



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LIBERTY MUTUAL INSURANCE :
COMPANY¹, :
Appellant Below, : No. 493, 2013
Appellant, :
 : Court Below – Superior Court
 : of the State of Delaware
vs. : in and for Kent County
 : C.A. No. K13A-01-002 RBY,
 : on appeal from the Industrial
 : Accident Board
JESUS SILVA-GARCIA and, : I.A.B. No. 1348611
CITY WINDOW CLEANING OF :
DELAWARE, INC.² :
Appellees Below, :
Appellees. :

**REPLY BRIEF OF APPELLANT LIBERTY MUTUAL INSURANCE
COMPANY TO ANSWERING BRIEF OF CITY WINDOW CLEANING OF
DELAWARE, INC.**

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DATED: December 23, 2013

15/1797100.v1

¹ The proper designation would be "LM Insurance Corporation".

² The proper designation would be "City Window Cleaning, Inc. of Delaware".

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ARGUMENT 1

The IAB erred in issuing its August 31, 2011 decision on insurance coverage because it was precluded from doing so. This issue was raised before the IAB. A75-A76.

The IAB decision following the March 31, 2010 hearing was substantive as to the issue of insurance coverage. This is because due process requires that, before an individual is deprived of his property, a hearing must be held and an appropriate determination made. By order dated March 31, 2010, the Board ordered CW to obtain a bond. A274. The Board's authority to order CW to pay money to obtain a bond came only after the Board held a hearing and determined that CW did not have workers' compensation insurance. That determination, following the March 31, 2010 hearing, cannot be ignored and retried, as was done at the August 17, 2011 hearing, which resulted in the Board's August 31, 2011 insurance coverage decision.

In *Green v. State*, a defendant who had been convicted of drug offenses and lost his property to forfeiture sought twice to have the forfeiture order set aside.³ His motions involved the same conviction and the same property, just as the instant case involves the same date of accident and the same issue of coverage. In *Green*, this Court held that, because the issue had previously been raised, the later motion

³ 70 A.3d 205 (Del. 2012).

was barred under the doctrine of *res judicata*.⁴ In the instant case, at the March 31, 2010 hearing, CW was unsuccessful in showing that it had insurance coverage. *Res judicata* is available when, although not a party to a prior action, there is a privity of interest.⁵ The March 2010 determination of the Board that there was coverage at the time of the accident is identical to Liberty Mutual's position, thus there is privity of interest. Just as Green was not permitted to have the forfeiture order re-litigated, neither was CW permitted to have the coverage issue re-litigated, as happened in this case. Appellees did not cross appeal and thus the IAB's March 31, 2010 determination that there was no insurance coverage should be upheld as the law of the case.⁶

⁴ *Id.*

⁵ *Grunstein v. Silva*, 2011 Del. Ch. LEXIS 12, *22 (Del. Ch. Jan. 31, 2011).

⁶ *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 815 (Del. 2013).

ARGUMENT 2

CW's contention that the Handbook is a "set of administrative rules and/or regulations that govern the issuance and renewal of 'involuntary' market worker compensation policies issued in Delaware" is erroneous. In the case of *B&B Maintenance Service, Inc. v. CNC Insurance Associates, Inc., et al.*, the Superior Court of Delaware discussed the Delaware Workers' Compensation Insurance Plan.⁷ In doing so, the Court noted that the Handbook "accompanies the DWCIP" and, moreover, that it "sets forth certain guidelines and policies for the DWCIP."⁸ Turning to the Handbook, it expressly provides in the Purpose of Handbook section as follows:

This handbook will assist you in understanding the Delaware Insurance Plan (DIP). It explains what the Plan is and how it works. The Plan has been filed with the Delaware Insurance Department as the method of providing Workers' Compensation Insurance to an employer who is unable to obtain such coverage in the voluntary market. The Department of Insurance exercises general regulatory authority over the Plan, but has designated the Delaware Compensation Rating Bureau, Inc. (DCRB) to administer the actual operation of the Plan under the jurisdiction of the President of the Delaware Compensation Rating Bureau, Inc.⁹

Therefore, the Handbook is simply a guide for the administration of the Plan and does not contain any administrative rules and/or regulations that are within the

⁷ 1996 Del. Super. LEXIS 533.

⁸ *Id.* at *4.

⁹ *See* A2.

purview of the IAB. Moreover, the Department of Insurance has general regulatory authority over the DWCIP and Handbook that accompanies it and the actual operation of the Plan as described in the Handbook is administered by the DCRB. This means that the Department of Insurance or the DCRB promulgated the Handbook and the former are authorized to interpret and enforce it and not the IAB, which is tasked with interpreting and enforcing the provisions of the Delaware Workers Compensation Act ("DWCA"). The coverage dispute does not arise out of the DWCA and, thus, no deference or weight should be given to the IAB's interpretation of Handbook.

1. The IAB erred in interpreting the Handbook.

Liberty Mutual reiterates the position set out in Argument 2 of its Opening Brief. As noted in that argument, cancellation requires an affirmative action. The failure to act is not an affirmative action and thus an insured does not cancel its policy by failing to pay its premium. Rather, the policy lapses due to expiration / non-renewal, as happened in this case. Thus, the IAB erred when it ruled that "the period of lapse was from January 1, 2010, the date of cancellation, to January 12, 2010. . . ." ¹⁰

CW argues the IAB's interpretation of the Handbook is entitled to deference. Ans. Br. at 20. Deference is owed to an administrative agency when the agency is

¹⁰ Coverage Op. at 17 (emphasis added).

interpreting its *own* rules, not those of some other agency. There is no evidence that, prior to the litigation in this case, the IAB had seen or was even aware of the existence of the Handbook that is discussed in this case, much less that it has some familiarity with it. Thus, there is no valid basis for deferring to the Board's interpretation of the other agency's Handbook. Without this erroneous deference, interpretation of the issue would follow the analysis set out in Liberty Mutual's Opening Brief and the key issue, as presented to the IAB, would be when the renewal premium payment was actually received.

2. The IAB erred in concluding that a meter mark is a U.S. postmark.

CW argues that the IAB did not err when it turned to secondary sources to determine whether a private meter mark is similar to a U.S. postmark because the term "U.S. postmark" is not defined in the Handbook and is reasonably susceptible to more than one meaning.

The words in the Handbook should be given their plain and ordinary meaning as that is the typical standard for construing words in a written document.¹¹ Only if the words are found to be ambiguous should efforts be undertaken to determine their meaning.¹² Here, the IAB never made a determination that the terms "U.S. postmark" and "postmark", as appearing in the

¹¹ See e.g. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. 2012).

¹² *Id.*

Handbook, were ambiguous before embarking on an exercise to interpret them and ultimately equate them with a "private meter mark".

In addition, the fact that the Handbook includes the term "U.S. postmark" along with "postmark" must be taken to mean that the latter term refers to the first. Certainly, if the Handbook only included the word "postmark", such word could reasonably be interpreted to have more than one meaning. Indeed, the cases relied upon by the IAB interpreted the undefined terms "postmark" or "cancellation mark", but only after finding them to be ambiguous. To counter the cases cited by the IAB, Liberty Mutual identified several cases that found private postmarks to be merely indicative of a mailing date, but not actual date of mailing and, therefore, such marks were viewed as unreliable.¹³ In addition, Liberty Mutual pointed out that the only case that appeared to interpret the meaning of a U.S. postmark requirement, albeit as it appeared in a federal regulation, to demonstrate that the requirement was clear and would be enforced.¹⁴

This Court also should recognize that the terms "private meter mark" or "private postmark" do not appear anywhere in the Handbook. The conclusion to be drawn from the absence of these terms is that they were never intended to be part

¹³ See *Wagshal v. District of Columbia*, 430 A.2d 524 (D.C. 1981); *Smith v. Idaho Dep't of Labor*, 218 P.3d 1133 (Idaho 2009); *Lin v. Unemployment Compensation Bd. of Review*, 735 A.2d 697 (Pa. 1999); *Corona v. Boeing Co.*, 46 P.3d 253 (Wash. App. 2002).

¹⁴ *Universal City Studios LLLP v. Peters*, 402 F.3d 1238 (D.C. Cir. 2005).

of the Handbook or to control the issue of determining a lapse period based on non-payment of a premium.

The clear error standard is inapplicable and the contention that the Court should defer to the IAB's interpretation of the Handbook, or that the IAB's interpretation of the Handbook is entitled to "due weight" is flawed. It is well accepted under Delaware law that courts should only defer to the judgment of an administrative agency as to the meaning or requirements of its *own* regulations or rules.¹⁵ In this case, no deference should be given to the IAB's interpretation of the Handbook because the terms in the Handbook are not its own regulations or rules. For the same reasons, this Court should give no weight whatsoever to the IAB's interpretation of the terms in the Handbook.¹⁶ Therefore, the Superior Court's decision is erroneous to the extent it deferred to the IAB on its interpretation of the Handbook.

Lastly, Claimant's reliance on *Lozier Corp. v. Douglas County Bd. of Equalization* is misplaced.¹⁷ The *Lozier* court considered whether a private postage meter mark constituted a "postmark" as that undefined term was used in a

¹⁵ See e.g. *Christiana Town Ctr., LLC v. New Castle County*, 985 A.2d 389 (Del. 2009); *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554 (Del. Ch. 1991) (emphasis added).

¹⁶ *C.f. Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r of Del.*, 2009 Del. Ch. LEXIS 133 (Del. Ch. July 24, 2009).

¹⁷ 829 N.W.2d 652 (Neb. 2013).

statute. Therefore, it is distinguishable because the Handbook uses the term "U.S. postmark" to determine the mailing date.

In sum, the IAB improperly embarked on an interpretation of terms in the Handbook when such terms are not ambiguous. Furthermore, the IAB concluded that a private meter mark is equivalent to a U.S. postmark based on factually inapposite cases that reached that conclusion in the context of interpreting the undefined term "postmark", but only after finding the term to be ambiguous. There is absolutely nothing ambiguous about the Handbook stating the lapse period runs through the date of the "U.S. postmark appearing on the envelope containing the item correcting the default." A13.

If this Court accepts that the IAB and Superior Court erred in finding that a private meter mark is equivalent to a U.S. postmark, which would mean that there was no U.S. postmark, then a decision must be reached regarding the lapse period based on the "postmark binding rule" that provides coverage will be effective 12:01 A.M. of the "date of receipt". A5. For the reasons stated in its Opening Brief, Liberty Mutual submits that the IAB's finding concerning when the premium payment was received by Liberty Mutual is not supported by substantial evidence.

ARGUMENT 3

Liberty Mutual relies on the positions set out in Argument 6 of its Opening Brief.

ARGUMENT 4

Liberty Mutual relies on the positions set out in Argument 5 of its Opening Brief.

CONCLUSION

WHEREFORE, Liberty Mutual asks this Honorable Court to reverse the decision below.

Respectfully submitted,

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DATED: December 23, 2013