

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 043060-06  
009521-06**

Jose Chico  
Merrimac Employment Services  
Workers' Compensation Trust Fund  
Liberty Mutual Insurance Company

Employee  
Employer  
Insurer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Bean.

**APPEARANCES**

Teresa Brooks Benoit, Esq., for the employee at hearing and oral argument  
James N. Ellis, Esq., for the employee on appeal  
Pedro Benitez-Perales, Esq., for the Workers' Compensation Trust Fund  
at hearing and on appeal  
William C. Tattan, Esq., for the Workers' Compensation Trust Fund  
at oral argument  
Jean M. Shea Budrow, Esq., for the insurer

**HORAN, J.** The employee appeals from a decision denying and dismissing his claim against the Trust Fund. We affirm.

The employee, a resident of Lawrence, Massachusetts, was hired by a recruiter in Massachusetts to work for the employer, a company doing business only in New Hampshire.<sup>1</sup> On March 2, 2006, the employee was injured when a forklift ran over his foot at work in New Hampshire. In accordance with New Hampshire law, Liberty Mutual Insurance Company (insurer) paid the employee workers' compensation benefits for several months. (Dec. 729-730.) A December 28, 2006 letter from the Workers' Compensation Division of the New Hampshire Department of Labor granted the insurer's request to terminate benefits as of that date. (Ex. 5.)

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<sup>1</sup> The employee testified that Merrimac Employment Services was an agency which placed him with different companies. (September 22, 2008 Tr. 28, 35.)

Subsequent to the termination of his benefits in New Hampshire, the employee filed claims in Massachusetts against the insurer and the Workers' Compensation Trust Fund (Trust Fund).<sup>2</sup> (Dec. 731; Employee br. 1.) Both claims were denied at conference, and the employee appealed. (Dec. 729.) Subsequent to the hearing, the employee settled his case with the insurer in New Hampshire. (Employee br. 11.)

In his decision, the judge found the insurer was not liable to pay benefits in Massachusetts because New Hampshire assigned risk policies do not cover out-of-state-claims.<sup>3</sup> (Dec. 731.) The judge also found the Trust Fund was not liable to pay compensation due to the applicability of G. L. c. 152, § 65(2)(e), which 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: . . . (e) 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; *provided, however, that (i) the claimant is not entitled to workers' compensation benefits in any other jurisdiction. . . .*<sup>[4]</sup>

Id. (Emphasis added.) The judge concluded:

The legislative intent of this provision could not be more clear. The Commonwealth of Massachusetts will not pay workers' compensation claims with money from state coffers that can lawfully be paid by some other entity. As the accident occurred in New Hampshire to a company insured in New

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<sup>2</sup> The parties do not dispute the employer was uninsured in Massachusetts at the time of the employee's injury.

<sup>3</sup> The employer's workers' compensation policy was a New Hampshire assigned risk policy. (November 7, 2008 Tr. 5-6.) We note the employee's appeal does not challenge the judge's findings respecting the insurer.

<sup>4</sup> We note that subpart (i) of the statute does not say, for example, that the "claimant is *no longer entitled* to workers' compensation benefits in any other jurisdiction." We believe the language chosen by the legislature makes it clear that it did not want the insured employers of the Commonwealth, who contribute to the trust fund, to underwrite, in whole or in part, losses covered by out of state insurers, or their trust funds. See Letteney's Case, 429 Mass. 280 (1999).

Hampshire and the New Hampshire insurer accepted the case and made payments to the employee, the provisions of section 65(2)(e)(i) certainly apply, and the Massachusetts Workers' Compensation Trust Fund cannot legally be made to pay this claim.

(Dec. 731-732.)

On appeal, the employee maintains the judge erred by dismissing his claim against the Trust Fund. The employee argues: 1) Massachusetts has jurisdiction over his claim because the contract of hire was made in Massachusetts; 2) receipt of workers' compensation benefits in New Hampshire does not bar his claim against the Trust Fund in Massachusetts; 3) G. L. c. 152, § 65(2)(e)(i) does not apply because he settled his case in New Hampshire, and is thereby precluded from entitlement to additional benefits there, and; 4) public policy considerations support his right to receive benefits from the Trust Fund.

The employee is correct that because he was hired in Massachusetts, the provisions of G. L. c. 152 apply to his claim. See, e.g., Lavoie's Case, 334 Mass. 403, 406 (1956); Conant's Case, 33 Mass. App. Ct. 695 (1992); Hillman v. Consolidated Freightways, Inc., 15 Mass. Workers' Comp. Rep. 67, 72 (2001). However, jurisdiction, ipso facto, is insufficient to establish the employee's entitlement to compensation from the Trust Fund.

It is undisputed that receipt of compensation in another state does not necessarily bar a supplemental award of compensation in Massachusetts. Hillman, supra at 69-70; Nason, Koziol and Wall, Workers' Compensation, § 5.8 (3<sup>rd</sup> ed. 2003), and cases cited. However, since the 1991 enactment of § 65(2)(e)(i), this is true only when the employer is *insured*<sup>5</sup> in Massachusetts. See footnote 3, supra. General Laws c. 152, § 65(2)(e)(i), obligates the Trust Fund to pay compensation to the employees of uninsured employers *only* if "the claimant is not entitled to workers' compensation benefits in any other jurisdiction." It is a well-established rule of

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<sup>5</sup> Contrary to the employee's contention, the Trust Fund is not an insurer unless specifically designated as such. See 452 Code Mass. Regs. § 3.04 ("The Trust Fund shall not be deemed to be an insurer except as expressly provided by M.G.L. c. 152, and 452 CMR 3.00").

statutory construction that when the language of a statute is plain and unambiguous, and its application would not otherwise contravene the legislature's clear intent, a court must follow it. See e.g., Morales's Case, 69 Mass. App. Ct. 424, 426-427 (2007). The employee would have us ignore the plain meaning of § 65(2)(e)(i), and require the Trust Fund to pay benefits when an employee, due to an out of state termination of benefits or settlement, is *no longer* entitled to *additional* benefits there. We reject this interpretation because it is contrary to the statute's plain meaning.

Furthermore, the employee's public policy argument ignores the obvious legislative intent behind the enactment of § 65(2)(e)(i). He posits that because the compensation act is a humanitarian measure, interpreting § 65(2)(e)(i) to bar his claim in Massachusetts punishes the employee, rather than the uninsured employer, for the failure to obtain workers' compensation insurance. However, "[n]either the 'beneficent design' of workers' compensation generally nor the ameliorative nature of one of its provisions may trump the plain meaning and purpose of the statute." McDonough's Case, 440 Mass. 603, 608 (2003). The court in CNA Ins. Cos. v. Sliski, 433 Mass. 491 (2001), examined the purpose of the 1991 amendments to § 65. The court explained that, in response to "unanticipated and increasing costs incurred by the Trust Fund," the legislature "narrowed the Trust Fund's obligations to pay benefits to employees of uninsured employers and vested the fund with several tools aimed at . . . controlling its expenditures." *Id.* at 499 n.8, quoting L. Locke, Workmen's Compensation § 3.3, at 41 (Koziol Supp. 2000). In Sliski, *supra*, the court dealt specifically with § 65(2)(e)(ii), which prohibits payment of § 28 benefits by the Trust Fund. The provision at issue in this case, § 65(2)(e)(i), was enacted simultaneously with § 65(2)(e)(ii),<sup>6</sup> and was thus another "part of this cost cutting legislative package." Sliski, *supra* at 498 n.8.

The insurer's acceptance of the claim, and its payment of benefits to the employee under New Hampshire law, established his entitlement to compensation

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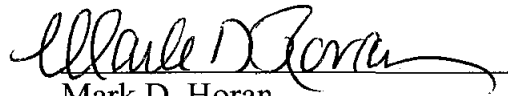
<sup>6</sup> See St. 1991, c. 398, § 85.

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outside of Massachusetts and invalidated his right to receive benefits from the Trust Fund. Accordingly, we affirm the decision.

So ordered.



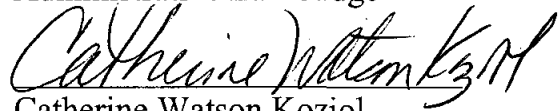
Mark D. Horan

Administrative Law Judge



Patricia A. Costigan

Administrative Law Judge



Catherine Watson Koziol

Administrative Law Judge

Filed:

