



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-97-2

FACTS:

You are a state official. You also are an attorney in private practice. In your law practice, you represent individuals who have been injured in the course of their employment. Your clients, who are not state employees, seek to obtain workers' compensation payments from their employers' insurers or from their employers. You represent these individuals in adjudicatory proceedings before the Division of Industrial Accidents ("DIA"). You state that, while you remain an elected state official, you will not represent injured state employees before the DIA.

The Commonwealth's Workers' Compensation Statute, G.L. c. 152, §§1-86, among other things, permits covered employees who have sustained an injury arising out of and during the course of their employment to collect monthly payments for weekly wage loss, as well as medical care and vocational rehabilitation. *See 29 L. Nason & R. Wall, Massachusetts Practice, §1 (1995 Supplement)*. In exchange for waiving their rights to sue their employers in tort for work-related injuries, employees receive the possibility of obtaining compensation for a loss of earning capacity caused by a work-related injury, "regardless of the fault of their employers or the foreseeability of harm." *Murphy v. Commissioner of the Division of Industrial Accidents*, 415 Mass. 218, 222 (1993). The workers' compensation system is a type of wage loss protection, "based on the legislative judgment that human loss directly arising out of commercial and industrial enterprises' is part of the operating cost of a business." *Id.*; *see also Neff v. Commissioner of the Dep't of Industrial Accidents*, 421 Mass. 70, 75 (1995); *Ahmed's Case*, 278 Mass. 180, 183 (1932).

Within seven days of receipt of a notice of an injury alleged to have arisen out of and in the course of employment and which incapacitates a worker from earning full wages for a period of five or more calendar days, an employer must notify its insurer, the injured employee and the DIA. G.L. c. 152, §6. Within fourteen days of receipt of a report of injury, the insurer must commence payment to the injured worker or notify the DIA, the employee and the employer that it refuses to commence payment. G.L. c. 152, §7. After an insurer's denial of benefits, an injured worker may file a claim for benefits with the DIA. Similarly, an insurer may file a complaint for modification or discontinuance of benefits. G.L. c. 152, §10.

When a claim or complaint has been received by the DIA there is an initial informal conciliatory proceeding before a DIA conciliator who attempts to resolve the dispute. G.L. c. 152, §10; *see also, Neff*, 421 Mass. at 74. If conciliation is not successful, the parties may elect to submit the case to binding arbitration before an independent arbitrator. G.L. c. 152, §'10, 10B. If arbitration is not sought, the conciliator refers the case to the Industrial Accident Board. G.L. c. 152, §'10, 10A; *see also, Murphy*, 415 Mass. at 223. When the contested case is referred to the Board, it is assigned to an administrative law judge who initially schedules a conference. *Id.* At the conference the parties must identify the issues in dispute, summarize anticipated testimony, and may present oral arguments and documentary evidence. *Id.* The administrative law judge, within seven days after the conference, must issue a written order stating whether and to what extent relief should be granted. *G.L. c. 152, §10A (2); Murphy*, 415 Mass. at 224. A party aggrieved by a conference order may seek an adjudicatory hearing of his claim. Based on the evidence presented at the hearing, the administrative law judge renders a decision. G.L. c. 152, § 11. Any party aggrieved by the hearing decision may first appeal to a three member Industrial Accident Review Board and finally to the Appeals Court. G.L. c. 152, §§11(C), 12. To enforce an order of the administrative law judge, a party in interest must initiate an action in the Superior Court. G.L. c. 152, §12. If an insurer fails to make all compensation payments due to an injured employee under a DIA order or decision, the insurer will be liable for penalties, payable to the employee. G.L. c. 152, §8.

You characterize the DIA as a “forum” to hear workers’ compensation disputes between two private parties - the injured worker and the private compensation insurance carrier, and you draw an analogy between the function of the DIA in hearing a claim and a court which litigates disputes between private parties.

QUESTION:

While you hold a position as a state official may you, in your private law practice, represent clients, who are not state employees, in workers’ compensation proceedings before the Division of Industrial Accidents?

ANSWER:

Under G.L. c. 268A, §4, you may represent a client, who is not a state employee, in workers’ compensation proceedings against an insurer, provided that the Commonwealth does not become a party to the proceedings and provided that the outcome of the proceedings does not affect any direct and substantial legal, pecuniary, or property rights or liabilities of the Commonwealth.

DISCUSSION:

G.L. c. 268A, §4(a) provides that “no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.” Further, G.L. c. 268A, §4(c) provides that “no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the Commonwealth or a state agency for prosecuting any claim against the Commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.” Section 4 is based on the principle that “public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government.” Perkins, *The New Federal Conflict Law*, 76 Harv. L. Rev. 1113, 1120 (1963). In discussing §17(a), the municipal counterpart to §4(a), we have stated

[The section] seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence—by action or inaction—official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest. *EC-COI-92-36*. See also, *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977).

As a state official,^{1/} you are a state employee for purposes of the conflict of interest statute.^{2/} Additionally, proceedings to determine workers’ compensation benefits are particular matters.^{3/} You recognize that G.L. c. 268A, §4 will prohibit you from representing a state employee who has been injured during the course of her state employment because the Attorney General will be a party to the proceedings and the Commonwealth will be required to pay any benefits that may be awarded during the proceeding. However, you contend that, in a workers’ compensation proceeding in which the Commonwealth is not a party, the Commonwealth does not have a direct and substantial interest in the proceeding between a claimant employed in private industry and a compensation insurer.^{4/} You request that this Commission re-consider its opinion in *EC-COI-91-10*, where the Ethics Commission concluded that the Commonwealth has a direct and substantial interest in all workers’ compensation matters.

In *EC-COI-91-10*, the Ethics Commission considered whether a former manager of the DIA was prohibited in his private law practice from representing private sector employees and private sector employers on matters before the DIA in which he may have participated or over which he had official responsibility in the two years before he left state service. We concluded that the Commonwealth has a direct and substantial interest in all workers’ compensation matters based on “the Department’s specific institutional interest in the enforcement of the workers’ compensation law, and on the broad interest that the Commonwealth has in workers’ compensation matters generally.” Therefore, we determined that the former DIA employee was restricted in his private law practice from representing clients in all matters before the DIA. In reaching our decision, we relied on the regulatory and administrative role played by the Commissioner of Insurance and the DIA within the system of workers’ compensation.

Subsequently, in *EC-COI-93-5*, in a discussion regarding §4, the Commission modified its position concerning whether extensive regulation of a matter, without more, was sufficient to find that the Commonwealth had a direct and substantial interest in the matter, stating “regulatory authority and oversight of an activity alone are not sufficient to find a particular matter in which the Commonwealth has a direct and substantial interest. Rather we must determine whether the regulated activity itself involves a “particular matter”... in which the employee is likely to become involved...is a particular matter in which the Commonwealth has a direct and substantial interest.” In light of this discussion in *EC-COI-93-5* and in light of the fact that the Commission’s decision, in *EC-COI-91-10*, focused on the general institutional and regulatory interests of DIA, rather than on the particular proceeding at issue, we will re-consider our prior *EC-COI-91-10* decision in order to answer the specific question of whether a proceeding before the DIA to consider a claim for benefits brought by a private sector employee against a private compensation insurer is a particular matter of direct and substantial interest to the Commonwealth.

When construing statutory language, we begin with the plain meaning of the statute. *Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O’Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of “interest” from *Webster’s Third New International Dictionary* (unabridged) is “right, title or legal share in something; something in which one has a share of ownership or control.” In legal parlance, the term “interest” is “the most general term that can be employed to denote a right, claim, title, or legal share in something.” *Black’s Law Dictionary*. Within the context of G.L. c. 268A, §4, interests of the Commonwealth would include proceedings affecting the Commonwealth’s legal rights or liabilities, pecuniary interests, property interests or proceedings where the Commonwealth would have a stake in the proceedings. See *EC-COI-91-10* (Commonwealth has interest if outcome would require expenditure of public funds, exposure to liability, implicate government’s rights and responsibilities); *EC-COI-88-6* (Town has direct and substantial interest in Ethics Commission proceedings against Town official as outcome may subject town to liability); *EC-COI-80-23* (Commonwealth, as a property abutter, has direct and substantial interest in a zoning change).

By using the modifying phrase “direct and substantial”, the Legislature intended that the Commonwealth’s interest in the proceedings or the outcome be significant and direct to the Commonwealth itself as an institution. As the Supreme Judicial Court noted, in deciding that a city does not have a direct and substantial interest in a criminal prosecution for a crime committed in the city, any interest of the city in the prosecution of a defendant for a violation of state law was not separate and distinct from the interests of the citizenry as a whole and was therefore not sufficiently direct to meet the standards under G.L. c. 268A. *Commonwealth v. Mello*, 11 Mass. App. Ct. 70, 73 (1980); see also *Burton v. United States*, 202 U.S. 344, 391-396 (1906) (direct interest of government must be more than government’s interest as “*parens patriae*” or interest government shares with all citizens).

Under G.L. c. 268A, §4, within the context of litigation matters, the Commission has found that the Commonwealth is a party to and has a direct and substantial interest in all criminal matters and in all civil matters where the Commonwealth is named a party. See *EC-COI-89-31*; *88-1*; *82-31*. Full time state employees who are also attorneys may not represent private clients in particular matters which “bring the financial interest of the state into play” and in regulatory or adjudicatory proceedings in which the state is a party. *EC-COI-82-33*.

In comparison, the Commission has found that, although lawsuits between private parties pending in the Commonwealth’s courts are particular matters, they are not generally of direct and substantial interest to the Commonwealth, absent a specific showing that the Commonwealth would be directly affected. See *EC-COI-88-1*; *80-54*. For example, in *EC-COI-80-16*, a Commonwealth attorney also served as a conservator in his private capacity. As conservator he was required to file a probate court accounting with the Department of Mental Health. The Commission stated that “while the Commonwealth has an interest in protecting legally incapacitated or incompetent persons and their property, that interest would be direct and substantial only where the Commonwealth is owed money.” Similarly, in *EC-COI-83-67*, a consulting attorney to a city was asked to assist, in his private law practice, with the preparation of a brief in a lawsuit against another Massachusetts town. Although the city was not a party to the litigation, it was likely to file an *amicus curiae* brief because the potential decision in the suit, as precedent, could affect future cases brought against the city. The Commission determined that the city’s interests in this litigation were not sufficiently direct because the outcome in the case would not have a direct effect on the city, rather, any precedential effect was indirect and only a potentiality.^{5/} See also, *EC-COI-83-120* (filing of *amicus curiae* brief by Secretary of State, without more, does not give

Secretary's Office a direct and substantial interest in outcome).

After considering the facts of your situation and our precedent, we are persuaded that the Commonwealth's interests in a benefits claim under G.L. c. 152, made by a private claimant against a private insurer or employer before the DIA, are not sufficiently direct and substantial to implicate G.L. c. 268A, §4.^{6/} In such a proceeding before the DIA, the real parties in interest are the injured worker, the insurer and the employer. The claimant's rights and the employer's and insurer's obligations arise from the private employment relationship, and not from any benefits awarded by the government, such as social security disability or other general welfare assistance benefits. As one well-known commentator has described the rights and obligations under G.L. c. 152, "although the rights of employees and the duties of employers and insurers are created by the compensation act, they are essentially private rights, not sounding in contract or tort, but growing from the status of the parties in the employment relation." 29 *L. Locke, Massachusetts Practice*, §10.

Generally, the Commonwealth does not have a stake in its determination whether or not a claimant receives benefits. The role of the Commonwealth in a benefits dispute is to provide an objective and impartial forum and to make a determination whether the requirements in the statute have been met for receipt of benefits. 29 *L. Nason & R. Wall, Massachusetts Practice, §1.0 (1995 Supplement)* (Division of Dispute Resolution at the DIA serves as "quasi-judicial tribunal for adjudicating contested claims"). We do not consider that the resources spent by the DIA to hear a benefits claim are sufficient to create a direct and substantial interest by the Commonwealth. We have never found, in the analogous situation of civil litigation, that the judicial resources expended in deciding a lawsuit constitute a direct and substantial interest on the part of the Commonwealth. Nor do we find that the Commonwealth's interest is sufficiently direct and substantial because, if benefits are denied, an injured worker may potentially require some government assistance benefit.

Thus, under G.L. c. 268A, §4, you may, while you continue to be a state employee, privately represent parties in benefit claims before the DIA because we conclude that such proceedings are not of direct and substantial interest to the Commonwealth. Our conclusion in this case is limited to the situation where a private claimant and a private insurer (or employer) have a benefits dispute before the DIA. If the Commonwealth, through the Attorney General or other state agency counsel, enters the dispute at any stage in the proceeding, including a future appeal, you will be prohibited from continuing your legal representation because the Commonwealth would become a party to the action, and therefore, §4 would become implicated. Furthermore, if your proposed legal representation involves a challenge to the DIA's procedures or regulations, you may not undertake this representation because a state agency has a direct and substantial interest in its procedures and rules.^{7/} See e.g., *EC-COI-87-34; 81-34*. Also, if the benefits dispute involves the Workers' Compensation Trust Fund, G.L. c. 152, §65, such as the case of an uninsured private employer, you may not undertake that representation because any payment will be made from a Commonwealth fund, and the Commonwealth will be a party in interest. See *McLean's Case*, 93 N.E.2d 233, 235 (1950). For example, if before or during your representation of a client, it becomes apparent that the employer is uninsured or that the insurer will be unable to pay any claim, you must decline representation or withdraw because the Workers' Compensation Trust Fund will become a party.

DATE AUTHORIZED: April 9, 1997

^{1/} (text of footnote deleted)

^{2/} "State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council ... G.L. c. 268A, §1(q).

^{3/} "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{4/} Briefly, in support of your contentions, you argue that the DIA is a "forum" similar to the courts in which to decide the rights of private parties, and the agency has no stake in the outcome. You urge us to consider a proceeding for benefits before the DIA to be analogous to a civil litigation trial between two private parties. The Commission has, in prior precedent, found that the Commonwealth does not have a direct and substantial interest in such litigation. See *EC-COI-80-54*. Moreover, you argue that state officials should be accorded the same treatment under the conflict statute as legislators to whom §4 applies less restrictively. Under G.L. c. 268A, §4, &5,

legislators may represent private parties for compensation if the proceeding is “quasi-judicial” which is defined as: (1) the action of the state agency is adjudicatory in nature; and (2) the action of the state agency is appealable to the courts; and (3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.” The Ethics Commission has found that workers’ compensation proceedings meet the definition of “quasi-judicial” within the meaning of §4 and has permitted legislators to represent private parties before the DIA. *EC-COI-85-82*. Finally, you argue that your clients are not “doing business with the Commonwealth” when they seek workers’ compensation benefits and most of your clients, when they seek your assistance, are not aware of your public position.

^{5/} According to the Commission, “the decision in this case will not have a direct effect on the city or any cases in which it is involved. Like any other court case to which it is not a party but which involves a law applicable to the city, the city has a (sic) indirect interest in the resolution of the case. However, such a potential effect does not give the city a direct and substantial interest for the purposes of §17. For example, the city would not have a direct and substantial interest in every United States Supreme Court case concerning police search and seizure procedures, despite the impact such a case may have on the City Police Department.”

^{6/} Our conclusion in this opinion modifies the conclusion reached in *EC-COI-91-10*, to the extent that it applies to a workers’ compensation proceeding between an employee who is not a state employee and a private insurer or self-insured employer. Our opinion today does not re-consider the conclusion in *EC-COI-91-10* that the Commonwealth has a direct and substantial interest in other types of DIA matters. *See, e.g.*, G.L. c. 152, §25; §25(c).

^{7/} The examples given are representative only and are not intended to be all-inclusive. The Commission’s Legal Division is available for further advice if you have questions about specific situations.