COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 020994-02 020995-02**

John J. Sullivan	Employee
Rich A. Sullivan Construction	Employer
Workers' Compensation Trust Fund	Insurer
One Beacon Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Fabricant)

APPEARANCES
Karen S. Fabiszewski, Esq., for the Workers' Compensation Trust Fund[1]
Mark J. Kelly, Esq., for One Beacon Insurance Co. at hearing
John J. Canniff, Esq., for One Beacon Insurance Co. on appeal

COSTIGAN, J. Can an assigned risk policy of workers' compensation insurance under G. L. c. 152, § 65A,[2] be in effect for any period of its proposed term when a) the employer's initial check for payment of the deposit premium was dishonored, and b) the insurer properly terminated the policy under the provisions

[1] The employee did not participate in the hearing, as his claims against the Workers' Compensation Trust Fund (Trust Fund) and One Beacon Insurance Company (the insurer) were resolved by lump sum settlements under G. L. c. 152, § 48, (Exs. 3 and 4), leaving the Trust Fund and the insurer to litigate the coverage issue before the administrative judge. (Dec. 2.)

[2] General Laws c. 152, § 65A, provides, in pertinent part:

> Any employer whose application for workers' compensation insurance has been rejected or not accepted within five days by two insurers may appeal to the commissioner of insurance and if it shall appear that such employer has complied with or will comply substantially with all laws, orders, rules and regulations in force and effect relating to the welfare, health and safety of his employees, and shall not be in default of payment of any premium for such insurance, then the commissioner shall designate an insurer who shall forthwith, upon the receipt of the payment for the premium therefore, issue to such employer a policy of insurance contracting to pay the compensation provided for by this chapter.

of G. L. c. 152, § 65B?[3] This is the question presented by the Trust Fund's appeal of an administrative judge's decision answering that question in the negative, and ordering it to pay benefits to an injured employee of the uninsured employer. The administrative judge concluded that no coverage had been effected, and that the employer was therefore uninsured for workers' compensation, even though it had received a binder of assigned insurance with the insurer. For the reasons that follow, we affirm the judge's decision.

On or about May 2, 2002, the employer, who was not then insured for workers' compensation, sent the Workers' Compensation Rating and Inspection Bureau (Rating Bureau) its application for coverage under § 65A, together with a check in the amount of $852 in payment of the deposit premium. On May 24, 2002, the Rating Bureau designated the insurer to issue an assigned risk policy to the employer under the provisions of § 65A. The effective date of the policy was May 21, 2002. The Rating Bureau forwarded the employer's application and check to the insurer for processing. (Dec. 2; Ex. 1 [Stipulation of the Parties].)

On May 31, 2002, the insurer deposited the employer's check, which was dishonored for insufficient funds soon thereafter. On June 20, 2002, the insurer duly notified the employer and the Rating Bureau, by certified mail, that it was

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[3] General Laws c. 152, § 65B, as amended by St. 1991, c. 398, § 90A, provides, in pertinent part:

> 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 [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, and, if such objections are filed, the commissioner, or his designee shall hear and decide the case within a reasonable time thereafter. Further appeal of the decision of the department may be taken to the superior court for the county of Suffolk.

rescinding the assigned risk policy that had issued as of May 21, 2002. The employer did not file objections to the insurer's notice of rescission, as permitted by § 65B. (Id.)

On June 5, 2002, after the Rating Bureau designated the insurer to issue a policy, but before the insurer sent its notice of recisssion, the employee sustained an injury while working for the employer. In July 2002, the employee filed a claim for benefits against the insurer. The insurer denied coverage. (Ex. 1.) Following a § 10A conference at which the employee's motion to join the Trust Fund was allowed, a different administrative judge denied the claim against the insurer and ordered the Trust Fund to pay the employee weekly incapacity and medical benefits. The employee and the Trust Fund appealed from the respective orders. (Dec. 3.)

This case is governed by the Appeals Court's analysis and reasoning in Cummings's Case, 52 Mass. App. Ct. 444 (2001). Cummings addressed the effect of a dishonored check on the initial issuance of an assigned risk policy of workers' compensation insurance under § 65A. The court concluded that the policy had, in fact, issued on the assigned effective date, and that actual receipt of the premium by the insurer was not a condition precedent to the *issuance* of the policy binding the insurer. Id. at 447-448. The Trust Fund maintains this ruling supports its argument that the insurer was bound to provide coverage in the present case, notwithstanding the dishonored check.

At first blush, the Trust Fund's argument seems right, given the Rating Bureau's practice of issuing policies "irrespective of when the premium funds are actually in the insurer's hands." Id. at 448. Upon closer scrutiny, however, Cummings does not actually support the Trust Fund's position. The Cummings court agreed with the insurer's argument that the assigned risk policy, issued without initial payment of a premium, would have been subject to rescission ("otherwise terminate[d]," in the language of § 65B), but for the insurer's failure to send the requisite notice to the Rating Bureau:

> Eastern contended that it sent a copy of this letter [stating that "the notice of assignment had been rescinded and that no coverage had been provided"] to the Rating Bureau; however, since no return receipt was found, there is no proof of the Rating Bureau's receipt of the letter. In contrast, Eastern's file contained a return receipt for the letter sent to Demolition Specialists [the employer]. *If this letter had been received by the Rating Bureau, the policy would have been rescinded, subject to the ten-day appeal period.*

Id. at 446 n.6. (Emphasis added.) This holding -- that Eastern Casualty was bound to provide coverage for the work injury, due to its failure to give proper notice of termination -- does not, as the Trust Fund urges, control the outcome here because, unlike Eastern in Cummings, One Beacon did give the notices of termination required by § 65B. The parties so stipulated. (Ex. 1.) What is pertinent from Cummings is that an otherwise effective assigned risk policy may be rescinded for initial non-payment of the premium, e.g., a dishonored check, such as happened here. The plain language of § 65B supports this conclusion:

> 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 . . . entitled to such insurance*. . . .

(Emphasis added.) We reject the Trust Fund's argument that an employer who is not, and never was, entitled to workers' compensation insurance, because it never paid for it, may nevertheless obtain coverage by default, based solely on the process, procedures and time line used by the Rating Bureau in administering the assigned risk pool under § 65A.

We also rely on case law defining and construing the term, "recission," to dispose of the Trust Fund's argument. "Rescission is an equitable remedy granted when there has been a mutual mistake of fact or fraud between the parties. *The purpose of rescission is to place the injured party in status quo ante."* Id. at 447 n.8. (Emphasis added.) Rescission means that the contract is voidable. Jurewicz v. Jurewicz, 317 Mass. 512, 517 (1945); Torrao v. Cox, 26 Mass. App. Ct. 247, 251 n.5 (1988). A voidable contract, once validly terminated by a party, is voided

retroactively, to the initial date of contracting. Addressing a contract to which a minor was a party, the Supreme Judicial Court reasoned:

> As the defendant was a minor his contract . . . was voidable (Frye v. Yasi, 327 Mass. 724, 728 [1951], and cases cited) and could be avoided or disaffirmed by him during his infancy. *Such disaffirmance would annul the contract on both sides, ab initio, and the parties would revert to their original situation as if the contract had not been made.* Boyden v. Boyden, 9 Met. 519. Carpenter v. Grow, 247 Mass. 133 [1923]. "Voidable" imports a valid act which may be avoided, rather than an invalid act which may be confirmed (Williston on Contracts [Rev. ed.] § 231), and the contract of a minor is valid as to both parties until rescinded. [Citations omitted.]

Rothberg v. Schmiedeskamp, 334 Mass. 172, 175-176 (1956). (Emphasis added.) We reach the same conclusion: the assigned risk policy was valid until rescinded by the insurer, when the disaffirmance of the contract of insurance rendered it void, "as if the contract had not been made" in the first place. Id. at 176.[4]

Accordingly, we affirm the judge's decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **June 14, 2006**

[4] Contrast Dearmon's Case, 58 Mass. App. Ct. 913 (2003), in which the court held that the insurer's notice of renewal premium due was not an unequivocal notice of its desire to cancel or otherwise terminate the policy under § 65B, and thus coverage extended beyond the policy's expiration date, non-payment of the premium notwithstanding.