COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 051369-00 057476-00**

Kenneth Pillman	Employee
Dan's Paving and Excavating	Employer
All America Insurance Co.	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Carroll, Fabricant and Costigan)

APPEARANCES
Robert L. Rice, Esq., for the employee
Mary Garippo, Esq., for the Workers' Compensation Trust Fund
Richard A. Wall, Esq., for All America at hearing
Paul M. Moretti, Esq., for All America on appeal
Sean T. McGrail, Esq. for the employer

CARROLL, J. The insurer, All America Insurance Co., appeals from a decision in which an administrative judge concluded that its cancellation of a voluntary workers' compensation insurance policy under M. G. L.c. 152, § 63, was ineffective, and that the insurer was therefore liable for the employee's industrial injury several months after the attempted cancellation. For the reasons that follow, we affirm the decision.

On March 20, 2000, the insurer sent notice of cancellation to the employer's mailing address of record for the policy, 39 Drake Road, Fitchburg, MA. (Dec. 3.) The notice of cancellation was properly mailed, with a certificate of mailing receipt. (Dec. 4.) The notice of cancellation was returned to the insurer as undelivered, with a notation that the forwarding service had expired. (Dec. 3; Ex. 3.) The insurance policy contained an additional address, where the business was located, 526 Electric Avenue, Fitchburg, MA.[1] (Dec. 3-4; Tr. I, 31.) The insurer did not attempt redelivery of the cancellation notice using that business

[1] There was testimony that the address of the place of operations is required to be listed in workers' compensation insurance policies. (Tr. I, 31.)

address.[2] The policy purportedly cancelled on April 4, 2000. (Dec. 3.) The date of injury was October 6, 2000. (Dec. 4.)

The judge concluded that it was incumbent upon the insurer to mail a subsequent cancellation notice to 526 Electric Ave., the additional address listed in the policy. As this was not done, the judge found that the cancellation of the policy for non-payment of the premium was not effective, as the insurer had not exercised due diligence in its notification. (Dec. 4.) Therefore, the insurer, remained on the risk for workers' compensation coverage as of the date of injury. (Dec. 5.)

We agree with the result reached by the judge in this case. This case involves the insurer's *actual knowledge* of non-receipt of the properly mailed cancellation notice, due to the return of its letter as undeliverable at that address. The salient additional fact is the presence of the alternative address in the insurer's record. We find that once it knew that notice was not delivered to the primary address listed in its records, the insurer had an obligation to attempt service at that alternative address.

The controlling statute is G. L. c. 175, § 187C, which governs the cancellation of insurance contracts in the Commonwealth. We have concluded that this statute applies to require notice of policy cancellations to employers under c. 152.[3] Fontaine v. Evergreen Construc. Co., 13 Mass. Workers' Comp. Rep. 62, 66 (1999). Section 187C provides, in pertinent part:

> A company issuing any policy of insurance which is subject to cancellation by the company shall effect cancellation by serving the notice thereof provided by the policy and by paying or tendering, except as provided in

[2] The employer testified that he and the insurance agent had a conversation regarding the business address, 526 Electric Ave., being used as the billing address. The employer further testified that he normally used the business address as his billing address, and he met with the insurance agent at that address. (Tr. I, 39-40.)

[3] This is so even though § 63 does not require notice of cancellation to the insured employer. See, e.g., Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 355 (1999).

> 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 delivered in hand to the named insured, or left at his last address 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, or be forwarded to said address by first class mail, postage prepaid, and a notice left or forwarded, as aforesaid, 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. See also Trudeau's Case, 280 Mass. 429 (1932)(applying § 187*D* in workers' compensation case).

There is no case law in the Commonwealth interpreting the part of the statute that the facts of this case put at issue, namely, the alternative addresses the insurer must use for notice of cancellation, "if its records contain no such [last] address" of the employer. The question we must answer is this: Does the return of the cancellation notice as undelivered, because the address ("the last address as shown by the company's records") is no longer valid, mean – as a practical matter – that the insurer's "records [then] contain no such address?" If so, the second clause requiring that the insurer look in its records for any "other address known to the company" in order to effectuate delivery of the cancellation notice would apply. We find that the answer to this question is "Yes."

We see the statutory interpretation here as a matter of logical necessity. It is impossible that the insurer's record would not contain a "last address" of the insured employer. Words in a statute must be given their usual and ordinary meaning. Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998). "'Last' is defined as 'coming after all others in time'; 'latest'; 'most recent'." Allstate Insurance Co. v. Nationwide Insurance Co., 82 N.C. App. 366, 370 (1986). That case went on to describe policy language, "last known address," "to mean the most recent mailing address known to the insurer." Id. This must be the same for the language of

§ 187C that we interpret here. There must always be a last known, most recent, mailing address in the insurer records for the subject policy. The policy could not have issued without it. To the extent that a "last address" for the employer must always exist in the insurer's record, the only way to lend meaning to the next clause, "if its records contain no such address," is for it to apply where the "last address" in the insurer's records is no longer viable. See United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 602 (1984). Such is the case here.

Our review of insurance law throughout the country supports our view. First, we have found only one other state, Rhode Island, that has a statutory cancellation provision mandating alternative delivery of notice where – following our interpretation of § 187C – the insurer's records contain an invalid mailing address (no "last address as shown by the company's record"). Rhode Island's courts have been as silent as the Commonwealth's regarding its identical provision, R.I.G.L. § 27-5-3.4.[4]

As to case law interpreting insurance policies which does not have the Rhode Island and Massachusetts provision discussed above, the majority rule is indeed as the insurer here argues: the proper delivery of notice to the last mailing address contained in the insurer's records satisfies its obligation for cancellation. See, e.g., Allstate, supra at 370-371. See generally 63 A.L.R. 2d 570, "Provision of policy for mailing of notice to insured's address as stated therein as affected by change of address." However, there are some states where, even without a specific statutory cancellation provision mandating alternative delivery of notice, a duty to send such alternative notice has been imposed. The minority rule is found in Ohio and Louisiana, and comports with our interpretation of the peculiar

[4] The Rhode Island statute applies to fire insurance policies, and reads, "That notice shall be delivered in hand to the named insured, or be left at his or her last address as shown by the company's records, or if its record contain no such last address, at his or her last business, residence or other address known to the company . . . ."

language of § 187C at issue here. In Griffin v. Gen. Acc. Fire and Life Assur. Co., 94 Ohio App. 403 (1953), the court held that an insurer with actual knowledge of non-receipt of its cancellation notice sent to the last known mailing address in the insurer's records had the additional duty to send that notice to the other address of the insured contained in its records.

> Ordinarily, the deposit of a notice of cancellation in the mail would be delivered to the insured at the address stated in the policy, and it has been held that proof of the mailing of a letter properly stamped and addressed affords prima facie evidence of its receipt by the addressee. The principle applies notwithstanding the address of the addressee may have been lately changed because the well-known accuracy, knowledge and facilities and practice of the postal service in such matters raise a presumption of delivery, but this is a rebuttable presumption and may be met by evidence of equal weight to overcome the presumption of delivery. [Citation omitted].
>
> As we view it, the provision that mailing of the notice shall be sufficient proof of notice was adopted to spell out the presumption of delivery upon proof of mailing and meet a claim on the part of the insured or those claiming through him that notice was not actually received. Mailing may be sufficient proof of notice, but it is not conclusive proof thereof. Under the evidence before the trier of the facts in the instant case, the prima facie showing of delivery was not only met but was overcome. In the face of the finding that the letters were returned by the postal service marked "not at," and that the whereabouts of the insured was known, in effecting a cancellation or forfeiture of the insured's rights under the policy, the insurer should not be permitted to rely solely upon the deposit of the notices in the mail, particularly where, under a further provision of the cancellation clause, delivery other than by mail could have readily been had.
>
> It is, therefore, concluded that where the insurer through its agent authorized and directed to cancel a policy is apprised that the insured has not received the notice thereof by mail and has knowledge of the place where delivery may be made, and in the absence of evidence that reasonably diligent efforts were made to find the insured and deliver such notice, mere proof of the depositing of the notice in the mail addressed to the insured at the address stated in the policy is sufficient, but not conclusive, proof of notice, and may be overcome by evidence that such notice was not actually received by the insured, and is ineffective to support a finding as a matter of law that the policy was duly cancelled.

Griffin, supra at 410-411.

Likewise, a Louisiana case features a "night club entertainer," Betty Jo Green, whose automobile insurance was to be cancelled due to her being deemed "not an insurable risk," but for the failure of delivery of the notice to the address listed on the policy. The notice was returned to the insurer marked "unknown." Breitenbach v. Green, 186 So.2d 712, 716 (1966). The insurer was aware of Miss Green's place of employment, "a well-known business establishment in New Orleans" by the name of the "Court of Two Sisters."[5] Id. The court concluded that the insurer's failure to attempt delivery of the notice at the address of Miss Green's employment was fatal to its claim of proper cancellation.

> The cancellation notice addressed by [the insurer] to Miss Green at the Owens Boulevard address shown in the policy as her place of residence was returned within a week. Thus [the insurer] had actual knowledge that it had not been received. If the notice had not been returned, [the insurer] would be in a much more favorable position under the presumption provided by [statute]; but since the notice was returned and [the insurer] had actual notice of nondelivery, the presumption of its receipt falls.
>
> [W]e must hold that after the return of the notice [the insurer] had a duty to make further effort to notify Miss Green. It did nothing, but merely filed the returned notice. As shown on the face of the policy, Miss Green was employed at the Court of Two Sisters. The very fact that she was employed there was one of the alleged reasons for the cancellation. The insurer could hardly say therefore that it did not know of any other address where Miss Green could be reached.

Id. at 718.

We choose to follow this minority rule, as it comports with the alternative notice provision of § 187C, and serves the policy of maintaining compulsory insurance coverage under c. 152. See Brown v. Leighton, 385 Mass. 757, 760 (1982), and cases cited.

---

[5] Miss Green, who used an assumed name while performing, had represented in her application for insurance that her duties were that of a secretary at the Court of Two Sisters. Id at 716.

The insurer interposes the defense that any alternative service of notice at the business address would have been ineffective, as the cancellation of the policy would have already taken place, by the time the insurer received the undelivered letter. The argument misses the point that the vaunted cancellation the insurer attempted by way of the returned letter was ineffective due to § 187C's alternative service provision discussed above. If the letter had not been returned undelivered, or if it had, and the insurer did not have any other address of the employer in its records, the insurer's cancellation would have been effective. However, those two factors being in the affirmative, the obligation to attempt delivery of the cancellation notice at the business address known to the insurer was triggered. That the date of cancellation pursuant to the undelivered notice (April 4, 2000) might have passed by the time the insurer knew it had not been delivered cannot control the outcome.[6] Such will likely be the case, whenever the effectiveness of the cancellation is put into dispute. See Frost v. David C. Wells Ins. Agency, Inc., 14 Mass. App. Ct. 305, 308-309 (1982)(June 1976 cancellation of § 63 insurance policy held ineffective; policy period extended to cover August 10, 1976 accident). The statute merely obliges the insurer to examine its file to determine whether there is some other address to which to make service, before it can rest assured that the cancellation is effective.

The insurer also argues that the case of Liberty Mutual Ins. Co. v. Wolfe, 7 Mass. App. Ct. 263 (1979), cited in Martinez v. Northbound Train, Inc. 18 Mass. Workers' Comp. Rep. 294 (2004), dictates as a matter of law that the legal sufficiency of the cancellation notice must be measured at the time of its mailing, and that subsequent knowledge cannot be applied retroactively to assess adequacy at that time. It is true that Wolfe states as much. Id at 265. However, the statute at issue in that case was G. L. c. 175, § 113A, not § 187C. Section 113A does not contain the statutory provision regarding alternative service of notice that we

---

[6] The date of the return of the undelivered notice was not established in the evidence.

apply in this case. Besides, the basic tenet of Wolfe is that § 113A does not require "actual receipt by the addressee." Id. We are in full agreement with that proposition vis-à-vis § 187C, but only insofar as the insurer's actual notice of *non-receipt*, subsequently obtained, is not accompanied by some other address in its records to which the insurer must attempt redelivery.[7] Martinez, supra, is not inconsistent with this interpretation, as it did not contemplate the provision of §187C at issue here.

The decision is affirmed.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

COSTIGAN, J., dissenting. The majority holds that if the insurer, *after* the mailing of a notice of cancellation to the insured employer's address listed in the policy for such notices, learns that the address is no longer valid, it is required to send another notice to any other address listed in the policy, or known to it, in order to effect cancellation. Because the plain language of G. L. c. 175, § 187C, does not impose such a requirement *nunc pro tunc*, I respectfully dissent.

At the heart of the majority's approach is the notion that the insurer must do all in its power to ensure actual receipt of the cancellation notice by the employer.

---

[7] The requirement placed on the insurer here is not of *actual receipt* of the cancellation notice, but that of the insurer's obligation to take another step in the cancellation process, when it learns of the employer's non-receipt of its notice. On these facts, if no other address existed in the policy – as surely is often the case, when the mailing and business addresses are the same – the cancellation would have been effective without actual receipt by the employer.

Had the legislature intended to require actual receipt, however, it knew how to say so. See G. L. c. 152, § 65B, relative to cancellation of assigned risk policies issued under § 65A.[8]

The policy here was not an assigned risk policy, but one issued voluntarily by the insurer. As we observed in Armstrong, infra at 522, assigned risk policies pursuant to § 65A are more closely regulated by § 65B than are the standard compensation policies, such as we have here, cancellation of which is governed by § 63. In fact, there is no statutory requirement within chapter 152 requiring notice to the insured employer of cancellation of a voluntary policy. As noted by the majority, see footnote 3, supra, § 63 requires notice only to the rating organization

---

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

> If, after the issuance of a policy under section 65 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 . . . .

(Emphasis added.) Under the plain language of § 65B, receipt of the cancellation notice by the employer is required. To hold otherwise would render meaningless the statutory provision allowing the employer to file objections to the proposed cancellation. See Armstrong v. Town and Country Carpentry, 10 Mass. Workers' Comp. Rep. 516, 522 (1996), aff'd *sub nom.* Armstrong's Case, 47 Mass. App. Ct. 693 (1999); Fontaine v. Evergreen Constr. Co., 13 Mass. Workers' Comp. Rep. 62, 66 (1999).

authorized by § 52C ten days prior to cancellation.[9]

As we stated in Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294, 303 (2004):

> Where a policy is voluntarily issued, we must look to the policy itself and to G. L. c. 175, § 187C, for the employer notice requirements to effect cancellation or termination. See Fontaine, supra at 65(c. 175, § 187C, applies in workers' compensation cases); Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 355 (1999)(same).[10] That statute provides that notice "forwarded to [the insured's address] by first class mail, postage prepaid, . . . *shall be deemed a sufficient notice*," provided that "[n]o 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."

(Emphasis added.) Section 187C does not require the insurer to produce a certificate showing actual receipt by the employer, a so-called "green card," or even mailing to an alternative address that may be listed in the policy. The statute requires only a certificate reflecting that the insurer mailed the notice of cancellation to "the name and address of the insured *stated in the policy*."

---

[9] General Laws c. 152, § 63, as amended by St. 2002, c. 279, § 3, provides, in relevant part:

> Such 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 or until a notice has been received by said organization that the employer has secured insurance from another insurance company or has otherwise insured the payment of compensation provided for by this chapter.

The insurer's compliance with this statute is not challenged by the other parties.

[10] "General Laws c. 175, § 187C, applies to assigned risk as well as voluntary policies, mandating in the case of assigned risk policies, that the cancellation notice be sent by certified mail. Dembitzski, supra at 355 [*aff'd* Mass. App. Ct. No. 2004-P-1031, *slip op.* (December 21, 2004).] However, since c. 152, § 65B, specifically applies to assigned risk policies, whereas c. 175, § 187C, governs insurance policies in general, § 65B's requirement of receipt by the employer takes precedence over the mailing requirement of § 187C. See Murphy v. Cowperthwaite, 18 Mass. Workers' Comp. Rep. 102 (2004), [*aff'd* Murphy's Case, 63 Mass. App. Ct. 774 (2005)]; Archer v. Turner Trucking & Salvage, 10 Mass. Workers' Comp. Rep. 166, 174 (1996)(specific statute prevails over general statute where two cannot be harmonized)."

(Emphasis added.) As the administrative judge found, (Dec. 4), the insurer did obtain such a receipt. (Ex. 5.)

Martinez also addressed the principles of statutory construction applicable here, but seemingly ignored by the majority:

> In construing a statute, " 'its words must be given their plain and ordinary meaning according to the approved usage of language . . . and . . . the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it.' " Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945). In Taylor, the court held that the word "shall", as used in § 35B ("An employee . . . shall . . . be paid such compensation at the rate in effect at the time of the subsequent injury") was plain and unambiguous, and mandatory in nature. The language of c. 175, § 187C, is likewise plain and unambiguous, and its words are similarly "mandatory, not precatory." Id. See also Piekarski v. National Non-Wovens, 16 Mass. Workers' Comp. Rep. 254, 258 (2002), quoting Hashimi v. Kalil, 388 Mass. 607, 609 (1983)(" 'The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.' ") Thus, mailing of the notice, such as occurred here, "shall be deemed sufficient notice" of cancellation as long as the insurer obtains a certificate of mailing receipt. [footnote omitted.]

Id. at 303.

As the majority acknowledges, there are no cases construing the statutory requirements for notice to the insured set forth in G. L. c. 175, § 187C. However, as we stated in Martinez, supra, the cases interpreting the notice requirements of G. L. c. 175, § 113A, regarding cancellation of compulsory motor vehicle liability policies, inform the issue of what § 187C requires. Interpreting language similar to § 187C, [11] the courts have held that "the sufficiency of a statutory notice of

---

[11] General Laws c. 175, § 113A, as amended by St. 1933, c. 119, § 1, provided, in relevant part:

> [N]otice of cancellation sent by the company to the insured, by registered mail, postage prepaid, with a return receipt of the addressee *requested*, addressed to him at his residence or business address stated in the policy *shall be a sufficient notice*.

(Emphasis added.) Amendments to § 113A after 1933 but prior to the holding in Liberty Mutual v. Wolfe, supra, did not affect this provision.

cancellation under § 113A(2) must be measured as of the time of mailing in the manner required by that section, *because mailing satisfies the statutory notice requirement, regardless of actual receipt by the addressee."* Liberty Mut. Ins. Co. v. Wolfe, 7 Mass. App. Ct. 263, 265 (1979).[12]

The majority posits that its interpretation of G. L. c. 175, § 187C is "a matter of logical necessity," because "[i]t is impossible that the insurer's records would not contain a 'last address' of the insured employer." This is simply not so, as the "last address" on file can be rendered invalid in any number of circumstances other than that which the majority suggests. For example, assume the following scenario. An insurer mails a bill for the policy premium to its insured at "the name and address of the insured stated in the policy." The bill is returned to the insurer undelivered, with the notation on the envelope, "Returned to Sender – Undeliverable as Addressed – Forwarding Period Expired." (See Ex. 3.) Should that insurer subsequently undertake to mail a notice of cancellation of the policy, *at the time of such mailing,* it will have actual knowledge that its insured is not at the address noted in the policy. If there is no updated "last address" in its records, the insurer would then have to use whatever alternative address is listed in the policy, or known to it, in order to effect cancellation.

---

[12] The Trust Fund considers this decision irrelevant to this case because Wolfe involved cancellation of a compulsory automobile insurance policy, not a workers' compensation policy. Curiously, it points to a Minnesota case, Donarsky v. Lardy, 251 Minn. 358 (1958), likewise involving an automobile insurance policy, as support for the proposition that the insured's knowledge of the cancellation, via actual receipt of the notice, is required, even if the applicable statutory requirements for mailing of notice are met. Merchant's Mutual Casualty Co. v. Justices of Superior Court, 291 Mass. 164 (1935), another case cited by the Trust Fund, also involved a compulsory automobile insurance policy. I cannot agree that the public policy considerations involved in cancellation of workers' compensation policies are any more important than those involved in cancellation of compulsory motor vehicle insurance policies. Most victims of accidents involving uninsured motorists are consigned to recovery under their own uninsured or underinsured coverage, whereas injured employees of uninsured employers may claim benefits from the Workers' Compensation Trust Fund under § 65, and civil damages from their employers under § 66.

Here, however, the insurer had no knowledge, when it mailed the cancellation notice, that the address for notice listed in the policy was no longer valid. Contrary to the majority's holding, the subsequent return of the notice undelivered did not render the notice address invalid, *nunc pro tunc*, nor did it change the insurer's notice obligations *ex post facto*.[13] Compare Armstrong's Case, supra (insurer in receipt of undelivered notice of cancellation of § 65A assigned risk policy required to send new notice, when insured's change of address notice was received by insurer six days prior to cancellation date).

The majority lets pass without comment the employer's failure to notify the insurer of both his change of address, for purposes of notice under the policy, and the contemporaneous relocation of his business operations (the "alternative address" to which the insurer was obliged, according to the majority, to re-send the notice of cancellation.) (1/22/02 Tr. 38-45.) See Couch on Insurance 3d, § 71:34, at 46 (2000)("The fact that the insured has changed his or her address does not affect the sufficiency of the notification, where the change is unknown to the insurer. Notice to the last address on file with the insurer is sufficient, though the insured's last assessment was paid from another address, where the insurer was not informed of the change.") (Footnotes omitted.) The employer here may not have been "one who wilfully avoids notice [and] is charged with the "knowledge . . . which would flow from the notice had it been actually received," Liberty Mutual v. Wolfe, supra at 265, quoting Conte v. School Comm. of Methuen, 4 Mass. App. Ct. 600, 605 (1976), but he, not the insurer, should bear the consequences of his inaction.

[13] The notice of cancellation at issue was mailed by the insurer from its location in Van Wert, Ohio on March 20, 2000. (Exs. 3 and 5.) There is no direct evidence, and the judge made no subsidiary finding of fact, as to when the insurer received its mailing back from the United States Postal Service, marked as undeliverable. However, based on the April 6, 2000 handwritten notation on the envelope, it is permissible to infer that the returned envelope containing the notice of cancellation was received by the insurer in Ohio on that date. The cancellation of the policy was effective April 4, 2000.

Accordingly, I dissent from the majority's decision which penalizes the insurer because the employer did not fulfill his obligations under the policy.

_____
Patricia A. Costigan
Administrative Law Judge

Filed: **January 30, 2006**