

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

WILLIAM HELD, JR., as Chairman of Contractors Compensation Trust; ALFRED LAVKER, as Chairman of Cooperative Association of Food Enterprises Workers' Compensation Trust; JOHN S. KOGET, as Chairman of THE ELEC-CON TRUST; GERALD O. SILVER, as Chairman of Empire State Education Trust; JOSEPH SCARING, as Chairman of Empire State Hospitality Workers' Compensation Trust; GREGORY F. DeLORENZO, as Chairman of Empire State Transportation Workers' Compensation Trust; FLOYD HUNTZ, as Chairman of First Automotive Services Trust; JOHN SHERMAN, as Chairman of NYSARC Workers' Compensation Trust; JOHN D. MANISCALCO and THOMAS J. PETERS, as Co-Chairman of New York Petroleum Associations Compensation Trust; PAUL ROSS, as Chairman of New York McDonald's Operators Worker's Compensation Trust; JAMES R. PIETROPAOLI, as Chairman of NY Transportation Workers' Compensation Trust; JOHN MacDOUGALL, as Chairman of Retailers of New York Workers' Compensation Trust; and KENNETH MONTERA, as Chairman of The Selective Safety Trust

Petitioners,

DECISION AND ORDER

For a Judgment Pursuant to New York CPLR
Article 78

Index No. 2957-08
RJI No.: 01-08-ST8743

-against-

STATE OF NEW YORK WORKERS' COMPENSATION
BOARD, and ZACHARY S. WEISS, as Chairman of the
Workers' Compensation Board,

Respondents.

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

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O'CONNOR, J.:

Petitioners, thirteen group self-insured trusts ("GSITs"), commenced the instant CPLR Article 78 proceeding to challenge the 2008 assessments levied against them by respondent New York State Workers' Compensation Board ("Board"). Petitioners now move for an order pursuant to CPLR § 7805 staying the 2008 assessments issued by respondents against petitioners and restraining respondents from otherwise taking any action to enforce the assessments against the petitioners, or taking any action against petitioners, their agents, third party administrators, or members based in

whole or in part on petitioners' non-payment of the challenged assessments pending the final determination of this proceeding. Respondents oppose the motion.

Pursuant to CPLR § 7805, a court may stay the enforcement of any determination under review pending the outcome of an Article 78 proceeding. The decision to grant or deny a stay pursuant to CPLR § 7805 is generally committed to the discretion of the court (*see* 14 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 7805.01 [2d ed. 2007]). However, courts have applied the traditional three-part test used to assess an application for preliminary injunctive relief (*see Matter of Jarrett v. Westchester County Dep't of Health*, 166 Misc.2d 777, 778 [Sup. Ct. Westchester County 1995]; *Matter of Lee v. New York City Dep't of Hous. Preserv. & Dev.*, 162 Misc.2d 901, 909 [Sup. Ct. N.Y. County 1994]). Thus, a court will grant a stay pursuant to CPLR § 7805 in a pending Article 78 proceeding where the movant demonstrates: (1) a likelihood of success on the merits; (2) irreparable injury if the provisional relief is not granted; and (3) that a balancing of the equities falls in the movant's favor (*see id*; *see also* 14 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 7805.01; Alexander, 1994 Supp. Practice Commentaries, McKinney's Consol. Laws of N.Y., Book 7B, CPLR § 7805, 2008 Supp. Pamph., at 498).

Upon a review of the record and after the hearing of oral argument on the matter, the Court finds that petitioners have made the requisite showing, entitling them to a stay pursuant to CPLR § 7805.

Likelihood of Success on the Merits

Petitioners contend that the 2008 assessments were levied in the absence of legal authority and in violation of petitioners' state and federal constitutional rights. Respondents assert that the 2008 assessments are expressly authorized and mandated by the plain language of Section 50(5)(f) of the Workers' Compensation Law ("WCL"), and that petitioners' claims rest upon "their

misinterpretation of the meaning of the unambiguous language of the statute.” In light of the alleged inconsistencies in the statutory scheme creating GSITs and the statutory language of WCL § 50(5)(f) as it relates to the assessments levied against GSITs together with the constitutional violations alleged, the Court finds that petitioners’ have established that there may be an inconsistency in the law, as well as possible violations of the law, therefore, petitioners have met the threshold burden regarding a likelihood of success on the merits on their claim.

Irreparable Harm

Petitioners contend that they will suffer irreparable harm if the Court denies the stay during the pendency of the Article 78 proceeding. Specifically, petitioners assert that the Board has threatened to seize \$14,381,500 in petitioners’ bonds and to rescind petitioners’ authorizations to operate as GSITs if petitioners do not pay the 2008 assessments, that petitioners’ trustees will be unable to fulfill their fiduciary obligations, and that GSITs will no longer be a viable insurance option for employers to fund their workers’ compensation obligations.

Respondents suggest that petitioners harm is simply that of economics, and as such, the harm is not irreparable and petitioners have an adequate remedy at law. The Court disagrees. Notwithstanding petitioners’ claims regarding the ability of its trustees to fulfill their obligations to the GSITs and the viability of GSITs as an insurance option for employers, petitioners contend that they cannot pay the 2008 assessments. Respondents, on the other hand, have indicated that they will draw upon any posted security or revoke petitioners’ authority to operate as a GSIT if they do not pay the assessments. Therefore, petitioners’ harm is imminent, and not remote and speculative as argued by respondents (*see Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 [2d Dep’t 1995]). Furthermore, the fact that petitioners may have sufficient assets to pay the 2008 assessments, that the relative percentage of the total assessment to each petitioner, compared to the amount of funds

charged by petitioners to their employer members, appears to be small, or that the actual amount at issue for the subject quarterly assessment ranges from \$47,000 to \$578,000 (and is less based upon amended figures) does not negate their arguments or render them without merit.

Balancing the Equities

Respondents contend that the monies the Board is seeking to recoup from petitioners are needed to pay workers' compensation claims of the defaulting GSITs. However, respondents have failed to demonstrate that any injured worker has been denied workers' compensation benefits during the pendency of this proceeding. In fact, respondents stated during oral argument that there are monies currently available from those GSITs that have paid their 2008 assessments. Respondents further argue that if the Board is enjoined from enforcing the 2008 assessments, "it is likely that many others will similarly refuse." The Court rejects this claim as being without merit. As such, since the irreparable injury to the petitioners may result in damage to the entire construct and existence of the GSITs, and the lack of demonstrated harm to the injured workers protected by the Workers' Compensation system if a stay of the proceedings were imposed, the Court finds that the balance of equities tips in favor of granting petitioners' a stay with regard to the assessments that were imposed that are the subject of the challenge in this proceeding.

It is clear from the positions stated by the parties to this proceeding that a portion of the assessments, namely ten million dollars (\$10,000,000.00), is attributable to a different provision of the law that is not being challenged, and can thus not be subject to the stay granted herein. While the Court takes note of the arguments made by the Workers' Compensation Board regarding the amount of money that the Board is required to pay to fulfill the obligations of the defaulting GSITs, and the burden that this places on the finances of the Board, this issue shall be addressed by ensuring an expedited decision in this matter in order to minimize the length of time that this situation will

continue without guidance from the Court regarding the legality of the Board's actions.

Accordingly, it is hereby

ORDERED, that petitioners' motion for a stay pursuant to CPLR § 7805 is hereby granted with regard to those assessments imposed pursuant to Workers' Compensation Law § 50(5)(f) and petitioners are directed to pay that portion of the assessments that have been imposed pursuant to Workers' Compensation Law § 50(5)(c) that is not subject to the issues raised in this proceeding **within thirty (30) days** of the date of this Decision and Order; and it is further


ORDERED, that the respondents are directed to provide petitioners with documentation to demonstrate the amount of those assessments imposed pursuant to Workers' Compensation Law § 50(5)(c) **within five (5) days** of the date of this Decision and Order in order to facilitate the petitioners payment of those assessments.

This memorandum shall constitute the Decision and Order of the Court. All papers are being retained by the Court. The Decision and Order is being forwarded to the attorneys for petitioners. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED.

ENTER.

Dated: May 2, 2008
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause (Teresi, J.), dated April 11, 2008; Verified Petition, dated April 9, 2008, with Exhibits A-H annexed; Affidavit of Craig R. Bucki, Esq., sworn to April

8. 2008; with Exhibits A-E annexed; Affidavit of Sean C. McPhee, Esq., sworn to April 7, 2008; Affidavit of Richard S. Flaherty, sworn to April 9, 2008 with Exhibits A-D annexed; Affidavit of Thomas J. Peters, sworn to April 8, 2008; Affidavit of John D. Maniscalco, dated April 8, 2008; Affidavit of Gerald O. Silver, sworn to April 7, 2008; Affidavit of David Bauer, sworn to April 2, 2008; Affidavit of Charles E. Hock, sworn to April 2, 2008, with Exhibits A-C annexed;
2. Petitioners' Memorandum of Law, April 8, 2008;
 3. Affidavit of Mary Beth Woods, sworn to April 23, 2008, with Exhibits A-P annexed;
 4. Respondents' Memorandum of Law, dated April 23, 2008, with Appendix;
 5. Reply Affidavit of Richard S. Flaherty, sworn to April 29, 2008, with Exhibits A & B annexed;
 6. Reply Affidavit of Charles E. Hock, sworn to April 30, 2008;
 7. Petitioners' Reply Memorandum of Law, dated April 30, 2008.