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Supreme Court of Texas.
Port-Elevator-Brownsville, LLC, Petitioner
v.
Rogelio Casados, Rafaela Casados, Individually and as Representatives of the State of their son, Rafael Casados, Respondents.
No. 10-0523.

October 6, 2011.

Appearances:

Mary A. Keeney, Graves, Doughery, Hearon & Moody, Austin, TX, for the Petitioner.
David Keltner, Kelly, Hart & Hallman, LLP, for the Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first cause, Port-Elevator-Brownsville v. Casados.

MARSHAL: May it please the Court, Mrs. Keeney will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF THE PETITIONER

ATTORNEY MARY A. KENNEY: May it please the Court, this case presents the question of when does an employer who subscribes to the Texas workers' compensation system get the protection that the Labor Code gives to those subscribing employers? When it applies Labor Code 408.001, it makes workers' compensation benefits the exclusive remedy of an employee for any claims against its employer for a work-related injury. Labor Code 401.011(18) tells us who an employer is and it does it in plain and simple language. An employer is a person who makes a contract of hire, employs one or more employees and has workers' compensation insurance coverage. Section 401.012(a) defines employee in very similar plain terms. An employee is each person in the service of another under a contract of hire. Port Elevator is an employer and it bought a policy providing workers' compensation insurance coverage and then it [inaudible] --

JUSTICE EVA M. GUZMAN: What part of its policy with Texas Mutual do you contend covers all employees?

ATTORNEY MARY A. KENNEY: The language says that it covers all of the insured's workplaces and, therefore, it covers all of the insured who's the employer. It covers all of their employees.

JUSTICE EVA M. GUZMAN: How does Texas Mutual's denial of coverage affect your claim?

ATTORNEY MARY A. KENNEY: It doesn't affect it at all, Your Honor. An insurance company's mistaken denial of coverage can't establish that there is no coverage. The coverage is there and the employer's right to assert the workers' compensation bar remains, it's their right to assert in the negligence action that's brought.

JUSTICE EVA M. GUZMAN: Now do you disagree that the classification of employees or the identification or the indentifying language is relevant in the analysis to determine whether Mr. Casados was, in fact, an employee?

ATTORNEY MARY A. KENNEY: Absolutely. The code classifications that are found in the policy are in the premium calculation section. That's not the coverage section of the policy. They're subject to change, they're subject to revision and they don't control what the coverage is.

JUSTICE EVA M. GUZMAN: How do we read the entire policy together then to give it meaning? We can't ignore one section and look solely at the other section. I know you've reconciled it.

ATTORNEY MARY A. KENNEY: Correct, Your Honor, but all that does is determine what the premium is and that involves a relationship between the insured and the insurer. It has nothing to do with whether there's coverage. For example, if a policyholder doesn't pay enough, premium doesn't pay the premium, that doesn't change the coverage under the policy. It may give the insurance carrier the right to cancel the policy, but the policy has very specific requirements and so does the Labor Code on how you would terminate a policy. You would have to cancel it. You would have to provide, in some circumstances, 10 days' notice, in others 30 days' notice and that's also in the policy. So the code classifications has nothing to do with what the coverage is. It has only to do with how you calculate the premiums. Plaintiffs don't dispute that Port Elevator has a valid policy and they have admitted that Port Elevator, that Mr. Casados was Port Elevator's employee when he suffered a fatal work-related injury. These undisputed facts place Mr. Casados and Port Elevator squarely within the definitions of employer and employee under the Labor Code. Mr. Casados status as a temporary worker doesn't change those facts.

JUSTICE DAVID M. MEDINA: I haven't had a chance to look at this policy, but are there any exclusions or definitions that can identify the Plaintiff in this situation?

ATTORNEY MARY A. KENNEY: No, there are no exclusions for coverage. Well, there's an exclusion for, for example, maritime and things like that where the federal law would apply, but there is no exclusion for any particular sort of employee and, for the most part, the forms won't permit that.

JUSTICE DAVID M. MEDINA: So he broadly falls under the definition in the policy as an employee.

ATTORNEY MARY A. KENNEY: Yes, actually, I think there is an exclusion for executive officers. I think the president and vice president of Port Elevator are excluded and that is specifically allowed by the Labor Code under I think it's 406.097 of the Labor Code. So there can be that sort of exclusion, but the general rule is all employees are covered. The Labor Code requires that and the policy provides for that. The policy terms and all the exclusion forms are all dictated by the Texas Department of Insurance. This is not something that an insured and an insurer can basically selectively decide what they want to do. The Labor Code and the Texas Department of Insurance essentially dictate most of these terms. Again, in Wingfoot Enterprises v. Alvarado, this Court recognized that a temporary worker can be an employee of both the temporary agency that provides the worker as well as the client employer, in other words Port Elevator, for whom that worker performs the work. In two recent opinions, this Court has recognized that the statutory definitions of employer and employee under the La-

bor Code create coverage for all employees of an employer that is insured under a policy. The Court did it most recently in Western Steel v. Altenburg when it held that an employer who had its own policy did, in fact, have workers' compensation coverage that would establish the exclusive remedy bar for all of its employees. The issue in that case is not an issue here, it was was this person an employee? In fact, the Court held that judgment was proper on the issue of the coverage under the policy even though the policy wasn't even in the record because it was undisputed that the employer had a policy. These policies, by and large, are very much alike and you don't really actually have to look at the terms because under the Labor Code they have to provide this coverage. The Court also applied these definitions in the Labor Code in Garza v. Excel Logistics when it stated that under these statutory definitions, an employer could utilize the exclusive remedy bar as long as it had its own insurance policy that explicitly covered it and Port Elevator has that policy. The court below, nevertheless, held that Port Elevator was not entitled to the exclusive remedy protection of the Labor Code, apparently accepting four arguments that were raised by the Plaintiffs in the briefing below. First was that Mr. Casados was a temporary worker. The policy didn't identify temporary workers. The employer didn't pay premiums on temporary workers and the carrier disputed coverage --

JUSTICE NATHAN L. HECHT: On the premiums issue, are premiums double paid?

ATTORNEY MARY A. KENNEY: No, they're not. As I understand it the practice in the industry is or at least with respect to this particular carrier, Texas Mutual is not to charge for temporary workers on their insured's policy as long as the temporary staffing agency does have a workers' compensation policy.

JUSTICE NATHAN L. HECHT: So this is just some agreement. What's in the [inaudible] or something?

ATTORNEY MARY A. KENNEY: It's an industry practice.

JUSTICE NATHAN L. HECHT: And then the carrier that did get the premiums is supposed to defend the, is supposed to pay the benefits?

ATTORNEY MARY A. KENNEY: Pardon?

JUSTICE NATHAN L. HECHT: Then the carrier that did get the premiums is supposed to pay the benefits?

ATTORNEY MARY A. KENNEY: Yes, although actually, there is liability under either policy. The question of who has primary responsibility where they would share it, whether they, I think Texas Mutual's position here probably would have been that the staff force carrier was primarily responsible and should pick up the loss, but the worker could make the claim against either carrier.

JUSTICE NATHAN L. HECHT: You'd think this would come up fairly often, not every day, but often enough that maybe carriers would have an agreement or there would be something more than just industry practice.

ATTORNEY MARY A. KENNEY: I think it is really just industry practice and a lot of it is driven, you know, frankly, by these decisions and the requirement in Wingfoot Enterprises v. Alvarado and the requirement in Garza v. Excel Logistics that you can't, you do have to have your own policy and it is just industry practice at this point. There may be a dispute some day, but that's not before this Court over which carrier is primarily responsible.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it a possible for an employer to have workers' comp coverage for some employees and not others? You mentioned exclusions for principals and that sort of thing, but can you do that for the workforce?

ATTORNEY MARY A. KENNEY: Generally, no. Now there is an exception that's been developed in the common law that deals with if you have separate businesses and there are Texas Department of Insurance forms

for an exclusion where you would identify a particular workplace and business that would not be covered, but you would actually under the Texas Department of Insurance you actually have to use one of those exclusionary forms.

JUSTICE DAVID M. MEDINA: If the term temporary employee is not defined in insurance policy, why can't we just decide since it's not specifically identified then there's no coverage for that individual. That seems like a reasonable conclusion.

ATTORNEY MARY A. KENNEY: Well, Your Honor, that's essentially what the plaintiffs are arguing and that's asking this Court to find an exclusion in a policy where there is no such exclusion. I think it's this Court's decision in Evanston Insurance Company v. ATOFINA where the court said exclusions in a policy have to be expressed and clear and unambiguous language and the Plaintiffs here cannot point to any policy language that would reasonably support an interpretation that temporary employees would not be covered. And it's also contrary to the policy of the Labor Code and the definitions in the Labor Code that simply don't allow that.

JUSTICE PAUL W. GREEN: What about those like the HC Beck case which involved an OCIP where by agreement, the contractor or the owner would provide the comp coverage and there was no direct payment by the companies for that premium. Does that have any application to this?

ATTORNEY MARY A. KENNEY: No, it doesn't and that you would have to use those Texas Department of Insurance endorsement, additional exclusionary forms. You would have to fill out one of those forms and you would have to spell out exactly how that is done. But that does happen, but that's not relevant here. There are no exclusionary forms like that at issue. The only case that the court of appeals cited for its ruling and it claimed governed its decision and required the result that it reached was Garza v. Excel Logistics and that case supports Port Elevator not the Plaintiffs. The only reason that the client who employed temporary workers in Garza did not get summary judgment was that it made the mistake of relying on the temporary agency's policy rather than its own and this court held no you're not, this is not a staff leasing services act case. If you're just a temporary, you know with temporary workers what you have to have is your own policy. And had that client employer proved up its own policy, the summary judgment for that employer would have been affirmed. We have that policy in this case; that's the result that Garza v. Excel Logistics requires.

JUSTICE DAVID M. MEDINA: Is there any allegation of ambiguity in the policy since the term is not defined; therefore, that whole broad section must be ambiguous and you lose?

ATTORNEY MARY A. KENNEY: No, Your Honor, and I think the policy is very clear. The policy is clear. The Labor Code is clear and this was a summary judgment against Port Elevator and a denial of the summary judgment that it sought for application of the Comp Bar. And, again, what they would have the Court do is look to the actual intent. They're saying that Port Elevator had no intent to cover these employees and neither did Texas Mutual. That intent is irrelevant as this court has held in I think at least two cases. I guess Fiess v. State Farm Lloyds and Progressive County Mutual v. Sink. The actual intent of the parties to policy terms that are dictated by the Texas Department of Insurance is not relevant and what you look to is the plain language and the plain language here provides coverage and there is no exclusion that can reasonably be found in any of that language.

JUSTICE DAVID M. MEDINA: But the plain language doesn't include the term that we're arguing about. So you want us to insert a term to give the policy meaning?

ATTORNEY MARY A. KENNEY: No, Your Honor. I'm not seeking to insert a term. I'm saying that under the plain language, all workplaces are covered for the insured and the insured is the employer and what the policy provides is that the carrier will pay all workers' comp benefits that would be owed by the employer and they were responsible for that. Essentially, the policy incorporates the Labor Code into it and under the Labor Code, all employees are covered. If employers cannot count on the Labor Code to protect them from common law

negligence actions for temporary employees' work-related injuries they become more likely to do one of two things and I'm about to run out of time. I think I'll just save that for rebuttal if the Court doesn't have any questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any question? Thank you, Counsel. Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Keltner will present argument for the Respondents.

ORAL ARGUMENT OF DAVID KELTNER ON BEHALF OF THE RESPONDENT

ATTORNEY DAVID KELTNER: If it please the Court. This is a situation in which the Petitioner ignores the facts and does so intentionally and relies on an application of law. If you really boiled this down and some of the briefs go a little bit parallel on this point, the real issue I think is this, whether the common law prohibition against splitting the workforce can extend coverage beyond what the parties intended the coverage to be. That I think is the question. This Court has actually answered that in several respects and let me get to that. The other side makes this suggestion. What they say is you can't split the workforce; therefore, we did not. Now in a very analogous case, this Court in St. Joseph Hospital v. Wolf addressed the same issue there. St. Joseph Hospital claimed that the employees of the hospital could not be vicarious for their actions because if they were responsible for the physician's actions, they would be in the unauthorized practice of medicine, which is prohibited by the statute. And what this Court said is very simple, not so fast. First thing, you're confusing illegality or prohibition with impossibility and the mere fact that the law says you can't do it doesn't mean it's impossible for you to do it and that's precisely what happened here. This was a litigation strategy and it's important that the Court understand this. This issue did not pop up between these parties until 18 months after this lawsuit was filed. It didn't pop up in the denial of coverage. It didn't pop up when the issue was actually tried or initially with the Court. 18 months later it popped up and just say, oh, you can't split coverage. Before that fact, before that happened, there's several undisputed facts that are proved by contemporaneous documentory evidence and under, as you know, City of Keller those can be conclusive and here's what they are. First off, Texas Mutual, even in its brief before you today, in its opening brief says to you that they intentionally did not cover temporary workers. By the way, we think temporary workers ought to be covered. We think the law should require that and, in fact, does and we would agree with amici on that point.

JUSTICE NATHAN L. HECHT: How can that be done without double payment of premiums?

ATTORNEY DAVID KELTNER: Your Honor --

JUSTICE NATHAN L. HECHT: Because both people want to be covered.

ATTORNEY DAVID KELTNER: And the issues is there could be situations where there needs to be coverage for both. So I'm not so sure that it's a double premium issue for the same thing because sometimes, as this court recognized in Garza, there is control on different aspects of the people's job. Same here. In Garza, the Court went into great detail about that, as you remember in Justice Owens' decision, in saying sometimes the temporary worker was controlled by one person, sometimes they were controlled by others; therefore, of course, there was a fact issue of who was the employer with the control --

JUSTICE NATHAN L. HECHT: But is there a way for the staffer to be covered and the employer also?

ATTORNEY DAVID KELTNER: Yes, Your Honor --

JUSTICE NATHAN L. HECHT: Without double payment of premium.

ATTORNEY DAVID KELTNER: There is and as you know, in the services leasing, the Leasing Services Act,

that can be done specifically. It's not done with temporary agencies currently by statute. As a result, many instances and this Court said in Garza, you employ two ways or you insure two ways, I'm sorry. You insure first by the issue of if you have an expressed policy issued to the client company, which is this case would be Port Elevator. Second, you can do it another way. You can do it, and this is I think important to the background of this case in the Court's eventual opinion. You can also do it through the temporary services company, but if you do, they have to be a named insured. Here's why. The experience modifier of the client company, in this case Port Elevator, had to be what the premium was based on. As all of you know and the statute provides and the Workers' Compensation Commission requires, experience modifiers drive the issue of what the premium is going to be. I haven't directly asked your question because I don't think the statute actually provides an answer for that.

JUSTICE NATHAN L. HECHT: But is there any practical answer? Of course, ideally, you want the worker covered and then the staffing agency wants the protection and the client wants the protection so how can that happen without a double payment of premiums?

ATTORNEY DAVID KELTNER: It can happen this way. You can assign the worker and it's really in the assignment of worker under the supervision of one particular person and that group pay. Make the decision that it is the client company, in this case Port Elevator, that is dictating all the work or exactly the opposite and have supervisors from the temporary agency and do it that way. So I think that's the answer to that.

JUSTICE DALE WAINWRIGHT: Counsel, Petitioner's brief says that Plaintiffs had admitted the Mr. Casados was an employee at both Port Elevator and Staff Force, both in the pleadings at the trial court and in opposing directing verdict and they quote statements in both instances. What's your response to that?

ATTORNEY DAVID KELTNER: That is, in fact, right. We have admitted that he was an employee and, in fact, that is crucial to our cause of action and we did admit that, there's no doubt about it. The issue, the situation we're caught in is this and it's a horrible one. To get the benefit of the workers' Comp Bar, there is a compact this Court has recognized many times and courts of appeals quite often and that is that if an employer gets a policy that covers a worker, and by the way, I disagree wholeheartedly with Counsel for the Petitioner on this one, 408.011 is the Comp Bar. It requires coverage for a specific worker, not that you just have coverage. It is, in fact, it is very specific as to that issue and it says recovery of workers' comp benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage. We didn't get the benefit of that. We know they didn't pay premiums. They had to admit that for temporary workers, such as Mr. Casados. We know that they knew they didn't pay premiums and this is terribly important after each year there is a true-up and those of you who have worked in these issues know that. There is a true-up on coverage and what you do is you try to determine who did you have working on the payroll? At true-up for four years, including the year that Mr. Casados was killed, they did not pay workers compensation premiums for temporary workers; therefore, they didn't pay it for Mr. Casados. Therefore, they're not entitled to the work bar. And the other issue is the policy requires one other thing and it's very important to look at and that is that, of course, Port Elevator had to be given notice of claims against the policy so it could participate in the workers' compensation process. That's part of this policy and when the coverage was denied for Mr. Casados and there was, the insurance company says we're denying it and by the way, we're denying it, one, because you're not an employee that was wrong then, second, because we never collected a premium for you, Port Elevator stood silent and it wasn't until 18 months after the common law lawsuit was filed that we have a response to that.

JUSTICE EVA M. GUZMAN: Except that 408.001 doesn't mention the word premiums. It simply focuses on an employee covered by workers' comp so that seems to be a tangential issue to the application of 408.001 in this context.

ATTORNEY DAVID KELTNER: Your Honor, that's right and let me, I'm going to make the argument that, to set this up in one respect that is the argument the Petitioner is making. What they're saying is coverage does not turn on intention. It just turns on the fact that you have coverage for one employee. If you have coverage for one

employee, you have coverages for all. I will take exception to one other thing the Petitioner said. They said you know really the truth of the matter is don't look at intention. This is a state-mandated policy. That is true. There's no doubt about it, but how you fill out the policy and what you put in is not controlled by the state. And many policies, as you will look at in cases that are cited to you by both parties, turn on how they're filled out. Many of these, including the older cases is Stanton and some of the others, Western Steel, for example, did insure all employees and did so specifically. In the Bradley case v. Phillips, same issue. No filling in of classifications. Here there is a filling in of classifications and the policy is very precise about this. The policy says that, by the way, classifications change what we're doing here and, second, what we are covering and what we are, and she says it's just a premium, it is mentioned several times and outside the premium language. The policy goes on to say we do exclude some people if they're not working, and it is the executives and officers of the company as long as they are not working in the covered items in the codes. If they were, they would be covered. Now the issue truly is, is it reality of the workplace where businessmen and workers reside that ought to control here? Or is it a law and legal fiction? This is a little bit like the old shell game that always happens and the issue is there's got to be a P under one of the shells and that P is coverage and the only thing they can say about that is resort to legal fiction when they didn't pay premiums, admitted that they did not intend to cover Mr. Casados or temporary workers because of a misunderstanding of what I think the law was. Now they don't say that. That's my guess, I must admit.

JUSTICE PAUL W. GREEN: Let me ask you while you're getting some water there.

ATTORNEY DAVID KELTNER: Yes.

JUSTICE PAUL W. GREEN: To follow up on Justice Hecht's question. This has to be, there are a lot of situations just like this and this isn't going to be a unique scenario. So would it be your estimate that there are a lot of relationships out there, staff leasing, temporary worker situations where everybody thinks everybody's covered, but you say that they're really not?

ATTORNEY DAVID KELTNER: Your Honor, I truly don't think so. Again, I would disagree with the Petitioner on that and let me explain why. Staff Leaving Services Act is very specific on what is covered and what is not. It is very easy in most, and having done this for a law firm, including my own, of getting workers' comp coverage, it is easy to list the categories of employees that you wish to be covered and it is easy to look to this Court's decisions in temporary workers and Garza is a classic example of that, and Garza tells you what policy you have to have and why and then you just determine who you want to have covered. And the issue is most of the time, most of the time, it's going to be everybody and the policy is going to reflect that in classifications or in a designation filled out in the form policy of that's what it's going to be.

JUSTICE PAUL W. GREEN: So it's more of an ENO situation then a --

ATTORNEY DAVID KELTNER: In many respects, it very much could be. There was a mistake here. There is no doubt that the general manager of Port Elevator testified he thought he had gotten coverage through Staff Force. The coverage through Staff Force was not good in this case for him because he was avoiding the experience modifier for his company, Port Elevator, and that is what Justice Owens said in the Garza opinion, which is unanimous from this Court, that you cannot do. It is that classic a situation. This is a factually outlier case. This issue does not come up very often and it is bizarre and of all the cases we've looked at, the issue of payment of premiums only comes up in a few cases. Now the other side says you shouldn't look at the failure of premiums and cite two cases for that proposition. Stanton is one of the cases they cite, a 1940 case from the Amarillo Court of Appeals. We believe it backs us. What it says is the payment of premiums sheds light on the intention of the parties on what to cover. Now that makes sense, that would, that's exactly what we believe is, too. There though and this is interesting and Justice Green, Justice Hecht, this goes to your questions, in that case it is clear and very specific that the policy covered all employees and listed worksites, but it was all employees in Texas.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can an employer decide it wants to cover the, let's say it's a car dealership and they want to cover the mechanics, but not the administrative staff and get a policy that classifies those two and says here's coverage for one, but we're not going to pay premiums and we don't want coverage for this other class of employees. Is that permitted?

ATTORNEY DAVID KELTNER: It shouldn't be and under the common law it is not. The issue though is this, as this Court said in the Christianson case and is also true in the Hatfield case, which is a Fifth Circuit case interpreting Christianson, the issue is that, the defense of coverage is at the choice of the worker. If the company were to do that, the worker would have the choice of either trying to enforce the workers' compensation benefits or go after his common law benefits. That has not rationally been addressed in the previous briefing to you from the other side. We have addressed it in our brief to you. The law, one of the other issues that comes up and they make a big deal of this is the law is encouraging everybody to be covered and in one respect in Texas that's true, in another respect it's not and I think you know that. The truth of the matter is, as you know, Texas is the only state in the country in which employers of a certain size are not required to have workers' compensation benefits. And, in fact, even when we had the tort reform legislation on this issue, that was a big issue was one of the things that was pushed by some people. The industry and various workers understandably said we don't like the system so much. We'd like to opt out of it. Now the opt-out has a consequence. If you opt in, you get a benefit, and this Court has held and Courts of Appeals have also held that you can get that benefit if you opt in, but if you do, you have an obligation and the obligation is not so much to the insurance company or the insurance company to the employer. It is to the State because the States is giving a benefit for people to opt in and what it does is it gives them an obligation to insure there is coverage. That is why 408.011 is very specific in saying that coverage is determined by employee not by general policy. In this case, the obligation to the State wasn't fulfilled. Because of the mistake somewhere, they didn't get the coverage they needed and admit they didn't pay for it and both the insurer and the insured basically say, in fact, the insurer says it directly, we didn't ever intended to give them coverage for that and, in fact, they still haven't paid premiums on that basis.

JUSTICE EVA M. GUZMAN: But what language in the policy though reflects this intent to exclude the temporary workers? Just looking at the policy what about that reflects that intent to exclude?

ATTORNEY DAVID KELTNER: Judge Guzman, I'm not so sure that it is excluding; it's not including. By doing the classifications which they admit do not contain temporary workers, they're not included in coverage in the first place, no reason to exclude them. The question I would ask the other side is, and I think it's already been answered for you, what included all workers here? And the answer is we [inaudible] covered all of the workplaces.

JUSTICE DALE WAINWRIGHT: What about the argument that because this is a standard form policy.

ATTORNEY DAVID KELTNER: Yes.

JUSTICE DALE WAINWRIGHT: As we said in Feiss, it's not necessarily the actual intent of the parties that governs. It's what the actual words mean.

ATTORNEY DAVID KELTNER: Your Honor.

JUSTICE DALE WAINWRIGHT: And you talked about the policy of the state to provide this backdrop coverage for all workers to the extent the employees, employers opt in. Whose burden is it to show exclusion?

ATTORNEY DAVID KELTNER: To show exclusions?

JUSTICE DALE WAINWRIGHT: We talked about Stanton, Christensen, and Hatfield, are they modified by Garza and Wingfoot, who's burden is that?
ATTORNEY DAVID KELTNER: The burden, let me go through the burdens because you asked an interesting

question and they shift a little bit, which I take it is your point. The real truth of the matter to get the benefit of the Comp Bar, you have to show coverage. You have to show coverage for the employee. They deny that. They say we just got to show coverage on one; if we cover one, we cover them all. The second issue getting to your--

JUSTICE DALE WAINWRIGHT: This Counsel said we covered everybody and talks about language.

ATTORNEY DAVID KELTNER: I don't, first off, I disagree that it covered everybody and --

JUSTICE DALE WAINWRIGHT: Assume it does.

ATTORNEY DAVID KELTNER: Assume it does, if you assume absolutely it covered everybody is there exclusion? No. Our point is it didn't include these people in coverage. It wasn't so much an exclusion, which we would have to prove. It is the individual coverage, which is their burden to prove. One additional thing in the dwindling seconds I have is address the amici concerns. This is not a case about Texas covering temporary workers. We believe they should be covered. If clerical workers had not been classification had not been included and premiums not paid on them, the result would be the same for the clerical workers. Temporary workers are important. The Comp Bar is important. Splitting of workforces is, is important. Those are all time-honored and wise principles adopted by this Court and the state. This case can be decided without doing any harm to any of those. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Keltner. Rebuttal, the Court will hear rebuttal.

REBUTTAL ARGUMENT OF MARY A. KEENEY ON BEHALF OF PETITIONER

ATTORNEY MARY A. KENNEY: I think Plaintiffs have conceded that their case turns on the code classification part of the policy. That's the only part of the policy that they point to that they claim excludes temporary employees and they rely on the Bradley v. Phillips case as supporting them saying that in that case, the policy didn't have any classification codes and, therefore, it covered all workers. They are mistaken. If you review that opinion carefully, you will see that there were classification codes and what happened in that case was that Phillips Petroleum left out any classification code for the chemical workers and the Court in that case, which reviewed all of the, reviewed the policy terms very carefully. They are very similar to the policy terms here because it is a form policy and found that that omission of that of that code classification didn't change the fact that all employees of Phillips Petroleum were covered. The claim that Port Elevator didn't intend to cover its employees while their actual intent is wrong, I would like to set the record straight. Port Elevator did everything that a responsible employer could have done. It not only bought its own policy, it required the temporary agency to provide it with the binder that showed it had coverage. It had double coverage. It made sure that both employers and the worker were protected under any circumstance.

CHIEF JUSTICE WALLACE B. JEFFERSON: Opposing council says you waited a long time to make that argument and to rely on the exclusivity bar.

ATTORNEY MARY A. KENNEY: There wasn't any reason to make that argument, Your Honor, because Staff Force's insurance company stepped up to the plate and wrote the Plaintiff's counsel and said these are the benefits available to you. There weren't, at that point in time, there aren't very many benefits that were available to parents of children on whom they were not dependant. They got burial benefits and Staff Force's insurance company paid into the subsequent injury fund, I think it was about $59,000, which is what they were required under the Labor Code to pay because there were no, there was no spouse, there was no child who would be receiving the income benefits. So the prop, the issue was addressed. The insurance companies had properly addressed that issue.

JUSTICE DAVID M. MEDINA: What about the argument that there was no intent to provide coverage because there's no premium collected and there was no true-up at the end of the year for a period of four years?

ATTORNEY MARY A. KENNEY: Your Honor, an audit by a carrier of the premiums owed can't determine the coverage under the policy.

JUSTICE DAVID M. MEDINA: I agree with that, but generally an insurance company is not going to pay or provide coverage if they don't collect the premium. They don't give coverage for free.

ATTORNEY MARY A. KENNEY: No, they don't and as I explained in the opening, Texas Mutual's policy is, as long as they're insured is insisting that the temporary agency has a policy they will, they will not assess an addition premium on temporary workers. They would have if there had not been a policy that the temporary agency had. And so, actually to say that Port Elevator didn't pay the premium is really not fair because Port Elevator paid the cost of these temporary workers that were insured under an additional workers' comp policy. So they basically did pay for that.

JUSTICE EVA M. GUZMAN: In the Phillips' case that you mentioned earlier were premiums an issue, the payment of premiums?

ATTORNEY MARY A. KENNEY: I can't recall that right off the top of my head, Your Honor.

JUSTICE EVA M. GUZMAN: And then what was the purpose then for including these classifications in the policy?

ATTORNEY MARY A. KENNEY: Well the purpose was simply to calculate the premium at subject to audit, but it's not to determine the coverage.

JUSTICE EVA M. GUZMAN: To identify employees on whom you would be responsible for premiums?

ATTORNEY MARY A. KENNEY: It's to, well it's for the relationship between the insured and the insurer to determine what, what the premium will be. It's subject to audit; it's subject to change.

JUSTICE EVA M. GUZMAN: How does that relate to who's covered though? Who you've identified?

ATTORNEY MARY A. KENNEY: It does not relate at all.

JUSTICE EVA M. GUZMAN: So then why identify them?

ATTORNEY MARY A. KENNEY: Because you do have to, well because insurance companies do expect to be paid and so they do have the code classifications to calculate the premiums.

JUSTICE EVA M. GUZMAN: So what is the relevance of the code classifications as it relates to who is covered? Why not just put all employees?

ATTORNEY MARY A. KENNEY: Because you couldn't do a calculation of the premium. They basically calculated a $55,000 a year premium based on these code classifications, the number of employees, the number of employees, the types can change. It changes --

JUSTICE EVA M. GUZMAN: I think Mr. Casados you contend fit into the last broad category, operations of the --

ATTORNEY MARY A. KENNEY: Actually, we think that the code classifications are irrelevant, but if they were, he would fit into grain elevator operations. He was working in the grain elevator, but, again, we think that that is completely irrelevant. And I see that I'm out of time. If the Court doesn't have any further questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: I think there are no further questions. Thank you, Ms. Kenney. That concludes the argument and the Court will take a brief recess.

MARSHAL: All rise.

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