COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 071159-90**

John Kerrigan	Employee
Commercial Masonry Corp.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Carroll)

APPEARANCES
Francis J. Hurley, Esq., for the employee
Clyde B. Kelton, Jr., Esq., for the insurer

LEVINE, J. The employee appeals the decision of an administrative judge denying his claim for an increase in his weekly wage pursuant to § 51; he contends that he was of such age and experience that his wages would have been expected to increase under natural conditions in the open labor market. He also appeals the award of ongoing § 34 weekly benefits, arguing that it is irrational and inequitable for him to receive less under § 34, for which there is no cost of living adjustment (COLA), than under § 35, for which there is such an adjustment. Alternatively, he argues that he should not be required to repay overpayments made as a result of his receipt of COLA. We disagree and affirm the decision.

John Kerrigan is a high school graduate with an associate's degree in business and accounting. For much of the decade prior to his 1990 injury, he worked as a laborer and equipment operator. He began work for the employer in July 1990 as a laborer, earning approximately $21.00 or $22.00 per hour. In addition to doing heavy lifting, Mr. Kerrigan maintained that he operated heavy equipment, including mixing machines, pallet jacks, front end loaders, cherry pickers and bulldozers. On August 30, 1990, while

lifting heavy cement blocks at work, he injured his shoulder, neck and back. He was approximately thirty-eight years old at the time of his injury. (Dec. 4.)

Pursuant to a 1991 hearing decision, the employee's § 34 temporary total incapacity benefits were modified to § 35 partial incapacity benefits beginning on October 29, 1991. In 1997, the insurer filed a complaint to discontinue payment of § 35 benefits; the complaint was denied at a § 10A conference. Before the hearing on the insurer's appeal, the employee filed motions to join claims seeking 1) an increase in his average weekly wage and compensation rate pursuant to § 51; 2) either a resumption of § 34 temporary total incapacity benefits or payment of § 34A permanent and total incapacity benefits; and 3) payment of medical bills under §§ 13 and 30. (Dec. 2.) At the hearing on December 3, 1999, the judge allowed the submission of additional medical evidence, (Dec. 3), and adopted the opinion of the employee's treating physician and credited the employee's testimony that his symptoms had worsened. (Dec. 8.) Accordingly, he found that Mr. Kerrigan was totally incapacitated and awarded ongoing § 34 benefits beginning May 15, 1998. (Dec. 8, 10.) The judge declined to award § 34A benefits because Mr. Kerrigan's treating physician suggested that there were treatment options that might lessen his pain and increase his mobility, and also because, if those failed, Mr. Kerrigan was a candidate for surgery. (Dec. 9.) The judge further found that Mr. Kerrigan's medical treatment had been reasonable and appropriate and that surgery would be appropriate if physical therapy was not successful. (Dec. 9, 11.) Finally, the judge denied Mr. Kerrigan's claim for an increase in his average weekly wage and compensation rate under § 51. (Dec. 9-10.)

The employee appeals two aspects of the judge's decision. First, he alleges that § 51 should have been applied to increase his compensation rate because the record contains sufficient evidence from which the judge could have found that his wages would

have increased but for the industrial injury.[1] He argues that he had the skills of a heavy equipment operator, and but for the industrial accident he would have obtained his heavy equipment operator's license. With that license he would have been paid more than the laborer's wages he was receiving at the time of the industrial injury. (Employee's brief.)

We find no error in the judge's denial of the employee's § 51 claim. In Sliski's Case, 424 Mass. 126 (1997), the Supreme Judicial Court clarified the purpose of § 51 benefits while distinguishing them from cost of living increases provided by § 34B:

> While COLA benefits are aimed at protecting an individual's economic position by acting as a buffer against the erosion of inflation, § 51 benefits attempt to compensate young workers for the economic opportunities they would have had if their careers had not been interrupted so early. In some cases, an employee's abilities and prospects at the time of injury may be such that the employee could not reasonably look forward to wage increases related to skill acquisition, so that any wage increases would be purely inflationary. In other cases, however, economic projections under § 51 will reflect expectations regarding skill development and job progression.

Id. at 135. Thus, to be entitled to § 51 benefits, the employee must "reasonably look forward to wage increases related to skill acquisition." Id. In the present case, the judge denied the employee's claim under § 51:

> Mr. Kerrigan's assertion that his employer should have paid him at a higher rate than a laborer's rate is not actionable under § 51. Other than that assertion, Mr. Kerrigan does nothing more than allege that the rates for the positions in which he

[1] General Laws c. 152, § 51, as amended by St. 1991, c. 398, § 78, reads as follows:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage. A determination of an employee's benefits under this section shall not be limited to the circumstances of the employee's particular employer or industry at the time of injury.

This section has been deemed procedural in character, St. 1991, c. 398, § 107, and applies to personal injuries irrespective of their date of occurrence. G.L. c. 152, § 2A. Sliski's Case, 424 Mass. 126, 129-130 (1997).

> worked have had their pay rates increase over the last decade.[2] Even if he had established that fact through more concrete evidence, that would not be enough to make § 51 applicable to his circumstances. Mr. Kerrigan would have had to have established that there was some process of advancement into or through a trade or profession that was prevented from reaching its conclusion by the occurrence of his injury. Mr. Kerrigan has not shown that he was in training for a more skilled position or on a track to achieve some higher status within a trade.
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> Section 51 exists to address the circumstances of those who have lost not just their wage or salary at the time of injury, but have also lost the opportunity to continue along a course of improvement that had already begun but could not continue because of the occurrence of an industrial injury. No such showing has been made by Mr. Kerrigan.

(Dec. 9-10.)

Mr. Kerrigan testified that he had worked as a heavy equipment operator and laborer; for the present employer, he testified that he was paid as a laborer. (Tr. 14, 16, 18). Mr. Kerrigan testified that he did not obtain his heavy equipment operator's license after the industrial injury because he did not work again because he was hurt. (Tr. 16.) He also testified that he "just never bothered" to get his license prior to his injury, although he had "more than enough" hours operating heavy equipment before August 30, 1990, to qualify. (Tr. 15.) In fact, he testified that he had the required number of hours to apply for the license a couple of years before his industrial injury. (Tr. 45.) However, he was not sure what the process was for getting a license, i.e., whether a written test was required or his hours just had to be documented. (Tr. 15-16.) But he testified he "definitely would have gotten" the license. (Tr. 40.) Based on this evidence, the judge was ultimately correct in denying the employee's § 51 claim.

[2] In fact, the employee does not now argue that the wages of the positions in which he worked had increased over the years; rather, he contends and he testified at hearing that he would have obtained his heavy equipment operator's license, with a corresponding increase in pay, but for his injury. In light of the discussion below regarding the lack of evidence that would satisfy the requirements of § 51, any misstatement by the judge is harmless error.

The employee must do more than assert that the mere fact that he may have been qualified to obtain the heavy equipment license prior to the industrial accident means he is entitled to application of § 51. Ignoring that the employee testified he simply "never bothered" to obtain the license and that he was not sure what the process was to obtain it, the judge could have credited the employee's testimony that he "definitely would have gotten" the license. (Tr. 40.) But even if that finding were made by the judge, the evidence is still insufficient to warrant application of § 51. This is because the record lacks any evidence as to when the employee would have obtained the license. The "employee has the burden of proving every element of his claim." Hughes v. D&D Elec. Contrs., Inc., 11 Mass. Workers' Comp. Rep. 314, 316 (1997)(after the industrial injury the employee continued his education and was eligible to become a master electrician in 1992 or 1993; the reviewing board held that the employee was entitled to the increased § 51 average weekly wage after December 31, 1993 [i.e., beginning January 1, 1994]). The only evidence in the record here is that the employee had sufficient hours operating heavy equipment to apply for the heavy equipment license a couple of years before his industrial injury. (Tr. 45.) But there is no evidence whatsoever as to when he would have obtained the license if the industrial injury had not occurred. Since he had already delayed two years prior to the industrial injury to seek the license, it would be speculative to assign any date after the industrial injury when he would have received the license. Unlike Hughes, there is no date in the evidence which could be used to fix the beginning of the increase in average weekly wage. The fact of the industrial accident by itself is no reason to give the employee the increase in wages which he had earlier, voluntarily eschewed. Contrast Hughes, where the employee continued his education after the industrial injury. Therefore, in the circumstances, the employee could not satisfy his burden of proof, and the judge's decision denying the employee's claim for § 51 benefits is affirmed. Compare Olejnikow v. Omni Plumbing and Heating, 15 Mass. Workers' Comp. Rep., _____ (March 8, 2001).

The employee next argues that it is irrational and inequitable for him to receive less compensation under § 34 than what he had been receiving under § 35, which, unlike

§ 34, is supplemented by a cost of living adjustment under § 35F.[3] The intent of the legislature will be frustrated, he contends, if an employee receives greater compensation for less incapacity. More specifically, the employee claims that he should not be forced to reimburse the insurer for § 35F benefits he has already received. We disagree.

Where the language of a statute is clear and unambiguous, it must be given its ordinary meaning. See Jinwala v. Bizzaro, 24 Mass. App. Ct. 1,4 (1987). The statute is clear that, for this August 30, 1990 injury, which occurred before the statutory amendment in 1991, COLA benefits were available as an adjustment to § 35 benefits, but not to § 34 benefits. G.L. c. 152, § 35F, added by St. 1985, c. 572, § 45; repealed by St. 1991, c. 398, § 67. Because the employee has claimed and been awarded § 34 benefits, the amount of which is mechanically determined based on his average weekly wage, we have no basis to modify that award. If an argument can be made that the law should be changed, it is up to the legislature, not the reviewing board or the administrative judge, to amend the statute. As the Appeals Court stated in Rogers v. Metropolitan Dist. Comm'n., 18 Mass. App. Ct. 337, 339 (1984):

> When statutory language is plain and unambiguous, it is not a court's function to make repairs in the 'faulty' text on the basis of . . . presumed legislative intent. . . . '[I]f the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it . . . would be tantamount to adding to a statute a meaning not intended by the Legislature.'

Finally, we address the employee's contention that the reviewing board should order that he not be forced to repay the insurer for benefits it paid under § 35F. The insurer had been paying the employee § 35 benefits pursuant to a conference order which denied the insurer's complaint to modify a previous decision ordering § 35 payments.

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[3] General Laws c. 152, § 35F, was repealed by St. 1991, c. 398, § 67. Prior to that, it read, in pertinent part:

> Any person receiving or entitled to receive benefits under section thirty-five whose benefits are based on a date of personal injury at least thirty-six months prior to the review date shall be paid, without application, a supplement to weekly compensation. . . .

By St. 1991, c. 398, § 106, the repeal was deemed substantive, so that only employees with dates of injury after the repeal are not entitled to § 35F COLA adjustments.

The decision does not specify that the employee was receiving § 35F benefits or how much those benefits were, but their receipt, due without application, and the fact that they boosted the employee's total compensation above his § 34 rate, appear to be undisputed by the parties. The decision allows the insurer to "credit itself with the benefits it has paid to date." (Dec. 10.) It thus appears that overpayments have been made pursuant to the aforesaid conference order; as a result, § 11D(3) applies.[4,5] That section gives the insurer the right to recover overpayments by unilaterally reducing weekly benefits by no more than thirty percent. The judge thus had no discretion to prohibit the insurer from recouping benefits or even to modify the amount of recoupment.[6] It necessarily follows that the reviewing board has no authority to instruct the judge to issue such an order. Contrast Cataldo v. City of Worcester, 12 Mass. Workers' Comp. Rep. 286, 288 (1998) (where there are no ongoing weekly benefits so that overpayments have been made which cannot be recovered by a unilateral reduction of weekly benefits, the remedy provided to

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[4] General Laws c. 152, § 11D(3), provides, in pertinent part:

> An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee.

(Emphasis added.)

[5] We consider § 35F COLA to be "compensation" for the purposes of § 11D(3). See Barbosa's Case, 47 Mass. App. Ct. 236 (1999)(§ 34B COLA treated as compensation subject to § 15 reimbursement analysis). Contrast Armstrong's Case, 416 Mass. 796, 800-801 (1994)(COLA not compensation for purposes of § 28). We point out that § 65(2) mandates that the proceeds of the Workers' Compensation Trust Fund "be used to . . . reimburse the following compensation: (a) reimbursement of adjustments to weekly compensation pursuant to section thirty-four B." (Emphasis added.) Indeed, the effect of COLA is merely to maintain the value of the weekly compensation awarded as against the erosion of inflation. It is thus not different in kind from weekly compensation benefits; it merely maintains the value of those benefits over time.

[6] In Dinardo v. Birchwood Care Center, 9 Mass. Workers' Comp. Rep. 178 (1995), the reviewing board upheld an administrative judge's right to specify the amount the insurer could recoup on a weekly basis under the portion of § 11D(3) quoted in note 4, above. However, that decision was reversed by a single justice of the Appeals Court (DiNardo's Case, No. 95-J-331, March 27, 1996).

the self-insurer under the second sentence of § 11D(3) is to bring a complaint pursuant to § 10).

Accordingly, the decision is affirmed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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