COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 011528-91 050567-02**

Charlotte V. Connor	Employee
Automatic Rolls of New England	Employer
Liberty Mutual Insurance Co.	Insurer
Royal Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Carroll)

APPEARANCES
Christine G. Narcisse, Esq., for the employee
Nicole M. Edmonds, Esq., for Liberty Mutual Insurance Co. at hearing
Thomas E. Fleischer, Esq., for Liberty Mutual Insurance Co. on appeal
William R. Trainor, Esq., for Royal Insurance Co.

COSTIGAN, J. Liberty Mutual Insurance Company (Liberty Mutual) and the employee cross-appeal from an administrative judge's hearing decision in this successive insurer case. Liberty Mutual argues that the judge erred in finding the employee's total incapacity from and after November 2002 remained causally related to a 1991 left knee injury for which it had accepted liability. It maintains that benefits should have been awarded against the successive insurer, Royal Insurance Company (Royal). The employee argues the judge erred as a matter of law in applying, *sua sponte*, the provisions of G. L. c. 152, § 35B,[1] to the weekly incapacity benefits Liberty Mutual was ordered to pay.

We summarize the pertinent facts as stipulated by the parties at hearing, and/or as found by the judge. Charlotte Connor sustained an industrial injury to

[1] General Laws c. 152, § 35B, provides, in pertinent part:

> 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. . . .

her left knee on March 15, 1991, at which time her average weekly wage was $598.72, and Liberty Mutual was the insurer on the risk. In May 1991 she underwent surgery for a lateral meniscal tear and following a program of physical therapy and home exercise, she returned to work in November 1991.[2] Despite persistent pain, buckling, and limitations for standing and kneeling, the employee persevered and worked with left knee pain. Another left knee surgery was performed in 1993, followed again by physical therapy and home exercise. The employee returned to work in approximately August 1993 with ever-present left knee pain and limited movement. She continued to work and to treat, with the prospect of a total knee replacement being discussed with her physicians beginning in 1994. (Dec. 5.) Due to financial constraints, the employee kept working despite her progressively worsening knee. (Dec. 6.)

On November 19, 2002, the employee tripped while mopping a floor at work. She went out from work on that date, and has not worked since. (Dec. 9.) The employee filed claims against both Liberty Mutual, for the accepted 1991 left knee injury, and Royal, for a November 19, 2002 alleged left knee injury. The parties stipulated that the employee's 1991 average weekly wage was $598.72; that the employee's 2002 average weekly wage was $653.54; and that Royal insured the employer from December 1, 2001 to December 1, 2003. Liberty Mutual denied further liability, contending the incident on November 19, 2002 constituted a new personal injury under the act for which Royal was liable. Royal

[2] Although the parties stipulated that Liberty Mutual accepted liability for the 1991 left knee injury, we find nothing in the record evidence establishing that Liberty Mutual paid the employee workers' compensation benefits for that initial nine-month period of lost time. Thus, we cannot determine whether the workers' compensation benefits paid by Liberty Mutual in April 1993, when the employee left work again and underwent further surgery, (Tr. 15), were subject to adjustment under § 35B. See footnote 1, supra. In any event, the employee testified that she was paid workers' compensation for the four months or so she was out from work after her 1993 surgery, (Tr. 30-31), and that after returning to work, she continued to work for another nine years, until November 2002. (Tr. 32-36.) That evidence establishes that the factual predicates of § 35B were met.

denied that the employee had sustained a new personal injury for which it was liable. (Dec. 3-4.)[3]

The judge found that the November 19, 2002 incident was merely coincidental to and contemporaneous with the employee's inability to continue working due to debilitating knee pain resulting from her work-related progressive degenerative knee condition. (Dec. 7, 10.)

> Her left knee was in contact with the floor [but] . . . that contact with the floor did not produce any significant increase in knee pain nor was there increased swelling on the knee. The pre-existing knee pain was no more frequent or severe and remained at the same level as before.

(Dec. 6.) The judge therefore assigned liability for the employee's incapacity, commencing on November 20, 2002, to Liberty Mutual, and dismissed the employee's claim against Royal. (Dec. 12-13.) The judge awarded § 34 total incapacity benefits at the rate of 66 2/3%, the rate applicable to the March 15, 1991 date of injury. However, the judge used the employee's 2002 average weekly wage of $653.54 to compute the employee's weekly benefit. (Dec. 13.)

Addressing the issues raised on appeal, we see no merit in Liberty Mutual's successive insurer argument. The judge's decision reflects that he carefully analyzed both the employee's testimony and the expert medical opinions in determining that the employee had not sustained a new work injury, and therefore that liability was not transferred from Liberty Mutual to Royal. "It is the duty of an administrative judge to address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could properly be found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We are satisfied that the judge's findings of fact pertinent to the successive insurer issue were

[3] All parties stipulated that because Royal had paid the employee § 34 total incapacity benefits for an unrelated but work-related shoulder injury from January 23, 2003 through May 22, 2003, the employee would not be entitled to receive any indemnity benefits for her left knee condition for that period. (Dec. 3, 4.)

warranted by the evidence he credited and adopted, and that he correctly applied the relevant rules of law. "[W]here [as here] the pain or complaints following a work injury have been continuous, subsequent incapacity will usually be deemed a recurrence of the original injury, chargeable to the first insurer, despite subsequent employment predating incapacity." Burke v. Burke & Roe Enterprises, 15 Mass. Workers' Comp. Rep. 332, 337 (2001), quoting Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999). Accordingly, we affirm that aspect of the judge's decision holding Liberty Mutual liable for payment of benefits to the employee.

We turn to the employee's appeal. She is content with the judge's award of § 34 benefits at the 66 2/3% rate applicable to her March 15, 1991 date of injury. She argues, however, that the judge should have applied that rate to her 1991 average weekly wage, rather than her 2002 average weekly wage.[4] Liberty Mutual argues that the judge should have used the 60% rate in effect on November 19, 2002, the date on which, it argues, the employee sustained either a new compensable personal injury, or a "subsequent injury" within the meaning of § 35B.

We address the employee's argument that because neither party raised § 35B, the judge was prohibited from applying it to the award of benefits. We consider the Appeals Court's decision in Taylor's Case, 44 Mass. App. Ct. 495 (1998), to stand for exactly the opposite of that proposition. In Taylor, the

[4] The employee's 1991 pre-injury average weekly wage was $598.72. Based on her March 15, 1991 date of injury, the applicable statute provided that her § 34 benefit be calculated as 66 2/3% of that average weekly wage, or $399.15. Her 2002 average weekly wage was $653.54 which, at the 60% formula then in effect, yielded a § 34 benefit of $392.12, $7.03 less than her original benefit. There is another financial downside for the employee. Application of § 35B to her incapacity benefits from and after November 19, 2002 would reduce her statutory maximum entitlements from 260 weeks to 156 weeks under § 34, and from 600 weeks to 260 weeks under § 35. See Bernardo's Case, 24 Mass. App. Ct. 48 (1987)(under § 35B, maximum benefits are those in effect on date of "subsequent injury," not original injury).

Appeals Court held that "[t]he [reviewing] board correctly construed the operative effect of § 35B," when it affirmed an administrative judge's determination that § 35B *required* the application of rates in effect in at the time of the employee's "subsequent injury" in December 1993. Id. at 498. The board had gone further, however, holding that the employee should have the option of deciding whether § 35B should be applied to his claim, depending on whether the prevailing rates were more or less favorable to him than his original benefit rates. The board gave the employee leave to reopen his case in order to retract his § 35B claim. Taylor v. Taylor Ocean Indus., 10 Mass. Workers' Comp. Rep. 588 (1996).

The Appeals Court reversed the reviewing board, holding that the applicability of § 35B was *not* left to the employee's election; it was not optional. Citing to McLeod's Case, 389 Mass. 431 (1983), and the mandatory nature of § 51A, the Appeals Court held:

> 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. [Citations omitted.] . . . Section 35B looks to the date upon which a subsequent injury occurs for purposes of determining the applicable compensation rates. See Bernardo's Case, 24 Mass. App. Ct. at 52. *There is no indication that the Legislature intended § 35B to be elective.* In McLeod's Case, [supra at 435], the Supreme Judicial Court concluded that the provisions of § 51A[5] were mandatory, using an analysis that is instructive here. The court stated that "[t]he mandatory nature of G. L. c. 152, § 51A, is demonstrated not only by the language that the Legislature employed, but also by the language it did not employ. The statute contains no guidelines for the exercise of discretion. In the absence of a clear expression of legislative intent, we think it unlikely that the Legislature intended to vest in the board unlimited discretion to choose between rates of compensation."

---

[5] General Laws c. 152, § 51A, as inserted by St. 1969, c. 833, § 1, provides:

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

Taylor's Case, supra at 499-500. (Emphasis added.) In McLeod, the Supreme Judicial Court held that even though the claimant widow had not raised § 51A before the industrial accident board, the statute applied and *required* the award of widow's benefits to be computed at the rate provided on the date of the final decision. The fact that application of § 51A increased the rate of § 31 benefits in McLeod, whereas application of § 35B to the employee's award here would decrease her overall entitlement, see footnote 5, supra, is irrelevant.

The Appeals Court's ruling in Taylor is unequivocal: "The board's decision that § 35B is elective was based upon an error of law." Id. at 501. It would likewise be an error of law to fashion the alternative "election" the employee urges -- avoid the application of § 35B by "electing" not to raise it. Moreover, the Appeals Court did not hold, or even intimate, that the insurer nevertheless must elect § 35B, that is, it must invoke the statute as an affirmative defense.[6] The employee's argument -- that § 35B, even after Taylor, is elective in nature, in that the employee may elect not to raise it and the judge may not apply its provisions unless the insurer raises them as an affirmative defense -- is based upon error of law.

In most cases it will be apparent at least by the time of the § 10A conference whether the employee a) had been receiving benefits under c. 152; b) returned to work for a period of not less than two months; and c) has a subsequent period of claimed incapacity. Once these statutory predicates are met, the administrative judge must perform a § 35B analysis -- he or she must consider the medical evidence and determine whether the employee has sustained a "subsequent injury," as defined by our case law. See Don Francisco's Case, 14 Mass. App. Ct. 456 (1982); Calheta's Case, 14 Mass. App. Ct. 464 (1982); and

[6] In Bauman v. Faulkner Hosp., 8 Mass. Workers' Comp. Rep. 283, 284 (1994), the reviewing board held that because § 35B was not "claimed" at hearing, it could not be raised for the first time on appeal. As Bauman was decided four years before the Appeals Court decided Taylor, we do not follow it.

Czarniak's Case, 14 Mass. App. Ct. 467 (1982). If the judge finds such a "subsequent injury," he or she must apply § 35B to the benefits awarded.[7]

Here, the judge's decision contains conflicting subsidiary findings of fact that do not permit a determination on appeal of whether § 35B applies to the employee's claim as a matter of law. On the one hand, the judge finds that the employee's "left knee condition has progressively worsened" and that she "kept working despite her continuing worsening knee condition" due to critical financial concerns. The judge also credited the employee's testimony "that the left knee pain has progressively worsened and it is often elevated and that the knee is prone to 'giving out'. . . ." (Dec. 6.) He also adopted the impartial medical examiner's opinion that "the March 15, 1991 meniscus tear injury is a major aggravating factor in [the employee's] deterioration from the accelerating arthritis." (Dec. 8.) On the other hand, in determining that the employee did not sustain a new compensable injury on November 19, 2002 for which Royal, the successive insurer, should be held liable, the judge found "that the painful ongoing symptomology of [the employee's] left knee was not aggravated by the incident of November 19, 2002 and that her left knee condition was no different thereafter than it was immediately before." (Dec. 7.) He concluded:

> The successive insurer doctrine does not have any legs here and I do not find an aggravation or acceleration of the employee's pre-existing long standing condition – there was no new personal injury *and there was no change in the underlying medical condition arising after March 15, 1991*

(Dec. 11; emphasis added.)

Therefore, we recommit this case to the administrative judge for further

[7] In this case, if the administrative judge applied § 35B to the award of benefits, he did not do so consistently. He used the employee's 2002 average weekly wage which, given his finding of no new compensable injury occurring in 2002 during Royal's coverage, would be proper only if § 35B were applicable. However, the judge also calculated the employee's § 34 benefit using the 66 2/3% formula, which would not be available if he had applied § 35B. Not only is § 35B not elective at all, it certainly may not be applied piecemeal to achieve the optimal result for the employee

subsidiary findings of fact clarifying whether the employee had a "subsequent injury," that is, a worsening of her condition, as defined in Don Francisco's Case, supra, Calheta's Case, supra and Czarniak's Case, supra, so as to render § 35B applicable to her claim as a matter of law.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

Filed: **June 21, 2006**