COMMONWEALTH OF MASSACHUSETTS

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

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

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

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

FABRICANT, J. The self-insurer and employee cross-appeal from a decision in which an administrative judge awarded a § 34B cost-of-living adjustment (COLA)[1] on § 34A permanent and total incapacity benefits being paid for a 1987 work injury. The self-insurer contends that the date the judge used to establish the applicable COLA multiplier, the 1987 date of injury, was erroneous because the employee's rate of compensation payments were based on a § 35B

[1] General Laws c. 152, § 34B provides, in pertinent part:

> Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits re based on a date of personal injury at least twenty-four months prior to the review date [October first of each year] shall have his weekly benefit adjusted, without application, in accordance with the following provisions:
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> (b) The death benefit under section thirty-one or 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. 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.

"subsequent injury"[2] date in 1994. Based on our decision in Favreau v. Perini/Kiewit/Atkinson, 20 Mass. Workers' Comp. Rep.___ (July 12, 2006), we affirm the judge's assignment of the 1987 date of injury for the purpose of calculating the employee's COLA, notwithstanding the rate-shifting effect of § 35B. The employee challenges the judge's denial of his claim for a § 8(5) penalty[3] based on the self-insurer's unilateral reduction of COLA being paid on the § 34A benefits. Based on our decision in Montleon v. Massachusetts Dept. of Public Works, 16 Mass. Workers' Comp. Rep. 354 (2002), we reverse that part of the decision and award the § 8(5) penalty claimed.

The facts relevant to the issues on appeal are a matter of stipulation set out in the decision on appeal. The employee sustained an injury to his low back on October 23, 1987, for which the self-insurer accepted liability. In 1992, the employee returned to work in a modified duty position for approximately four months. The employee left work again because of pain related to his injury. The self-insurer paid benefits, but based the weekly rate on the employee's higher average weekly wages earned while working in 1992. The employee then returned to work again from November 1992 until February 1994. After a period of § 35 partial incapacity payments, paid pursuant to § 19 agreement between the

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[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. . . .

[3] General Laws c. 152, § 8(5), provides, in pertinent part:

> [I]f the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty payment equal to twenty per cent of the additional compensation due on the date of such finding.

parties, the employee claimed, and was awarded, § 34A permanent and total incapacity benefits, again based on the higher return-to-work average weekly wages. Those benefits were paid from March 13, 1999 and continuing pursuant to a hearing decision. For the next three years, the self-insurer paid COLA on the § 34A benefits, using a COLA multiplier based on the original 1987 date of injury (Dec. 3-4.)

In 2002, the self-insurer unilaterally reduced the employee's COLA by changing the multiplier date from 1987 to 1994, when the employee left work for good. The employee filed a claim seeking a § 8(5) penalty for the self-insurer's illegal reduction of payments, and for reinstatement of the 1987 COLA multiplier. (Dec. 5-6.)

The judge agreed with the employee that 1987 was the correct COLA multiplier date. We also agree. However, we need not go into the judge's reasoning behind her conclusion because, after her decision was filed, we decided Favreau, supra. That case analyzed the proper application of COLA where the employee's underlying benefits had been subject to a rate adjustment pursuant to § 51A.[4] The insurer in Favreau argued the same theory of law that the self-insurer advances here: that the shift of the date on which the rates of the employee's benefits are calculated necessarily results in a shift of the date from which the COLA multiplier must be derived. In Favreau, we disagreed with the assertion that the pairing of the earlier COLA multiplier with a later rate of benefits resulted in a "windfall." We applied COLA based on the date of injury to the rate of benefits payable to the employee on the filing date of the decision, subject to the maximum weekly entitlement of the average weekly wage in the commonwealth (SAWW) at any given time. Id. The analysis under § 51A is equally applicable to

[4] General Laws c. 152, § 51A, provides:

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

the rate-shifting effect of § 35B. We therefore affirm the decision as to the calculation of COLA based on the original date of injury and the § 35B "subsequent injury" rate adjustment.

As to the employee's appeal, Montleon, supra, decided the issue presented here in the employee's favor: a § 8(5) penalty is due for the wrongful unilateral reduction of COLA. The self-insurer's unilateral reduction of COLA in the present case did not fall within any of § 8(2)'s prescribed circumstances in which such action would be allowable, and the self-insurer does not contend otherwise. Section 8(5) provides a penalty for payments improperly discontinued or reduced, if additional compensation is later ordered. Figueiredo's Case, 49 Mass. App. Ct. 906, 907-908 (2000). The self-insurer merely argues that under Armstrong's Case, 416 Mass. 796, 799, COLA is not "compensation," and thus is not within the scope of § 8(5)'s "additional compensation." See footnote 3, supra. Armstrong held that COLA was not compensation in the context of a § 28 claim for double compensation based on the employer's willful misconduct. On the other hand, Barbosa's Case, 47 Mass. App. Ct. 236 (1999), treated COLA as compensation for purposes of § 15 reimbursement. Since the courts' characterization (or not) of COLA as "compensation" is indeterminate, we choose to follow Montleon, supra, in which we directly addressed the interplay between § 35F COLA[5] and § 8(5):

> The issue [is] whether an order to pay additional COLA benefits would trigger a penalty under § 8(5). We hold that it would. The statute refers to failure to make "*any payments* required under this chapter" (emphasis added) and then to "additional compensation" later being ordered. We have held § 35F COLA benefits to be compensation for the purposes of § 11D(3), which allows an insurer to recover overpayments by unilateral reduction of weekly benefits up to 30% of any remaining compensation owed the employee. Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 215 (2001).

[5] There is no analytical difference between § 35F COLA on partial incapacity benefits (from 1986 to 1991, now repealed) and § 34B COLA here at issue.

Montleon, supra at 363. We follow this reasoning, and note that § 8(5)'s pairing of the failure to make "any payments required under this chapter" with the remedy of "additional compensation" ordered, necessarily brings COLA within its coverage. COLA is clearly a "payment required under this chapter."

Accordingly, we reverse the denial of the claimed § 8(5) penalty, and order that it be applied to the COLA awarded in the hearing decision.

We otherwise affirm the decision, and award an attorney's fee under § 13A(6) in the amount of $1,407.15.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **December 5, 2006**