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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006565-12**

Andrew Lubofsky	Employee
Lowe's Home Centers, Inc.	Employer
Lowe's Home Centers, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Harpin)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Ronald S. Barnes, Esq., for the employee
Gordon L. Sykes, Esq., for the self-insurer

CALLIOTTE, J. The employee, who was working three jobs at the time of his injury, appeals from a decision denying his claim to include wages earned through his employment with the United States Postal Service (USPS) in the calculation of his average weekly wage. We affirm the decision.

The employee worked for the self-insured employer, Lowe's Home Center, on a part-time basis, from 4 p.m. until 8 p.m., five days a week. The employee also worked full time as a supervisor for the USPS, and eight hours each Sunday as a security guard for LAZ Parking. (Dec. 4-5; Tr. 11-13.) On March 14, 2012, the employee injured his neck unloading appliances from a truck at Lowe's. He has been unable to return to his physically demanding job there. He has continued working as a supervisor at the USPS, but at reduced hours. He has missed no time from his job at LAZ Parking. (Dec. 4-5.)

The self-insurer accepted liability for the injury, (Dec. 3), and paid the employee § 34 weekly benefits, which were later corrected to § 35 benefits, based on his lost earning capacity at Lowe's and his continuing work for LAZ.[1] The employee filed a

[1] The self-insurer initially paid § 34 benefits based on the employee's incapacity only from his job at Lowe's, because it was unaware the employee also worked one day a week at LAZ. After

claim seeking recalculation of his average weekly wage by including his wages earned at the USPS for the fifty-two weeks prior to his injury, which would result in a concomitant increase in his § 35 benefits. Following a denial at conference, the employee appealed. Prior to hearing, the judge allowed the self-insurer's motion to join its complaint to discontinue benefits. (Dec. 2.)

In his decision, the judge found that the employee continues to be partially incapacitated due to a herniated cervical disc caused by his injury at Lowe's. He further found the employee could perform his work at the USPS for a maximum of six hours per day, but could not perform his heavy job unloading trucks for Lowe's, or, indeed, any other job at the end of his shift at the USPS. (Dec. 6.) In addition, the judge found the employee was "concurrently employed by the U.S. Postal Service," (Dec. 7), but that

> the U.S. Postal Service is not an *insured employer* as defined by Section 1(1) of the Act. I do not find that his wages for this employer should be included in his average weekly wage and I do not find that his lost earnings from this job should be included in the calculation of his compensation rate.

(Dec. 7; emphasis added.) Accordingly, the judge denied the employee's claim and found his lost earning capacity was equivalent to only his weekly wages at Lowe's, or $256. 31. (Dec. 5, 6.) The judge also denied the self-insurer's complaint to discontinue benefits. (Dec. 7-8.)

The only issue before us on appeal[2] is whether the judge erred by failing to include the employee's wages earned at his full-time job with the USPS in the calculation of his

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the parties became aware of this job, benefits were adjusted to §35, (Self-insurer br. 2; OA Tr., 4-6), and later formalized pursuant to a § 19 agreement. See infra, note 2.

[2] The self-insurer also appealed on the ground that the judge failed to determine an average weekly wage and compensation rate exclusive of the employee's wages at the USPS. (Self-insurer br. 8.) However, the parties resolved this issue by a § 19 agreement, approved December 17, 2014. The parties agreed the employee's pre-injury average weekly wage, based on wages earned at his jobs at Lowe's and LAZ, was $381.17, and that the employee's § 35 partial compensation rate was $153.68. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

average weekly wage.[3] The employee argues that recent case law has "breached" the holding in Letteney's Case, 429 Mass. 280 (1999), that, in the context of § 35C, out-of-state wages may not be used to calculate an employee's average weekly wage. The first "breach" occurred in Sellers's Case, 452 Mass. 804 (2008), where the court allowed an employee's average weekly wage to be calculated based on his combined wages from both his insured and *uninsured* Massachusetts employers. The second breach, according to the employee, occurred in Wadsworth's Case, 461 Mass. 675 (2012), where the court held that out-of-state wages earned after an employee returned to work could be factored into the calculation of his average weekly wage pursuant to § 35B. The employee further maintains that the statutory text alone does not dictate the result, but we must look instead to the "ameliorative purpose" of the statute. Letteney's Case, supra at 283.

The self-insurer counters that the plain meaning of G.L. c. 152, §§ 1(1) and 1(6), indicates that only wages earned in the concurrent employment of an "insured employer or self-insurer" are to be used in calculating average weekly wage, and that the federal government is not an "insured employer" under chapter 152. Moreover, the self-insurer asserts that neither Sellers's Case nor Wadsworth's Case has extended the law to the point where we can ignore the statutory definitions and base an employee's average weekly wage on earnings paid by a concurrent employer who is not required to participate in the Massachusetts workers' compensation system. We agree with the self-insurer.

> The definition of "average weekly wages" includes the following provision:
>
> In case the injured employee is employed in the concurrent service of more than one *insured employer* or self-insurer, his total earnings from the several *insured employers* and self-insurers shall be considered in determining his average weekly wages.

G. L. c. 152, § 1(1)(emphases added). "Insured" or "insured persons" is defined as:

[3] With respect to the employee's earnings at the USPS, the judge found that, prior to his injury, he earned $1,246.53 per week. From March 15, 2012, to October 12, 2013, he averaged $417.90 per week; and from October 13, 2013, to the date of hearing, he averaged $815.14 per week. (Dec. 5.)

> an *employer* who has *provided by insurance* for the payment to his employees by an insurer of the *compensation provided for by this chapter*, or is a self-insurer under subparagraph (a) or (b) of paragraph (2) of section twenty-five A, or is a member of workers' compensation self-insurance group established pursuant to section twenty-five E to twenty-five U, inclusive.

G. L. c. 152, § 1(6)(emphases added).[4]

Prior to the court's decisions in Sellers and Wadsworth, this board relied on the above provisions of the statute, as well as the analysis in Letteney to address the question presented here: whether wages earned at concurrent out-of-state employment[5] are to be factored into the computation of the employee's average weekly wage. See Kinder v. Lance, Inc., 13 Mass. Workers' Comp. Rep. 376 (1999). There, we held that a Rhode Island employer was

> not an "insured employer" within the meaning of § 1(6), as it was not insured for the payment of compensation under c. 152. Rather, its workers' compensation insurance covered only liability under the compensation law of Rhode Island. As such, the employee's earnings from that employer could not be considered "concurrent" within the meaning of § 1(1), because they were not derived from "insured" employment.

Id. at 378. We concluded that the court's decision in Letteney resolved any ambiguity in the statute's construction. Kinder, supra, at 378-379.

In Letteney, the court interpreted § 35C,[6] which provides that an employee who suffers an injury which does not make him eligible for compensation for at least five

[4] "Employer," is defined, in pertinent part, as, "an individual, partnership, association, corporation or other legal entity . . . employing employees *subject to this chapter*." G. L. c. 152, § 1(5)(emphasis added).

[5] Although the USPS, as a federal employer with locations in Massachusetts, is not technically an out-of-state employer, it is nonetheless an employer which does not insure, and is not required to insure, employees pursuant to chapter 152. The Federal Employees' Compensation Act (5 U.S.C. § 8101 et seq.) provides workers' compensation benefits to employees of the USPS. Thus, the principles discussed are the same for out-of-state and federal employees.

[6] General Laws c. 152, § 35C, provides in relevant part:

years, is to have his benefits calculated based on his rate of pay at the time of disability, rather than at the time of injury. Letteney was self-employed in Florida at the time he became eligible for benefits, although his last exposure to asbestos was many years earlier in Massachusetts. The court held that, pursuant to § 35C, Letteney's average weekly wage could not be based on his out-of-state wages. Discerning "no very plain meaning" in the language of Section 35C, the court based its decision on the "conception of workers' compensation as an insurance scheme funded entirely by the contributions of Massachusetts employers." Id. at 284. The court held that,

> Compensation to the employee measured by earnings *outside the Massachusetts workers' compensation system* constitutes a liability for which neither the employer nor any other Massachusetts employer has provided . . . . Self-employment, *out-of-state employment*, and other excluded employment are *not within the system* and thus . . . long run equilibration cannot take place.

Id. at 285-286 (emphases added)(footnote omitted).

As in Letteney, the employee in Kinder had employment that was not " 'within the system' of c. 152," and thus his earnings out-of-state could not be included in his §1(1) average weekly wage. Kinder, supra, at 379. See also Defranceschi, Jr.'s Case, 59 Mass. App. Ct. 1107 (2003)(Memorandum and Order pursuant to Rule 1:28)(relying on Letteney, court affirmed judge's decision refusing to calculate average weekly wage by including wages earned at concurrent employment in Connecticut).

We now re-examine our holding in Kinder in light of the court's decisions in Sellers and Wadsworth, keeping in mind that:

> " 'The work[ers'] compensation act is to be construed broadly, rather than narrowly, in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design. . . . But it is also settled that, in

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> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.

> construing a statute, its words must be given their plain and ordinary meaning according to the approved usage of language . . . and that the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it.' "

McCarty's Case, 445 Mass. 361, 364 (2005), quoting Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945). We conclude that the reasoning in Sellers and Wadsworth does not override the clear statutory expression in §§ 1(1) and 1(6) to limit concurrent wages to those earned by employees working for employers who are required to be insured under Chapter 152.

Sellers's Case deals explicitly with the concurrent wage provision of § 1(1). However, the issue presented in Sellers is different from the issue here. In Sellers, the court addressed whether wages from two Massachusetts employers, one of whom was "illegally uninsured," should be added to determine the employee's average weekly wage. The court found the concurrent wage provision was "silent" with respect to this issue, and thus interpreted Section 1(1) " 'in the context of the over-all objective the Legislature sought to accomplish,' " Sellers, supra, at 810, quoting National Lumber Co. v. LeFrancois Constr. Corp., 430 Mass. 663, 667 (2000), as well as the subsequent amendments to the workers' compensation law. The court pointed out that the concurrent wage provision was enacted in 1935, see St. 1935, c. 332, § 1, within the context of the "beneficent design" of the Act, in an attempt to "define the term 'average weekly wage' 'more equitably' for the 'protection of workers' suffering serious injuries in the discharge of their duties.' " Sellers, supra, at 809-810, quoting 1935 Senate Doc. No. 1, at 14-15. The court reasoned that the legislature referred to *insured* concurrent employers because, in 1935, employer participation was voluntary so there was "no need for the legislature to advert to the calculation of average weekly wages by *uninsured* employers." Id. at 811-812(emphasis added). However, in 1943, the Act was amended to require nearly all employers to carry workers' compensation insurance. And, in 1985, the Workers' Compensation Trust Fund was created to " 'give employees of uninsured employers the same rights, benefits and duties under the workers' compensation act as employees of

insuring employers.' " Id. at 812, quoting Nason, Koziol, & Wall, Workers' Compensation § 7.4, at 133 (3d ed. 2003). See G.L. c. 152, § 65(2)(e). "Those 'rights' and 'benefits' include providing an injured employee with a monetary award that reflects the earning capacity of which the work-related injury deprived him." Sellers's, supra, at 812-813. The court concluded:

> Precluding an injured employee . . . from receiving wage replacement benefits calculated on the basis of his concurrent employment because one of his employers failed to obtain workers' compensation insurance would be contrary to the purposes of the act, is not compelled by the statutory language, and would be inconsistent with the mandate of the definitional section of the act to consider the issue presented in context.

Id. at 809. Thus, the Trust Fund was required to pay workers' compensation benefits calculated on the employee's average weekly wages from both his employers, insured and "illegally uninsured."[7] Id. at 814.

The dichotomy which the court addressed in Sellers was *insured* versus *uninsured Massachusetts* employers, who are required by Chapter 152 to carry workers' compensation insurance, not insured Massachusetts employers versus insured out-of-state employers outside this board's jurisdiction.[8] While the court in Sellers found the statute silent on whether the concurrent wage provision applies to illegally uninsured Massachusetts employers, the statute is by no means silent on whether concurrent wages from employers insured outside Chapter 152 are to be included in average weekly wage determinations. Section 1(1) provides that concurrent wages from "insured employers," which are defined in § 1(6) as employers who have provided by insurance for payment of

[7] In Sellers, the employee was working for the uninsured employer at the time of his injury. Thus, the Workers' Compensation Trust Fund was obligated to pay workers' compensation benefits based on the employee's wages earned at the uninsured job pursuant to § 65(2)(e), without application of the concurrent wage provision of § 1(1).

[8] The court cited with approval a portion of a footnote from Nason, Koziol & Wall, Workers' Compensation, § 18.4 at 23 n.4 (3d ed. 2003): " 'To exclude from the definition of concurrent employment all . . . *domestic employers who fail to insure* would be depriving those employees of the benefits plainly intended by the [1935] amendment.' " Sellers, supra, at 814 n.17 (emphasis added).

"compensation provided for by *this chapter*," are to be included in determining average weekly wage. This language must be given its "plain and ordinary meaning," McCarty's Case, supra, at 364, "*unless a different meaning is plainly required by the context* or specifically prescribed." Sellers, supra, at 814 (emphasis in original), quoting G.L. c. 152, § 1. In Sellers, the context of the enactment of the 1935 amendment adding the concurrent wage provision, as well as the subsequent creation of the Trust Fund by § 65 to pay benefits to injured employees of uninsured employers, informed the interpretation of § 1(1) with respect to uninsured employers. By contrast, there have been no amendments indicating a legislative intent to calculate average weekly wage by including earnings from employers who are insured outside the Massachusetts workers' compensation system.[9] In Sellers, a different interpretation than the "plain and ordinary" meaning was required by the context. Here, it is not.

The court's decision in Wadsworth does not modify, or even mention, the concurrent wage provision of Section 1(1). Rather, it addresses whether wages earned in out-of-state employment should be factored into the rate of compensation payable under § 35B.[10] In construing § 35B, the court in Wadsworth limited the holding in Letteney to

[9] In fact, since the concurrent wage provision was enacted in 1935, there have been two relevant changes to §1, which further indicate that the concurrent employment provision applies to wages earned at employers who provide workers' compensation coverage under chapter 152. The first added references to self-insurers in the concurrent wage provision of § 1(1). St. 1943, c. 529, § 1. The second added to § 1(6)'s definition of "insured" or "insured persons," the words "or is a member of workers' compensation self-insurance group established pursuant to section twenty-five E to twenty-five U, inclusive." St. 1986, c. 662, § 5.

[10] General Laws c. 152, § 35B, provides, in its entirety:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury; provided, that if compensation for the old injury was paid in a lump sum, he shall not receive compensation unless the subsequent claim is determined to be a new injury.

"out-of-State wages earned after suffering latent injuries" pursuant to § 35C, Wadsworth, supra, at 679, and declined to apply the reasoning in Letteney to its § 35B analysis. Wadsworth, supra at 687. The court found that, whereas in Letteney it had been unable to discern any "plain meaning" from the language of § 35C, Wadsworth, supra, at 686, the language of § 35B was clear, reflecting

> a legislative determination that, where a previously injured employee has returned to work for at least two months and suffers a subsequent injury that again incapacitates him from work, his earning capacity is best measured by the wages he was earning at the time of his subsequent injury at his new employment rather than at the time of his initial injury at his prior employment. As a measure of earning capacity, it matters not whether the wages are earned in Massachusetts or outside Massachusetts. "The words of § 35B are *plain and unambiguous*. 'An employee . . . shall . . . be paid such compensation at the rate in effect at the time of the subsequent injury.' These words are mandatory, not precatory." Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting G.L. c. 152, § 35B.

Wadsworth, supra, at 687-688(emphasis added). The holding in Wadsworth thus hinges on an interpretation of the specific language of § 35B, not on an interpretation of the phrase "concurrent service of more than one insured employer" contained in § 1(1), and the definition of "insured" or "insured persons" found in § 1(6).

The employee's argument, that the court's holding in Wadsworth should be extended to cases of concurrent wages earned by employees working for out-of-state employers, would have us render superfluous the language of §§ 1(1) and 1(6), see Globe Newspaper Co. v. Commissioner of Educ., 439 Mass. 124, 129 (2003)(" 'none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning' "), and "infer an intention on the part of the Legislature beyond the plain language of the statute." McCarty, supra, at 365, citing Commissioner of Revenue v.

As the court in Wadsworth points out, § 35B deals with an employee who is " 'subsequently injured' due to a recurrence of [a] former injury." Id. at 685, citing Don Francisco's Case, 14 Mass. App. Ct. 456, 460-462 (1982). If the employee suffers a new injury rather than a recurrence of a prior injury, the insurer at the time of the new injury is responsible for paying benefits at the rate in effect at the time of the new injury. Wadsworth, supra, at 685 n.11. In the case of out-of-state employment, that would be the insurer of the out-of-state employer, not the Massachusetts insurer of the original employer.

Cargill, Inc., 429 Mass. 79, 82 (1999). This we decline to do. Just as the reasoning in Letteney cannot be applied to § 35B cases, the reasoning in Wadsworth is inapplicable to concurrent wage cases under § 1(1).

Although the practical impact on the compensation system is not dispositive of our decision, the court in both Wadsworth and Letteney found it relevant to the determination of whether to include out-of-state wages in the computation of average weekly wage under §35B or § 35C, respectively. The court in Wadsworth went to great lengths to distinguish the significant unforeseeable "unfunded insurance liability" due to compensation based on out-of-state wages in § 35C latency cases, with which it was concerned in Letteney, from the more modest and foreseeable unfunded liability that would result from inclusion of out-of-state wages under § 35B. The court concluded that including out-of-state wages in determining the compensation rate under § 35B would not "place a significant burden on insurers or act to increase unfairly workers' compensation premiums." Id. at 689.

By contrast, were we to agree with the employee here that his concurrent wages earned at the USPS were to be included in his average weekly wage calculation, we would be opening the door to significant, unforeseeable "unfunded liability," and the resulting premium increases for Massachusetts employers insured under Chapter 152. Acceptance of the employee's argument would potentially require that average weekly wage calculations include concurrent wages earned not only by employees of the federal government, but also by employees of out-of-state employers not participating in the Massachusetts workers' compensation system; by police officers and firefighters, whose compensation is provided under G. L. c. 41, § 111F; by employees of counties, cities and towns who have not accepted chapter 152, see G. L. c. 152, § 69; and by other non-covered workers. See G. L. c. 152, § 1(4).

We recognize that the purpose of the concurrent employment provision is not to benefit insurers by keeping insurance premiums down, or even foreseeable, but to more fairly compensate employees for their lost earning capacities. Sellers, supra, at 811-814.

In addition, we are sympathetic with the employee's argument that denying his request to include his federal wages in his average weekly wage calculation fails to fully serve this purpose. However, the legislature chose to limit the basis of an employee's compensation to employment with employers subject to chapter 152. We may not amend a statute's language or infer legislative intention where the language is clear. McCarty, supra at 673, citing Commissioner of Revenue v. Cargill, Inc., supra. Section 1(1) is explicit that concurrent wages may be factored into average weekly wage where an "employee is employed in the concurrent service of more than one insured employer or self-insurer." Section 1(6) defines an "insured" employer as one which "has provided by insurance for the payment to his employees by an insurer of the compensation provided for *by this chapter*, or is a self-insurer." Id.(emphasis added). The USPS is not such an employer. [11]

[11] Courts in two other jurisdictions have refused to include concurrent wages earned with federal employers in the calculation of average weekly (or monthly) wage, based on an analysis of the statutory language of their workers' compensation acts. In Lopa v. Brinker Int'l, Inc., 296 Conn. 426 (2010), the court held that the USPS was not an employer within the meaning of the Connecticut concurrent wage statute, which provides that "the injured employee's average weekly wages shall be calculated upon the basis of wages earned from all such employers in the period of concurrent employment." Connecticut General Statutes § 31-310. An "employer" is defined as a "public corporation within the state." Id. at § 31-275(10). The court held that, although the USPS may be a "public corporation," it was not a "public corporation *within the state*" because it was not "organized and existing pursuant to the laws of [Connecticut]," but pursuant to federal law. Lopa, supra, at 433- 434. Accordingly, "the postal service cannot be an employer, as defined by § 31-275(10) for the purposes of calculating the plaintiff's average weekly wage pursuant to § 31-310." Id.

Similarly, in State Indus. Ins. Sys. v. Prewitt, 113 Nev. 616 (1997), the Nevada Supreme Court held the federal government was not an employer subject to provisions of Nevada workers' compensation act for purposes of calculating average monthly wage. The court concluded: "This court's policy of liberally construing workers' compensation statutes in favor of the injured worker may not be used to alter the clear meaning of the statute." Id. at 619. Cf. Reaves v. United Parcel Serv., 792 So.2d 688 (2001)(Florida District Court of Appeal)(concurrent employment with USPS fell within broad definition of "employment" as "any service performed by an employee for the person employing him" and was not one of specifically enumerated exclusions within workers' compensation act; thus, claimant's wages earned at the USPS could be added to his wages earned at private employer [UPS] where he was injured, to calculate his average weekly wage).

Accordingly, we conclude the judge properly denied the employee's claim to include his wages earned at the USPS in the calculation of his average weekly wage. The decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William C. Harpin
Administrative Law Judge

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