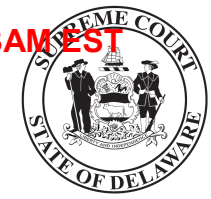
EFiled: Nov 07 2013 11:53AM EST
Filing ID 54518916
Case Number 493,2013



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED OPENING BRIEF OF APPELLANT LIBERTY MUTUAL INSURANCE COMPANY

MARSHALL DENNEHEY WARNER, COLEMAN & GOGGIN

/s/ Linda Wilson

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DATED: November 7, 2013

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NATURE OF PROCEEDINGS

This is an appeal of an insurance coverage decision rendered by the Industrial Accident Board (IAB).[1] A70. The procedural background is somewhat complicated.

On February 22, 2010, Jesus Silva-Garcia (Claimant) filed a Petition to Determine Compensation Due (petition) with the IAB alleging he suffered a compensable work injury on January 15, 2010, while working for City Window Cleaning of Delaware, Inc. (CW) A269. On March 19, 2010, the IAB notified CW it was unable to locate workers' compensation insurance coverage for CW as of the date of injury and issued notice of a March 31, 2010 hearing to determine whether CW had insurance coverage at the time of the alleged work injury. A272-A273.[2] After the hearing, since there was no coverage, the IAB ordered CW to submit a bond in the amount of $250,000.00 within 45 days.[3] A275. It also scheduled Claimant's Petition to Determine Compensation Due for a June 9, 2010

[1] Liberty Mutual is not aware of any other occasion where the IAB has rendered an insurance coverage determination. In 2010, Liberty Mutual moved the IAB to dismiss CW's request for an insurance coverage determination due to lack of jurisdiction. In a November 23, 2010 Order, the IAB concludes it has jurisdiction to determine insurance coverage issues. A28. Then, on August 23, 2012, the IAB, seemingly, indicates it does not have jurisdiction to determine insurance coverage issues when it says, "whatever arguments Liberty Mutual has . . . with its client or employer is between his client and his employer. It's not with this board. The board is here to determine the facts whether compensation is due or not." A267. The actual Decision on Insurance Coverage is dated August 31, 2011.

[2] CW's workers' compensation insurance policy through Liberty Mutual had lapsed on January 1, 2010, due to nonpayment of premium. A71.

[3] On August 17, 2011, Herb Hertzel, owner of CW, testified he has taken no steps to comply with this order. A127.

hearing. A276. Instead of prosecuting his claim against CW at the June 9, 2010 hearing, on April 15, 2010, Claimant filed a Complaint in Superior Court against CW, alleging negligence. A277. Claimant and CW then stipulated to a stay of Claimant's Petition to Determine Compensation Due until the negligence action was resolved. A282. On May 25, 2010, that stipulation was made an Order of the IAB. A283.[4]

As part of the negligence action, Claimant served notice of a Rule 30(b)(6) deposition on Liberty Mutual. A284, A288. That deposition occurred August 13, 2010. With the negligence action still pending in Superior Court and Claimant's Petition to Determine Compensation Due before the IAB still stayed, on September 9, 2010, CW asked the IAB to hold an evidentiary hearing in order to render an insurance coverage decision. A290. Pursuant to the request of CW, the IAB took steps to schedule a hearing, and indicated it would keep Claimant's Petition to Determine Compensation Due on hold while the coverage issue was decided. A291. The IAB scheduled the coverage hearing for October 15, 2010.

Liberty Mutual notified the IAB of its intention to present a motion to dismiss the insurance coverage action on the grounds the IAB lacks jurisdiction to determine insurance coverage matters. That motion was also scheduled for

[4] It was not until more than two years later, on July 9, 2012, that Claimant requested the petition be reactivated and scheduled for a hearing on the merits. A311.

October 15, 2010, prior to the insurance coverage hearing. Based on its position that the IAB did not have jurisdiction to hear insurance coverage actions, on October 8, 2010, Liberty Mutual filed a Complaint for Declaratory Judgment in Superior Court, seeking a determination that there was no coverage at the time of the January 15, 2010 accident. A292.

At the October 15, 2010 hearing before the IAB on Liberty Mutual's motion to dismiss the insurance coverage action for lack of jurisdiction, Liberty Mutual advised the IAB of the Declaratory Judgment action. Given the Declaratory Judgment action, the IAB did not hear the insurance coverage action on October 15, 2010. Rather it ordered the parties to submit memoranda of law on whether the IAB was estopped from hearing the insurance coverage action given that a Complaint for Declaratory Judgment was pending in Superior Court. By Order dated November 23, 2010, the IAB held it had jurisdiction to hear insurance coverage matters but that it could not do so while the Complaint for Declaratory Judgment was pending in Superior Court. A21.

On December 7, 2010, CW filed a Motion to Dismiss the Complaint for Declaratory Judgment. On May 26, 2011, based on the November 23, 2010 holding of the IAB that it had jurisdiction to hear insurance coverage actions, the Court dismissed the Declaratory Judgment action. The IAB was so advised and, on June 17, 2011, the IAB notified the parties that a hearing on the insurance

coverage action, as requested by CW on September 9, 2010, would be heard August 17, 2011. The hearing went forward on that date and, on August 31, 2011, the IAB issued its Decision on Insurance Coverage, determining that coverage did exist as of January 15, 2010. (Attachment 1). The IAB also ordered Liberty to reimburse CW amounts CW had been paying Claimant, despite the fact that, at that time, there had not been an acknowledgment or determination that Claimant was an employee, or that he had suffered a **compensable** injury, Claimant's Petition to Determine Compensation Due was still on hold, and the only issue noticed for the hearing was the insurance coverage action.

On September 12, 2011, Liberty Mutual filed a motion for reargument of the IAB's decision pursuant to IAB Rule 21. The IAB issued a response, titled Order on Motion to Strike, on January 31, 2012, denying the motion for reargument. A48. On March 5, 2012, Liberty Mutual filed an appeal of the IAB's insurance coverage decision in Superior Court New Castle County (NCC), where the insurance-related transactions had taken place, and where the hearing was held, without obtaining stipulation of the parties as to a change of venue.

Over the next several months, there was a significant amount of litigation in this case, which is summarized in the Nature and Stage of the Proceedings of the opening brief filed by Liberty Mutual in the appeal before the Superior Court. The end result was that the March 5, 2012 appeal was dismissed as an impermissible

interlocutory appeal and the matter remanded to the IAB for a hearing on Claimant's Petition to Determine Compensation Due with comment from the Court that, once a decision was rendered on that petition, the petition could be appealed at that time so as to have the insurance coverage decision reviewed. Claimant's Petition to Determine Compensation Due was heard November 30, 2012. A decision was rendered December 12, 2012. Notice of Appeal was filed in Superior Court on January 7, 2013. Superior Court's decision regarding the appeal, in favor of Appellees, was rendered August 22, 2013. (Attachment 2). Notice of Appeal was filed with this Court on September 19, 2013.

SUMMARY OF ARGUMENT

1. The IAB erred in rendering a decision on insurance coverage based on the doctrines of *res judicata* and collateral estoppel.

2. The IAB erred when it used the cancellation provision in the Handbook to determine the renewal date of an expired policy.

3. The IAB erred in ignoring the express language in the Handbook.

4. The IAB erred when it determined that a private meter mark is the same as a U.S. postmark.

5. There is not substantial evidence in the record to support the IAB's finding that the premium payment was, more likely than not, received on January 15, 2010, after 2 P.M.

6. The IAB erred when it relied on *Levan v. Independence Mall, Inc*. to determine the effective date of the renewal policy.

STATEMENT OF FACTS

Claimant suffered an injury, which resulted in the partial amputation of his left leg, at approximately 7:30 a.m. on January 15, 2010, while working for CW.[5] A97-A99, A116. CW's workers' compensation insurance coverage had lapsed approximately two weeks earlier, due to nonpayment of the premium payment due for renewal of a policy (the policy) that expired on January 1, 2010. A83, A88, A113. Coverage was eventually renewed upon Liberty Mutual's receipt of the premium payment. The dispute in this case centers on the period of lapse.

CW is the named insured on a workers' compensation insurance policy issued by Liberty Mutual for the period January 1, 2009 to January 1, 2010. A83. This was an assigned risk policy obtained on the involuntary market pursuant to the Delaware Insurance Plan. (DIP). A79. The DIP is administered by the Delaware Compensation Rating Bureau, Inc. (DCRB). A2. The DCRB promulgates a Handbook that sets forth policies and procedures. A1.

Herb Hirzel (Hirzel) is president and owner of CW. A78. He received renewal quotes, which informed him that coverage would cease if the premium payment was not received by Liberty Mutual on or before January 1, 2010. A85-A86. CW did not mail in the requested payment prior to January 1, 2010. A71,

[5] Prior to December 12, 2012, no Agreement as to Compensation had been filed with the IAB and there had been no determination of the IAB that Claimant was an employee of CW and that his injury was compensable. A308.

A88. According to Hirzel, information to pay the workers compensation deposit premium was entered into CW's accounting program on January 7, 2010, but the check was not actually written until January 12, 2010, even though he had people working between January 1, 2010 and January 12, 2010. A92, A120, A202.

Hirzel testified that, on January 12, 2010, he called his office manager and told her to get the premium payment out "today." A93. His office manager testified she mailed the premium payment on January 12, 2010. A189. The envelope containing the premium payment was not U.S. postmarked. A131. It contains a meter marked date of January 12, 2010 that was placed thereon by a private meter possessed by CW. A72, A94. Hirzel has no evidence regarding when the envelope containing the premium payment was placed in Liberty Mutual's Philadelphia lockbox. A133. CW's office manager also did not know what happened to the premium payment once she placed it in the blue post box. A198-A199.

Mr. Baron works at Citibank, which processes payments for Liberty Mutual. Mr. Baron testified that the Philadelphia post office box (lockbox) is "swept" multiple times a day. A148. The contents are taken to Citibank's processing center in New Castle. A148. The premium payment in this case was not in the Philadelphia post office box prior to 1:00 pm on January 15, 2010. A152, A153, A156. The fact that the check for the premium payment was stamped with a date

of the 18th suggests it was placed in the Philadelphia post office box after 1:00 p.m. on January 15 or on January 16, 2010 or January 17, 2010. A156. The premium payment check was presented to Citibank for deposit on January 18, 2010. A144. The funds for the premium payment left CW's account on January 20, 2010. A143.

ARGUMENT 1

A. QUESTION PRESENTED.

Whether the IAB erred in rendering its August 31, 2011 decision because it was precluded from doing so by the doctrines of *res judicata* and / or collateral estoppel. (A75-A76).

B. SCOPE OF REVIEW.

This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by directly examining the decision of the agency.[6] The IAB's decision is reviewed to determine if it is supported by substantial evidence and free from legal error.[7] Where substantial evidence supports the IAB's findings, the Court must affirm the findings.[8] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[9] The Court will review the entire record to determine whether the IAB could have fairly and reasonably reached its conclusion.[10] In doing so, it will review the record in the light most favorable to the party prevailing below.[11] The Court does not sit as a trier of fact and will not substitute

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[6] *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 380-81 (Del. 1999).
[7] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 308-09 (Del. 1975).
[8] *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).
[9] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).
[10] *National Cash Register v. Riner*, 424 A.2d 669 (Del. Super. Ct. 1980).
[11] *General Motors Corp. v. Guy*, 1991 Del. Super. LEXIS 347 (Del. Super. Ct. Aug. 16, 1991).

its judgment for that rendered by the IAB.[12] On questions of fact, the Court shall give deference to the experience and specialized competence of the IAB.[13] In reviewing alleged errors of law, the Court's review is plenary.[14]

C. MERITS OF THE ARGUMENT

The IAB erred in rendering its August 31, 2011 decision because the issue of insurance coverage had already been determined and was, therefore, barred by *res judicata* and/or collateral estoppel.[15] *Res judicata* prohibits judicial bodies from reconsidering conclusions of law previously adjudicated.[16] Collateral estoppel bars judicial bodies from reconsidering conclusions of fact made previously by another body.[17]

In March of 2010, the IAB became aware that there was an issue regarding insurance coverage. By March of 2010, CW was aware that Liberty Mutual had renewed CW's policy with a lapse that included the date of the accident. Thus, the issue of coverage was ripe. The fact that Liberty Mutual was asked to further consider its determination regarding the period of lapse does not make it less so. A hearing was noticed and held on March 31, 2010. Given a full and fair opportunity to present its case on the merits to the IAB, which CW obviously believed to have

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[12] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[13] 29 *Del. C.* §10142 (d).
[14] *Brooks v. Johnson,* 560 A.2d 1001, 1002 (Del. 1989).
[15] *Green v. State*, 70 A.3d 205 (Del. 2012).
[16] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).
[17] *Id.*.

jurisdiction to determine coverage issues since it is the one that asked the IAB for a coverage determination in September 2010, CW failed to prove it had insurance as of the date of the accident. It was not necessary for Liberty Mutual to participate in the March 31, 2010 hearing for the IAB to conclude that CW was without coverage. CW could have subpoenaed witnesses, or offered testimony. It did not. Having found that CW did not have insurance coverage on the date of the accident, the IAB ordered CW, not Liberty Mutual, or any other person or entity, to post a bond pursuant to 19 *Del. C.* § 2372(b). Given this prior determination regarding insurance coverage, the IAB erred in considering the matter again and rendering its August 31, 2011 decision.[18]

[18] *Green v. State*, 70 A.3d 205 (Del. 2012).

ARGUMENT 2

A. QUESTION PRESENTED.

Whether the IAB erred as a matter of law when it followed provisions in the Handbook that pertain to cancelled policies to determine the period of lapse regarding an expired policy. (A76-A77. A237).

B. SCOPE OF REVIEW.

The scope of review is as set out in part "B" of Argument 1, which is hereby incorporated.

C. MERITS OF THE ARGUMENT

In its efforts to determine the period of lapse, the IAB, properly, looked first to the Handbook. While it was proper to look first to the Handbook for guidance, the Handbook cannot be used to determine the period of lapse because the Handbook does not contain any provisions on how to calculate this for an expired / non-renewed policy. The provision relied on by the IAB discusses how to calculate the period of lapse for a cancelled policy. That provision does not apply to this case.

At page 17 of its decision, the IAB writes, "[t]he Handbook further defines the period of lapse: 'from and inclusive of the date of cancellation through the date of the U.S. postmark appearing on the envelope containing the item correcting the

default. . . '"[19] (Attachment 1, p.17) (emphasis added). This provision is found on page 13 of the Handbook, under the section, "Reinstatement of the Policy Cancellation." A13.

While there is no dispute that there was a lapse in coverage, a lapse in coverage can be due to the expiration / non-renewal or the cancellation of a policy. There is a difference.[20]

"'Renewal' or 'to renew' means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term."[21] So, for instance, a policy is issued to an insured with an effective period of January 1, 2009 to January 1, 2010. If the end of the policy period arrives and the policy is not renewed, the policy expires. The expiration could be due to a lack of payment of premium or a host of reasons including, for example, a lack of funds or the acquisition of a policy from a different insurer.

Cancellation of a policy, however, differs from an expiration scenario. Cancellation occurs when a policy is in effect and, for some reason, typically a default situation as some examples noted by bullet points on page 12 of the

[19] Hereinafter, this will be referred to as "the cancellation provision." It is found at A13.
[20] *Moore v. Travelers Indem. Ins. Co.,* 408 A.2d 298 (Del. Super. Ct. 1979).
[21] *Id*.

Handbook, that policy is cancelled by the insurer. "'Cancellation', is said to be 'an affirmative action taken by an insurer to terminate an existing policy whereas a failure to renew concerns a policy that has ceased to exist.'"[22] In *Moore*, the Court noted how the words were used alternatively and, based on that, the Court concluded the terms were not meant to be used synonymously. This is similar to our case, where the Handbook specifically references "expiration / non-renewed" and "cancellation."[23] See, for example, page 11 of the Handbook, in the first paragraph under Renewal Procedure, where it says, "cancelled" or "non-renewed." A11. See page 11 of the Handbook, in the second paragraph under "Renewal procedure," where it talks about "expiration" of the prior policy. See Section III of the Handbook, where there is a "renewal procedure" section and a "cancellation procedure " section. A11-A12. Based on the foregoing, it is clear the Handbook recognizes a distinction. Because the Handbook uses "expiration / non-renewal" and "cancellation" alternatively, it is clear, as in *Moore*, the intent is for the words to be given their own meaning and not to be used interchangeably. The IAB failed to note this distinction.

Our case does involve a lapse, but it is a lapse due to the expiration / non-renewal of a policy, not the cancellation of a policy. The IAB's decision is based

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[22] *Id.*

[23] "Expiration" and "non-renewed" do appear to be used synonymously in the Handbook and will be therefore listed together, with a "/". A11.

on a provision in the Handbook that pertains to lapses due to cancellation; whereas our case does not involve a lapse due to a cancellation.

Pursuant to Section V of the Handbook, page 15, the servicing carrier and the employer are required to strictly comply "with all terms and conditions of the policy contract." A15. The IAB's decision must be consistent with this obligation of Liberty Mutual to strictly comply with all terms and conditions of the policy contract. Given the obligation to strictly comply, Liberty Mutual is not permitted to interpret the period of lapse the way the IAB did using an inapplicable provision. The IAB arrived at its decision by relying on a provision that pertains to cancelled policies when the policy in this case is an expired / non–renewed case. The terms have specific meanings and Section V of the Handbook requires strict adherence. Thus, the IAB erred when it calculated the period of lapse / effective date of renewal using the provision set out on page 13 of the Handbook. A13.

Since there is no provision in the Handbook that provides guidance on how to determine the period of lapse for an expired policy, and because the promulgators of the Handbook were clearly aware of the distinction between "expiration / non-renewal" and "cancellation," the IAB should have turned to case law for guidance on how to determine the period of lapse.

The available case law provides that a renewal policy does not go into effect until the carrier has actually received the premium payment.[24] This has been interpreted to mean actual receipt by the insurer or its agent of the full premium payment due.[25] "Absent an agreement to the contrary, delivery of a check and acceptance of it is not payment until the check itself is paid."[26]

At the August 17, 2011 hearing, Melissa Bennett testified the check was presented for deposit on January 18, 2010, and went through the processing bank on January 19, 2010. A144. The funds left CW's Wilmington Trust's account on January 20, 2010. A144. Mr. Barone testified the check was posted on January 19, 2010. A150. There is no substantial evidence that the premium payment was received by Liberty Mutual or its agent on January 12, 2010, or January 13, 2010. Per the holdings in *Moore* and *Colonial Ins. Co,* the IAB erred in concluding the policy was in effect as of January 15, 2010. Deference is not owed to the IAB's interpretation of the Handbook because the IAB was not interpreting *its own* rules.[27]

[24] *Colonial Ins. Co. v. Wilson,* 1991 Del. Super. LEXIS 257 (Del. Super. Ct. July 15, 1991).
[25] *Moore v. Travelers Indem. Ins. Co.,* 408 A.2d 298 (Del. Super. Ct. 1979).
[26] *Id*. *citing Wall v. Mutual Life Ins. Co.*, 467 F.2d 321, 324 (5th Cir. 1972). *Bartleman v. Humphrey*, 441 S.W.2d 335, 342 (Mo. 1969).
[27] *Christiana Town Ctr., LLC v. New Castle County*, 985 A.2d 389 (Del. 2009)(emphasis added).

ARGUMENT 3

A. QUESTION PRESENTED

Whether the IAB erred in ignoring the express language in the Handbook. (A75. Also, this question pertains to the standard of review for a decision of the IAB and is, therefore, not a question required to be preserved below as such).

B. SCOPE OF REVIEW

The scope of review is as set out in part "B" of Argument 1.

C. MERITS OF THE ARGUMENT

The IAB's August 31, 2011 decision interprets a Handbook provision that governs how to determine a period of lapse. In so doing, the IAB erred as a matter of law when it ignored the express language in the Handbook.

In *B&B Maintenance Serv. Inc. v. CNC Ins. Assocs.*, the Superior Court stated that the objective of the Delaware Workers' Compensation Insurance Plan (DWCIP) is to provide "workman's compensation insurance to an employer who is unable to obtain such coverage in the 'voluntary market". [28] The Superior Court further noted that a handbook accompanied the DWCIP and that this handbook sets forth certain guidelines and policies applicable to the DWCIP. Although the DWCIP is not a contract or statute, Liberty Mutual submits that standard rules of

[28] 1996 Del. Super. LEXIS 533.

interpretation should apply to its provisions including giving effect to plain and unambiguous terms, and giving ordinary and common meanings to undefined terms.[29] Ambiguity exists if two reasonable interpretations or meanings can be given to a term.[30]

Section III of the Handbook provides, "[t]he lapse shall be for the time period from and inclusive of the date of cancellation through the date of the U.S. postmark appearing on the envelope containing the item correcting the default or, if received by other means, consistent with the postmark binding rule." A13. Section II of the Handbook, in the section pertaining to the Binding of Coverage, provides, in pertinent part that "[i]n no event shall coverage be bound earlier than 12:01 A.M. on the first day following the postmark time and date on the envelope . . . If there is no postmark, coverage will be effective 12:01 A.M. of the date of receipt. . . ". A5.

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[29] *See e.g. Dewey Beach Enters. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307-08 (Del. 2010) (The rules of statutory construction are well settled . . .a court must determine whether the provision in question is ambiguous. . **.** if it is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning. . . Undefined words in a statute must be given their ordinary, common meaning . . words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning); *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776 (Del. 2012) (Court will interpret clear and unambiguous terms according to their ordinary meaning. . . Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. . . A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction . . . an ambiguity exists "[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings . . .Where a contract is ambiguous, "the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.").

[30] *Id*.

The referenced provision in the Handbook clearly provides that the appearance of a U.S postmark is to be used in determining the time period of a lapse in coverage. According to the Handbook, absent the U.S. postmark, the time period of a lapse is determined based on the date the item curing the defect is received. The term "U.S. postmark" is unambiguous. CW does not expressly argue that it is ambiguous, rather seems to argue that a private postmark is equivalent to a U.S. postmark, a wholly separate issue which is addressed hereafter. It is this separate issue that is addressed by the wealth of cases referenced by the Superior Court, not whether the term "U.S. postmark" is ambiguous. Because the term "U.S. postmark" is unambiguous, the words are to be given their plain meaning. It is undisputed that the envelope sent by CW containing the premium payment does not contain a U.S. postmark. A131. The IAB, therefore, should have found that the effective date of policy renewal was at midnight on the date the premium payment was received by Liberty Mutual. Accordingly, the IAB erred as a matter of law when it ignored the express wording in the Handbook and found the effective date of renewal to be January 13, 2010, one day after the private meter mark appearing on the envelope. Deference is not owed to the IAB's interpretation of the Handbook because it was not interpreting *its own* rules.[31]

[31] *Christiana Town Ctr., LLC v. New Castle County*, 985 A.2d 389 (Del. 2009)(emphasis added).

ARGUMENT 4

A. QUESTION PRESENTED.

Whether the IAB erred in finding that a private meter mark is the same as a U.S. Postmark. (A75. Also, this question pertains to the standard of review for a decision of the IAB and is, therefore, not a question required to be preserved below as such).

B. SCOPE OF REVIEW.

The scope of review is as set out in part "B" of Argument 1, which is hereby incorporated.

C. MERITS OF THE ARGUMENT

The IAB decided that a private meter mark is the same as a U.S. postmark based on factual evidence and its interpretation. That decision was made in error and is flawed.

As stated previously, it is generally accepted that written language is to be construed as drafted unless it is potentially ambiguous. Herein, the IAB did not find the "U.S. postmark" language in the Handbook to be ambiguous before considering other sources to assist it in equating a private meter mark to a U.S. postmark.

The cases cited by the IAB in support of its summary statement private meters marks have been found to be official postmarks and entitled to the same

privileges as a U.S. postmark are factually distinguishable because those cases dealt with the meaning of the undefined terms "postmark" or "cancellation mark" as those terms appeared in statutes applicable to appeals and review periods of administrative agencies.

For example, in *Chevron U.S.A., Inc. v. Dep't of Revenue*, the Supreme Court of Wyoming interpreted the meaning of "postmark" as used in a statute that did not include a definition of the term.[32] Initially, the court found that the term "postmark" was ambiguous because it was susceptible to more than one meaning. Because it found the term to be ambiguous, the court examined the legislative intent behind the statute and concluded that the intent was to simply provide a date certain for the beginning of the statutory appeals period, which a private postage meter stamp did just as well as a stamp affixed by the U.S. Postal Service. As for *Bowman v. Administrator*, the Supreme Court of Ohio found that the term "postmark" was not defined in any Ohio rule or statute applicable to taking an appeal from an administrative agency.[33] In *Headrick v. Jackes-Evans Mfg. Co.*, the Court of Appeals of Missouri was asked to address the issue of an erroneously postmarked envelope containing an Application for Review of an administrative decision within a statutory period.[34] The envelope in question had a private meter

[32] 154 P.3d 331 (Wyo. 2007).
[33] 507 N.E.2d 342 (Ohio 1987).
[34] 108 S.W.3d 114 (Mo. Ct. App.).

mark of November 16, 2002 instead of September 16, 2002, which was the last day to file an appeal. Because the envelope was mailed erroneously with a future date, the court remanded for a determination of when the envelope was actually mailed. In *Frandrup v. Pine Bend Warehouse*, the Minnesota Court of Appeals was asked to interpret statutory language requiring a "cancellation mark" on any appeal concerning reemployment insurance benefits.[35] The court found that the term "cancellation mark" was not defined in the statute and, also, was ambiguous. To the extent, *Chevron U.S.A., Bowman, Frandrup* cases also discussed and/or relied upon the Domestic Mail Manual (DMM) to support their conclusions, Liberty Mutual notes that the older versions of the DMM apparently included regulations indicating that the post office would inspect metered mail to ensure the postage meter stamp's date accuracy. The current, DMM does not contain such regulations; rather, the onus appears to be on the mailer to correct any mistakes in the date of the postage meter stamp. [36]

In addition, at least one Delaware court has noted that a postmark is merely an indication of a date of mailing and, in fact, may conflict with the actual date of

[35] 531 N.W.2d 886 (Minn. Ct. App. 1995).
[36] *See Lozier Corp. v. Douglas County Bd. of Equalization*, 829 N.W.2d 652 (Neb. 2013).

mailing.[37] Moreover, several courts have found private postmarks to be inherently unreliable as they can be manipulated to show any desired date.[38]

In *Idaho Department of Labor*, the Idaho Supreme Court, addressing the timeliness of an appeal, explained as follows:

> A postmark can only be applied by the USPS itself to indicate whether, when, and where the post office accepted the piece of mail or to show that there is a defect in the mailpiece or its affixed postage. In contrast, the United States Postal Service Domestic Mail Manual defines a postage-meter machine as a "device or system of components a customer uses to print evidence that postage required for mailing has been paid." Thus, "the metered stamp [in private offices] has little, if any, probative force as evidence of the date of mailing." Like a back stamp, a postage-meter mark cannot be a postmark because it does not indicate if, when, or where the USPS accepted custody of the mailpiece. The user can easily print an inaccurate date or deliver the mail on a different date than that indicated by the postage meter on the envelope. The sender can also simply omit part or all of the date from the mailpiece and send the letter at any time. [citations omitted].[39]

The Court also observed:

> It is true that even though the mark is simply evidence that the customer paid postage, metered mailpieces bearing a date "must be deposited or presented" to the USPS on the meter-stamp date according to the rules that the USPS imposes on meter users. If the mailpiece is not deposited on the meter-stamp date, a date correction must be applied to the piece. Nonetheless, despite the USPS policy against accepting a mailpiece with an incorrect

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[37] *See Minnick v. State Farm Mut. Auto. Ins.* Co., 174 A.2d 706 (1961).
[38] *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).
[39] *Id.*, 218 P.3d at 1136.

> postage-meter date, the USPS cannot closely scrutinize all of the millions of meter-marked dates on the mail it processes. In short, the meter mark is merely evidence of whether postage was paid--not when it was placed in USPS custody.[40]

In *Lin*, the Pennsylvania Supreme Court noted that it had held several times that a private postage meter mark is not the equivalent of an official U.S. Postal Service mark, and was not determinative of the timeliness of an appeal. In reaching its conclusion, the Court stated that the drafters of the regulation governing appeals did not recognize that placing an appeal in the mail initiates the appeal, but rather, the regulation only recognized the postmark date.[41] According to the Court, "the U.S. postmark, as opposed to a private meter postmark or testimony concerning the placing of the appeal in the mail box, is virtually unassailable evidence of the time of mailing of an appeal."[42]

In *Corona*, the Washington Court of Appeals explained as follows with respect to the date an appeal was deemed to have been filed:

> Under the Board's regulations, "the filing of a written communication with the board is perfected by mail when the written communication is deposited in the United States mail." Further, "unless evidence is presented to the contrary, the date of the United States postal service postmark shall be presumed to be the date the written communication was mailed to the board." The private postage meter stamp is not "evidence to the contrary" to overcome the presumption that the United States postal service postmark is the date Corona's petition for review

[40] *Id.*
[41] *Id.*, 735 A.2d at 699.
[42] *Id.*

> was mailed to the Board. The private postmark is nothing more than evidence that the postage was applied to the envelope on February 1. It is not evidence that the envelope was placed in the United States mail. It is entirely conceivable that postage can be applied to an envelope by using a private postage meter on one day, but that the letter is not deposited in the mail until a later day. Indeed, a private postage meter stamp can be applied to an envelope any number of days before that envelope is deposited in the mail. By contrast, a United States postal service mark cannot be applied to an envelope until that envelope is actually placed into the United States mail. Accordingly, only a United States postal service postmark can be evidence of when an envelope was mailed.[43]

Lastly, in *Universal City Studios LLLP v. Peters*, the District of Columbia Circuit Court considered an appeal concerning the rejection of copyright royalty claims as untimely by the Copyright Office.[44] The Copyright Office regulations specifying that a claim would be considered timely if the claim "(1) was actually received by the Office during July, or (2) bears a July U.S. postmark and was sent via the United States Postal Service." The regulations also expressly state that "claims dated only with a business meter that are received after July 31, will not be accepted as having been timely filed."

The District Court granted summary judgment to the Copyright office because it found that the regulations establishing a bright line rule were clear and, further, that Copyright Office's refusal to grant a waiver was not an abuse of discretion because the essence of the rule was to prohibit case-by-case inquiries

[43] *Corona v. Boeing Co.*, 46 P.3d 253, 255.
[44] 402 F.3d 1238 (D.C. Cir. 2005).

into the time of mailing. An appeal followed based on the interpretation of the regulation, the waiver request, and due process grounds, the latter two of which we do not discuss.

The Circuit Court reviewed the regulation and concluded:

> The rules make clear that claims arriving after July that do not bear a U.S. postmark will not be accepted unless the claimant can produce a stamped receipt. Section (c) states the general rule very clearly: "Claims dated only with a business meter that are received after July 31, will not be accepted as having been timely filed." Section (e) provides for the one and only exception to this rule for claims without a U.S. postmark: "in the event that a properly addressed and mailed claim is not timely received by the Copyright Office," claimants "may nonetheless prove" proper filing using a receipt. In other words, the rule is only "permissive" in that it allows claimants their one means of escaping the consequences of section (c).

The Circuit Court, therefore, affirmed summary judgment in favor of the Copyright office.

ARGUMENT 5

A. QUESTION PRESENTED.

Whether there is substantial evidence in the record to support the IAB's finding that the premium payment was, more likely than not, received on January 15, 2010, after 2 p.m. (This question pertains to the standard of review for a decision of the IAB and is, therefore, not a question required to be preserved below as such).

B. SCOPE OF REVIEW.

The scope of review is as set out in part "B" of Argument 1, which is hereby incorporated.

C. MERITS OF THE ARGUMENT

This litigation centers on CW's request for an insurance coverage determination. Therefore, CW has the burden of proof.[45] It must meet its burden by a preponderance of the evidence.[46] Findings of the IAB must be supported by substantial evidence.[47]

CW offered absolutely no evidence on the issue of when the premium payment was actually received by Liberty Mutual or Citibank. Instead, CW offers conjecture as to when the premium payment was received by way of its own

[45] 29 *Del. C.* §10125(c).
[46] *Lawson v. Chrysler Corp.*, 199 A.2d 749 (Del. Super. Ct. 1964).
[47] *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).

"investigation". Not only did the IAB accept CW's conjecture, it inexplicably found it to be consistent with the testimony of a representative of CW's bank.

On the issue of when the premium payment was received, Liberty Mutual presented two witnesses. The first witness, Melissa Bennett, office coordinator for the Legal Department at Wilmington Trust Company, CW's bank, testified that CW's check was presented for deposit to Citibank, Liberty Mutual's bank, on January 18, 2010, and processed on January 19, 2010, based on a stamp affixed to the back of the check. The second witness, Michael Barone, Director of Citibank, confirmed that the check had been presented to Citibank on January 18, 2010, and processed on January 19, 2010. Mr. Barone testified that, although he could not determine when the premium payment envelope was placed into the lockbox, any payment received prior to a 1:00 p.m. on January 15, 2010 would have been processed as of January 15, 2010. He further testified that, the fact that the check was stamped on the 18th suggests it was received in the lockbox on the 16th or 17th. A156.

The postmark binding principle in the Handbook requires "receipt" for purposes of making coverage effective. A5 The word "receipt" is commonly defined to mean the act of receiving. Black's law dictionary defines "receive" as meaning "to take into possession and control; accept custody of" and Merriam Webster defines it to mean "receive to mean to come into possession, acquire."

Under the commonly understood and legal definitions, to receive connotes an element of possession, control or accepting custody. Herein, while it is possible that the premium payment was placed into the lockbox sometime between 1:00 p.m. on January 15, 2010 or on January 16 or 17, 2010, the indisputable fact is that Citibank did not receive the premium payment until it had it in its possession, control or custody. That did not occur until January 18, 2010, when Citibank acknowledged receiving it by way of a stamp affixed to the back of the check.

In no way can Ms. Bennett's testimony be construed to support a finding that the premium payment was received by Citibank on January 15, 2010. At best, it suggests that the premium payment could have been placed in the lockbox after 1:00 p.m. on January 15, 2010 or on January 16 or 17, 2010, which is not the same as Citibank receiving the check. Rather, the uncontradicted and credible evidence demonstrates that Citibank received the premium payment check on January 18, 2010. If Citibank is deemed to have received the check on behalf of Liberty Mutual, this means that the policy renewed at midnight on January 18, 2010, if the cancellation provision of Handbook applies.

The IAB also found it would be unfair to hold CW to a processing cut off time which ends before the business day as established by Liberty Mutual and Citibank. Such a finding is unwarranted under the circumstances. CW had been informed months in advance by Liberty Mutual that a payment was due if it

wanted to renew the policy. CW elected not to make a timely premium payment and, moreover, decided to wait almost two additional weeks to do so. This entire controversy could have been avoided if CW had simply obtained a U.S. postmark on the envelope transmitting its check or some form of receipt from the U.S. post office evidencing that the premium payment was being sent to Liberty Mutual, rather than relying on a private meter mark, which numerous courts including this Court, have recognized as an unreliable indication of a mailing date. Liberty Mutual submits that the onus is on CW to make sure that it receives the premium payment and, if it wants it to be received by a certain date it should take steps to achieve that objective, such as mailing the premium payment by overnight mail, two day delivery or other options offered by private entities and the U.S. post office.

In addition, the Handbook provides two ways to determine when a premium payment should be deemed received – by U.S. postmark or its binding principle, which focuses on when something is received. To suggest that the insured can argue that the processing cut-off is unfair, and for the IAB to accept such a contention, invites fraud and manipulation. CW had many options at its disposable to make sure Liberty Mutual received its premium payment before Claimant was injured. It failed to employ any of them. To find that Liberty Mutual acted unfairly is tantamount to shifting CW's burden onto it.

In addition, the Handbook does not dictate how a participating insurer is required to receive premium payments. As such, it certainly is not unreasonable for Liberty Mutual to have a lockbox in which the U.S. post office can place envelopes containing premium payments for the assigned risk program. Further, there is no evidence in the record to support a finding that the system put in place by Liberty Mutual to process payments took longer than some other system.

The IAB's decision on when the renewal policy is effective is not based on substantial evidence; but rather, is premised on conjecture and the imposition of a fairness standard that simply does not apply to Liberty Mutual here because the burden is on CW to assure that Liberty Mutual received the premium payment in a timely fashion.

ARGUMENT 6

A. QUESTION PRESENTED

Whether the IAB erred in relying on the *Levan* case as it is both factually and legally distinguishable. (A236).

B. SCOPE OF REVIEW

The scope of review is as set out in part "B" of Argument 1, which is hereby incorporated.

C. MERITS OF THE ARGUMENT

Levan v. Independence Mall Inc. had nothing to do with the renewal of an insurance policy, but instead addressed the issue of whether a claimant was entitled to receive additional workers compensation benefits after compensation had already been paid. [48] Besides being factually distinguishable, the issue raised in *Levan* required the Court to determine whether the applicable statute of limitations had expired based on a five year bar from the time of the insurer making the last payment. Herein, CW's policy expired because it failed to timely renew an expiring policy and has nothing to do with the application of a statute of limitations. As discussed previously, established case law demonstrates that a policy renews upon receipt of the premium payment by the insurer or, if the

[48] 940 A.2d 929 (Del. 2007).

Handbook applies, pursuant to the binding principle. In either case, the mailing of the premium payment is not determinative.

In addition, in creating a bright line test such as the "mailing date," the *Levan* court was interested in creating a rule that allowed parties to operate with some degree of predictability.[49] Under the circumstances involved in paying compensation, the *Levan* court concluded that predictability was better achieved when the payment obligation of an employer or insurer was conditionally satisfied upon the mailing of the check. While predictability in the determination of the lapse period for a renewed policy is relevant herein, as stated previously, guidelines / rules are already in place. It is generally accepted that a policy renews when the premium payment is received.[50] If the Handbook applies, the policy renews at midnight of the first day following the U.S. postmark on the envelope or, if there is no U.S. postmark, on the day the premium payment was received.

The IAB's determination that a bright line rule makes sense is also premised on faulty assumptions. Contrary to the IAB's view, Liberty Mutual is not the only party in sole control over the receipt of the premium payment. As suggested previously, CW had several options available to it to assure that Liberty Mutual received the premium payment on or by a specific date including overnight or other guaranteed or tracked delivery. In addition, Liberty Mutual is not seeking to

[49] *Id*., 940 A.2d at 934-35.
[50] *Minnick v. State Farm Mut. Auto. Ins. Co.,* 174 A.2d 706, 712 (1961).

deny coverage; rather, there was no policy in effect due to CW's failure to timely renew. Herein, it is CW that is seeking to renew coverage and, thus, unlike the burden to make a payment addressed in the *Levan* case, the burden is on CW to make sure that Liberty Mutual receives its premium payment. To allow a "mailing date" to govern when a policy renews invites inequity, unfairness, and possibly fraud. For instance, an insured, with a private meter, can pre-stamp an envelope containing a premium payment, hold the envelope and mail it after an injury has occurred. A similar outcome would occur if an insured placed a regular stamp on the envelope and mails it after becoming aware of an injury. For these reasons, the *Levan* case is distinguishable and the receipt date of a premium payment or the application of the binding principle provides for more predictability in the determination of any lapse period at issue in the renewal of a policy.

CONCLUSION

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

Respectfully submitted,

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DATED: November 4, 2013