COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 002448-13 000354-14**

Annie Talbert	Employee
Polaroid Corporation, Inc.	Employer
Polaroid Corporation, Inc.	Self-Insurer (insolvent)
Employers Reinsurance Corp.	Reinsurer
Workers' Compensation Trust Fund	Third-Party Respondent

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)
This case was heard by Administrative Judge Spinale.

APPEARANCES
Ronald C. Kidd, Esq., for the reinsurer
William A. Hanlon, Esq., for the third-party respondent

KOZIOL, J. The present appeal arises from the insolvency of the self-insurer, Polaroid Corp., Inc, and concerns an issue we identified as being unripe for adjudication in our earlier decision in Talbert v. Polaroid Corp., Inc., 30 Mass Workers' Comp. Rep. 271, 274 n.4 (2016), hereinafter Talbert I. The reinsurer (ERC) now appeals from a decision denying and dismissing its claim for reimbursement from the Workers' Compensation Trust Fund (WCTF), pursuant to §§ 34B(c) and 65(2)(a),[1] for cost of

[1] General Laws, c. 152, § 34B(c), states, in pertinent part:

> Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted, without application, in accordance with the following provisions; . . . .
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> . . . .
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> (c) The supplemental benefits under this section shall be paid by the insurer concurrent with the base benefit. Insurers shall be entitled to quarterly reimbursements for supplemental benefits, pursuant to section sixty-five, for cases involving injuries that occurred on or before October first, nineteen hundred and eighty-six, and for those cases

living adjustments (COLA) paid to the employee in conjunction with her receipt of weekly benefits under § 34A. (Dec. II, 7.) We affirm the judge's decision.

In Talbert I, we addressed the cross appeals of the WCTF and ERC from the decision of a different judge,[2] who ordered the WCTF to pay the employee § 34A and § 34B benefits, and ordered ERC to reimburse the WCTF for the payment of those benefits pursuant to its contract of reinsurance. ERC appealed from that decision because the judge made no findings regarding whether its contract with the self-insured contemplated reimbursement of COLA, where the payment of COLA was "not a risk anticipated by the parties at the time the contract was made." Talbert I, at 274. Based on our decision in Janocha v. Malden Mills Industries, Inc., 30 Mass. Workers' Comp. Rep. 165,179-186 (2016)(Section 25A[2][c] guarantees payment of benefits to employees of self-insurers; by its own terms a self-insurer cannot be 'uninsured'), we reversed the judge's decision and ordered ERC to pay directly to the employee §§ 34A and 34B benefits. Acknowledging that ERC's contract argument remained at issue, we rejected it as a matter of law, holding that "COLA payments 'cannot be separated from, or taken out of, the payment of weekly' § 34A benefits." Talbert I, at 274. We did not address ERC's

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> occurring thereafter, to the extent such supplemental benefits are due to the increase of greater than five percent in the average weekly wage in the commonwealth in any given year. No self-insurer, self-insurance group or municipality that has chosen non-participation in the assessments for funding such reimbursements pursuant to section sixty-five shall be entitled to such reimbursements.

General Laws, c. 152, § 65(2)(a) states in pertinent part:

> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B; . . . . No reimbursements from the Workers' Compensation Trust Fund shall be made under clauses (a) . . ., to any non-insuring public employer, self-insurer or self-insurance group which has chosen not to participate in the fund as hereinafter provided.

[2] The first decision, issued by Administrative Judge Lewenberg on May 22, 2015, is hereinafter referred to as Dec. I. The present decision, issued by Administrative Judge Spinale on March 17, 2021, is hereinafter referred to as Dec. II.

argument, raised for the first time on appeal, regarding "whether the WCTF may, in the future, refuse to reimburse COLA paid to the employee by ERC, when, and if, ERC submits a reimbursement request to the WCTF." Id., at n.4. We do so here.

The present matter was tried on an agreed statement of facts, (Dec. II, 1, n.1), which we supplement where needed from the record. The employee's compensable injury occurred on January 26, 1979, while she was working for the self-insured employer. On that date, Polaroid Corp., Inc. was a duly licensed self-insurer, having secured a bond with Greenwich Insurance Company, a subsidiary of XL Insurance (XL), and an excess reinsurance contract with ERC, pursuant to G.L. c. 152, § 25A(2)(b). (Dec. II, 2; Talbert I, at 273.) On November 21, 1986, the self-insurer began paying the employee § 34A permanent and total incapacity benefits. Thereafter, the self-insurer received reimbursement for the COLA portion of the employee's weekly benefits from the WCTF, pursuant to §§ 34B(c) and §65(2)(a). (Dec. II, 3.) When the employee's claim hit the $250,000 per claim retention level set forth in the reinsurance policy, ERC began reimbursing the self-insurer for the base portion of the weekly benefits it paid to the employee. Talbert I, at 272 n.1.

Upon the self-insurer's bankruptcy in 2004, the XL bond began paying the employee's workers' compensation benefits through a third-party administrator, CCMSI. (Dec. II, 3.) ERC reimbursed XL for the base portion of the employee's weekly benefit, and, as we noted in Talbert I, XL, through CCMSI, never sought reimbursement of COLA from ERC. Id. at 272-273 n.2. Instead, it filed a claim for COLA reimbursement from the WCTF but later withdrew that claim when it was determined to be time barred. (Id.; Dec. II, 3.) The XL bond exhausted on March 4, 2013, "at which point the employee stopped receiving workers' compensation benefits." Talbert I, at 273. The employee filed a claim against ERC for weekly benefits, the WCTF was joined to that action, and on October 11, 2016, through our decision in Talbert I, supra, we required ERC to pay the employee's weekly benefits directly to the employee.

On November 8, 2016, ERC reimbursed the WCTF $166,441.29 for the base and COLA benefits it paid the employee from March 5, 2013, through October 11, 2016, and

thereafter, ERC paid the employee's weekly benefits, which included a total of $21,582.64 in COLA benefits to the employee. (Dec. II, 3-4.) In May of 2017, ERC filed a claim for COLA reimbursement from the WCTF pursuant to § 34B(c), but no reimbursement was made. On April 3, 2018, ERC filed the present action seeking reimbursement of the COLA benefits it had paid to the employee. The parties agreed that ERC is a reinsurer/excess carrier and that it does not collect or remit assessments to the WCTF. (Dec. II, 4.) The parties also stipulated that ERC's policy with the self-insurer,

> is an agreement between ERC and Polaroid or its successor in interest. In no portion of the policy did ERC assume the responsibility to pay benefits to any Employee or former Employee of Polaroid. It was expressly a reimbursement policy. Despite the foregoing, the Review Board did order ERC to pay benefits (base and COLA) directly to the Employee.

(Dec. II, 4.)

After reciting the relevant portions of §§ 34B(c) and 65(2), the judge found:

> In order to be entitled to COLA reimbursements an entity must collect and remit assessments. In other words, the entity must participate in the reimbursement system by collecting assessments or remitting assessments in order to reap the benefits. As ERC has never collected or remitted assessments, they are not eligible to benefit from the system-in this case receive reimbursement for COLA (and other payments) made to the employee.

(Dec. II, 5.)[3] The judge observed that the yearly assessments on employers and the system of collecting the assessments is a "pay-as-you-go" proposition and, relying on the Appeals Court's decision in Home Ins. Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 189, 193 (2015), he found that, "the pay as you go concept underlying the workers' compensation scheme makes the collection and transmittal of assessments an integral part of the reimbursement process" so "that noncontributors of assessments cannot claim reimbursement." (Dec. II, 5-6.) Accordingly, the judge concluded that "since ERC did not participate in the system by writing Insurance and/or collecting and

[3] There is nothing in the decision or the parties' briefs explaining what "other payments" ERC may be seeking.

remitting assessments, they cannot claim reimbursement under Section 34B." (Dec. II, 6.)

On appeal, ERC asserts two claims of error. First, it argues the judge erred by relying on Home Ins. Co., supra, because Home Insurance Company was a primary insurer whose failure to collect assessments resulted in it forfeiting the right to participate in the reimbursement process. Therefore, it should be distinguished from the present situation where the employer was bankrupt and there was no employer from whom ERC could collect the assessment. (ERC br., 2-3.)

Whether the matter concerns a "primary insurer" or a self-insurer, self-insurance group, or municipality, the funding mechanism of the WCTF has been discussed by the appellate courts and has long been described as constituting "a 'pay-as-you-go' system." E.I. Dupont De Nemours & Co. v. Commonwealth, 65 Mass. App. Ct. 350, 354-355 (2005)(at time of self-insurer's filing of notice of nonparticipation, "an employer has disengaged from the trust fund's reimbursement mechanism and cannot be reimbursed for an employee's subsequent injury"). Home Ins. Co., supra at 193. Nothing in §§ 34B or 65 provides for reimbursement to entities that are not collecting and remitting assessments. See E.I Dupont DeNemours & Co., supra, and Home Ins. Co., supra.

ERC freely admits it has not reported or collected any assessments under § 65, arguing it is not a "primary insurer" under the Act, which is required to report and collect assessments, but a reinsurer. Its argument, further clarified in its second claim of error on appeal, is that "as an excess carrier it had no obligation to collect and remit assessments to the WCTF under the statute" as "only the employer . . . had this obligation." (ERC br., 4.) The difficulty with ERC's argument is that its success depends upon it being considered neither a primary insurer, for which the decision in Home would be issue determinative, nor a self-insurer under §65, but a reinsurer that is nonetheless entitled to obtain reimbursement for COLA solely by virtue of its payment of benefits to the employee. In essence, ERC claims to be an entity that has more rights than the self-insurer or an insurer would have under the same circumstances.

ERC also argues that the judge erred by relying upon the "non-participation" portion of § 65(2) to support his ruling because that statutory provision does not apply to it since ERC is not a self-insurer, self-insurance group, or a municipality. (ERC br. 3.) However, it cannot escape the fact that it stands in the shoes of the self-insurer regarding its payment obligations to the employee. Indeed, after our decision in Talbert I, the Appeals Court issued its decision in Janocha's Case, 63 Mass. App. Ct. 179 (2018), holding that the Act "requires the reinsurer to pay benefits to employees in the event the self-insurer becomes insolvent and the bond becomes exhausted, avoiding an otherwise inevitable gap in coverage." Id. at 187. Once there is no longer a reporting of assessments from a self-insured, the self-insured has disengaged from the system, and the law prohibits reimbursement. Based on all these factors, we see no error in the judge's ruling that "since ERC did not participate in the system by writing insurance and/or collecting and remitting assessments, they cannot claim reimbursement under Section 34B." (Dec. II, 6.)

Second, ERC further argues that in any event, our decisions in Pastore v. Polaroid Corp. Inc., 30 Mass. Workers' Comp. Rep. 215 (2016) and Malacaria v. Polaroid Corp. Inc., 30 Mass. Workers' Comp. Rep. 233 (2016), require reimbursement in the event of bankruptcy of the self-insured employer because COLA payments did not exist at the time it entered into its contract of reinsurance and thus, COLA payments were not a risk contemplated at the time ERC entered into its reinsurance contract with Polaroid.

ERC reads far more into our decisions, than is stated in our dicta. In both cases, we merely observed and agreed with One Beacon, which was the entity responsible for payment of the employees' benefits in those cases, that the Legislature provided insurers with eligibility for reimbursement from the WCTF through §§ 34B and 65(2)(a), to ameliorate the burden of paying for a benefit not contemplated at the time the risk was insured. Pastore, supra at 223-224; Malacaria, supra at 235-236. We did not state that there was an absolute right to reimbursement whenever COLA was paid. Indeed, even self-insurers that actively participate in the pay-as-you-go funding mechanism of the WCTF do not have an unfettered right to reimbursement just because they paid the

COLA benefit. Beatty's Case, 84 Mass. App. Ct. 565, 568 (2013)(Court unpersuaded that the use of the word "shall" in § 34B[c] signified an "unqualified right to reimbursement" as § 34B[c] "narrows the right to reimbursement" based on factors such as participation in the fund, as set forth in § 65[2]). To the extent ERC claims remediation must be made for its plight, that is a task for the Legislature, not the reviewing board.

Accordingly, finding no error in the judge's decision, we affirm it.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

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