**STATE OF VERMONT**
**DEPARTMENT OF LABOR AND INDUSTRY**

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| | ) | State File No. L-24296 |
| Scott Russell | ) | |
| | ) | By: Margaret A. Mangan |
| | ) | Hearing Officer |
| v. | ) | |
| | ) | For: Steve Janson |
| | ) | Commissioner |
| Nolin's Trucking . | ) | |
| | ) | Opinion No. 07S-00WC |

## RULING ON INA'S MOTION FOR STAY

The Insurance Company of North America and its affiliates, including CIGNA (collectively "INA"), by and through its counsel, Dinse, Knapp & McAndrew, P.C., moves pursuant to 21 V.S.A. § 675 (b) for a stay of the order under Opinion No. 07-00WC pending appeal.

In the underlying worker's compensation case, after assuming jurisdiction over the insurance coverage dispute between the employer Nolin's Trucking and the insurer INA, this Department ordered INA to adjust the workers' compensation claim. Since then, Judge Katz in the Chittenden Superior Court determined that at the time of Mr. Russell's accident, INA had no policy in place with Nolin's Trucking. The court also determined that this Department had no jurisdiction to determine whether a policy had been renewed or lapsed. *Insurance Co. North America v. Russell, et al*., Chittenden County Superior Court, Docket No 598-99CnCiv (May 15, 2000).

Pursuant to 21 V.S.A. § 675, in an appeal from the Department of Labor and Industry, no stay shall exist unless specifically granted. Any award or order of the Commissioner shall be in full effect from its issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675 (b). The Commissioner has the discretionary power to grant or deny a request for a stay. *Austin v. Vermont Dowell & Square Co*., Opinion No. 2A-88 (Sept. 20,1988). In order to justify the issuance of a stay, the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable harm if the stay were not granted; (3) that a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re. Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987). See also *Longe v. Boise Cascade*, Vt. Supreme Court Entry Order, Dec. 21, 1998) (expressly clarifying that the four part *In re. Insurance Services Offices, Inc*. test applies to requests for stay under § 675 (b.)).

Given the recent superior court opinion, INA has shown that it is likely to succeed on the merits, and, therefore, meets the first prong of the test. Next, INA faces irreparable harm if it were forced to obey directly conflicting orders from this Department and the superior court. Third, issuance of a stay is not likely to harm the claimant who has a civil action pending

directly against the employer for the injuries sustained in the workers' compensation accident. Finally, the best interests of the public would be served by having this Department defer to the superior court judgement in the parallel action.

Accordingly, INA's Motion for a Stay is GRANTED.

Dated at Montpelier, Vermont, this 29th day of May 2000.

Steve Janson
Commissioner

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Case submitted on briefs.

**APPEARANCES:**

H. Joseph Gamache, Esq. for Nolin's Trucking
Shapleigh Smith, Esq. for INA/CIGNA

**ISSUES:**

1. Whether this Department has jurisdiction over the insurance coverage issue.

2. Whether the insurer was required to provide notice to the Commissioner, through the Department of Labor and Industry's designated reporting agent, before it stopped workers' compensation coverage for the employer.

**Background:**

1. This case stems from an injury Scott Russell sustained on June 3, 1998, while in the employee of Nolin's Trucking. Mr. Russell filed a worker's compensation claim with this Department after which Nolin's was ordered to pay interim benefits. However, INA, the insurer to whom Nolin's sent the claim, refused to accept it on the grounds that the Nolin's insurance policy had lapsed and there was no coverage for the claimed injury.

2. On February 18, 1999, Charles Bond, Workers' Compensation Director, determined that INA had failed to give proper notice of cancellation of the policy as required by 21 V.S.A. § 696 and ordered INA to reinstate coverage and adjust this claim. INA refused to do so.

3. On March 26, 1999 Mr. Bond again ordered INA to reinstate Nolin's coverage and process the claim. INA continued in its refusal to do so. Also on March 26, INA filed a Notice of Contest in which it challenged Mr. Bond's order.

**Underlying Facts:**

4. One affiliate of the Insurance Company of North America (INA) is CIGNA. The name INA will be used throughout this decision.

5. Ernest and Shirley Nolin do business as Nolin's Trucking.

6. Scott Russell, at all times relevant to this action, was an employee of Nolin's Trucking. INA issued a workers' compensation insurance policy to the Nolins in 1997 with effective dates February 14, 1997 to February 14, 1998.

7. On December 1, 1997, INA notified the Nolins of its intent to renew their workers' compensation insurance policy if the Nolins made a renewal payment by February 14, 1998.

8. The Nolins did not pay the renewal premium. INA contends that their workers' compensation policy lapsed on February 14, 1998.

9. After Scott Russell's June 3, 1998 work-related injury, he was temporarily totally disabled from working.

10. On October 20, 1998, Charles Bond issued an Interim Order of Benefits in which he ordered Nolin's Trucking to immediately pay interim benefits, including indemnity benefits at the rate of $202.87 per week.

11. On December 1, 1998, the claimant filed an action in Chittenden Superior court against the Nolins in which he seeks recovery for the injuries he suffered during the course of his employment with the Nolins.

12. On February 18, 1999, Charles Bond wrote to INA asserting that it had not given proper notice of the cancellation policy pursuant to 21 V.S.A. § 696 and demanded that INA reinstate coverage.

13. On March 22, 1999 INA responded to Mr. Bond by stating that the Nolins, d/b/a Nolin's Trucking, were not covered by INA for any claim after the Nolins failed to submit payment.

14. On March 26, 1999 Mr. Bond again ordered INA to reinstate coverage and process the claim.

15. INA has not provided coverage or adjusted this claim.

**CONCLUSIONS OF LAW:**

A. Jurisdiction

1. INA, the Insurance Company of North America, and its affiliates including CIGNA, defend this claim on the theory that this Department has no jurisdiction to consider insurance coverage questions. INA contends that because the Superior Court has asserted jurisdiction over the coverage dispute, it necessarily follows that Charles Bond exceeded the jurisdiction of this Department when he ordered that INA assume coverage of the claim.

2. The insurer cites this Department's decision in *Lehouiller v. Cincinnati Ins. Co.*, Opinion No. 18-99WC (4/15/99) in support of its assertion that this Department lacks jurisdiction. In *Lehouiller*, the Department was asked to examine the terms of an insurance contract and the effect of an alleged misstatement on the insurance application. The insurer argued that since its workers' compensation policy excluded coverage of illegal employment, the Commissioner should find that the claimant was illegally employed, and dismiss the insurer from the workers' compensation claim. The insurer also sought an order requiring the employer to reimburse it for compensation already paid. The Department dismissed the action because nothing in the Workers' Compensation Act gave it authority to determine whether or not the injured worker's employment was illegal and its jurisdiction did not include overseeing contract disputes and interpretation of the terms of an insurance policy. See e.g., *Morrisseau v. Legac*, 123 Vt. 70 (1962).

3. This case differs because the Department is not being asked to interpret the terms of a policy, but instead is being asked to determine whether the insurer complied with specific provisions of the Workers' Compensation Act. Other states have reached similar conclusions. See e.g., *Travelers' Inc. v. Hawaii Roofing Co.*, 64 Hawaii 380, 641 P.2d 1333 (1982) (compensation division had exclusive jurisdiction to decide whether insurance carrier had given proper notice of cancellation). See also, A. Larson, WORKERS' COMPENSATION LAW § 92.41.

B. Insurance coverage

4 To assure that Vermont employees injured in the course of their employment shall have a remedy that is expeditious and independent of proof of fault, and that their employers have a liability which is limited and determinate, the legislature crafted the Workers' Compensation Act. 21 V.S.A. § 601 *et. seq.*; Morrisseau v. Legac, 123 Vt. 70 at 76 (1962).

5 Among the Act's provisions are those compelling all employers to have workers' compensation insurance or to be self-insured. § 687. The statutory term "employer" includes "insurer." § 601 (4). Employers must report injuries to the Commissioner, § 701, or risk the imposition of penalties, § 702. Employers must register with this Department when they commence or cease business. § 705. And when the employer has failed to comply with the mandatory insurance provisions of the Act, this Department is authorized to impose fines or close businesses. § 692.

4. Specifically the legislature has provided that:

> Employers…shall secure compensation to their employees…[b]y insuring and keeping insured the payment of such compensation with any corporation

> or reciprocal or interinsurance exchange authorized to transact the business within the state….

21 V.S.A. § 687(a)(1).

5. Once insurance has been secured, § 696 provides that a workers' compensation policy:

> [S]hall not be cancelled within the time limits in such policy or contract for its expiration until at least 45 days after a notice of intention to cancel such policy or contract….

6. Furthermore, with regard to renewals:

> An insurance carrier who does not intend to renew a policy of workers' compensation insurance or guarantee contract covering the liability of an employer under the provisions of this chapter, 45 days prior to the expiration of such policy or contract, shall give notice of such intention to the commissioner of labor and industry and to the covered employer. Such notice shall be given by certified mail or certificate of mailing. An insurance carrier who fails to give such notice shall continue the policy or contract in force beyond its expiration date for 45 days from the day such notice is received by the commissioner. However, this latter provision shall not apply if, prior to such expiration date, the insurance carrier has offered to continue the insurance beyond such date by delivery of a renewal contract or otherwise or if the employer notifies the insurance carrier that he does not wish the insurance continued beyond such expiration date, or if the employer complies with the provisions of section 687 of this title, on or before the expiration of the existing insurance or guarantee contract.

21 V.S.A. § 697.

7. The employer argues that INA is responsible for this claim because it terminated insurance coverage without giving proper notice to the Commissioner through its designated reporting agent, NCCI, as required by § 696. In support of its argument, Nolin's cites cases in several jurisdictions that hold coverage is deemed to have continued unless the insurer complies with the strict statutory notice requirements. See, *e.g.*, *Commissioners of the State Insurance Fund v. Donjon Marine Co, Inc.,* 664 N.Y.S. 2d 599 (1997) (notice not provided to the employer).

8. INA asserts that Nolin's Trucking has the burden of proving both that the loss happened during the coverage period and that it either paid a premium for coverage during the period in which the injury occurred or had some legally valid excuse. With respect to the merits of the coverage issue, INA distinguishes between "cancellation," "non-renewal," and mere expiration or lapse of a policy by its terms. It argues that the term "cancellation" is inapplicable here because that term means "unilateral action by an insurer to terminate a policy before the end of the policy period." *Suchoski v. Redshaw*, 163 Vt. 620, 623 (1995). In contrast, the term "nonrenewal" generally is understood to mean that the insurer has not extended another contract to the insured. See, *American*

*Casualty Co. v. Nordic Leasing, Inc*., 42 F.3d 725, 732 (1994). ("Nonrenewal … may merely be the insurer's exercise of its right not to extend another contract to the insured." (Cite omitted).)

9. In *Suchoski*, 163 Vt. 623, the Vermont Supreme Court held that cancellation requirements of 8 V.S.A. § 3880, "Notice of cancellation," did not apply to the nonrenewals of a homeowner's insurance contract. Like the nonrenewal in this case, the nonrenewal in *Suchoski* resulted from the policyholder's failure to renew the policy with the payment of a premium. INA acknowledges that *Suchoski* involved a statute governing fire and casualty policies, not workers' compensation policies. In fact, 8 V.S.A. § 3880 (a) expressly excludes workers' compensation policies.

10. Unlike the situation in *Suchoski* which involved the voluntary purchase of homeowners' insurance whose coverage ceased automatically with nonpayment, this worker's case involves a statutory mandate. Vermont has a strong regulatory interest in the workers' compensation system that it lacks in the homeowners' insurance context, a difference our legislature has made abundantly clear by providing for separate statutory schemes.

11. Next, INA contends that no Vermont statute requires an insurer to do anything when a workers' compensation policy expires by its own terms, due to an insured's failure to renew the policy by paying premiums. It cites to the notice provisions in § 696 for cancellations and in § 697 for nonrenewals, but argues that the last sentence in § 697 explicitly exempts situations like this present one from the notice requirement. Citing 18 *Couch on Insurance* 2d § 68:11 at 14 & n.4 (1983), INA asserts that "No notice is required where the insurer had previously manifested its intent to renew, but the insured failed to pay renewal premiums." However, in the workers' compensation context, the contract between the employer/insured and its insurer must be evaluated in light of mandatory insurance provisions in the Act, designed to protect not only the insured, but also injured workers.

12. The primary objective of this Department is to give effect to the intention of the legislature. To do so requires examining not only the "statute's language, but its subject matter, its consequences, and the reason and spirit of the law." *Dusharm v. Nationwide Insurance Company*, 47 F. Supp. 2d 514, 521 (1999), citing *Roddy v. Roddy*, (No. 97-410 Vt. Supreme Court filed Oct. 2,1998); *Merkel v, Nationwide Ins. Co*., 166 Vt. 311, 314 (1997).

13. The overall legislative workers' compensation system clearly calls for continuous coverage. Certainly no notice of "nonrenewal" would be necessary in those instances where the insurer offered to continue insurance for an employer who had obtained workers' compensation coverage from another insurer. It would not be necessary if the insurer offered to continue insurance for an employer who had stopped doing business. Undoubtedly § 697 provision exempting notice can only be read to cover those narrow situations in which an employer is not left without coverage.

14. However, once an insurer has provided coverage to an employer, that coverage is "cancelled" as soon as it is stopped. It does not matter that it was stopped for the failure to pay a premium. Such a cancellation triggers the notice provision of § 696 with which

INA failed to comply. To accept INA's argument that notice was not required would lead to interrupted coverage in a system that requires continuity. It would create an anomaly by directing that the Department shut down businesses that do not have insurance coverage and yet remove the only means by which the Department can learn that coverage has not continued. Such a result would violate the legislative scheme.

15. In sum, the Department of Labor and Industry would be unable to perform its essential functions, including tracking coverage and penalizing those without it, without the essential notice provisions.

**ORDER:**

Accordingly, since INA failed to give the statutory required notice that the Nolin's coverage had ended, it is obligated to cover Scott Russell's worker's compensation claim.

DATED at Montpelier, Vermont, this 24th day of March 2000.

Steve Janson
Commissioner