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19-P-1475 Appeals Court

RAYMOND F. GAINES'S CASE.

No. 19-P-1475.

Suffolk. June 4, 2020. - August 10, 2020.

Present: Desmond, Sacks, & Shin, JJ.

Department of Industrial Accidents. Insurance, Workers' compensation insurance. Workers' Compensation Act, Cost of living allowance, Reimbursement of insurer. Limitations, Statute of. Practice, Civil, Statute of limitations. Administrative Law, Agency's interpretation of statute, Agency's interpretation of regulation. Public Employment, Worker's compensation.

Appeal from a decision of the Industrial Accident Reviewing Board.

Edmund R. St. John, III, for town of Adams.
W. Frederick Uehlein for Royal Insurance Company.

SACKS, J. The town of Adams (town) appeals from a decision of the reviewing board (board) of the Department of Industrial Accidents (DIA) concluding that certain reimbursement claims

made against the town by the Royal Insurance Company (Royal)[1] are not subject to the two-year limitations period set forth in a DIA regulation. We affirm the board's decision.

Background. In 1976, a town employee suffered a fatal industrial accident, and Royal, as the town's workers' compensation insurer, began paying weekly benefits to his widow, which continued until at least 2016. Beginning in 1986, Royal also paid supplemental cost of living adjustment (COLA) benefits to the widow pursuant G. L. c. 152, § 34B. Royal was initially reimbursed for the COLA payments by the Workers' Compensation Trust Fund (trust fund) established by G. L. c. 152, § 65 (2).

At some point before July 1, 1992, the town joined the Massachusetts Interlocal Insurance Association (MIIA), a licensed self-insurance group, and became responsible for paying new workers' compensation claims. Effective July 1, 1992, the MIIA opted out of participation in the trust fund. Royal continued to receive reimbursement from the trust fund for the widow's COLA benefits for various periods of time, including a period in 2008-2009, but excluding some preceding and succeeding periods.

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[1] The workers' compensation insurer, Royal, is now known as Arrowood Indemnity Company. The case was litigated in Royal's name both at the DIA and in this court, and we refer to the insurer as Royal.

In 2012, the trust fund notified Royal that, due to the MIIA's opt-out, the trust fund would not pay Royal's pending or future claims for reimbursement of the COLA benefits. Royal continued to submit such claims to the trust fund, but the claims went unpaid. In 2016, therefore, Royal submitted COLA reimbursement claims directly to the town for periods from 2007 to 2016 and continuing, excluding the 2008-2009 period already reimbursed.[2] The town did not dispute that, as a member of the MIIA, it was liable to Royal for reimbursement of the widow's COLA benefits for the period following the MIIA's opt-out.[3] The town asserted, however, that Royal's claims were subject to the two-year limitations period established by a DIA regulation, 452 Code Mass. Regs. § 3.03(3) (1999).

A DIA administrative judge agreed with the town and thus ordered the town to reimburse Royal only for the COLA benefits for the period two years prior to Royal's 2016 claim and continuing. Royal appealed to the board, which held the

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[2] As of March 31, 2017, Royal's claims against the town totaled $136,643.50, plus interest, plus reimbursement for ongoing COLA benefits paid to the widow.

[3] The record is silent regarding (1) why the trust fund did not inform Royal until 2012 that, based on MIIA's opt-out, the trust fund would no longer pay Royal's reimbursement claims, and (2) why Royal did not consistently make such claims for all periods before 2012. This case presents no question regarding Royal's entitlement to reimbursement from the trust fund, or vice versa, for any period.

regulation inapplicable and ordered the town to pay all of Royal's claims. The town then filed this appeal.

Discussion. We review the board's decision pursuant to G. L. c. 152, § 12 (2), and G. L. c. 30A, § 14. Here, that decision turns on the board's interpretation of the statute governing reimbursements to insurers for COLA benefits, G. L. c. 152, § 65 (2), and the limitations period regulation. We thus keep in mind that "[t]he interpretation of a statute by the agency charged with primary responsibility for administering it is entitled to substantial deference" (citation omitted). Alves's Case, 451 Mass. 171, 173 (2008). The board's interpretation of the regulation is also entitled to our deference. See Richards's Case, 62 Mass. App. Ct. 701, 706-707 & n.15 (2004).

Under G. L. c. 152, § 65 (2) (a), the trust fund pays "reimbursement of adjustments to weekly compensation pursuant to section thirty-four B," i.e., reimbursement of COLA benefits paid by insurers. Under the DIA regulation, "[a] party requesting reimbursement pursuant to . . . G. L. c. 152, [§ 65 (2) (a)] . . . shall file a form prescribed by the [DIA], received and date stamped by the [DIA] no later than two calendar years from the date on which the benefit payment, for which the reimbursement request being filed, was due." 452 Code Mass. Regs. § 3.03(3). In Beatty's Case, 84 Mass. App. Ct. 565

(2013), we upheld the validity of this regulation, as furthering the "statutory goal of maintaining the [trust] [f]und's pay-as-you-go design, or, . . . of protecting the integrity of the [f]und and its budget process from stale claims and the risk of a shortfall." Id. at 570.

The statute provides, however, that "[n]o reimbursements from the . . . [t]rust [f]und shall be made under clause[] (a) . . . to any non-insuring public employer, self-insurer or self-insurance group which has chosen not to participate in the fund as hereinafter provided." G. L. c. 152, § 65 (2), first par. For such a nonparticipating public employer, "its insurer shall not be entitled to reimbursement from the . . . [t]rust [f]und, 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 clause[] (a)." G. L. c. 152, § 65 (2), fourth par. The town agreed that it was subject to this provision, but asserted that the language makes COLA reimbursement claims against nonparticipating public employers "equivalent to those same kind[s] of claims against the [t]rust [f]und." The town thus contended that Royal fit within 452 Code Mass. Regs. § 3.03(3), i.e., as a "[a] party requesting reimbursement pursuant to . . . G. L. c. 152, [§ 65 (2) (a)]," and thus was subject to the regulation's two-year limitations period.

The board disagreed. It reasoned that the regulation's provision for "reimbursement pursuant to . . . G. L. c. 152, [§ 65 (2) (a)]," means reimbursement from the trust fund, because that is the only reimbursement available under § 65 (2) (a). Because the town (by virtue of the MIIA's opt-out) did not participate in the trust fund, it was required to reimburse Royal for payments Royal made on the town's behalf "that would otherwise be subject to reimbursement under [§ 65 (2) (a)]" (emphasis added). G. L. c. 152, § 65 (2), fourth par. The board viewed this language as creating an alternative reimbursement process -- one not involving the trust fund, and not "subject to" or "pursuant to" § 65 (2) (a), and thus not subject to the regulation.

The board acknowledged our decision in Beatty's Case, but noted that it dealt only with reimbursement claims against the trust fund -- not against an employer that did not participate in the trust fund and was not subject to its special budgeting and funding mechanisms. The board saw nothing in the reasoning of Beatty's Case that required "borrowing" the regulation's two-year limitations period and applying it to claims that fell outside of its terms and rationale.

On appeal, the town claims generally that the board erred, but identifies no specific error in the board's reasoning. That reasoning appears to us to be well-grounded in the plain

language of the statute and regulation. The town identifies no ambiguity in the language of either, let alone one that could support a ruling in the town's favor. Nor does the town demonstrate any inconsistency between Beatty's Case and the board's decision here.

The town also argues that the board's interpretation irrationally distinguishes between public employers that do and do not participate in the trust fund, and thus the interpretation violates the town's equal protection rights. We reject this contention for two reasons. First, the town did not make the argument to the board, and "an issue not raised before the [agency] is deemed waived" on judicial review. Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 354 (1987). Second, and in any event, it is a "basic principle that governmental entities do not enjoy the constitutional guaranties of due process and equal protection." Spence v. Boston Edison Co., 390 Mass. 604, 608 (1983).

The town finally argues as a policy matter that limitations periods serve valuable purposes; that few types of claims are not subject to some limitations period; and that applying a limitations period here would protect municipalities in ways similar to the way that, as Beatty's Case recognized, the regulation's limitations period protects the trust fund and its participants. Beatty's Case, 84 Mass. App. Ct. at 571-572.

But, even in the workers' compensation context, not all claims are subject to limitations periods. See Alves's Case, 451 Mass. at 174-180. The town's policy concerns are most appropriately directed to the DIA, insofar as the regulation is concerned.[4] As for the statute, any "[i]nconsistencies are for the Legislature to remedy." Id. at 180.

The decision of the reviewing board is affirmed.

So ordered.

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[4] The parties have not briefed, and we express no view on, the question whether the DIA is statutorily authorized to issue a regulation setting a limitations period for COLA reimbursement claims against entities that do not participate in the trust fund. See G. L. c. 152, § 65 (12).