium is paid, is strengthened by the further provision in C.R.S. 1963, 81-15-11, which reads as follows:

> ". . . After the inspection of the premises of any employer, or after considering the experience of such employer, the commission may quote with respect to his risk a rate higher or lower than that indicated by its manual as applicable to his risk."

The above portion of the statute, coupled with the statement in C.R.S. 1963, 81-15-1, which creates the Fund, can very well be interpreted to mean that the Fund must accept all risks tendered to it, regardless, and also to provide a reason for the provision

in 81-15-11 that the policy shall not be in effect until the policy is issued and the premium therefor paid.

The holdings in the various cases cited by opposing counsel relating to the general problem of constitutionality, we respectfully submit, are not in point on the case at bar. We have no quarrel with the general principle relating to the interpretation of the Fifth and Fourteenth Amendments of the United States Constitution, and Article V, Section 25, of the Constitution of the State of Colorado. The situations in the decisions cited by counsel in support of their position are entirely dissimilar to the problem presented by the case at bar. As a matter of fact, the Fund, by virtue of the fact that it probably is required and as a matter of policy does accept all risks, is in a class by itself, and is performing a mission which in many instances private companies would decline and do continually decline to accept, and until private companies are either willing voluntarily or are required by law under some sort of an assigned risk plan to accept risks regardless of their severity, they cannot truthfully claim that powers given by the legislature to the Fund for the purpose of handling such risks are class legislation, or deprive the private companies of any property or

right guaranteed to them by either the United States Constitution or the Constitution of the State of Colorado.

IV. CONCLUSION

In conclusion, then, the defendant Fund takes the position that its policy of insurance, which was issued on August 13, 1965, never became effective because there was no compliance by the employer with C.R.S. 1963, 81-15-11, in that no premium was ever paid. Secondly, that the act of completing the record by serving notice on the Commission of a cancellation "flat" pursuant to authority of 81-15-12 established the fact that the policy was cancelled by operation of law prior to the accident in which William Gene Rose was injured.

Sections 132 and 133, Workmen's Compensation Act, C.R.S. 1963, 81-15-11 and 81-15-12, are constitutional and are a part of the powers granted to the Commission for the purpose of taking care of the special situation of the Fund as a carrier which must take all risks tendered to it, and in that sense confers general powers on the Commission as the administrator of the Fund, which said powers are already enjoyed by the private insurance companies as a matter of private contract in their relationship with the risks which they decide

to accept and insure, and that it was not the intention of the Industrial Commission of Colorado to hold that the said two sections were applicable equally to the Fund and private insurance companies.

The defendant in error Fund respectfully submits that the order and judgment of the court below affirming the orders of the Industrial Commission should be affirmed.

Respectfully submitted,

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