COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 052495-95; 054608-95; 055875-95; 055876-95; 052235-95**

Walter Dembitzski	Employee
Business Interiors	Employer
Metro Floors	Employer
Sienna Constructions	Employer
Pyramid Carpet Installation	Employer
Travelers Ins. Co.	Insurer
Aetna Casualty and Surety Co.	Insurer
New Hampshire Ins. Co.	Insurer
Workers Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, McCarthy and Levine)

APPEARANCES

Arthur G. Zack, Esq., for the Employee
Mark H. Likoff, Esq., for the Employee at hearing
Scott Richardson, Esq., for Travelers (Business Interiors) at hearing
Paul Moretti, Esq., for Travelers, on brief
Robert Snell, Esq., for Aetna (Metro Flooring)
Beth R. Levenson, Esq., for Aetna, on brief
Patricia A.Costigan, Esq., for New Hampshire Insurance (Sienna Construction)
Dino N. Theodore, Esq., for the Workers' Compensation Trust Fund (Metro Flooring)
Vincent F. Massey, Esq., for Trust Fund, on brief
James F. Fitzgerald, Jr., Esq., for Metro Flooring (uninsured)

MAZE-ROTHSTEIN, J. This multiple insurer case returns to the reviewing board a second time, after we recommitted it to the administrative judge for additional findings on the issue of proper cancellation of the employer's, (Metro Flooring), workers' compensation policy with Aetna. Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348 (1999). In his Amended Decision After Remand, ("Dec. II"), the judge found that Aetna properly cancelled the employer's policy for non-payment, in full

compliance with the various applicable statutory provisions, G.L. c. 152, §§ 63 and 65B, and G.L. c. 175, § 187C. (Dec. II 17, 25.) The judge again concluded that Travelers, the insurer for Business Interiors, another subcontractor, was liable under G.L. c. 152, § 18. (Dec. II 25.) Dembitzski, supra at 351. Travelers appeals, and for the reasons that follow, we now reverse the decision and order that Aetna pay the compensation ordered in the decision.

The only issue before us is whether the employer, Metro Flooring, was covered for workers' compensation with a policy of insurance with Aetna on the date of injury, December 12, 1995. Aetna claims that it cancelled its policy with the employer for non-payment of the premium due on November 5, 1995, as of December 6, 1995. (Travelers Exs. 2D and 2H.) Though the prior recommittal expressly noted that in "the interest of justice the judge may take such further evidence as is necessary to properly address the cancellation dispute," Dembitzski, supra at 359, the judge did not elect to do so. Instead he made the following findings regarding this issue on the existing record. They appear in Additional Subsidiary Findings of Fact Number 7:

> I find that Metro Flooring obtained Workers' Compensation insurance coverage on an assigned-risk basis under Section 65A from Aetna Insurance Company, for a policy period of January 5, 1995 through January 5, 1996 with an initial premium deposit of $2775.00 and was to pay the balance in three quarterly installments. . . . As of October 9, 1995, the total premium due to Aetna from Metro Flooring was $31,693.00, an amount not consistent with the terms of the contract for payment of premiums as stated in the policy. On this basis, the employer ceased to be eligible for insurance coverage, and cancellation procedures were subsequently initiated by the insurer.[1]
>
> Based on the detailed records submitted by Travelers Insurance and by Aetna Insurance, I find that Aetna properly cancelled its policy effective December 6, 1995 – one week prior to the date of Mr. Dembitzski's industrial injury. I find that the documentation submitted into evidence clearly demonstrated that Aetna complied with the requirements of section 65B and section 63 of the

[1] Although unnecessary to the disposal of this appeal, we note error in the above finding. The employer did not "cease to be eligible for insurance coverage" on the mere basis of an adjusted premium. The employer did cease to be eligible for insurance coverage when it failed to pay the adjusted premium on the date due, November 5, 1995, (Travelers Ex. 2D), which undisputed fact renders the error harmless.

> Statute, as well as the requirements of G.L. c. 175, § 187C, in canceling that policy for non-payment of premiums as follows: I find that notice of cancellation of the payment of premium was sent to the employer by certified mail, postmarked November 20, 1995 at the U.S. Postal Service's main office in Hartford, CT. [See Traveler's[] Exhibits #2I and #2J.] This meets the requirements of General Laws c. 175, Section 187C which states, in relevant part: "Such notice . . . shall be forwarded 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." I find that a separate notice of cancellation was sent to the Workers' Compensation Rating and Inspection Bureau on November 22, 1995. [See Travelers[] Ex. 2H. The original Aetna file copy of this November 17, 1995 document is stamped in red ink "Bureau Copy and card sent 11/22/95."] . . . I find the date of notice to the employer (November 20, 1995) and the notice to the rating organization (November 22, 1995) were done sufficiently timely to meet the requirements of Section 65B and Section 63, both of which require ten days prior written notice for cancellation to be effective. [Footnote omitted.] The notice to the employer was therefore mailed 15 days before the effective date of cancellation, and the notice to the Rating Bureau was mailed 13 days before that date. There is no evidence that the employer filed a notice with the Department's office of insurance within ten days after receipt of such notice that, pursuant to Section 65B, it objected to this cancellation; therefore the cancellation became effective on the date specified in that uncontested cancellation notice. The uninsured employer offered no testimony nor evidence to rebut the presumption that the timely-mailed notice was actually received, nor that it was received less than ten days prior to the effective date of cancellation, nor that there was any defect or error in the cancellation documentation. I find that on December (sic) [November] 26, 1995 the Quincy office of Aetna mailed an additional Notice of Cancellation [Travelers[] Ex. 2J] to Metro Flooring, reiterating the December 6, 1995 effective date of cancellation . . . simply [as] an administrative attempt to provide the employer with information about an amount due for coverage provided prior to the cancellation for collection purposes.

(Dec. 16-19; footnote [1] added.) The problem with this analysis is that there is no evidence of the supposed statutory notice sent from Hartford to the employer on November 20, 1995. No document of actual notice was introduced at the hearing. Travelers Ex. 2I, which the findings cite when discussing the supposed notice to the employer, merely listed twelve employers under the heading "Countrywide Certified

Mail – Direct Notice of Cancellation" and included Metro Flooring. In other words, while we have Aetna's secondary proof of mailing, that is, Aetna's internal document suggesting it gave notice, we have no direct proof of what it mailed.[2] We conclude that the evidence relied on is insufficient proof of compliance with the rigorous statutory requirements governing cancellation of workers' compensation insurance policies.

Aetna had the burden of showing that it properly cancelled the policy of workers' compensation insurance that it had with Metro Flooring, which would have provided coverage for the December 12, 1995 industrial injury under the policy period. See Armstrong's Case, 47 Mass. App. Ct. 693 (1999). Non-payment of the premium due is a valid reason for cancellation, Altinovitch's Case, 237 Mass. 130, 134 (1921), but the requirements for cancellation are strictly construed against the insurer. See Frost v. David C. Wells Ins. Agency, 14 Mass. App. Ct. 305, 307-308 (1982). We can hardly think of a more basic consideration for an insurer interposing the defense of proper cancellation than the introduction into evidence of the actual notice of cancellation. It is this burden that Aetna failed to meet in the present case despite the opportunity afforded it on recommittal from the reviewing board. See Dembitzski, supra at 359.

As the decision appropriately notes, Aetna had to send the employer its purported notice of cancellation via certified mail, pursuant to G.L. c. 175, § 187C, and that notice had to allow the employer ten days to object to such cancellation, pursuant to G.L. c. 152, § 65B. The key to the adequacy of proof here is found in "mailbox rule" law. The longstanding general rule is that the "depositing of a letter in the post office, postage prepaid, properly addressed to . . . [the] place of business . . . , is prima facie evidence that it was received in the ordinary course of mails." Eveland v. Lawson, 240 Mass. 99, 103 (1921). (Emphasis in original). This general rule is codified in G.L. c. 175 § 187C, applicable here. Evidence of the contents of the notice sent is so basic to prove the general rule that there is little case law in the Commonwealth on the necessity of this

[2] The Notice of Cancellation, dated November 26, 1995 and mailed from Quincy, Massachusetts (Travelers Ex. 2J) could not have been the document sent certified from Hartford, Connecticut on November 20, 1995, and the judge's findings to that effect are obviously correct. (Dec. 19.)

threshold element. But some early cases reveal it can be satisfied by a copy of the actual notice, id., or by direct oral testimony of the content of the notice by its author. Tobin v. Taintor, 229 Mass. 174 (1918); Fleming v. Doodlesack, 270 Mass. 271 (1930).

We have found but one Massachusetts case where there was no evidence of the actual notice and its content. Schneider v. Boston Elevated Ry. Co., 259 Mass. 564 (1927), involved statutorily required mailbox rule notice of a road defect abutting railway tracks. Six exhibits were attached to a bill of exceptions, two of which purported to be letters addressed to the city of Boston. Id. at 566. But there was no showing of what if any connection they had to the case. The Schneider court held that on the record "the plaintiffs have failed to show . . . what was written in the notices . . . . In this state of the evidence the plaintiffs have not gone far enough to avail themselves of the provisions of" the governing statutes. Id. at 567.

Likewise, in the present case the threshold elements of the mailbox rule, here codified in c. 175, § 187D, have not been met. We simply have no evidence that anything was placed in an envelope in Hartford, Connecticut and sent to the employer on November 20, 1995, or, if so placed, what its contents were. The twelve employer list, "Countrywide Certified Mail – Direct Notice of Cancellation," (Travelers Ex. 2I), does not prove the existence of any particular notice of cancellation referred to therein.[3] As stated by the court in Sarlo v. Antona Trucking Co., 90 A.D.2d 611, 456 N.Y.S. 2d 169 (A.D. 1982), "In the present case, the sole evidence that a notice of cancellation was sent to the employer is a mailing manifest which shows that a piece of certified mail was sent to the employer. However, there is nothing in the manifest or the record which demonstrated that a cancellation notice was in fact sent to the employer." Id. at 170. See also Adebahr v. 3840 Orloff Ave. Corp., 106 A.D.2d 770, 483 N.Y.S.2d 803, 804 (A.D. 3d Dept. 1984)(court affirmed workers' compensation board's determination that insurer had failed to prove lawful cancellation, rejecting its indirect evidence – return receipt and

[3] Nor does vague testimony that at best could give rise to an inference of general business practice, be said to prove anything was actually sent in the subject instance. See Frost, supra at 307-308 (statutory cancellation requirements are strictly construed against the insurer).

acknowledgment thereof – of a notice of cancellation not in evidence). The necessary nexus of proof between Aetna's list and an actual notice mailed was not proven.

Accordingly, we reverse the decision's order against Travelers and order that the benefits be paid by Aetna, due to its failure to prove lawful cancellation in accordance with the governing statutes.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: April 9, 2001