

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NO. 002448-13
000354-14**

Annie Talbert
Polaroid Corp., Inc.
Polaroid Corp., Inc.
Workers' Compensation Trust Fund
Employers Reinsurance Corp.

Employee
Employer
Self-insurer (insolvent)
Trust Fund
Reinsurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

Anthony V. Quercia, Esq., for the employee at hearing and on appeal
David T. DeCelles, Esq., for the employee on appeal
Janice M. Toole, Esq., for the Workers' Compensation Trust Fund
Ronald C. Kidd, Esq., for Employers Reinsurance Corp.

KOZIOL, J. The Workers' Compensation Trust Fund (WCTF) and Employers Reinsurance Corp. (ERC) cross-appeal from a decision ordering the WCTF to pay the employee § 34A benefits and § 34B cost of living adjustments (COLA), and requiring ERC to reimburse the WCTF "pursuant to the terms of ERC's reinsurance contract" with the now insolvent self-insurer, Polaroid Corporation, Inc. (Polaroid). (Dec. 6.) We vacate the decision and order ERC to pay, directly to the employee, § 34A and § 34B COLA benefits from the date Polaroid's statutory bond exhausted, March 5, 2013, and continuing.

The employee sustained an industrial injury on January 26, 1979, while working for the employer, Polaroid. (Ex. 5); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). At that time, Polaroid was a licensed self-insurer, having satisfied the provisions of § 25A(2)(b), by securing a bond with Greenwich Ins. Co., a subsidiary of XL Insurance, (XL), and § 25A(2)(c), by purchasing "an excess reinsurance contract" with ERC under a policy

that covered the date of the employee's injury. (Ex. 6.) The ERC reinsurance policy had a \$250,000 per claim retention level that was met in this case.¹ (Tr. 7-8; Dec. 4.)

Subsequent to Polaroid's insolvency, XL paid benefits to the employee pursuant to its bond. (Dec. 5.) ERC reimbursed XL for the medical benefits and base weekly compensation it paid to the employee: "[i]t did not reimburse for COLA benefits."² Id.; C.f. Malacaria v. Polaroid Corp. Inc., 30 Mass. Workers' Comp. Rep. ____ & n.4 (August 26, 2016)("[t]he law does not contemplate reinsurers reimbursing the § 25A(2)(b) bondholder"). XL paid the employee's § 30 medical benefits, and §§ 34A and 34B benefits, until the bond's exhaustion on March 4, 2013, at which point the employee stopped receiving workers' compensation benefits. (Dec. 5.)

The employee then filed this claim against ERC, seeking § 34A benefits (plus § 34B COLA) from March 5, 2013, and continuing, in the amount of \$992.00 per week.³ (Ex. 2, Dec. 3); Rizzo, supra. The judge's August 22, 2013, conference order denied, without prejudice, a motion to join the WCTF, and ordered ERC to pay the employee only her base rate of compensation, \$178.76 per week, based on an average weekly wage of \$268.15, from March 6, 2013, and continuing, plus § 30 medical benefits. Rizzo, supra. (Dec. 2.) Both the employee and ERC appealed.

Subsequently, on January 13, 2014, the judge joined the WCTF for the hearing, which was held on April 3, 2014. (Dec. 2.)

¹ After the retention level was met, ERC reimbursed Polaroid for benefits it paid the employee at a rate of 60% of the base benefit. (O.A. Tr. 5.) ERC concedes it cannot show why the reimbursement was reduced to 60% of base benefits paid, and acknowledges it would be obligated to reimburse 100% of the base benefit "to anyone standing in the shoes of Polaroid." Id.

² The third party administrator hired by XL to administer Polaroid's claims, CCMSI, never sought reimbursement of COLA from ERC. (Tr. 19, 29; O.A. Tr. 16.) The record indicates CCMSI attempted to receive COLA reimbursement from the WCTF, but its request was rejected as untimely filed. (Tr. 46; O.A. Tr. 17.)

³ Although the employee's Form 110 Claim and the Form 161 Employee's Hearing Memorandum, (Ex. 2), both state only that the employee is claiming § 34A benefits, the \$992.00 in weekly benefit sought by the employee, contemplated payment of her § 34A base benefit plus § 34B COLA.

At the hearing, the issues in controversy were: whether the WCTF had an obligation to pay the claimant and be reimbursed by ERC “pursuant to the contract of re-insurance” or, whether ERC had “the obligation to pay the Section 34A benefit to the claimant directly pursuant to the contract of re-insurance?” (Dec. 4.) The parties stipulated that the employee’s compensation rate under § 34A, with § 34B COLA, “was [\$]992 as of March of 2013 when the benefits were stopped.” (Tr. 7; Dec. 3.)

The judge made the following findings of fact:

There is no disagreement that the employee is due benefits pursuant to Section 34A. The problem is that XL, the statutory entity paying benefits under a bond, ran out of funds and stopped paying the employee. [ERC] stopped reimbursing XL since it had ceased making payment of benefits. Under these circumstances, I find that the result is that the employer is rendered uninsured in violation of Chapter 152. I find that the [WCTF] is obligated to pay any benefits due to the employee as a result of her accepted claim against Polaroid.

I find that the [WCTF] is entitled to reimbursement by [ERC] under the statutorily required policy of re-insurance. (Exhibit #6).

(Dec. 9.) The judge then ordered the WCTF to “pay benefits under Section 34A of the Act at the rate of \$992.00 (plus applicable cola [sic] beginning October 1, 2013) per week passed on an average weekly wage of \$268.15 from March 5, 2013 to date and continuing.” (Dec. 6.) The judge also allowed the WCTF to “take credit for all payments made by [ERC] under the Conference Order as if it had made said payments and been reimbursed by [ERC].” *Id.* Finally, the judge ordered ERC to “reimburse the [WCTF] pursuant to the terms of the contract of re-insurance.” *Id.*

On appeal, the WCTF argues the judge erred by ordering it to pay the employee any benefits. (Dec. 5-6.) ERC argues that its role is limited to reimbursement, not direct payment of benefits to the employee. We agree with the WCTF, for the reasons set forth in Janocha v. Malden Mills Industries, Inc., 30 Mass. Workers’ Comp. Rep. ____ (June 21, 2016)(Section 25A(2)(c) guarantees payment of benefits to employees of self-insurers: by its own terms a self-insurer cannot be “uninsured”); Pastore v. Polaroid Corp. Inc., 30 Mass. Workers’ Comp. Rep. ____, &

nn.6 & 7 (August 1, 2016). See Federoff v. Ewing, 386 Mich. 474 (1971)(under Michigan Workers' Compensation Act, indemnification language in reinsurance contract stricken to allow employee to receive benefits directly from reinsurer).

ERC's appeal argues recommitment is required because the judge ordered it to reimburse the WCTF pursuant to the terms of its reinsurance contract but he made no findings determining whether the reinsurance contract contemplated reimbursement of COLA. Although we vacate the reimbursement order and direct ERC to pay benefits to the employee directly, its contractual argument still has bearing on this issue; accordingly, we address it.

At the hearing, Mr. Donald Warring testified for ERC. Mr. Warring is employed by ERC as a "claims expert," and was called to testify in order "to explain . . . basically how this particular [reinsurance] policy works." (Tr. 12, 14.) Mr. Warring testified that there was no language in ERC's contract prohibiting ERC from reimbursing benefit payments for risks not anticipated at the time the reinsurance contract was formed. (Tr. 32-33.) Thus, there is no factual support for ERC's allegation that COLA is outside the parameters of its contractual obligations because the payment of COLA was not a risk anticipated by the parties at the time the contract was made.

We agree with the WCTF that ERC is responsible for directly paying the employee's § 34B COLA. When the hearing began, ERC stated on the record, "[t]he question that's really not technically before you at this point, the real fight down the line, is going to be about the COLA because, after all, the COLA was created by the Massachusetts Legislature after the date of injury and after the effective dates of this particular policy." (Tr. 12.) Although the judge did not address this argument in his decision, recommitment is not required because we have held, as a matter of law, that COLA payments "cannot be separated from, or taken out of, the payment of weekly" § 34A benefits. Pastore, supra. Accordingly, ERC must pay §§ 34A and 34B

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benefits directly to the employee.⁴ ERC also must reimburse the WCTF for benefits paid to date, and shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of \$1,613.55.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: **October 11, 2016**

⁴ The WCTF and ERCs' arguments, advanced on appeal for the first time, 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, are not ripe for adjudication. As such, we do not address those arguments.