COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 072257-01**

Michael Sellers	Employee
John Havlin Tree Service	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
Paul Nugent, Esq., for the employee
Pedro Benitez-Perales, Esq., for the Trust Fund

HORAN, J. The Workers' Compensation Trust Fund appeals from a decision ordering it to pay the employee compensation based on his concurrent earnings. The Trust Fund argues the absence of more than one "insured" employer bars his recovery under the concurrent employment provision of G. L. c. 152, § 1(1). We disagree and affirm the decision.

Michael Sellers sustained devastating injuries to his spinal cord, resulting in quadriplegia, when he was crushed by a falling tree limb while working for the Havlin Tree Service (Havlin) on September 1, 2001. The employee's permanent and total incapacity as a result of the accident is unquestioned. On the date of injury Havlin did not have the requisite workers' compensation coverage; the employee's concurrent employer, the Steve Miller Company (SMC), was insured by Liberty Mutual. (Dec. 3.)

The only issue at hearing concerned interpretation of the following definition of concurrent employment found in § 1(1):

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.

The judge concluded the employee's average weekly wage is the sum of his earnings from both the uninsured employer, Havlin, and the insured concurrent employer, SMC. (Dec. 5.)

The Trust Fund, which is paying the employee's worker's compensation benefits under the provisions of G. L. c. 152, § 65(2)(e),[1] contends that because the employee had only one "insured" employer, SMC, the concurrent employer provision of § 1(1) is inapplicable. The Trust Fund's position has some appeal. Indeed, the definition of "insured" is "an employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter . . . ." G. L. c. 152, § 1(6). The employee maintains the Trust Fund's interpretation is contrary to the policy of mandatory workers' compensation insurance coverage, unfairly punishes the injured worker for his employer's wrongdoing, and ignores the important historical context surrounding the enactment of the concurrent employer provision. We find the employee's arguments persuasive.

The Trust Fund's interpretation of "insured employer" in the context of the concurrent employment provision ignores a well-established premise of statutory construction. We must construe a statute "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Jinwala v. Bizarro, 24 Mass. App. Ct. 1, 3 (1987), quoting Industrial Fin. Corp. v. State Tax Comm., 367 Mass. 360, 364 (1975). The obvious purpose of the concurrent employment provision is remedial; prior to its enactment, an employee's compensation rate would not reflect the true loss of his Massachusetts earnings. See Gillen's Case, 215 Mass. 96 (1913)(average weekly wage should be based on method to best measure an employee's future loss of earning capacity).

[1] The Trust Fund makes "payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter . . . ."

We therefore see no impediment to interpreting the definition of concurrent employment, "employed in the concurrent service of more than one insured employer or self-insurer," to include employment with an employer which is *required* to be insured under the act, but which has illegally failed to comply with that mandate. See G. L. c. 152, § 25A ("In order to promote the health, safety and welfare of employees, *every employer* shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner: (1) By insurance with an insurer . . . .")(Emphasis added).

In 1935, when the concurrent employment provision of § 1(1) was enacted, workers' compensation insurance coverage was elective for employers in Massachusetts. Coverage for the vast majority of our employers did not become mandatory until 1943. G. L. c. 152, § 25A. See Price v. Railway Express Agency, Inc., 322 Mass. 476, 478-480 (1948). Thus, at the time the legislature inserted the concurrent employment definition into the statute, it was impossible for an employer to be without workers' compensation insurance illegally, as there was simply no mandatory coverage requirement.

> Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part, and in the light of the Constitution and of the common law, to the end that they be held to cover subjects presumably within the vision of the Legislature and, on the one hand, be not unduly constricted so as to exclude matters fairly within their scope, and, on the other hand, be not stretched by enlargement of signification to comprehend matters not within the principle and purview on which they were founded when originally framed and their words chosen.

Town of Oxford v. Oxford Water Co., 391 Mass. 581, 588 (1984), quoting Commonwealth v. Welosky, 276 Mass. 398, 401-402 (1931). Given the historical context of *elective* participation in the act, we conclude that "the Legislature did not advert to the precise issue before us," Letteney's Case, 429 Mass. 280, 284 (1999), that is, the consequence of failing to provide *mandatory* insurance

coverage. "It is for us to deduce what that principle requires," id., vis-à-vis concurrent employment. We believe the definition of "insured employer" contemplated by the concurrent employment statute must be construed in the employee's favor. We see no policy or rationale to justify an interpretation of § 1(1) which would deprive the employee the benefit of his concurrent earnings simply because one of his employers failed to provide the workers' compensation coverage required by law. We note an appellate court in New York has reached the same conclusion in construing a similar section of that state's workers' compensation law: "An employee's right to have his or her wages from concurrent employment included in the average weekly wage should not hinge upon whether that employee is fortunate enough to be employed by an entity in compliance with the law." Lashlee v. Pepsi-Cola Newburgh Bottling, 301 A.D.2d 879, 881 (2003).

We emphasize our interpretation of the concurrent employment provision is within the analytical framework of Letteney's Case, supra, which disallowed the use of self-employment and non-Massachusetts employment for the purposes of establishing an average weekly wage. Id. at 285-286. The reasoning of the court in Letteney, although addressing § 35C's shifting of the average weekly wage in cases of latent diseases such as asbestosis, wholly supports our interpretation of concurrent employment:

> Compensation to the employee measured by earnings outside the Massachusetts workers' compensation system constitutes a liability for which neither the employer nor any other Massachusetts employer has provided. It may be said that this happens whenever an employee receives a higher award than that measured by the last wage the employee earned from the employer for whom he worked at the time he sustained the injury. That would not be a valid objection. The later Massachusetts employer paying that higher wage [at the time the employee comes down with the industrial disease] would presumably have paid premiums based on that higher wage. Although that later employer would not be liable for the higher award, its participation in the general system may be supposed, at least roughly, to work out in the long run when it must pay higher compensation for subsequent earnings of its employees earned elsewhere in

> the system. [Footnote omitted.] Self-employment, out-of-State employment and other excluded employment are not within the system and thus this long-run equilibrium cannot take place.
>
> Where an employee is injured by an employer who is required to, but illegally has not insured, the worker obtains his compensation from the trust fund, to which all Massachusetts employers are required to contribute . . . . This is a further demonstration that all Massachusetts employers participate in a common system . . . .

Id. The point is this: *Both* employers in the present case are required to participate in the Massachusetts workers' compensation system. One just happened to be participating illegally, causing the Trust Fund – to which all Massachusetts employers are required to contribute – to pay the benefits that would have otherwise been the responsibility of Havlin's (non-existent) insurer.[2]

Because, on the facts of this case, we interpret "insured employer" in § 1(1) to mean an employer legally required to carry workers' compensation insurance, we affirm the decision awarding the employee worker's compensation benefits based on his concurrent earnings with both Massachusetts employers.[3]

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: August 7, 2006

[2] The Trust Fund may, of course, seek reimbursement from the renegade employer. See G. L. c. 152, § 65(8).

[3] The Trust Fund argues the case at hand is governed by our holding in Chalmers v. City of Boston, 13 Mass. Workers' Comp. Rep. 435 (1999). We agree with the employee that Chalmers is factually distinguishable. In light of our rationale here, we express no opinion regarding its viability.