COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOs. Various**
Daniel Panu	Employee
Chrysler Motors Corp.	Employer
DIA Number	46365-90
Ralph Belleville	Employee
First National Stores	Employer
DIA Number	7410-72
Alfred Berwick	Employee
Mount Ida College	Employer
DIA Number	38502-91
Clarence Bouchard	Employee
N.E. Sand and Gravel	Employer
DIA Number	9981-82
Kevin Fitzgerald	Employee
Modual Components	Employer
DIA Number	33369-04
Edwin Murphy	Employee
RSR Realty	Employer
DIA Number	3811-81
Francis L. Murphy	Employee
Frank E. Murphy	Employer
DIA Number	29355-90
Francis L. LaPierre	Employee
Williams Distrib. Corp	Employer
DIA Number	1467-84 & 34780-08
Peter Shemeth	Employee
BH Cutler Roofing Co.	Employer
DIA Number	29651-94 & 87273-89

Douglas White	Employee
Pinkertons, Inc.	Employer
DIA Number	80620-76
Mary Williams	Employee
RIS Paper Co.	Employer
DIA Number	19305-08
Insurers	Home Insurance Comp. in Liquidation
	Workers' Compensation Trust Fund

REVIEWING BOARD DECISION

(Judges Harpin, Koziol and Fabricant)

The case was heard by Administrative Judge Taub.

APPEARANCES

Donald E. Wallace, Esq. and Andrew S. Levine, Esq., for Home Insurance Company in Liquidation at hearing
Donald E. Wallace, Esq., for Home Insurance Company in Liquidation on appeal
William C. Tattan, Esq. and Yvonne Vierra-Cardoza, Esq. for Workers' Compensation Trust Fund at hearing and on appeal

HARPIN, J. Home Insurance Company in Liquidation (Home) appeals from a decision finding that it did not have standing to bring an action against the Workers' Compensation Trust Fund (WCTF) for reimbursement of COLA payments made to the named employees. We affirm the ultimate finding that Home lacked standing to bring this case, but only as to claims for reimbursement of COLA benefits paid after Home ceased reporting the assessment base amount, ceased collecting assessments from employers, and ceased paying those funds to the department. We reverse the finding that Home was entitled to receive reimbursement from the WCTF for COLA payments made prior to June 13, 2003, and affirm that part of the decision denying reimbursement for COLA payments

made by the Massachusetts Insurers Insolvency Fund (MIIF) to the named employees after June 13, 2003. Finally, we recommit the case to the judge for further findings on when Home stopped reporting to, and collecting assessments for, the department, and for findings on whether COLA reimbursements are due Home for the period prior to that date, and, if necessary, in what amount.

PROCEDURAL HISTORY

Home filed complaints against the WCTF seeking reimbursement under G. L. c. 152, § 65(2)(a) for COLA payments it claimed to have made to the named employees pursuant to § 34B. The complaints were consolidated before Administrative Judge Frederick Levine, who heard testimony and received numerous exhibits over seven days of hearing in 2009 and 2010. (Dec. 4.) However, prior to the completion of the matter, Judge Levine[1] was confirmed as an Administrative Law Judge on the reviewing board, and the case was reassigned to a different judge. The parties agreed to submit the case to the new judge without the necessity of a new hearing. The judge thereupon reviewed the hearing transcripts, the admitted exhibits, and the parties' post-hearing briefs and closing arguments. In his decision, the judge found Home lacked standing to bring its claims. However, even if it did have standing, it would be entitled to seek reimbursement for COLA payments made only before June 13, 2003, the date MIIF began paying compensation benefits. He ruled that after that date Home no longer was entitled to seek reimbursement. Home, not being satisfied with the outcome, filed this appeal.

FACTS

Home became a New Hampshire corporation in 1973 and remained so until its liquidation in 2003. It was licensed to write workers' compensation insurance policies in Massachusetts. The named employees all worked for employers who purchased such policies and were injured during the pendency of those policies. (Dec. 6.) During the time it wrote Massachusetts policies Home reported and

[1] Judge Levine took no part in deciding this appeal or reviewing any draft of the decision.

collected assessments from its policyholders, and remitted them to the Department of Industrial Accidents as required by § 65(3)[2], in order to fund the WCTF. (Dec. 7.)

In June, 1995, Home was ordered by the New Hampshire Insurance Department to stop writing new policies. (Dec. 7.) Home thereafter began the process of discontinuing its active operations, described as a "run-off" of its business. When its Massachusetts policies expired and were not renewed, Home ceased collecting § 65 assessments, although the exact date this occurred was not determined below. At some point, Home stopped being the vehicle, through its policyholders, for contributing to the funding of the WCTF. (Dec. 7.) However, Home continued to manage, adjust, and administer all workers' compensation claims made against its Massachusetts policies. This included paying all benefits due to the named employees, such as COLA benefits under § 34B. It did so, and appeared as a party in litigation of those claims, until June 13, 2003, the effective date of its liquidation. (Dec. 7.)

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[2] G.L. c. 152, § 65(3) provides:

> (3) Each insurer authorized to write workers' compensation in the commonwealth, each self-insurer, each self-insurance group, and the commonwealth shall report to the department annually on or before May first, the assessment base amount for employers subject to this chapter. The Massachusetts workers' compensation rating bureau shall report aggregate base amount data for employers insured by its members. The assessment base amount for all employers shall be the losses paid under this chapter for the preceding twelve month period beginning January first and ending on the last day of December.
>
> If an insurer, self-insurer, or self-insurance group fails to report such base amounts to the department on or before May first, the department may assess a one thousand dollar fine for each month or part thereof that its report is late and may estimate a base amount, until the actual base amount is determined, by taking into consideration the actual base amount last reported for the assessment payor; provided, however, that no estimated base amount shall be greater than one hundred and twenty per cent of the actual base amount reported.

In 1997, Home was placed under formal supervision by the New Hampshire Insurance Department. In 2003 the Commissioner of that Department determined that Home's liabilities exceeded its assets, and thereafter filed a "Verified Petition for Order of Liquidation" with the New Hampshire Superior Court. Subsequently the court issued an Order of Liquidation, effective June 13, 2003, which has factored significantly in this present litigation.[3] (Dec. 7.)

The judge found that Home remained (including as of the date of the decision) a licensed insurer in Massachusetts, as that term was defined at G. L. c. 152, § 1(7),[4] despite being in liquidation. He noted the company's license had been renewed in New Hampshire and "has not been revoked in Massachusetts." (Dec. 8.) He specifically rejected the WCTF's argument that by virtue of the liquidation and the limitations on Home's activities it was no longer an "insurer." (Dec. 8.)

Under G. L. c. 152, § 61, Home, when it began to transact business in the Commonwealth as a solvent foreign corporation, had to furnish a bond running to the Commonwealth in order to insure the payment of workers' compensation benefits in the event it became insolvent. By statute, the bond was conditioned on the deposit by Home, upon its withdrawal from the transaction of business in the

[3] Home was referred to in the Order as "Home Insurance Company in Liquidation," but the judge used this term and "Home" interchangeably. (Dec. 7.) We do as well.

[4] G.L. c. 152, § 1(7) defines "Insurer" as

> any insurance company, reciprocal, or interinsurance exchange, authorized so to do, which has contracted with an employer to pay the compensation provided for by this chapter. The term "insurer" within this definition shall include, wherever applicable, a self-insurer, the commonwealth and any county, city, town, or district which has accepted the provisions of section sixty-nine of this chapter. The term "insurer" as used in this chapter, except where used to refer to regulation of insurance companies by the division of insurance, and except where used in sections sixty-five A and sixty-five C, shall include where applicable a workers' compensation self-insurance group established pursuant to the provisions of sections twenty-five E to twenty-five U, inclusive.

Commonwealth, of an amount equal to its obligations incurred or to be incurred under workers' compensation policies, the amount to be determined by the Commissioner of Insurance. G. L. c. 152, § 62.[5] On June 13, 2003, the date of the New Hampshire Order of Liquidation, the amount of the deposits and interest which was held in trust by the Treasurer of the Commonwealth under G. L. c. 152, §62, amounted to $5,527,000. In 2005 the Massachusetts Commissioner of Insurance filed a Verified Petition with the Supreme Judicial Court seeking to be appointed the permanent Ancillary Receiver of Home, which was granted on June 6, 2005. In this position the Commissioner, pursuant to G. L. c. 175, § 180E, oversaw the assets of Home in Massachusetts, which included the § 62 Special Deposit made by Home as a condition of doing business in Massachusetts. (Dec. 8; WCTF Ex. 1.)

On June 13, 2003, the effective date of the Order of Liquidation, MIIF, pursuant to G. L. c. 175D, § 5,[6] became responsible for the payment of benefits to

[5] Throughout the hearing, in the decision, in all parties' briefs and even at the oral argument before the Reviewing Board, the parties and the judge considered that the relevant statutes were G. L. c. 152, §§ 57, 59 and 60. However, those statutes refer specifically and exclusively to domestic insurance companies, and as such are not relevant to Home, a foreign company based in New Hampshire. The Verified Petition of the Commissioner of Insurance, filed with the Supreme Judicial Court in May, 2005, (WCTF Exhibit 1), makes this abundantly clear. See discussion, infra.

[6] G.L. c. 175D, § 5 provides, in part:

> (1) The Fund shall:
>
> (a) be obligated to the extent of the covered claims against the insolvent insurer existing prior to the declaration of insolvency and arising within sixty days after the declaration of insolvency, . . . but such obligation shall include only that amount of each covered claim which, unless it is a claim for compensation or other benefits which arises out of and is within the coverage of a workers' compensation policy, is less than three hundred thousand dollars.
> (b) be deemed the insurer to the extent of its obligation on the covered claims and shall have all rights, duties and obligations of the insolvent insurer to such extent, . . .

the named employees, including the payment of COLA benefits,[7] As part of its duties MIIF took over the management of all outstanding claims against Home. Home no longer was involved in the management, adjustment, or payment of any of the claims brought under its policies. MIIF contracted with Guaranty Fund Management Services (Guaranty Fund), to administer the claims and payments. (Dec. 9.)

Initially MIIF obtained the money to administer and pay the claims from the assessments paid by all employers to solvent insurance companies, which then paid over the money to the fund established by G. L. c. 175D, § 5(1)(c)[8].

(d) investigate claims brought against the Fund and adjust, compromise, settle and pay covered claims to the extent of the Fund's obligation and shall deny all other claims; (e) notify such persons as the commissioner may direct;
(f) handle claims through its employees or through one or more insurers designated as servicing facilities. Designation of an insurer as a servicing facility is subject to the approval of the commissioner and may be declined by the insurer; and (g) reimburse each servicing facility for obligations of the Fund paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Fund and shall pay the other expenses of the Fund incurred under this chapter.

(2) The Fund may:
(a) appear in, defend, and appeal, any action on a claim brought against the Fund;
(b) employ such personnel as are necessary to handle claims and perform other duties of the Fund;
(c) borrow funds necessary to carry out the purposes of this chapter in accordance with the plan;
(d) sue or be sued; . . .

[7] "The Fund is a 'statutorily mandated, nonprofit, unincorporated association of all insurers writing certain kinds of direct insurance in the Commonwealth ... available to settle certain unpaid claims which arise out of and are within the coverage of an insurance policy issued by an insolvent insurer.' [citations omitted] The Fund is obligated to pay covered claims against an insolvent insurer (up to $300,000 per claim) in place of that insurer. G.L. c. 175D, § 5(1)(a) & (b)." Massachusetts Care Self-Insurance Group, Inc. v. Massachusetts Insurers Insolvency Fund, 458 Mass. 268, 269 (2010).

Periodically MIIF gathered information on the payments made on the claims and the costs incurred in the administration of those claims, and sent the resulting report to the Liquidator for Home. That person reviewed the payments and costs, approved those he deemed appropriate, and then submitted them to the New Hampshire Superior Court, for a judge's review and approval. (Dec. 9.)

Once the benefits payments and costs were approved, the Liquidator obtained payments, called early access distributions, to reimburse MIIF for its expenditures. The administrative costs of the claims were reimbursed from the general estate of Home, which was held by the New Hampshire Superior Court and overseen by the Liquidator. (Dec. 9.) The benefits payments, including COLA payments, were reimbursed from the § 62 deposit originally made by Home and maintained by the Treasurer of the Commonwealth of Massachusetts. Id. The reimbursement was obtained when the Liquidator forwarded a request to the Ancillary Receiver (the Commissioner of Insurance), who, in turn, petitioned the Supreme Judicial Court for authorization to make the payment. If the Court gave its approval, the Treasurer then made a payment to MIIF from the statutory deposit in the amount sought. (Dec. 9.) The first such authorized payment, in the amount of $725,210.07, was made on June 6, 2005, pursuant to an Order Appointing Permanent Ancillary Receiver issued by the Supreme Judicial Court. The Court noted in the Order that it "retains jurisdiction to issue such further orders as appropriate." (WCTF Ex. 1.)

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[8] G.L. c. 175D, § 5(1)(c) provides that the Fund shall:

> (c) assess insurers the amounts necessary to pay the obligations of the Fund and the expenses of handling covered claims subsequent to an insolvency and to pay the cost of examinations under paragraph (1) of section eight and other permissible expenses incurred under this chapter. The assessments of each insurer shall be in the proportion that the net direct written premiums of the insurer for the calendar year preceding the assessment bears to the net direct written premiums of all insurers for the calendar year preceding the assessment. The Fund shall pay claims in any order which it may deem reasonable, including the payment of claims as such are received from the claimants or in groups or categories of claims.

Once the Massachusetts statutory deposit is exhausted, MIIF will become a Category II creditor of Home, which means it will apply directly to the Liquidator for reimbursement of payments it makes, and take its place in line with other Category II creditors for distributions from Home's assets held by the New Hampshire Superior Court. When this occurs, MIIF can no longer rely on getting 100% of its workers' compensation payments reimbursed, and will have to utilize its ability to assess solvent insurers under G. L. c. 175D, § 5(1)(c) to make up the difference. (Dec. 10.)

Home's witnesses testified that it sought the § 65 COLA reimbursements from the WCTF in order to replenish, in part, the §62 statutory deposit. However, the judge found no authority that would require such a payment to go only to the statutory deposit, and instead found that any COLA reimbursements, if payable to Home, would be forwarded to the general estate of the insurer. Once there, those funds, as a general asset, would be subject to distribution to all the creditors at the discretion of the Liquidator and the Court, and would not automatically be used to reimburse MIIF for its COLA payments. (Dec. 10.)

As of December 15, 2009, MIIF had received a total of $3,990,368.36 in early access distributions from the Massachusetts § 62 statutory deposit. (Dec. 10.) At the oral argument before the reviewing board, counsel for Home noted that the statutory deposit was exhausted. (O.A. Tr., 35.)

STANDING

As a threshold matter, the judge found Home did not have standing to bring the claim for COLA reimbursement. (Dec. 12.) The judge made the preliminary finding that the persons who brought and prosecuted the claim for COLA reimbursement lacked the "necessary authority" from the Liquidator to file this action. (Dec. 5.) He thereupon denied and dismissed the claims as "not properly before the Department." (Dec. 13.)

Home argues that the two representatives of Home who filed the requests for reimbursement from the WCTF, Jonathan Rosen and Russell Bogin, had

implied authority from the Special Deputy Liquidator, Peter Bengelsdorf, to bring this claim, despite not having explicit written authority from him to do so. The WCTF asserts the language of the June 13, 2003, Order of Liquidation from the New Hampshire Superior Court required clear prior written authority from the Special Deputy Liquidator in order to confer standing to Rosen and Bogin to file the reimbursement requests and bring this action.

The finding that Home lacked standing to bring these claims was generally correct, but not for the stated reason. McCambly v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 57, 61 (2007)(reviewing board will affirm decision with right result, even if judge asserts wrong reason). The question whether Rosen and Bogin had written authority from the Special Deputy Liquidator to bring the claims was resolved when an Affidavit from Mr. Bengelsdorf, filed with a Motion for Reconsideration of the Decision shortly after the decision was entered, made it clear they did have such authority. While ordinarily we would defer to the judge's finding, Kijek v. Osram Sylvania, Inc., 13 Mass. Workers' Comp. Rep. 86, 89 (1999)(decision on question of fact need not be reexamined due to a Motion for Reconsideration), in this case the evidence established that Rosen and Bogin acted with the approval of the Special Deputy Liquidator.

The greater question on standing, however, is whether Home had a right to bring any claims for COLA reimbursement from the WCTF. Claimants appearing before the Department must have a:

> sufficient interest in the outcome of litigation to warrant consideration of [their] position by a court. It is the legal right to set the judicial machinery in motion, . . . not a procedural technicality. Standing is, rather, that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims . . . and must be defined on a case-by-case basis. . .

Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89, 92 n. 8, citing 1A C.J.S. Actions § 101 (2005). The issue of standing may be raised at any time, even on appeal, as it is an element of jurisdiction that is always of concern to any

court. Id. Thus, the real question of Home's standing is whether it has a "sufficient interest in the outcome of [this] litigation." Id.

Home has asserted it has the right to COLA reimbursements from the WCTF for essentially two reasons. The first is that the money held by the Commonwealth's Treasurer, and paid out from time to time by the Commissioner of Insurance upon request of MIIF, was held "in trust," and remained the property of Home under § 59. Therefore, if all the outstanding benefits owed were ever to be fully paid, any remainder would be returned to Home. The second is that once Home obtained the COLA reimbursements, they would be used to refund the statutory deposit, thus prolonging the time before MIIF would become a Category II creditor of Home in Liquidation. Neither reason has merit.

As noted above, Home (as well as the judge and the WCTF) made a fundamental mistake in considering the applicable statute under which the $5,527,000 deposit was made and held. The parties and the judge assumed the deposit was made pursuant to G. L. c. 152, § 57, and that § 59 governed the situation where there was an amount remaining after all benefits due claimants had been paid. Section 59 does indeed require the state treasurer to hold a deposit in trust, and "return the balance to the company upon written notice from the department that there is no likelihood of further payments becoming due on account of such claims." However, § 59 does not apply to Home, a foreign (i.e. out of state)[9] company, because its deposit was made pursuant to § 61, not § 57. Section 61 requires:

> Every foreign insurance company transacting the business of workers' compensation insurance in the commonwealth shall furnish a bond running to the commonwealth, with some surety company authorized to transact business in the commonwealth as surety, for such term and such amount and in such form as may be approved by the commissioner of insurance, the bond being conditioned upon the

[9] " 'Foreign company,' a company formed by authority of any state or government other than this commonwealth." G. L. c. 175, § 1.

> making of the deposits required by the following section. The annual license of such a company shall not be issued or renewed until it has filed with the commissioner a bond as aforesaid covering a future period at least as long as that covered by the license. In place of a bond as aforesaid the company may furnish other security, upon a like condition, satisfactory to the commissioner.

G. L. c. 152, § 61 (emphasis added).

The 2005 Verified Petition for Appointment of Permanent Ancillary Receiver of the Commissioner of Insurance specifically referenced § 61 as the operative statutory provision. After requesting her appointment by the Supreme Judicial Court, she noted the Massachusetts treasurer was holding two statutory deposits on behalf of Home. "The second deposit specifically secures the payment of Home's workers' compensation claims in Massachusetts. . . . See G. L. c. 152, §§ 61 and 63." (Home's Ex. 1.)

Once having made the statutory deposit as a condition of doing business in this Commonwealth, Home was subject to the strictures of § 62 regarding the usage to which that deposit may be put. That section requires:

> Every such foreign insurance company shall, within five days after its withdrawal from the transaction of business in the commonwealth or after the revocation of its license issued by the commissioner of insurance or of his refusal to renew it, deposit with a trustee to be named by the department an amount equal to twenty-five per cent of its obligations incurred or to be incurred under workers' compensation policies issued to employers in the commonwealth; and within thirty days after such withdrawal, revocation of or refusal to renew a license, such company shall deposit with said trustee an amount equal to the remainder of such obligations incurred or to be incurred, the amount of which obligations shall be determined by the department. The amounts so deposited shall be available for the payment of the said obligations of the company to the same extent as if the company had continued to transact business in the commonwealth, and the trustee so receiving said deposits shall pay such obligations at the times and in a manner satisfactory to the department.

G. L. c. 152 § 62 (emphasis added).

The standard principles of statutory construction require that "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Cornetta's Case, 68 Mass. App. Ct. 107, 112 (2007), citing Hanlon v. Rollins, 286 Mass. 444, 447 (1934).

The obvious purpose of § 62 is to protect claimants who receive their compensation benefits from a foreign insurer which becomes insolvent and no longer transacts business in the Commonwealth. That is the "mischief" to be remedied. In that situation the amount deposited, determined by the Commissioner of Insurance, is to be equal to the amount of compensation the insurer remains obligated to pay into the future. There is no provision made for a balance remaining after all payments have been made to claimants, such as there is in § 59, because it is assumed the deposit will be enough to cover the outstanding obligations, and no more.

The judge's reliance on § 59 to support his finding that the deposit was an asset of Home because the insurer had "technical" ownership of it, due to its inchoate right to any balance remaining after all benefits had been paid out, (Dec. 8), was thus in error. The statute under which the deposit was actually made, § 62,[10] does not provide for that eventuality. All the funds in the deposit are assumed to be used to pay the claimants their benefits, which is what occurred in this case. Given that standing requires a party to have a "sufficient interest in the outcome of the litigation," Rodriguez, supra, Home has no standing, as it has no interest in the funds held in the deposit. They were earmarked solely for the purpose of paying its benefit obligations, and, once placed in the deposit, ceased being the property of Home.

[10] The judge held that it was a § 57 deposit. (Dec. 8.)

The judge made the further finding that the deposited funds were an asset of Home because the Liquidator "has authority over whether and in what amount disbursements are to be made from this account." (Dec. 8.) This finding misconstrues the actual process for disbursing the § 62 funds. The statute requires that "the trustee so receiving said deposits shall pay such obligations at the times and in a manner satisfactory to the department." The trustee in this case was the Treasurer of the Commonwealth, who took direction from the Commissioner of Insurance. The Commissioner, appointed as the Ancillary Receiver of Home by the Supreme Judicial Court pursuant to G. L. c. 175, § 180E, continued to be under the direction of that court. "A decree to conserve the assets of a foreign insurer shall direct the receiver forthwith to take possession of the property of such insurer in the commonwealth and to conserve the same, subject to the order of the court." G. L. c 175, § 180E (emphasis added). The Court, not the Liquidator, thus had the final authority over when and in what amounts disbursements were to be made from the § 62 fund. The fund did not hold money that was an asset of Home, as Home's Liquidator did not have the ultimate say in its distribution.

Home's second argument is equally without merit. The judge made the specific finding of fact that there was no authority requiring Home to pay over any COLA reimbursements it received to refund the § 62 deposit. (Dec. 10.) He instead found that any COLA reimbursements, if payable to Home, would have accrued to the general estate of the insurer. Once there, the funds, as a general asset, would be subject to distribution to all the creditors at the discretion of the Liquidator and the Court, and would not be automatically used to reimburse MIIF for its COLA payments. (Dec. 10.) As there was sufficient support in the record for this finding of fact, we do not disturb it. Wicklow v. Fresnius Medical Care Holdings, Inc., 28 Mass. Workers' Comp. Rep. ___ (April 9, 2014).

HOME'S ENTITLEMENT TO RECEIVE REIMBURSMENT

In the event his ruling on the lack of standing was reversed on appeal, the judge made further findings on the issue whether Home was entitled to any

reimbursement from the WCTF. He found that Home, having paid compensation benefits, including COLA benefits under § 34B, up to the date of its formal liquidation, June 13, 2003, "met the basic requirements to apply for and receive the quarterly reimbursements from the WCTF addressed in § 34B(c) and prescribed for as a use of WCTF monies in § 65(2)." (Dec. 11.) After that date the judge found that MIIF, "out of its own resources, directly makes timely payments to the benefit recipients." (Dec. 12.) The judge further held that any disbursements to MIIF from the statutory deposit were not Home's payment of the benefits, as it was merely "Home complying with a statutory requirement that it use a statutorily required reserve account to, as much as possible and for as long as possible, repay the entity that has assumed its liabilities." (Dec. 12.) For that reason the judge found that Home would not be entitled to any reimbursements from the WCTF for COLA payments made after June 13, 2003, because "Home cannot be 'reimbursed' for that which it has not been found to have paid."[11] (Dec. 12.)

While we agree that Home was not entitled to receive COLA reimbursements after June 13, 2003, it was also not entitled to receive them before that date, once it ceased collecting assessments to fund the WCTF. In making his comprehensive and detailed conclusions on this issue, the judge failed to give consideration to the one fact that controls the outcome. He found that when its Massachusetts policies expired and were not renewed, Home ceased collecting § 65 assessments and stopped contributing to the funding of the WCTF. (Dec. 7.) This occurred at some point after June, 1995, when it was ordered to cease writing policies (Dec. 7), and had likely occurred by 1997, when Home came under formal supervision by the New Hampshire Department of Insurance. (Dec. 7.) The judge made no finding of fact as to the exact date of the expiration of Home's remaining

[11] In addition, reimbursement to Home would be prohibited after MIIF began paying compensation to claimants on June 13, 2003, as the reimbursement would be an indirect benefit to an insurer, a result contrary to G. L. c. 175D, § 1(2). Pilon's Case, 69 Mass. App. Ct. 267, 172 (2007)

policies, nor as to the date the funding of the WCTF by the assessments collected on those policies ended. However, as workers' compensation polices in Massachusetts are usually for one year, subject to renewal, all of Home's polices would likely have lapsed by sometime in 1997. Once Home's contributions to the WCTF ceased, the issue is whether its right to obtain reimbursements for COLA contributions also ceased.

The relevant statutes and case law do not answer this question directly. Under § 34B, "Insurers shall be entitled to quarterly reimbursements for [COLA] benefits, pursuant to section 65, for cases involving injuries that occurred on or before October first, nineteen hundred and eighty six, . . ." However, "no self-insurer, self-insurance group or municipality that has chosen non-participation in the assessment provisions for funding such reimbursements pursuant to section sixty-five shall be entitled to such reimbursements." G. L. c. 152, § 34B(c). This bar to reimbursement is repeated in § 65(2). Left out of the statutory scheme is the situation at present, where an insurer stops collecting the assessments that fund the WCTF, due to its pending insolvency. Thus, the precise issue is whether the bar to reimbursements applies when an insurer, not mentioned as one of the three entities able to "opt-out" of the WCTF, E. I. Dupont de Nemours & Co. v. Commonwealth, 65 Mass. App. Ct. 350, 353 (2005),[12] nevertheless stops reporting the assessment base and stops collecting the assessments.

The WCTF is funded by yearly assessments on employers. Id. at 354; G. L. c. 152, § 65(2). This system is essentially a "pay-as-you-go" proposition, with the right to reimbursement made conditional on paying the assessment each year that provides the money to pay out the reimbursements. Dupont, supra., at 354. When a self-insurer, self-insurance group, or municipality has "opted-out" and not paid

[12] While Dupont concerns an issue of § 37 reimbursement and not one sought under § 34B, both statutes reference the "opt-out" right and both note the result of an "opt-out" is the loss of the right of reimbursement under § 65. As such it is fully applicable to an analysis of § 34B.

the annual assessment, the insurer's entitlement to reimbursement for COLA benefits it has paid is lost. Beatty's Case, 84 Mass. App. Ct. 565, 568 (2013) (insurer's right to COLA reimbursements linked to § 65 requirement of participation in the WCTF by employers through their assessments.)

Home stopped reporting and collecting the § 65 assessments after its policies terminated between 1995 and 1997. (Dec. 7.) Under § 65(3), Home, and every other "insurer authorized to write workers' compensation in the commonwealth," was required to report to the Department of Insurance, by May first of each year, "the assessment base amount for employers" holding its policies. That amount was calculated by determining the losses paid for those employers for the twelve-month period from January first to December thirty-first of the year preceding the reporting date. Id. The assessment collected and paid over to the department would thus have covered at least 1995, Beatty, supra., (assessments calculated by May first used to determine next year's funding of WCTF), and may have covered 1996, depending on when Home's policies ended.

While there was no formal "opt-out" by the employers, the end result was the same – the assessments that would have funded any reimbursement for COLA benefits were not paid into the WCTF by Home. The "pay-as-you-go" aspect of the WCTF was triggered not by the identity of the employers but by the fact that there had to be funds deposited into the WCTF in order for it to carry out its statutory duty of reimbursement. Just as a self-insurer that has chosen to "opt-out" suffers the loss of its right to reimbursement, an insolvent insurer that no longer reports the assessment base amount, collects the assessments, and pays them over to the WCTF, must also lose its right to receive COLA reimbursements. Beatty, supra. Therefore, Home no longer had any right to seek reimbursement for COLA payments made after it stopped reporting and collecting assessments.

Because the judge did not determine when this occurred, the case must be recommitted for such a finding, with the judge free to take new evidence on that one issue, if warranted. The judge must then consider any defenses raised by the

WCTF that were not resolved in the bifurcated hearing, and make appropriate rulings on whether Home would be entitled to COLA reimbursement for the short period when it continued to fund the WCTF.

Accordingly, the finding that Home lacked standing to bring this action is affirmed, in part. The denial of Home's right to reimbursement for COLA benefits paid after June 13, 2003 is also affirmed, the finding that Home would have a right to reimbursement prior to June 13, 2003 is reversed, and the case is recommitted for findings on whether Home would be entitled to reimbursement for benefits paid while it still collected and forwarded assessments to the department.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

FILED: June 24, 2014