COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 035603-11 026684-11**

Stephen Buonopane	Employee
Mike's Landscaping and General Contracting Co.	Employer
National Union Fire Insurance	Insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Long)

The case was heard by Administrative Judge Solomon

APPEARANCES
Judson L. Pierce, Esq., for the employee
Michael T. Henry, Esq., for National Union Fire
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund
Richard S. Ravosa, Esq., for the employee

FABRICANT, J. This case presents an issue of coverage only, as the underlying claim has been resolved by the parties with a § 19 agreement in which liability has been accepted, and the Workers' Compensation Trust Fund (Trust Fund) has agreed to pay a closed period of partial disability benefits. The case before us now presents the issue of whether the employer's workers' compensation policy was properly cancelled by National Union Fire Insurance (insurer). As there is ample evidence in support of the judge's finding of proper notice of policy cancellation, we affirm the decision for the reasons set forth below.

The underlying claim was for injuries sustained by the employee, Stephen Buonopane (employee), on June 18, 2011, while working as a landscaper for Mike's Landscaping and General Construction Co., Inc. (employer). The employee's claim was the subject of a February 15, 2012, § 10A conference, which resulted in an order of § 34

benefits, to be paid by the Trust Fund. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). On the day of the conference the Trust Fund moved to join the employer as a party, pursuant to G. L. c. 152, § 65(13), which the judge allowed. Rizzo, supra. The Trust Fund's appeal of the conference order resulted in a *de novo* hearing on March 29, 2013 and May 27, 2013,[1] in which all the parties participated. (Dec. 3; Rizzo, supra.) On September 12, 2013, the Trust Fund and the employee entered into a § 19 Agreement, in which the Trust Fund agreed to pay a closed period of § 35 partial incapacity benefits to the employee, without prejudice, and without any determination as to the issue of liability between the insurer and the Trust Fund. (Dec. 3; Rizzo, supra.) It was explicitly agreed that "the parties dispute whether it is the Insurer or the Trust Fund that is legally liable." Rizzo, supra. It was noted that the full hearing took place to determine which of those two parties was liable. Id.

Because insurance coverage was the only unresolved issue following the execution of the § 19 agreement, the judge was to determine only whether the insurer "effectuated cancellation of the employer's workers' compensation insurance on May 16, 2011 in accordance with statutory requirements and the policy's cancellation provisions." (Dec. 4.)

The policy at issue was the employer's workers' compensation policy with the insurer, with effective dates from January 21, 2011 through January 21, 2012.[2] Initially, the premiums for this policy were determined by payroll data supplied by the employer. That data resulted in an estimated annual premium of $8,987.00, (to be paid in monthly installments of $1,049.00), subject to a final determination of premium following an audit of the employer's records. A March 2011 audit determined that there was a premium overpayment by the employer on the previous year's policy, and the insurer and employer

[1] The transcripts from the March 29, 2013 and May 27, 2013 dates of hearing shall be referenced herein as Tr. I and Tr. II respectively.

[2] This was a voluntary policy subject to the cancellation requirements of § 63, not an assigned risk policy, subject to § 65B's cancellation requirements. (Dec. 6, fn. 6.)

agreed that the insurer would apply the refund of that overpayment toward the premium due on the 2011 policy. (Dec. 4.)

The employer made only one initial premium payment of $2,700.00 on January 27, 2011.[3] (Ins. Ex. 4.) The insurer then credited two additional payments to the employer's account on March 18, 2011 ($2,141.00) and March 21, 2011 ($891.00), representing the total amount of the overpayment owed to the employer. This left a remaining premium of $168.00 due by April 21, 2011 as reflected in the insurer's March 22, 2011 billing invoice to the employer. (Ins. Ex. 3.) A subsequent invoice of April 21, 2011, indicates that the $168.00 balance remained unpaid and the policy was subject to cancelation if that amount was not paid immediately. (Dec. 3; Trust Fund Ex. 3.)

When no further payment was received by the insurer, it mailed a Notice of Cancellation to the employer on April 29, 2011, indicating that the policy would be cancelled on May 16, 2011 unless the premium due was paid by then. (Ins. Ex. 4.) As no payment was sent, the policy was cancelled on the specified date, and the employee was injured approximately one month later on June 18, 2011. (Dec. 3.)

The Trust Fund[4] first questions whether the insurer met its statutory burden of proof in showing that the Notice of Cancellation was mailed to the employer. There is agreement by the parties that the requirements for cancellation of this policy are contained within the provisions of G.L. c. 152, § 63 and G.L. c. 175, § 187C.[5] For the

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[3] The insurer asserts that the employer's failure to pay the initial premium due on this policy triggered the filing of a Notice of Cancellation on February 10, 2011. (Ins. br. 3.) Mary Sarsfield, the insurer's underwriting director, testified only that on February 10, 2011, a Notice of Cancellation, indicating a cancellation date of February 27, 2011, was sent to the employer due to non-payment of premium, but that the policy was re-instated following payment. (Tr. I, 94-95.) However, the insurer's Account Reconciliation History (Ins. Ex. 4) indicates that $2,700.00 was paid on January 27, 2011, well before the notice was sent on February 10, 2011. Mary Sarsfield's subsequent testimony on this issue does not provide a clear explanation for this apparent discrepancy. (Tr. I, 133-138.) Regardless, as the policy was re-instated, it does not directly impact any issue currently before us.

[4] Substantially similar arguments are made by both the Trust Fund and the employer on appeal.

[5] G.L. c. 152, § 63 provides in relevant part:

purposes of this cancellation, the relevant requirements are, 1) written notice must be given at least ten days before cancellation, and, 2) written notice sent by mail is not effective unless a certificate of mailing receipt is obtained from the United States Postal Service showing the name and address of the insured. Pillman's Case, 69 Mass. App. Ct. 178 (2007)(insurer on voluntary workers' compensation policy required to comply with G.L. c. 175, § 187C to cancel policy).

Despite the insurer's possession of a certificate of receipt signed by an employee of the employer,[6] the Trust Fund argues there is no evidence that could establish with any certainty that the cancellation notice introduced at trial was the item that was, in fact,

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> Such insurance [i.e. voluntary insurance policies] 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.

G.L. c. 175, § 187C provides in relevant 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 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 be 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.

[6] At hearing, it was argued that the written notice may have been improper because it was sent to "Mike's Landscaping and General" instead of "Mike's Landscaping and General Contracting Co., Inc." However, the judge found that the notice was sent to the address stated in the 2011 policy, and that the slight abbreviation of the employer's name was not enough to cause confusion or hamper delivery. (Dec. 6.) Further, the insurer introduced the certified mail receipt from the United States Postal Service indicating that the item had been delivered on May 2, 2011, and signed for by "F. Santangelo." Flavia Santangelo is the wife of the employer, and an employee of the company. (Dec. 6.) The employer disputed that his wife was at work in May, 2011. However, as the policy at issue was voluntary, the requirement of proof of receipt of notice in G. L. c. 152, § 65B (applicable only to assigned risk policies) does not apply. Id.

mailed by the insurer. (Trust Fund br. 9.) It asserts that because the certificate of mailing receipt identification number does not appear on the Notice of Cancellation, the insurer cannot meet its burden of proof that it was delivered with the signed receipt. We disagree. The judge credited the testimony of the insurer's underwriting director that the insurer's underwriting records reveal no other mailings sent to the employer on that date other than the cancellation notice. (Dec. 6.) Absent evidence to the contrary, we find no reason to upset the credibility findings of the judge on this issue. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)(assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge).

The Trust Fund's second argument is simply that the insurer's last invoice to the employer of April 21, 2011, indicating that $168.00 was due immediately, was confusing and ambiguous, due primarily to the inclusion of an attached payment coupon containing the total outstanding amount of $1,227.00, representing the sum of the "immediately" due $168.00 and the current premium charge of $1,059. 00. (Trust Fund br. 10-11.) It is argued that the payment coupon could be read to afford the employer an additional 30 days to pay the entire amount, as the due date on that billing cycle was May 21, 2011. We do not agree.

First of all, on its face, the April 21, 2011 invoice gives a clear indication of when each amount is due, with itemized dates and instructions for payment. Secondly, this document must be considered in context with the prior invoice of March 22, 2011, which only lists the $168.00 amount outstanding, and clearly provides the due date of April 21, 2011. Finally, even if the April 21, 2011, invoice was misinterpreted by the employer as providing additional time to pay the outstanding premium, there is no evidence that any subsequent payment of any kind was, in fact, made or attempted.

Accordingly, we affirm the decision of the administrative judge.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: June 11, 2018