

**DYER STRAIGHTS
TRANSPORTATION, INC.
v.
MAINE EMPLOYERS' MUTUAL
INSURANCE COMPANY**

Docket NO. INS-05-104

]
]
]
]
]
]
]

DECISION AND ORDER

This adjudicatory proceeding has been convened on the petition filed by Dyer Straights Transportation, Inc., pursuant to 24 A M.R.S.A. §§ 229 and 2908(6), contesting the cancellation of its workers' compensation insurance policy by the Maine Employers' Mutual Insurance Company ("MEMIC"), pursuant to 24-A M.R.S.A. § 2385-F, for nonpayment of an outstanding premium debt. Following a public hearing before the Superintendent on August 5, 2005,¹ the Petition is denied, as discussed more fully below, because Dyer Straights' repeated failures to pay premium on time constituted valid grounds for cancellation and Dyer Straights remained in default on its obligations at the time the policy was cancelled. I also find, however, that there is room for improvement in MEMIC's collection practices; improvement that might make tragic situations like this one less likely to occur.

Factual and Procedural History

The parties are in substantial agreement on the material facts. Unlike most lines of insurance, workers' compensation premiums are not finally determined until after the policy expires. Premium is billed on an estimated basis during the policy period, and then the insurer conducts an audit after policy termination to determine the employer's actual payroll during the policy term and to verify that it was classified correctly by type(s) of business for rating purposes. Because Dyer Straights has been a growing business and has chosen to estimate its anticipated payroll each year on the basis of its previous year's experience, the audit always results in additional premium owed.

Dyer Straights' 2004–05 policy period terminated on January 30, 2005. After conducting the premium audit, MEMIC sent Dyer Straights a bill for \$6747.² Dyer Straights did not dispute the amount owed. However, David Dyer, the owner, testified that Dyer Straights could not always afford to pay its bills as they came due, and would prioritize outstanding bills according to their urgency. In particular, he testified that because insurance is a necessity, a cancellation notice draws immediate attention and he makes sure to cure the default in time to avoid cancellation.

Accordingly, Dyer Straights did not pay the audit bill immediately, MEMIC sent notice on March 30 that the 2005–06 policy would be cancelled for nonpayment of premium on May 5, and Dyer Straights entered into an installment payment agreement with MEMIC on April 5. Under the terms of the agreement, MEMIC

rescinded the May 5 cancellation, and Dyer Straights agreed to pay three equal installments of \$2249 by April 8, May 8, and June 8. The agreement was a form agreement, and testimony on behalf of MEMIC by Craig Reynolds, MEMIC's Product Development Manager, suggested that such agreements with policyholders are not uncommon.

The check for the April 8 installment was dated April 7 and received by MEMIC on April 13. Mr. Dyer testified that checks were not always sent the same day they were written. Because MEMIC had received the April payment shortly after the due date, MEMIC accepted the payment and did not initiate the cancellation process or exercise its right to accelerate the debt at that time. However, the check for the May 8 installment, dated May 13, was not received by MEMIC until May 24.

Meanwhile, on May 12, MEMIC sent a notice of cancellation to Dyer Straights, reciting a "Past Due Balance" of \$4498 (comprising both of the installments then remaining outstanding) and a cancellation date of June 17. MEMIC also sent an "Agent's Copy" of the cancellation notice to its insurance producer, the Champoux Agency in Lewiston. Dyer Straights offered into evidence a copy of the Agent's Copy that bears the handwritten note "on or around 16" next to the May 12 date, but was also date-stamped "MAY 13 2005" at the bottom of the page.

MEMIC subsequently sent Dyer Straights several additional letters, which recite that they were also copied to the Champoux Agency. A collection notice dated May 18 recited that "The audit premium in the amount of \$4,498.00 is past due for payment," and requested that "If payment has not been made, please send your remittance in full within 15 days from the date of this letter." A similar notice dated May 24 recited that the past-due balance was \$2,249.00, followed by a more strongly worded notice dated June 8 which added that "Previous requests for payment have not been answered" and warned: "We have given you ample opportunity to respond to our requests for payment. Unless full payment is received within 10 days, we will have no alternative but to forward this delinquent premium to our Collection Agency. Should you have coverage with another carrier, we will be requesting that said carrier issue a cancellation." Finally, MEMIC sent a Cancellation Memorandum, dated June 20, confirming that the policy was cancelled as of June 17.

Dyer Straights' check for the third and final installment was dated June 16, but MEMIC did not receive it until June 27.³ MEMIC promptly deposited the check. Later that same day, one of Dyer Straights' drivers was injured in an accident. Dyer Straights reported the injury on June 28, and MEMIC denied the claim on the ground that the policy was no longer in force. Mr. Dyer testified that he and his staff were unaware of the cancellation until that day, and the Cancellation Memorandum dated June 20 bears a handwritten note "Received on 6/28/05." Mr. Dyer asked the Champoux Agency whether they had received any notice,

and the agency faxed Dyer Straights the Agent's Copy of the Cancellation Notice on June 30.

On June 30, Dyer Straights obtained a replacement policy from MEMIC and filed a complaint against MEMIC with the Bureau of Insurance disputing the cancellation.

Three basic issues are raised by the Petition:

- Was the notice of cancellation valid?
- If the notice was valid, did Dyer Straights take sufficient actions before June 17 to prevent the cancellation?
- If the policy was cancelled as scheduled on June 17, did Dyer Straights take sufficient actions on or after June 17 to reinstate the policy?

Validity of Notice

The first question presented is whether MEMIC sent Dyer Straights a valid and timely notice of cancellation. It is undisputed that valid grounds for cancellation existed on May 12, 2005, and that contents of the notice were sufficient. However, as noted above, Dyer Straights contends that it did not receive the notice in advance of the cancellation.

In general, 24-A M.R.S.A. § 2908(5)(A) prohibits an insurer from cancelling an insurance policy within the scope of the statute until "10 days after receipt by the insured of a notice of cancellation." However, to minimize subjective inquiries regarding whether and when notice was actually received by the insured, 24-A M.R.S.A. § 2908(5)(C) provides that "A post-office certificate of mailing to the named insured at his last known address is conclusive proof of receipt of notice on the 3rd calendar day after mailing." This does not resolve all problems that might arise, since the third calendar day after mailing in this case was May 15, 2005. The Superintendent takes official notice, pursuant to 5 M.R.S.A. § 9058, that May 15, 2005 was a Sunday and that the United States Postal Service does not conduct regular mail deliveries on Sundays.

However, the Cancellation Control Act applies a different timeliness standard for workers' compensation policies. Pursuant to 24-A M.R.S.A. § 2908(5)(A), "Notice of cancellation of workers' compensation insurance is subject to Title 39-A, section 403, subsection 1," which relies on the date of mailing rather than the date of actual or presumed receipt: "The insurance may not be cancelled within the time limited in such policy for its expiration until at least 30 days after the insurance company mails to the board and to the employer a notice of the cancellation of the insurance." Because the notice was mailed on May 12, which is more than 30 days before June 16,⁴ the notice to Dyer Straights was timely. The Superintendent further takes official notice, pursuant to 5 M.R.S.A. § 9058, that according to the records of the Workers' Compensation Board, notice of the Dyer Straights cancellation was received by the Board electronically on May 11.

Although Dyer Straights argued that the reference to a "post-office certificate of mailing" in 24 A M.R.S.A. § 2908(5)(C) establishes a requirement that notice be sent by certified mail, there is a difference between a certified mail receipt and a "certificate of mailing," which is a document by which the post office verifies that it has processed a letter or letters on the date marked to the listed addressee or addressees.

This question is academic in any event, because even if Dyer Straights had been correct that certified mail is necessary to trigger the conclusive presumption of Paragraph 5(C), I would still find by a preponderance of the evidence that the notice was in fact mailed to the correct address on May 12, more than 30 days before the cancellation was scheduled to take effect. MEMIC has provided a copy of a May 12 certificate of mailing, which indicates that Dyer Straights was among the eleven addressees listed. According to the certificate, all eleven of the documents referenced were cancellation notices with effective dates of June 17. Although the post office does not verify the contents, there is no basis for speculating that the contents were anything other than as described, Dyer Straights has provided no evidence of any other correspondence from MEMIC mailed that day, and Dyer Straights does not dispute that the address on the certificate listed for Dyer Straights is the correct one.

I therefore conclude that Dyer Straights was sent sufficient and timely notice that its policy was subject to cancellation. Furthermore, even if Mr. Dyer is correct that the notice was lost somewhere along the way and that he and his staff had no knowledge that cancellation was imminent, he was well aware that Dyer Straights was not in compliance with the agreed payment schedule and that the consequences of noncompliance could include policy cancellation.

Effect of the May Premium Check

Next, Dyer Straights contends that even though it was half a month late on the payment that was due May 8, the payment was nevertheless sent in time to avoid cancellation. There is no valid basis for such a claim. It certainly cannot arise out of any communication from MEMIC, which never explicitly promised any kind of grace period at all. By its terms, the cancellation notice was unconditional, and did not offer reinstatement to Dyer Straights on any terms whatsoever. It simply stated that "your Insurance will cease at 12:01 A.M. on the date shown above" because of a "DEFAULT ON PAYMENT PLAN." MEMIC never rescinded that cancellation notice, and never told Dyer Straights anything that even suggested that the cancellation notice might be rescinded. The collection notice that followed warned of more serious consequences if the outstanding debt remained unpaid, but did not reference the cancellation at all, let alone suggest that cancellation might be avoided if the debt were paid promptly.

Unfortunately, the language of the cancellation notice may have been plain and clear, but it was not accurate. Cancellation was by no means inevitable at that

point. Mr. Dyer testified to a belief – supported by experience – that paying an overdue premium promptly after receiving a cancellation notice would be sufficient to avoid the cancellation. Mr. Reynolds did not dispute this, but rather corroborated it by noting that on some occasions, MEMIC would even reinstate coverage retroactively upon receiving payment shortly after the cancellation date.⁵

There is nothing wrong with MEMIC's reinstatement practices. Indeed, to do otherwise would be inappropriate, since MEMIC is a statutory carrier of last resort. For other insurers, it is a matter of case-by-case business judgment whether or not to hang onto an account that has trouble paying its bills on time but has a history of making good in the end. MEMIC, however, has neither the need nor the ability to exercise such judgment, because MEMIC is required by law to make workers' compensation coverage available to all employers not otherwise covered, unless they have an outstanding premium debt or fail to comply with reasonable safety requirements. 24 A M.R.S.A. § 3711. Neither the public interest nor MEMIC's own self-interest is served by requiring an employer to go through the process of cancellation and reapplication if the employer's default is cured before the effective date of cancellation and the employer is entitled as a matter of right to replacement coverage the moment the prior policy has been cancelled.

However, neither MEMIC nor its consumers are well served when policyholders lack clear guidance as to what they must do to avoid cancellation and when they must do it. MEMIC's goal, after all, is not cancellation; it is payment. Although putting the unwritten rules in writing and providing explicit safe harbors might raise concerns of employers taking advantage of the grace period and playing fast and loose with due dates, but the reality is that Dyer Straights is far from the only policyholder that has learned that as long as it pays by the eleventh hour, cancellation is doomed to be a hollow threat. Therefore, compliance with MEMIC's due dates might actually be improved by judicious use of other remedies short of cancellation, since these can be invoked even if the employer belatedly cures its default.

More clarity would also reduce the risk that a policyholder might guess wrong as to where the safe harbor can actually be found, believing (or trying to persuade itself) that it is the eleventh hour when it is really the thirteenth. Indeed, drawing the lines clearly and accurately would serve MEMIC's own self-interest by improving its ability to defend itself in those cases – which will still inevitably arise – where the policyholder crosses the line anyway.

In this case, however, I find that Dyer Straights knew or should have known that whether it was already one o'clock or whether it was only a few minutes past midnight, time had run out. To begin with, Dyer Straights acknowledged when it executed the payment agreement that if it paid any installment late, MEMIC could, *inter alia*, rescind the payment plan and accelerate the debt. MEMIC had the right to do this as early as April 9, separate from and

independent of its right to initiate the cancellation process. Although MEMIC could, again, have given Dyer Straights clearer and more conspicuous notice that it was exercising its right to accelerate the debt, I find that MEMIC notified Dyer Straights twice, in both the cancellation notice and the collection notice that followed, that MEMIC regarded the entire outstanding balance of \$4498 as past due.

Unfortunately, there were two equal installments remaining at the time MEMIC accelerated the debt. This means that when MEMIC warned Dyer Straights on May 24, upon receiving payment for the first \$2249, that an overdue balance remained unpaid, the amount designated as past due was the same amount that Dyer Straights had just paid. Since the May 24 letter did not acknowledge receipt of any payment, there is the possibility that an employer could believe that it simply crossed in the mail with the payment. Any such hopes, however, should have been dashed by the June 8 letter which warned that Dyer Straights was still in default after multiple requests. Finally, after the cancellation and a full week before the day of the accident, MEMIC sent a confirmation memorandum warning Dyer Straights that the policy had been cancelled. Thus, the notice provided by MEMIC, though less than optimal for the reasons discussed above, substantially exceeded the minimum required by law.

Dyer Straights' objections that it was not actually aware of this notice are unavailing for three reasons. The first is that, as discussed in the previous section, the law does not require subjective awareness on the policyholder's part, which would encourage willful ignorance before the fact and difficult evidentiary disputes after the fact. As between an insurer that has given notice in compliance with the statute and therefore reasonably but mistakenly believes the policyholder is aware of the impending cancellation, and a policyholder that reasonably but mistakenly believes that the insurer has not yet given notice, it is the policyholder that is responsible for the consequences of the misunderstanding because it was the policyholder's responsibility to comply with the contract and avoid giving the insurer grounds for cancellation existed in the first place.

Second, even if Mr. Dyer's sworn recollection is fully accurate that he was absolutely unaware that Dyer Straights had been sent a notice of cancellation and that the May 20 confirmation memorandum was delayed in the mail for eight days, and even if it was not Dyer Straights' own fault that the cancellation notice was lost before its staff had a chance to read it, it strains credulity to imagine that Dyer Straights did not receive enough of the other MEMIC correspondence to be on notice that something was seriously amiss. Even the supposed failure to receive a cancellation notice, despite significant delays in payment of both the May and June installments, was something Mr. Dyer should have been concerned might be too good to be true based on his past experience with late payments. Asking either MEMIC or the Champoux Agency at any relevant time would have resolved any confusion.

And third, Dyer Straights was in willful violation of its contractual obligations, while MEMIC had already exercised considerable forbearance. Not only had Dyer Straights knowingly paid all three installments late, but the payment agreement itself was the result of Dyer Straights' willful failure to pay the audit bill when due. Instead of making a hardship request to MEMIC after receiving the audit bill, Dyer Straights waited for a cancellation notice before negotiating a payment agreement. Dyer Straights knew that failure to pay on time could result in policy cancellation, and knew that it had repeatedly failed to pay on time. The strategy of exposing itself to cancellation and curing the default in time for MEMIC to rescind the cancellation might have been driven by business necessity, but it was a strategy Dyer Straights engaged in at its own peril. Furthermore, the installment that was originally due on June 8 did not arrive until June 27. Even if Dyer Straights believed that curing its default, no matter how late, gave it absolute protection from cancellation, Dyer Straights was unquestionably knowingly in default on the scheduled June 17 cancellation date.

Dyer Straights contends, however, that this case should be controlled by *North East Insurance Co. v. Concord General Mutual Insurance Co.*, 461 A.2d 1056, 1058 (Me. 1983), in which the Law Court held that "By accepting late payment of premiums without question, an insurer waives any right to consider the policy terminated or canceled for lack of timely payment." Although that case also involved the acceptance of a late payment tendered after the insurer had sent a notice of cancellation, the premium payment at issue there was for a period of coverage that extended into the future, and thus the policyholder did not owe the full amount paid unless the cancellation was rescinded. Here, by contrast, the debt was for a prior policy period and Dyer Straights would owe MEMIC the full amount and more, whether or not coverage terminated on the stated cancellation date. Furthermore, the payment was not accepted "without question," but rather was followed by two letters warning that a past due balance remained unpaid.

Effect of the June Premium Check

Finally, it is undisputed that the accident did not occur until after the close of business on June 27, hours after the premium check fully discharging Dyer Straights' outstanding debt was received and deposited by MEMIC. It would be a largely academic question whether a gap in coverage existed if that gap was closed before the accident occurred.

However, once a policy has terminated, the employer has no policy unless and until an insurer issues a new one. If the employer has an outstanding premium debt, it remains obligated to pay that debt whether or not it has coverage. Discharging that debt is merely one precondition for obtaining new coverage,⁶ not an instant, unilateral binder of coverage. Mr. Reynolds testified that after a policy is cancelled, MEMIC may exercise its discretion to reinstate the policy if there is only a minimal interval between a policy cancellation and the policyholder's payment of the amount owed, but that a gap of coverage of

this length was too much exposure, so that MEMIC would require the policyholder to apply for and obtain a new policy on a prospective basis. MEMIC made the new coverage effective on June 30, and MEMIC had every right to do so.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that Dyer Straights' Petition is *DENIED*, and MEMIC's coverage obligations under Policy 1810067471 are limited to dates of injury before June 17, 2005.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before October 11, 2005. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

1 Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decision making authority.

2 The grounds for cancellation raised by MEMIC relate solely to this audit bill on Dyer Straights' 2004-05 policy. MEMIC does not allege that Dyer Straights was in default at any relevant time on the estimated premium installments for its 2005-06 policy.

3 Although Mr. Reynolds testified that the check was not received and deposited until the day after the accident, the date stamps on the check show this to be an error in recollection. Furthermore, MEMIC agrees that at a minimum, the check must have been in the mail before the accident occurred.

4 The 30-day period should be measured to June 16 rather than June 17 because the minimum notice period is 30 full days, the cancellation was scheduled to take effect one minute after the stroke of midnight, and I find by a preponderance of the evidence that MEMIC did not mail the notice at or before 12:01 a.m.

5 However, as noted in the next section, this is the exception rather than the rule and would not be considered when the delay is as long as it was in this case.

6 24-A M.R.S.A. §§ 2385-F; 3711(3).

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

AUGUST 31, 2005

**ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER**