COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 40951-98 52842-98, 53347-98**
David Roberts	Employee
Builders Plus	Employer
Eastern Casualty Insurance Co.	Insurer
Vertec Corporation	General Contractor
Travelers/Charter Oak Fire Insurance Co.	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Tanya P. Millett, Esq., for the employee
John A Smillie, Esq., for Eastern Casualty
Sheila S.Cunningham, Esq., for Travelers
Donna Sullivan-Andronico, Esq., for W.C.T.F. at hearing
Danielle L. Salvucci, Esq., for W.C.T.F. on appeal

MAZE-ROTHSTEIN, J. Eastern Casualty Insurance Company ("the insurer") appeals from a decision that held it liable for the payment of workers' compensation benefits for an industrial accident, which occurred after it alleged it had cancelled its coverage of the employer. The administrative judge found that the insurer had not properly cancelled its assigned risk policy, because it had not notified the employer of its intention to do so. G.L. c. 152, § 65B. The insurer argues on appeal that it had no obligation to notify the employer of its impending cancellation, because the employer's premium financing company ("AMGRO"), who paid the annual premium in full, had requested cancellation. For the reasons that follow, we disagree and affirm the decision.

The undisputed pertinent facts found are that on October 19, 1998, the employer, Builders Plus, was working as a subcontractor for the general contractor, Vertec Corporation. The employer had an assigned risk workers' compensation policy with the

insurer, effective from June 27, 1998 to June 27, 1999. The policy had been financed through AMGRO Premium Finance Company, to whom the employer would make monthly installment premium and interest payments. (Dec. 4.) The agreement between AMGRO and the employer contained the provision that the employer/insured

> hereby irrevocably appoints the holder of this note [AMGRO] Attorney-in-Fact with full authority to cancel the scheduled policies, receive all sums assigned herein and to execute and deliver on behalf of the undersigned all documents, forms and notices related to the above listed insurance policies in furtherance of this agreement. Any payments received prior to the effective date of such cancellation shall be credited to the balance due hereunder without any obligation on the part of the Payee [the insurer] or AMGRO to revoke its Notice of Cancellation, except as otherwise provided by G.L. c. 255C, § 21.

AMGRO paid the premium for the employer's coverage in full on July 27, 1998. (Dec. 5.)

AMGRO sent the insurer a Notice of Cancellation dated September 16, 1998, which the insurer received on September 18, 1998. The notice requested cancellation as of October 1, 1998. AMGRO's notice of cancellation specified the employer's non-payment of the installment premium as the reason for the requested cancellation. (Insurer's Ex. 2, p. 29.) Marcia Martin, the account administrator for the insurer, believed that she had indeed cancelled the policy for nonpayment of the premium to AMGRO, who had full right to cancel the policy under the premium finance agreement, and which request the insurer was obligated to respect. (Dec. 5; February 9, 2000 Tr. 32.) At no time did the insurer account administrator, Martin, have any direct dealing with the employer. (Dec. 5.)

Ms. Martin prepared a Notice of Cancellation for the insurer on September 18, 1998 and sent it to the Rating Bureau on that date. She sent no such notice to the employer. The Notice of Cancellation sent to the Rating Bureau listed the reason for such cancellation as "Nonpayment of Premium." The cancellation was effective as of

October 1, 1998.[1] The employee suffered an injury at the workplace on October 19, 1998, on which date the insurer contends it no longer covered the employer for risks under c. 152. (Dec. 6.)

The judge determined that the insurer had improperly cancelled its assigned risk policy of insurance with the employer. (Dec. 9-10.) We agree with the outcome but do not endorse his reasoning in reaching this result. We, thus, affirm the decision, but for different reasons.

The crucial statute in the analysis of this case is G.L. c. 152, § 65B. It governs procedures that insurers must follow to properly cancel or terminate an assigned risk policy of workers' compensation insurance:

> If, after the issuance of a policy under section sixty-five A [assigned risk policy], 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 insured of its desire to cancel or terminate the same. Such cancellation or terminations 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 . . . .

Id.

The insurer argues that it did not violate § 65B when it failed to give the employer notice of cancellation on its assigned risk insurance policy, because AMGRO, the premium financing agency, stood in the shoes of the employer and had requested cancellation. The employer had indeed executed a Power of Attorney that explicitly granted AMGRO full authority to cancel its policy of workers' compensation insurance. As such, the application of § 65B, under the insurer's theory, would certainly be questionable, since the predicate statutory showing of the employer's non-entitlement to insurance had not been made. However, the insurer is not arguing the actual facts of the present case in that it overlooks its own designation of "non-payment" not "insured

[1] Due to our disposition on the grounds that follow, we do not reach the question of whether the Rating Bureau's Notice of Cancellation was also in violation of the ten day waiting period requirement under G.L. c. 152, § 63.

requested" as the reason for cancellation in its Notice of Cancellation. (Insurer Ex. 2, p. 28.) The insurer received the information as to the employer's non-payment of the installment premium from AMGRO's notice of cancellation. (Insurer Ex. 2, p. 29.) The insurer's account administrator, Ms. Martin, testified that she believed non-payment was the reason for cancellation. (February 9, 2000 Tr. 32.) Since there is a concert of opinion that cancellation was premised on the employer's non-payment, § 65B did apply, as "it []appear[ed to the insurer] that the employer to whom the policy was issued is not or has ceased to be entitled to such insurance." Id. The insurer's failure to follow § 65B's provisions for proper cancellation, by failing to send notice to the employer, renders the attempted cancellation ineffective. As a result, coverage continued through to the date of injury. Frost v. David C. Wells Ins. Agency, Inc., 14 Mass. App. Ct. 305, 306-307 (1982).

Furthermore, the insurer's argument that it should prevail under G.L. c. 152, § 55A, and the regulation, 452 Code Mass. Regs. §1.02, fails for much the same reason. G.L. c. 152 § 55A, added by St. 1991, c. 398, § 84, states:

> Notwithstanding any general or special law to the contrary, a mid-term notice of cancellation of a workers' compensation policy shall be effective only if based on one or more of the following reasons: (i) non-payment of premium; (ii) fraud or material misrepresentation affecting the policy or insured; (iii) a substantial increase in the hazard insured against. Nothing in this section shall limit an insurer's right to refuse to renew a workers' compensation policy.

The regulation defines "mid-term notice of cancellation" for the purposes of § 55A as "any notice of policy discontinuance [cancellation] during the term of the policy where such discontinuance is initiated by the insurer, *and shall not include discontinuances initiated by insured."* 452 Code Mass. Regs. § 1.02. (Emphasis added). The insurer would have us construe § 55A, in combination with the cognate regulatory definition, to mean that AMGRO's request for cancellation removed the requirement of a § 65B mid-term notice of cancellation. As stated above, the subject cancellation was undisputedly believed to be due to the employer's non-payment of its installment premium payment. AMGRO's request for cancellation did not change that underlying fact, which was noted

in the Rating Bureau's notice of cancellation. Section 55A has clear application to the insurer's mid-term cancellation at issue in this case. The related regulation cannot reasonably be applied as espoused by the insurer, because it flies in the face – and makes impossible the application – of the statute that it interprets. See G.L. c. 152, § 5. A contrary construction would not follow the well-established law holding insurers to strict compliance with the notification requirements for terminating policies covering workers' compensation risk. See Armstrong's Case, 47 Mass. App. Ct. 693, 696 (1999); Frost, supra at 307-308. The Appeals Court recently noted, "The purpose of G.L. c. 152 is to ensure that financial assistance is made readily and speedily available to injured employees." Cummings' Case, 52 Mass. App. Ct. 444, 446 (2001). The courts' and this department's approach to insurance coverage has followed that overall policy consideration, "in light of the necessity of ensuring that coverage is provided for injured employees." Id. at 448. Lest we forget, the Supreme Judicial Court reminded us in CNA Ins. Cos. v. Sliski, 433 Mass. 491 (2001), that " 'The history of workmen's compensation in this Commonwealth shows that the Legislature gradually but consistently has enlarged the scope of the laws pertaining to it, and that the courts have construed those laws liberally for the protection of the injured employee.' " Id. at 496, quoting Roberge's Case, 330 Mass. 506, 509 (1953).

Accordingly, we affirm the decision and order the insurer to pay a fee, pursuant to § 13A (6) in the amount of $ 1243.36.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: December 5, 2001