COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020945-05**

Leo W. MacDougall, Jr.	Employee
Harding and Smith	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Costigan)

The case was heard by Administrative Judge Solomon.

APPEARANCES
Joseph P. McKenna, Esq., for the employee
Michael P. McCoy, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits, enhanced by the application of § 51A. The insurer argues only that the § 51A adjustment was contrary to law. For the reasons stated in McEneaney v. Modern Continental Constr., 23 Mass. Workers' Comp. Rep. 319, 323-326 (2009), we agree § 51A does not apply to the employee's claim, and we vacate only that part of the award.

The employee suffered a work injury to his lower back on June 24, 2005. The insurer accepted the case, paying § 34 incapacity benefits and § 30 medical benefits for two surgical procedures. (Dec. 3-5.) Thereafter, the insurer filed a complaint to modify or discontinue the employee's weekly benefits. (Dec. 2.) At the § 10A conference on March 22, 2007, the judge allowed the employee to join a claim for psychiatric disability related to his orthopedic injury. The judge denied the insurer's request for modification or discontinuance, and the insurer appealed to an evidentiary hearing. (Dec. 2-3.) Prior to the hearing on May 1, 2008, the judge allowed the employee to join a claim for § 34A benefits, which the employee sought prospectively, commencing on the date of exhaustion of his § 34 benefits, June 24, 2008. (Dec. 3.) The case was still pending before the judge

when the employee's § 34 benefits exhausted, and the insurer voluntarily began paying the employee weekly § 35 benefits at the maximum rate.

In her hearing decision, the judge denied the insurer's complaint for modification or discontinuance, ordered the insurer to pay the employee's claim for § 34A benefits from June 24, 2008 and continuing, and ordered the insurer to pay § 30 medical benefits for his psychiatric injury. Applying § 51A, the judge ordered the insurer to increase the rate of the employee's benefits to that available on the filing date of the decision, December 31, 2008. (Dec. 9.)

The provisions of § 51A state:

> 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.

General Laws c. 152, § 51A. We have held that § 51A does not apply where an insurer is paying § 35 benefits, pursuant to a § 10A conference order, at the time a final decision is filed awarding § 34A benefits. See McEneaney, supra at 326; see also Conte v. Pan Constr. Co., Inc., 51 Mass. App. Ct. 398, 401 (2001)(payment of lower weekly benefits under New Jersey's workers' compensation act barred application of § 51A on employee's claim for further weekly benefits for the same injury under Chapter 152); Madariaga's Case, 19 Mass. App. Ct. 477, 482 & n.7 (1985)(§ 51A did not apply where the insurer "continued to pay" weekly benefits while disputing payment under § 36A). Cf. Mugford's Case, 45 Mass. App. Ct. 928, 929 n.1 (1998)(where employee had exhausted § 34 benefits and was not receiving *any* weekly benefits in the year prior to the issuance of the decision awarding § 34A benefits, § 51A applied); Paredes v. M. DeMatteo Constr., 18 Mass. Workers' Comp. Rep. 59, 60-62 (2004)(§ 51A applied to § 35 award where insurer stopped paying weekly benefits after § 34 benefits exhausted but prior to final decision, even though final decision awarded § 35 benefits retroactively, resulting in overpayment).

Section 51A "has no application where the employee is receiving weekly benefits at the time of the final decision on his pending claim for additional weekly incapacity benefits." McEneaney, supra at 324-325. Here, the insurer had no legal obligation to pay the employee any weekly incapacity benefits upon the exhaustion of his § 34 benefits. G. L. c. 152, § 8(2)(g). Under the circumstances, we see the insurer's voluntary payment of maximum § 35 benefits, upon the exhaustion of the employee's § 34 benefits, as the payment of benefits in response to the employee's newly joined § 34A claim. See McEneaney, supra at 322 n.8 (2009), citing Tredo v. City of Springfield Sch. Dept., 19 Mass. Workers' Comp. Rep. 118, 123 (2005)("Even if the employee had claimed only § 34A benefits, we would view such a claim as empowering the administrative judge to award § 35 benefits as a lesser included claim.") Accordingly, because the insurer was providing the employee "a stream of weekly benefits during the pendency of his claim" for § 34A benefits, McEneaney, supra at 324, we cannot say that "no compensation has been paid prior to the final decision on such claim." G. L. c. 152, § 51A.

Therefore, we reverse only so much of the decision as ordered the insurer to apply the § 51A adjustment to the rate of compensation due pursuant to the award of § 34A benefits, and order the insurer to pay the employee's § 34A benefits at the rate available on the date of injury.[1]

So ordered.

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[1] We do not consider the prospective nature of the employee's § 34A claim, or the fact the employee joined his § 34A claim after the § 10A conference on the insurer's complaint, (Dec. 3), as matters pertinent to the disposition of the issue on appeal. Moreover, while the parties' briefs were filed before we filed our decision in McEneaney, at oral argument, which was held after that decision had been filed, the employee did not argue that his situation materially differed from Mr. McEneaney's. Instead, the employee argued that our reasoning in that case was incorrect as a matter of law. The employee maintained § 51A must be applied whenever the insurer fails to make payment under the section of the Act claimed by the employee because § 51A was intended to remedy the Legislature's establishment of a maximum weekly compensation rate which negatively

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Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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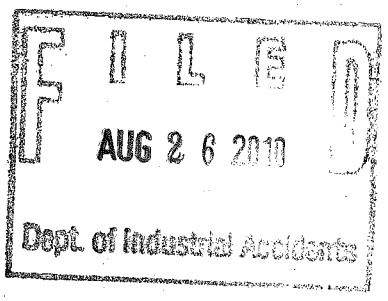

impacts high wage earners like the employee. For the reasons stated in McEneaney, supra at 324-326, we disagree.