COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 05183-99**

Robert Richards	Employee
E.I. Dupont De Nemours & Co., Inc.	Employer & Self-insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein and Wilson)

APPEARANCES
Michael Mahaney, Esq., for the self-insurer
Pedro Benitez-Perales, Esq., for the Trust Fund
Andrew S.A. Levine, Esq., for Salem Hospital, amicus curiae

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge denied its petition for second injury reimbursement under § 37, in part because the self-insurer had elected to end its participation in the § 65(2) reimbursement system ("opt out"). The self-insurer argues that it should be allowed to pursue § 37 reimbursement for amounts paid for the subject 1993 date of injury, as that injury pre-dated the effective date of the self-insurer's opt out election. For the reasons that follow, we disagree and affirm the decision.

The operative statutory provisions are contained in G.L. c. 152, § 65(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: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B; (b) reimbursement of adjustments to weekly compensation pursuant to section thirty-five C; *(c) reimbursement of certain apportioned benefits pursuant to section thirty-seven;* (d) payment of vocational rehabilitation benefits pursuant to section thirty H; (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 section twenty-eight and no interest pursuant to section fifty shall be payable out of the trust fund; (f) reimbursement of benefits pursuant to section twenty-six; and (g) reimbursement of certain apportioned benefits pursuant to section thirty-seven A.

> *No reimbursements from the Workers' Compensation Trust Fund shall be made under clauses (a) to (g), inclusive, to any non-insuring public employer, self-insurer or self-insurance group which has chosen not to participate in the fund as hereinafter provided.*
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> . . .
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> No private employer with a license to self-insure and no private self-insurance group shall be required to pay assessments levied to pay for disbursements under clauses (a) to (g) inclusive, and neither the commonwealth, nor any city, town, or other political subdivision of the commonwealth or public employer self-insurance group shall be required to pay assessments levied to pay for disbursements under clause (a), (b), (c), (d), (e), (f) or (g) *if such employer or group has given up an entitlement to reimbursement under said clauses by filing a notice of non-participation with the department.*

G.L. c. 152, § 65(2), as amended by St. 1991, c. 398, § 85 (emphasis added).

The facts underlying this question of statutory construction are quite simple. The employee was injured on May 5, 1993. (Dec. 3.) The self-insurer elected not to participate in the § 65(2) trust fund, effective July 1, 1994. (Dec. 9.) The self-insurer and the employee settled the claim for the 1993 injury via § 48 lump sum agreement on June 13, 1995. (Dec. 8.) In 1997, the self-insurer filed a petition for reimbursement of certain apportioned benefits under § 37, pursuant to § 65(2)(c), which were paid in the 1995 lump sum agreement. The Trust Fund denied the petition, and the matter went before an administrative judge. (Dec. 2.) The judge denied the petition, in part because the self-insurer opted out of the § 65(2) trust fund, giving up entitlement to reimbursements thereunder, such as the § 37 reimbursements at issue in the present case. (Dec. 16.) We affirm the decision on that basis.

The self-insurer contends that the judge misconstrued the provisions of § 65(2). The thrust of the self-insurer's argument is that the election to opt out of the § 65(2) trust fund only bars reimbursement *prospectively*, that is, for amounts paid for injuries occurring after the effective date of the self-insurer's opting out. Thus, the self-insurer argues, reimbursements stemming from dates of injury prior to its July 1, 1994 opting out – such as those at issue in the present case – remain due and payable by the Trust Fund, notwithstanding its later election to opt out.

The basis for the self-insurer's argument is its claim that § 65(2)'s provisions governing opt outs are ambiguous and, as a result, need to be interpreted in the light of various legal and policy considerations.[1] See Kaplan v. Contributory Retirement Appeal Bd., 51 Mass. App. Ct. 201, 205 (2001). We do not agree. "[S]tatutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Town of Brookline, 435 Mass. 353, 360 (2001). We read the words, "No reimbursements . . . shall be made," to mean what they say. Upon electing non-participation, the self-insurer receives "no reimbursements," not just no reimbursements for dates of injury yet to occur.[2] The Legislature did not place limits on the comprehensive word, "no." See Doherty v. Commissioner of Admin., 349 Mass. 687, 691 (1965) (court concluded that "the words 'all employees' must be taken to mean what they say"); Hollum v. Contributory Retirement Appeal Bd., 53 Mass. App. Ct. 220, 223 (2001) (court construed "any employees" in the comprehensive sense of "every" employee who was not expressly excluded). Finally, the additional provisions in the third and fourth paragraphs of § 65(2), describing the mechanics of opting out, in no way detract from the plain meaning of "no reimbursement." See supra.

Even if we were to read "no reimbursements" as ambiguous, as the self-insurer argues, the legislature's characterization of the amendment adding the opt out provisions as procedural renders the amendment applicable to "personal injuries irrespective of the date of their occurrence" under § 2A, St.1991, c. 398, § 107 and would lead us to the same result. Although the date of injury at issue in this case is after the enactment of the amendment on December 23, 1991, we read the procedural characterization as necessarily implying that, upon electing to opt out, "*[n]o reimbursements* from the Workers' Compensation Trust Fund shall be made" to the self-insurer for all "personal

[1] We uncovered no legislative history to aid in interpretation of the 1991 addition of the opt out provisions.

[2] The self-insurer argues that the Legislature should have said "No reimbursements for any and all dates of injury" if they meant that. We do not find that argument persuasive. It is inherently reasonable to read "no" as meaning "no."

injuries irrespective of the date of their occurrence."[3] § 65(2) and § 2A supra, emphasis added. Such application subsumes the present date of injury, even though the same result would have obtained in this particular case had the amendment been deemed substantive and applicable only to dates of injury after December 23, 1991, its effective date. See Massachusetts Ass'n. for the Blind v. Board of Assessors of Brookline, 391 Mass. 384, 390 (1984) ("In this case, as in others, the distinction between 'substantive' and 'procedural' is elusive").

We now address the self-insurer's argument that a plain meaning read of "no reimbursements" renders an illogical and unfair result. The self-insurer claims to be entitled to reimbursement based on its participation in the § 65 trust fund as of the date of injury, prior to opting out. We must analyze the premises on which the self-insurer's claim of entitlement is based. We agree with the self-insurer concerning a fundamental principle underlying c. 152: "[R]ights to compensation and the obligation of the insurer to pay compensation [are] governed and fixed by the act" as of the date of injury. Beausoleil's Case, 321 Mass. 344, 348 (1947). Informing that tenet is the constitutional consideration regarding contractual relationships, that the law in effect at the time the relationship comes into existence cannot be changed by subsequent legislation: "[R]ights and obligations [existing on the date of injury], being contractual in nature, could not be impaired by a subsequent statute." Id. Cases cited by the court in Beausoleil for support of such a construction of the Act articulate the same considerations. See Ahmed's Case, 278 Mass. 180, 183-184 (1932); Aleck's Case, 301 Mass. 403, 406-407 (1938); Frank Kumin Co. v. Marean, 283 Mass. 332, 334-335 (1933) (vested debtor/creditor liability created by statute – an implied term of every contract between corporation and creditors, and relied upon as such – could not be impaired by subsequent legislative mandate without violating contract clause of federal Constitution).

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[3] The 1991 enactment of the opt out provisions has no effect until the self-insurer's election to invoke those provisions. But for the addition of the opt out provisions, the 1991 amendment changed very little in § 65(2). See clauses (e)(i) and (ii) and second paragraph. Therefore, in order for § 107 to apply to the amendment in a meaningful way, it should apply to the opt out provisions, once invoked by way of the self-insurer's election.

The self-insurer argues, accordingly, that a right to reimbursement could be considered and relied upon by the self-insurer in its regular course of claims adjustment, because it was participating in the § 65 trust fund by way of assessments paid as of the date of injury. Although there is no contract between the self-insurer and the Trust Fund, the self-insurer apparently would have us consider it an implied term of the contract of employment: that the self-insurer should be the beneficiary of the Act as it stood when its obligations to the employee arose on the date of injury. See Beausoleil, supra. Following this approach, the self-insurer's right to § 65 reimbursement stemming from dates of injury that occurred prior to the effective date of its opting out were vested substantive rights – entitlements – that could not be modified by later legislation. See Ziccardi's Case, 287 Mass. 588, 591 (1934); Shelby Mut. Ins. Co. v. Commonwealth, 420 Mass. 251, 257 (1995).

We disagree with the entitlement approach that the self-insurer puts forward, because it fails to account for one crucial element in the analysis: The legislature, in adding self-insurers' opt-out rights in the 1991 amendment to § 65(2), neither extinguished nor impaired any rights of self-insurers vis-à-vis § 65(2) reimbursement for dates of injury prior to opting out. This is because opting out is *an election*. A self-insurer that opts out has no claim to a violation of entitlements to reimbursement; there is no prejudice where the self-insurer voluntarily waives the right alleged as being denied.[4] There is not here "an attempt to take property from the [self-]insurer" as in Ziccardi, supra. The self-insurer's claim to unfairness is answered by the simple reminder that no self-insurer is compelled to opt out. There is no basis to say that the extinguishing of all reimbursement by way of the self-insurer's election to opt out, renders the election unusable. It is simply less advantageous than the self-insurer would have it be.

The self-insurer proposes, as further support for its position, an analogy to occurrence-based insurance policies – such as in automobile insurance – which assign to

[4] Had the addition of the non-participation option *replaced* an earlier provision, which was more favorable to self-insurers, the self-insurer's vested rights argument might have more force. However, as it stands, the legislature only conferred a new right to self-insurers, which was wholly elective.

an insurer the responsibility for any occurrence within the policy period. Similarly, the self-insurer argues, the Trust Fund, as reinsurer, should do the same for injuries which occurred while the self-insurer was paying assessments (premiums) under § 65, notwithstanding the later opt out. While we acknowledge its homely allure, the analogy carries no persuasive authority. One might (although we do not) just as easily propose an analogy to "claims-made" insurance policies, those which "cover[] the insured for claims made during the policy year and reported within that period or a specified period thereafter regardless of when the covered act or omission occurred." Chas. T. Main v. Fireman's Fund Ins. Co., 406 Mass. 862, 863-864 (1990). [5]

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[5] A conceivable application of Shelby Mut. Ins. Co. v. Commonwealth, 420 Mass. 251 (1995) comes to mind in reference to the "claims made" insurance policy analogy. This application could require the Trust Fund to honor all claims for reimbursement made prior to the effective date of the opt out. The holding of Shelby Mutual reads as follows:

> If the statute [St.1989, c. 565– effective 2/27/90 – designating 1985 statute replacing Trust Fund for old bankrupt Second Injury Fund as prospective in application, only to injuries on or after 12/10/85] was intended to apply retroactively to insurers' *claims filed* in 1980, 1982, 1983 and 1988, as here, the [insurers'] claims were extinguished by St. 1989, c. 565, because the injuries were sustained before December 10, 1985. However, if St. 1985, c. 565, was intended to apply prospectively only, that is, only to reimbursement claims filed after the statute's effective date, the statute does not apply to this case because the insurers' claims at issue were filed before February 27, 1990, and the dates on which the employees' injuries were sustained are without consequence.
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> "Unless the legislative intent is unequivocally clear to the contrary, a statute operates prospectively, not retroactively." Sentry Fed. Sav. Bank v. Co-operative Cent. Bank, 406 Mass. 412, 414 (1990). "It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action." Heins-Werner Corp. v. Jackson Indus. 364 Mass. 523, 525 (1974), and cases cited. When, as is clearly the situation here, the statute extinguishes substantive rights, it will not be applied retroactively to pending claims "unless the Legislature has stated the contrary explicitly." Austin v. Boston Univ. Hosp., 372 Mass. 654, 657 (1977). The Legislature has not stated the contrary explicitly in St. 1989, c. 565. We hold, therefore, that St. 1989, c. 565, does not apply to claims for reimbursement that were filed before February 27, 1990, as were the claims in these cases.

Shelby Mutual at 256-257 (emphasis added). However, we consider that Shelby Mutual does not apply to the present case, given the fact that the Legislature here has stated explicitly that the

Finally, the self-insurer argues that the Trust Fund's interpretation of the opt out provisions, which we adopt today, is illogical because a self-insurer that ceases to do business in the Commonwealth is not equivalently barred from continuing reimbursement. We do not agree. The Legislature simply does not treat every employer and insurer operating within the Act in exactly the same manner. To the extent that the self-insurer's argument impliedly raises constitutional concerns regarding the rationality of the distinction, we are not persuaded that such an assertion, if made, would carry the day.[6] See Leigh v. Board of Registration in Nursing, 399 Mass. 558, 560 (1987) (simply raising a legislative distinction as debatable does not an irrational classification make).

Accordingly, we affirm the decision.

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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amendment applies to all injuries irrespective of the date of their occurrence. See St. 1991, c. 398, § 107; G.L. c. 152, § 2A.

[6] Following the self-insurer's reasoning, the opt out legislation in its entirety would raise similar concerns. That is to say, how is it that the Legislature bestowed the right to opt out only upon self-insurers, self-insurance groups and public employers? Certainly, a private employer could be treated just the same as "[a] public employer which has a policy with a workers' compensation insurer[:]"

> [It] shall have the ability to file a notice of non-participation as specified above; provided, however, that its insurer shall not be entitled to reimbursement from the Workers' Compensation Trust Fund, and the insured public employer shall be required to reimburse its insurer for any payments the insurer makes on its behalf that would otherwise be subject to reimbursement under clauses (a) to (g), inclusive.

MAZE-ROTHSTEIN, J. (concurring) I concur that on this record, there was no error in denying the self-insurer's petition for second injury reimbursement under G. L. c. 152, § 37, because the self-insurer had elected to withdraw from the G. L. c. 152, § 65(2) reimbursement system ("opt-out"). However, the inapposite dicta on procedural application of § 2A, [7] to § 65(2)'s "no reimbursements" language obfuscates, with a complex and entirely unnecessary digression, an otherwise clear analysis.

Whether a statute is to be applied prospectively or retroactively is, in the first instance, a question of the Legislature's intent. See Eastern Cas. Ins. Co, Inc., v. Roberts, 52 Mass. App. Ct. 619 (2001), citing Moakley v. Eastwick, 423 Mass. 52, 57 (1996). Remedial or procedural statutes apply retroactively to those pending cases which, on the effective date of the statute, have not yet gone beyond the procedural stage to which the statute pertains. See City Council of Waltham v. Vinciullo, 364 Mass. 624, 628 (1974). None of which matters here at all. It is an exercise in futility to resort to such interpretive tools in order to apply § 65(2) since, as correctly noted, all events relevant to the self-insurers opt out took place well after the December 23, 1991 enactment of the amendments to § 65(2): the employee was injured on May 5, 1993; the self-insurer elected not to participate in the § 65(2) trust fund on July 1, 1994, and filed its petition for reimbursement the

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§ 65(2), fourth paragraph. In other words, disparate treatment is not, per se, an issue, and we are not going to make it one on our own initiative.

[7] Section 2A, as amended by St. 1991, c. 398, §§ 85 to 89, provides, in pertinent part:

> Every act, in amendment of this chapter which increases the amount or amounts of compensation payable shall, for the purposes of this chapter, be deemed to be substantive in character and shall apply only to personal injuries occurring on and after the effective date of such act, unless otherwise expressly provided. Every act, in amendment of this chapter, in effect on the effective date of this section or thereafter becoming effective which is not deemed to be substantive in character within the meaning of this section shall be deemed to be procedural or remedial only, in character, and shall have application to personal injuries irrespective of the date of their occurrence, unless otherwise expressly provided.

thereafter in 1997. (Dec. 3, 8, 9.) As § 65(2) was effective December 24, 1991, opt-out provision had the force of law some two and one half years before the self-insurer elected to remove itself from the reimbursement system.

The administrative judge correctly reasoned that it was the employer's decision to opt out that terminated the self-insurer's entitlement to reimbursement from the Trust Fund. (Dec. 10.) This is, in fact, the only relevant triggering mechanism of the opt-out provision. The majority opinion correctly takes the position that the words, "No reimbursements . . . shall be made," to mean what they say; upon the moment of opt-out, the self-insurer receives "no reimbursements," not just "no reimbursements" for dates of injury yet to occur. It need go no further. The statute applies here by simple prospective application. Consequently, in this entirely post-enactment date case, the procedural analysis is errant.

Susan Maze-Rothstein
Administrative Law Judge

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