COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 75500-87**

John M. Camara	Employee
DPW Mass. Highway Department	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine and Carroll)

APPEARANCES
Paul M. Moretti, Esq., for the employee on appeal
Linda C. Scarano, Esq., for the employee at hearing
Arthur Jackson, Esq., for the self-insurer

MCCARTHY, J. The employee appeals from a decision in which an administrative judge awarded ongoing § 34A permanent and total incapacity benefits commencing on March 13, 1999. The parties had executed an earlier §19 agreement covering the period from February 4, 1995 to March 13, 1999, which provided for payment of § 35 partial incapacity benefits. This agreement was approved by the department. The judge's hearing decision reformed that approved agreement, and ordered recoupment from the employee to the self-insurer. Because the judge had no authority to reform the approved agreement, we reverse the decision in part.

Mr. Camara injured his low back at work on November 23, 1987. The self-insurer accepted the injury, and paid various periods of § 34 benefits through October 3, 1992, when Mr. Camara returned to work. He worked until February 1994, when his pain became unbearable. (Dec. 5-6.) The parties entered into a § 19 agreement to pay § 35 compensation beginning February 4, 1995. The agreement provided for a weekly benefit rate based on two thirds of the employee's $488.87 average weekly wage at the time of

his 1992 return to work, less an earning capacity of $130.00.[1] The self-insurer paid benefits under the agreement for a total of five years. It then discontinued payments in accordance with § 35B,[2] as interpreted by the Appeals Court in Taylor's Case, 44 Mass. App. Ct. 495 (1998)(§ 35B application includes lowering compensation rates as much as increasing rates). The self-insurer also paid COLA increases under § 35F for 1997 and 1998, consistent with the original date of injury in 1987. The employee filed the present claim for § 34A permanent and total incapacity benefits after the self-insurer discontinued payments under the agreement. (Dec. 8.)

In her hearing decision awarding § 34A benefits – an award which is not contested – the judge addressed the self-insurer's argument that the parties had not applied the correct compensation rates in their 1995 agreement. She found:

> [B]oth the average weekly wage and the percentage used to calculate the weekly benefits were inconsistent with the mandatory requirements of § 35B. . . . [A] review of the credible evidence . . . showed that the more correct average weekly [wage] for the new date of injury of February 1, 1994 [the last day of the

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[1] General Laws c. 152, § 19, provides, in pertinent part:

> [A]ny payment of compensation shall be by written agreement by the parties and subject to the approval of the department. Any other questions arising under this chapter may be so settled by agreement. Said agreement shall for all purposes be enforceable in the same manner as an order under section twelve.
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> . . .
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> [T]he Department shall approve any agreement received on a prescribed form unless such agreement is deemed to be in violation of law. Any agreement not approved shall be returned to the party submitting it. Except as provided by section ten B, a party to any agreement under this chapter may file a complaint with the superior court to vacate or modify such agreement on grounds of law or equity.

[2] General Laws c. 152, § 35B, states, in relevant 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. . . .

> employee's return to work] should have been $506.74. [Footnote omitted]. Hence, based on an average weekly wage of $506.74 and an earning capacity of $130.00 per week, Employee's § 35 rate would be $226.04 per week. (See Taylor's Case, 496, 44 Mass. App. Ct. 495 (1998) § 35B requires the application of rates in effect as of . . . the date of the employee's subsequent injury which enactment included the 60% rate for calculating compensation benefits.) . . .
> [T]he inference the court draws from the various documents introduced by the parties was that neither side was certain about the exact average weekly wage and that they appeared to compromise more times than not about the average weekly wage. Hence, the court does not find it to be bound by any agreement that the parties entered which violated the law which, in this case, is § 35B.

(Dec. 8-9.) The judge ordered recoupment of benefits paid in the agreement that exceeded the $226.04 weekly rate which she determined to be the correct rate of compensation, along with the COLA paid pursuant to the original 1987 date of injury, rather than the 1994 date of the § 35B "subsequent injury." (Dec. 12-13.)

We agree with the employee that the analysis and order of recoupment here was beyond the authority of the judge to undertake. The parties' § 19 agreement simply does not stand on the same footing as an appealed order or decision of an administrative judge. As a result, the employee's citation to cases such as Lavallee v. Department of Pub. Works, 10 Mass. Workers' Comp. Rep. 582 (1996), and Silvia v. Department of Environmental Mgt., 10 Mass. Workers' Comp. Rep. 49 (1996), misses the mark. Those cases stand for the proposition that a judge may not order benefits which c. 152 does not provide. They say nothing about §19 agreements, which an administrative judge may not review and reform.

The self-insurer cites the well-established governing authority. See, e.g. Hansen's Case, 350 Mass. 178, 180 (1966)("once approval [of an agreement] is granted by the division [the Act] precludes further inquiry into the merits of the original controversy except by the Superior Court for fraud or mistake"); West's Case, 313 Mass. 146, 153 (1943)("When an agreement for compensation has been made and approved . . . , then all further inquiry into the merits of the original claim both as to liability and the amount of compensation for the period covered are, in the absence of fraud, accident or mistake,

conclusively settled"); Virta's Case, 287 Mass. 602, 605 (1934)("When the instrument of the finality of a memorandum of agreement has been approved by the board and has been acted upon, it has passed beyond the control of the board so far as concerns inquiry as to its validity"); O'Reilly's Case, 258 Mass. 205, 209 (1927)("After an agreement has been approved by the department, and acted upon, any party in interest may and should present that agreement to the Superior Court for a decree of reformation or cancellation, if such a decree would be justified on the facts had the agreement been made in a suit heard and determined in that Court"); Kareske's Case, 250 Mass. 220, 227 (1924)(where there is a memorandum of agreement approved by the department "[t]he insurer paid what was agreed; and it ought not now to be able to raise any question it then forbore to litigate").

As it is beyond dispute that c. 152 does not invest administrative judges with equitable power to reform approved written agreements of parties, see Levangie's Case, 228 Mass. 213, 216-217 (1917), we reverse the judge's findings to that effect. We reverse the orders of recoupment regarding the rates paid in that agreement, as well as the order of recoupment of § 35F COLA. The self-insurer's remedy for fraud or mutual mistake, if such there be, lies in the Superior Court. See LaFleur v. C.C. Pierce Co., 398 Mass. 257-262 (1986). We otherwise affirm the decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: February 20, 2002

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge