CASE NO. 6335 CRB-5-19-6 CLAIM NO. 500166444	:	COMPENSATION REVIEW BOARD
LAUREL B. BELLERIVE CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	JUNE 10, 2020

THE GROTTO, INC.
EMPLOYER
RESPONDENT-APPELLEE

and

LIBERTY MUTUAL INSURANCE COMPANY
INSURER
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant-appellee was represented by William M. O'Donnell III, Esq., Carmody, Torrance, Sandak & Hennessey, 50 Leavenworth Street, P.O. Box 1110, Waterbury, CT 06710.

The respondent-appellee, The Grotto, Inc., was represented by James P. Brennan, Esq., Brennan Law Firm, L.L.C., 207 Bank Street, Fourth Floor, P.O. Box 1071, Waterbury, CT 06721-1071.

The respondent-appellant, Liberty Mutual Insurance Company, was represented by Christopher J. Powderly, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

The respondent-appellee, Second Injury Fund, was represented by Donna Summers, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the May 24, 2019 Finding and Decision by Charles F. Senich, the Commissioner acting for the Fifth District, was heard December 20, 2019 before a Compensation Review Board panel consisting of Commissioners Peter C. Mlynarczyk, David W. Schoolcraft and Toni M. Fatone.[1]

OPINION

PETER C. MLYNARCZYK, COMMISSIONER. The respondent-insurer, Liberty Mutual Insurance Company (Liberty Mutual), has appealed from a Finding and Decision (finding) issued by Commissioner Charles F. Senich (commissioner) on May 24, 2019 which determined that it had failed to effectively cancel its insurance coverage for the respondent-employer (The Grotto), as of the date of the claimant's compensable injury and, therefore, was responsible to pay benefits for the claimant's injury. Liberty Mutual argues that as it properly notified the agent of the Commission, the National Council on Compensation Insurance (NCCI), of its intent to cancel the policy prior to the date of the claimant's injury, it complied with its statutory obligations under General Statutes § 31-348[2] and the policy was validly cancelled. The Grotto argues that subsequent communications from Liberty Mutual after the asserted cancellation notice led it to believe that the policy was still in effect, which the commissioner credits by finding The Grotto reasonably believed the coverage remained in force. Having

[1] We note that two motions for extension of time were granted during the pendency of this appeal.

[2] General Statutes § 31-348 states: "Every insurance company writing compensation insurance or its duly appointed agent shall report in writing or by other means to the chairman of the Workers' Compensation Commission, in accordance with rules prescribed by the chairman, the name of the person or corporation insured, including the state, the day on which the policy becomes effective and the date of its expiration, which report shall be made within fifteen days from the date of the policy. The cancellation of any policy so written and reported shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman. Any insurance company violating any provision of this section shall be fined not less than one hundred nor more than one thousand dollars for each offense."

reviewed the communication received by The Grotto from Liberty Mutual, we believe there was sufficient evidence to support the commissioner's conclusion that The Grotto reasonably believed as late as March of 2016 that the policy was still in force. Conclusion, ¶ J. We nevertheless believe the commissioner erred in holding that the policy was still in force on March 1, 2016, particularly in light of precedent such as Yelunin v. Royal Ride Transportation, 121 Conn. App. 144 (2010). Accordingly, we must reverse the finding.

The commissioner reached the following factual findings at the conclusion of the formal hearing. He noted the parties had submitted a stipulation of facts that focused on the terms of the policy of insurance between Liberty Mutual and The Grotto. We note that, on September 15, 2015, Liberty issued The Grotto a workers' compensation insurance policy that was scheduled to expire on August 20, 2016 – policy number WC5-31S-606763-045. [Stipulation #17.] The commissioner noted that Liberty Mutual claimed to have cancelled this policy on October 14, 2015, but NCCI had said the effective date on which this policy had been cancelled was November 3, 2015. See Findings, ¶¶ 2-4. The Grotto argued that it had paid the full premium for this policy prior to the date of that injury and reasonably believed the policy was still in effect. See Findings, ¶ 6.

In his findings, the commissioner cited several examples of communications from Liberty to The Grotto, communications he considered "inconsistent at best." Findings, ¶ 7. On February 18, 2016, Liberty Mutual issued a new endorsement for the policy in question and sent it to The Grotto. This endorsement said, in part, that "other than the endorsement changes to Policy #WC5-315-606763-045, all other terms and conditions of

this policy remain unchanged." Findings, ¶ 9. Liberty Mutual then sent a letter to The Grotto on February 24, 2016, requesting a response to an audit report warning that a "failure to submit the audit report '**may result in cancellation of your existing policy**.'" Findings, ¶ 10, (Emphasis in original finding). However, a different letter was sent by Liberty Mutual to The Grotto on the same day, which said that the policy had been cancelled on November 3, 2015. This letter also noted the result of an audit determining that there had been a $5 underpayment of the premium. The commissioner noted that, while that letter represented that the cancelled policy had only been in effect for about seven weeks, Liberty Mutual did not send back to the insured any portion of the $4,835 estimated annual premium it had paid. See Findings, ¶ 11. The commissioner also found that on March 15, 2016 Liberty Mutual sent two additional letters. One letter, referencing a revised audit, referred to the policy at issue here as having been cancelled on November 3, 2015. See Findings, ¶ 13. The other said that The Grotto's self-audit was incomplete and requested the submission of additional materials. See Findings, ¶ 12. On March 17, 2016, Liberty Mutual sent The Grotto a letter stating a policy issued to them had expired on August 20, 2015, and a final audit determined there had been a premium underpayment of $12. See Findings, ¶ 14.[3] Finally on April 15, 2016, Liberty Mutual returned to The Grotto a prorated portion of the premium which had been paid on the policy at issue here, amounting to $3,151.86. See Findings, ¶ 15.

Based on these factual findings, the commissioner concluded that the Commission had jurisdiction over this dispute because the claimant's interests were directly impacted by the position Liberty Mutual had taken denying coverage. He cited Stickney v.

[3] A motion to correct was granted which clarified that the letters referred to in Findings 12 and 14 pertained to a prior policy, not policy WC5-315-606763-045.

Sunlight Construction, Inc., 248 Conn. 754 (1999), for reaching this conclusion. Conclusion, ¶ E. He further determined that it was necessary for him to go beyond "traditional workers' compensation law" in order to properly resolve this matter. Conclusion, ¶ F. He concluded "the NCCI records are not dispositive in regard to the issues before me" and "the letters sent by Liberty to The Grotto are inconsistent at best." Conclusion, ¶¶ G-H. He further concluded "The Grotto reasonably believed that their workers' compensation insurance coverage was in place on the date of the injuries in question, March 1, 2016" and that "[p]olicy #WC5-315-606763-045 was in full force and effect, insuring the workers' compensation obligations of The Grotto on March 1, 2016." Conclusion, ¶¶ I-J. The commissioner also called Liberty Mutual's actions "unreasonable." He found that the insurer was responsible for paying all benefits resulting from the claimant's March 1, 2016 injury.

Both Liberty Mutual and The Grotto filed motions to correct. The Grotto sought, *inter alia*, a finding that the notice provided by Liberty Mutual to NCCI did not comply with General Statutes § 31-321[4], which it believes would have mandated the use of certified mail to serve the notice. The commissioner granted this motion. Liberty Mutual's motion to correct sought to substitute findings that the policy had been properly cancelled and was no longer in effect on the date of the claimant's injury, *citing* Dengler v. Special Attention Health Services, 62 Conn. App. 440 (2001), and claiming the Commission lacked jurisdiction to adjudicate what it deemed an insurance policy dispute.

[4] General Statutes § 31-321 states: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

The commissioner denied this motion in its entirety and Liberty Mutual has pursued this appeal.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The key points underlying the commissioner's conclusion that the policy remained in full force through the date of claimant's injury are twofold. Procedurally, he held the cancellation was invalid because it was not served by certified mail. Substantively, he held that he was free to look beyond the NCCI filings for evidence that the policy remained in force – evidence which showed Liberty Mutual had sent inconsistent signals to The Grotto leading it to believe the policy was still in place. Conclusion, ¶¶ G, H and I. On appeal, Liberty Mutual argues that it was not obligated to file its cancellation via certified mail and that the commissioner erred in granting the

claimant's motion to correct on that point. Liberty Mutual argues that the cancellation became effective on November 3, 2015, that the NCCI filings were binding on the commissioner, and he had no right to consider the extraneous evidence submitted by The Grotto because such evidence involved a contract dispute outside the jurisdiction of this commission.

We turn first to the commissioner's conclusion that the cancellation was ineffective because the notice did not comply with the requirements of § 31-321. [Ruling on Motion to Correct, No. 4.] While that statute calls for notices to "an employer, employee or commissioner" to generally be served by means of personal service or by means of registered or certified mail, it also allows for service in another fashion if "the rules of the commission direct otherwise." Any notice which purports to commence or cancel workers compensation insurance must be received by the chairman's office in order to be effective, and not by any specific individual within the chairman's office. The date of mailing is irrelevant. Piscitello v. Boscarello, 113 Conn. 128, 131 (1931). Thus, the typical reasons for mandating registered or certified mail are inapplicable in this context. Moreover, the "rules of the Commission" have designated NCCI and its electronic reporting system as the agent for the Commission in reporting insurance coverage and cancellation. This process has been implicitly upheld in appellate cases such as Yelunin, supra, and DiBello v. Barnes Page Wire Products, Inc., 67 Conn. App. 361 (2001). Even if we were inclined to apply a "plain meaning" interpretation of this statute pursuant to General Statutes § 1-2z and question the manner in which the Commission has been receiving notices of insurance coverage over recent decades, the

precedent in Hummel v. Marten Transport, LTD, 282 Conn. 477, 495-501 (2007) stands for the principle that long standing precedent predating this statute is unaffected. Electronic notification of cancelation through NCCI satisfies the requirements of Section 31-321, and the commissioner erred in concluding the failure to send the notice of cancellation by certified mail rendered the cancellation ineffective.

Having determined that the filing of the notice of cancellation was procedurally valid, we now consider Liberty Mutual's argument that the trial commissioner was barred from considering other evidence on the question of coverage. To do so, we must first address the process of cancelling a policy.

Under the Workers' Compensation Act, the process by which an insurer effectively cancels a policy is rather simple. Section 31-348 provides that the insurer must give written notice to the commission (in this case through NCCI), and that cancellation "will be effective fifteen days after it is filed with the chairman of the commission." Dengler, supra, at 459. Our Appellate Court has made it clear that beyond filing such a notice there are no other requirements to effectuate cancellation – even going so far as to hold that notifying the employer is not a prerequisite to effective cancellation. Yelunin, supra. In the instant case notice was given to the employer, and there is no allegation that the notice given was in any way equivocal. Therefore, absent some evidence that Liberty Mutual agreed to rescind its cancellation prior to the expiration of the fifteen-day window, we would be compelled to hold that the policy was effectively cancelled on November 3, 2015.

Liberty Mutual did not file a notice that it was rescinding its cancellation, and it argues that the absence of such a filing deprived the commissioner of the right to do

anything but affirm the cancellation. We do not agree that the absence of such a filing denied the commissioner the right to consider the employer's evidence. An insurer is obligated to report its risks to the commission and is bound by the coverage representations it makes. Piscitello, supra, at 131 (even if the insurer erroneously reported a policy that never actually went into effect, "as long as it remains of record the insurer cannot deny that the policy reported is in effect."). Those filings are only binding as to the insurer, however. An employer who has contracted with an insurer for coverage will not be denied the opportunity to present independent evidence of the existence of coverage simply because an insurer neglected to report the existence of the policy. See, e.g., Lee v. Empire Construction Special Projects, LLC, 5751 CRB-2-12-5 (August 8, 2013), and Dibello v. Barnes Page Wire Products, 3970 CRB-7-99-2 (March 2, 2000), *aff'd*, 67 Conn. App. 367 (2001), *cert denied*, 260 Conn 915 (2002). If an insurer reaches an agreement to rescind its threatened cancellation but fails to notify NCCI, the employer cannot be denied an opportunity to offer evidence to set the record straight. In this case, notwithstanding the absence of a notice to NCCI rescinding the cancellation, the commissioner did have the right to look to other evidence that might show that the cancellation did not actually take place, as scheduled, on November 3, 2015.

In this case, that other evidence consists of the communications between Liberty and The Grotto. While The Grotto focuses on the content of that communication, we believe the timing is a critical point. Had Liberty Mutual acted in some manner to rescind its original notice within 15 days of its notice to NCCI, the original policy would have remained in effect. Liberty Mutual issued its notice of cancellation on October 13, 2015. A review of the commissioner's findings and of the facts stipulated to by the

parties at the formal hearing shows that there was no communication between Liberty Mutual and The Grotto until after the effective date of the termination. Under the circumstances, any conclusion that The Grotto was misled into thinking that Liberty's decision to cancel the policy had been rescinded prior to cancellation would be without support in the record. On the record presented in this forum, we must conclude that the policy's coverage ended on November 3, 2015.

We believe Yelunin dictates this result. In Yelunin, the Second Injury Fund appealed this tribunal's decision[5] that a valid cancellation notice from the carrier to the insured had been received prior to the claimant's date of injury. The carrier argued to our Appellate Court that the entire issue of whether the insured received a valid cancellation notice was irrelevant as, in its interpretation of the law, once the Commission received such a notice and fifteen days had passed, the cancellation was finalized regardless of whether the insured had received notice. Our Appellate Court adopted that position:

> Cancellation of a workers' compensation insurance policy occurs in accordance with § 31–348. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 459, 774 A.2d 992 (2001). Section 31–348 provides in relevant part that '[t]he cancellation of any [workers' compensation insurance policy] shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman [of the workers' compensation commission].'

Yelunin, supra, 149. The Court concluded that once notice of the cancellation was received by the commission, the precedent in Dengler, supra, meant no further action by the carrier was required to cancel the policy:

> Indeed, '§31–348 has been interpreted as protecting employees or anyone examining coverage records in the commissioner's office. In that regard, an employer's understanding as to when coverage

[5] Yelunin v. Royal Ride Transportation, 5274 CRB-1-07-9 (September 5, 2008), *aff'd*, 121 Conn. App. 144 (2010).

> terminated is largely irrelevant ....' (Emphasis added.) Dengler v. Special Attention Health Services, Inc., *supra*, at 461, 774 A.2d 992. Therefore, the board's review of the adequacy of Hartford's notice to Royal was unnecessary, as Hartford was not required to provide notice of the cancellation to Royal in order for the cancellation to become effective.

Id.

We are mindful that in cases such as Lee, *supra*, we permitted the conduct of the insurer to be considered in determining that valid insurance coverage was in place on the date of the injury.[6] As such, we will consider the argument that the events that took place after the effective date of cancellation were material to the question of whether coverage continued beyond November 3, 2015 or was, perhaps, reinstated.

The commissioner did not specifically articulate the basis for his conclusion that the policy remained in force. He did, however, cite several factors which we must assume formed the factual basis for his conclusion: (1) that Liberty Mutual did not return any of the premium until after the work injury; (2) that Liberty Mutual issued an endorsement in February 2016; and (3) that Liberty Mutual sent letters saying the policy "may" be cancelled if The Grotto did not provide certain information.[7]

The finding that Liberty Mutual did not return any portion of the premium until after the work accident might be relevant to the allegation that the employer honestly believed it still had insurance. However, for the failure to refund the premium to be

[6] We note that our precedent has stated an insurance carrier can be held to have undertaken to insure an employer either by filing a policy with NCCI or by having "induced reliance by issuing an insurance certificate and subrogation waivers," Lampo v. Angelo's Pizza East Rock, L.L.C., 6134 CRB-3-16-10 (January 31, 2018), *appeal withdrawn*, A.C. 41368 (February 21, 2018) *citing* Lee v. Empire Construction Special Projects, LLC, 5751 CRB-2-12-5 (August 8, 2013), *appeal withdrawn*, A.C. 35991 (February 6, 2015).

[7] While the trial commissioner also concluded that Liberty Mutual's actions "have been and are unreasonable," his finding does not suggest he considered this a legal basis for imposing liability on the insurer.

evidence that Liberty intended its coverage to continue after November 3, 2015, the delay in making the refund would have to be inherently inconsistent with the claimed cancellation. We can find no evidence in the record to suggest that Liberty Mutual had an obligation to return the unused portion of the premium prior to completion of the various audits.

The same is true of the fact that the insurer issued an endorsement to the policy on February 28, 2016, nearly three months after cancellation. Findings, ¶ 9. While the receipt of an endorsement from Liberty Mutual may well have supported the employer's subjective belief that the policy was still in force, it could only be evidence that the policy actually was still in place if the issuance of such an endorsement was logically or legally inconsistent with the notion that the policy had previously been cancelled. Since the cancellation of this policy did not render it void *ab initio*, Liberty Mutual's coverage remains in force and effect for any claims that might arise for injuries occurring prior to November 3, 2015. For the time prior to November 3, 2015, Liberty Mutual and The Grotto still have a contractual relationship, with ongoing mutual obligations. As such, the mere fact an endorsement was issued in February 2016 is not inherently inconsistent with termination of coverage as of November 3, 2015. In this case, the changes that were made to the policy by the endorsement are not disclosed in either the commissioner's findings or the stipulation of the parties. Absent evidence of the content of the endorsement there would be no factual basis to conclude the changes made by the endorsement in any way acted to extend Liberty Mutual's coverage for injuries after November 3, 2015.

In addition to the retention of the premium and the issuance of an endorsement, the trial commissioner cites the inconsistent letters sent by Liberty Mutual in the months following the notice of cancellation. While some of the letters Liberty Mutual sent after November 5, 2015 specifically stated the policy had been cancelled, others only threatened possible cancellation. See, e.g., Findings, ¶ 10.

While we cannot dispute that these conflicting letters may have led The Grotto to *believe* the coverage was still in place, they cannot support a conclusion that the coverage under the policy actually did continue, notwithstanding the November cancellation notice. The holding in Yelunin makes it clear that the employer's subjective belief is immaterial. The sole question before the commissioner was whether the policy's coverage remained in force after the November 2015 cancellation.[8] Given the substantively limited powers of this forum, a conclusion by the commissioner that coverage continued would require competent evidence that Liberty Mutual *intended* the coverage to continue. While some of the letters Liberty Mutual sent said only that the policy "may" be cancelled, others expressly stated the policy *had* been cancelled in November 2015.

We believe that after the expiration of the 15-day period following notice of cancellation only unequivocal evidence of an intent to continue or reinstate coverage would be sufficient to support the commissioner's conclusion that Liberty Mutual's

[8] Whether Liberty Mutual was justified in cancelling its policy, or whether it breached its contract with The Grotto by doing so, are questions that must be determined in another forum. If the cancellation was legally completed and there had not been a reinstatement of this policy (be it documented with NCCI or not), our commission lacks the ability to adjudicate these disputes. See Stickney, supra.

coverage remained in force on March 1, 2016. The record before the trial commissioner simply did not contain such evidence.

As we find the May 24, 2019 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fifth District, contrary to law, we herein reverse the finding.

Commissioners David W. Schoolcraft and Toni M. Fatone concur in this Opinion.