

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NOS. 055055-95
012001-14

Nicklaus J. Ward	Employee
Polaroid Corp., Inc.	Employer
Polaroid Corp., Inc.	Self-insurer (insolvent)
Workers' Compensation Trust Fund	Trust Fund
Travelers Casualty & Surety Co.	Reinsurer

REVIEWING BOARD DECISION (Judges Koziol, Fabricant and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

Bernard J. Mulholland, Esq., for the employee
David C. Michels, Esq., for the trust fund
Thomas Weilgus, Esq. for the reinsurer at hearing
John J. Canniff, Esq., for the reinsurer on appeal

KOZIOL, J. This is the Workers' Compensation Trust Fund's (WCTF) appeal from another decision ordering it to pay an ongoing workers' compensation obligation of the now insolvent self-insured, Polaroid Corp. Inc.; specifically, payment of the employee's §§ 13 and 30 medical benefits. See Malacaria v. Polaroid Corp., Inc., 30 Mass. Workers' Comp. Rep. ____ (August 26, 2016); Pastore v. Polaroid Corp., Inc., 30 Mass. Workers' Comp. Rep. ____ (August 1, 2016). However, here the judge ordered the "Special Polaroid Fund" to reimburse the WCTF "pursuant to the terms of said fund." (Dec. 6.) The WCTF argues the judge erred by ordering it to pay the employee's benefits and by ordering the "Special Polaroid Fund" to reimburse the WCTF. We agree.

On July 1, 1995, the date of the employee's work-related injury, Polaroid was a licensed self-insurer, having satisfied the provisions of § 25A(2)(b) by securing a bond with Greenwich Ins. Co., and § 25A(2)(c), by securing an excess reinsurance

contract with the reinsurer, “Travelers Surety & Insurance Company,”¹ “covering workers’ compensation obligations incurred between January 1, 1995 and January 1, 1996.” (Exs. 5, 6.) The reinsurer’s policy “had a self-retention level of five hundred thousand dollars (\$500,000.00) per claim.” (Exs. 5, 7.)

Polaroid paid the employee \$ 35 partial incapacity benefits as a result of his injury. Ultimately, the employee and Polaroid entered into a lump sum settlement agreement, approved January 16, 2001, on a “with liability” basis. (Exs. 5, 6.) As a result, Polaroid remained responsible for the ongoing payment of the employee’s medical treatment for his work-related diagnoses of major depression and anxiety disorder. G. L. c. 152, § 48(2).

Upon commencement of Polaroid’s Chapter 11 bankruptcy action,² Polaroid ceased paying the employee’s benefits. As a result, pursuant to G. L. c. 152, § 25A(2)(b), the statutory bond was activated. (Ex. 5.) At that point the bond holder, Greenwich Insurance Co., assumed responsibility for paying those benefits, and hired a third party administrator, Cannon Cochran Management Services, Inc. (CCMSI) to administer the employee’s and other injured Polaroid workers’ claims. (Exs. 5, 9, 11, 12, 13.)

In the autumn of 2012, Polaroid’s bankruptcy action was near completion and the Chapter 7 Trustee contacted the Department of Industrial Accidents regarding those Polaroid claims that remained open, but had not reached the retention level of

¹ The policy was issued by Aetna Casualty and Surety Company “which has since been purchased by Travelers Surety & Insurance Company.” (Ex. 5.) We identify the reinsurer as Travelers Casualty & Surety Company, because all the department filings have used that name without objection. Rizzo v. M.B.T.A., 16 Mass. Workers’ Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

² Neither the stipulations of fact nor the judge’s decision, state the date Polaroid filed its petition for Chapter 11 bankruptcy or when that action was converted to a Chapter 7 proceeding. “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.’ ” Pastore, supra. n. 6, quoting from In re Polaroid Corp., 472 B.R. 22, 27 & n. 1 (D. Minn. 2012).

the reinsurer contracts. (Ex. 5.) “Through a series of calls for collateral from the bond holder to Polaroid, the bonding company held collateral in excess of the six million dollar (\$6,000,000.00) amount of the bond.” (Ex. 5.) The bankruptcy trustee filed a “Motion for Turnover of Assets” which was heard by the United States Bankruptcy Court of the District of Minnesota on October 9, 2012. (Ex. 11.) The bankruptcy trustee “proposed that a certain sum, reasonably calculated to get these five claims to the retention level, be turned over to the Commonwealth of Massachusetts for purposes of paying workers’ compensation benefits to these specifically named individuals until they had reached the retention level.” (Ex. 5.) In addition, “the Commonwealth of Massachusetts agreed to take possession of approximately five hundred four thousand (\$504,000.00), now named the Special Polaroid Fund, for the express purpose of maintaining the claims of these five specifically named individuals.” (Ex. 5.)

On October 10, 2012, the Bankruptcy Court issued an order stating, in relevant part:

1. Greenwich Insurance Company (‘Greenwich’) shall provide to the Chapter 7 Trustee and to the Commonwealth of Massachusetts a final accounting regarding the exhaustion of the bond and the payment of expenses by October 19, 2012.
2. On completion of the final accounting . . . the Commonwealth of Massachusetts shall have until November 9, 2012, to notify the Trustee and Greenwich either that (1) it agrees that the bond has been exhausted or, (2) if not fully exhausted, that it agrees with the accounting as to amounts remaining in order to exhaust the bond, or (3) if not fully exhausted, that it does not agree with the accounting as to the amounts remaining in order to exhaust the bond and, instead, believes that a different amount remains to exhaust the bond. [Then] Greenwich . . . shall, . . . immediately turn over to the Chapter 7 Trustee all of the estate’s property currently in its possession, custody or control in excess of the amounts indicated above pursuant to the Commonwealth’s determination and notification and, thereupon, as to the Commonwealth, the bond shall be deemed to be discharged when the \$6 million has been fully satisfied.

3. On receipt of the funds from Greenwich . . . , the Chapter 7 Trustee shall provide \$504,654 of the funds to the Commonwealth of Massachusetts for its voluntary assumption of the administration of workers' compensation claims as described below.
4. The Commonwealth of Massachusetts shall not seek any further recovery of amounts under the bond beyond the amount set forth in paragraph 3 above, or make other claims in this case in connection with such bond.
5. The funds transferred to the Commonwealth of Massachusetts shall be used to continue payments on five Massachusetts workers' compensation claims, identified as Massachusetts Department of Industrial Accidents Claim Nos. The Commonwealth may, in its discretion, reach lump sum settlements with the above claimants in lieu of continuing prior payments. . . .
6. The Commonwealth of Massachusetts shall bear no additional liabilities or obligations other than the payment of funds in accordance with this Order and any costs of administration, and does not assume any other liabilities or obligations that Polaroid may owe to Massachusetts workers' compensation claimants, Greenwich . . . and its agents, and/or other creditors of the bankruptcy estate. Nothing in this Order waives or extinguishes any rights of Massachusetts workers' compensation claimants, nor does it prevent the Commonwealth from notifying claimants of this Order and/or related proceedings.
7. If, after full payment of the five workers' compensation claimants referenced in paragraph 5 above, a balance remains in the funds transferred to the Commonwealth of Massachusetts (including any interest earned on such funds), such remaining balance shall revert to the Commonwealth.

(Ex. 8.) The employee's claim was not one of the five claims identified by the Bankruptcy Court.³ (Ex. 8.)

³ The WCTF and the employee both argue that only five individuals were found to have open claims, and the employee's claim was not one of them, because CCMSI failed in its duty to provide an accurate accounting of the open claims and erroneously marked the employee's file "closed." (Ex. 11; WCTF br. 6-7; Employee's br. 9.) The employee also blames the Department of Industrial Accidents, in part, for its failure to promptly recognize that CCMSI failed to account for the employee's open claim, as well as for its failure, under G. L. c. 152, § 25A, to require Polaroid to post a sufficient bond in order to maintain its self-insured status. (Employee br. 9-10, 12.) At hearing, the judge expressly denied the reinsurer's motion to join the Department of Industrial Accidents as a party to the hearing (Tr. 5-8), and he made no findings of fact about these allegations. The allegations, and any legal consequences they

Meanwhile, the employee's medical benefits were paid by the bond holder "until on or about October 24, 2012," when the payments stopped. (Dec. 5; Ex. 5.) The employee then filed the present claim against the excess carrier, seeking payment under §§ 13 and 30 for his psychiatric therapy bills from October 24, 2012 and continuing. (Dec. 2, 3, 4, 6.) The claim was denied at conference and the WCTF was joined as a party for hearing. (Dec. 2.) At the time of the hearing, "approximately ninety eight thousand dollars (98,000.00) ha[d] been paid to the employee on the instant claim, and therefore the retention level ha[d] not yet been met." (Ex. 5; Dec. 5.) Indeed, if the employee is correct that his yearly work-related medical expenses have consistently averaged less than \$ 5,000.00, it is unlikely benefit payments made on his behalf will reach the self-insured retention level in the foreseeable future. (Employee br. 13.)

Against this backdrop, the judge made the following findings:

Subsequent to [Polaroid's] insolvency XL Insurance⁴ paid 13 and 30 benefits pursuant to its bond until on or about October 24, 2012. Re-insurance was secured thru [sic] Travelers Casualty and Surety Co. as required by the Act. The excess reinsurance policy had a self-insured retention level of five hundred thousand dollars per claim which has not been met. The self-insurer's bond with XL was exhausted on or about March 4, 2013. The Commonwealth of Massachusetts is in possession of a certain fund from the bankruptcy estate to cover certain claims including this employee's benefits. It has not paid the claimed bills.

3. PAYMENTS TO THE EMPLOYEE:

There is no disagreement that the employee is due benefits pursuant to Section 13 and 30. The problem is that XL, the statutory entity paying benefits under a bond, ran out of funds and stopped paying the employee. The reinsurer's retention level has not been met and the Special Polaroid Fund has not paid the bills. Under these circumstances, I find that the result is that the Self-insurer is

may have if proven, concern matters beyond the jurisdiction of the adjudicatory arm of the Department of Industrial Accidents.

⁴ Although the parties' stipulations refer to the bond holder as Greenwich Insurance Company, in Pastore, the parties stated that Greenwich Insurance Company is a subsidiary of XL Insurance. Pastore, supra.

rendered uninsured in violation of Chapter 152. I find that the Workers' Compensation Trust Fund is obligated to pay any benefits due to the employee as a result of her [sic] accepted claim against Polaroid.

I find that the Trust Fund is entitled to reimbursement by the Special Polaroid Fund to the degree that funds are available for that purpose.

(Dec. 5.)

The judge ordered the WCTF to pay the employee's medical benefits under "Sections 13 and 30 specifically for psychiatric therapy bills of Janice Hannah, PhD. From October 24, 2012 to date and ongoing." (Dec. 6.) He further ordered "[t]hat the Special Polaroid Fund reimburse the Trust Fund pursuant to the terms of said fund." (Dec. 6.)

On appeal, the WCTF argues the judge erred in ordering it to pay the employee any benefits, and that the excess carrier is obligated to pay the employee's §§ 13 and 30 medical benefits. The WCTF further argues the judge erred in ordering reimbursement from the Special Polaroid Fund. We agree. Pursuant to, and for the reasons stated in our decisions in Malacaria, Pastore and Janocha v. Malden Mill Industries, Inc., 30 Mass. Workers' Comp. Rep. ____ (June 21, 2016)(reinsurer may be required to drop down to provide coverage for claim that has not reached self-insured retention level), we vacate the order requiring the WCTF to pay the employee's medical benefits from October 24, 2012 and continuing, and order the reinsurer to pay those benefits.

For the following reasons, we also vacate the judge's finding that the Special Polaroid Fund is obligated to reimburse the WCTF, or any other entity, for payments made on the employee's claim. "The Comptroller of the Commonwealth of Massachusetts is in possession of and makes payments from the Special Polaroid Fund." (Ex. 5.) However, neither the Special Polaroid Fund, the Commonwealth of Massachusetts, nor, the Comptroller of the Commonwealth, were parties to this action. See Holden v. Town of Wilmington, 25 Mass. Workers' Comp. Rep. 165 (2011)(judge's order against entity that was not present and joined as a party to the

proceeding denied party due process of law). In addition, the judge's finding of fact that, "[t]he Commonwealth of Massachusetts is in possession of a certain fund from the bankruptcy estate to cover certain claims *including* this employee's benefits," (Dec. 5 [emphasis supplied]), lacks any basis in the evidence. The Bankruptcy Court's order shows that the employee's claim was not one of the five claims under consideration when the Special Polaroid Fund was created, and the employee was not identified by the Bankruptcy Court as being one of the five claimants entitled to receive payment from that fund. (Exs. 5, 6.) The judge lacked jurisdiction to modify an order of the Bankruptcy Court.

Accordingly, we vacate the orders compelling the WCTF to pay the employee's benefits, and ordering reimbursement from the Special Polaroid Fund, and we order the reinsurer to pay the employee's §§ 13 and 30 benefits from October 24, 2012, and continuing. The reinsurer shall 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.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: **September 6, 2016**