

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 017468-85

Jack Lonardelli
City of Medford Highway Dept.
City of Medford

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Horan)

APPEARANCES

William M. LeDoux, Esq., for the employee
Salvatore J. Perra, Esq., for the self-insurer

McCARTHY, J. The employee challenges an administrative judge's denial of his claim for § 34B cost of living adjustments ("COLA") commencing as of the first date of his § 34A award (October 5, 2000), for a 1981 industrial injury. The hearing decision addressed only the issue of which review date under § 34B should apply: the October 1, 2000 review date four days prior to the commencement of § 34A payments, or the October 1, 2001 review date, three hundred and sixty one days after the commencement of the § 34A award. (Dec. 2.) We affirm the decision.

The stipulated facts upon which the decision was based were as follow:

1. In a hearing decision filed on July 23, 2002 the employee, Jack Lonardelli was awarded Section 34A benefits from October 5, 2000 to date and continuing.
2. The self-insured employer paid Section 34A benefits from October 5, 2000, but did not commence the payment of Section 34B COLA benefits until October 1, 2001.
3. But for the question of when Mr. Lonardelli's Section 34B benefits should commence, at all relevant times Mr. Lonardelli has not been disqualified from receiving Section 34B benefits by any statute or regulation.

(Dec. 2.) No testimony was taken.

General Laws c. 152 § 34B, applicable to this 1981 date of injury, provides in pertinent part that:

Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date [October first of each year] shall be paid, without application, a supplement to weekly compensation to the extent such supplement shall not reduce any benefits such person is receiving pursuant to federal social security law. The supplemental benefits shall be paid in accordance with the following provisions:--

(a) The director of administration shall determine the percentage increase between (i) the average weekly wage in the commonwealth on the date the permanently and totally disabled employee was injured . . . and (ii) the average weekly wage in the commonwealth on the review date.

. . .

(b) [T]he permanent and total disability benefit under section thirty-four A that was being paid prior to any adjustments under this section shall be the base benefit. The base benefit shall be changed on each review date by the percentage change as calculated in paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of benefit to be paid on and after the review date. The difference between the base benefit and the adjusted benefit shall be termed the supplemental benefit.

General Laws c.152, § 34B (St.1985, c. 572, § 43A), specifically designated as having "application to personal injuries irrespective of the date of their occurrence" by St. 1986, c. 662, § 53.

"[I]n construing a statute, its words must be given their plain and ordinary meaning according to approved usage of language . . . and . . . the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it." Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945). The first words of § 34B -- "any person receiving or entitled to receive" -- are unambiguous. Mr. Lonardelli was neither "receiving [n]or entitled to receive" § 34A benefits on October 1, 2000. He claimed, and was awarded, permanent

and total incapacity benefits only from and after October 5, 2000.¹ Under paragraph (b) of § 34B, *supra*, the "adjusted benefit" -- that which includes the COLA supplemental benefit added to the base benefit -- is payable "on and after" the review date. In other words, the COLA adjustments are to be paid in addition to the base benefit " *on and after*" each October 1 review date. (Emphasis added.) The statute does not say, "on *or* after."

Here, because the employee was not receiving nor entitled to receive a base § 34A benefit on October 1, 2000, the COLA adjustments could not be paid on and after that date, as provided by the statute. Therefore, the employee's argument -- that the October 1 review date here may predate the initial payment of the base benefit on October 5, 2000 -- cannot prevail. Further support for this view is found in § 34B(b) which states that, "the permanent and total disability benefit under section thirty-four A that was being paid *prior* to any adjustments under this section shall be the base benefit." (Emphasis added.) In the case at hand, § 34A was not being paid prior to the date the dissent would start the COLA benefit.

We disagree with our dissenting colleague that "it can be safely assumed the legislature intended COLA payments be delivered to permanently and totally disabled workers sooner, rather than later, to help them keep pace with inflationary forces." That Mr. Lonardelli must wait almost twelve months for his cost of living adjustment is not contrary to the beneficent design of the statute or to legislative intent, particularly when

¹ Section 34A, as applicable to the employee's February 20, 1981 injury, required exhaustion of the \$45,000 statutory maximum payable under §§ 34 and or 35:

While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, following *payment of the maximum amount* of compensation provided in sections thirty-four and thirty-five, or either of them, a weekly compensation equal to two-thirds of his average weekly wage but not more than one hundred and fifty dollars per week nor less than thirty dollars a week during the continuance of such permanent and total incapacity.

St. 1976, c. 474, § 6. (Emphasis added.) The 1991 amendment to § 34A, providing for payment of permanent and total incapacity benefits "following payment of compensation provided in sections thirty-four and thirty-five," does not require exhaustion of the statutory maximums. Slater's Case, 55 Mass. App. Ct. 326 (2002).

one considers the following scenario. A worker suffered a catastrophic industrial injury after the 1991 amendment and was immediately accepted by the insurer as permanently and totally incapacitated. See footnote 1, supra. However, she could not receive the COLA supplement to her weekly base § 34A benefit until time passed and her date of injury was ". . . at least *twenty four months* prior to the review date." (Emphasis added.) Even under the regulation championed by the dissent, her COLA benefit could not begin at the onset of permanent and total incapacity, the result the dissent endorses for Mr. Lonardelli.

Moreover, as to the legislature's intent, we note that for the five-year period from November 1986 to December 1991, COLA benefits were available to partially incapacitated workers, but not until the date of personal injury was at least *thirty-six* months prior to the October 1st review date. See § 35F, added by St. 1985, c. 572, § 45, and repealed by St. 1991, c. 398, § 67. We perceive no legislative intent that supplemental COLA benefits be paid from the first date of entitlement to the qualifying base incapacity benefit, nor that insurers be required to undertake COLA calculations on multiple dates throughout the calendar year. "The base benefit shall be changed on each review date. . . ." § 34B(b).

The word "shall" is plain, unambiguous and mandatory, not precatory, in nature. Taylor's Case, id.; see also Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294, 303 (2004); Hashimi v. Kalil, 388 Mass. 607, 609 (1983). ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.") Contrary to the argument advanced by the employee and endorsed by our dissenting colleague, the statute does not permit a retrospective COLA calculation using a review date on which no base benefit was payable to the employee. As the employee had no base § 34A benefit on October 1, 2000, there was nothing to change. Moreover, the statute does not require insurers to calculate and effect cost-of-living adjustments on any date during the calendar year other than October 1st. To the extent that our decisions in Graziano v. Polaroid Corp., 9 Mass. Workers' Comp. Rep. 729, 730 (1995), Marrone v. General Elec. Co., 11 Mass. Workers' Comp. Rep. 266, 268 (1997), and Sullivan v. Bennell Contracting Corp. 19 Mass. Workers' Comp. Rep. ____ (April 8, 2005), imply otherwise, we decline to follow them.

To the extent that 452 Code Mass. Regs. § 3.03(2)² directly contradicts the provisions of § 34B, we decline to apply it, and we report the contradiction to the Commissioner pursuant to § 5 of c. 152. See Appendix A. See also Corriveau's Case, 43 Mass. App. Ct. 924 (1997).

The decision is affirmed.

So ordered.

Filed: October 5, 2005

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

HORAN, J., (dissenting). The administrative judge below, and counsel for both parties, struggled with the issue of whether Mr. Lonardelli should be required to wait nearly an additional year prior to receiving his first cost of living (COLA) adjustment. The statute, standing alone, is subject to different, yet reasonable, interpretations. Remarkably, nowhere in the hearing decision, or in the briefs submitted to us, is there *any* mention of the regulation which helps to resolve this issue. The regulation,³ which the majority feels compelled to invalidate, viewed in consort with the statute it was designed to elucidate, supports only one result: Mr. Lonardelli should have received his first COLA adjustment to his base § 34A benefit on October 5, 2000.⁴

² The regulation provides, in pertinent part, that "[t]he initial increase in benefits under M.G.L. c. 152, § 34B shall be payable on the first October 1st subsequent to the date marking the 24-month anniversary of the date of injury."

³ See footnote 2, supra.

⁴ I agree with the majority that the employee was not entitled to receive a COLA benefit on October 1, 2000. This is only so, however, because he was not "receiving or entitled to receive" § 34A (the qualifying "base" benefit) on that date. Once he qualified for § 34A benefits, on October 5, 2000, his base benefit should have been adjusted because his date

I turn first to G. L. c. 152, § 5, which permits us to ignore a duly promulgated regulation *only* when "it is found that the application of any section of this chapter is made *impossible* by . . . [its] . . . enforcement" (Emphasis added). We must presume the validity of this regulation "unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Consolidated Cigar Corp. v. Dept. of Public Health, 372 Mass. 844, 855 (1977). Due to the nature of these benefits, it can be safely assumed the legislature intended COLA payments be delivered to permanently and totally disabled workers sooner, rather than later, to help them keep pace with inflationary forces. The enforcement of this policy is certainly not made impossible by the application of 452 Code Mass. Regs. § 3.03(2). The regulation does not conflict with the statute; in fact, it clarifies it, promotes its undeniable purpose, and is consistent with its beneficent design. See CNA Ins. Companies v. Sliski, 433 Mass. 491, 493 (2001)(the workers' compensation statute should be given a broad interpretation, in light of its humanitarian purpose).

Except in cases where the payment of § 34B benefits would operate to reduce an employee's federal social security benefits, the statute requires only that the employee is a "person . . . entitled to receive benefits" under § 34A "whose benefits are based on a date of personal injury at least twenty-four months prior to the review date." The regulation plainly requires that only *one* October 1st review date pass subsequent to the twenty-four month anniversary of the employee's injury date. Nothing in the statute, regulation, or our caselaw⁵ mandates that Mr. Lonardelli wait for *another* review date to arrive prior to COLA entitlement.

of injury was then more than twenty-four months past, and the first October 1 "review date" had already passed (as of October 1, 1983, as the employee was injured on February 20, 1981).

⁵ Our prior decisions in Sullivan v. Bennell Contracting Corp., *supra*; Marrone v. General Elec., *supra*; Graziano v. Polaroid Corp., *supra*, all reflect this construction, and have been reasonably relied upon by litigants and insurers alike. Our prior holding in Prendergast v. Bay State Volkswagen, 17 Mass. Workers' Comp. Rep. 166, 167-168 n. 2 (2004), is inapposite - the employee did not challenge the judge's § 34B order commencing on the October 1 following receipt of § 34A benefits.

The majority construes the phrase "on and after" in the *computation* section of § 34B (the statute's subsection (b)), to conclude that because Mr. Lonardelli was not receiving § 34A benefits "on" October 1, 2000, he could not *qualify* for COLA benefits until the following October 1. In reaching its conclusion, I believe the majority focuses too narrowly on the phrase "on and after." There are more reasonable and beneficent interpretations of this phrase, and this statute, consistent with the purpose of § 34B, and the explicit directive contained in 452 Code Mass. Regs. § 3.03(2). I do not believe the phrase "on and after" was intended to add a further *qualification* requirement for the receipt of COLA benefits, because the phrase appears in a subsection of § 34B, which defines the method of *computing* these important benefits. See § 34B(a-c). In this context, the phrase simply means that on and after each October 1, the new (and presumably higher) COLA rates are payable to all employees who otherwise qualify for them under the statute's first full paragraph, and 452 Code Mass. Regs. § 3.03(2).⁶

Contrary to what the majority suggests, Mr. Lonardelli's COLA benefit as of October 5, 2000 is easily calculable. Our department issues a "Circular Letter" each October. On October 2, 2000, Circular Letter No. 303 provided the following instruction: "To calculate the adjustment under § 34B multiply the claimant's unadjusted weekly compensation by the ADJUSTED MULTIPLIER FOR TOTAL COMP . . . in the fifth column of the attached table . . . [t]o be eligible for a COLA under . . . § 34A the date of injury must have occurred at least **two** years prior to this review date (October 2, 2000)." (Bold in original.) The majority also posits "the statute does not permit a retrospective COLA calculation using a review date on which no base benefit was payable to the employee." I disagree, and note that *all* COLA adjustments are based on past annual increases in the "average weekly wage of the commonwealth." (See G. L. c. 152, § (1)(9)).

⁶ The phrase "on and after" may also be interpreted to make it clear that employees injured on October 1 need not wait *three* years for their first COLA adjustment - a result also consistent with 452 Code Mass. Regs. § 3.03(2). In other words, had Mr. Lonardelli been injured on October 1, 1998, and was entitled to receive § 34A benefits as of October 1, 2000, he would not be required to wait another year to receive his first COLA adjustment (his 24 month wait and October 1 review date would be satisfied simultaneously). See also Slater's Case, *supra* at 329 (2002) (not requiring exhaustion of § 34 benefits prior to qualifying to receive § 34A benefits "seems more consistent with the provisions of . . . § 34B").

Consider the following: Assume Mr. Lonardelli first qualified for § 34A benefits on September 15, 1995, and had received a COLA (under the majority's reasoning) for the first time on October 1, 1995. Assume further he returned to part time work and received § 35 benefits (and thus no COLA) from September 1, 1999 to October 5, 1999. Following his failed return to the workforce, he is then placed back on § 34A benefits, as of October 5, 1999. I conclude the employee would then, again, be entitled to a COLA, as of *October 5*, based on the multiplier in effect on the last review date, October 1, 1999. My colleagues would appear to insist no such COLA benefit would be due until the *following* October or, at best, be payable based on the multiplier in effect on October 1, 1998, because he was not "on" § 34A benefits on October 1, 1999. While it is true § 34B does not use the word "retrospective," there is nothing in the statute, or the regulation, which specifically prohibits a "look back" approach. I conclude the statute, read in its entirety, and in combination with 452 Code Mass. Regs. § 3.03(2), requires such an exercise.⁷

Mr. Lonardelli was entitled to receive § 34A benefits as of October 5, 2000, a date *already* more than twenty-four months following his 1981 injury date, and a date *already* after the "first October 1st subsequent to the 24-month anniversary" of his injury date. 452 Code Mass. Regs. § 3.03(2). Accordingly, in keeping with the board rule, the requirements of G. L. c. 152, § 5, and our own caselaw, he should not be required to wait *another 360 days* prior to receiving his first § 34B COLA. The employee should have been awarded § 34B benefits payable from the initial date of § 34A eligibility, October 5, 2000, using the multiplier applicable to the February 20, 1981 date of injury and the October 1, 2000 review date.

Mark D. Horan
Administrative Law Judge

⁷ This is also consistent with another statutory use of the commonwealth's average weekly wage. An employee's receipt of § 34 benefits is capped by the average weekly wage of the commonwealth "on or next prior to the date of injury" See G. L. c. 152, §§ 1(10) and 34. In other words, to determine the cap on weekly § 34 benefits for an employee injured on August 1, 2005, we look back to the average weekly wage of the commonwealth on October 1, 2004 (the last review date).

Jack Lonardelli
Board No. 017468-85

Filed: October 5, 2005

APPENDIX A

October 5, 2005

John C. Chapman, Commissioner
The Commonwealth of Massachusetts
Department of Industrial Accidents
600 Washington Street - 7th Fl.
Boston, MA 02111

RE: Employee: Jack Lonardelli
Employer: City of Medford Highway Department
Self-insurer: City of Medford
Board No.: 017468-85

Dear Commissioner Chapman:

Pursuant to G. L. c. 152, § 5, be advised that, the reviewing board is today filing its decision in the above-named case. In the course of deciding the issue raised on appeal, we have determined that 452 Code Mass. Regs. § 3.03(2) arguably contradicts the provisions of § 34B, and therefore the majority has declined to apply the regulation. Specifically, the regulation moves up the date of entitlement to COLA benefits in contravention of the provisions of § 34B.

Very truly yours,

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

cc: Senior Judge James L. LaMothe, Jr.