COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 805744-85 080211-90 807089-76 022896-90 022746-10**
Francis Beatty, Maria Carvalho, Adolphus Gordon, Helena Raposo and Francis Yebba	Claimants[1]
Harvard University	Employer
Harvard University	Self-Insurer/Petitioner
Workers Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
John J. Canniff, Esq., for the self-insurer
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund

COSTIGAN, J. The question presented by the self-insurer's appeal is whether a departmental regulation imposing a two-year limitations period on petitions for reimbursement of § 34B cost-of-living (COLA) adjustments,[2] contradicts

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[1] The claimants are non-interested parties in this appeal.

[2] General Laws c. 152, § 34B, provides, in pertinent part:

> October first of each year shall be the review date for the purposes of this section.
>
> 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;
>
> . . .
>
> (b) The death benefit under section thirty-one or the permanent and total disability benefit under section thirty-four A that was being paid prior to any adjustments under this section shall be the base benefit. The base benefit shall be changed on each review date by the percentage change as calculated in paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of the benefit to be paid on and after the review date. If the adjusted benefit is larger than the base

and renders impossible the proper application of that statute. See G. L. c. 152, § 5.[3] The administrative judge concluded that it did not, and denied the self-insurer's petitions seeking reimbursement of COLA supplemental benefits paid to employees more than two years before the petitions were filed.

We agree with the self-insurer that the regulatory limitations period is an improper and invalid exercise of executive authority, and therefore decline to apply it. We reverse the decision and order the Workers' Compensation Trust Fund (Trust Fund) to pay the disputed reimbursement claims.

> benefit, the difference shall be termed the supplemental benefit. In no instance shall the adjusted benefit under this section be greater than three times the base benefit.
>
> (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 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 single year.

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

> 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. . . .

[3] The statute provides, in pertinent part:

> The commissioner shall promulgate rules and regulations *consistent with this chapter* for carrying out the functions of the department. . . . Neither an administrative judge nor the reviewing board shall have the authority to repeal, revoke, or otherwise set aside a regulation promulgated by the commissioner; provided, however, that if in any proceeding within the division of dispute resolution it is found that the application of any section of this chapter is made impossible by the enforcement of any particular regulation, the administrative judge or reviewing board shall not apply such regulation during such proceeding only.

(Emphasis added.)

This case was tried on a stipulation of facts.[4] (Dec. 4.) The regulation invoked by the Trust Fund and challenged by the self-insurer provides, in pertinent part:

> A party requesting reimbursement pursuant to M.G.L. c. 152, § 65(2)(a) or

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[4] The parties stipulated, and the judge found, that:

1. Supplemental benefit payments pursuant to M.G.L. c. 152 §34B were alleged to have been properly made by Harvard University to Francis Beatty (DOI: 01/19/1981), Maria Carvalho (DOI: 09/24/1990), Adolphus Gordon (DOI: 09/07/1976), Helena Raposo (DOI: 04/15/1990), and Francis Yebba (DOI: 05/24/1978) ("Claimants") for the period from 07/01/2005 through 06/30/2010.

2. Claims were filed by Harvard University on 07/22/2010 for reimbursement of the supplemental benefits for the period of 07/01/2005 through 06/30/2010 paid to the Claimants pursuant to §34B(c); the claims for the period from 07/01/2005 through 07/21/2008 were denied by the Workers' Compensation Trust Fund by letters dated 09/15/2010.

3. Harvard University submitted the prescribed forms and information in support of the claims for reimbursement of the supplemental benefits on each Claimant by providing the following information:
    a. Orders for payment of benefits pursuant to §34A or §31.
    b. Evidence supporting each claimant or claimant's decedent [sic] remains alive and well.
    c. Completed Form CR-28s showing that the payments of the supplemental benefits did not result in an offset of federal Social Security disability payments.
    d. Payment printout reports showing payments made pursuant to §34B were made for the period from 07/01/2005 through 06/30/2010.

4. The Workers' Compensation Trust Fund issued reimbursement to Harvard University pursuant to §34B(c) for payments made for the period from 07/21/2008 through 06/30/2010, and has accepted a filing for reimbursement of payments made for the period from 07/01/2010 to 12/31/2010.

5. The Workers' Compensation Trust Fund previously issued reimbursement to Harvard University pursuant to §34B(c) for payments made to each of the Claimants through 06/30/2005.

6. The Workers' Compensation Trust Fund has denied reimbursement to Harvard University for payments made prior to two years before the filing of the request for reimbursement, or for the period from 07/01/2005 through 07/21/2008 pursuant to 452 CMR 3.03. [Footnote omitted.]

> § 65(2)(b), shall file a form prescribed by the Department, received and date stamped by the Department no later than two calendar years from the date on which the benefit payment, for which the reimbursement request being filed, was due.

452 Code Mass. Regs. § 3.03(3). We take judicial notice[5] that the regulation, first adopted as an emergency rule on March 5, 1999 and published in the Massachusetts Register, No. 864, was ultimately adopted on April 30, 1999, at which time it was published in the Massachusetts Register, No. 868, with an effective date of February 17, 1999.[6]

Answering the self-insurer's challenge to the application of the regulatory limitations period to bar reimbursement of § 34B supplemental benefits paid more than two years prior to its claims, the judge found that the Trust Fund correctly relied on the regulation to deny the disputed claims. (Dec. 5-6.) He reasoned that the two-year limitations period served two rational purposes: providing an incentive to the self-insurer to timely pay COLA supplemental benefits;[7] and, protecting the Trust Fund from stale reimbursement claims. (Dec. 6.) The judge therefore dismissed the self-insurer's claims as time-barred.

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[5] Following oral arguments on April 23, 2012, the reviewing board panel asked the Trust Fund and the self-insurer to submit copies of all versions of 452 Code Mass. Regs. § 3.00 et seq., from the date of original promulgation to the present, with the effective dates of any and all revisions/amendments; and copies of all DIA Circular Letters addressing § 34B COLA reimbursements, from the November 1, 1986 original effective date of the statute, to the present, together with copies of all DIA Forms promulgated for use by insurers/self-insurers seeking § 34B COLA reimbursements from the Workers' Compensation Trust Fund. Both parties did so, the documents are made a part of the record, and we take judicial notice of those documents. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[6] The regulation, as published in the 1999 Official Edition of "Massachusetts Workers' Compensation Law," provided that the two-year limitations period ran from when the benefit payment for which reimbursement was requested "was made." At some point thereafter, and as published in the 2000 Official Edition of same, "was made" was changed to "was due." Given our ruling that the regulation is invalid, we need not consider whether this change was properly effected.

[7] We note there was no allegation that the § 34B adjustments otherwise had not been paid promptly and "without application" by the self-insurer.

The self-insurer argues that the regulation is invalid under G. L. c. 152, § 5. Further, it argues the regulation violates its statutory right, under § 34B, to reimbursement of COLA supplemental benefits otherwise due. We agree.

Regulations are accorded deference, Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 768 (1980), where there is a "rational relationship to the goals or policies of the agency's enabling statute." Miller v. Labor Relations Comm'n, 33 Mass. App. Ct. 404, 406 (1992). The Massachusetts courts "must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 855 (1977). It is likewise true that an agency may set regulatory timetables for the conduct of its statutory business. Scofield v. Berman & Sons, Inc., 393 Mass. 95, 101 (1984). However, such limitations must remain "within the ambit of the enabling statute." Commonwealth v. Racine, 372 Mass. 631, 635 (1977).

> In assessing the legality of an administrative agency's properly promulgated regulation, we employ sequentially two well-defined principles. First, we determine, using conventional tools of statutory interpretation, whether the Legislature has spoken with certainty on the topic in question, and if we conclude that the statute is unambiguous, we give effect to the Legislature's intent.

Goldberg v. Board of Health of Granby, 444 Mass. 627, 632-633 (2005). "An agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts." Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 646 (2000).

In this case, the plain language of § 34B mandates two acts: 1) the self-insurer *shall pay* COLA supplemental benefits without application, based upon the statute's formula and schedule; and 2) the Trust Fund *shall reimburse* the self-insurer for those payments, based on the statute's formula governing that obligation. The word "shall" is plain, unambiguous and mandatory, not precatory, in nature. Taylor's Case, 44

Mass. App. Ct. 495 (1998). "[T]he language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it." Id. at 499.

Moreover, there is no rational relationship between the two-year limitations period of Rule 3.03(3) and the goals and policies -- "the underlying purpose" -- of the enabling statute, § 34B. Smith, supra. Unlike the statute's timetable that links the self-insurer's obligations to pay COLA supplemental benefits to the annual October 1st establishment of the state average weekly wage, there is no statutory timetable or limitation on the Trust Fund's obligations to reimburse the self-insurer. Despite amending the Act in 1991 to include in G. L. c. 152, § 37, a two-year statute of limitations on reimbursements from the so-called Second Injury Fund,[8] the Legislature has failed to supply any limitations period for COLA reimbursements. See A.I.M Mutual Ins. Co. v. Workers' Compensation Trust Fund, 81 Mass. App. Ct. 1126 (2012)(Memorandum and Order Pursuant to Rule 1:28).

The pre-1991 version of G. L. c. 152, § 37, relative to second injury fund reimbursements, provided no express statute of limitations. Rejecting the Trust Fund's arguments to the contrary, our appellate courts ultimately held that in such circumstances, no statute of limitations could be borrowed from other statutes. See Alves's Case, 451 Mass. 171, 179-180 (2008), and Oakes's Case, 67 Mass. App. Ct. 81 (2006), *aff'd*, 451 Mass. 190 (2008). The proper remedy for the absence of a statute of limitations was not the adoption of a regulatory limitations period, but rather the enactment, *by the Legislature*, of a two-year statute of limitations in § 37,

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[8] General Laws c. 152, § 37, as amended by St. 1991, c. 398, § 71, provides, in pertinent part:

> Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-fourA, thirty-six A, and, where benefits are due under any of said sections, section thirty; . . . No reimbursement shall be made for payments due during the first one hundred and four weeks from the date of onset of disability or death, whether paid under an agreement, decision or lump sum settlement. Any petition for reimbursement under this section shall be filed no later than two years from the date on which the benefit payment for which the reimbursement request is being filed was made.

effective December 23, 1991, and expressly deemed substantive in nature. See St. 1991, c. 398, §§ 71 and 106. Although both § 37 and § 34B deal with much the same concept -- reimbursement by the Trust Fund to insurers and self-insurers of certain benefits paid to employees and claimants -- the Legislature did not see fit to add a statute of limitations to § 34B in 1991, nor has it done so since. It is axiomatic that,

> the legislature is presumed to intend and understand all the consequences of its actions. Charland v. Muzi Motors, Inc., 417 Mass. 580, 583 . . . (1994). Inconsistencies are for the Legislature to remedy. See Louis's Case, 424 Mass 136, 142-143. . . . (1997).

Alves's Case, supra at 179-180. Thus, the adoption of Rule 3.03 was not a valid exercise of executive authority.

Cited by the Trust Fund in support of the regulation, Miller, supra, is inapposite. There, the regulatory six-month requirement contained in 452 Code Mass. Regs. § 15.03 (1986), applied to the filing of a prohibited practice charge with the Massachusetts Labor Relations Commission under M. G. L. c. 150E. The regulation was "not expressed precisely in the form of a statute of limitations. . . . [Rather] [i]t is phrased somewhat in the nature of a jurisdictional test." Miller, supra at 407, quoting Boston Police Superior Officers Fedn. v. Labor Relations Commn., 410 Mass. 890, 891 n.1 (1991):

> Except for good cause shown, no charge shall be entertained by the [c]ommission based upon any prohibited practice occurring more than six months prior to the filing of a charge with the [c]ommission.

The Appeals Court held the regulation was designed to "insure prompt preliminary determinations" and "prevent litigation of stale claims." Miller, supra at 408. The claim held barred in Miller charged that the plaintiff's union had violated its duty of fairly representing him in his illegal labor practice claim against his employer. Id. at 405-406. This type of fact-intensive litigation is distinguishable from the wholly ministerial nature of the Trust Fund's statutory duty to reimburse the self-insurer for liquidated amounts paid in § 34B COLA supplemental benefits. Nothing in the effectuation of the Trust Fund's reimbursement is analogous to the adjudication of "a

large number of employment disputes," as in Miller, supra at 408. No factual investigation is necessary in the reimbursement process, other than the certifications and documentation the Trust Fund requires be filed in support of a COLA reimbursement request. See footnote 10, infra. If an insurer sees fit to leave its § 34B reimbursement sitting in the Trust Fund's coffers for years on end, the only detriment is to the insurer for its loss of the use of the funds. Moreover, if, as in this case, an insurer is forced to file a claim for reimbursement and ultimately prevails, the Trust Fund, by statute, is not liable for the payment of § 50 interest. G. L. c. 152, § 65(2)(e)(ii).

More important, however, is that the regulation at issue in Miller contained an exception to the six-month filing requirement, for good cause shown:

> Thus, this regulation is neither purely mechanical nor does it bar all claims after the deadline. Instead, the rule is somewhat elastic. It allows consideration of whether there is a valid reason for the party's tardiness in filing charges.

Id. Rule 3.03 has no such escape clause. Because it deprives insurers of property rights -- the statutorily mandated reimbursement of paid COLA benefits -- the rule is an invalid exercise of executive authority which usurps what is, in our opinion, the exclusive province of the Legislature.

Nor are we persuaded by the Trust Fund's argument that the regulatory limitations period furthers the policy of encouraging insurers and self-insurers to make timely payments of COLA supplemental benefits to employees and claimants. Section 34B itself mandates payment of COLA adjustments "without application." Employees' and claimants' attorneys are quite capable of enforcing that mandate, which can trigger § 14 sanctions and § 8(5) penalties, should an insurer frivolously or unreasonably refuse to pay those supplemental benefits short of an order to do so. Accordingly, we reject the Trust Fund's argument that "[t]o find that the regulation does not apply would be to permit the self-insurer to delay its payment of COLA with impunity in violation of the statute." (Trust Fund br. 6.) In such circumstances, in addition to penalties, the self-insurer, unlike the Trust Fund, would also be liable to

pay § 50 interest. We consider that the statutorily mandated reimbursement of COLA benefits to the insurers and self-insurers of the commonwealth, unhampered by time limitations for the filing of reimbursement petitions, provides sufficient incentive for the voluntary payment of § 34B supplemental benefits.[9]

There is no statutory policy evinced anywhere in § 65 which endows the Trust Fund with the role of policing insurance practices. Simply put, the regulatory limitations period serves the interests of but one entity -- the Trust Fund -- and it cannot be said that the Trust Fund has been consistent in its application of the regulation to insurers. Notwithstanding the regulation's adoption on April 30, 1999, effective retroactively to February 19, 1999, the department's circular letters from and after October 1, 1999, make no mention of the two-year statute of limitations:

> To apply for reimbursements under §34B(c) for cost-of-living adjustments as calculated above, please complete the attached forms, and forward them to the address given below.
>
> Requests for reimbursements should be submitted at the close of each quarter of the calendar year. Requests submitted during the first calendar quarter of 2000 should be for reimbursement of monies due and paid during the last calendar quarter of 1999. Please note that, pursuant to §34B(c), reimbursement will be denied to any insurer that has paid supplemental benefits prior to 24 months from the recipient's date of injury. . . .

DIA Circular Letter No. 300, issued October 1, 1999. That, and each subsequent, circular letter contained a department-promulgated form cover letter, to be used by insurers requesting COLA reimbursements, and an accompanying COLA reimbursement request form. Neither document has ever referenced the regulatory

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[9] In Rowley v. Allston Supply Co., Inc., 25 Mass. Workers' Comp. Rep. 81 (2011), *aff'd*, A.I.M Mut. Ins. Co. v. Workers' Compensation Trust Fund, supra, the Trust Fund argued, and the reviewing board agreed, that § 37's two-year statute of limitations reflected the Legislature's intent to limit the time in which an insurer could recover reimbursement for payments of benefits under § 37. Rowley, supra at 83. What the Trust Fund fails to recognize, however, is that it is the Legislature's prerogative to enact such a retrenchment of insurers' rights to reimbursement. Notwithstanding the provisions of G. L. c. 152, § 5, see footnote 3, supra, that authority does not extend to the rulemakers.

two-year limitations period. The language of the circular letters addressing petitions for COLA reimbursement, and the department-promulgated forms to be used by insurers, have remained identical for the past twelve years. See DIA Circular Letter No. 303 (10/02/2000); No. 308 (10/01/2001); No. 310 (10/01/2002); No. 312 (10/01/2003); No. 316 (10/01/2004); No. 320 (10/03/2005); No. 321 (9/29/2006); No. 323 (10/5/2007); No. 327 (10/03/2008); No. 332 (10/02/2009); No. 336 (10/06/2010); and No. 339 (10/04/2011).[10]

Finally, as to the Trust Fund's argument that the department, as part of its stewardship of the workers' compensation system in the commonwealth, "has a fiduciary duty to ensure fiscal integrity in the administration of the Trust Fund," (Trust Fund br. 4), we consider, as did the Legislature, that the Trust Fund's funding mechanism is flexible enough to withstand § 34B reimbursement claims which are greater than two years old. See §§ 65(3) and (4). In particular, § 65(4)(c) provides, in pertinent part:

> Additional assessments may be levied by the commissioner [of administration], subject to the approval of the secretary of labor and workforce development, if he finds such assessments necessary in order to make disbursements for any expenses or compensation payments in the fiscal year which exceed the revenue generated by the assessments for the fiscal year levied pursuant to subsection (5). Any additional assessment proposed by the commissioner shall be reviewed by the advisory council. Upon the affirmative vote of at least seven voting members, the advisory council may submit its estimate of the necessary additional assessment to the director of labor and workforce development.

Because the regulatory two-year limitations period in 452 Code Mass. Regs.

[10] From and after 2005, the subject circular letters also contained "DIA Trust Fund M.G.L. c. 152 § 34B(c) COLA Reimbursement Directions," which likewise fail to reference any limitations period and which state, without qualification, that "[t]he amount to be reimbursed to the Insurer will be equal to the Supplemental Benefit times the number of weeks paid in the quarter." Included in the supporting documentation to accompany a COLA reimbursement request is "Proof of Payments – Insurers must provide an indemnity record of what has been paid out. This will also ensure that the request has been made in a timely fashion."

§ 3.03 contradicts the plain and unambigous language of § 34B, and serves no rational purpose within the ambit of that statute, we reverse the decision denying the self-insurer's petitions.[11] We order the Trust Fund to reimburse the self-insurer, pursuant to § 34B, the COLA supplemental benefits it paid to the five subject claimants for the period from June 22, 2005 to June 22, 2008.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

Filed: **August 2, 2012**

[11] Because "the application of . . . section [34B] of this chapter [is] . . . made impossible by the enforcement of" the regulatory limitations period in 452 Code Mass. Regs. § 3.03, the regulation must be deemed unenforceable in this particular case. G. L. c. 152, § 5. See Corriveau v. Home Ins. Co., 43 Mass. App. Ct. 924, 925 (1997). See attached Appendix (§ 5 letter informing department director of "the explicit contradiction" found between the regulation and this chapter).

APPENDIX

August 2, 2012

Phillip L. Hillman, Director
The Commonwealth of Massachusetts
Department of Industrial Accidents
1 Congress Street
Boston, MA 02114

RE:	Claimants:	Francis Beatty; Maria Carvalho; Adolphus Gordon; Helen Raposo; Francis Yebba
	Employer:	Harvard University
	Self-insurer/Petitioner	Harvard University
	Respondent :	Workers' Compensation Trust Fund
	Board Nos.:	805744-85; 080211-90; 807089-76; 022896-90; 022746-10

Dear Director Hillman:

The reviewing board today is filing its decision in the above-captioned case. Pursuant to G. L. c. 152, § 5, we advise you that in the course of deciding the issue on appeal, we determined that there is an explicit contradiction between 452 Code Mass. Regs. § 3.03 and G. L. c. 152, § 34B, and that the proper application of that statute is made impossible by the enforcement of the cited regulation.

Accordingly, we have refused to appy 452 Code Mass. Regs. § 3.03 in this case.

Very truly yours,

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge