COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 006217-16 038415-16**
Adilson DaSilva	Employee
Andre Ebersole	Employer
Associated Employers Insurance Company	Insurer
XD Home Improvement, Inc.	Employer
AmGuard Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Long)

This case was heard by Administrative Judge Bean.

APPEARANCES
Seth J. Elin, Esq., for the employee
Edwin W. Barrett, III, Esq., for Associated Employers Insurance Co.
Steven J. Bolognese, Esq., for AmGuard Insurance Co., at hearing
John J. Canniff, Esq., for AmGuard Insurance Co., on appeal

CALLIOTTE, J. The claimant, a corporate officer who chose to be exempt from coverage under his corporation's policy of workers' compensation insurance, appeals from a decision denying and dismissing his claims against the insurer of his corporation and the insurer of the general contractor. The claimant makes four arguments, none of which we find meritorious. Therefore, we affirm the decision.

Adilson DaSilva emigrated to the United States from Brazil in 2005 at the age of twenty-one. His native language is Portuguese. Although he speaks some English, he cannot read or write in English. On March 11, 2016, while dismantling an antenna in preparation for starting a roofing job, the claimant fell approximately forty feet, sustaining numerous injuries. He was in the hospital for eight days with orthopedic injuries and a collapsed lung, and then spent eighteen more days in a rehabilitation facility. He claims he has been unable to work since the accident. (Dec. 447- 448.) At the time of the injury, the claimant was the sole owner of the corporation which had been

hired to do the roofing job, XD Home Improvement, Inc. The general contractor on the job was Andre Ebersole. (Dec. 448.) Both companies carried workers' compensation insurance. Pursuant to G. L. c. 152, § 18, the claimant filed a claim against Associated Employers Insurance Company, (Associated Employers), the insurer for the general contractor. Following a § 10A conference in which the judge denied the claim against Associated Employers, that insurer succeeded in having the judge join AmGuard, the insurer of the claimant's corporation, XD Home Improvement. The case proceeded to hearing with both insurers. (Dec. 447.)

The threshold issue was whether the claimant was covered under the policies of either insurer. The basic facts were undisputed. Effective October 6, 2015, the claimant purchased a policy of workers' compensation insurance for employees of his company, through his agent, B&S Gillis Insurance. However, he excluded himself from coverage under the policy by signing a "Form 153," pursuant to G. L. c. 152, § 1(4),[1] and 452 Code Mass. Regs. 8.06.[2] (Dec. 448.) On February 19, 2016, he signed and filed with the Department, through his agent, a second Form 153, seeking to rescind his exemption

[1] General Laws c. 152, § 1(4), states, in relevant part,

> This chapter shall be elective for an officer or director of a corporation who owns at least 25 percent of the issued and outstanding stock of the corporation. Notwithstanding section 46, these provisions shall apply only if the corporate officer provides the commissioner of industrial accidents with a written waiver of his rights under this chapter. Said commissioner shall promulgate regulations to carry out the purpose of this paragraph. Violations of this paragraph shall subject the corporation to the penalties set forth in section 25C.

[2] 452 Code Mass. Regs. § 8.06(1), provides,

> Pursuant to M.G.L. c. 152, § 1(4), a corporate officer or director who owns at least 25% of the issued and outstanding stock in a corporation may elect to be exempted from the provisions of M.G.L. c. 152. Said exemption may only be exercised if the corporate officer(s) or director(s) submits a waiver of his or her rights to any claim as delineated in M.G.L. c. 152. This waiver shall be in the form of an affidavit promulgated by the DIA and known as Form 153: *Affidavit of Exemption for Certain Corporate Officers* and may be submitted electronically.

from coverage. On February 26, 2016, the Department approved that Form 153 affidavit, and returned the notice of approval to the employee at his business address, with instructions that it was his "obligation to submit an approved affidavit to your insurance carrier in order to complete this process." (Ex. 7, Notice of Decision Regarding Affidavit of Exemption for Certain Corporate Officers or Directors.) However, the employee did not send written notification of his desire to be covered under his company's workers' compensation policy to his insurance carrier, as required by 452 Code Mass. Regs. § 8.06(5),[3] prior to his industrial accident on March 11, 2016. (Dec. 449.)

At hearing, there was conflicting testimony from the claimant and from representatives of B&S Gillis Insurance, his insurance agency, as to the claimant's understanding of his coverage status, and what his insurance agents had communicated to him. The claimant testified that he was unaware he was not covered by workers' compensation insurance when he initially purchased it in October 2015. After speaking to a friend who was denied workers' compensation benefits after signing a Form 153, the claimant consulted with his insurance agent, found out he was not covered, and attempted to rescind his original Form 153. His agent sent a new Form 153, which the claimant had signed, to the Department, indicating the claimant no longer wished to be exempt from coverage. After the Department approved the form on February 26, 2016, the claimant admitted he did not follow the requirement in § 8.06(5) that he notify the insurer of his desire to rescind his exempt status. He claimed he did not know about that requirement. (Dec. 449.)

[3] 452 Code Mass. Regs. § 8.06(5), provides,

> If, after an approved Form 153 has been submitted to a carrier, one or more exempted officer(s) or director(s) chooses to be covered under the current workers' compensation policy, he or she must submit a written, or electronic, signed request on corporate letterhead to the carrier. Coverage will be made effective for that officer(s) or director(s) as of the date after receipt of the written request. Such coverage shall remain in effect until completion of the current policy term. A new Form 153 must be submitted to the DIA and then sent to the carrier.

Two representatives of B&S Gillis also testified. Sabrina Gillis testified that "she explained everything about the workers' compensation policy to the [claimant] in Portuguese." (Dec. 449.) Despite her recommendation in the fall of 2015 that the claimant include himself in his company's policy, he declined to do so because it was too expensive. Therefore, she helped him fill out the first Form 153 exempting him from coverage. She denied that he asked her if he was covered when he came to her office in February 2016, seeking to revoke his exemption. At that time, another employee of B&S Gillis, Raquel Matos, helped him complete a new Form 153 indicating he no longer wished to be exempt. Ms. Matos testified that, after receiving approval from the DIA to change his exempt status, she called the claimant several times to ask him to come in and write the notice to the insurance carrier on his letterhead. However, he told her he had changed his mind due to the expense. Ms. Gillis further testified that, after his injury in March 2016, the claimant called and asked her for a backdated letter so that he could receive workers' compensation benefits. On March 18, 2016, she sent him an e-mail stating she could not help him with that, but explaining how to end his exempt status. The claimant testified he does not recall getting that e-mail. (Dec. 449.)

In his decision, the judge found the testimony of Sabrina Gillis and Raquel Matos "credible and persuasive." He found the claimant's testimony "incredible and self-serving." (Dec. 450.) He concluded,

> [T]he claimant is not entitled to workers' compensation benefits because he had exempted himself from workers' compensation coverage under the provisions of § 1(4) and 452 CMR 8.06(4). He signed the requisite Form 153 to exempt himself in September 2015 and never effectively rescinded it. He did file a Form 153 seeking to rescind his exemption, and his insurance agent sent it along to the DIA as required by law. But the claimant never complied with the last necessary requirement of notifying the insurer of the rescission of his exemption in a writing on his company's letterhead. He had the opportunity to do so prior to the industrial accident, but made the conscious decision not to file that last document, despite the repeated prompting of Sabrina Gillis and Raquel Matos to do so.

(Dec. 449-450.) Citing Findlay's Case, 77 Mass. App. Ct. 108 (2010)(claimant failed to qualify as an employee where he did not give written notification to the insurer of desire

to effectuate a rescission of a sole proprietor's exemption from workers' compensation), the judge further found that, if the claimant was not an employee of XD Home Improvement, Inc., he could not be an employee of the § 18 general contractor.

> [Section] 18 was created to protect injured employees who were employed by uninsured employers. XD Home Improvement was insured for workers' compensation purposes. The claimant in this case took the affirmative step of exempting himself from workers' compensation protections. [Section] 18 was not created so that corporate officers from subcontractors could poach workers' compensation benefits from the general contractors who retain them.

(Dec. 450.) Thus, the judge denied and dismissed the claims against both insurers. Id.

On appeal, the claimant makes four arguments, three of which center around his contention that G. L. c. 152, § 18 applies to impose liability on the general contractor's insurer, Associated Employers. His last argument, which we address first, is that, once the Department approved the second Form 153 affidavit on February 26, 2016, he was, in fact, covered by his own company's insurance policy, issued by AmGuard. The claimant maintains that the regulation setting forth the process by which a corporate officer who has exempted himself from coverage may revoke his exemption and obtain coverage is inconsistent with the purpose and beneficent design of the Act. 452 Code Mass. Regs. § 8.06(5), see supra n. 3. He contends that barring him from recovering when he deviates from precise regulatory formalities does not serve this purpose. Further, because G. L. c. 152, § 1(4) does not contain any of the requirements for coverage a corporate officer must fulfill before withdrawing his exemption of insurance, the regulation conflicts or is inconsistent with the statute. (Employee br. 16-20.)[4] We disagree.

Corporate officers are generally covered by the Massachusetts Workers' Compensation Act as employees of the corporation, which "is a legal entity distinct from any of its stockholders or officers." Emery's Case, 271 Mass. 46, (1930). However, in

[4] To the extent the claimant challenges the judge's credibility findings to support his arguments, we do not disturb them. Credibility determinations are the sole province of the administrative judge, unless they are arbitrary and capricious or derived from inferences which are not reasonably drawn from the evidence. See DeOliveira v. Calumet Constr. Corp., 29 Mass. Workers' Comp. Rep. 173, 178 (2015), and cases cited. Here, they are neither.

2002, the legislature added a paragraph to G. L. c. 152, § 1(4), which defines "Employee," making "[t]his chapter" elective for certain officers or directors of a corporation. St. 2002, c. 169, effective October 23, 2002. The amendment further provides, "Notwithstanding Section 46, [which makes invalid an agreement by an employee to waive his right to compensation], § 1(4) applies "only if" the corporate officer provides the Department "with a written waiver of his rights under this chapter." Thus, § 1(4) expresses the clear intent that a corporate officer who meets certain criteria may waive his right to compensation, and permissibly elect, in effect, not to be considered an "employee" under the Act. Section 1(4) then specifically authorizes the commissioner (now director) to promulgate regulations to carry out the purpose of that paragraph. Id.

The regulations, in turn, set forth specific requirements which a corporate officer must follow to become exempt, which include signing a Form 153, "Affidavit of Exemption for Certain Corporate Officers," submitting it to the Department for approval, and then providing "a copy of the approved Form 153 to the insurance carrier as proof that the named corporate officer(s) or director(s) have been properly exempted and that workers' compensation coverage is no longer required for those persons." 452 Code Mass. Regs. § 8.06(1) and (4). The effective date of the change is the next policy date following the carrier's receipt of the approved Form 153, or "the day following the carrier's receipt of that form, along with a written request that the election be made effective mid-term." § 8.06(4).

The regulation challenged by the claimant, § 8.06(5), sets forth a procedure by which a corporate officer who has exercised his right to become exempt may opt back into the workers' compensation system during the pendency of a policy period. As does the opt-out provision, it requires that the corporate officer sign and submit to the Department a Form 153 for approval, indicating he no longer wishes to be exempt, and that he notify his insurance carrier once the Department approves the Form 153. Id. The claimant argues that because G.L. c. 152, § 1(4) does not contain any conditions a

claimant must fulfill before withdrawing his or her exemption from coverage, the regulation conflicts with the statute, as a regulation is to "fill gaps and provide guidance." (Claimant br. 20.) He appears to primarily challenge the rational relationship between the statute and the provision requiring that the employee notify the insurer, as well as the Department, of his desire to no longer be exempt. Id. at 19.

Properly promulgated regulations have " 'the force of law . . . and must be accorded all the deference due a statute.' " Ivey v. Comm'r of Correction, 88 Mass. App. Ct. 18, 23 (2015), quoting from Borden, Inc. v. Comm'r of Pub. Health, 388 Mass. 707,723 (1983). The party challenging a regulation has the "heavy burden of showing 'that the regulation has no rational relationship to the goals or policies of the agency's enabling statute.' " Beatty's Case, 84 Mass. App. Ct. 565, 567 (2013). The employee has failed to meet this burden.

Contrary to the claimant's argument, § 8.06(5) is not in conflict with the statute, but permissibly fills in the gaps enabling its implementation. Section 1(4) clearly expresses the purpose that corporate officers owning more than 25% of the corporation be allowed to exempt themselves from coverage. However, it contains no method for a corporate officer who has opted out of coverage to opt back in during the mid-term of the policy. The regulation does. We think that by providing a method for opt-in during the pendency of the policy, rather than requiring that the corporate officer wait until the start of a new policy period, the regulation actually fulfills, rather than subverts, the general proposition that the Act "is to be construed broadly to include as many employees as its terms will permit." Findlay's Case, supra at 111-112, quoting from Murphy's Case, 63 Mass. App. Ct. 774, 776 (2005), and Warren's Case, 326 Mass. 718, 719 (1951). Thus, we fail to see how the challenged regulation is not rationally related to the "goals or policies of the agency's enabling statute," Beatty's Case, supra, which include its humanitarian purpose and beneficent design.

Nor is the requirement that the claimant take the affirmative step of notifying the insurer prior to changing his coverage status contrary to the Act's purpose. In Findlay's

Case, supra, the court dealt with a provision of G. L. c. 152, § 1(4) regarding sole proprietors, added at the same time as the provision in question regarding corporate officers. Under the amendment to § 1(4), a sole proprietor "may elect coverage by securing insurance with a carrier." Id.; St. 2002, § 169, effective October 23, 2002. Regulations promulgated pursuant to this section set out the affirmative steps a sole proprietor is required to take to become a covered employee, which included submitting a written request to the insurance carrier, the receipt of which determines the effective date of coverage. 452 Code Mass. Regs. § 8.07. The sole proprietor in Findlay secured a policy of insurance but failed to notify his insurer that he wished to elect coverage for himself. He attempted to bring himself within the coverage of the Act by arguing that its broad construction required the inclusion of "as many employees as its terms will permit." Findlay, supra at 111-112. The court disagreed with the claimant, and held that the statute "reasonably can be read to require a sole proprietor, [in order] to be covered as an employee, to make an affirmative election in the form of notice to the insurer, that personal coverage is sought." Id. at 112. Thus, the regulation was not in conflict with the statute, and the sole proprietor, because he had not notified his insurer he desired coverage for himself, was not covered by his insurance policy.

The opt-in provision regarding corporate officers is essentially analogous to that regarding sole proprietors. When a corporate officer who has elected to be exempt chooses to rescind that exemption, coverage does not become effective until the corporate officer takes affirmative action, which includes notice to the insurer. This requirement recognizes that notice to an insurer is important for it to be able to determine whether, and to what extent, to adjust the policy's premium to reflect additional coverage. We see no conflict between 452 Code Mass. Regs. 8.06(5) and the workers' compensation statute.[5] Thus, by failing to fulfill the requirements of notice to the insurer in § 8.06(5),

[5] The claimant admits, and the judge found, that he gave no notice at all to the insurer of his desire to fall within the policy. (Claimant br. 6; Dec. 449.) Thus, as in Findlay, supra, "the validity of the specific notice requirements in the regulation, such as a writing and use of company letterhead," id. at 112, n.7, is not before us.

the claimant failed to bring himself within the Act's coverage, and the corporation's insurer, AmGuard, is not liable for payment of compensation.

We turn now to the claimant's arguments that filing the Form 153 served only to release AmGuard from covering him, but did not exclude the general contractor's insurer from assuming coverage pursuant to Section 18.[6] (Claimant br. 13.) The claimant maintains that Section 18 does not require the injured person to be an employee of the subcontractor (here XD Home Improvement, Inc.) to impute liability to the general contractor. He states, without supporting citation, "Anyone who contracts with a General Contractor and performs work for that General Contractor that would entitle them to be insured by the General Contractor is affected by, and subject to, Section 18. That worker is entitled [to] coverage through the General Contractor[,] regardless of whether he is an 'employee' of [the] subcontractor." (Claimant br. 11-12.)

It is a "general principle of statutory interpretation . . . that 'every word in a statute should be given meaning' . . . and no word is considered superfluous." Findlay, supra at 113 (internal quotations and citations omitted). Moreover, it is axiomatic that the various portions of the workers' compensation statute "must be read as a whole, without overemphasizing the importance of any portion of the act but giving to each its appropriate force and effect, so that various portions taken together shall constitute a harmonious and consistent legislative enactment." Price v. Railway Exp. Agency, 322 Mass. 476, 480 (1948). The claimant's position that the general contractor should be liable to pay compensation in this situation violates both these principles of statutory

[6] General Laws c. 152, § 18, provides, in relevant part:

> If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter, if the independent or sub-contractors were insured persons.

construction. It essentially ignores the language and purpose of G. L. c. 152, § 1(4), discussed infra, allowing corporate officers, such as the claimant, to waive their rights as employees who are covered under the Act. Furthermore, it fails to acknowledge that, under § 18, a general contractor is responsible only for paying compensation to *employees* of *uninsured* subcontractors. See, e.g., DeOliveira v. Calumet Contr. Corp. 29 Mass. Workers' Comp. Rep. 173, 178 (2015). Not only is the corporate officer who has elected to waive his rights under Chapter 152, not an employee under the statute, but XD Home Improvement, Inc., is not an uninsured subcontractor. As the claimant acknowledges, the purpose of § 18 "is to prevent a general contractor ' "from escaping the obligation of the [Act] by letting out a part of his work to irresponsible subcontractors.' " (Claimant br. 10, quoting Cannon v. Crowley, 318 Mass. 373, 375 [1945]). The claimant offers no rationale, nor do we discern any, for how Andre Ebersole, the general contractor, could be considered to be "escaping the obligation of the Act," or how XD Home Improvement, Inc., the subcontractor, could be found "irresponsible" where the claimant had simply invoked the provisions of § 1(4) by electing not to be subject to chapter 152, and then failed to follow the regulatory procedures for effectively opting back in.

We touch briefly on the claimant's remaining arguments. The claimant maintains that, even though he may not be covered by AmGuard because he failed to provide them with notice he wished to opt back into the system, the notice requirement is not relevant to the general contractor's insurer. Thus, he contends, once the Department approved the Form 153, he was effectively back in the system, and became eligible for benefits as an uninsured subcontractor of Andre Ebersole. The claimant cites no support for this argument, and we can find none. Rather, both the statute and regulation indicate that when a corporate officer elects to be exempt from the provisions of Chapter 152, or chooses to opt back into the compensation system, his election affects his right to compensation under the statute *in toto*, not his right to compensation only from the insurer of his own corporation. Certainly, the regulations do not indicate that failure to

complete the opt-in process converts an exempt corporate officer into an "uninsured subcontractor" eligible for compensation from the general contractor. We therefore reject this argument.

Finally, we have no jurisdiction to address the claimant's suggestion that there should be a requirement that the general contractor inquire as to whether the corporate officer is exempt from his own policy. The claimant asks us to engage in rule-making, which is beyond the scope of our authority as an adjudicatory body. See G.L. c. 152, § 11C.

Accordingly, the decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **December 27, 2019**