

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 082643-89**

Darryl Conte  
P.A.N. Construction Co.  
Aetna Casualty & Surety

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges McCarthy, Wilson and Smith)

**APPEARANCES**

Joseph M. Burke, Esq., for the employee  
Alice A. Kokodis, Esq., for the insurer

**MCCARTHY, J.** The employee appeals from a decision in which an administrative judge denied his claim for application of § 51A benefits on an award of § 34 weekly incapacity benefits.<sup>1</sup> We agree with the judge that the insurer's payment of compensation for total incapacity under the workers' compensation law of New Jersey, where the injury took place, removed this claim from the scope of § 51A's coverage. We affirm the decision.

Darryl Conte sustained multiple injuries on August 15, 1989, when he fell 100 feet while painting a water tower in Rahway, New Jersey, in the course of his employment. He survived the fall but suffered grievous injuries. The insurer accepted liability, and began to pay weekly temporary total incapacity benefits under the New Jersey workers' compensation statute. On May 1, 1990, the employee filed a claim at the Massachusetts Department of Industrial Accidents for benefits under G.L. c. 152, on the basis that the

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<sup>1</sup> General Laws c. 152, § 51A reads:

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

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contract of hire was executed in Massachusetts. The claim was denied in a hearing decision filed on August 28, 1992. (Dec. 2.) The employee appealed and on August 25, 1995, the reviewing board reversed that decision, and ordered the insurer to pay weekly § 34 benefits, allowing the insurer to take credit for the payments made pursuant to the New Jersey statute. (Dec. 2-3.) The reviewing board reasoned that the employment contract was made in Hanover, Massachusetts, as a matter of law, because the employee was in Hanover when he accepted the offer of the New Jersey job from the employer's agent. This gave Massachusetts concurrent jurisdiction over the claim. Conte v. P.A.N. Construction Co., 9 Mass. Workers' Comp. Rep. 497, 499 (1995). The reviewing board decision did not address the application of § 51A.

The present claim for § 51A benefits was tried on the following stipulated facts: The employee's claim for § 34 benefits was filed on May 1, 1990. The insurer denied the claim. At the time the employee filed that claim for benefits, the insurer was paying the employee total incapacity benefits under the New Jersey workers' compensation law at a rate of \$324.91 per week, based on an average weekly wage of \$816.00. The reviewing board ordered that § 34 benefits be paid on August 25, 1995, but did not refer to a rate of compensation payment. Pursuant to the decision, Aetna paid compensation at the weekly rate of \$444.20, retroactive to the date of injury, based on an \$880.00 average weekly wage. (Dec. 3-4.)

The judge denied the employee's claim for § 51A's upward adjustment of his compensation rate from the \$444.20 maximum compensation rate available on the date of injury in 1989 to the \$585.66 maximum compensation rate that would obtain as of the date of the final decision, in 1995, awarding benefits. (Dec. 8.) The judge reasoned, *inter alia*, that payments of compensation under the New Jersey statute, during the period in which the insurer contested the claim for additional compensation in Massachusetts, rendered § 51A inapplicable to the award of that additional compensation. (Dec. 5-6.) We agree, and affirm the decision.

In McLeod's Case, 389 Mass. 431 (1983), the court interpreted § 51A: "G.L. c. 152, § 51A reflects a legislative intent to avoid obsolescence of compensation rates by requiring benefits to be computed in accordance with the statutory rate in effect at the time of the final decision, *when no payments have been made during the period the claim has been contested.*" Id. at 435, emphasis added. The Appeals Court interpreted the above language in McLeod to mean that a claimant receiving ongoing payments of weekly benefits during the period of a disputed claim for benefits under an entirely different section (specific benefits pursuant to § 36A) is not entitled to § 51A benefits. Madariaga's Case, 19 Mass. App. Ct. 477, 482 (1985). The court reasoned:

We recognize that the present insurer had disputed its liability to pay the claimant specific benefits under §§ 36 and 36A, from the time such benefits were sought by the claimant although it had paid (and continued to pay) weekly compensation probably important to the claimant. The inclusion in § 152, § 51A, of the words, "In any claim in which no compensation has been paid prior to the final decision on such claim," may have been in part a legislative effort to encourage insurers to make a prompt determination and payment of undisputed compensation to claimants likely to be facing fiscal problems. We perceive no legislative intention in the words from § 51A just quoted to make any separation of 'compensation' based upon the section of c. 152 under which particular compensation was paid.

Id. at 482-483 n. 7. Contrast Mugford's Case, 45 Mass. App. Ct. 928 (1998)(rescript) (affirming award of § 51A benefits in § 34A claim although § 34 benefits paid until exhausted while claim was being contested).

We consider that the insurer's "prompt determination and payment of undisputed compensation" due to the employee under the New Jersey workers' compensation statute brings the present case within the court's treatment of this issue in Madariaga, supra. Although the payment of compensation was pursuant to a different state's statute, it was for the same class of weekly temporary total benefits for the same injury, and the insurer was credited with the full amount of the New Jersey compensation paid. Conte v. P.A.N. Construction Co., 9 Mass. Workers' Comp. Rep. 497, 500 (1995). Cf. Gordon's Case, 26 Mass. App. Ct. 924, 926 (1988)(rescript)(payments under private contractual benefit plans do not constitute "compensation under § 51A). The insurer provided for the employee,

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albeit under a workers' compensation system that is not quite so beneficent as our own. Under the circumstances, we think the judge was correct in deciding that the application of § 51A would unjustifiably penalize the insurer. (Dec. 6.)

The decision is affirmed.

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William A. McCarthy  
Administrative Law Judge

Filed: April 28, 1999

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Sara Holmes Wilson  
Administrative Law Judge

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Suzanne E.K. Smith  
Administrative Law Judge