

## SYLLABUS

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### Walter Sroczyński v. John Milek (A-68/77-07)

Argued May 5, 2008 -- Decided December 17, 2008

#### PER CURIAM

The issue in this appeal is whether a workers' compensation insurance carrier satisfied or substantially complied with the statutory requirements set forth in N.J.S.A. 34:15-81 for cancelling a policy, by its use of the electronic file transfer protocol (FTP) established by the New Jersey Compensation Rating and Inspection Bureau (CRIB) to transmit notice of cancellation to the New Jersey Commissioner of Banking and Insurance.

Under N.J.S.A. 34:15-81, to cancel workers' compensation coverage, the insurance carrier must send notice of cancellation to the employer by certified mail. It also must file with the Commissioner "like notice" and a "certified statement" that the carrier provided the required notice to the employer. N.J.S.A. 34:15-89 provides that CRIB is responsible for establishing rules and regulations for workers' compensation insurance. The Commissioner supervises CRIB's actions, including the adoption of the rules contained in CRIB's Workers' Compensation and Employers' Liability Insurance Manual (the Manual). The Manual, which incorporates by reference all of the relevant statutes, authorizes carriers to submit cancellation notices through CRIB's FTP system. That system permits only the transfer of data, not documents.

New Jersey Manufacturers Insurance Company (NJM) issued a workers' compensation and employer's liability policy to John Milek Construction (Milek) covering the period from May 6, 2003 to May 6, 2004. In August 2003, NJM sent Milek a certified mail notice of cancellation for nonpayment of premiums. NJM also sent notice of the cancellation to the Commissioner, using the FTP established by CRIB. In February 2004, Walter Sroczyński, an employee of Milek, was injured on the job. In March 2004, he filed a claim with the Division of Workers' Compensation.

NJM moved to be relieved of responsibility for coverage, arguing that it had properly canceled Milek's policy six months earlier. Sroczyński and the Uninsured Employer's Fund (UEF) opposed NJM's motion. The Judge of Compensation ruled that NJM failed to cancel the policy because NJM did not file a "certified statement" when it transmitted data using the FTP. The judge also held that the Manual does not relieve a carrier from its obligation to certify the information, and that strict compliance with the cancellation statute was necessary to avoid allowing a carrier to evade its responsibilities.

The Appellate Division affirmed. 396 N.J. Super. 248 (2007). NJM had argued that because it complied with the Manual, it complied with the statute. The panel rejected NJM's argument because it would require the court to ignore the "certified statement" portion of the statute and a key provision of the Manual requires compliance with all sections of the workers' compensation statutes. The panel also found that the case does not satisfy the purpose of the substantial compliance doctrine, which is to "avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Finally, the panel awarded counsel fees and costs to Sroczyński and the UEF.

The Supreme Court granted NJM's motion for leave to appeal from the judgment and the award of attorney's fees. 192 N.J. 591 (2007); 193 N.J. 272 (2007).

**HELD:** A carrier does not satisfy N.J.S.A. 34:15-81 merely by transmitting electronic notice of cancellation of coverage to the Commissioner by way of the FTP. The statute clearly requires that to effectuate the cancellation, a carrier also must file a statement certified by an employee that the required notice was provided to the insured.

1. The language of N.J.S.A. 34:15-81 is clear, requiring carriers to file a certified statement with the Commissioner

to effectuate the cancellation of coverage. Although CRIB could create an alternate mechanism by which insurers could comply with the statute, it could not adopt a protocol that allows the cancellation of coverage without submission of some version of the statutorily required certification. Use of the FTP system to transmit data about policy cancellations, without any accompanying certification, cannot be effective in light of the unambiguous demands of N.J.S.A. 34:15-81. (p. 8)

2. This case does not satisfy the purposes of the substantial compliance doctrine. The Legislature commanded that the insurer provide to the Commissioner a certification by an employee attesting to the truthfulness of the fact that proper notice was sent to the insured. The purpose of that provision was to place personal responsibility on an employee of the insurer to assure that proper notice of cancellation was given and to require that employee to certify to that fact, recognizing the legal implications of a false certification. Providing electronic information to the Commissioner, without a certification, completely defeats the notion of personal responsibility that the certification provision was intended to secure. It was not simply a technical misstep. (p. 8-9)

3. Although the industry acted in good faith in its approach to the issue in reliance on CRIB's confusing advice, the fact remains that the clear requirements of N.J.S.A. 34:15-81 were not satisfied, nor was substantial compliance effectuated. This is not a new rule of law to be applied prospectively; rather, the Court has merely confirmed the meaning of the clear statute. Nevertheless, the Court is concerned that the decision that the FTP system has been ineffective to achieve cancellation will cast doubt on thousands of policy cancellations in spite of the fact that they were never challenged. Thus, Sroczynski and any other party who previously raised the notice issue should be granted relief from the improper cancellations, but those cancellations that were never challenged should stand because the policyholders waived their right to do so. (p. 9-11)

4. The award of counsel fees to Sroczynski is affirmed. The award of fees to UEF is reversed. The Court's analysis of Rule 2:11-4(b), Rule 2:11-4(a), and Rule 4:42-9(a)(8) reveals no ground on which to sustain such an award to UEF. (p. 11-12)

The judgment of the Appellate Division is **AFFIRMED in part and REVERSED in part**.

**JUSTICE RIVERA-SOTO** filed a separate opinion **CONCURRING IN PART** and **DISSENTING IN PART**, in which **JUSTICE HOENS** joins, expressing the view that in these unique circumstances, driven in large measure by the acts of the statutorily created entity responsible for compliance with the statute, the carrier substantially complied with the admittedly clear and unambiguous statutory requirements for the cancellation of a workers' compensation insurance policy; and, thus, judgment should be entered in favor of the carrier.

**CHIEF JUSTICE RABNER** and **JUSTICES LONG, ALBIN, and WALLACE** join in the Court's opinion. **JUSTICE RIVERA-SOTO** has filed a separate opinion, concurring in part and dissenting in part, in which **JUSTICE HOENS** joins. **JUSTICE LaVECCHIA** did not participate.

SUPREME COURT OF NEW JERSEY  
A-68/77 September Term 2007

WALTER SROCYNSKI,

Petitioner-Respondent,

v.

JOHN MILEK, t/a JOHN MILEK  
CONSTRUCTION,

Respondent,

and

NEW JERSEY MANUFACTURERS  
INSURANCE COMPANY,

Respondent-Appellant,

and

UNINSURED EMPLOYER'S FUND,

Respondent-Respondent,

and

ROBERT WOOD JOHNSON  
UNIVERSITY HOSPITAL,

Intervenor-Respondent.

Argued May 5, 2008 - Decided December 17, 2008

On appeal from the Superior Court, Appellate  
Division, whose opinion is reported at 396  
N.J. Super. 248 (2007).

Michael J. Marone argued the cause for  
appellant (McElroy, Deutsch, Mulvaney &  
Carpenter, attorneys; Mr. Marone and Richard  
J. Williams, Jr., of counsel and on the

briefs).

David Hoffman argued the cause for respondent Walter Sroczyński (Wysoker, Glassner, Weingartner, Gonzalez & Lockspeiser, attorneys).

William L. Boyan argued the cause for respondent Uninsured Employer's Fund.

Donna Marie Montano argued the cause for intervenor-respondent Robert Wood Johnson University Hospital (Celentano, Stadtmauer & Walentowicz, attorneys; Steven Stadtmauer, of counsel and on the briefs).

Jerome J. Graham, Jr., submitted a brief on behalf of amici curiae Property Casualty Insurers Association of America and Insurance Council of New Jersey (Graham Curtin, attorneys; Mr. Graham and George C. Jones, on the brief).

PER CURIAM

New Jersey Manufacturers Insurance Company (NJM) issued a standard Workers' Compensation and Employer's Liability Insurance Policy to John Milek Construction (Milek) covering the period from May 6, 2003 to May 6, 2004. Milek ceased making payments on the policy after the initial premium was satisfied. As a result, on August 14, 2003, NJM sent Milek a notice of cancellation by certified mail. On August 15, 2003, NJM notified the New Jersey Commissioner of Banking and Insurance of the cancellation, using an electronic file transfer protocol (FTP) established by the New Jersey Compensation Rating and

Inspection Bureau (CRIB).<sup>1</sup>

On February 28, 2004, petitioner, Walter Sroczynski, an employee of Milek, sustained a work-related injury. On March 17, 2004, Sroczynski filed a claim with the Division of Workers' Compensation, seeking workers' compensation benefits.

NJM moved to be relieved of responsibility for providing coverage, arguing that it had properly canceled Milek's policy almost six months earlier. Opposing NJM's motion was Sroczynski and the Uninsured Employer's Fund (UEF). Because of the significant medical costs incurred in caring for Sroczynski after his injury, the trial judge also granted Robert Wood Johnson University Hospital (RWJH) intervenor status.

At issue in the case was whether NJM satisfied N.J.S.A. 34:15-81, which sets forth the specific requirements for cancellation of a workers' compensation policy of insurance:

Any contract of insurance issued by a stock company or mutual association against liability arising under this chapter may be canceled by either the employer or the insurance carrier within the time limited by such contract for its expiration.

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<sup>1</sup> CRIB is responsible for "establish[ing] and maintain[ing] rules, regulations, and premium rates for workmen's compensation and employer's liability insurance and equitably adjust[ing] the same, as far as practicable, to the hazard of individual risks, by inspection by the bureau." N.J.S.A. 34:15-89. The Commissioner supervises all of CRIB's actions, including the adoption of the rules and regulations contained in CRIB's Workers' Compensation and Employers' Liability Insurance Manual (the Manual). The Manual incorporates by reference all of the relevant statutes.

No such policy shall be deemed to be canceled until:

a. At least ten days' notice in writing of the election to terminate such contract is given by registered mail by the party seeking cancellation thereof to the other party thereto; and

b. Until like notice shall be filed in the office of the commissioner of banking and insurance, together with a certified statement that the notice provided for by paragraph "a" of this section has been given; and

c. Until ten days have elapsed after the filing required by paragraph "b" of this section has been made.

The provisions "b" and "c" of this section shall not apply where the employer has replaced the contract to be canceled by other insurance, and notice of such replacement has been filed with the Commissioner of Banking and Insurance. In such event the notice required by provision "a" may, if given by the insurance carrier, recite as the termination date the effective date of the other insurance, and the contract shall be terminated retroactively as of that date. No notice of cancellation of any such contract need be filed in the office of the Commissioner of Banking and Insurance where the employer is not required by any law of this State to effect such insurance.

[N.J.S.A. 34:15-81 (emphasis added).]<sup>2</sup>

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<sup>2</sup> The CRIB Manual authorizes carriers to submit cancellation notices by means of electronic transmission. Electronic submission of cancellation information can be achieved in one of two ways: in the form of a magnetic tape that includes the data prescribed in the National Workers Compensation Data

At a plenary hearing, the Judge of Compensation heard testimony from an assistant vice president of NJM. He testified that NJM was aware of the procedures required by N.J.S.A. 34:15-81 to cancel workers' compensation coverage and that the notice of cancellation sent to Milek by certified mail satisfied the statute. He also claimed that NJM complied with the "like notice" and "certified statement" requirements of N.J.S.A. 34:15-81(b) by the electronic transfer to CRIB.

The Judge of Compensation ruled that NJM failed to cancel the policy because, as NJM acknowledged, it did not file a written "certified statement" when it transmitted data by way of the FTP. Further, the judge discounted NJM's reliance on the CRIB Manual because it "outlines the manner in which the notice is to be filed and in no way relieves the carrier from its obligation to certify the information." Finally, based on the public policy favoring the provision of workers' compensation insurance, the judge found that strict compliance with the cancellation statute was necessary to avoid allowing a carrier to evade its responsibilities and "deny the insured worker the recovery promised to him by the law."

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Specifications Manual; or, through a secure internet connection using CRIB's FTP system that permits only the transfer of data, not documents. The Manual also includes an Approved Form for Filing Notice of Cancellation by Carrier, known as Form 116-B. Form 116-B incorporates a certification by the carrier that N.J.S.A. 34:15-81 has been satisfied.

NJM appealed, arguing that its cancellation of Milek's policy satisfied the statute and, alternatively, that the doctrine of substantial compliance applies. In rejecting those arguments, the panel focused exclusively on the purpose and meaning of the "certified statement" requirement of N.J.S.A. 34:15-81(b) and declared that NJM's argument would require it "to ignore a portion of the statutory scheme that the Legislature believed was important, and would in effect constitute a rewriting of the statute." Sroczyński v. Milek, 396 N.J. Super. 248, 256 (App. Div. 2007). The panel also rejected NJM's argument that because NJM complied with the CRIB Manual, it complied with the statute, stating "NJM's argument ignores one of the key provisions of the manual[,] "id." at 255, which requires compliance with all sections of the workers' compensation statutes. Further, the panel rejected NJM's substantial compliance argument, concluding that the case does not satisfy the purpose of the substantial compliance doctrine, which is to "avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 352 (2001). Finally, it awarded counsel fees and costs to Sroczyński and the UEF.

We granted NJM's motion for leave to appeal from the judgment and the award of attorneys' fees to Sroczyński and to

the UEF. 192 N.J. 591 (2007); 193 N.J. 272 (2007). We also granted leave to the Property Casualty Insurers Association of America (PCIA) and the Insurance Council of New Jersey (ICNJ) to participate as amici curiae.

Before us, the parties maintain the positions they advanced below. NJM argues that it complied, or at least complied substantially, with the statute, and that any contrary holding would, at best, be a new rule of law requiring purely prospective application, and that counsel fees are not authorized. Amici PCIA and ICNJ side with that view.

Sroczyński and the UEF counter that the statute was not satisfied because of the absence of a "certified" statement, that the CRIB Manual specifically incorporates the statutory requirements, and that this case does not involve the kind of technical slip-up that substantial compliance was meant to address. In addition, they urge us to conclude that their interpretation is not a new rule of law and that counsel fees are authorized. Amicus RWJH supports that view.

We have carefully reviewed this record in light of the claims advanced and, except with respect to the award of counsel fees to the UEF, have concluded that there is no warrant for our intervention. We therefore affirm the judgment of the Appellate Division in Sroczyński's favor substantially for the reasons expressed in Judge Baxter's opinion.

We add the following. The language of N.J.S.A. 34:15-81 is clear and unambiguous, allowing for no interpretation other than that filing a certified statement with the Commissioner is a prerequisite to effectuating the cancellation of coverage. In light of the clarity of that part of the statute, CRIB lacked the authority to relieve the insurers of their obligation to comply with the requirement for filing a certification. Although CRIB could, consistent with its legislative mandate, create an alternate mechanism by which insurers could comply with the statute, it could not adopt a protocol that operated to allow the cancellation of coverage without submission by the insurers of some version of the statutorily required certification. In short, the Appellate Division correctly concluded that the use of the FTP system to transmit data about policy cancellations, without any accompanying certification, cannot be effective in light of the clear and unambiguous demands of N.J.S.A. 34:15-81(b).

Regarding substantial compliance, although we might not have parsed the elements of the doctrine exactly as the Appellate Division did, we too have concluded that this is not a case that satisfies the policies that inform the substantial compliance doctrine. Here, the Legislature did not simply require notice to the Commissioner but also commanded that the insurer provide a certification by an employee attesting to the

truthfulness of the fact that proper notice was afforded the insured. Although the legislative history of the Act is sparse, it seems obvious that the purpose of that provision was to place personal responsibility on an employee of the insurer to assure that proper notice of cancellation was given and to require that employee to certify to that fact, recognizing the legal implications of a false certification. The electronic provision of information to the Commissioner, without a certification, completely defeats the notion of personal responsibility that the certification provision was intended to secure. It was, thus, not simply a technical misstep. As such, the insurer could derive no comfort from a substantial compliance analysis which is meant to ameliorate the harsh consequences of actions that meet the spirit of a law but technically fall short.

To be sure, the industry acted in good faith in its approach to the issue in reliance on CRIB's, at best, confusing advice. Nevertheless, the fact remains, as the Appellate Division pointed out, that the clear requirements of N.J.S.A. 34:15-81 were not satisfied, nor was substantial compliance effectuated.

NJM and the amici argue that such a decision constitutes a new rule of law which should be applied prospectively. We disagree. In ruling, we have merely confirmed the meaning of a clear statute. Thus, there is no warrant for a retroactivity

analysis. State v. Burstein, 85 N.J. 394, 403 (1981) (holding retroactivity analysis relevant only in cases involving departure from existing law). Where a ruling is not a break from the past, we construe it as "one that has always applied." State v. Calbert, 190 N.J. 14, 22 (2007).

Nevertheless, we are concerned over the amici's argument that the practical effect of invalidating all prior cancellations with respect to which notice was electronically afforded would be to create chaos in the workers' compensation insurance industry. Although the magnetic tape option allowed by CRIB does permit transmission of certifications as the statute requires, many insurers have been relying on the FTP system and therefore have not complied with that part of the statute at all.<sup>3</sup> The decision that the FTP system has been ineffective to achieve cancellation thus will cast doubt on thousands of policy cancellations in spite of the fact that they were never challenged. Had those cancellations been challenged in a timely fashion, the insurer might have been able to

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<sup>3</sup> We note that on October 9, 2006, after the filing of this litigation and likely because of it, CRIB issued Advisory Bulletin #16 which alerted carriers that "a question exists" regarding whether cancellation notices submitted by magnetic tape and FTP satisfy the requirements of N.J.S.A. 34:15-81(b). Advisory Bulletin #16 recommended that electronic filing of cancellation notices be accompanied by a transmittal letter containing a certification, in prescribed language, which includes the "like notice" statement required by the statute and previously included in Form 116-B.

reconstruct the records and provide an employee's certification. Whether that would be possible now seems problematic. That is an untenable state of affairs. Thus, we have concluded that Sroczynski and any other party who previously raised the notice issue should be granted relief from the improper cancellations but that those cancellations that were never challenged should stand because the policyholders waived their right to do so.

That outcome is not perfect, but it rewards those who pursued their legal options; leaves those who waived a challenge with the results of their waiver; and does not throw into chaos an industry that adopted a mistaken plan of action in good faith reliance on official misinformation.

With respect to counsel fees, we affirm regarding the award to Sroczynski. We find no basis on which to conclude that the Appellate Division abused its discretion in its grant of fees to Sroczynski or in the quantum thereof. See R. 2:11-4(a) (incorporating statutory bases for award at trial level, R. 4:42-9(a) thus encompassing N.J.S.A. 34:15-64).

We reach a different conclusion in respect of the Appellate Division's award of counsel fees to the UEF. Our analysis of R. 2:11-4(b) reveals no ground on which to sustain such an award on an appeal. Although broad in its description of workers' compensation appeals, the rule suggests that the award of fees is intended for the benefit of the injured worker and thus

provides no ground for an award in favor of UEF. See R. 2:11-4(b).

Nor do we find authority in the more general subpart of the Rule which refers to "actions in which an award of counsel fees is permitted by R. 4:42-9(a)." R. 2:11-4(a). That Rule, which allows an award of fees to a successful claimant in actions based on indemnity or liability insurance policies, see R. 4:42-9(a)(6), has no application because the Fund does not qualify as such a successful claimant. See Messec v. USF&G Ins. Co., 369 N.J. Super. 61, 64 (App. Div. 2004) ("Fees should not be awarded [under Rule 4:42-9(a)(6)] when an insurer loses a dispute with another insurer . . . .").

The only other potentially applicable rule refers to statutes that specifically allow counsel fees, see R. 4:42-9(a)(8). However, there is neither a basis for such an award in the UEF statute (N.J.S.A. 34:15-120.1 to -120.30) nor in the workers' compensation statute (N.J.S.A. 34:15-64). Lacking a basis in law, we reverse the award of counsel fees to the UEF.

The judgment of the Appellate Division in favor of Sroczynski is affirmed and the award of counsel fees to the UEF is reversed, for the reasons to which we have adverted.

CHIEF JUSTICE RABNER and JUSTICES LONG, ALBIN, and WALLACE join in the Court's opinion. JUSTICE RIVERA-SOTO has filed a separate opinion, concurring in part and dissenting in part, in which JUSTICE HOENS joins. JUSTICE LAVECCHIA did not participate.

SUPREME COURT OF NEW JERSEY  
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WALTER SROCZYNSKI,

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JOHN MILEK, t/a JOHN MILEK  
CONSTRUCTION,

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NEW JERSEY MANUFACTURERS  
INSURANCE COMPANY,

Respondent-Appellant,

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UNINSURED EMPLOYER'S FUND,

Respondent-Respondent,

and

ROBERT WOOD JOHNSON  
UNIVERSITY HOSPITAL,

Intervenor-Respondent.

JUSTICE RIVERA-SOTO, concurring in part and dissenting in  
part.

On February 28, 2004, Walter Sroczyński was injured while  
in the employ of John Milek, t/a John Milek Construction  
(Milek). Two and one-half weeks later, Sroczyński filed a

workers' compensation claim against his employer. Then unknown to Sroczynski, his employer's workers' compensation insurance had been cancelled almost six months earlier by New Jersey Manufacturers Insurance Company (NJM), his employer's workers' compensation insurance carrier, for non-payment of premiums. In doing so, the workers' compensation insurance carrier sent a timely certified mail notice of cancellation to its insured -- Sroczynski's employer - and, in accordance with the then-obtaining protocols, also sent an electronic notice of cancellation to the New Jersey Commissioner of Banking and Insurance.

In this appeal, Sroczynski -- who was a stranger to the transactions between his employer and its workers' compensation insurance carrier as well as the transactions between that insurance carrier and its State regulators -- acknowledges that the electronic notice of cancellation issued by the workers' compensation insurance carrier satisfied the notice transmission requirements promulgated by the New Jersey Compensation Rating and Inspection Bureau (CRIB). Sroczynski contends, however, that the electronic notice of cancellation issued by the insurance carrier did not satisfy statutory requirements and, hence, was ineffective. Thus, he claims that he is entitled to workers' compensation benefits that are greater than what he has

