COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACIDENTS **BOARD NO. 088117-84**

Michael J. Sullivan	Employee
Transmission Structures Limited	Employer
Continental Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee at hearing
Gillian B. Schiller, Esq., for the employee on appeal
Richard J. Conner, Esq., for the insurer

WILSON, J. The insurer appeals a decision in which an administrative judge awarded the employee closed periods of §§ 34 and 35 weekly benefits for an October 1994 "subsequent injury" under the provisions of § 35B. The insurer contends that the employee was not entitled to compensation, as he had reached his statutory maximum amount of payments under the law in effect at the time of his original December 27, 1984 industrial injury. We see no error of law with regard to further compensation and affirm the decision in accordance with Barbaro v. Smith & Wesson, 9 Mass. Workers' Comp. Rep. 652 (1995), and Don Francisco's Case, 14 Mass. App. Ct. 456 (1982), with the exception of one point conceded by the employee regarding the correct percentage rate.[1]

Mr. Sullivan suffered an industrial injury to his left leg and back on December 27, 1984. The insurer accepted liability for the injury, and paid weekly incapacity benefits under §§ 34 and 35 until the aggregate statutory maximum amount of 250 times the

[1] We summarily affirm the decision insofar as the insurer disputes both the judge's allowance of the employee's motion to join the § 35B claim and the judge's rejection of a second injury and application of the successive insurer rule.

average weekly wage in the commonwealth at the time of the injury was reached in September 1989. (Dec. 5.) See St. 1981, c. 572, §§ 1 and 2. The employee returned to work for various employers. On or about October 27, 1994, Mr. Sullivan experienced a worsening of his back pain from activity at home. (Dec. 7.) He was unable to continue working, and underwent unsuccessful disc surgery at L5-S1. (Dec. 7-8.)

The employee claimed further benefits pursuant to the provisions of § 35B, as well as under §§ 34A and 30.[2] Section 35B provides, in its entirety:

> 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; provided, however, that if compensation for the old injury was paid in a lump sum, he shall not receive compensation unless the subsequent claim is determined to be a new injury.

St. 1970, c. 667, § 1. The insurer resisted the claim. (Dec. 2.) As a result of a hearing, the administrative judge determined that the employee's 1994 physical change and worsened condition was a recurrence of the employee's 1984 industrial injury and, therefore, a "subsequent injury" within the meaning of § 35B and the Massachusetts Appeals Court constructions in Don Francisco's Case, 14 Mass. App. Ct. 456 (1982), and Czarniak's Case, 14 Mass. App. Ct. 467 (1982). The judge cited Barbaro v. Smith & Wesson, supra at 662, for the proposition that the employee, who had exhausted weekly benefits under the quantity-based statutes in effect in 1984, was still entitled to the increased duration-based maximums for §§ 34 and 35 in effect at the time of the 1994 "subsequent injury." (Dec. 9.) The judge accordingly ordered that the insurer pay closed periods of temporary total and partial incapacity benefits, along with medical benefits under § 30. (Dec. 12.) The insurer appeals.

As an initial matter, the employee concedes one of the insurer's issues on appeal, the percentage rate at which the insurer should pay the benefits awarded. In his

[2] The judge's denial of permanent and total incapacity benefits under § 34A was not appealed by the employee.

application of § 35B, the judge erred by failing to calculate benefits according to the 60% rate in effect under the 1991 versions of §§ 34 and 35. See St. 1991, c. 398, §§59 and 63. Instead, he applied the 66 2/3% rate under the prior statute. The employee agrees that the Appeals Court opinion in Taylor's Case, 44 Mass. App. Ct. 495 (1998), governs: "§ 35B require[s] the application of rates in effect as of . . . the date of [the employee's] 'subsequent injury.' Those rates were inserted by St. 1991, c. 398, § 59[,]" which enactment included the 60% rate for calculating compensation benefits. Id. at 498. We therefore reverse the judge's order that compensation benefits be paid at the 66 2/3% rate in effect in 1984, and order that benefits be paid at the proper 60% rate applicable to the employee's 1994 "subsequent injury."

The insurer next argues that the exhaustion of the employee's aggregate incapacity benefits under §§ 34 and 35 at the time of the original 1984 industrial injury -- 250 times the then-current average weekly wage in the commonwealth (SAWW) -- bars the receipt of incapacity benefits under the increased rates available under the 1991 amendments to those sections via the provisions of § 35B. We do not agree. The insurer's construction of § 35B would exclude the statutory maximum rates from the scope of the statute's coverage in cases such as the present one. We neither see such an exclusion as consistent with the Legislature's purpose in enacting § 35B, nor as supported by the statutory interpretations of the Appeals Court and the reviewing board.

Barbaro v. Smith & Wesson, 9 Mass. Workers' Comp. Rep. 652 (1995), governs our disposition of the present case. In Barbaro, we addressed the application of § 35B to an employee injured at work on February 12, 1985, who exhausted the aggregate benefits available to him as of that date (250 times the SAWW) through the receipt of § 34 benefits. Id. at 653-654. As such, "[n]o further benefits were available under § 35 pursuant to the 1981 amendment" applicable at the time of that 1985 injury. Id. at 654. The employee claimed a "subsequent injury" under § 35B in 1988, and sought partial incapacity benefits commencing after the exhaustion of his aggregate maximum benefits under the earlier version of § 34. St. 1981, c. 572, § 1. The § 35 benefits the employee sought under § 35B, however, were those in effect under the 1986 version of the statute,

St. 1985, c. 572, § 44, which entitled the employee to 600 weeks of §35 benefits. Id. We agreed with the employee that he was entitled to the rate of § 35 compensation available to him as of the occurrence of his "subsequent injury."

> [T]he meaning of 'rate' [in § 35B] is inextricably bound to legislative adjustments of both weekly maximum benefit scales and cumulative maximum benefits, whether calculated by quantity of money or duration of total weeks. . . . The employee prevails with regard to his contention that he is entitled to the 600 week statutory maximum rate for § 35 benefits as of the time of his subsequent injury and incapacity in 1988 . . . .
>
> Our interpretation of the legislative history to § 35B is confirmed by the decision of the Appeals Court in Bernardo's Case, 24 Mass. App. Ct. 48 (1987). Just as in the instant case, the Appeals Court was presented with the issue of whether § 35B was intended to benefit a 'subsequently injured' employee by allowing him to receive the larger aggregate amount of statutory maximum benefits available at the time of the later change in the employee's condition. Id. at 49, 51. The Appeals Court affirmed the Superior Court order allowing the employee to collect weekly benefits up to the aggregate statutory maximum in effect at the time of the subsequent injury. Id. at 50-52.

Barbaro, supra at 660. The exhaustion of aggregate benefits available under the old statute, or when that exhaustion occurred, was not an issue in our Barbaro analysis. Instead, we concentrated on the employee's entitlement to benefits as of the subsequent injury date. In Rainville v. Roy's Towing, 9 Mass. Workers' Comp. Rep. 662, 663-664 (1995), we followed Barbaro and awarded § 35 benefits for a 1989 subsequent injury, even though the employee had exhausted his entitlement to § 35 benefits under the pre-1986 Act (i.e., the 250 times SAWW quantitative maximum). Insofar as the insurer attempts to distinguish these cases from the present one on the basis that benefits in Barbaro and Rainville were not exhausted at the time of the subsequent injuries (Insurer's Brief, 6-7), such an argument parallels its statutory construction argument regarding the phrase "subsequently injured and receives compensation." We do not agree with the proffered distinction or the statutory construction on which it is based. See discussion, infra.

The insurer's argument misses the mark by focusing on the wrong date. The court in Don Francisco's Case, 14 Mass. App. Ct. 456 (1982), explained it this way: "The

insurer looks to the [original 1984] injury . . . . *Under § 35B, however, the employee's right to compensation at the increased rate and the insurer's burden to pay it originate in the change in the employee's condition subsequent to his return to work* [, the 1994 'subsequent injury']." Id at 463 (emphasis added). In other words, the exhaustion of benefits prior to the subsequent injury date is wholly beside the point in determining the rights and obligations of the parties on that subsequent injury date. In the present case, the employee's entitlement to compensation benefits at the increased durational rates available under the 1991 amendments to §§ 34 and 35 "originate[d] in the change in the employee's condition subsequent to his return to work" in 1994. As of that date, on or about October 27, 1994, the employee's entitlement was for three years of § 34 and five years of § 35 benefits. See St. 1991, c. 398, §§59 and 63. Since the employee received benefits under §§ 34 and 35 for approximately five years under the quantity-based versions of those statutes in effect in 1984, there may be some measure of benefit entitlement remaining under the new rates in 1994. Therefore, the judge was correct to award benefits in accordance with the durational "rate[s] in effect at the time of the subsequent injury."

This is not to say that the judge should have ignored the benefits paid from 1984 to 1989 for the original 1984 injury. The benefits due as of the 1994 "subsequent injury" are a continuation of those paid in 1984-1989 -- the remaining weeks of entitlement left from the total number of weeks paid under each section at that time.[3] Hence, the "subsequent injury" does not start the benefits clock running anew. There is, after all, only one "personal injury" under the Act in this case -- that which occurred on December 27, 1984. See Rainville v. Roy's Towing, 9 Mass. Workers' Comp. Rep. 662, 664

[3] The analysis necessarily requires the reader to compare apples and oranges and view what was paid for the original 1984 injury through the lens of the rights and obligations (i.e. the duration-based statutory maximum rates) that obtain at the time of the "subsequent injury." The number of weeks paid under §§34 and 35 respectively is the applicable reference point, not the amount of money paid under the old versions of those statutes. The new rate available as of the "subsequent injury" refers in no way to aggregate amounts of benefits paid.

(1995)("[T]he insurer's obligation to pay § 35 benefits up to the statutory maximum rate in effect at the time of the June 30, 1989 recurrence ["subsequent injury"] shall take into account all weeks of payments under § 35 prior to that recurrence. . . . The insurer is entitled to a credit toward the statutory maximum of six hundred weeks for all payments made under § 35, whenever such payments occurred."). See also Taylor's Case, supra at 499 n.4; Barbaro, supra at 660 n.11.

The insurer contends as a matter of statutory construction that the language of § 35B, "subsequently injured and receives compensation," bars the employee's claim for weekly benefits at the time of his subsequent injury. According to the insurer, since the employee had exhausted his benefits under the law in effect in 1984, he could not meet the prerequisite of "receiv[ing] compensation" at the time of his subsequent injury. Therefore, the insurer argues, the statute cannot apply. (Insurer's brief 8.) In our view, such a construction would yield arbitrary and irrational results. See Betances v. Consolidated Serv. Corp., 11 Mass. Workers' Comp. Rep. 65, 69-70 (1997).

We read the phrase, "subsequently injured and receives compensation," as meaning that the recurrence alleged as a subsequent injury is one which entitles the employee generally to compensation under the Act: that it is causally related to the original industrial injury. Were we to follow the insurer's construction, two disparate groups of employees with claims asserted under § 35B would result.[4] One group would consist of those employees who had not exhausted benefits under the statutes in effect as of their original dates of injury. These employees would receive the benefits of the § 35B rates in effect at the time of the subsequent injury. The other group would be those employees who had exhausted the former statutory maximum rates, for whom the § 35B rate at the time of the subsequent injury would not apply. It is clear that neither group of employees is in a position to claim any entitlement greater than the other. All that is on the table for both is the rate of benefits payable at the time of the subsequent injury, no more and no less. This is an arbitrary and pointless distinction, and one which derogates

[4] We address here only the applications of § 35B that may expand the entitlement to compensation, like the instant case, and unlike Taylor's Case, supra.

from "an harmonious structure faithful to the basic designs and purposes of the Legislature." Mailhot v. Travelers Insurance Co., 375 Mass. 342, 345 (1978). The Legislature's purpose in enacting § 35B was to defeat the obsolescence of compensation rates. See Taylor's Case, supra at 500. In the present case, the aggregate statutory maximum rate applicable in 1984 was obsolescent as of the time of the 1994 subsequent injury. Entitlement to "receive[] compensation" at an obsolescent rate at the time of the subsequent injury would be a meaningless prerequisite to the application of § 35B. We conclude that "subsequently injured and receives compensation" refers to the general concept of compensability.

Finally, the insurer argues by analogy that the last clause of § 35B, excluding its application for those injuries for which liability has been redeemed in a lump sum agreement, supports its exhaustion argument, because "[i]n both instances the insurer's obligation to pay benefits to the employee has ceased." (Insurer's brief, 9.) The insurer's argument is based on a misconception. Accepting the insurer's view on exhaustion, even if an employee has exhausted benefits under §§34 and 35 under the original injury rates, he can conceivably still invoke the provisions of § 35B to adjust certain rates in a claim for § 34A permanent and total incapacity benefits. Such rates as the employee's average weekly wage, see Taylor's Case, supra at 496, and the weekly maximum rate established by § 1(10) could certainly be impacted by the application of § 35B to a § 34A claim. A lump sum agreement bars any application of § 35B, because it, by its very nature, "function[s] as a commutation of the right to receive future [weekly] compensation payments. . . . The lump sum agreement should be regarded as a substitute for continuing periodic compensation payments." Carrier's Case, 3 Mass. App. Ct. 502, 504-505 (1975). See also Paltsios's Case, 329 Mass. 526, 529 (1952). Indeed, insofar as the Legislature saw fit to reiterate this well-established black letter law, it is quite noteworthy that it did not make such a reference to exhaustion under the old rate of compensation. Instead, the Legislature considered and rejected a version of § 35B that specifically denied enhanced compensation under § 35B where the employee had previously exhausted the total benefit available to him for the original injury. 1970 House Doc. No.

5589, §1. In the absence of any explicit language regarding exhaustion in the statute, we interpret § 35B in the more inclusive fashion that we have outlined above.

Accordingly, we affirm the decision, with the exception of the 66 2/3% rate applied to the payment of benefits for the "subsequent injury." We reverse that rate and order that the insurer pay benefits at the applicable 60% rate. We order that the insurer set off the total duration of weeks for which it paid under §§34 and 35 from 1984 to 1989 and pay the closed periods of the judge's order, (Dec. 12), with the remainder of any benefits available to the employee under St. 1991, c. 398, §§ 59 and 63; only, however, to the extent that it is possible to do so.[5] If the parties are not capable of coming to agreement as to this matter of accounting, a further claim will be necessary.

The employee is entitled to an attorney's fee of $1,000.00.

So ordered.

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: February 8, 2000

_____
William A. McCarthy
Administrative Law Judge

Smith, J. concurring. The judge erred as a matter of law in not applying the lower weekly compensation rates and the duration limitations of the 1991 version of §§ 34 and 35. Taylor's Case, 44 Mass. App. Ct. 495 (1998). The employee concedes that "[a]llowing the insurer to credit itself with previous payments would obliterate his current award of benefits altogether, as he had exhausted his benefits under the more generous pre-1991 rates." (Employee's brief at 9.) However, his concession is not expressly based upon the correct legal analysis. Because the judge found that the employee had exhausted

[5] We do not stray into the murky swamp of attempting exact orders, for we have neither the parties' stipulation nor a judge's findings on either the amounts or duration of §§ 34 and 35 benefits paid after the 1984 injury.

his §§ 34 and 35 benefits in 1989, (Dec. 1), which would be less than 364 weeks from the date of injury, we are unable to confirm that he has received the maximum benefits allowed under the 1991 rate structure. For that reason, should he request it, a recommittal for further factual findings on the number of weeks paid for each type of benefit would be appropriate. Absent a retraction of his concession, the litigation should be finally concluded with an order denying the claim.

I agree with the majority that a "subsequent injury" does not start the §§ 34 and 35 time limitations running anew. It is clear from the decision of the Appeals Court in Taylor's Case, at 499 n.4, that we count the number of weeks of benefit payments from the date of the original work injury. Taylor had previously received benefits under pre-1991 version of §§ 34 and 35 for approximately 49 weeks. He then claimed § 34 benefits pursuant to § 35B as the result of a subsequent injury. Under the 1991 act, he was entitled to a maximum of 156 weeks of § 34 total compensation. The court subtracted the 49 weeks of compensation paid under the prior versions of §§ 34 and 35 and found that he had 107 weeks of § 34 benefit entitlement left. That method of calculation is applicable here.

An employee who qualifies for a § 35B rate adjustment after December 23, 1991 is limited to one hundred fifty-six weeks of total compensation, St. 1991, c. 398, §59, and two hundred sixty weeks of partial compensation, [6] St. 1991, c. 398, § 63. "[T]he number of weeks the employee may receive benefits under these sections shall not exceed three hundred sixty-four." G.L. c. 152, § 35, as amended by St. 1991, c. 398, § 63.

Sullivan's average weekly wage for his December 27, 1984 injury was $1339.44. (Dec. 2.) His § 34 benefits were capped by the statewide average weekly wage on the date of his injury, $ 341.06, and he was limited to a combined maximum benefit amount under §§ 34 and 35 of $85, 265 (250 weeks times $341.06). The parties stipulated that the insurer had paid Sullivan this maximum benefit amount. (Dec. 5; Tr. 5, 9.) Thus we

[6] Where an employee has suffered significant permanent impairment, § 35 increases the maximum entitlement to five hundred and twenty weeks. According to the impartial medical

know that he has received at least two hundred and fifty weeks of compensation, but we do not know the total number of weeks paid. Such information is necessary to answer the exhaustion question under the 1991 rate structure.

I would reverse the judge's orders of compensation and deny the pending claim for further compensation based on the December 17, 1984 injury, unless the employee, within thirty days, retracts the concession in his brief that benefits calculated at the 1991 rates have been exhausted. Upon such retraction, if the parties are unable to agree on what benefits remain due, it would be appropriate to recommit the case for further findings of fact on the number of weeks of total and partial compensation previously paid.

I would so order.

Suzanne E.K. Smith
Administrative Law Judge

examiner, whose opinion the judge adopted, (Dec. 10), Sullivan's loss of function did not cross that threshold. (Ex. A, 6.)