RENDERED: JUNE 13, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000795-MR

EDWIN COHEN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-01616

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF INSURANCE,
and STATE AUTOMOBILE MUTUAL
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING
** ** ** ** ** ** ** **

BEFORE: COMBS and PAISLEY, Judges; and MILLER, Special Judge.[1]

COMBS, JUDGE. This is an appeal of a decision of the Franklin Circuit Court affirming an order of the Commonwealth of Kentucky, Department of Insurance, which upheld a decision of State Automobile Mutual Insurance Company ("State Auto") not to

[1] Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

renew the appellant's automobile liability policy. The circuit court concluded that the decision was supported by substantial evidence of record and that it was consistent with the provisions of KRS[2] 304.20-030(4)(c). The appellant argues that the court erred by failing to conclude that the loss he had suffered was the result of an act of God -- thus negating State Auto's reason for refusing to renew his policy. We affirm.

On January 7, 1998, the appellant, Edwin Cohen, suffered a loss in an automobile accident. On April 3, 2001, he was involved in a second automobile accident in which he sustained a second loss. Subsequently, State Auto issued a notice of non-renewal. The notice of non-renewal complied with all statutory requirements and listed the reason for non-renewal as losses -- or accidents -- occurring on January 7, 1998, and April 3, 2001.

Cohen requested and received an administrative hearing with the Department of Insurance on August 27, 2001. Cohen admitted before a hearing officer that he had sustained two losses within the past five years. While he accepted responsibility for the first accident, Cohen contended that the second incident resulted from his sudden and unexpected loss of consciousness –- "an act of God" -– while he was driving. He

[2]Kentucky Revised Statutes.

stated that he had fainted as the result of an undiagnosed potassium deficiency that has since been corrected by medication. A State Auto representative testified that the insurer routinely used loss frequency as a factor in arriving at a decision for non-renewal. He acknowledged that Cohen's losses were the determining factors in the decision not to renew his liability policy.

Following a review of the evidence and the relevant policy and statutory provisions, the hearing officer prepared his findings of fact and conclusions of law. He recommended that State Auto's decision not to renew be enforced. On November 7, 2001, the Commissioner of the Department of Insurance entered an order adopting the recommendation of the hearing officer. Cohen appealed the order to the Franklin Circuit Court.

In an opinion and order affirming the decision of the Department of Insurance, the Franklin Circuit Court relied on the provisions of KRS 304.20-040(4)(c). The statute forbids insurers from refusing to renew a policy of automobile insurance solely because the insured has sustained one or more losses that:

> immediately result from a natural cause without the intervention of any person and that could not have been prevented by the exercise of prudence, diligence, and care....

The court interpreted this language to mean an "act of God" as that phrase is commonly defined by Kentucky case law.

The Franklin Circuit Court correctly concluded that an insurer could not refuse to renew a policy based on a loss that resulted from an act of God. However, the court was not persuaded that Cohen's loss was the result of an act of God. Consequently, it agreed that State Auto's non-renewal of Cohen's policy was not barred by KRS 3-4.20-040(4)(c). The court held that the Department of Insurance had correctly applied the rule of law and that its decision was supported by substantial evidence. This appeal followed.

Cohen argues that the Franklin Circuit Court erred by concluding that the second loss was not the result of an act of God. He contends that the loss resulted from an unforeseen event and not from a lack of prudence, diligence, or care as set forth by the pertinent statute. Because the medical condition underlying his loss of consciousness has been diagnosed and corrected since the accident, Cohen argues that State Auto's refusal to renew his policy is unfair and unenforceable.

State Auto and the Department of Insurance contend that the insurer's decision not to renew the policy is not prohibited by the provisions of KRS 304.20-040. While the insured's fainting spell was sudden, they argue that it was

neither unforeseeable nor unexpected and that, therefore, the loss did not result from an act of God.

Medical records confirm that Cohen had experienced a similar fainting spell in January 2001 –- just two months prior to his automobile accident. As a result of his first loss of consciousness, Cohen suffered a fracture to his back. Since Cohen was painfully aware that he was susceptible to fainting without warning, the Department of Insurance contends that the second loss could have been prevented if he had acted with prudence, diligence, and care in seeking immediate medical treatment. State Auto also contends that whether Cohen's potassium level can be adequately controlled to reduce the likelihood of future episodes is not a material consideration under the provisions of the statute. We agree.

Cohen's potassium level had been adjusted by medication for some time prior to 2001. He was aware for several months before his second automobile accident that he might faint without experiencing any warning symptoms. Prudence, diligence, and care under these circumstances dictated that Cohen either consult promptly with a physician or stop driving his automobile in order to prevent an accident. As he failed to do either, we cannot conclude that Cohen's second collision resulted from an act of God. Consequently, State Auto's non-renewal decision was not prohibited by the provisions

of KRS 304.20. The Department of Insurance did not err by enforcing the decision; the Franklin Circuit Court did not err by affirming the Department's order.

Accordingly, we affirm the opinion and order of April 15, 2002, of the Franklin Circuit Court.

ALL CONCUR.

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