

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 026792-02, 051804-02

Mark D. Bombard	Employee
RDA Construction Corp.	Employer
Liberty Mutual Insurance Co.	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

APPEARANCES

Brian C. Cloherty, Esq., for the employee at hearing and on appeal
William A. Hanlon, Esq., for the employee on appeal
Thomas E. Fleischer, Esq., for Liberty Mutual
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund
William J. Richards, Esq., for the employer at hearing
Morgan J. Gray, Esq., and Kerry G. Nero, Esq., for the employer on appeal

HORAN, J. Liberty Mutual Insurance Company (Liberty) appeals from a decision awarding the employee, a longshoreman, § 34 total incapacity benefits to their statutory exhaustion, followed by ongoing partial incapacity benefits at the maximum rate. We affirm the decision.

On August 1, 2002, the employee suffered a right tibial plateau fracture while unloading a barge in New Bedford harbor. After several surgical procedures over the course of eighteen months, the employee was left with significant limitations in the use of his right leg. He experiences sharp, stabbing intermittent pain, particularly when twisting, pivoting, kneeling, squatting, climbing stairs, and with prolonged sitting, standing or walking. (Dec. 6.) The employee filed claims for workers' compensation benefits against the insurer. Liberty denied coverage for the employee's date of injury, so the employee also filed a claim against the Workers' Compensation Trust Fund (WCTF). (Dec. 3-4.)

Liberty sent a notice of non-renewal to the employer on July 12, 2002, stating that its assigned risk coverage would terminate at the end of the policy period, July 29, 2002, if not renewed by payment of the stated premium. Based on the testimony of the insurer's representative, the judge found the notice was not sent certified mail, return receipt requested, but by regular mail. The judge also credited the testimony of the employer's president that the employer did not receive the notice. Accordingly, the judge found the insurer's coverage was not cancelled under the provisions of G. L. c. 152, § 65B,¹ and that the insurer was responsible for the payment of the employee's incapacity and medical benefits. (Dec. 7-8.)

Liberty raises several arguments on appeal. First, it argues the administrative judge lacked jurisdiction to hear the employee's claim. We disagree. The circumstances surrounding the employee's work activities on the date of injury place him within the "twilight zone" of concurrent jurisdiction between the federal Longshore and Harbor Workers' Compensation Act, and our Workers' Compensation Act. See Zangao v. M.B. Seafood, 16 Mass. Workers' Comp. Rep. 64 (2002).

The insurer's argument that it did not insure the employer on the employee's date of injury also fails. Under the provisions of G. L. c. 152, § 65B, the insurer was obligated to prove the employer's *receipt* of the notice of non-renewal in order to effect a termination in coverage. See Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294, 302-303 & n.7 (2004). The insurer did not send its notice via certified mail, return receipt requested. Even though there is no requirement for that formality, it certainly would have aided the insurer in carrying its burden to prove the employee's receipt of the notice of non-renewal. Armstrong's Case, 47 Mass. App. Ct. 693 (1999). Instead, the judge credited the testimony of the employer's president that the employer did not receive the notice. (Dec. 7.) The judge did not err.

¹ General Laws c. 152, § 65B, provides, in pertinent part:

[A]ny insurer desiring to cancel or otherwise terminate [an assigned risk] 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

We summarily affirm the decision with regard to the insurer's remaining arguments on appeal concerning the employee's total incapacity, and the award of an enhanced attorney's fee. With respect to the latter, we find no abuse of discretion in light of the multiple issues addressed at the hearing.

The decision is affirmed. Liberty shall pay the employee's attorney a fee, pursuant to the provisions of G.L. c. 152, § 13A(6), in the amount of \$1,495.34.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **December 23, 2008**