

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

GUSTAVO BENITEZ GOMEZ, *Applicant*

vs.

**EXPRESSIONS GENERAL REMODEL;
NORGUARD INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11969555
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the answer, and the contents of the report of the Arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the arbitrator's Report, which we adopt and incorporate, we will deny reconsideration.

In addition to the reasons stated by the Arbitrator in the Report, we note that WCAB Rule 10625 defines "proof of service" as "a dated and verified declaration identifying the document(s) served and the parties who were served, and stating that service has been made and the method by which it has been made...". (Cal. Code Regs., tit. 8, § 10625.) We agree with the Arbitrator that petitioner failed to establish by a preponderance of evidence that a notice of cancellation was in fact mailed.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 22, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**GUSTAVO BENITEZ GOMEZ
RATTO LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
LAW OFFICES OF BRUNN & FLYNN
OFFICE OF THE DIRECTOR – LEGAL UNIT
UNINSURED EMPLOYERS BENEFITS TRUST FUND**

JB/cs

I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this date.
CS

**REPORT & RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

STATEMENT OF CONTENTIONS

Defendant NorGUARD Insurance filed a timely and verified Petition for Reconsideration dated October 27, 2023, and received by the undersigned on October 28, 2023 in response to the Conclusion of Law and Order of October 4, 2023, issued by the undersigned arbitrator pursuant to Labor Code sections 5270 et seq. No Answer has been received to date.

Defendant NorGUARD contends that the Conclusion of Law set forth below was in error because:

- 1) NorGUARD's evidence established that the notice of cancellation of the workers' compensation insurance policy covering Expressions General Remodel was in fact validly mailed.
- 2) The California Insurance Code does not require a mailing ledger.
- 3) The notice of cancellation in and of itself is adequate proof of mailing, and the notice offered constitutes such proof.
- 4) The notice of cancellation met the requirements of the policies terms.
- 5) The fact that cancellation information was submitted to the WCIRB was not considered.

DISCUSSION

Pursuant to the October 4, 2023 Conclusions of Law and Orders it was determined that:

Conclusions of Law

1. The workers' compensation insurance policy issued by NorGUARD Insurance Company (policy number JAWC857596) had not been effectively cancelled via legally proper notice to the employer, Expressions General Remodel, prior to applicant's alleged injury on May 8, 2018.
2. Expressions is covered by workers' compensation insurance on the date of the applicant's alleged injury on May 8, 2018.

Order

**GOOD CAUSE APPEARING THEREFORE,
IT IS ORDERED** that Expressions General Remodel is covered by the workers'

compensation policy purchased from NorGUARD Insurance Company (policy number JAWC857596) and thus NorGUARD is liable for any compensation owed as a result of the injury alleged herein.

My reasoning for these conclusions can be found in my Opinion on Decision:

Opinion on Decision

Introduction

This matter has been submitted to arbitration pursuant to Labor Code section 5275 (a)(1). Applicant, an employee of Expressions General Remodel, sustained an injury on May 8, 2018. Norguard contends that there had been a workers' compensation insurance policy in place covering employees of Expressions, but that it was cancelled on or about November 12, 2017, prior to applicant's May 8, 2018 injury.

Issue

Whether the workers' compensation insurance policy issued by NorGUARD to the employer, Expressions General Remodel had been effectively cancelled via legally proper notice to the employer prior to applicant's injury on May 8, 2018.

Discussion

The law is well-settled that "[i]nterpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal. 4th 19) "A contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (California Civil Code section 1636.) "Such intent is to be inferred, if possible, solely from the written provisions of the contract." (*TRB Investments, supra* at 27.)

The Policy Language

It appears to be undisputed that NorGUARD issued two workers' compensation insurance policies to Expressions. The first was JAWC726125 effective from 06/11/2016 to 06/11/2017. (See Expressions Exhibit A). The second, an extension of the first, was JAWC857596 effective from 6/11/2017 to 06/11/2018. (See Expressions Exhibit B).

Referring to the "Standard Policy" portion of the policies (see NorGUARD Exhibit 23, WC 00 00 00 C), NorGUARD directs our attention to Part 5, Section F of the policies, "Records", that states:
"You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them."

NorGUARD then directs our attention to Part 5, Section G of the "Standard Policy", "Audit", that states:

“You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.”

Next NorGUARD directs our attention to Part 6, Section A of the “Standard Policy”, “Inspection”, that states:

“We have the right, but are not obligated to inspect your workplace at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions that we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.”

Finally NorGUARD directs our attention to Part 6, Section D of the “Standard Policy”, “Cancellation”, that states:

“1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.

“2. We may cancel this policy. We must mail or deliver to you not less than two days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.

“3. The policy period will end on the day and hour stated in the cancellation notice.

“4. Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with the law.”

(Emphasis added)

Further, the “California Cancellation Endorsement” (Form 04 06 01A) attached to both policies states, in pertinent part:

“... ”

The cancellation condition in Part Six (Conditions) of the policy is replaced by these conditions:

Cancellation:

“... ”

“2. We may cancel this policy for one or more of the following reasons:

“... ”

“b. Failure to reports payroll;

“c. Failure to permit us to audit payroll as required by the terms of this policy or of a previous policy issued by us;

“... ”

“3. If we cancel your policy for any of the reasons listed in (a) through (f), we will give you 10 days advance written notice, stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice...”
(See Expressions Exhibits A and B, page 27).

The Statutory Law

Additionally, the cancellation of workers’ compensation insurance policies are regulated in California by California Insurance Code section 676.8. Section 676.8 (b) lists the grounds upon which a workers’ compensation policy may be cancelled. The policy in question was allegedly cancelled based upon NorGUARD’s contention that Expressions failed to permit NorGUARD to audit its payroll to calculate the appropriate premium to charge for workers’ compensation insurance coverage, thus allegedly violating one of the conditions under which a policy may be canceled. Insurance Code section 676.8(b)(2), states:

“The policyholder’s failure to report payroll, to permit the insurer to audit payroll, as required by the terms of the policy or of a previous policy issued by the insurer, or to pay any additional premium as a result of an audit of payroll as required by the terms of the policy or of a previous policy.”

The requirements of an effective cancellation can be found in section 676.8(c) that states, in pertinent part:

“The policy shall not be cancelled for the conditions specified in paragraph (1), (2), (5) or (6) of subdivision (b) except upon 10 days written notice to the policy holder by the insurer... Subdivision (a) of Section 1013 of the Code of Civil Procedure applies if the notice is mailed.”

Subdivision (a) of section 1013 of the Code of Civil Procedure states:

“(a) In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence. Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, 12 calendar days if the place of address is the Secretary of State's address confidentiality program (Chapter 3.1 (commencing with Section 6205) of Division 7 of

Title 1 of the Government Code), and 20 calendar days if either the place of mailing or the place of address is outside the United States, but the extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by this section or other statute or rule of court.”

The Contentions

NorGUARD’s Contentions

NorGUARD contends that since Expressions failed to make its payroll documents available, either by providing records or cooperating with an audit, it had the right to cancel the policy in place pursuant to:

- 1) the language found in the body of the policy at:
 - a. Part 5, Section F,
 - b. Part 5, Section G,
 - c. Part 6, Section A,
- 2) the language of the California Cancellation Endorsement section 2, subsections b and c and
- 3) the California Insurance code section 676.8 (b)(2).

Further, and most importantly here, NorGUARD argues that it effectively canceled the policy by mailing it in compliance with:

- 1) the language found in the body of the policy at Part 6, Section D, subsection 2,
- 2) the language of the California Cancellation Endorsement section 3, and
- 3) the California Insurance code section 676.8 (c).

Expressions and Applicant’s Contentions

Expressions contends it only learned of the alleged lack of coverage when coverage was denied by NorGUARD subsequent to applicant’s injury. Expressions and the applicant both argue that there was insufficient proof that notice of cancellation was actually mailed as required by the policy and the statutory authority mentioned above. They point to NorGUARD Exhibit 27 as the only document purportedly establishing mailing, and state that it appears to be, at least in part, a United States Postal Service receipt, but with a listing of notices purportedly sent that is marked confidential and proprietary. The document makes no express reference to NorGUARD. And, they contend that the testimony of Mr. Marcincavage, NorGUARD’s witness, is too far removed from the actual mailing process, especially as to the notice in question, to constitute substantial evidence of mailing the specific notice required.

Legal Analysis

The sole question of whether NorGUARD has coverage over the injury herein rests on a determination of whether or not the Notice of Cancellation (NorGUARD Exhibit 3) was in fact mailed. The language in the above- mentioned policy, the endorsement and the California Insurance Code are consistent in establishing that it is the proof of mailing the notice in question that is determinative of whether notice has been legally established. The legal basis for issuing the notice, and the fact that the notice was not received, do not appear to be in dispute. There also does not appear to be any dispute that the address for Expressions is 1190 Burnett Avenue, Suite C, Concord, CA 94520.

Thus, the sole question herein is whether or not the notice of cancellation (NorGUARD Exhibit 3) was actually mailed. The only evidence upon which to make this determination is essentially 1) NorGUARD's Exhibit 27 and 2) the testimony of Albin Marcincavage, NorGUARD's sole witness.

NorGUARD's Exhibit 27

Exhibit 27 appears on its face to be a combination of a United States Postal Service form that is entitled, "Firm Mailing Book for Accountable Mail" with another form in some manner attached to the USPS form, that has a heading of:

DNON-DNOC Insured Proof of Mailing
INTERNAL USE ONLY
** CONFIDENTIAL & PROPRIETARY**

The form attached to the USPS for also states, "Prepared: 10/23/2017 07/08/10", and it also shows, "Page 7 of 40". It appears to list numerous addresses, all of which are redacted except for one that shows "JAWC857596. Expressions General Remodel, Inc. 1190 BURNETT AVENUE, STE C, Concord, CA 94520."

There is also what appears to be a USPS stamp dated 10/23/2017. There is also some writing that is a somewhat blurry that states, "FOR UPS ONLY".

There is no express marking on this Exhibit referencing NorGUARD, or its parent company. So what we have on its face appears to be a UPS Form attached to a USPS form, with no writing on the form referencing NorGUARD; but referencing the address of the insured, Expressions.

Testimony of Albin Marcincavage

Mr. Marcincavage testified that he is a current employee of NorGUARD, was hired in June of 2015, and is currently a specialist in underwriting. (Arbitration Transcript page 12, line 12 through page 12, line 18). He testified that he is knowledgeable regarding NorGUARD's internal policies and procedures regarding mailing. (Arbitration Transcript page 12, line 25 through page 13, line 2).

As to the mailing policies and procedures he testified that NorGUARD used the United States Postal Service and physically mailed documents at the USPS, and that would include notices of cancellation. (Arbitration Transcript page 13, line 22 through page 14, line 7).

Mr. Marcincavage explained various aspects of NorGuard Exhibit 27. The reference to “UPS Shipping” was on the form because, as he testified, NorGUARD had purchased these form from United Parcel Service. (Arbitration Transcript page 17, line 7 through page 18, line 18).

He testified that this form was provided to him by the NorGUARD legal department and it was considered a NorGUARD business record to provide proof of mailing. (Arbitration Transcript page 21, line 16 through page 22, line 4).

On cross-examination, Mr. Marcincavage testified that he did not know who prepared NorGUARD Exhibit 27 and indicated that it was prepared in the mail room, and he didn't know who that was, but someone on the mail room team. (Arbitration Transcript page 22, line 19 through page 23, line 4). He explained that he worked in underwriting and wasn't involved in the mail room, and had no involvement in preparing Exhibit 27. (Arbitration Transcript page 23, line 11 through page 24, line 2). He testified that he believed that that notice of cancellation would have been inside the envelope sent to the address referenced on Exhibit 27, but he has no actual personal knowledge of that. (Arbitration Transcript page 27, lines 10 through 25). When he was asked if he knew what a proof of service was, he testified that he did not. (Arbitration Transcript page 29, line 22 through page 30, line 2). Mr. Marcincavage knew of no other evidence establishing that a notice of cancellation was mailed to Expressions. (Arbitration Transcript page 30, lines 23 through 25).

It was also learned on cross-examination that between the witnesses deposition and his testimony during the arbitration hearing, he had spoken to Rosemary Farrell, a coverage specialist for NorGUARD, who apparently explained to him the reason for the UPS reference on the Exhibit 27 form. (Arbitration Transcript page 35, line 14 through page 36, line 23, and page 37, lines 16 to 24). He also testified that other than testifying in this matter he performed no actual work regarding the Expressions account. (Arbitration Transcript page 38, line 25 through page 39, line 6).

Conclusion

This case turns on the question of whether or not it has been established by a preponderance of the evidence (California Labor Code section 3202.5) that the notice of cancellation in question (Norguard Exhibit 3) was in fact mailed. There is evidence that it was, but in light of the questions apparent from both the document offered as the documentary evidence in support of the requisite mailing, as well as the questions raised by the depth, or lack thereof, of the understanding of the

mailing process by the only witness presented by NorGuard, the evidence presented lacks the requisite substantiality to establish to a preponderance of the evidence that the notice of cancellation was in fact mailed.

First of all, the documentary evidence is less than clear. A simple proof of service that the Notice of Cancellation had been sent with a signature by the person who sent it, would have provided the simple, clear and straightforward documentary evidence that would provide clarity on the issue of mailing. Instead, we have what appears to be a document showing a mass mailing without any indication as to who mailed these documents, and doesn't even reference NorGUARD.

Secondly, a witness with first hand familiarity with the mailing room may have been able to clarify the origins of Exhibit 27. However, the witness presented is from underwriting; an aspect of insurance that is irrelevant here. And, much of his testimony appears to be based upon what he was told by others in the legal department.

This evidence does not provide the substantial evidence of mailing necessary to establish to a preponderance of the evidence that the Notice of Cancellation was in fact mailed.

Conclusion

Therefore, I conclude that policy number JAWC857596 issued by NorGUARD providing workers' compensation insurance coverage for Expressions General Remodel was not effectively cancelled via legally proper notice to the employer prior to applicant's injury on May 8, 2018.

Arbitrator's Comments on Reconsideration

There is no dispute that the mailing of the notice of cancellation establishes that a policy is validly cancelled, per the Insurance code and the policy itself. The question is whether the mere existence of a cancellation notice is adequate proof that it was mailed.

NorGUARD appears to make the argument that it is. If NorGUARD is correct, then the policy is cancelled.

However, the Insurance Code section [676.8(c)] requires written notice to the policy holder, not simply the existence of a cancellation notice. And, if it is contended that the notice was provided by mail, there must be some proof that it was in fact mailed. Here, the issue is whether there is adequate proof that it was mailed. The nature and extent of the proof required is not specified in the Insurance Code. Thus, it appears to be the job of the arbitrator to determine, based upon the evidence presented, whether there was, to a preponderance of the evidence, an actual

mailing of the notice of cancellation in question to the policy holder. For the reasons set forth in my Opinion, I've concluded that there was not.

It is true that the Insurance Code doesn't expressly require a mailing ledger. However, when the carrier chooses to present a mailing ledger as proof of mailing, a determination of that piece of evidence's credibility is certainly important in determining how much weight to give to that piece of evidence. NorGUARD chose to introduce it into evidence, and other than the notice itself, is the only documentary evidence establishing that the notice was mailed. I found it less than credible, for the reasons described in my Opinion.

Finally, the fact that information regarding cancellation was submitted to the Workers' Compensation Insurance Rating Bureau does not speak to the issue of whether or not the notice of cancellation was mailed to the policy holder.

RECOMMENDATION

I recommend that the Petition for Reconsideration dated October 27, 2023, filed by NorGUARD, be DENIED.

Date: October 31, 2023

/s/ STEVEN SIEMERS

STEVEN SIEMERS, Arbitrator