

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 005950-87
000205-14**

Gelsomina Malacaria	Employee
Polaroid Corporation, Inc.	Employer
Polaroid Corporation, Inc.	Self-Insurer
Commercial Union Ins. Co./One Beacon Ins. Co.	Reinsurer
Workers' Compensation Trust Fund	Trust Fund

REVIEWING BOARD DECISION

(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

William H. Murphy, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
Mark H. Likoff, Esq., for the reinsurer
Janice M. Toole, Esq., for the trust fund

HORAN, J. The Workers' Compensation Trust Fund (WCTF), Commercial Union Insurance Company/One Beacon Insurance Company (Reinsurer),¹ and the employee appeal from a hearing decision ordering the WCTF to pay her ongoing § 34A and cost of living (COLA) benefits,² plus attorney's fees and costs,³ and further ordering the reinsurer to reimburse the WCTF for the payment of her § 34A and COLA benefits. We reverse the decision, except for the award of attorney's fees, which we modify.

At the hearing, the parties stipulated the employee suffered a work-related injury on September 2, 1982, and that she was entitled to receive, and was paid, § 34A permanent and total incapacity benefits before and after Polaroid, the self-insurer,

¹ The decision refers to Commercial Union/One Beacon as the excess carrier. (Dec. 1.) We refer to Commercial Union/One Beacon as the reinsurer, as that term was chosen by the legislature to describe insurers providing the additional coverage contemplated by G. L. c. 152, § 25A(2)(c).

² See General Laws c. 152, § 34B.

³ See General Laws c. 152, § 13A.

went bankrupt. (Dec. 3-5.) Following Polaroid's bankruptcy, the bondholder paid the employee's benefits until March 4, 2013.⁴

The employee filed a claim against the reinsurer, seeking payment of § 34A and COLA benefits from March 4, 2013, to date and continuing. Following the conference, the reinsurer was ordered to pay the employee § 34A benefits only. Both parties appealed, and at the hearing, the WCTF was joined. (Dec. 1-2.)

In response to the employee's claims, the reinsurer denied any obligation to pay benefits to the employee directly. The WCTF denied liability as well, contending the self-insurer was not an uninsured employer.⁵

Without providing his rationale, the judge concluded the self-insurer was, "under these circumstances . . . rendered uninsured in violation of Chapter 152." (Dec. 6.) He ordered the WCTF to pay the employee § 34A and COLA benefits from March 4, 2013,

⁴ To qualify as a self-insurer under our workers' compensation act, an employer must obtain a license, pursuant to G. L. c. 152, § 25A(2), in one of two ways. The hearing decision reveals that Polaroid obtained its license by complying with § 25A(2)(b) and (c). Subsection (2)(b) required Polaroid to obtain "a bond running to the commonwealth, with some surety company authorized to transact business in the commonwealth as a surety . . . guaranteeing the payment of any liability on [the self-insurer's] part that may have arisen under this chapter." Subsection (2)(c) required Polaroid to obtain reinsurance, "[a]s a *further guarantee*" of Polaroid's "ability to pay the benefits provided for by this chapter to [its] injured employees. . . ." (Emphasis added.) Thus, the statutory scheme required the reinsurer to pay the benefits due injured workers once the bond funds became depleted. See *Janocha v. Malden Mill Industries, Inc.*, 30 Mass. Workers' Comp. Rep. ____ (June 21, 2016) (describing the "three tiers of protection for the employee" afforded by § 25A(2)); *Pastore v. Polaroid Corp., Inc.*, 30 Mass. Workers' Comp. Rep. ____ (August 1, 2016) (iterating reinsurer's obligation to pay injured workers directly upon depletion of the § 25A(2)(b) bond). But that did not happen here. Contrary to the statutory scheme, the reinsurer reimbursed "XL, the statutory entity paying benefits under [the] bond," until XL "ran out of funds and stopped paying the employee" on March 4, 2013. (Dec. 5.) The reinsurer then "stopped reimbursing XL since it had ceased making payment of benefits." (Dec. 5-6.) We emphasize once again the reinsurer's obligation under the Act is to provide a "further guarantee of a *self-insurer's* ability to pay" benefits to injured workers. § 25A(2)(c) (emphasis added); see *Janocha*, *supra*; *Pastore*, *supra*. The law does not contemplate reinsurers reimbursing the § 25A(2)(b) bondholder, as that reduces the proceeds potentially available to the injured worker in favor of the bondholder. Such payments, as made here, are contrary to the protections afforded by § 25A(2) to injured employees of defunct self-insurers.

⁵ General Laws c. 152, § 65(2)(e) obligates the WCTF to pay benefits to employees who are injured while working for employers "uninsured in violation of this chapter. . . ."

to date and continuing, and ordered the reinsurer to “reimburse the [WCTF] pursuant to its contract of re-insurance.” *Id.* The judge also ordered the WCTF to pay an attorney’s fee of \$3,500, plus expenses.

On appeal, the WCTF argues it has no obligation to pay the employee pursuant to the statute. The reinsurer argues its obligations are defined by contract, and that, *inter alia*, it cannot be held liable for the direct payment of compensation benefits to the employee. The employee challenges the statutory basis for the attorney’s fees and costs awarded.

The upshot of our decision in Janocha, *supra*, is this: under G. L. c. 152, there is no such thing as an uninsured self-insurer. Accordingly, pursuant to Janocha, G. L. c. 152, § 65(2)(e), and 452 Code of Mass. Regs. § 3.04(2),⁶ we reverse the decision ordering the WCTF to pay benefits to the employee directly. There are, however, self-insurers like Polaroid, who, subsequent to licensure, lose the capability to meet their financial obligations under the act. See Pastore, *supra*. To protect injured workers in this scenario, the legislature enacted G. L. c. 152, § 25A. Janocha, *supra*. In accordance with Janocha, we hold that the reinsurer is liable for the direct payment of § 34A and COLA benefits to the employee from March 4, 2013, to date and continuing.⁷ Because the employee’s date of injury is prior to October 1, 1986, the reinsurer may, as provided by G. L. c. 152, § 34B(c), seek reimbursement from the WCTF for COLA payments made to the employee.

⁶ This regulation provides that prior to filing a claim against the WCTF, the claimant “shall obtain from the Office of Insurance a written certification that, according to the Department’s records, the employer was not covered by a workers’ compensation insurance policy on the date of the alleged injury.”

⁷ We reject the reinsurer’s argument that the terms of its reinsurance contract should control. That the contract in question falls short of honoring the reinsurer’s statutory obligation is of no consequence. As the Supreme Judicial Court recently stated in Ins. Co. of the State of Pennsylvania v. Great Northern Ins. Co., 473 Mass. 745, 750 (2016), “[w]orkers’ compensation insurance is a creature of statute, and all workers’ compensation insurance policies must be interpreted to comply with applicable statutes and regulations governing workers’ compensation.”

Lastly, the employee argues the judge erred by ordering the WCTF to pay attorney's fees and costs. Rather, she argues the last sentence of § 13A(9)⁸ applies, making the fee the product of her agreement with counsel. We disagree. Because the reinsurer appealed the conference order, and the employee prevailed at the hearing, we consider the judge's award of a \$3,500 fee to constitute the proper exercise of his discretion pursuant to the first sentence of § 13A(9). As we perceive no abuse of that discretion, we affirm the amount of the fee award. Because the hearing decision improperly ordered the WCTF to pay fees and costs, we order the reinsurer to reimburse the WCTF the total amount of the fees and costs it paid pursuant to the hearing decision.

But for the attorney's fee award, the decision is reversed. Pursuant to G. L. c. 152, § 13A(6), the reinsurer shall pay an attorney's fee of \$1,618.19 to employee's counsel.

So ordered.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **August 26, 2016**

William A. Harpin
Administrative Law Judge

⁸ General Laws c. 152, § 13A(9), provides, in pertinent part:

In any hearing or review requested by an insurer aggrieved by an order or decision with respect to an injury occurring prior to November first, nineteen hundred and eighty-six . . . there shall be awarded an amount sufficient to compensate the employee for the reasonable costs of such hearing review or proceeding including reasonable counsel fees and expenses, provided that the employee prevails at such hearing review or proceeding. Such amounts shall be paid by the insurer. Any other attorneys' fees for services provided claimants for injuries prior to November first, nineteen hundred and eighty-six, shall be of an amount agreed upon between the employee and the attorney.