COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOs. 020363-05 006209-13 006188-13 028932-13**

Robert Janocha	Employee
Malden Mill Industries, Inc.	Employer
Malden Mill Industries, Inc.	Self-Insurer (insolvent)
Safeco Insurance Company[1]	Bond holder
ACE American Insurance Company	Excess Insurance Carrier
Worker's Compensation Trust Fund	Statutory Uninsured Payor

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant, and Koziol)[2]

The case was heard by Administrative Judge Bean.

APPEARANCES
Robert H. Barry, Esq., for the employee
Paula-Lee Chambers, Esq., for Safeco Insurance Company
Vincent M. Tentindo, Esq., for Ace American Ins. Co., at hearing
John J. Canniff III, Esq., for Ace American Ins. Co., at hearing and on appeal
William C. Tattan, Esq., for the Workers' Compensation Trust Fund, at hearing
Judith A. Atkinson, Esq., for the Workers' Compensation Trust Fund, at hearing and on appeal

HARPIN, J. The Workers' Compensation Trust Fund (WCTF) and Safeco Insurance Company (Safeco) cross-appeal from a decision awarding § 34A benefits to the employee. The judge ordered the WCTF to pay weekly benefits to the employee from the date that the Safeco bond was exhausted, until $400,000.00 was paid in medical and indemnity benefits, at which time Ace American Insurance Company (ACE), as the excess carrier, would take over payments. The

[1] Safeco was subsequently acquired by Liberty Mutual Insurance Company. For purposes of clarity we will refer to the bondholder as Safeco.

[2] Judge Levine was on the original panel. However, due to his retirement Judge Koziol has been substituted in his place.

judge also ordered that Safeco return to the bond such funds as it received from a third party settlement, and reimburse the WCTF for moneys it had paid out as a result of a conference order, and pay the weekly benefits until such time as the bond became exhausted. We reverse so much of the decision that orders the WCTF to pay any benefits, and order that ACE pay benefits to and on behalf of the employee from the date of the exhaustion of the bond.

FACTS

The parties stipulated to the following facts:

The employee worked for the employer until he was injured on January 21, 2005, at which time the employer was self-insured. (Dec. 421.) The employee received § 34 benefits and continued to do so until their exhaustion, after which, as a result of a decision of Judge Bean on March 4, 2010, he began receiving § 34A benefits. (Dec. 422, 424.) He has continued receiving those benefits to the present day, and his entitlement to permanent and total incapacity compensation is not disputed by any of the parties to this action. (Dec. 422, 425.)

On the date of injury the self-insurer, as required by G. L. c. 152, § 25A(2)(c),[3] had reinsurance in effect that it purchased from ACE, with a

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[3] G. L. c. 152, § 25A states, in relevant part:

> In order to promote the health, safety and welfare of employees, every employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner:
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> (1) By insurance with an insurer or by membership in a workers' compensation self-insurance group, established pursuant to the provisions of sections twenty-five E to twenty-five U, inclusive, or
>
> (2) Subject to the rules of the department, by obtaining from the department annually a license as a self-insurer by conforming to the provisions of one of the two following subparagraphs and also to the provisions of subparagraph (c) if required. . . .
>
> (b) By furnishing annually a bond running to the commonwealth, with some surety company authorized to transact business in the commonwealth as surety, in

> such form as may be approved by the department and in such amount not less than twenty thousand dollars as may be required by the department, said bond, however, to be upon the condition that if the license of the principal shall be revoked or if the principal shall cease to transact business in the commonwealth or if the department shall refuse to renew the license or if the principal shall insure with an insurer, the principal shall upon demand deposit with the state treasurer an amount of securities equal to the penal sum of the bond or a single premium non-cancellable policy issued by some insurance company authorized to transact the business of workers' compensation insurance in this commonwealth, insuring him against any liability that may have arisen under this chapter or a bond executed as surety by some company authorized to transact the business aforesaid in this commonwealth, in an amount and form approved by the department, guaranteeing the payment of any liability on his part that may have arisen under this chapter. The department shall, at least semiannually, determine the liabilities of a self-insurer both incurred or to be incurred because of personal injuries to employees under this chapter. The department may at any time require an additional bond, similarly conditioned, or further security or permit a decrease in the amount of said bond provided the amount of the bond or the bonds in no case shall be less than twenty thousand dollars. The liability of the surety shall not exceed in the aggregate the penal sum or sums stated in any such annual bond or bonds or in any endorsements giving effect to any such increase or reduction. The department may permit a substitution of a new bond or bonds for the bond or bonds which have been furnished and shall return the old bond or bonds to the self-insurer as soon as a new annual bond has been obtained.
>
> (c) 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.
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> Such reinsurance shall be in such amounts and form as the department may approve and shall be effected with a company as provided in section twenty of chapter one hundred and seventy-five, provided, the minimum amount shall be not less than five hundred thousand dollars. Such 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. . . .
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> (3) The department may make rules governing self-insurers, and may revoke or refuse to renew the license of a self-insurer because of the failure of such self-insurer promptly to make payments of compensation provided for by this chapter, or for any other reasonable cause. Any person aggrieved by the action of the department in refusing to grant a license or in revoking, or refusing to renew, a

license of a self-insurer under this section or by the action of the department in requiring an additional deposit or further security under subparagraph (a) of this section, or in requiring a further bond or security for an additional sum under subparagraph (b) of this section may demand a hearing before the department, and if, after said hearing, the department denies his petition, he may within ten days after receipt of a notice stating reasons for such denial, file a petition in the superior court for Suffolk county for a review thereof; but the filing of such a petition shall not suspend the action of the department unless a stay thereof shall be allowed by the justice pending a final determination by the court. The court shall summarily hear the petition and may make any appropriate order or decree.

(4)(a) The commissioner of insurance shall require each insurer issuing a policy under this chapter to offer, as a part of the policy or as an optional endorsement to the policy, deductibles, including reasonable small deductibles optional to the policyholder for benefits payable under this chapter. Deductible amounts offered shall be fully disclosed to the prospective policyholders in writing in amounts determined by the commissioner. The policyholder exercising the deductible option shall choose only one deductible amount.

(b) If the policyholder exercises the option and chooses a deductible, the insured employer shall be liable for the amount of the deductible for benefits paid for each compensable claim of work injury suffered by an employee or, at the option of the policyholder, an aggregate deductible as determined by the commissioner. The insurer shall pay all or part of the deductible amount, whichever is applicable, to a compensable claim, to the person or medical provider entitled to the benefits conferred by this chapter and then seek reimbursement from the insured employer for the applicable deductible amount. The payment or nonpayment of deductible amounts by the insured employer to the insurer shall be treated under the policy insuring the liability for workers' compensation in the same manner as payment or nonpayment of premiums.

(c) Optional deductibles shall be offered in each policy insuring liability for workers' compensation that is issued, delivered, issued for delivery, or renewed under this chapter on or after a date to be determined by the commissioner, unless an insured employer and insurer agree to renegotiate a workers' compensation policy in effect, so as to include a provision allowing for a deductible.

(d) Premium reductions for deductibles shall be determined by the commissioner of insurance.

(e) This subsection shall not apply to employers who are approved to self-insure against liability for workers' compensation or group self-insurance funds for workers' compensation established pursuant to the provisions of this chapter.

retention amount of $400,000.00. (Dec. 422.) It also posted a bond with the department in the amount of $4,300,000.00, again in compliance with § 25A(2)(b). (Id.) At some point the department allowed a reduction in the bond to $2,400,000.00 which took place before the employer entered into bankruptcy. (Id.) Once the employer filed for bankruptcy[4] Safeco, as the holder of the bond, began paying compensation benefits to claimants, including the employee. (Id.) On or about October 5, 2012, Safeco notified the employee that the bond had been exhausted and it would not be making any further payments to him. (Id.) The employee then filed a claim against ACE, as the excess carrier, for the payment of benefits to him. ACE filed motions to join the department and the WCTF, and to dismiss the claim against it. (Id.) After a conference the judge denied the motion to dismiss the claim, allowed the motion to join the WCTF but denied joinder of the department, and by a March 27, 2013, order, directed the WCTF to start paying the employee § 34A benefits. (Dec. 422, 424.) The WCTF filed a motion to join Safeco, which initially was denied, but after WCTF's request for reconsideration it was allowed. (Dec. 424.)

The judge found that once the Safeco bond was exhausted, the employer became uninsured pursuant to § 65(2)(e),[5] and the WCTF thereafter "became the

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> (f) The commissioner of insurance may promulgate regulations to enforce the provisions of this section.

[4] The employer/self-insurer filed for bankruptcy on March 13, 2007. (Ex. 24, note 2.)

[5] General Laws c. 152, § 65(2) states, in relevant part:

> (2) 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; (ii) no benefits pursuant to

responsible party for providing workers' compensation benefits to the employee." (Dec. 427.) He ordered that the WCTF therefore pay the employee § 34A benefits from the date of the exhaustion of the Safeco bond until the total amount of the indemnity and medical benefits paid to, or on behalf of, the employee reached $400,000.00, at which time the excess carrier, ACE, would become responsible for indemnifying the WCTF for its payment of those benefits. (Dec. 426, 438-439). He found, as a matter of contract interpretation and law, that ACE was not required to drop down below the $400,000.00 retention floor of its contract with the employer and pay compensation benefits. (Dec. 430.) He also found that Safeco had improperly failed to return to the bond $99,581.69, the amount of its lien recovery from a third party settlement entered into by the employee, less recovery costs, and that it had to reimburse the WCTF any amount paid out by the Fund, until such time as the bond was either exhausted again, or, if not exhausted after reimbursement, Safeco would have to pay the employee his benefits, until the bond was exhausted, at which time the WCTF would once again begin paying those benefits. (Dec. 432, 437-438.)

The WCTF argues the judge erred in ordering it to pay benefits to the employee, as the employer was never "uninsured," as required by § 65(2)(e). It also asserts that ACE should be required to reach down below its $400,000.00 contractual amount as a matter of public policy and pay the benefits once the bond was exhausted. Finally, it argues that Safeco's payment of $509,887.77 to medical providers for treatment of a number of employees was improper, as it did not properly determine if the treatment was adequate and necessary, in accordance with §§ 13 and 30, and therefore the amount paid out to providers should be returned to the bond by the bondholder, making it available for further payment of benefits. Safeco, as cross-appellant, argues that the judge erred in holding that its lien recovery should have been returned to the bond, and that his order that it

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section twenty-eight and no interest pursuant to section fifty shall be payable out of the trust fund;

reimburse the WCTF for its payments to the employee was contrary to law. We address each of these argument, beginning with the issues involving Safeco.

SAFECO'S PAYMENT OF MEDICAL BENEFITS

The WCTF argues that Safeco improperly paid medical benefits on behalf of a number of employees, in the amount of $509,887.77, due to its failure to conduct utilization review (UR) of the proposed treatment, and its failure to have a direct order for the provision of the treatment or a medical opinion causally relating that treatment to the industrial injury. It asks that the case be remanded for Safeco to conduct UR of all the medical treatment for which it paid. If any such treatment was found to be "unrelated, unnecessary or inappropriate" Safeco should add to the bond an equivalent amount, to be paid to all the affected employees as part of their benefits. The judge rejected this argument, finding that Safeco, as a surety and not an insurer, was not required by law to undertake UR of the medical bills submitted to it. The judge noted that had there been evidence that Safeco improperly paid claims for unrelated medical conditions, a return of equivalent funds to the bond would have been required. However, the judge found no such evidence was ever presented by the WCTF, or any other party. He denied the WCTF's request to order the restitution to the bond of the $509,887.77 Safeco paid for medical benefits for all the affected employees.

Safeco is not an insurer, as stressed by the judge (Dec. 432), but is a surety bound by the terms of the bond and § 25A(2)(b) to "guarantee[ ] the payment of any liability on [the self-insurer's] part that may have arisen under this chapter." It is settled law, of ancient lineage, that

> [a] surety's bond is a contract. It sets the limits of the surety's liability. The fact that [the] bond is required by statute does nothing to alter the settled principles of contract and suretyship law. That this is a statutory bond does not 'enlarge the risk' which the bonding company has undertaken. . . . A surety 'cannot be holden beyond the fair scope of [its] engagement, as intended by the parties when undertaken.'

C & I Steel, LLC v. Traveler's Cas. and Sur. Co. of America, 70 Mass.App.Ct. 653, 657 (2007) quoting Peerless Ins. Co. v. South Boston Storage & Warehouse, Inc., 397 Mass. 325, 327 (1986) and President of Dedham Bank v. Chickering, [21 Mass. 314,] 4 Pick. 314, 340 (1826).

Safeco is required to guarantee the payment of benefits that were originally the responsibility of the self-insurer, but its obligations are not enlarged to the point that it becomes subject to all the requirements of a self-insurer. Its obligation is only to ensure that appropriate benefits are paid in a timely manner. Safeco's senior counsel, John O'Donnell, whose primary responsibility was handling claims of payment performance bonds, such as the one in issue in this case, testified that he paid medical treatment bills at DIA rates, and that he reviewed the date of injury for which the treatment had been given and the type of services provided, in order to ensure that it was correct. (Dec. 434; Transcript of hearing on September 18, 2013: 28, 97, 127, 128.) The judge found his testimony to be credible, (Dec. 434), making it final. Comeau v. Enterprise Electronics, 29 Mass. Workers' Comp. Rep. ____ (2015). It is thus clear that Safeco did conduct a review of the medical bills to ascertain that they were related to the various employees' injuries, and that they were paid at the appropriate DIA rates. Also, the WCTF made no offer of proof that any of the medical bills were improperly paid, as the judge noted. In any event, in light of our ultimate disposition that the WCTF is not liable to pay any benefits to the employee, its complaint about Safeco's payment of medical benefits is moot.

RETURN OF LIEN RECOVERY TO THE BOND

For its part, Safeco cross appeals, arguing the judge erred in requiring that it return to the bond the $99,469.46 lien recovery it received from a § 15 settlement the employee reached with a third party. The judge found this lien recovery was solely for the purpose of replenishing the bond, and not to provide a profit to Safeco for paying benefits it was obligated to pay by the terms of the bond and § 25A(2)(b). We agree.

On June 30, 2010, the employee, his wife, and their children settled their third party action against Wood Mill, LLC for $465,000.00. (Ex. 19.) As part of that settlement the employee was allocated $155,000.00, with the remainder going to his wife and children for their loss of consortium claims. As of April 26, 2010, the employee had received $59,954.00 in medical benefits and $198,808.00 in weekly indemnity benefits, totaling $258,762.00. (Superior Court Memorandum of Decision on Joint Petition for Approval of Settlement, June 15, 2010, Ex. 24.) In denying the initial allocations, the superior court judge noted that "Liberty comes to stand in the shoes of the insurer (sic) as a result [of the Safeco bond]. Mr. Janocha's claim is among those covered by Safeco's bond, and Safeco holds the lien on Mr. Janocha's recovery in this case under G. L. c. 152, § 15. Safeco is presently owned by Liberty." (Id. note 2).[6]

Although the superior court judge found that Safeco "stands in the shoes" of the (self) insurer, and was entitled to recover its lien on the third party proceeds, the administrative judge found that Safeco was "not an insurer but a surety, and the recovery is not to repay the expenditures of an insurer but to replenish the bond." (Dec. 432.) Safeco argues that it has an equitable right of subrogation and can assert any and all rights of the Principal to which it issued its bond, which meant that the lien recovery belonged to Safeco and not to the bond. It also asserts that should the lien recovery "somehow reduce[] the aggregate limit of the bond," the employee should be required to reimburse the WCTF, to avoid a double recovery, as he already received the $99,581.69 "in the first instance." (Safeco br. 16.)

Safeco is not an insurer, but is subject to the obligations of a surety. (See *infra*.) Safeco is correct, however, that it "stands in the shoes" of the self-insurer,

[6] A re-negotiated set of allocations was approved by the judge on June 30, 2010. Apparently, the Safeco lien was reduced by agreed compromise to $99,581.69 in the final version of the § 15 petition. (Ex. 19.)

in terms of the self-insurer's right to obtain recovery of its lien for payment of compensation benefits from a third party action for damages from the industrial injury. National Shawmut Bank of Boston v. New Amsterdam Gas Co., 411 F.2d 843, 844 (1st Cir. 1969)(applying Massachusetts law). Safeco, as a surety, has all the rights of the self-insurer for reimbursement from a third party. Pearlman v. Reliance Ins. Co., 371 U.S. 132, 137 (1962). What Safeco does not acknowledge, however, is: 1) it is readily ascertainable, as a matter of simple mathematics, that the lien asserted by Safeco consists of indemnity payments made by both the self-insurer and Safeco; and, 2) the continuing nature of its obligations to the employee, as opposed to a performance bond such as in National Shawmut Bank, where the completion of the project completed the obligations of the surety. The judge correctly noted:

> For the insurer in a case, such as this where the employee continues to receive weekly compensation benefits, the section 15 recovery goes to the insurer, and the insurer continues to pay the weekly benefits, so that over time, all of the money filters back to the employee, unless he recovers from his injury before the money is exhausted.

(Dec. 432.)

The surety's obligations are set out in § 25A(2)(b), which states that it must be "a bond executed as surety by some company authorized to transact the business aforesaid in this commonwealth, in an amount and form approved by the department, guaranteeing the payment of any liability on his part that may have arisen under this chapter." The purpose of the bond is to pay the "liability" of the self-insurer, which in this case consists of ongoing compensation benefits. Any funds recovered from a lien stemming from past payments of those benefits must, by statute, be used solely for the payment of that liability. We affirm the finding that the $99,581.69 must be credited back to the bond and Safeco's obligation to pay benefits to this employee continue, until such time as that additional amount is exhausted.

ORDER OF REIMBURSEMENT OF WCTF BY SAFECO

Safeco argues, as its final point, that it cannot be compelled to reimburse the WCTF for payments the Fund made to the employee and medical providers pursuant to the conference order, as the Fund was not a third party beneficiary under the bond. However, an insurer that pays compensation under a conference order is entitled to reimbursement for that payment if a hearing decision changes the liable entity. Carroll v. State St. Bank and Trust, 19 Mass. Workers' Comp. Rep. 306, 311 (2005).[7] That was the case here, for once the judge ordered that the lien proceeds be returned to the bond, the WCTF was entitled to have the money it paid returned to it, up to the level of the bond. The WCTF may have been an unforeseen recipient of the reimbursement, but its status was due only to the conference order, and the later decision. It could not have been a third party beneficiary, as a determination of that status is made as of the time of the execution of the contract, not many years later. Machado v. System4, LLC, 471 Mass. 204, 210 n. 13 (2015). Safeco's argument is thus without merit.

THE WCTF'S OBLIGATIONS WHEN A SELF-INSURER BECOMES BANKRUPT

The judge found that § 65(2)(e) did not limit the WCTF's payment of claims to those where the employer was uninsured on the date of injury, but included those situations where the ability to pay compensation ended at some future time, even though the employer complied with all applicable statutes and was "insured" on the date of injury. This was error.

We start with an examination of the statute, which, as always, we interpret:

> according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection

[7] This rule is not applicable where the party later ordered to pay compensation is the Insolvency Fund, as it can never, by statute, make payments to an insurance company. G. L. c. 152, § 175D § 1(2)(a); Comeau v. Enterprise Electronics Inc., 26 Mass. Workers Comp. Rep. 229, 234-235 (2012).

> to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. Hanlon v. Rollins, 286 Mass. 444, 447 (1934). We must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. The Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). We begin by looking at the words of the statute -- but not in isolation from the statute's purpose or divorced from reason and common sense. DiGiacomo v. Metropolitan Property & Cas. Ins. Co., 66 Mass.App.Ct. 343, 346 (2006). [T]he ultimate goal is to determine and effectuate the intent of the Legislature in the situation presented.

Cornetta's Case, 68 Mass.App.Ct. 107, 112 (2007).

In addition, we must consider that the Act "is to be construed broadly, rather than narrowly, in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design." Litchfield v. Town of Westford, 27 Mass. Workers' Comp. Rep 71, 80 (2013).

Under G. L. c. 152, § 65(2)(e), the WCTF must pay compensation benefits when an employer is subject to the personal jurisdiction of the commonwealth and is "uninsured in violation of this chapter." The statute does not state that the determination of uninsured status be made as of the date of injury, but references only the Act as a whole. However, 452 Code of Mass. Regs. 3.04(2),[8] which is to be construed and applied in the same manner as a statute, Litchfield v. Town of Westford, 27 Mass. Workers' Comp Rep. 71, 80 (2013); Nelson v. Neles Jamesbury, Inc., 16 Mass. Workers' Comp Rep. 172, 174 (2002), makes it a

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[8] 452 Code of Mass. Regs. 3.04(2) states:

> (2) As a condition precedent to the filing of a claim against the Fund or to the joinder of the Fund by any party, the claimant or party 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. The director of the Office of Insurance or his designee shall sign the certification. When the claimant files the claim with the Office of Claims Administration, the claimant shall attach the certification and also submit a copy of the claim and certification to the Office of Legal Counsel.

condition precedent to filing a claim against the WCTF, or joinder of the WCTF as a party to a claim, that the party must produce written certification that "the employer was not covered by a workers' compensation insurance policy on the date of the alleged injury." The "ordinary and approved usage" of the regulation's language thus requires that "uninsured" be defined as an employer that has not obtained a workers' compensation insurance policy covering it and its employees on the date of injury of the employee bringing a claim. If a claim cannot be filed or a joinder allowed without proof that the "uninsured" status was determined as of the date of injury, an employer covered by insurance on that date cannot be deemed "uninsured" on any later date. Thus, the regulation recognizes that the whole system of workers' compensation rests on contracts of insurance that only oblige insurers to cover risks occurring during the policy period. Crowley's Case, 287 Mass. 367, 371 (1934)(an insurer is responsible only for injuries occurring during the period covered by its policy). See also Seller's Case, 452 Mass. 804, note 2 (2008)(WCTF established to provide "a source of payment for an employee who suffers a work-related injury while working for an employer who does not have workers' compensation insurance in violation of the workers' compensation statutory scheme.")

Here, the employer was insured as of the date of injury, as it had been granted a license by the department to act as a self-insurer, and it had obtained a bond and reinsurance as required by § 25A(2)(b) and (c). The fact that by seven and a half years later the employer was bankrupt and the bond was exhausted, did not make the employer "uninsured in violation of the chapter," as it had fully complied with the applicable law on the employee's date of injury in 2005. Where an employer is not "uninsured" as of the date of the injury, the WCTF has no obligation under § 65(2)(e) to pay compensation benefits to its injured employees at any time. The judge's erroneous order that it pay such compensation is reversed.

SECTION 25A'S PROTECTION OF EMPLOYEES OF SELF-INSURERS

The employee was not without recourse when the employer/self-insurer became bankrupt, however. For self-insurers, G. L. c. 152, § 25A, provides the protection for employees that can be viewed as similar to that provided by the Insurer's Insolvency Fund when an insurer is involved.[9] Under § 25A(2), an employer must obtain a license from the department in order to act as a self-insurer, and in order to obtain that license the employer must provide basic information on its assets, payroll, and nature of its business. It must then obtain a bond from a surety company, "running to the commonwealth," that will "guarantee[ ] the payment of any liability on his part that may have arisen under this chapter." The department is required, at least once every two years, to "determine the liabilities of a self-insurer both incurred or to be incurred," and may require a greater amount of the bond, or may authorize a decrease in the bond. § 25A(2)(b). "[A]s a further guarantee of [its] ability to pay the benefits provided by this chapter to injured employees," the self-insurer must also obtain reinsurance of at least $500,000.00. § 25A(2)(c).

The employer in this matter did all of the required actions in order to obtain its license as a self-insurer: it obtained a bond in the original amount of $4,200,000.00, an amount that was later reduced in 2006, with the department's

[9] Had the employer been covered by a compensation insurance policy in 2005, and the insurer on the risk became insolvent at a point in the future and unable to pay benefits, payment of compensation would have been taken over by the Insurer's Insolvency Fund, pursuant to G. L. c. 175D. See Panu v. Home Insurance in Liquidation, 28 Mass. Workers' Comp. Rep. 91, 96-97 (2014), aff. 88 Mass. App. Ct. 189 (2015). Under that statute, the Fund is "deemed the insurer to the extent of its obligation on the covered claims and shall have all rights, duties and obligations of the insolvent insurer to such extent." G. L. c. 175D, § 5(1)(b). However, as a self-insurer, the employer was explicitly excluded from coverage by this Fund when it became bankrupt. G. L. c. 175D, § 5(1)(a)(coverage extended only to covered claims of an insolvent insurer, which is defined at §1(4) as an insurer authorized to transact insurance in this Commonwealth).

approval, to a $2,300,000.00 bond held by Safeco[10] (Ex.14); and it obtained reinsurance with ACE, the policy of which, titled an "Excess Workers' Compensation Insurance Policy," provided for a retention for each accident of $400,000.00. (Ex. 9.) Once the bond became exhausted in October, 2012, however, and the amount paid out to the employee had not yet reached $400,000.00,[11] the statutory scheme for the protection of the employee, at first reading, appears to have left him no remedy, as the WCTF, as already noted, could not be required to step into the gap in coverage.

However, the purpose of § 25A(2) must fit within the overriding purpose of Chapter 152, which is to guarantee the continuing provision of compensation benefits to an injured employee in all circumstances. As the Supreme Judicial Court noted in <u>LeClair</u> v. <u>Silberline Mfg. Co., Inc.</u>, 379 Mass 21, 26-27 (1979)(emphasis added):

> Since 1943 the Workmen's Compensation Act, G.L. c. 152, has been compulsory for most employees in the Commonwealth. (citations omitted). <u>If an employer is in a compulsory category, the statute demands that provision be made for payment to employees of the compensation guaranteed by the Act either by insurance with a private insurer or by the employer's own qualification as a self-insurer</u>. . . What these statutory provisions reveal, and what this court has often recognized, is that the Workmen's Compensation Act is a humanitarian measure designed to provide adequate financial protection to the victims of industrial accidents. There can be little doubt that without the benefits provided by the statute, as enforced through compulsory insurance, many injured employees and their families would be forced to shoulder by themselves large portions of the costs of job-related accidents. (citation omitted). With workmen's compensation, the employee and the employee's family acquire a limited, although substantial, right to be insured against the

[10] Had the department not agreed to the reduction of the bond, there would have been no need for this case, as there would have been more than sufficient funds to pay the benefits to this and other employees.

[11] At oral argument, the employee's attorney stated that, at that time, he believed the employee had received "about $340,000.00" in benefits. (Oral Argument Tr. 57.)

> grievous financial impact that may result from injury in the workplace.

When an insurer becomes insolvent, the statute's purpose is fulfilled by the Insurer's Insolvency Fund taking over payment, or, when an employer never was "insured" (or self-insured) to begin with, by the WCTF paying the benefits. To be complete, the circumstances presented here, where a self-insurer becomes insolvent, also must fit within the general purpose of the Act.

Under § 25A(2) there are three tiers of protection for the employee. The primary tier is the payment of compensation by the self-insurer directly to the employee, pursuant to the license issued by the department under § 25A(2). If the self-insurer becomes bankrupt or ceases to do business, the second tier is activated. In that circumstance the statute requires payment by a mandated bond "running to the commonwealth," the purpose of which is the "guaranteeing [of] the payment of any liability on [the self-insurer's] part that may have arisen under this chapter," § 25A(2)(b), with the caveat that "[t]he liability of the surety shall not exceed in the aggregate the penal sum or sums stated in any such annual bond or bonds. . . ." Id. Once the bond is exhausted the third tier is activated, which is the requirement of reinsurance. The reinsurance is "a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees," and is "to protect [the self-insurer] from extraordinary losses or losses caused by one disaster." § 25A(2)(c). The third tier, on which ACE sits, is activated when the bond is exhausted and there is no other source of payment of the employee's required compensation.

ACE argues that its contract with the employer prevents it from paying any benefits to the employee directly, and in addition its contractual obligation to indemnify an actual direct payor is not triggered until the $400,000.00 retention amount has been paid to or on behalf of the employee.[12] The ACE policy notes, on its information page, that it is a "Specific Excess Workers' Compensation and Employers' Liability Insurance policy,"[13] with a retention, for each accident, of $400,000.00. (Ex. 9.) The policy notes that "We will indemnify you for loss covered by you under Part One – Workers' Compensation Insurance . . .paid by you in excess of Your Retention." Id. It also notes, in Part One (A), that "This workers' compensation insurance applies to loss paid by you as required by the workers' compensation law for bodily injury by accident . . .," with "loss" defined as "the amount actually paid by you for regular benefits under the workers compensation law in effect at the date the accident . . . occurs." The policy further states that "Terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law." Finally, as noted by the judge, the policy recites that "your bankruptcy or insolvency will not relieve us from the payment of any claim covered by this policy: however, in no event shall our obligation to pay be increased or expanded as a result of your bankruptcy or insolvency so as to apply to Your retention, or otherwise." (Ex. 9.)

ACE further asserts that, in case of insolvency of the self-insurer, the plain meaning of the policy language that its obligation will not "be increased or expanded . . . so as to apply to your retention," is that the contractual obligation to pay once the $400,000.00 retention floor is reached cannot be expanded to include a drop down when the bond exhausts. It cites Vickodil v. Lexington Ins. Co., 412 Mass. 132, 138 (1992), noting that, in a reinsurance policy, absent specific

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[12] ACE claims that its obligation to pay benefits has not yet matured, because the employee had received only about $340,000.00 in benefits at the time of the oral argument. (Oral Argument Tr. 57).

[13] General Laws c. 152, § 25A(2)(c), refers to "reinsurance" for extraordinary losses. It is apparent that a "reinsurance" policy and an "excess" policy cover the same event, which ordinarily is an indemnification of the policy holder when a loss exceeds a given amount, in which case the excess insurer reimburses the policy holder its payments on the loss above that amount. Boston Ins. Co. v. Fawcett, 375 Mass. 535, 543 (1970)(the policy at issue in that case was even titled "Excess Motor Truck Cargo Reinsurance").

contractual language allowing a drop down, there could be no lowering of the retention floor. Were there to be such an uncontracted-for drop down, ACE continues, it would have the effect of making the excess carrier a party to the original insurance arrangement, which violates the rule that an excess policy is a separate and distinct policy from the original coverage. Allmerica Financial Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621, 629-630 (2007). In Allmerica the court noted the plaintiffs in Vickodil were left with a gap in insurance coverage, due to the insolvency of the lower level insurer. There was no recourse for the plaintiffs, however, for the court would not extend the excess carrier's coverage to alleviate that gap.

The judge agreed with ACE and found the ACE policy was a retention, not a deductible policy as urged by the WCTF,[14] and that, absent a specific contractual obligation (which he did not find), "the excess carrier's coverage does not drop down to cover a lower coverage amount in the case of bankruptcy or insolvency." (Dec. 431.)

The WCTF argues the judge erred because ACE's policy must be interpreted in light of the guaranteed right of an injured employee to receive the benefits provided by the Act, LeClair, supra. The WCTF argues the retention provision in the ACE policy should be found to be void as a matter of law, and ACE ordered to begin the direct payment of benefits to the employee upon the exhaustion of the Safeco bond. We agree.

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[14] The WCTF argues strongly that the ACE policy should be construed as a deductible contract, and therefore that ACE's obligation to pay dropped down once the Safeco bond was exhausted, without regard to the $400,000.00 retention. The judge correctly noted that the ban on deductible policies in § 25A(4)(e), which states "[t]his subsection shall not apply to employers who are approved to self-insure against liability for workers' compensation . . . ," applies only to the primary responsibility of a self-insurer to pay benefits to injured employees. (Dec. 430.) It does not apply to reinsurance policies. However, given our finding, *infra*, that a policy drop down is warranted due to the overriding beneficent interpretation of the Act, no distinction need be drawn on whether it is a deductible policy.

In determining the rights and obligations of the parties to an insurance policy covering a workers' compensation loss, the first requirement is to look to the language of the policy. Interpretation of a standard insurance policy, in the first instance, is a matter of law for the courts, with the policy construed in light of the statutory scheme that governs such polices, and by considering what an objectively reasonable insured would expect to be covered. Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 225 (2011). However, workers' compensation requires a different and unique application of contract law. As stated recently by the Supreme Judicial Court, "Workers' 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." Ins. Co. of the State of Pennsylvania v. Great Northern Ins. Co., 473 Mass. 745, 750 (2016).

A review of the history of the relevant statute makes it clear the excess insurer has an obligation to step into the shoes of the self-insurer and bond holder when there is no other source of funds for the payment of benefits. Section 25A entered into Chapter 152 in 1943, with the passage into law of the Acts of 1943, Chapter 529, § 7. That section required that ". . . every employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner: (1) By insurance with an insurer, or (2) . . by obtaining . . . annually a license as a self-insurer by conforming to the provisions of one of the two following sub-paragraphs and also to the provisions of subparagraph (c), if required."[15] Id. (emphasis added). The section then required a self-insurer to comply with either sub-paragraph (a), which provided for a deposit of securities with the state treasurer to ensure payment of compensation (a route not chosen by the employer), or sub-paragraph (b), which required the furnishing of a bond, the route chosen by the employer through Safeco.

[15] This language remains unchanged to the present day.

Under either circumstance sub-paragraph (c) stated that "[a]s a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees the department may require that a self-insurer reinsure his compensation risk against catastrophe . . ." Id. (emphasis added).

Five years later, the Acts of 1948, Chapter 176, re-wrote sub-paragraph (c), leaving in place the above language, but added, after "catastrophe," the words, "or excess losses." In addition, the following language was added: "[s]uch reinsurance, when required, shall provide that the liability of the reinsurer, covered by the reinsurance, for any payments due, or payable, upon the revocation of or refusal to renew the license of the self-insurer for which he is liable shall thereupon become fixed and absolute upon the reinsurer." Id. The amendment further provided that when a decision of the department against the self-insurer in favor of an employee was issued, "the department shall be entitled to prescribe the manner in which any reinsurance money due the self-insurer under the provisions of his reinsurance shall be applied to the satisfaction of any such decision or decree." Id.

The final amendment to § 25A occurred with the Acts of 1949, Chapter 441, § 4, which set into place the language which has remained to this day, with only one minor exception.[16] Notably, the requirement of reinsurance, which had been discretionary on the department's part ("the department may require that a self-insurer reinsure his compensation risk") now became mandatory. "As a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees, shall make arrangements satisfactory to the department, by reinsurance, to protect it from extraordinary losses or losses caused by one disaster." Id. (emphasis added). The last part of the sub-paragraph was also changed, so that it now reads:

> Such reinsurance shall provide that the use or disposition of any money received by a self-insurer or former self-insurer under any

[16] The minimum amount of reinsurance was increased from $250,000.00 to $500,000.00.

> 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.

Id. The mandatory nature of this 1949 amendment is a further indication the legislature intended employees to continue to receive compensation even when the second tier bond was exhausted.

The language of § 25A(2)(c) reiterates the employee's right to receive benefits provided by the Act. Reinsurance is required "[a]s a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter. . . ." It is this requirement that is meant to make certain there is no gap in the receipt of benefits by the employee, even when the bond required in the second tier has been exhausted. Thus, the language limiting ACE to an indemnification position runs counter to its statutory obligation, to ensure that benefits are received by the employee. "The rights of the employee cannot be narrowed by any contractual arrangements between the employer and insurer, whatever effect the policy may have on their reciprocal obligations." Workers' Compensation, 29 Mass. Practice § 7.8 (3rd ed.) See also Frost v. David C. Wells Ins. Agency, Inc., 14 Mass.App.Ct. 305, 438 N.E.2d 1086 (1982)(attempt to limit duration of policy by agreement ran counter to statutory requirements of notice before cancellation). The policy must therefore be construed in a fashion that upholds the requirements of Chapter 152, which in this case means that ACE must pay the benefits directly to the employee when there is no longer an entity available to pay the benefits. The policy itself anticipated that its provisions might run afoul of the Act, as it provided that "Terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law." (Ex. 9).[17]

[17] ACE argued that it has no claims department. Regardless, ACE has an obligation to pay benefits directly and its argument that it has no claims department does not, in any way, abrogate that obligation.

For the same reason that direct payment is read into the contract language of the policy, ACE's coverage must drop down to pay the employee. ACE contracted with the employer to "guarantee" payment of compensation to the employee when certain specific conditions occurred. Here, the employer became bankrupt and the second tier payor, Safeco, exhausted the bond in ensuring payment of compensation to the employee. Unless the third tier payor, ACE, becomes liable for the direct payment of compensation to the employee immediately upon the exhaustion of the bond, there will be no source for the payment of benefits to the employee, as the WCTF would not be a viable payor, nor would the Insolvency Fund, see *infra*. If there were no drop down in coverage a gap would exist that would never be closed, effectively cutting off an employee's right to compensation for all time. We therefore hold that the ACE reinsurance contract must be construed in light of this policy so that ACE must begin payment of compensation once the bond is exhausted, and must make direct payments to the employee and to medical providers on behalf of the employee, regardless of the specified retention amount.

We reverse such parts of the judge's decision that ordered payment of benefits by the WCTF and absolved ACE from making any direct payments to the employee, or any payments at all until the retention level was reached. We order ACE to make direct payments to the employee upon the exhaustion of the bond, and to reimburse the WCTF for any payments it has made not covered by the reimbursement from Safeco.

As the employee's benefits were at risk, we find that he prevailed. See Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996). Pursuant to G. L. c. 152, § 13A(6), we order ACE, as the insurer required by this decision to pay the employee's benefits after the exhaustion of the bond, to pay the employee's counsel an attorney fee in the amount of $1,618.19.

So ordered.

William C. Harpin
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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