

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Labor & Industry,
Uninsured Employers Guaranty Fund,
Petitioner

v.

Workers' Compensation Appeal
Board (Lentine and Liberty Mutual
Insurance Company),
Respondents

James Lentine,

Petitioner

v.

Workers' Compensation Appeal
Board (Volpe Tile & Marble, Inc.
and Liberty Mutual Insurance
Company),
Respondents

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: November 20, 2013

This consolidated matter¹ involves cross-petitions for review of orders of the Workers' Compensation Appeal Board (Board) dated December 21, 2012 and February 21, 2013, that affirmed in part, and reversed in part, the August 27, 2010 decision of the Workers' Compensation Judge (WCJ). In its decision, the WCJ granted the Claim Petition of James Lentine (Claimant) against Volpe Tile and Marble (Employer), granted a Joinder Petition filed by Employer against Liberty Mutual Insurance Company (Liberty Mutual), and dismissed as moot a Claim Petition filed against the Uninsured Employer Guaranty Fund (UEGF). After Liberty Mutual appealed, the Board, by order dated December 21, 2012, affirmed the WCJ's grant of the Claim Petition and reversed the WCJ's grant of Employer's Joinder Petition against Liberty Mutual. By amended Order dated February 21, 2013, the Board reversed the dismissal of UEGF on the grounds that, at the time Claimant's injuries were sustained, Employer failed to insure or self-insure its workers' compensation liability under Section 305 of the Pennsylvania Workers' Compensation Act (Act),² 77 P.S. § 501, triggering UEGF's statutory obligation in the event an employer defaults on the payment of benefits to a claimant. For the reasons that follow, we affirm.

On April 21, 2009, Claimant suffered a work injury to his lower back and left leg, in the course of scope of his employment with Employer, and reported his injury to Employer that day.³ (Certified Record (C.R.), WCJ 8/27/2010

¹ The appeals were consolidated by this Court's order dated May 31, 2013, wherein the Uninsured Employers Guaranty Fund was designated petitioner under Pa. R.A.P. 2136.

² Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2708.

³ Claimant's injuries were sustained while carrying heavy stone through the stairwell to the basement of a home where Employer was installing a wet bar. (9/29/2009 Notes of Testimony before WCJ at 10.)

Opinion and Order (WCJ Opinion), Findings of Fact (F.F.) ¶¶1, 7, 11.) In the Joinder Petition, Claimant alleged that Employer had workers' compensation insurance with Liberty Mutual at the time of the alleged work incident. (WCJ Opinion, F.F. ¶2.) Liberty Mutual billed Employer \$112,000 in annual premium for an insurance policy that covered the period from October 18, 2008 through November 1, 2009, and Employer paid the required deposit of twenty-five percent, or \$28,273.25, plus three installments of approximately \$10,700 each, in December 2008, January 2009, and February 2009. (WCJ Opinion, F.F. ¶7.)

After Employer's March installment payment was rejected for insufficient funds, Liberty Mutual sent a cancellation notice dated March 9, 2009, advising Employer that failure to pay prior to a listed cancellation date of April 13, 2009 (thirty-five days after the issuance of the cancellation notice) would result in cancellation of the policy. (*Id.*) Employer did not pay prior to the listed cancellation date, but on April 21, 2009, the day that Claimant was injured, Employer mailed the March installment. (*Id.*)

After Claimant reported his injury, Employer notified Liberty Mutual, and Claimant testified that he received a telephone call from a claims adjuster at Liberty Mutual the next day notifying him that his claim had been accepted and that he would be getting a prescription card in the mail. (C.R., 9/29/2009 Notes of Testimony before WCJ (9/29 N.T.) at 15.) Claimant testified that on May 7 or 8, 2009, approximately two weeks after his injury, he received another call from the insurance adjuster, who told him that there was no insurance, and he would not be able to issue Claimant a check. (9/29 N.T. at 19.)

Before the WCJ, Liberty Mutual's supervising accountant testified that Liberty Mutual received the installment payment from Employer on April 30,

2009, more than two weeks after the cancellation became effective, and stated that receipt of the check had no impact on cancellation of the policy. (C.R., 4/12/2010 Notes of Testimony before WCJ (4/12/2010 N.T.) at 15.) Liberty Mutual cashed Employer's check for the March installment amount on May 4, 2009. (WCJ Opinion, F.F. ¶7.) On June 24, Liberty Mutual sent Employer a refund check for unearned premium in the amount of \$22,939. (*Id.*) Liberty Mutual's supervising accountant testified with regard to a policy endorsement dealing with return of unearned premium that states as follows:

1. If this policy is cancelled and there is unearned premium due you:
 - a. If the Company cancels, the unearned premium will be returned to you within 10 business days after the effective date of cancellation.
 - b. If you cancel, the unearned premium will be returned within 30 days after the effective date of cancellation.
2. Because this policy was written on the basis of an estimated premium and is subject to a premium audit, the unearned premium specified in 1 a. and 1 b. above, if any, shall be returned on an estimated basis. Upon our completion of computation of the exact premium, an additional return premium or charge will be made to you within 15 days of the final computation.

(C.R., Pennsylvania Act 86-1986 Endorsement, 4/12/2010 N.T., Exhibit C)

In the Opinion, the WCJ summarized the testimony of Liberty Mutual's supervising accountant, and found that although he acknowledged that Liberty Mutual did not return an estimated amount of unearned premium as

required by item 2 of the endorsement, the supervising accountant expressed his belief that Liberty Mutual was entitled to withhold the refund pending a mail audit of the policy. (WCJ Opinion, F.F. ¶8.)

The WCJ found that Liberty Mutual accepted Claimant's claim for compensation and exercised control over Claimant's medical treatment while in possession of all information necessary to make a coverage determination regarding the claim, and was therefore estopped from denying coverage. (WCJ Opinion, Conclusions of Law at ¶6.) Further, the WCJ concluded that Liberty Mutual accepted payment of the past-due premium and did not return it for more than two months following the effective date of cancellation, and that such acceptance of payment constitutes valid consideration and acceptance of the offer to reinstate benefits. (WCJ Opinion, Conclusions of Law at ¶5.)

In its December 21, 2012 Opinion and Order, the Board examined the language of the insurance policy and determined that the return of the unearned premium was not a requirement for the cancellation of the policy, and therefore the WCJ erred in finding that Liberty Mutual failed to comply with the terms relating to cancellation. (12/21/2012 Board Opinion and Order at 6-7.) The Board distinguished *Buff v. Fetterolf*, 215 A.2d 327 (Pa. Super. 1966), a Pennsylvania Superior Court case on which the WCJ relied, and found that Liberty Mutual effectively cancelled Employer's policy, and unlike *Buff*, nothing in the record indicated that Liberty Mutual considered Employer's policy to be reinstated. The Board stated:

In *Buff*, the insurer sent a notice of cancellation to the employer on May 23, 1962, with an effective date of cancellation of June 8, 1962, for non-payment of premium. On June 14, 1962, an employee was injured

and notice was given to the insurer. Also on that date, the employer sent a check in the full amount of the premium to the insurer. The insurer cashed the check, marked it “paid in full” for the policy, and sent notice to the rating bureau that the policy was reinstated. The Court held that it was possible for a contract that has been cancelled to be renewed or reinstated by a proper offer, acceptance and consideration. *Id.* at 329. In *Buff*, the offer was the form of a check for the full amount of the premium billed; the acceptance was the cashing of the check, marking it “paid in full,” and notice to the rating bureau that the policy was reinstated; and the consideration was the amount of the check. The Court held that the policy was reinstated in accordance with the company’s normal procedures and confirmed by the notice to the rating bureau, which the insurer later attempted to rescind. *Id.* at 330.

(*Id.*) The Board reversed the WCJ’s grant of the Joinder Petition and affirmed the grant of Claimant’s Claim Petition, but did not address the Claim Petition against UEGF that had been dismissed as moot. On February 14, 2013, the Board granted Claimant’s Petition for Rehearing and, on February 21, 2013, without oral argument, amended its December 21, 2012 Opinion and Order to reverse the dismissal of UEGF, and ordered that if Employer defaults on the payment of benefits to Claimant, UEGF shall make indemnity and medical payments. (2/21/2013 Board Order.) The Board directed that in all other respects, its December 21, 2012 Opinion and Order remained in effect. (*Id.*) This appeal followed.⁴

⁴ This Court’s review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights have been violated. *American Road Lines v. Workers’ Compensation Appeal Bd. (Royal)*, 39 A.3d 603, 610 n.6 (Pa. Cmwlth. 2012). Where an appeal presents a question of law, our scope of review is plenary. *Id.*

UEGF raises three issues for our review. First, UEGF argues that neither Claimant nor Liberty Mutual appealed from the portion of the WCJ's order that dismissed as moot the Claim Petition filed against UEGF, and have thus waived the issue of UEGF's liability here. Second, UEGF contends that Liberty Mutual's failure to adhere to the terms of its policy precluded it from validly cancelling its policy. Finally, UEGF claims that Liberty Mutual's actions subsequent to the alleged cancellation estop it from disclaiming coverage, and its acceptance and deposit of payment constituted an offer and acceptance that reinstated the policy.

Before this Court, Claimant concurs in UEGF's arguments that Liberty Mutual's cancellation of the policy was invalid and that Liberty Mutual is estopped from disclaiming coverage due to its acceptance of the underlying work injury claim; however, Claimant argues that UEGF remains liable for Claimant's benefits, in the event the dismissal of Liberty Mutual is affirmed by this Court.⁵

As an initial matter, we reject UEGF's argument that the issue of its liability was never properly before the Board, and that it was denied the opportunity to address its potential liability. In August, 2009, Claimant filed a Claim Petition against Employer and UEGF, UEGF timely answered the petition, and it was consolidated for decision together with Claimant's original Claim Petition and the Joinder Petition filed by Employer. (WCJ Opinion, F.F. ¶4.) Throughout the proceedings before the WCJ, UEGF was represented by counsel, and counsel assumed an active role in each of the hearings and depositions. UEGF

⁵ Before this Court, Employer failed to file a brief. On August 30, 2012 Employer filed an Out of Existence/Withdrawal Affidavit with the Pennsylvania Department of Revenue. (Certified Record, Employer's counsel's Motion to Support Praecipe to Withdraw as Counsel, with attachments.)

was duly served with notice of Liberty Mutual's appeal to the Board, but did not choose to participate. Following the issuance of the Board's December 21, 2012 decision dismissing the Claim Petition against Liberty Mutual, and Claimant's filing of a Petition for Rehearing to address the liability of UEGF, UEGF filed a Petition for Review with this Court "to protect its potential interest in the outcome of this matter"; however, that Petition for Review was stricken as inoperative by this Court after the Board granted a rehearing, and on March 25, 2013, following the Board's issuance of the amended order, UEGF filed a Petition for Review of both the original and the amended Board order. (C.R., 2/20/2013 Commonwealth Court Order; 3/25/2013 UEGF Petition for Review.) By its December 21, 2012 Opinion and Order, the Board determined that Employer's workers' compensation insurance policy with Liberty Mutual had been cancelled and was not in place at the time Claimant sustained his injuries, and as result, established that Employer had failed to insure or self-insure its workers' compensation liability under Section 305 of the Act, 77 P.S. §501. By its February 21, 2013 Order, the Board amended its December 21, 2012 Opinion and Order to reverse the dismissal of UEGF, and ordered that Employer was responsible to make payment of indemnity and medical benefits due Claimant, and if Employer defaulted on the payment of such benefits, UEGF's *statutory* obligation to pay benefits would be triggered under Section 1603(b) of the Act, added by Section 7 of the Act of November 9, 2006, P.L. 1362, 77 P.S. §2703(b).

We turn next to UEGF's and Claimant's argument that Liberty Mutual's failure to return to Employer a sum representing the estimated amount of unearned premium, within ten days of the effective cancellation date, resulted in an invalid cancellation of the workers' compensation insurance policy. Here, the

uncontroverted facts establish that Liberty Mutual followed the requirements set forth in its policy with regard to cancellation for non-payment of premium. The policy specifies: “[w]e may cancel this policy. **We must mail or deliver to you not less than ten days advance written notice stating when the cancel[l]ation is to take effect.** Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice. ...[t]he policy period will end on the day and hour stated in the cancel[l]ation notice.” (C.R., Record Exhibit LMIC-1, Policy at 10 (emphasis added).)

Employer acknowledged receipt of written Notice of Cancellation, indicating that the policy would be cancelled effective April 13, 2009 unless a premium installment payment of \$10,693.82 was received; Employer’s President testified that he did not mail a check for this premium installment until April 21, 2009, the date of Claimant’s injury, because it was not until then that funds were available in his bank account. (3/30/2010 N.T. at 22-23, Exhibit B, March 9, 2009 Notice of Cancellation.)

Liberty Mutual’s supervising accountant testified that the Notice of Cancellation was issued on March 9, 2009 and sent by certified mail to Employer, and he stated that because the installment amount was not received by the effective date of cancellation, the policy was not reinstated. (4/12/2010 N.T. at 13, 15.) He testified that Liberty Mutual received Employer’s check on April 30, 2009 and it was cashed on May 4, 2009; he stated that payments are sent directly to a lockbox at Liberty Mutual’s bank, and posted to Liberty Mutual’s bank account on the following business day. (*Id.* at 15, 24.) The supervising accountant explained that notwithstanding the cancellation of Employer’s policy on April 13, 2009, Liberty Mutual would not have immediately returned any premium payments received

after the effective cancellation date; he testified that unearned premiums are not calculated and returned until final audits, based on form audits mailed to and completed by the policy holder, are completed. (4/12/2010 N.T. at 16, 25.) The supervising accountant stated that once credits are posted to an individual account, any amounts due a policy holder are disbursed immediately. (*Id.*) The supervising accountant testified that the true exposures are not known until the end of the year, and there was a possibility that Employer could have owed more money than the amount presented in the March installment for the portion of the year preceding the cancellation date. (4/12/2010 N.T. at 44.)

We find no error in the Board's determination that the cancellation of the policy was valid. The sole limitation set forth in the policy regarding cancellation is the requirement that notice must be provided at least ten days in advance of the cancellation. Claimant and UEGF rely on the venerable *Gosch v. Firemen's Insurance Co.*, 33 Pa. Super. 496 (1907), and its holding that, under the terms of a fire insurance policy (where the insured had paid the premium for the entire policy period to a broker, and the broker had never delivered the premium to the insurance carrier), return of the unearned premium was a condition precedent to effective cancellation by the insurer. However, *Gosch* has more recently been distinguished by *Turney v. Allstate Insurance Co.*, 74 A.2d 730 (Pa. Super. 1950), where the Superior Court noted that "in the *Gosch* case and similar cases the contracts involved were somewhat ambiguous and capable of a construction which, under equitable principles, required the rescinding party to return the premium as a condition of cancellation." *Turney*, 74 A.2d at 731. The *Turney* court opined, "[i]n the present case the contract is unambiguous and expressly gives defendant the right to cancel upon notice; return of the premium is treated separately, and is to

take place as soon as practicable or within a reasonable time after notice of cancellation.” *Id.* Where the right to cancel an insurance policy is expressly reserved in the contract itself, then the extent of the right and the conditions upon which it may be exercised must be determined by reference to the contract. *Clairton City School District v. Mary*, 541 A.2d 849, 851 (Pa. Cmwlth. 1988). As noted by the Board, while a policy endorsement requires Liberty Mutual to return an estimated amount of the unearned premium within ten days after the effective date of cancellation (with any additional unearned premium owed to be returned within fifteen days of the final audit computation), there is nothing in the policy to suggest that the failure to do so would invalidate the cancellation of the policy and, in effect, reinstate the policy.

Finally, we address the argument that Liberty Mutual’s actions subsequent to the alleged cancellation estop it from disclaiming coverage, and that its acceptance and deposit of payment constituted an offer and acceptance that reinstated the policy. The record establishes that Liberty Mutual contacted Claimant one day after Liberty Mutual received notice of the injury from Employer to inform him that his claim had been accepted, and advise him that he would be receiving a prescription card. However, Claimant testified that he knew on the day he sustained his injuries that Employer had “an issue” with insurance, and that it was approximately two weeks later that he was informed by Liberty Mutual that there was no coverage. (9/29/2009 N.T. at 47-48, 50.) The record also establishes that within four days after the date Employer’s check for the late installment was cashed, Liberty Mutual had notified Claimant that Employer lacked insurance coverage. We cannot agree with UEGF that Liberty Mutual, by its actions, provided either Claimant or Employer with sufficient reasons to rely on the

existence of coverage, nor do we accept that Liberty Mutual's actions in receiving and depositing Employer's installment check after the effective date of cancellation constituted, in any way, a reinstatement of the policy. As noted by the Board, the WCJ's reliance on *Buff v. Fetterolf* is misplaced here, where there is no record evidence that would indicate an intention by Liberty Mutual to reinstate the cancelled policy.

Accordingly, we affirm the December 21, 2012 and February 21, 2013 orders of the Board.

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Labor & Industry,	:	
Uninsured Employers Guaranty Fund,	:	
Petitioner	:	
v.	:	No. 445 C.D. 2013
Workers' Compensation Appeal	:	
Board (Lentine and Liberty Mutual	:	
Insurance Company),	:	
Respondents	:	
	:	
James Lentine,	:	
Petitioner	:	
v.	:	No. 480 C.D. 2013
	:	
Workers' Compensation Appeal	:	
Board (Volpe Tile & Marble, Inc.	:	
and Liberty Mutual Insurance	:	
Company),	:	
Respondents	:	

ORDER

AND NOW, this 20th day of November, 2013, the December 21, 2012 and February 21, 2013 orders of the Workers' Compensation Appeal Board in the above-captioned matters are AFFIRMED.

JAMES GARDNER COLINS, Senior Judge