COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 033371-99**

Maribel Paredes Employee
M. DeMatteo Construction Employer
National Union Fire Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein and McCarthy)

APPEARANCES
John J. Widdison, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

LEVINE, J. The parties cross-appeal an administrative judge's decision awarding the employee ongoing G. L. c. 152, § 35, partial incapacity benefits for an August 30, 1999 industrial injury. The insurer argues that the judge erred by assigning an average weekly wage under § 1(1) in accordance with the "prevailing wage" statute, G. L. c. 149, §§ 26 and 27. We summarily affirm the decision as to that issue. McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285 (1997). The employee argues that the judge erred by failing to apply § 51A to award compensation in accordance with the rates applicable as of the filing date of the judge's hearing decision. In the circumstances of this case, we agree, and reverse the decision as to that issue.

The employee injured her knee while working as a union apprentice carpenter. (Dec. 5.) The insurer accepted the claim, but did not agree with the employee's claim that her average weekly wage was governed by the prevailing wage provisions of G. L. c. 149, §§ 26 and 27. The employee filed a claim to adjust her average weekly wage and the insurer joined its complaint to modify the § 34 total incapacity compensation that it was paying. A February 2000 conference order awarded the employee benefits based on the prevailing wage and denied the insurer's complaint to modify the § 34 benefits. The case was appealed to a hearing. (Dec. 2.) In August 2002, the employee's § 34 benefits

exhausted. Based on that exhaustion and pursuant to § 8(2)(g), the insurer terminated payments. After the § 34 benefits exhausted in August 2002, the judge allowed the employee's motion to join a claim for § 35 partial incapacity benefits, beginning from the time of exhaustion of § 34 benefits. (Dec. 2-3.)

In his hearing decision, the judge awarded the employee benefits under the provisions of the prevailing wage law and under G. L. c. 152, § 51;[1] but the judge also allowed the insurer's complaint to modify the employee's weekly benefits. The judge ordered that the employee's § 34 temporary total incapacity benefits be reduced to § 35 partial incapacity benefits as of April 18, 2001, approximately one and one half years prior to the exhaustion of § 34 benefits. Thus, as of that April 18, 2001 modification date, the judge awarded the employee the ongoing § 35 benefits that she had sought in her joined claim (albeit much earlier in time than she had sought), based on an earning capacity of $320.00 per week. (Dec. 17.) The employee then requested reconsideration of the judge's award on the basis that G. L. c. 152, § 51A, mandates that her benefits be calculated as of the filing date of the decision.[2] The employee argues that the insurer had not paid the claimed § 35 compensation prior to the decision in the case, thereby triggering the provisions of § 51A. The judge denied the employee's request in a May 29, 2003 letter. The judge wrote:

> Having considered the arguments of the parties, I find there is no basis to change the § 35 compensation rate ordered in the decision. [Section] 51A states that "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 injury." The

[1] The employee's claim for § 51 benefits was joined at hearing. (Dec. 3.) Section 51 allows for an increase in an employee's weekly wage if, when injured, "under natural conditions, . . . his wage would be expected to increase. . . ."

[2] 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.

> decision and order reflect the fact that a modification of the payment of compensation was required as of April 17, 2001.

Although an argument can be made in support of the judge's denial, case law requires a different result. The retroactive reduction of the employee's benefits from § 34 to § 35 as of April 18, 2001 could mean that the insurer, which had paid § 34 benefits from April 18, 2001 to August 26, 2002, had in effect paid a portion of the § 35 benefits the employee had claimed. Although the employee had claimed those § 35 benefits beginning August 26, 2002, the insurer's effective payment of those benefits during the prior period could be seen as a payment of compensation on the § 35 claim "prior to the final decision." § 51A. However, such a construction does not comport with the Appeals Court's interpretation of § 51A. Therefore, we are compelled to reverse the judge's § 51A denial and award the claimed adjustment in the rate of compensation.

In Madariaga's Case, 19 Mass. App. Ct. 477 (1985), the court deemed § 51A inapplicable to a widow's claim for § 36A loss of function benefits because she "had been receiving from the insurer weekly [§ 31] payments." Id. at 482. The court contrasted the Supreme Judicial Court's decision in McLeod's Case, 389 Mass. 431 (1983), where "it was not disputed that 'no compensation . . . [had been] paid prior to the Superior Court decision,' " the final decision on the employee's claim. Id. In Mugford's Case, 45 Mass. App. Ct. 928 (1998), the Appeals Court held that § 51A applied because the insurer did not pay § 34A benefits claimed by the employee prior to the administrative judge's decision. Id. at 929-930. During the course of the proceedings, the insurer had inadvertently paid § 34 benefits for about nine and one half months after § 34 benefits exhausted; the court stated that the overpayment "does not affect the outcome of the case." Id. at 929 n.1. The Mugford court distinguished Madariaga's Case: "In that case, unlike [Mugford], the widow was receiving ongoing weekly payments at the time that the final decision was made." Mugford, supra at 930. Finally, in Conte v. P.A.N. Constr. Co., 51 Mass. App. Ct. 398 (2001), the employee was injured in New Jersey in August 1989, and the insurer commenced payment of the equivalent of § 34 benefits under New Jersey law. Id. at 399. In May 1990, the employee claimed § 34 benefits pursuant to c. 152, which were higher than those of New Jersey's. Id. The insurer did not pay the higher benefits until the reviewing board decision ordered it to do so. Id. The Appeals Court held that § 51A did not apply in the circumstances, because the New Jersey payments were the equivalent of compensation paid under c. 152. Id. at 401. In reaching that conclusion, the court cited Madariaga's Case for support. It explained that in Madariaga "§ 51A [was] not applicable

to [a] claim by decedent's widow for special death benefits provided by G. L. c. 152, § 36A, where [the] insurer had been paying [the] widow weekly death benefits provided by § 31 of the statute since [the] date of her husband's death." Conte, supra at 401. Unlike the employee in the present case, Mr. Conte, like Ms. Madariaga, was receiving benefits while his claim for Massachusetts § 34 benefits was pending and prior to the final decision on the claim. Id. Therefore, § 51A did not apply.

In contrast, and as in Mugford, § 51A applies in the present case. As in Mugford, no compensation, under any section of the act, was being paid to the employee during the time of the employee's disputed claim for benefits. No compensation was paid to the employee here after her § 34 benefits exhausted in August 2002 and after she subsequently brought a claim for § 35 benefits. It is this particular factor that stands as the harmonizing element in the Appeals Court cases construing § 51A. Because the insurer ceased paying benefits under § 34 upon exhaustion, and resisted payment of the claimed § 35 benefits until finally ordered to do so, the § 51A adjustment in the rate of § 35 compensation applies in this case, notwithstanding the overpayment due to the retroactive reduction of benefits. As in Mugford, supra, "[t]his overpayment does not affect the outcome of the case." 45 Mass. App. Ct. at 929 n. 1.

Accordingly, the denial of the § 51A application is reversed and the insurer is ordered to pay benefits in accordance with that section. The decision is otherwise affirmed. Pursuant to § 13A(6), the insurer is further ordered to pay a fee to the employee's attorney in the amount of $1,276.27, plus necessary expenses.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

FEL/kai

Filed: April 9, 2004