

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 039121-06
035689-06**

Stephen P. Visco
Robert Wyatt Enterprises, Inc.
A.I.M. Mutual Insurance Company
Workers' Compensation Trust Fund

Employee
Employer
Insurer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

John H. Perrone, Esq., for the employee
Michael K. Landman, Esq., for the insurer
Jarrod M. Hochman, Esq., for the employer
Thomas M. Wielgus, Esq., for the Workers' Compensation Trust Fund

HORAN, J. This case comes to us on appeal by both the Workers' Compensation Trust Fund (Trust Fund) and the employer, and concerns solely the issue of coverage.¹ The judge concluded that AIM Mutual Insurance Company (AIM) properly cancelled the employer's workers' compensation insurance coverage prior to March 31, 2006, the employee's date of injury.² (Dec. 9.) The appellants challenge the judge's decision on two grounds. For the reasons that follow, we affirm the decision in part, and recommit the case for further findings based on the record.

There is no dispute AIM provided workers' compensation coverage to the employer from January 22, 2005 through January 22, 2006. (Dec. 7.) The judge found AIM had sent out a renewal quote on November 7, 2005, requesting the premium be

¹ Oral argument was held on September 15, 2009. Thereafter, the parties asked us to defer our decision pending the result of a scheduled December, 2009 mediation. The parties later reported that resolution via mediation was unsuccessful.

² The employee sustained serious personal injuries when he was attacked and robbed at work. (Dec. 6.)

paid by January 2, 2006. The judge also found the employer failed to tender payment of the premium by the due date. As a result, on or about January 6, 2006, AIM sent the employer, via certified mail, a "Notice of Non Renewal" indicating that coverage would terminate on January 22, 2006. (Dec. 7.) Finding no deficiency in the notice itself, and "the testimony of the insurer's witness credible that this green card corresponded to the termination notice," the judge concluded the policy lapsed on January 22, 2006.³ Consequently, the judge found the employer was uninsured on the employee's injury date. (Dec. 7-8.) The judge dismissed the claim against AIM and ordered the Trust Fund to pay benefits to the employee. (Dec. 9.)

The insurance policy in question was an "assigned risk" policy. See G. L. c. 152, § 65A.⁴ (Dec. 4.) Accordingly, under § 65B,⁵ "the insurer was obligated to prove

³ The judge also found "that on or about April 19, 2006 the insurer received a check from the employer for \$4,501.00 dated January 14, 2006. The envelope that the check was in was damaged and postmarked April 18, 2006. I find that this check came into the possession of the insurer on April 19, 2006 and not before." (Dec. 7-8.) The appellants do not challenge this finding on appeal.

⁴ 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.

⁵ General Laws c. 152, § 65B, 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 insurer [sic] of its desire to cancel or terminate the same.

Stephen P. Visco
Board Nos. 039121-06 & 035689-06

the employer's receipt of the notice of non-renewal in order to effect a termination in coverage." Bombard v. RDA Constr. Corp., 22 Mass. Workers' Comp. Rep. 355, 356 (2008), citing Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294, 302-303 n.7 (2004). The insurer's notice of non-renewal must also unambiguously express its intention to terminate, and not renew, the policy. E.g., Dearmon's Case, 58 Mass. App. Ct. 913 (2003). The appellants aver AIM's attempted non-renewal failed on both counts.

The appellants'⁶ first argument is that the insurer's notice of non-renewal was ambiguous. The pertinent content of the notice, dated January 7, 2006, follows:

Notice of Non Renewal

Robert Wyatt Enterprises Inc.
30A Main Street
Winthrop, MA 02152

Policy No. AWC 7018312012005
Policy Period: 01/22/2005 TO 01/22/2006
Effective Date of Termination: 01/22/2006

Reason for Non Renewal: Renewal Premium Not Received \$4501.00

DEAR POLICYHOLDER:

Several weeks ago, you received our renewal quotation. In that offer, we stated that the deposit premium would have to reach our office by 01/02/2006 in order for you to obtain a renewal policy. That date has passed, and we have not received your deposit premium.

The purpose of this Notice of Non-Renewal is to notify you that your policy will terminate at 12:01 on your policy expiration date, 01/22/2006.

Very truly yours,

PLEASE MAKE REMITTANCE TO:

A.I.M. Mutual Insurance Co
P.O. Box 4070
Burlington, MA 01803-0970

Robert Cella
Executive Vice President
And General Manager

John M. Biggio Insurance Agency
399 Winthrop Street
Winthrop, MA 02152 Broker

There is no disputing AIM provided notice of its intention to terminate the policy to the workers' compensation rating bureau. (Tr. II [3/18/08], 81-85.)

⁶ By written declaration dated April 14, 2009, the employer adopted the Trust Fund's brief as its own, stating that its position was sufficiently presented therein.

(Ins. Ex. 8.) The judge found the notice “contained an unambiguous intent to terminate coverage” and that “the option of remitting the overdue payment” did not change “the clear intent of the notice as a termination notice.” (Dec. 7.) We cannot say the judge’s conclusion was erroneous as a matter of law. The notice identified the insured party, Robert Wyatt Enterprises Inc.; the notice is dated January 7, 2006, which was sufficiently prior to the termination date; it is entitled “Notice of Non-Renewal” in large bold-type font; the policy number is identified; the policy period is listed (1/22/05 – 1/22/06); and the reason for non-renewal is stated: “Renewal Premium Not Received \$4,501.00.” (Ins. Ex. 8.) The judge found this correspondence clearly communicated that if payment was not received, the employer’s workers’ compensation coverage would terminate on January 22, 2006.⁷ The request for remittance, under the circumstances presented here, does not require a finding that the notice of non-renewal was ambiguous. Therefore, we affirm this aspect of the judge’s decision.

The appellants next contend the judge committed reversible error when he concluded the employer received the insurer’s notice of non-renewal. (Trust Fund br. 5, 19-22.) This issue is more problematic. The judge never expressly found the employer received the notice of non-renewal, (Ins. Ex. 8), although such a finding may be inferred from the judge’s statements respecting the “green card” routinely used as a return receipt for certified mailings. The judge found:

The green card came back to the insurer with *a* signature on January 11, 2006. I find the testimony of the insurer’s witness credible that this green

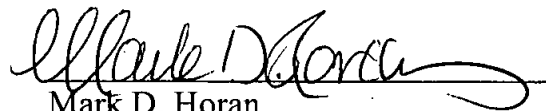
⁷ The Trust Fund cites Dearmon’s Case, *supra*, in support of its argument that the notice of non-renewal issued here must be found to be ambiguous as a matter of law. (Trust Fund br. 12-18). In Dearmon, the insurer sent a letter to its insured attempting termination of coverage prior to “the date it could be known whether the renewal offer was accepted.” 58 Mass. App. Ct. at 914. The Dearmon letter contained a renewal premium amount, a due date, and the statement that “if payment is not received by the due date . . . *either the policy will be issued with a lapse in coverage or our premium check will be returned and no policy will be issued.*” *Id.* at 913. The judge found that the non-renewal notice in this case was materially different. Moreover, in this case, prior to issuing its notice of non-renewal, the insurer mailed a letter to the employer containing a renewal quote, and requesting payment to secure coverage for the next policy term. There is no dispute that the insurer did not receive a payment from the employer prior to the policy’s termination date.

card corresponded to the termination notice.

(Dec. 7.)(Emphasis added.) The judge did not identify the insurer's witness whose testimony he credited. Two witnesses, Ms. Pauline Brown and Ms. Judi Barry, testified on behalf of the insurer concerning the notice of non-renewal. (Tr. II, 7-80, 102-130.) Neither had taken part in the mailing. (Tr. II, 15-17, 42-43, 68-70, 122-124.) The green card allegedly attached to the envelope containing the notice of non-renewal was not in evidence.⁸ Even if it had been, the insurer's witnesses admitted the green card was not addressed to the employer, and that the certified mailing receipt from the United States Postal Service contained no address. (Tr. II, 42, 68-70, 123-124.) Moreover, the "Article Number" contained in box two of the green card appears nowhere on the notice of non-renewal that was purportedly sent to the employer. (Ins. Ex. 8; Tr. II, 70, 110, 120.) Finally, the signature on the unaddressed green card could not be identified. (Tr. II, 18, 69.) Ms. Barry described the general process used by the insurer to conduct certified mailings of notices of non-renewal, and conceded the reason the "certified letter number" (the aforementioned "Article Number") is not typed on the notice of non-renewal is "[b]ecause there is such a huge amount of them." (Tr. II. 110.) In view of the foregoing, we conclude the judge could not permissibly find, in the manner described, that the employer received the notice of non-renewal.

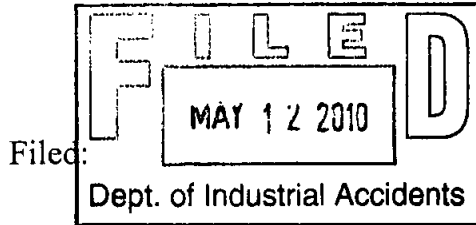
Because we are not at liberty to interpret or credit testimony, or to make findings of fact that are not required by the evidence, G. L. c. 152, § 11C, rather than reverse the decision, we recommit the case for further findings, based on the record, concerning the issue of the employer's receipt of AIM's notice of non-renewal.

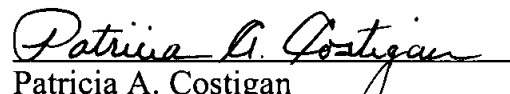
So ordered.



Mark D. Horan
Administrative Law Judge

⁸ It was marked for identification purposes only. (Dec. 2; Ins. Ex. 3; Tr. II, 6-7, 47.)

Stephen P. Visco
Board Nos. 039121-06 & 035689-06




Patricia A. Costigan
Administrative Law Judge


Catherine Watson Koziol
Administrative Law Judge