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Insurance-Rule of Construction-Classification of Risks

INSURANCE—RULE OF CONSTRUCTION—CLASSIFICATION OF RISKS—The plaintiff was named beneficiary in the policy in question. The policy insured "Thomas E. Holbrook, by occupation chief operator, office and superintendent only" against loss of life, effected directly and independently of all other causes thru external, violent, etc. . . . means." The indemnity was $5000.00. The policy further provided that it "contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates. In the event that the insured is injured . . . after having changed his occupation to one classified as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, . . . in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate limits fixed by the company for such more hazardous occupation." The second paragraph of defendant's answer set out, among other things: ". . . that at the time of the accident which resulted in the death of Holbrook, he was doing an act pertaining to the more hazardous occupation of electric lineman; and that under the terms of the policy his recovery should be limited to $100.00." The accident occurred at night. There was a sudden and unexplained interruption along a particular portion of the electric line over which Holbrook had charge. The evidence showed that Holbrook called in a lineman and that they both went out to locate the trouble. The said lineman went up one pole but found no defect there. They both then advanced to a nearby switch tower, and this time Holbrook himself went up to make the investigation. It was while Holbrook was on the tower that he received a charge of electricity which caused his death. When Holbrook went up the tower he took none of the customary lineman's equipment . . . the evidence even showed that he did not have a flashlight and that the lineman on the ground held a flashlight up for Holbrook. Holbrook, as superintendent, was responsible for the service along this particular line, and in the event of an emergency it became his duty, as such superintendent, to take all proper steps to reinstate the service, and tho he was not required to do any physical labor, yet he might do so in the execution of orders, in cases of emergencies, or in showing other men how to do the work. The company's manager testified: "We use most any man for trouble when there is trouble." The court below gave plaintiff a judgment for $5000.00. The insurance company prosecutes this appeal. Judgment of the court below affirmed. *Fidelity Health and Accident Co. v. Holbrook,* Appellate Court of Indiana, Dec. 4, 1929, 169 N. E. 57.

The principal question involved here turns on a proper interpretation of the "classification of risks" clause. That such a clause is valid see: *Tobin v. National Casualty Co.,* 63 Cal. App. 578, 219 Pac. 482. Our Appellate Court very nicely raised the question by the following interrogatories: "Must the clause be construed to mean that the indemnity to be paid will be diminished, if the act done by the insured is an act, including any act pertaining to his own occupation, which may also pertain to another classed by the company as more hazardous? Or does it mean any

act pertaining to another occupation classed by the company as more hazardous, but in no way pertaining to his own occupation?" The court then said in answer to these questions: "Clearly, the language is ambiguous, and the latter construction, which is more favorable to the insured, must prevail." The rule of construction thus applied is clearly the correct one and represents the decided weight of authority. *Travelers' Protective Association v. Jones,* 75 Ind. App. 29, 127 N. E. 783; *Queen Ins. Co. of America v. Delphi Strawboard Co.,* 76 Ind. App. 47, 128 N. E. 697; 14 R. C. L. 926; 3 R. C. L. Supp. 316. The construction seems the reasonable one. See *Smith v. Massachusetts Bonding Co.,* 179 N. C. 489, 102 S. E. 887. But *contra, Ebeling v. Banker's Casualty Co.,* 61 Mont. 58, 201 Pac. 284.

". . . insurer was liable for the full amount of the policy . . .; since the provision relating to reduced indemnity did not contemplate inhibition of acts the performance of which was necessarily implied from the vocation stated in the policy" *Thorne v. Casualty Co. of America,* 106 Me. 274, 76 Atl. 1106; *King v. Standard Accident Insurance Co.,* — Mo. App. —, 248 S. W. 984. The evidence indicates that the act done here was not one which was beyond Holbrook's duties as "chief operator and superintendent" and the fact that incidentally the act was one customarily performed by a lineman is immaterial. That this distinction is made in the cases see note 22 A. L. R. 780, 781; also, *King v. Standard Accident Insurance Co., supra.*

Ebeling v. Banker's Casualty Co., 61 Mont. 58, 201 Pac. 284, and the cases therein cited have not been overlooked, and the reasoning of the Montana court is not without force. On the whole, however, the reasoning of the North Carolina court in *Smith v. Massachusetts Bonding Co., supra,* is sounder. In the *Ebeling case* the insured was classified as a "proprietor and meat cutter in shop," and he was killed while engaged (temporarily) as a "tender in transit of live stock." The report of the case gives little or no evidence, but it would seem to be a reasonable presumption that one employed as a "proprietor and meat cutter" would hardly be called upon as such to act as "tender in transit of live stock." In the principal case the evidence was clear that as "chief operator and superintendent" Holbrook was expected, and others employed in similar positions with the service company were expected, to do just what Holbrook was called upon to do in this case. In this matter we need not indulge in presumptions, . . . the evidence seems clear enough. It is because of this difference in the facts between the *Ebeling case* and the principal case that we can distinguish the cases. That this same duty or act pertained to a more hazardous occupation is immaterial. *Thorne v. Casualty Co. of America, supra; King v. Standard Accident Insurance Co., supra.* The pertinent question is, whether it was in any way connected with the insured's occupation? If it was, plaintiff was entitled to recover $5000.00.

T. R. D.