

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF  
INDUSTRIAL ACCIDENTS

BOARD NO. 027432-95  
029282-13

Theodore Van Sickle  
Polaroid Corp., Inc.  
Polaroid Corp., Inc.  
Workers' Compensation Trust Fund  
Travelers Casualty & Surety Co.

Employee  
Employer  
Self-insurer (insolvent)  
Trust Fund  
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.** The employee's claim for ongoing § 34A permanent and total incapacity benefits, § 34B COLA, and §§ 13 and 30 payment of medical benefits, (Ex. 2), lies at the heart of this dispute concerning the continuing workers' compensation obligation of the now insolvent self-insured, Polaroid Corp. The judge found the Workers' Compensation Trust Fund (WCTF) to be the entity responsible for paying these benefits, and the WCTF appeals.

The parties' stipulation of facts is expressly incorporated by reference in the judge's decision. (Dec. 3, Ex. 4.) Pursuant to G. L. c. 152, § 25A(2)(b) and (c), the self-insurer obtained a bond from Greenwich Insurance Company and purchased reinsurance through Travelers Casualty and Surety Co.<sup>1</sup> "covering Polaroid's

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<sup>1</sup> As a threshold matter, we note the judge referred to the reinsurer as "Employers Reinsurance Corporation" three times in his decision. (Dec. 4, 5, and 6.) In addition, the WCTF's brief refers to the reinsurer as "Old Republic," (WCTF br. 6), and "Employers' Reinsurance Corporation," (WCTF br. 3, 12), as well as "Travelers Casualty and Surety," (WCTF br. 1, 3, 4, 5). The reinsurer asserts that, "the excess carrier is Travelers Casualty

**Theodore Van Sickle**  
**Board Nos. 027432-95, 029282-13**

workers' compensation obligations incurred between January 1, 1995 and January 1, 1996." (Ex. 4.)

The employee sustained a work-related injury on March 9, 1995, and "was awarded full Section 34 benefits followed by Section 34A benefits, continuing [sic] per order of Judge McDonald issued on April 22, 1999." (Ex. 4.) "The excess reinsurance policy had a self-insured retention level of \$500,000.00, which has been met on the [employee's] claim." (Ex. 4.) When Polaroid filed for bankruptcy, the bond was activated. (Ex. 4.) The employee continued to receive his benefits until the bond exhausted, at which point his benefits ceased being paid, and he filed the present claim against the reinsurer.<sup>2</sup> (Ex. 4); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). At conference, the judge ordered the reinsurer to pay the employee § 34A benefits "from October 2,

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and Surety Co., not 'Old Republic' " or " 'Employer's [sic] Reinsurance Corp.' " and "[n]either reference is correct or comports with the evidence or stipulations." (Reinsurer's br. 5 n.4.) We agree, and note only that the "Excess Workers' Compensation and Employers' Liability Policy" was issued by "Aetna Casualty and Surety Company" (Aetna). (Ex. 6.) The parties stipulated that Aetna was "purchased by the Traveler's Casualty & Surety Company." (Ex. 4.) Thus, we refer to, and where indicated will otherwise insert, the proper name of the reinsurer, Travelers Casualty and Surety Co., throughout this decision.

<sup>2</sup> The precise dates of these events are not stated in the record. The employee testified:

Q: Now, at some point in the fall of 2012, did your weekly checks stop; if you recall?

A: I think so.

Q: And at some point did they then start back up again for a short while?

A: Yes, I think so.

Q: And as far as since, say, early 2013, have you gotten - - before we came into court, did you get any checks?

A: From when?

Q: From early 2013 till we came in to see the Judge for our conference.

A: Oh, no.

Q: And since we came into court, you've been getting checks again?

A: Yes.

(Tr. 32-33.) Because there is no dispute regarding the dates the employee was entitled to payment of benefits, we will assume he stopped receiving his benefits for a short time on October 1, 2012, and finally stopped receiving his benefits on January 17, 2013.

**Theodore Van Sickle**  
**Board Nos. 027432-95, 029282-13**

2012 to November 12, 2012 and from January 18, 2013 and continuing at the Section 34A base rate of \$585.66 per week plus medical benefits under Section 30.” (Ex. 4.) Pursuant to the conference order, the reinsurer paid the employee’s benefits but appealed from the order. (Ex. 4.) The WCTF was joined as a party for hearing. (Tr. 6.)

In his hearing decision, the judge determined that when the reinsurer “stopped reimbursing” the bond holder, “since [the bondholder] had ceased making payment of benefits,”<sup>3</sup> Polaroid was rendered uninsured in violation of Chapter 152. (Dec. 5.) He ordered the WCTF to pay the employee’s § 34A benefits “at the rate of \$585.66 (plus applicable cola [sic] beginning October 1, 2013) per week based on an average weekly wage of \$1,158.23<sup>4</sup> from October 2, 2012 to November 12, 2012[,] and from January 18, 2013[,] to date and continuing plus medical benefits under the provisions of M.G.L. c. 152, Section 30.” (Dec. 6.) The judge’s order allowed the WCTF to credit itself for all payments made by the reinsurer, “under the Conference Order as if it had made said payments and been reimbursed by [the reinsurer].” (Dec. 6.) The judge further ordered the reinsurer to reimburse the WCTF “pursuant to the terms of the contract of re-insurance.” (Dec. 6.) Only the WCTF appeals.<sup>5</sup>

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<sup>3</sup> In Malacaria v. Polaroid Corp., 30 Mass. Workers’ Comp. Rep. \_\_\_\_ n.4 (August 26, 2016), we noted, “[t]he law does not contemplate reinsurers reimbursing the § 25A(2)(b) bondholder, as that reduces the proceeds potentially available to the injured worker in favor of the bondholder. Such payments, as made here, are contrary to the protections afforded by § 25A(2) to injured employees of defunct self-insurers.”

<sup>4</sup> The employee’s average weekly wage was \$1,158.23, pursuant to G.L c. 152, §1(1). However, on the employee’s date of injury, March 9, 1995, the maximum compensation rate, pursuant to § 34A, was \$585.66, which serves as the base benefit for any COLA calculation. G. L. c. 152, § 34B(b).

<sup>5</sup> The employee did not appeal from the judge’s decision and the record contains no explanation as to why the judge tied payment of COLA to the date “October 1, 2013,” rather than October 1, 2012, unless the date is a scrivener’s error. The reinsurer argues the issue of COLA was “not contested or disputed. The employee was claiming it merely to be complete, it was not contested and issues of disability and benefit entitlement were not before the judge. (R.A. 27). Section 34B is an adjunct with absolute application.” (Reinsurer’s br. 5 n.4.) Accordingly, since the reinsurer concedes the payment of COLA is inescapably tied to the

**Theodore Van Sickle**  
**Board Nos. 027432-95, 029282-13**

The WCTF argues on appeal that 1) the judge erred in ordering it to pay the employee's benefits; and, 2) the judge "erred by remaining silent on the issue of whether the [reinsurer] is responsible for paying or reimbursing COLA benefits." (WCTF br. 6, 16.) We agree the judge erred in ordering the WCTF to pay the employee's benefits for the reasons set forth in our recent decisions in 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); and Janocha v. Malden Mills Industries, Inc., 30 Mass. Workers' Comp. Rep. \_\_\_ (June 21, 2016)(Section 25A(2)(c) guarantees payment of benefits to employees of self-insurers: by its own terms, a self-insurer cannot be "uninsured").

Accordingly, we vacate the order requiring the WCTF to pay the employee's workers' compensation benefits, and we order the reinsurer to pay those benefits. Malacaria, supra.; Pastore, supra. The reinsurer may take credit for the payments it made pursuant to the judge's conference order of November 19, 2013, and for any reimbursements it has made to the WCTF pursuant to the judge's decision, since May 22, 2015, the date of the hearing decision. To the extent the WCTF has not been reimbursed by the reinsurer for all the payments it has made to the employee, the reinsurer shall make that reimbursement. We do not address the WCTF's argument regarding COLA benefit reimbursement because the disposition of the first issue presented on appeal renders its argument moot. The reinsurer 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.

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Catherine Watson Koziol  
Administrative Law Judge

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receipt of permanent and total incapacity benefits, and the employee has not appealed, we do not address the matter further.

**Theodore Van Sickle**  
**Board Nos. 027432-95, 029282-13**

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Bernard W. Fabricant  
Administrative Law Judge

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William C. Harpin  
Administrative Law Judge

Filed: *September 7, 2016*