COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 004718-89 029283-13 012201-13**
John Pastore	Employee
Polaroid Corp., Inc.	Employer
Polaroid Corp., Inc.	Self-insurer (insolvent)
Workers' Compensation Trust Fund	Trust Fund[1]
Commercial Union/One Beacon	Excess Insurance Carrier

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Michael C. Akashian, Esq., for the employee at hearing and on appeal
Noah A. Winkeller, Esq., for the employee on appeal
David C. Michels, Esq., for the Workers' Compensation Trust Fund
Mark Likoff, Esq., for Commercial Union/One Beacon

KOZIOL, J. The Workers' Compensation Trust Fund (WCTF) and Commercial Union/One Beacon (One Beacon), cross-appeal from a decision ordering the WCTF to pay the employee § 34A benefits, § 34B cost of living adjustments (COLA), and requiring One Beacon to reimburse the WCTF pursuant to the terms of One Beacon's reinsurance contract with the now insolvent self-insurer, Polaroid. (Dec. 6.) We reverse the judge's award against the WCTF, affirm his determination that the employee is not bound by One Beacon's 1998 agreement with Polaroid, and order One Beacon to pay the employee § 34A and § 34B COLA benefits from the date Polaroid's statutory bond exhausted, March 5, 2013, and continuing.

[1] For purposes of this action, we designate the Workers' Compensation Trust Fund as "Trust Fund." The Workers' Compensation Trust Fund cannot be designated as an "insurer" because, "pursuant to General Laws c. 152, § 1(7), it is not so defined. See 452 Code Mass. Regs. § 3.04(1) ('The Fund shall not be deemed to be an insurer except as expressly provided by M.G.L. c. 152 and 452 CMR 3.00.') The nature and obligations of the Fund are set forth in General Laws c. 152, § 65(2, 4-10, 13.)" Coogan v. Gene Costa and Sons, 27 Mass. Workers' Comp. Rep. 191, 191 n.1 (2013).

The case was heard on a joint stipulation of facts, (Ex. 5), expressly incorporated by reference in the judge's decision. (Dec. 4.) The employee sustained an industrial injury on September 8, 1983,[2] while working for the employer, Polaroid Corporation, Inc. (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), including securing a bond with Greenwich Ins. Co., a subsidiary of XL Insurance, (XL bond). (Ex. 5.); G. L. c. 152, § 25A(2)(b). Polaroid also was "required to purchase an excess reinsurance contract to further insure their workers' compensation obligations as a self-insurer." (Ex. 5.); G. L. c. 152, § 25A(2)(c). Polaroid satisfied that obligation by purchasing "an excess reinsurance contract" with One Beacon's predecessor, Commercial Union, "in order to cover workers' compensation obligations incurred between January 1, 1983 and January 1, 1984." (Ex. 5.) One of those "workers' compensation obligations," was the payment of the employee's benefits.

Polaroid accepted the employee's claim and paid the employee weekly benefits as a result of his injury. (Dec. 5.) Subsequently, on December 27, 1991, Polaroid agreed to pay the employee § 34A, permanent and total incapacity benefits, from June 18, 1988 and continuing, at a rate of $ 297.85 per week.[3] (Dec. 5; Ex. 5, 12.)

The One Beacon excess reinsurance policy had a $250,000 self-insured retention level (One Beacon br. 2, 4; WCTF br. 2-3), which the employee's claim met "on or about June 30, 1996." (Ex. 5.) Thereafter, when Polaroid sought payment pursuant to that policy, One Beacon denied its request because Polaroid had voluntarily placed the employee on § 34A benefits. (Exs. 7, 11; One Beacon br. 2.) Ultimately, as a result of that dispute, Polaroid and One Beacon entered into a

[2] Although the judge's decision states the employee was injured on September 2, 1982, (Dec. 5), on June 24, 2015, the judge issued a "Notice of Scribner's Error" stating that the correct date of injury was September 8, 1983.

[3] The employee's average weekly wage is $689.08. (Dec. 6.) However, on the employee's date of injury, the maximum compensation rate, pursuant to § 34A, was $297.85, which serves as the base benefit for any COLA calculation. G. L. c. 152, § 34B(b).

settlement agreement on December 2, 1998, whereby Polaroid accepted payment of $155,000 to redeem One Beacon's obligations under the excess policy to reimburse it for current and future payments made to the employee. (Dec. 5.) Neither the employee nor the Department of Industrial Accidents had any knowledge of the 1998 settlement until 2013. (Ex. 5.)[4]

The proceeds of the settlement became the only funds One Beacon ever paid on the employee's claim, and One Beacon does not know whether Polaroid credited those funds to the employee's claim reserves. (Ex. 5.) Upon commencement of Polaroid's Chapter 11 bankruptcy action, Polaroid ceased paying the employee's benefits and, pursuant to G. L. c. 152, § 25A(2)(b), the statutory bond was activated. (Ex. 5.) At that point the XL bond assumed the responsibility for paying those benefits.[5] (Ex. 5; Dec. 5.) When the XL bond exhausted on March 4, 2013, the employee stopped receiving his workers' compensation benefits. (Ex. 5.)

The employee filed this claim, seeking, inter alia, weekly § 34A benefits from March 5, 2013 and continuing, § 34B COLA, §§ 13 and 30 medical benefits, § 50 interest and a § 8(5) penalty. (Dec. 2.) The claim was denied at conference and the WCTF was joined as a party for hearing. (Dec. 3.) In his decision, the judge made the following sparse findings:

> 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. The reinsurer asserts no obligation as it settled its obligation under the reinsurance policy and even if it had not that it is under no obligation to pay the employee benefits directly. Under these circumstances, I find that the result is that the employer

[4] The agreement left untouched One Beacon's responsibility to pay for other employees who were injured during the policy period of January 1, 1983 to January 1, 1984. (Exs. 5, 6.)

[5] Although neither the parties' stipulations, nor the hearing record state the date that the bankruptcy proceedings were commenced, (Ex. 5), "Polaroid Corporation and several related companies were put into bankruptcy by voluntary petitions filed on December 18, 2008." In re Polaroid Corp., 472 B.R. 22, 27 (D. Minn. 2012). The excess carrier asserts that the XL bond discharged its responsibilities to pay Polaroid's injured employees by hiring a third party claims administrator to "handle the claim and, inter alia, issue the appropriate payments." (One Beacon br. 4.)

> is rendered uninsured in violation of Chapter 152. I find that the Workers' Compensation Trust Fund is obligated to pay any benefits due the employee as a result of his accepted claim against Polaroid.
>
> I find that the Trust Fund is entitled to reimbursement by Employers Reinsurance Corporation [sic] under the statutorily required policy of re-insurance (Exhibit # 10). I find that any agreement between Polaroid and One Beacon Insurance Company does not bind the parties and is in violation of the Act which requires maintaining excess insurance coverage.

(Dec. 5-6.)

On appeal, the WCTF argues the judge erred in ordering it to pay the employee any benefits, and that One Beacon is obligated to pay the employee's § 34A and § 34B COLA benefits. (Dec. 5-6.) In response, One Beacon argues it cannot be held responsible for direct payment to the employee, because the reinsurance contract with Polaroid is a contract for indemnification only. Moreover, One Beacon argues the judge erred in finding its 1998 settlement agreement with Polaroid is in violation of Chapter 152 and does not bind the employee. (Dec. 6.) It argues, pursuant to that agreement, it has no responsibility to reimburse the WCTF for any payments made to the employee. One Beacon further argues it should not be ordered to pay any COLA, either directly to the employee or through indemnification.

1. The WCTF's Appeal.

The WCTF argues the date of the employee's accident controls in determining whether an employer is uninsured in violation of the Act, thereby triggering its responsibility to pay under G. L. c. 152, § 65(2)(e). The WCTF asserts that requiring it to pay the employee's benefits in this case requires it to perform an ultra vires act. We agree, and therefore vacate the judge's order requiring the WCTF to pay the employee directly for his § 34A and § 34B benefits from March 5, 2013, and continuing, 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").[6]

In addition, the WCTF was not created until 1985, thus, it did not exist on the employee's date of injury. St. 1985, c. 572, §55. After its creation, the legislature passed St. 1989, c. 565:

> Notwithstanding the provisions of section two A of chapter one hundred and fifty-two of the General Laws, section sixty-five of said chapter one hundred and fifty-two shall apply to an injury occurring on or after December tenth, nineteen hundred and eighty-five, except said section sixty-five shall apply to an injury for which compensation is payable under sections thirty-four B and thirty-five C of said chapter one hundred and fifty-two, regardless of the date of such injury.

We have stated the "enactment in 1989 of c. 565, . . . clarified the legislative intent to apply § 65(2)(e) prospectively." Rich v. Air Temp Engineering, 7 Mass. Workers' Comp. Rep. 351, 353 (1993)(examining claim that was filed, tried and decided below prior to enactment of St. 1989, c. 565).[7] As we held in Janocha, One Beacon, the

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[6] The plain language of § 65(2)(e) prohibits the judge's ruling. Pursuant to §65(2)(e), the WCTF is limited to making "payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter." G.L. c. 152, § 65(2)(e). "Employer" is defined in pertinent part, as "an individual, partnership, association, corporation or other legal entity, . . . including . . . the receiver or trustee of an individual, partnership, association, corporation or other legal entity, *employing* employees subject to his chapter. . . ." G. L. c. 152, § 1(5) (emphasis added.) Nothing in the record indicates Polaroid, its receiver or trustee, was "employing employees" on March 5, 2013, so as to qualify on that date as an "employer" under § 1(5). Indeed, Polaroid Corporation "and several related companies" were initially placed into bankruptcy "by voluntary petitions on December 18, 2008," but the Chapter 11 proceeding was converted to a Chapter 7 proceeding "on August 31, 2009, after the closing of a sale of most of the estates' assets under 11 U.S.C. § 363." In re Polaroid Corporation, 472 B.R. 22, 27 & n.1 (D. Minn. 2012); (Ex. 5.) On March 5, 2013, Polaroid simply was not an "employer . . . uninsured in violation of this chapter," so no award under § 65(2)(e) could stand.

[7] The dissenting member of the reviewing board agreed with the majority regarding the effect of St. 1989, c. 565:

> By this enactment, the Legislature clearly expressed its intention to have the provisions of St. 1985, c. 572, § 55, regarding claims against uninsured employers,

reinsurer, is responsible for directly paying the employee's weekly benefits. 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).

2. One Beacon's Agreement with Polaroid.

One Beacon argues the judge erred in finding the employee was not bound by its 1998 agreement with Polaroid, so as to find One Beacon liable for reimbursement of payments to the employee under its excess reinsurance policy with Polaroid. One Beacon asserts that its agreement with Polaroid redeemed its obligation to make any payments pertaining to the employee's claim. One Beacon argues that as a reinsurer, under its policy, it may freely compromise a claim with the reinsured without notice to, or approval by, the Department of Industrial Accidents or the employee, who it claims "is a stranger without privity to the contract [of reinsurance] and with no legal interest in it." (One Beacon br. 8.) One Beacon also argues no statutory provisions require it to notify the department or the employee about its agreement, or prohibit it from entering into such agreements.

One Beacon's argument has force if viewed solely as an ordinary reinsurance arrangement, voluntarily entered into between two insurance companies. However, here, the relationship is different. The statutory scheme set forth by Chapter 152 governs Polaroid and One Beacon's relationship, as well as the employee's claim for benefits, and is designed to protect injured workers. Under the Act, such a transaction is also prohibited without notice and approval of the department.

Employers who are self-insured for workers' compensation purposes are not in the business of insurance and are not subject to the rules that govern typical insurance companies. Rather, the employer's "self-insured" status is created solely by

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> apply only to injuries occurring after its effective date of December 10, 1985. The user of the words 'notwithstanding the provisions of section two A' indicates an unequivocal override of the ordinary result under M.G.L. c. 152, § 2A. . . .

Id. (Smith, ALJ dissenting), 367.

compliance with § 25A of Chapter 152, and the self-insurer is regulated by the department, not the Commissioner of Insurance. G. L. c. 152, § 12A(3); 452 Code of Mass. Regs. § 5.00 et. seq.; C.f. 211 Code of Mass. Regs. §§ 67.00 et. seq. (Division of Insurance Regulations for Workers' Compensation Self-Insurance Groups). Against this regulatory backdrop, § 25A(2)(c) not only protects injured workers by requiring reinsurance to be in place, but also requires the department's involvement throughout the tenure of the reinsurance relationship:

> *As a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees, every self-insurer shall make arrangements satisfactory to the department*, by reinsurance, to protect it from extraordinary losses or losses caused by one disaster. . . [s]uch reinsurance shall provide that the use or disposition of any money received by a self-insurer or former self-insurer under *any such reinsurance shall be subject to the approval of the department*, and no such money shall be assignable or subject to attachment or be liable in any way for the debt of the self-insurer unless incurred under this chapter.

G. L. c. 152, § 25(2)(c)(emphasis added). The statute clearly contemplates the department's involvement at the commencement of the relationship because the department alone determines whether the "arrangements . . . by reinsurance" are satisfactory to protect the self-insurer and their injured workers. Id. Where the parties attempt to terminate or modify such an arrangement, even with regard to one individual claim, without the department's approval, they make a substantive change to the agreement that bypasses the statutory scheme, depriving the department from determining whether the altered "arrangements" are "satisfactory." Indeed, One Beacon argues its agreement with Polaroid means there is no reinsurance in this case, a scenario plainly prohibited by the statute. Janocha, supra. As found by the judge, the agreement violates "the Act which requires maintaining excess insurance coverage." (Dec. 6.)

The statute further requires the department to have notice of the self-insurer's plans to dispose of money it receives from a reinsurer, because "the use or disposition of any money received by the self-insurer or former self-insurer . . . shall be subject to the approval of the department." G. L. c. 152, § 25(2)(c); See generally G. L. c. 152,

§ 15 (requiring approval of third-party settlement). Here, the department was not notified of the "agreement" until fifteen years later, when Polaroid itself, and the $ 155,000 it received, ceased to exist. As One Beacon admits, it has no idea what Polaroid did with the money. (Ex. 5.) As a practical matter, it only makes sense that the department be involved in the resolution of disputes between the self-insurer and the reinsurer, because the integrity of the statutory scheme depends on having funding mechanisms in place to ensure the payment of injured workers' benefits.

However, the most fundamental problem with the agreement is its practical effect – it operates as a lump sum settlement of the employee's claim, without his consent and without consideration. Again, the employee had no knowledge of the "agreement" until 2013. Even under the former version of § 48 applying to claims, such as the employee's, with dates of injury prior to November 1, 1986, such an agreement must be agreed to by the employee and approved by the board as being "deemed to be for the best interests of the employee or his dependents." G. L. c. 152, § 48, as amended by St. 1977, c. 776, § 1. The employee cannot be prejudiced by an agreement to which he was not a party, and which was never deemed to be in his best interests. The judge did not err in finding the agreement was in violation of the Act.[8] See Opare's Case, 77 Mass. App. Ct. 539 (2010)(agreement can't be approved over employee's objection).

[8] One Beacon argues that it is the entity that is prejudiced by the judge's decision because it paid $155,000 and questions "what did the Excess Carrier receive . . . if not an end to their involvement in any part of this claim." (One Beacon br. 9.) We only observe that using its own calculations, the payment represents approximately ten years of payment of the employee's base benefits, "thirteen if the present value impact were accounted for." (Id. at 8.) Polaroid sought its reimbursement for benefits paid to the employee after his claim payout reached the contract's retention level in 1996. Polaroid paid the employee until its bankruptcy proceedings were filed in 2008, thus paying the employee 12 years of benefits without being reimbursed by the reinsurer. Moreover, One Beacon's calculations are based solely on the employee's base benefit rate, not the employee's benefit rate as adjusted upwardly by COLA under § 34B, which we discuss infra.

3. COLA payments under § 34B.

Lastly, One Beacon argues it cannot be held responsible for paying COLA because § 34B did not exist at the time it issued its policy to Polaroid; therefore, the premium Polaroid paid for reinsurance did not contemplate such an expense. We disagree.

In 1985, two years after the employee's injury, the legislature enacted § 34B providing COLA payments for employees receiving § 34A benefits. G.L. c. 152, § 34B, added by St. 1985, c. 572, § 43A. By St. 1986, c. 662, § 53, § 34B was made applicable to all such claims, regardless of the date of injury. COLA benefits are due "without application," and have but two statutory exceptions: 1) they are not payable when there is less than 24 months between the date of injury and the date of review; and, 2) they are not payable when their receipt will adversely impact the amount of social security payments the employee is receiving. G. L. c. 152, 34B. Otherwise, COLA must be paid when due and cannot be separated from, or taken out of, the payment of weekly benefits. As such One Beacon, the direct payer of benefits under Janocha, supra, must pay the COLA as well.

The legislature recognized the plight of insurers that had not contemplated the payment of COLA when writing policies in effect before its date of enactment. By St. 1989, c. 565, the legislature made § 65(2)(a)'s reimbursement provisions for §§ 34B benefits effective "regardless of the date of such injury."[9] Thus, the unanticipated losses created by the 1985 Reform Act's enactment of this particular benefit enhancing provision, are eligible for reimbursement from the WCTF. Indeed, One Beacon acknowledges that if it pays the employee such benefits, it may seek

[9] Section 35C, which covers latent injuries, was also added by the legislature in the 1985 Reform Act. G. L. c. 152, § 35C, added by St. 1985, c. 572, § 45. Section 35C provided, for the first time, that where a difference of five or more years exists between the date of injury and the date of the employee's eligibility for benefits, the insurer must pay the employee's benefits based on the employee's date of eligibility for benefits, rather than his or her date of injury, thus avoiding the payment of compensation based on obsolete wages. By St. 1985, c. 572, § 66, the legislature made § 35C effective even where the date of injury was prior to the effective date of its enactment. By St. 1989, c. 565, the legislature also made § 65(2)(b)'s reimbursement provisions for § 35C effective, "regardless of the date of such injury."

reimbursement from the WCTF. (One Beacon br. 16-17.) This is indeed the mechanism contemplated by §§ 34B and 65(2)(a). Because One Beacon must pay the employee's weekly benefits, it must also pay his COLA.

Accordingly, we vacate the award against the WCTF, affirm the judge's determination that the employee is not bound by One Beacon's 1998 agreement with Polaroid, and order One Beacon to pay the employee directly §§ 34A and 34B benefits from the date Polaroid's statutory bond exhausted, March 5, 2013, and continuing. One Beacon 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 $1,618.19.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: ***August 1, 2016***