COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 015006-05

Cecilia Aufiero	Employee
City of Brockton School Department	Employer
City of Brockton	Self-Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Daniel F. Clifford, Jr., Esq., for the employee
Gregory F. Galvin, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying and dismissing her claim for § 34 and medical benefits. We reverse the decision as contrary to law, and award the benefits claimed.

On March 23, 2005, Cecilia Aufiero, a substitute cafeteria worker for the City of Brockton School Department, sustained a low back injury at work. She was totally incapacitated from that date until June 29, 2005. (Dec. 3-4.) The judge denied her claim at conference, and the employee appealed. The primaryissue at the hearing was whether the employee was entitled to workers' compensation coverage. G. L. c. 152, § 69.[1] Relying on a provision in a collective bargaining

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[1] The first, and main, paragraph of G. L. c. 152, § 69, provides, in pertinent part:

> The commonwealth and any county, city, town or district having the power of taxation which has accepted chapter eight hundred and seven of the acts of nineteen hundred and thirteen . . . shall pay to laborers, workmen, mechanics, and nurses, employed by it who receive injuries arising out of and in the course of their employment, or, in case of death resulting from such injury, to the persons entitled thereto, the compensation provided by this chapter. . . .
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> The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive . . . shall include other employees except members of a police or fire force, regardless of the nature of their work, of the commonwealth or of any such county, city,

agreement, (Ex. 3), and focusing his attention on the second paragraph of § 69,[2] the judge found the self-insurer provided coverage to some school department employees, but not to substitute cafeteria workers. (Dec. 4-5.) Accordingly, he denied the claim.

The employee argues, *inter alia*, that the judge improperly relied on the collective bargaining agreement to deny her claim. Based on our review of § 69, the applicable case law and the record, we agree.

We begin our analysis with an overview of the statute's history. In 1913, the legislature authorized, but did not obligate, the Commonwealth and its political subdivisions to voluntarily participate in our workers' compensation system insofar as they desired to extend coverage to their "laborers, workmen and mechanics." St. 1913, c. 807. As summarized by the Supreme Judicial Court in Tracy v. Cambridge Junior College, 364 Mass. 367, 374 (1973):

> Successive amendments of c. 152, Section 69, have redefined the phrase "laborers, workmen and mechanics" and *broadened the option of governmental units to include more and more of their personnel within these "limited" categories*. Statute 1927, c. 309,

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> town, district, county tuberculosis hospital district, or regional school district to such extent as the commonwealth or such county, city, town, district, county tuberculosis hospital district or regional school district, acting respectively through the governor and council, county commissioners, city council, the qualified voters in a town or district meeting, the trustees of such county tuberculosis hospital district, or the regional district school committee, shall determine, as evidenced by a writing filed with the department. The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive, shall, if the city council or the town meeting so votes, also include such elected or appointed officers of the city or town, except the mayor, city councillors, selectmen or members of the police or fire force, as the mayor or board of selectmen may, from time to time, designate, as evidenced by a writing filed with the division.

[2] The second paragraph of Gen. Laws c. 152, § 69, added by St. 1951, c. 610, § 2, provides, in pertinent part:

> Any county, city, town or district which accepts this section may provide for payment of compensation of certain or all of its employees by insurance with an insurer, subject, however, to the provisions and limitations of this section.

> Section 12, specified that "[t]he terms . . . shall include foremen, subforemen and inspectors . . .
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> to such extent as the . . . [governmental unit] shall determine. . . ." Statute 1936, c. 403, provided that the terms ". . . shall include other employees except members of a police or fire force, *regardless of the nature of their work*. . . to such extent as the . . . [governmental unit] shall determine. . . ." This legislated option to consider any employee a laborer, workman or mechanic was limited by St. 1939, c. 468, which decreed that "all employees of any such city or town, except members of a police or fire force, who are engaged in work being done under a contract with the state department of public works [3]. . ." were to be covered regardless of the expressed desires of the governmental unit involved. Having already broadened the terms to include all employees, the Legislature, by St. 1966, c. 401, decreed that "elected or appointed officers . . . except the mayor, city councillors, selectmen or members of the police or fire force" may also be designated laborers, workmen and mechanics.

(First emphasis added; second emphasis in original.) The legislature subsequently added "nurses" to the phrase "laborers, workmen and mechanics." St.1971, c. 1059. Thus, all of the statute's amendments empower governmental units to extend workers' compensation coverage to additional segments of their workforce. Only members of a police or fire force, mayors, city councilors and selectmen remain statutorily ineligible for coverage under the act. See footnote 1, supra.

In 1966, having already adopted the act for its laborers, workmen and mechanics,[4] the self-insurer, by vote of the city council, elected to extend workers' compensation coverage to "clerks, department heads, and members of boards and commissions of the City of Brockton, except employees of the School Department." See Ex. 7. The self-insurer maintains that "[t]he [city]

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[3] The phrase "department of public works" was replaced by "department of highways" by Stat. 1991, c. 552, § 99.

[4] At oral argument, counsel for the self-insurer conceded the city had long ago accepted the provisions of § 69 to effect workers' compensation coverage for its "laborers, workmen and mechanics." See Donnelly's Case, 304 Mass. 514 (1939)(evincing coverage for City of Brockton laborer who was killed working on a city cemetery construction project); Paccia's Case, 4 Mass. App. Ct. 830 (1976); Stat. 1914, c. 142.

Council, therefore, *excluded all employees of the School Department* when it accepted the provisions of c. 152." (Self-ins. br. 2; emphasis added.) The city did no such thing. Clearly, the school department "exception" refers only to those categories of employees, such as department heads, identified in the order. Moreover, by its terms, the 1966 city council vote did not annul the coverage previously extended to the laborers, workmen and mechanics of the school department.[5] Instead, it responded to the legislature's then most recent invitation to bring additional city workers within the act's ambit.

The self-insurer's second argument, also relied upon by the judge, concerns the second paragraph of § 69. See footnote 2, supra. The judge found this provision "permits a municipality to determine *which particular employees* shall be entitled to the *protections* of the workers['] compensation act." (Dec. 4; emphasis added.) He then turned his attention to the language in a collective bargaining agreement,[6] and denied the claim. (Dec. 3-5.)

We disagree with the judge's interpretation of the statute. This 1951[7] amendment was enacted in response to the holding in Stoltz's Case, 325 Mass. 692 (1950). In Stoltz, the City of Westfield

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[5] It remains an open question whether a city, or any governmental unit, may revoke its acceptance of the act. The act does not expressly sanction such a course. Assuming, *arguendo*, that a city could choose to invalidate its decision to elect coverage, we believe that intention would have to be clearly expressed in a vote by the city council. See § 69 (city council vote required to adopt the provisions of the act). That did not occur here.

[6] The self-insurer persuaded the judge that after the 1966 city council vote, the city, via collective bargaining, extended coverage to full time cafeteria workers, but not to part-time cafeteria workers like Ms. Aufiero. We see nothing in the statute, or case law, that permits collective bargaining agreements to restrict or invalidate the workers' compensation coverage triggered by the city's prior acceptance of the act by vote as authorized by § 69. See footnote 1, supra. Indeed, G. L. c. 152, § 10C(1)(a), specifically provides that collective bargaining agreements can provide for "benefits supplemental to those provided" under the act. The act does not permit contractual agreements to limit, restrict or invalidate the benefits otherwise provided by law. See Cox's Case, 225 Mass 220, 225 (1916)("the rights of the employee cannot be narrowed by contract between the employer and the insurer" citing Gould's Case, 215 Mass. 480, 483 (1913).

[7] See Stat. 1951, c. 610, § 2.

had purchased at least two workers' compensation insurance policies to cover employees in different city departments; the city was not a self-insurer. Id. A dispute arose concerning which of two insurers, both on the risk on the employee's injury date, was responsible for the *payment* of his compensation. The court accepted and quoted the following view taken by this board:

> [T]he city could not so insure its laborers, workmen, and mechanics in some of its departments and not such employees in others. If the city elected to so insure, it then assumed the position of any other employer subject to the act; i.e., *if it insured at all, it was required to insure the whole of its obligations to the extent of its acceptance of the act* (Cox's Case, 225 Mass. 220). . . . But it is our considered opinion that *if the city insured at all with an insurance company, it was required to do so under a single policy of insurance* contracted for through its legislative and executive authority. . . . In the foregoing view, it is our opinion further that as matter of law any one of the multiple policies of workmen's compensation covering laborers, workmen, and mechanics of the city at the time of the employee's injury and constituting duplicate or manifold coverage might be selected and held liable to pay compensation on the instant claim (Cox's Case, 225 Mass. 220). In particular, either of the two insurers named in this record could be selected to thus pay, since they were both parties to this proceeding.

Id. at 695-696; (emphasis added.) The second paragraph of § 69, therefore, does not modify the first; instead, it authorizes "[a]ny county, city, town or district" accepting § 69 to "provide for *payment* of compensation of *certain or all of its employees by insurance with an insurer*, subject, however, to the *provisions and limitations of this section*." (Emphasis added.) Thus, the first paragraph describes which employees a municipality may cover, and the mechanism by which it may extend such coverage. The second paragraph pertains to how a municipality may choose to provide for payments due those employees covered under the first paragraph. For example, a city may insure all, or a portion, of its "c. 152" employees with an insurer, as opposed to self-insuring for all, or part, of its workforce. The judge's interpretation of the second paragraph of § 69 effectively eviscerates the procedures set forth in the statute's first paragraph. Accordingly, we reject his interpretation. "None of the words of a statue is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision capable of effectuating the presumed intention of the Legislature." Globe Newspaper Co. v. Commissioner of Education, 439 Mass. 124, 129 (2003), quoting Bolster v. Commissioner of Corps. & Taxation, 319 Mass. 81, 84-85 (1946).

The only issue remaining, therefore, is whether the employee, a substitute cafeteria worker, is a "laborer" or "work[er]" as contemplated by the act. She is. In Brewer's Case, 335 Mass. 601 (1957), the court considered the same question with respect to a student nurse[8] whose duties "included the following: giving baths to patients, cleaning utensils and other equipment, cleaning medicine closets and utility rooms, washing beds, preparing food , *serving meals,* [9]and the like." Id. at 602; (emphasis added.) The court held "that the claimant prior to her graduation was a 'laborer or a workman' within the intendment of Section 1(4). The work she did at the hospital during her eight hour shift was largely 'menial and manual' and of the sort that would be done by a laborer or workman." Id. at 605. There can be no argument that the work performed by Ms. Aufiero as a substitute cafeteria worker differs in any material respect from the work performed by the employee in Brewer. See Tracy, supra at 375-376; Berg v. City of Newton, 13 Mass. Workers' Comp. Rep. 68, 70 (1999)("[i]n sum, those governmental employees performing menial or physical tasks" are covered under the c. 152 definition of "laborers").

The decision is reversed. We award the employee § 34 benefits at the rate of $160.00, based upon the stipulated average weekly wage of $160.00,[10] from March 25, 2005, through June 29, 2005,[11] and medical benefits under §§ 13 and 30. (Dec. 4.) The self-insurer shall also pay employee's counsel a § 13A(5) hearing fee in the amount of $4,925.03.

So ordered.

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[8] The case predated the 1971 inclusion of nurses into the § 69 categories of covered employees.

[9] Dr. Jay Portnow's July 26, 2005 report indicates the employee was "pushing a cart to the commissary when she slipped on some turkey salad on the floor and landed on her buttocks." (Ex. 2.)

[10] Because the employee's average weekly wage is less than the minimum compensation rate in effect on her injury date, the employee's compensation rate equals her average weekly wage. See G. L. c. 152, §§ 1(11) and 34.

[11] The judge adopted Dr. Portnow's opinion that the employee was totally disabled for this period of time, and that her injury was work-related. (Dec. 4.) The self-insurer did not appeal the decision, otherwise takes no exception to this finding in its brief, and at hearing offered no medical evidence to rebut the opinion of Dr. Portnow. Accordingly, there is no need to recommit the case on these issues.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **September 5, 2008**