COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 023225-05**
Roque Pena	Employee
Scully Signal Company	Employer
Arrowood Indemnity Co.	Insurer
Workers' Compensation Trust Fund	Respondent

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Williams.

APPEARANCES
Dorothy Linsner, Esq., for the insurer at hearing
W. Frederick Uehlein, Esq., for the insurer at hearing and on appeal
Janice Toole, Esq., for the Workers' Compensation Trust Fund at hearing and on appeal
William Hanlon, Esq., for the Workers' Compensation Trust Fund at hearing and on appeal

FABRICANT, J. The insurer appeals from the administrative judge's decision denying and dismissing its claim for ongoing payments pursuant to § 37, based on the decisions in Markos-Waiswilos v. Salem Hospital, 67 Mass. App. Ct. 904 (2006) and Home Ins. Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 189, 193 (2015), rev. den. 473 Mass. 1107 (2015).[1] (Dec. 7.) We affirm the judge's decision.

[1] M.G.L. c. 152, § 37 states in pertinent part:

> Whenever an employee who has a known physical impairment which is due to any previous accident, disease or any congenital condition and is, or is likely to be, a hindrance or obstacle to his employment, and who, in the course of and arising out of his employment, receives a personal injury for which compensation is required by this chapter and which results in a disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which would have resulted from the subsequent personal injury alone, the insurer or self-insurer shall pay all compensation provided by this chapter.
>
> Insurers making payments under this section shall be reimbursed by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed

This case has a long factual and procedural history. The insurer is the successor to several insurers including Safeguard Insurance Company. (Tr. I, 26, 30-31).[2] Safeguard insured the employer for workers' compensation in Massachusetts from January 1, 2001, to January 1, 2002. (Stip. 3.) The employee suffered an industrial injury in 2001 while working for the employer. The insurer and/or its predecessors paid medical and indemnity compensation to the employee with respect to the injury pursuant to §§ 30 and 34A. Royal & Sun Alliance filed a petition for § 37 reimbursement from the Workers' Compensation Trust Fund (WCTF) on July 26, 2005. (Joint Ex. 1, Stip. 5). In 2007, Royal & Sun Alliance became Arrowood, the current insurer, (Tr. I, 26), which continues to be licensed as an insurer in Massachusetts. (Stip. 2.)

On October 27, 2008, the employee's workers' compensation claim was lump sum settled on a "with liability" basis, pursuant to G. L. c. 152, § 48(2), obligating the insurer to continue to be liable for payment of medical benefits under § 30. (Joint Ex. 2, Stip. 4.) On April 22, 2009, Arrowood and the WCTF negotiated a settlement of the § 37 claim and entered into a Form 123 "Agreement Under Section 37 or 37A" memorializing the settlement. (Joint Ex. 3, Stip. 6.) Pursuant to the Form 123 agreement, the WCTF reimbursed Arrowood the amount of $293,637.94, which is 85% of 75% of eligible benefits paid through November 20, 2008, plus 85% of 75% of ongoing medical benefits. (Stip. 6.) The insurer subsequently requested additional reimbursement, and the WCTF reimbursed various amounts for periods from November 21, 2008, through September 30, 2013. (Stip. 7.)

> seventy-five percent of all compensation due under sections thirty-one, thirty-two, thirty-three, thirty-four A, thirty-six A, and, where benefits are due under any of such sections, section thirty; provided, however, that the insurer is not a self-insurer, a group self-insurer or municipality that has chosen not to be subject to the assessments which fund said reimbursements; and, provided, further, that no reimbursement shall be made for any amounts paid during the first one hundred and four weeks from the onset of disability or death.

[2] The transcript of the hearing held on August 28, 2018, is referred to herein as "Tr. I." The transcript of the hearing held on November 9, 2018, is referred to herein as "Tr. II."

Beginning in 2009, the insurer filed Form 50's (the form for computing assessments) with the Department of Industrial Accidents, reporting zero premiums paid and therefore no assessments due. (Stip. 10, 12.) After we issued our decision in Panu v. Chrysler Motors Corp., 28 Mass. Workers' Comp. Rep. 91 (2014), the WCTF began denying Arrowood's reimbursement requests, prompting Arrowood to file a petition in the Superior Court, seeking enforcement of the Form 123 agreement, pursuant to G. L. c. 152, §19(1).[3] (Joint Ex. 8.) After a hearing on the WCTF's motion to dismiss, the Superior Court noted that our decision in Panu was then on appeal to the Appeals Court, and concluded, based on the doctrine of primary jurisdiction, that the denial of reimbursement "should be fully reviewed administratively before judicial review." Superior Court Memorandum of Decision and Order dated March 24, 2015. (Joint Ex. 8 at 3.) Accordingly, the Court dismissed the complaint "without prejudice with the insurer's right to seek judicial review of the final decision of the Department of Industrial Accidents." Id. at 3-4. In September of 2015, the Appeals Court affirmed our decision in Panu, and further appellate review was denied. Home Insurance Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 189 (2015), rev. den. 473 Mass. 1107 (2015). On March 29, 2016, the WCTF sent an email stating it could not process the insurer's requests for reimbursements until "assessment issues" are resolved. (Stip. 9.) Meanwhile, the insurer appealed from the Superior Court's dismissal of its complaint for enforcement of the Form 123 Agreement. On May 15, 2016, the Appeals Court affirmed that decision. Arrowood Indem. Co. v. Workers' Compensation Trust Fund, 89 Mass. App. Ct. 1125 (2016) (Memorandum and Order Pursuant to Rule 1:28).

[3] The Appeals Court, in a similar case, discussed the nature of a Form 123 Agreement stating, "these noncompensation related agreements may be enforced under the provisions of G. L. c. 152, § 12, which provide for submission 'to the superior court department of the trial court for the county in which the injury occurred or for the county of Suffolk.' G. L. c. 152, § 12(1), inserted by St. 1985, c. 572, § 26. Otherwise stated, they are enforceable just as though they had been the subject of an administrative order." Lumbermens Mutual Casualty Company v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 183, 186 (2015).

Thereafter, the insurer commenced the present action at the Department, seeking reimbursement pursuant to § 37. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice may be taken of board file). On November 15, 2016, a §10A conference was held on the insurer's § 37 claim. (Dec. 3.) The parties' Form 140 Conference Memorandum showed that, at that time, the insurer sought reimbursement in the amount of $1,266.36 from January 1, 2015, through December 31, 2015, plus "ongoing reimbursement at the rate of 63.75% from January 1, 2016," and the WCTF defended against that claim maintaining it was "barred by Home v. WCTF, 88 Mass. App. Ct. 183 (2015)." Rizzo, supra. A denial was issued on November 17, 2016, from which the insurer appealed.

The administrative judge held a hearing on August 28, 2018, and November 19, 2018. (Dec. 3.) The judge's decision indicates that at the time of the hearing, the insurer sought reimbursement in the amount of $5,388.05 for compensation it paid to the employee up to June 30, 2018, and § 50 interest, as well as ongoing reimbursement at the negotiated rate by virtue of the Form 123 settlement contract. (Dec. 3; Joint Ex. 3.) At the hearing, the parties submitted joint exhibits and stipulations, and the insurer presented witnesses. (Dec. 1-6.) On the second day of hearing, the WCTF sought to amend its hearing memorandum, (Dec. 2, Statutory Exhibit A), to add a claim for § 14 penalties, alleging that the insurer's attempt to retry issues decided in Panu, supra, was without reasonable grounds. (Tr. II, 44-45.) The judge allowed the WCTF to proffer its § 14 argument in its written closing argument. Id. On August 23, 2019, the judge issued his decision denying the insurer's claim as a matter of law, and finding the insurer's arguments, "although novel and creative, and border[ing] on demeaning the court and its[] abilities, do[es] not rise to the level of frivolity to warrant the application of § 14 penalties at this time." (Dec. 8.)

Only the insurer appeals, arguing the judge erred in denying its claim because he based his decision on Panu, supra, aff'd Home Ins. Co. v. Workers' Compensation Trust Fund, 88 Mass. App. Ct. 189, rev. den., 473 Mass. 1107 (2015), both of which it claims were wrongly decided. (Ins. br. 11.) The WCTF maintains that the insurer is not entitled

to § 37 reimbursement, citing Panu for the premise that, when the insurer went into run-off, stopped writing policies and collecting assessments from employers, and stopped remitting assessments to the WCTF, its entitlement to § 37 reimbursement ceased. (WCTF br. 10-11.) As a result, the WCTF concludes that the Form 123 agreement with the insurer is void. (WCTF br. 7, 13, 18-19.)

The administrative judge found that, although the insurer went into run-off and continued to pay the employee's medical benefits, it stopped writing new policies, stopped collecting assessments from employers, and stopped remitting assessments to the WCTF. (Dec. 7.)[4] The judge's decision shows that in denying the insurer's reimbursement claim, he properly relied on the Appeals Court's decisions in Markos-Waiswilos v. Salem Hospital, 67 Mass. App. Ct. 904 (2006)(holding that § 37 reimbursement could not occur where a self-insurer voluntarily removes itself from the trust fund reimbursement mechanism) and Home, supra, to find that the WCTF ceased being liable to reimburse the insurer pursuant to § 37 as of the time the insurer stopped collecting and remitting assessments to the WCTF. (Dec. 7, 8.)

The case before us is distinguishable from Panu: where Panu dealt with a § 34B cost-of-living adjustment claim with an insolvent insurer, here we have a § 37 petition, a Form 123 contract and a solvent insurer. Regardless, none of these factual differences affect the determinative issue in the judge's decision - the status of the insurer, as defined by Home, which is necessary for it to be eligible for reimbursement. Indeed, we observe that Home was denied reimbursement, during run-off, before it became insolvent. Home, supra at 192-193. "[T]he precise issue is whether the bar to reimbursements applies when an insurer, not mentioned as one of the three entities able to "opt-out" of the WCTF[5] . . . nevertheless stops reporting the assessment base and stops collecting the

[4] The insurer's final policy expired in July 2005. As noted by the Appeals Court "an insurer in run off stops issuing new policies but continues to administer existing policies." Arrowood, supra at n.2.

[5] Those three entities are identified in G. L. c. 152, § 65(2), which provides, in relevant part, "No reimbursements from the Workers' Compensation Trust Fund shall be made under clauses (a) to

assessments." Panu, supra. The "run-off" status of the insurer here, resulting in the failure to remit assessments to the WCTF from 2006 forward, is well-documented, as well as uncontested, and was an issue specifically addressed in Home, supra. Accordingly, the administrative judge found that the clear interpretation and guidance provided in Home reaffirms the proposition that, since the insurer no longer collected and remitted assessments to the WCTF, the insurer was no longer entitled to reimbursement. (Dec. 8.) The judge also addressed the arguments raised and repeated by the insurer on appeal, finding:

> Arrowood has argued that the reviewing board and Appeals [C]ourt based its decision on a lack of understanding of the funding mechanism of the Trust Fund and misunderstanding of the public policy implications as applied to employer[s] and Insurers in an attempt to overturn what at this point is well settled law. The Reviewing Board and the Appeals [C]ourt have affirmed after a full review and complete consideration of the facts before them that this is a 'pay as you go' system and once you stop paying into the system you no longer have rights to reimbursement from said system.

(Dec. 8.)

The judge considered Arrowood's claim that reimbursement here would cause no harm to the public and was "unconvinced that as a matter of public policy or equity they should be entitled to reimbursement on that basis." (Dec. 8-9.) The judge continued:

> For years Arrowood has received a benefit, that arguably, they were not entitled [to] and by proper interpretation and application of the law rightfully ended. Although the Trust Fund paid said reimbursement pursuant to the form 123, I do not find that the doctrine of estoppel or waiver should apply to the Trust Fund and that the guidance provided by the court in Home Ins. Co. vs. WCTF, 88 Mass. App. Ct. 189, 193 (2015) clearly articulates the legal basis for which the insure[r] would no longer be entitled to reimbursements under section 37 or the continued enforcement of their form 123.

(Dec. 9.)

(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."

We note that the insurer advances no argument that the judge erred in finding the doctrine of estoppel or waiver should not apply to the WCTF. Nor does it argue that the Form 123 agreement must control the outcome of this case even if Home, supra, applies. Instead, the insurer argues only that Home, which provides the basis for the WCTF's failure to honor the Form 123 agreement, was wrongly decided and is incorrect. Having correctly found that the issue presented here was also present in Home, the judge did not err in finding Home squarely applied to this case. Further, given the procedural history of Panu, and its affirmation by the appeals court in Home, we see no grounds to overturn or otherwise disturb this decision as requested by the insurer. See Home, supra.[6]

The final issue concerns the WTCF's ongoing claim for penalties pursuant to § 14. (WCTF br. 21-24.) The WTCF did not appeal from the judge's decision; thus, its argument for § 14 penalties is not properly before us for consideration on appeal, and we do not address it.

Accordingly, for the reasons articulated in this decision, we affirm the hearing decision.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **March 11, 2022**

Martin J. Long
Administrative Law Judge

[6] We note that the Appeals Court received a number of amicus briefs filed on behalf of insurance companies in Home, and are confident that the Appeals Court considered all of the arguments set forth above, even if they were not advanced by Arrowood.