**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NOS. 028934-06 037009-10**

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| Haris Duarte | Employee |
| Trelleborg Sealing Solutions | Employer |
| Travelers Insurance Company | Insurer |
| Century Mill Stables | Employer |
| Workers' Compensation Trust Fund | Trust Fund |

**REVIEWING BOARD DECISION**
(Judges Horan, Koziol and Levine)

The case was heard by Administrative Judge Maher.

**APPEARANCES**
J. Channing Migner, Esq., for the employee at hearing
John A. Smillie, Esq., for the employee on appeal
Donna J. Gully-Brown, Esq., for Travelers Insurance Company
Joseph F. Hardcastle, Esq., for Century Mill Stables
Pedro Benitez-Perales, Esq., for the Workers' Compensation Trust Fund

**HORAN, J.** The employee appeals from a decision awarding him a closed period of § 34 benefits and ongoing § 35 benefits.[1] We affirm.

The employee worked as a materials handler for Trelleborg Sealing Solutions, (Trelleborg). (Dec. 6.) On September 20, 2006, he injured his left arm at work, and "felt pain in his left arm up to the left side of his neck." (Dec. 5-6.) His average weekly wage at that time was $396. (Dec. 5.) Travelers Insurance Company, (Travelers), accepted liability for the injury and paid the employee compensation for a closed period. (Dec. 6; Tr. 9-10.)

[1] Appeals filed by Travelers Insurance Company and the Workers' Compensation Trust Fund were subsequently withdrawn. The employee then settled his claim against the insurer. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file). At the lump sum conference, the parties informed the presiding judge that Travelers had previously paid the employee all the benefits ordered in the hearing decision under review.

The employee worked for several employers between 2006 and 2010, and although "there was no other event/injury to [his] left upper extremity or neck," he experienced "regular pain" in those areas. (Dec. 7.) In October, 2010, he began working as a general laborer for Century Mill Stables (Century). One month later, he sought medical treatment for his left arm. Id. Finally, in early December, after "working in the barn where he shoveled manure and cleaned approximately ten stalls," his pain increased. (Dec. 7-8.) He did not return "to work the day after Christmas . . . and has not worked since due to pain in his shoulder and neck." (Dec. 7.) His average weekly wage at Century was $265.72. (Dec. 14, 17.)

In response to the employee's claim for benefits, Travelers moved to join Century, alleging the employee's work there resulted in "an aggravation or [a] new injury. . . ." (Dec. 3.) The motion resulted in the joinder of Century and the Workers' Compensation Trust Fund (WCTF), as Century was uninsured in December, 2010. Id. At hearing, the WCTF raised, inter alia, the defenses of liability, disability and causal relationship. The applicability of § 35B was also at issue.[2] (Dec. 5.)

On February 2, 2012, the employee underwent a § 11A examination by Dr. Charles Kenny. Dr. Kenny's medical report and deposition testimony were admitted into evidence. (Dec. 2; Ex. 1.) On medical complexity grounds, the judge allowed the parties to submit additional medical evidence. (Dec. 2; Ex. 11-12.)

[2] 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. . . .

Crediting the employee's history and complaints of pain, and adopting, in part, the medical opinions of Dr. Kenny, Dr. Amy Abbot,[3] and Dr. Brian McKeon, the judge found:

> [T]hat during the months of October, November and December of 2010, heavy work while working as an employee for Century . . . exacerbated [the employee's] shoulder and neck pain and caused him to be out of work for a period until the increased symptoms resolved and returned to baseline.

(Dec. 11.) The judge also found that,

> from December 26, 2010 when [the employee] left work at Century . . . due to the overwhelming pain . . . he was temporarily and totally unable to perform any remunerative work. However, based on the physical limitations discussed by Dr. Kenny in his deposition testimony I find that the employee . . . is capable of part time employment. . . . I assign an earning capacity of $64 based on eight dollars per hour for approximately eight hours per week from the date of Dr. Kenny's examination.

(Dec. 12.) The judge concluded the employee was entitled to § 34 benefits "from December 26, 2010 to February, 4, 2012," and ongoing § 35 benefits based on an assigned $64 earning capacity as of February 5, 2012.[4] (Dec. 17.) The judge then addressed the issues of causal relationship and § 35B.

Adopting Dr. Kenny's opinion that the employee's work at Century caused "a temporary exacerbation and worsening of his symptoms," (Dec. 12-13), and Dr. Abbot's opinion that the employee's condition had improved as of "her evaluation on April 21, 2011," (Dec. 13), the judge ordered the WCTF to pay the employee § 34 benefits from December 26, 2010 to April 21, 2011, and ordered Travelers to pay the

[3] In the decision, and in the employee's brief, Dr. Elizabeth Dobles is identified as the author of the April 21, 2011 medical report relied upon by the judge. In fact, Dr. Abbot was the examining physician that day. Dr. Dobles also treated the employee in 2011, which may have led to the confusion. We treat this as a scrivener's error.

[4] We note Dr. Kenny examined the employee on February 2, 2012, not February 5, 2012; however, this slight error benefits the employee and is not material to his appeal.

employee § 34 benefits from April 21, 2011 to February 5, 2012, and § 35 benefits from that date forward based on the assigned $64 weekly earning capacity. (Dec. 17.)

In determining the § 35 and § 34 compensation rates, the judge utilized § 35B to set the employee's average weekly wage at $265.72, the wage on the date of his "subsequent injury" in December, 2010. (Dec. 14, 17.) See footnote 2, supra.

The employee raises two issues on appeal. We address them in turn.

First, the employee maintains the judge misapplied § 35B by basing the compensation rate on the employee's average weekly wage at Century, which was lower than his average weekly wage at Trelleborg. The employee argues that because Travelers, the insurer for Trelleborg on his original 2006 injury date, was ordered to pay compensation ongoing from April 21, 2011, his 2006 average weekly wage of $396 should have been used to calculate his § 35 and § 34 benefits on and after April 21, 2011.

We do not reach this issue because the employee's decision to settle his case with Travelers, without reservation of rights against it,[5] leaves him without a remedy. Williams v. Material Handling Installations, 20 Mass. Workers' Comp. Rep. 325, 326 (2006)("it is incumbent upon the parties to articulate what is *not* intended to be covered by a lump sum settlement"); Sylvia v. Burger King Corp., 6 Mass. Workers' Comp. Rep. 272 (1992)(failure to preserve § 36 claim in lump sum settlement agreement barred claim for same); See Stillman v. General Dynamics, 23 Mass. Workers' Comp. Rep. 121, 125 (2009)(settlement by insurer with employee "relinquished all other rights and recourses it could have pursued" against him).

Lastly, the employee argues the judge erred when he concluded "that the aggravation of the employee's injuries . . . sustained at Century . . . had resolved as of April 21, 2011." (Employee br. 11.) Dr. Kenny did not opine, and the judge did not find, that the employee's condition was aggravated by his employment at Century. Dr. Kenny testified "there's evidence against [an aggravation], because on the

[5] See footnote 1, supra.

subsequent physical examination findings that I looked at . . . I don't see any evidence of significant new pathology at that point."[6] (Ex. 1, Dep. 37.) Rather, the doctor testified, and the judge found, that the employee's work at Century resulted in an exacerbation of his symptoms; his prior work-related condition was not permanently altered. (Dec. 9; Ex. 1, Dep. 24-37.) In fact, Dr. Kenny described the employee's work at Century as causing only a "temporary worsening of symptoms," and that at the time of the doctor's February 2, 2012 examination, the employee "wasn't suffering from an exacerbation." (Ex. 1, Dep. 25, 37.) Although Dr. Kenny admitted he did not "know how long it took for that exacerbation to resolve," he testified that, "[t]hey typically take six weeks or so." (Ex. 1, Dep. 37.)

Once the judge adopted Dr. Kenny's opinion on this issue, he was faced with determining the date that the work-related exacerbation of the employee's condition subsided; in other words, when did the WCTF's obligation to pay the employee's compensation end? With a dearth of evidence addressing this issue, the judge adopted the opinion of Dr. Abbot, who found some improvement in the employee's condition as of April 21, 2011 ─ about ten weeks beyond Dr. Kenny's estimate of a six week typical recovery period. (Dec. 10.)

As with the employee's § 35B issue, we need not address his argument that the WCTF's obligation to pay should have ceased, not on April 21, 2011, but on February 2, 2012, when Dr. Kenny opined the employee was no longer "suffering from an exacerbation." (Ex. 1, Dep. 37.) This is because the employee has already been paid benefits by Travelers[7] for the period between April, 2011 and February, 2012, at the same rate that he would have been entitled to receive from the WCTF.[8] Therefore,

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[6] The employee does not contest that he experienced a temporary deterioration in his work-related condition. Cf. Czarniak's Case, 14 Mass. App. Ct. 467 (1982).

[7] See footnote 1, supra.

[8] Taylor's Case, 44 Mass. App. Ct. 495, 499-500 (1998)("Section 35B looks to the date upon which a subsequent injury occurs for purposes of determining the applicable compensation rates."); See Louis's Case, 424 Mass. 136, 142-143 (1997)(where partial benefits from prior

ordering the WCTF to pay the employee for that period would violate the law against double recovery. Mizrahi's Case, 320 Mass. 733, 736-737 (1947); Comeau v. Enterprise Elecs., Inc., 26 Mass. Workers' Comp. Rep. 229, 241 (2012).

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **August 4, 2014**

injury are exhausted, "if an employee suffers a subsequent injury . . . [the employee's weekly] benefit will be calculated only according to the reduced wages of her subsequent employment, whether it was less remunerative than the position she filled prior to her initial injury or not.").