Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13696

ARROWOOD INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

WORKERS' COMPENSATION TRUST FUND,
Defendant-Appellee.

ON APPEAL FROM THE DEPARTMENT OF INDUSTRIAL ACCIDENTS
REVIEWING BOARD

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE PLAINTIFF-APPELLANT FOR REVERSAL

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

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ISSUE PRESENTED

Amicus curiae New England Legal Foundation (NELF) addresses the issue that this Court identified in its amicus announcement of November 27, 2024:

> Whether under G. L. c. 152, §§ 37 and 65, an insolvent insurer in "run-off," i.e., administering its workers' compensation policies but no longer issuing new policies and no longer paying assessments into the Workers' Compensation Trust Fund (WCTF), is entitled to reimbursement from WCTF for second-injury benefit payments made on the insolvent insurer's policies.

INTEREST OF AMICUS CURIAE

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights.

[1] Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the plaintiff-appellant, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the judicial enforcement of a business's economic rights under a statute. NELF is also committed to upholding the judiciary's essential role to exercise its independent review of an administrative statute and decide whether an administrative agency has acted within its statutory authority.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the legal issue set forth in the Court's amicus announcement.

ARGUMENT

I. AN INSURER IN "RUN-OFF" IS ENTITLED TO REIMBURSEMENT FROM THE WORKERS' COMPENSATION TRUST FUND FOR PAYING AN EMPLOYEE'S "SECOND-INJURY" BENEFITS.

A. The Workers' Compensation Act Requires Employers To Pay Into The Trust Fund, In Exchange For Requiring The Commonwealth To Reimburse Employers' Insurers When They Pay An Employee's Second-Injury Benefits.

The best reading of the Workers' Compensation Act is that an insurer in "run-off"[2] is entitled to reimbursement from the Worker's Compensation Trust Fund when it pays "second-injury"[3] benefits to an employee who is covered by an existing policy. "[C]ourts use every tool at their disposal to determine the best reading of the [administrative] statute and resolve the [purported] ambiguity." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). This is because the Act establishes a mandatory funding and reimbursement scheme among employers, their insurers, and the Trust Fund. Private employers who are insured by third parties *must* contribute to

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[2] That is, the insurer no longer sells new insurance policies but continues to administer claims under its existing policies. *See* Record Appendix 303-04.

[3] This refers to an employee with a preexisting physical impairment who then suffers a compensable work-related injury. *See* G. L. c. 152, § 37 (1st ¶).

the Trust Fund. See G. L. c. 152, § 65(5) (1st ¶). In return, the Commonwealth *must* reimburse employers' insurers from the Trust Fund when the insurers pay an employee's second-injury benefits. See G. L. c. 152, § 37 (2nd ¶). The Act makes no exception for an insurer in run-off. Nor would the Legislature have any reason to do so. An insurer's run-off period does not harm the Trust Fund because the Act requires *employers* to contribute to the Fund.

In particular, employers must furnish the Trust Fund's revenues by paying an assessment on their insurance premiums. "Revenues for . . . the trust fund established herein shall be raised by an assessment on all employers subject to this chapter." G. L. c. 152, § 65(2) (2nd ¶). Employers pay the assessments to their insurers, who, in turn, deliver the employers' payments to the Commonwealth for deposit in the Trust Fund. "Insurers shall bill and collect assessments on insured employers. . . . Insurers shall transmit assessments collected during each quarter . . . to the state treasurer[.]" G. L. c. 152, § 65(5). That is, insurers are statutorily designated *agents* of the Commonwealth who collect employers' mandatory contributions and remit them to

the Commonwealth, much as a retailer collects a sales tax from a customer and remits the sales tax to the Commonwealth. *See* G. L. c. 64H, §§ 2, 3(a).

In exchange for employers' mandatory funding of the Trust Fund, employers' "[i]nsurers making [second-injury] payments . . . *shall be reimbursed* by the state treasurer from the trust fund created by section sixty-five in an amount not to exceed seventy-five percent of all compensation due." G. L. c. 152, § 37 (2nd ¶) (emphasis added). This statutory language is absolute and brooks no exceptions. "[T]he Legislature's use of the word 'shall' reflects the imposition of a nondiscretionary, mandatory obligation." *Garcia v. Exec. Off. of Hous. & Livable Comtys.*, 495 Mass. 86, 91 (2024).

In sum, the Act establishes a mandatory quid pro quo among employers, their insurers, and the Commonwealth. Employers provide the Trust Fund's revenues in exchange for the Fund's substantial reimbursement to their insurers when they pay employees' second-injury benefits. Employers, in

turn, benefit from this quid pro quo in the form of reduced insurance premiums.[4]

In essence, the Trust Fund compensates insurers and, indirectly, their insured employers, for the additional financial loss that occurs when an employee's preexisting physical impairment exacerbates her work-related injury. This statutory compensation scheme is intended to encourage employers to hire and retain employees with physical disabilities. "To encourage employers to hire handicapped workers, the General Court [since] 1919 [has] created a fund to reimburse insurers a portion of their workers' compensation payments made when a previously injured employee has suffered a further work-related injury." *Shelby Mut. Ins. Co. v. Commonwealth*, 420 Mass. 251, 252 (1995).

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[4] Reimbursement to an insurer reduces the employer's loss and thereby improves its "experience modifier," a factor that determines the amount of its insurance premiums. *See* G. L. c. 152, § 53A(16) ("The commissioner of insurance shall establish loss control standards for insureds that . . . may include . . . the experience modifier of the insured[.]"). *See also Deerfield Plastics Co. v. Hartford Ins. Co.*, 404 Mass. 484, 488 (1989) ("The [experience modifier] calculation is a mathematical one that is based on data concerning [the employer] and its loss experience . . . to which certain established experience rating principles are applied.").

B. The Workers' Compensation Act Does Not Contain An Exception For Reimbursing The Insurer In Run-Off, Nor Would The Legislature Have Any Reason To Do So.

Conspicuously absent from this comprehensive statutory scheme, in which the Legislature has left virtually no stone unturned, is any exception for reimbursing an insurer in run-off from the Trust Fund. "When interpreting the absence of language in an otherwise detailed and precise statute, we regard an omission as purposeful[.]" *Gibney v. Hossack*, 493 Mass. 767, 774 (2024) (cleaned up). *See also Bus. Interiors Floor Covering Bus. Tr. v. Graycor Constr. Co. Inc.*, 494 Mass. 216, 232 (2024) ("We do not read into the statute a provision which the Legislature did not see fit to put there[.]") (cleaned up).

Nor would the Legislature have any reason to deny reimbursement to an insurer in run-off. After all, the Trust Fund does not lose any revenues from an insurer in run-off, because the Act requires the *employer* to finance the Trust Fund. "Revenues for . . . the trust fund established herein shall be raised by an assessment on all employers subject to this chapter." G. L. c. 152, § 65(2) (2nd ¶). As this case illustrates, when an insurer enters a run-

off period, the affected employer simply purchases an insurance policy from another insurer and continues to pay its mandatory contributions to the Trust Fund through that insurer. *See* Record Appendix 309.

Therefore, the Trust Fund's revenues remain constant, based on the number of covered employers in the Commonwealth. Insurers are merely the conduit for employers' mandatory contributions to the Trust Fund. "Insurers shall bill and collect assessments on insured employers. . . . Insurers shall transmit assessments collected during each quarter . . . to the state treasurer." G. L. c. 152, § 65(5). Therefore, an insurer's insolvency does not diminish the Trust Fund's revenues, and the Commonwealth should be held to its statutory duty to reimburse the insurer in run-off when it pays second-injury benefits.

C. The Department Of Industrial Accidents Reviewing Board Erroneously Equated An Insurer In Run-Off With A Self-Insured Employer Who Exercises Its Statutory Right To Opt Out Of The Trust Fund.

For these reasons, the Department of Industrial Accidents (DIA) Reviewing Board erred when it equated an insurer in run-off with a self-insured employer who exercises its statutory right not to contribute to the Trust Fund. *See* G. L. c. 152, § 37 (2nd ¶) (no

reimbursement from Trust Fund for "a self-insurer, a group self-insurer or municipality that has *chosen not to be subject to the assessments* which fund said reimbursements") (emphasis added). "Where an agency determination involves a question of law, it is subject to de novo judicial review[.]" *Hartnett v. Contributory Ret. Appeal Bd.*, 494 Mass. 612, 616 (2024) (cleaned up).

Unlike the Act's requirement that private employers who are insured by third parties must pay into the Trust Fund, the Act allows *self-insured* private employers and groups of self-insured private employers the right to opt out of the Act's funding and reimbursement scheme.[5] Those categories of employers can elect not to contribute to the Trust Fund. When they do so, however, they forgo any reimbursement from the Fund. G. L. c. 152, § 37 (2nd ¶) (no reimbursement from Trust Fund for "a self-insurer [or] a group self-insurer . . . that has

[5] *See* G. L. c. 152, § 65(2) (3rd ¶) ("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 [from the Trust Fund] . . . 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 [of industrial accidents].").

chosen not to be subject to the assessments which fund said reimbursements.").

But a self-insured employer's exercise of its statutory right to opt out of the Trust Fund has nothing to do with the insurer in run-off. Unlike the the self-insured employer who elects not to contribute to the Trust Fund, the insurer in run-off does not cause any loss to the Trust Fund's revenues, as amicus has discussed above. In brief, the Act requires the employer to contribute to the Trust Fund, while the insurer merely remits the employer's payments to the Commonwealth. *See* G. L. c. 152, § 65(5) (1st ¶). The employer who is affected by an insurer in run-off continues to pay its mandatory contributions to the Trust Fund through another insurer. Therefore, the Act's exception for self-insured employers who elect not to contribute to the Trust Fund does not apply to the insurer in run-off.

Accordingly, a decision upholding the DIA Reviewing Board's denial of reimbursement to the insurer in run-off would contravene the Act's mandatory funding and reimbursement scheme. Specifically, the employer affected by an insurer in run-off fulfills its statutory duty when it purchases

a new insurance policy and continues to pay its mandatory contributions to the Trust Fund. And the insurer in run-off also fulfills its statutory duty when it continues to pay an employee's second-injury benefits under an old policy. According to the Act's mandatory quid pro quo, the Commonwealth must now fulfill *its* statutory duty to reimburse the insurer for its second-injury payments.

If allowed to stand, the DIA Reviewing Board's decision would also defeat the Act's purpose to provide economic incentives for the hiring and retention of individuals with physical impairments. If the Commonwealth's position prevailed, an insurer in run-off would not be reimbursed for paying second-injury benefits, and the employer would not benefit from reduced insurance premiums. Both the insurer and the employer would lose the financial incentives that are necessary to advance the Act's socially desirable purpose to employ individuals with disabilities. The Legislature could not have intended such an untoward result. "[W]e must avoid any construction of statutory language [that] leads to an absurd result, or that otherwise would frustrate the Legislature's

intent." *Bellalta v. Zoning Bd. of Appeals of Brookline*, 481 Mass. 372, 378 (2019) (cleaned up).

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court reverse the decision of the DIA Reviewing Board.

Respectfully submitted,

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Dated: January 6, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 12-point Courier New. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of pages to be counted in this brief is 12.

/s/ Ben Robbins

Ben Robbins

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this sixth day of January, 2025, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Plaintiff-Appellant, in *Arrowood Indemnity Company v. Workers' Compensation Trust Fund*, SJC-13696, by causing it to be delivered by eFileMA.com to counsel for the Defendant-Appellee, Douglas Martland, douglas.martland@mass.gov. I also certify that, on the same day, I emailed a pdf copy of the brief-as-filed to counsel for the Plaintiff-Appellant, Eric A. Smith, at easmith@verrill-law.com.

Signed under penalties of perjury.

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