

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CALIBER ONE INDEMNITY COMPANY,)
)
Plaintiff,)
vs.) NO. 1:04-cv-00417-LJM-VSS
)
O & M CONSTRUCTION COMPANY,)
)
Defendant.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CALIBER ONE INDEMNITY COMPANY,)
Plaintiff,)
)
vs.) 1:04-cv-417-LJM-VSS
)
O&M CONSTRUCTION COMPANY,)
Defendant.)

ORDER ON PLAINTIFF’S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter comes before the Court on plaintiff’s, Caliber One Indemnity Company (“Caliber One”), Motion for Judgment on the Pleadings. Caliber One seeks a declaratory judgment that it has no duty to defend or indemnify O&M Construction Company (“O&M”) in an underlying wrongful death action, and that the Court award costs, disbursements, and attorneys’ fees with respect to this action. For the reasons set forth below, the Court **GRANTS** the plaintiff’s motion for Judgment on the Pleadings and **DENIES** the award of costs, disbursements, and attorneys’ fees at this time, as the plaintiff has failed to provide the Court with any basis for such an award.

I. BACKGROUND

For purposes of this motion, the Court accepts the following well-pleaded factual allegations from the complaint as true. This action arises out of a claim for coverage by O&M under a general liability insurance policy issued to it by Caliber One. Comp. ¶ 1. O&M seeks coverage in connection with an action brought against it and another defendant, entitled *Brate v. Teppco a/k/a Texas Eastern Products*

Pipeline Company et al., Civ. No. 2003082077 (Ct. Com. Pl., Butler County, Ohio) (the “Underlying Action”), in which the plaintiff seeks, among other things, damages resulting from O&M’s alleged breach of its duties and obligations to protect an employee, Brandon A. Jones (“Mr. Jones”), from butane gas exposure at a construction site, resulting in his alleged wrongful death on June 28, 2002. *Id.* ¶¶ 3-4, 13. Caliber One issued to O&M, general liability insurance policy no. CAL 0002519-01 (“Caliber One Policy”), effective during the events at issue in the Underlying Action. *Id.* ¶ 15; Exh. B. Initially, Caliber One agreed to defend O&M in the Underlying Action. Comp. ¶ 18. However, by letter dated October 27, 2003, Caliber One disclaimed coverage to O&M under the Caliber One Policy for the Underlying Action, but agreed to continue the defense of the Underlying Action on a temporary basis and under a full reservation of rights. *Id.* ¶ 19; Exh. C. On December 9, 2003, Caliber One, in response to a request by O&M to reconsider its position, reaffirmed its disclaimer of coverage. Comp. ¶ 21; Exh. D.

The Caliber One Insurance Policy provides, by Endorsement #7, Stop-Gap Employers’ Liability Coverage (“stop-gap coverage”). Pursuant to this endorsement, Caliber One agreed:

We will pay those sums that you become legally obligated to pay as damages because of ‘bodily injury’ caused by an accident or disease to any employee of yours arising out of and in the course of their employment provided the employee is *reported and declared* under a workers’ compensation fund of one or more of the following states: Washington, West Virginia, Wyoming, North Dakota, *Ohio* or Nevada. . . .

Comp. ¶ 25; Exh. F (emphasis added). Mr. Jones executed, on a form issued by the Ohio Bureau of Workers’ Compensation, an “Agreement to Select a State Other than Ohio as the State of Exclusive Remedy,” dated January 2, 2001 (“Form C-112”). Comp. ¶ 26; Exh. F. Form C-112 reads, in pertinent part:

[T]he employer and said employees mutually agree to be bound by the Workers’

Compensation Law of the state, which appears opposite the names of the various employees; and it is mutually agreed that regardless of where the injury occurred or where the disease was contracted, the rights of the employee(s) and his, her or their dependents shall be governed by the laws of the state or states herein agreed upon, and the laws of that state or states shall be the exclusive remedy against the employer on account of injury, disease or death in the course of and arising out of employment.

Comp., Exh. F. Pursuant to an agreement between Mr. Jones and his employer, as indicated by Form C-112, Mr. Jones elected Indiana as the state of his exclusive remedy, and as the state under which his rights under the workers' compensation law will be governed. Comp. ¶ 27; Exh. F.

II. MOTION FOR JUDGMENT ON THE PLEADINGS STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure provides that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” In considering a motion for judgment on the pleadings, courts employ the same standard as that applied to a motion to dismiss under Rule 12(b). *See N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). A motion will be granted only if it appears beyond a doubt that the non-movant cannot prove any facts that would support a claim for relief. *See N. Ind. Gun*, 163 F.3d at 452. In determining whether judgment on the pleadings is proper, the Court accepts as true all facts alleged in the complaint and draws all reasonable inferences from the pleadings in favor of the non-movant. *See Gillman v. Burlington N. Ry. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989).

Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, “a copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.” Therefore, the Court, in ruling on a Rule 12(c) motion for judgment on the pleadings, may consider exhibits that are attached to the pleadings. *See*

N. Ind. Gun, 163 F.3d at 452 (“the pleadings include the Complaint, the answer, and any written instruments attached as exhibits”).

III. DISCUSSION

O&M argues that it is entitled to coverage in the Underlying Action under the stop-gap¹ endorsement of the Caliber One policy because Jones’ filing of a Form C-112 makes Jones “reported and declared” under the Ohio workers’ compensation fund even if Jones chose Indiana as his state of exclusive remedy. Def.’s Mem. Opp. at 1. Alternatively, O&M asserts that the terms “reported” and “declared” in the stop-gap coverage endorsement are undefined in the policy, are therefore ambiguous, and that the endorsement should be construed against the drafter, Caliber One.² *Id.* Caliber One asserts that by selecting Indiana as his state of exclusive remedy, Mr. Jones waived all of his workers’ compensation rights under Ohio law and was, thus, not “reported and declared” under Ohio workers’ compensation fund. Pl.’s Mot. Supp. at 8-9.

The rules of insurance contract interpretation are well established in Indiana. The Seventh Circuit recently wrote, “under Indiana law, insurance contracts are governed by the same rules of construction as

¹ The purpose of stop-gap coverage is to overcome the workers’ compensation and employee exclusions in certain specified states and in certain situations, thereby providing coverage to an employer for injury to its employee. Pl.’s Mem. Supp. at 8 (*citing Gen. Accident Ins. Co. v. Gastineau*, 990 F. Supp. 631 (S.D. Ind. 998); *Penn Traffic Co. v. AIU Ins. Co.*, 790 N.E.2d 1199 (2003) (additional citations omitted)).

² The parties to this action seem to agree that because Mr. Jones died in the course of his employment with O&M, Caliber One rightfully disclaimed coverage based on a clause in the Caliber One policy, providing that insurance does not apply to: “E. ‘Bodily injury’ to . . . (1) An employee of the insured arising out of and in the course of employment by the insured.” Comp., Exh. C. Accordingly, the parties only dispute stop-gap coverage under the policy.

other contracts.” *Ind. Funeral Dir. Ins. Trust v. Trustmark Ins. Corp.*, 347 F.3d 652, 654 (7th Cir. 2003). *See also Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 243 (Ind. 2000). Insurance contracts must be construed in an ordinary and popular sense, as would a person of average intelligence and experience. *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407, 411 (7th Cir. 1996); *Miller v. Universal Bearings*, 876 F. Supp. 1038, 1043 (N.D. Ind. 1995); *Wright v. Am. States Ins. Co.*, 765 N.E.2d 690, 693 (Ind. Ct. App. 2002); *Jim Barna Log Sys. Midwest v. Gen Cas. Ins. Co. of Wis.*, 791 N.E.2d 816, 823 (Ind. Ct. App. 2003). When interpreting an insurance policy, “a contract or word is ambiguous only when reasonably intelligent people could differ on its meaning.” *Schenkel & Schultz v. Homestead Ins. Co.*, 119 F.3d 548, 550 (7th Cir. 1997). *See also USA Life One Ins. Co. of Ind. v. Nuckolls*, 682 N.E.2d 534, 539 (Ind. 1997). However, when a policy is ambiguous, the terms are “construed strictly against the insurer to further the general purpose of the insurance contract to provide coverage.” *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985). *See also Bosecker*, 724 N.E.2d at 244.

The Caliber One stop-gap endorsement agrees to pay sums legally obligated to pay as damages because of “‘bodily injury’ caused by an accident . . . to any employee . . . arising out of and in the course of their employment provided the employee is reported and declared under a workers’ compensation fund in one or more of the following states: . . . Ohio.” Comp. ¶ 25; Exh. F. The Court agrees with Caliber One’s contention that Caliber One agreed to provide coverage to an injured employee of O&M, notwithstanding the workers’ compensation exclusion, if and only if the employee is reported and declared under a workers’ compensation fund in several enumerated states, including Ohio, but not Indiana. Pl.’s Mem. Supp. at 4. The Ohio Legislature has provided a mechanism whereby employees of non-Ohio

employers, who are performing work in Ohio, can elect to disclaim any rights under the Ohio Workers' Compensation Fund, in favor of their rights under the state in which their employer is located. Specifically, Ohio Code provides as follows:

Whenever, with respect to an employee of an employer who is subject to and has complied with this chapter, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed.

* * *

If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and the employee's dependents under the laws of that state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment without regard to the place where the injury was sustained or the disease contracted.

OHIO REV. CODE ANN. § 4123.54. In order for Mr. Jones to have been "reported and declared" under the Ohio workers' compensation fund, his employer must have reported him and declared that he would collect benefits from the Ohio fund, if injured. It cannot rationally be said, that when Mr. Jones executed an "Agreement to Select a State Other than Ohio as the State of Exclusive Remedy," and expressly chose Indiana as his state for workers' compensation benefits, that he also is reported and declared under the Ohio statutory scheme. Section 4123.54 states specifically that when an employer and employee agree to be bound by the laws of another state, the laws of that state are the employee's exclusive remedy. By selecting Indiana as the state of exclusive remedy on the C-112 Form, Mr. Jones expressly disavowed his intention to claim benefits from the workers' compensation fund of the State of Ohio in the event of injury.

O&M appears to misconstrue the language of the policy, and is incorrect in its assertion that simply filing the C-112 form caused Mr. Jones to be “reported and declared” within the meaning of the stop gap coverage endorsement of the Caliber One policy. The Court reject’s O&M’s suggestion that, by means of the very form through which Mr. Jones expressly disclaimed any intention to be covered under the Ohio fund, Mr. Jones was “reported and declared” under that fund. Pl.’s Amend. Rep. Mem. Supp. at 3.

O&M also argues that the words “reported” and “declared” are not defined in the Caliber One policy and are ambiguous. Def.’s Mem. Opp. at 1. The Seventh Circuit has recognized, in a case under Indiana law, “there is no requirement that each and every term in an insurance policy be defined to avoid ambiguity.” *Myles v. Gen. Agents Ins. Co.*, 197 F.3d 866, 869 (7th Cir. 1999). *See also Nat’l Ben Franklin Ins. Co. v. Calument Testing Serv.*, 60F.Supp. 2d 837, 841 (N.D. Ind. 1998) (quoting *Sans v. Monticello Ins. Co.*, 676 N.E.2d 1099, 1101 (Ind. App. 1997) (“there is no rule in insurance policy construction that each and every term must be defined”). The terms “reported” and “declared” are common English words and should be given their plain meaning. As the Supreme Court of Indiana has written, “Where the contract is plain and its meaning clear, the court will not change its evident meaning, by rules of construction, and thereby make a new contract for the parties.” *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 669 (Ind. 1997) (quoting *Firemen’s Ins. Co. v. Temple Laundry Co.*, 144 N.E. 838, 839 (Ind. 1924)). As is the case here, “[i]f no ambiguity exists, the policy will not be interpreted to provide greater coverage than the parties bargained for.” *Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 203, 209 (7th Cir. 1998). *See also Earl v. Am. State Preferred Ins. Co.*, 744 N.E.2d 1025, 1027 (Ind. Ct. App. 2001).

To “declare” is “to make known, manifest, or clear.” BLACK’S LAW DICTIONARY 409, (6th Ed.

1990). To “report” means “to give an account of, to relate, to tell, to convey or disseminate information.” *Id.* at 1300. “[R]eported” and “declared,” appear in the conjunctive, joined by the word “and” in the stop-gap coverage endorsement and, therefore, as the Seventh Circuit has stressed in other contexts, both conditions must be satisfied. *See, e.g., Adams v. Catrambone*, 359 F.3d 858, 864 (7th Cir. 2004) (“as we emphasized above, 820 ILCS 115/2 is drafted in the conjunctive: The word ‘and’ joins 820 ILCS 115/2(1),(2) and (3), which means that only a plaintiff who meets all three prongs of 820 ILCS 115/2 falls within the statutory exclusion”); *Cincinnati Ins. Co. v. Flanders Elec. Motor Service*, 40 F.2d 146, 152 (7th Cir. 1994) (where an insurance policy refers to a “sudden and accidental” release of pollutants, such a release must be both sudden *and* accidental). In order for Mr. Jones to have been “reported and declared” under the Ohio workers’ compensation fund, thus providing stop-gap coverage under the Caliber One Policy, his employer must have made known that he would collect benefits from the Ohio fund, if injured. It cannot be said that Mr. Jones was declared or reported under the Ohio fund by executing an “Agreement to Select a State Other than Ohio as the State of Exclusive Remedy,” and expressly choosing to be covered by Indiana’s fund.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** plaintiff’s, Caliber One Indemnity Company, Motion for Judgment on the Pleadings and **DENIES** the award of costs, disbursements, and attorneys’ fees at this time, as the plaintiff has failed to provide the Court with any basis for such an award.

IT IS SO ORDERED this 28th day of September, 2004.

LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.

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