COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000524-96**

Adelard Fontaine	Employee
Evergreen Construction Co.	Employer
Workers' Compensation Trust Fund	Insurer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Warren Tolman, Esq., for the employee
Paul R. Ingraham, Esq., for the Worker's Compensation Trust Fund
Peter M. Bancroft, Esq., for Eastern Casualty Insurance Co.
Tracey E. Palmer, Esq., for the employer

WILSON, J. The Workers' Compensation Trust Fund appeals from a decision in which an administrative judge found it liable for the payment of compensation benefits to an employee who was injured while working for an uninsured employer. The Trust Fund contends that the decision is contrary to law. It argues 1) that Eastern Casualty Insurance Co., which was on the risk prior to the injury, failed to properly "terminate" the policy in accordance with the provisions of G.L. c. 152, § 65B, and 2) that Eastern Casualty is estopped from denying coverage because it accepted the employer's premium payment. Because the judge's subsidiary findings of fact sufficiently support his conclusion that Eastern Casualty properly did not renew its policy of insurance with the employer for non-payment of the renewal premium, and adequately notified the employer of such action, we affirm the decision.

The employee suffered an industrial injury on February 20, 1996. Upon being informed by the Department of Industrial Accidents that the employer was not insured for

workers' compensation claims on the date of injury, the employee instituted a claim against the Trust Fund for payment of compensation benefits. See G.L. c. 152, § 65(2)(e). (Dec. 5.) The Trust Fund agreed to pay benefits without prejudice pursuant to § 15A, but moved to join Eastern Casualty and the employer to the proceedings at the § 10A conference, which motion was allowed by the judge. The judge ordered the Trust Fund to continue paying § 34 temporary and total incapacity benefits. The Trust Fund and employer both appealed to a full evidentiary hearing. (Dec. 2.)

At issue at the hearing was whether Eastern Casualty properly did not renew its policy of workers' compensation insurance with the employer prior to the industrial injury. (Dec. 3.) The facts found by the judge that underlie the nonrenewal issue are as follows: The employer's mailing address was P.O. Box 630, Bellingham, MA 02019. (Dec. 5.) In 1994, the LJM Insurance Agency arranged for all of the employer's insurance policies to be put in place. On November 10, 1994, a Notice of Assignment for Workers' Compensation coverage under G.L. c. 152, § 65A, was sent to LJM and to the employer. The coverage was for the period from October 27, 1994 to October 27, 1995, with an annual premium of $10,310.00. Two checks drawn by the employer largely paid for the year's coverage. (Dec. 6.)

On July 31, 1995, Eastern Casualty billed the employer $381.00 for an experience modification endorsement to its 1994-1995 policy, with payment due on August 15, 1995. (Dec. 6.) Eastern Casualty notified the employer by letter dated August 30, 1995 that its insurance policy was due to expire on October 27, 1995, and that the premium renewal quote was in the amount of $6778.00. That letter stated, "In order to ensure uninterrupted Workers' Compensation coverage, we must receive your renewal down payment by the effective date. In addition, all premiums billed on the expiring policy must be paid before we can renew your policy." Eastern Casualty sent a new billing notice on August 31, 1995 reflecting the total balance due of $7159.00, as the $381.00 billed earlier for the prior year's policy had not been paid. (Dec. 7.)

On October 12, 1995, Eastern Casualty sent a Notice of Cancellation or Nonrenewal by certified mail to the employer's post office box.[1] The notice stated that Eastern Casualty was not renewing the employer's coverage for "failure to pay renewal deposit premium." The Bellingham Post Office received that letter on October 17, 1995, and made two separate notifications to the addressee employer on October 17, 1995 and on October 26, 1995. The Post Office returned the letter to Eastern Casualty on November 1, 1995 as "unclaimed." (Dec. 7.)

On October 12, 1995, Eastern Casualty also filed a Notice of Nonrenewal with the Workers' Compensation Rating and Inspection Bureau, advising that the policy was "being nonrenewed [on October 27, 1995] for the following reason: 5," which number designated non-payment of premium. (Dec. 7-8.) On November 9, 1995, Eastern Casualty notified LJM Insurance Agency that the policy had expired and was not renewed for failure to pay the required premium. (Dec. 8.) Several days after the employee's February 20, 1996 work injury, Eastern Casualty received and processed the employer's check in the amount of $381.00, which was the balance due on the previous year's policy for 1994-1995. (Dec. 11-13, 18.)

The judge found that Eastern Casualty made proper notification to the employer in writing, by certified mail, more than ten days prior to the effective date of the policy expiration, in accordance with the provisions of G.L. c. 152, § 65B. The judge found that,

> by the two attempted deliveries by the Bellingham Post Office previously discussed . . . [the employer] had constructive receipt of Eastern Casualty's intent to non–renew his policy. [The judge further found] that the Certified letter was mailed to the correct address of [the employer's] business . . . and that there is no issue of a defect in the notification process concerning an incorrect address being used by the insurer, thus making Armstrong [v. Town & Country Carpentry, infra] inapposite to this matter. [The judge drew] a reasonable inference that [the employer] simply failed (for whatever reason) to not (sic) claim this certified mailing, despite his testimony that he usually stops at the Post Office at least once per week to pick up his business mail.

[1] The box for nonrenewal was checked off on the Notice of Cancellation or Nonrenewal form. (Insurer Ex. 7.)

(Dec. 9.) The judge found the testimony of the employer's president "utterly lacking in credibility and forthrightness in these proceedings."[2] (Dec. 13.)

The judge concluded that the employer was not insured by Eastern Casualty on the February 20, 1996 injury date, coming, as it did, several months after the October 27, 1994 to October 27, 1995 policy coverage lapsed. The Trust Fund accordingly was ordered to pay workers' compensation benefits. (Dec. 19.) The Trust Fund on appeal asserts that Eastern Casualty's "termination" of the insurance policy was ineffective, because the employer never received notice of "termination." We disagree and affirm the decision.

There are three statutes that are relevant to this case. First, G.L. c. 152, § 63, provides in pertinent part as follows:

> [Workers' Compensation] insurance shall not be cancelled or shall not be otherwise terminated until ten days after written notice of such cancellation or termination is given to the rating organization . . . .

There is no dispute that a Notice of Cancellation or Nonrenewal was sent to the Workers' Compensation Rating and Inspection Bureau on October 12, 1995, more than ten days before the expiration of the policy on October 27, 1995, and months before the industrial accident.

Next, the general statutory provisions governing the cancellation of all insurance policies in the Commonwealth provide in relevant part:

> A company issuing any policy of insurance which is subject to <u>cancellation</u> by the company shall effect <u>cancellation</u> by serving the notice thereof provided by the policy and by paying or tendering, except as provided in this and the following section, the full return premium due thereunder in accordance with its terms without any deductions. Such notice and return premium, if any, shall . . . be forwarded to [the last address of the named insured as shown by the company's records, or, if its records contain no such address, at his last business, residence or other address known to the company] by first class mail, postage prepaid, and a

[2] The judge supported his credibility finding with plentiful subsidiary findings of fact regarding the president's inculpatory behavior, such as misreporting his own salary, claiming that he was unaware of the company's financial straits, and applying for cheaper workers' compensation coverage when he claimed to have been under the impression that he was still insured by Eastern Casualty. (Dec. 11-16.)

> notice left or forwarded, as foresaid, shall be deemed a sufficient notice. No written notice of cancellation shall be deemed effective when mailed by the company unless the company obtains a certificate of mailing receipt from the United States Postal Service showing the name and address of the insured stated in the policy.

G.L. c. 175, § 187C (emphasis supplied). See also § 187D; Trudeau's Case, 280 Mass. 429 (1932). It is undisputed that the insurer sent a notice of cancellation or nonrenewal to the correct address of the employer, that there was no return premium due, and that such notice was sent by certified mail. Because the action taken by the insurer was a nonrewal for failure to pay the renewal premium deposit rather than a cancellation of an effective policy, we conclude that the insurer went beyond the requirements of § 187C by sending a notice of nonrenewal . See 45 C.J.S. Insurance § 492 (1993) (where insured fails to pay a renewal premium by the due date, the policy lapses and expires, and the insurer has no obligation to send a notice of cancellation).

Finally, this assigned risk policy of insurance, issued under the provisions of G.L. c. 152, § 65A, was governed more specifically by the provisions of G.L. c. 152, § 65B:

> If, after the issuance of a policy under section sixty-five A, it shall appear that the employer to whom the policy was issued is not or has ceased to be entitled to such insurance, the insurer may cancel or otherwise terminate such policy in the manner provided in this chapter; provided, however, that any insurer desiring to cancel or otherwise terminate such a policy shall give notice in writing to the rating organization and the insure[d] of its desire to cancel or terminate the same. Such cancellation or termination[ ] shall be effective unless the employer, within ten days after the receipt of such notice, files with the department's office of insurance objections thereof, and, if such objections are filed, the commissioner, or his designee shall hear and decide the case within a reasonable time thereafter.

Again, there is no dispute that the insurer gave timely notice of nonrenewal to the employer, which "ceased to be entitled to such insurance" by its failure to pay the renewal premium. Nor is there any question regarding timely objection by the employer of such termination of the insurance policy. The only question is whether the employer received the notice.

The judge's findings make it very clear that the mailing by the insurer of the certified letter noticing nonrenewal on October 12, 1995 satisfied the statutory requirement of the employer's receipt of that notice. The mailbox rule provides that "[a] *properly addressed* letter with prepaid postage, deposited in the U.S. mail, is presumed to have reached its addressed destination. This prima facie evidence of receipt, once countered by evidence of non-delivery, creates an issue of fact for the administrative judge to decide." Cuzzi v. The Ice Box, 11 Mass. Workers' Comp. Rep. 443, 446 n. 4 (1997), citing Hughes, Evidence § 308 at 375 (1961)(emphasis added). The judge simply did not believe the testimony of the employer's president to the effect that that the two separate notifications of receipt of the *properly addressed* certified letter were never placed in the company's post office box. (Dec. 9.) Cf. Armstrong v. Town & Country Carpentry, 10 Mass. Workers' Comp. Rep. 516 (1996), *appeal docketed*, No. 96-J-516 (Mass. App. Ct. 1996) (notice sent to wrong address); Canavan v. Hanover Insurance Co., 356 Mass. 88 (1969) (wrong address); Greenberg v. Flaherty, 306 Mass. 95 (1940) (wrong address). To the extent that Armstrong rejected the application of the mailbox rule in a § 65B cancellation case, supra at 523 n. 10, we decline to follow it. That dicta was unnecessary to the disposition of the appeal in that case, as the insurer's mailing of its notice *to the wrong address* clearly defeated the *prima facie* evidence of receipt under the mailbox rule. In the case at hand, unlike Armstrong, we find no defect in Eastern Casualty's nonrenewal of its assigned risk policy with the employer.

The Trust Fund also contends that even if Eastern Casualty effectively "canceled" the October 1995 to October 1996 policy, it is estopped from denying coverage as it accepted and processed Evergreen's $381.00 payment on February 26, 1996. Because that payment was for the exact outstanding balance due on the prior 1994-1995 policy, the judge concluded it had no relevance to the October 12, 1995 nonrenewal of the 1995-1996 policy for failure to pay the premium on that policy. (Dec. 11-12.) In addition, the administrative judge was not convinced by the employer's assertions that he was current in his premiums for the 1994-1995 policy and, thus, was making the $381.00 payment on

the 1995-1996 policy. (Dec. 12.) Indeed, the judge found the employer "utterly lacking in credibility." (Dec. 13.) As we see no error, the decision is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: March 9, 1999