

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 000480-94
029790-13

Joseph Flaherty (Deceased)	Employee
Katherine Flaherty	Claimant
Polaroid Corp., Inc.	Employer
Polaroid Corp., Inc.	Self-insurer (insolvent)
Workers' Compensation Trust Fund	Trust Fund
Old Republic Insurance Co.	Reinsurer

REVIEWING BOARD DECISION

(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

David J. McMorris, Esq., for the employee
David C. Michels, Esq., for the trust fund
William P. Rose, Esq., for the reinsurer

KOZIOL, J. The Workers' Compensation Trust Fund (WCTF) and the reinsurer appeal from a decision holding the WCTF responsible for paying the claimant's benefits, and ordering the reinsurer to reimburse the WCTF for 100% of those payments. We vacate the decision and order the reinsurer to directly pay the claimant the full amount of the benefits due under the statute.

The following salient facts are taken from the board file and the parties' stipulation of facts, incorporated by reference in the judge's decision. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file); (Dec. 3, Ex. 1). The employee began working for the employer in 1959. (Ex. 1.) On September 20, 1987, the employee contracted asbestosis due to work-related asbestos exposure, Rizzo, supra., and he worked until January 2, 1989, when the asbestosis incapacitated him. (Ex. 1.) As a result of a conference order issued on September 9, 1994, the employee was awarded § 34 benefits from January 2, 1989 and continuing. Rizzo, supra.; (Ex. 1.) Those benefits were paid by the self-

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insurer to exhaustion, followed by payment of § 34A benefits. (Ex. 1.) On April 27, 1998, the employee passed away due to his injury and the self-insurer voluntarily began paying § 31 survivor's benefits to the widowed claimant, Katherine Flaherty. (Ex. 1.)

Pursuant to G. L. c. 152, § 25A(2)(b) and (c), the self-insurer obtained a bond from XL Reinsurance (XL)¹ and purchased reinsurance from Old Republic Insurance Co. (reinsurer), covering Polaroid's workers' compensation obligations "for the policy years 1987 and 1988," which included the present claim. (Ex. 1.) The self-insured retention level for this claim, \$300,000.00, (Ex. 1, Attachment 4), was satisfied at all times relevant to this proceeding. (Ex. 1.) Unbeknownst to the claimant or the Department of Industrial Accidents, in 2007, the reinsurer denied XL's request for reimbursement pursuant to the reinsurance agreement. (Ex. 1.) XL then filed suit against the reinsurer in Federal District Court for the District of Massachusetts "to resolve issues of coverage under the bond and insurance policy regarding the Flaherty claim."² (Ex. 1.) Neither the claimant nor the Department of Industrial Accidents was notified about this lawsuit. Again without notice to the "Department of Industrial Accidents, the Massachusetts Division of Insurance, or the Claimant," on August 18, 2009, XL and the reinsurer "entered into a settlement agreement by which [the reinsurer] agreed to reimburse [XL] for seventy percent (70%) of the documented benefits it would pay to Mrs. Flaherty and pay [XL] (on behalf of Greenwich) Two Hundred Fifty Thousand Dollars (\$250,000)." (Ex. 1.)

¹ The surety bond was obtained "from NAC Reinsurance American, Inc. (Greenwich Insurance Company), which has since been purchased by XL Reinsurance." (Ex. 1.) We will refer to the bond holder as XL.

² The reinsurer refused to pay XL, contending "its rights had been impaired by the handling of the Flaherty claims" and specifically alleging, "that many provisions of its policy were not met, including but not limited to those which required that it should have received notice when (1) the Department had found that Mr. Flaherty's claim was compensable, (2) his two prior employers were found not responsible, (3) Polaroid's two prior insurers had also been found not responsible, (4) Mr. Flaherty had passed away in April 1998, (5) his widow had begun receiving Section 31 benefits, and (6) the payment and reserves for the Flaherty claims had exceeded 50% of the Retention." (Ex. 1.)

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“The self-insurer’s bond with XL was exhausted on or about May [sic] 5, 2013³ and XL terminated payments to the employee’s widow.” (Dec. 5.) The claimant then filed the present claim against the reinsurer seeking § 31 survivor’s benefits. Rizzo, supra. A December 2, 2013, conference order allowed a motion to join the WCTF “for hearing,” and required the reinsurer to pay the claimant § 31 benefits at a rate of \$618.97 per week from March 5, 2013 to September 30, 2013, and at a rate of \$623.30 from October 1, 2013 and continuing. Rizzo, supra. In his hearing decision, the judge stated both parties appealed from the conference order.⁴

At hearing, the claimant sought payment of § 31 benefits “from May 5, 2013 to date and continuing in the amount of \$884.24 plus [§] 34B COLA from October 1, 2013.”⁵ (Dec. 2; Ex. 1, Form 161 Employee’s Hearing Memorandum.) The judge ultimately ordered the WCTF to pay the claimant the benefits sought at hearing,⁶ and in doing so, he made the following findings:

There is no disagreement that the widow is due benefits and that the reinsurer is obligated to reimburse at least 70% of those benefits. The problem is that XL, the statutory entity paying benefits under a bond, ran out of funds and stopped paying the widow. The reinsurer stopped reimbursing XL since it had ceased making payment of benefits. Under these circumstances, I find that the result is that the employer is rendered uninsured in violation of Chapter 152. I find that the [WCTF] is obligated to pay any benefits due to the widow as a result of her accepted claim against Polaroid.

³ The parties’ stipulations state, “[t]he Self Insurer continued to pay benefits under Section 31 until March 4, 2013” and “XL Reinsurance continued to pay benefits to Mrs. Flaherty until March 5, 2013, when it claimed that the bond was exhausted.” (Ex. 1.)

⁴ None of the parties take issue with the judge’s finding. However, we note that the board file indicates that only the employee appealed from the conference order. Rizzo, supra.

⁵ The record supplies no explanation for the amendment of the claimant’s claim which at conference sought benefits from March 5, 2013, Form 140 Conference Memorandum, Rizzo, supra, to the May 5, 2013 date set forth in the Form 161 Hearing Memorandum. (Ex. 1, Form 161 Employee’s Hearing Memorandum.)

⁶ None of the parties challenge the amount of, or duration of, the benefits ordered.

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I find that the [WCTF] is entitled to reimbursement by [the reinsurer] under the statutorily required policy of re-insurance. I find that the [WCTF] is not limited by the settlement agreement between XL and [the reinsurer] as it was not a party and that the agreement is contrary to the statutory requirement to obtain and maintain re-reinsurance. I find that [the reinsurer] is obligated to reimburse 100% of the benefits paid to the widow pursuant to the re-insurance contract (#4 in Exhibit #1.)

(Dec. 5.)

On appeal, the WCTF argues that the judge erred in ordering it to pay the claimant's benefits;⁷ and urges us to order the reinsurer to pay benefits directly to the claimant, at the rate of 100% of the benefits due. The reinsurer argues the judge did not err in ordering the WCTF to pay the claimant's benefits, but he did err in finding the reinsurer's settlement agreement with XL was contrary to the statute and in requiring it to reimburse the WCTF 100% of the benefits paid to the claimant rather than 70% of those payments as set forth in its settlement agreement with XL. 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"); See also, Federoff v. Ewing, 386 Mich. 474 (1971)(under Michigan Workers' Compensation Act, indemnification language in reinsurance contract stricken to allow employee to receive benefits directly from reinsurer). Accordingly, we vacate the order requiring the WCTF to pay the employee's workers' compensation benefits, and order the reinsurer to pay those benefits. Malacaria, supra.; Pastore, supra.

⁷ The WCTF also contends the reinsurer has taken the position that it cannot be obligated to pay or reimburse COLA benefits. (WCTF br. 14, 18-20.) The reinsurer's brief makes no argument about COLA benefits. Therefore, we do not address this portion of the WCTF's argument because the issue, if any, has been waived by the reinsurer.

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Both the WCTF and the claimant contend that the judge did not err in finding the settlement agreement between the reinsurer and XL was contrary to the statute and could not be enforced. We agree for the reasons set forth in Malacaria, supra. at n.4 (reimbursement to bond holder “contrary to the protections afforded by § 25A(2) to injured employees of defunct self-insurers”) and Pastore, supra.(reinsurance arrangement cannot be modified or compromised without department involvement as statutory scheme depends on having funding mechanisms in place to ensure payment of workers’ compensation benefits). Accordingly, the reinsurer must pay the claimant 100% of her benefits, not 70%.

The reinsurer shall pay the employee’s counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of \$1,613.55.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: October 5, 2016