COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014069-00**

Pasquale Pezzulo	Employee
City of Salem	Employer
City of Salem	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Maze-Rothstein and Carroll)

APPEARANCES
Donald E. Wallace, Esq., for the employee
Kevin T. Daly, Esq., for the self-insurer

COSTIGAN, J. The self-insurer accepted liability for the employee's 1986 industrial injury[1] and paid him weekly incapacity benefits, without interruption, for almost fourteen years, always at the rate to which he was entitled for temporary total incapacity under G. L. c. 152, § 34.[2]

---

[1] After working as a clothes presser in a clothing factory for almost twenty-five years, (Dec. 3), the employee commenced employment as a school custodian with the City of Salem in April 1971, when he was forty-six years old. (Dec. 3-4, 13.) His custodial duties included washing floors, cleaning bathrooms, changing lights, and other school building maintenance tasks. On occasion, he was required to carry ladders and clean boilers. On June 10, 1986, the employee, then sixty-two years old, injured his neck and right shoulder while lifting a table at work. He did not return to work after that date. (Dec. 3-4, 10.)

[2] General Laws c. 152, § 34, as amended by St. 1985, c. 572, § 42, and applicable to the employee's date of injury, provided in pertinent part:

> While the incapacity for work resulting from the injury is total, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to two-thirds of his average weekly wage before the injury . . . The total number of weeks of compensation due the employee under this section *shall not* exceed two hundred and sixty.

(Emphasis added.) Based on Mr. Pezzulo's average weekly wage of $365.78, the self-insurer paid him $243.85 every week for almost 725 weeks, notwithstanding that the statutory maximum period for temporary total incapacity benefits was only 260 weeks.

On April 28, 2000, the self-insurer unilaterally terminated those payments, citing, on the incorrect departmental form,[3] the sole reason that the employee had exhausted the statutory maximum payable for temporary total incapacity,[4] which indeed he had. That event, however, had occurred on June 4, 1991, when Mr. Pezzulo reached the 260-week limit for § 34 benefits applicable to his date of injury. (Dec. 2, 4.) It is not disputed that the City continued to pay the employee weekly incapacity benefits at the same rate for another eight years and eleven months, during which time,

> [h]e picked up his checks every week at the personnel office at Salem City Hall. No one ever questioned his entitlement to these checks. No one suggested that the employee should return to work. No light duty jobs were offered.

(Dec. 4.)

After his benefits were terminated, the employee filed a claim for permanent and total incapacity benefits under § 34A, and applicable cost-of-living adjustments under § 34B, from and after June 5, 1991. In the alternative, he claimed temporary partial incapacity benefits under § 35, and applicable COLA benefits under § 35F, from and after April 29, 2000. He also claimed medical benefits under §§ 13 and 30, a penalty under § 8(5)[5] for the self-insurer's alleged illegal discontinuance of compensation, § 14

---

[3] The self-insurer filed D.I.A. Form 106, entitled "Insurer's Notification of Termination of Weekly Compensation During Payment-without-Prejudice Period." (Employee Ex. 2.)

[4] General Laws c. 152, § 8(2), provides in pertinent part: "An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations: . . . (g) the benefits payable to the employee have been exhausted pursuant to sections thirty-one, thirty-four, or thirty five. . . ."

[5] Section 8(5), in effect on April 28, 2000, provides in pertinent part:

> Except as specifically provided above, if 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.

penalties for the self-insurer's alleged unreasonable defense of his claim,[6] and interest under § 50. (Dec. 1-2.)

In the hearing decision which the employee's appeal brings to our review, the administrative judge denied the employee's § 8(5) penalty claim, finding that "[p]ursuant to Section 8(2)(g), the City was permitted to terminate the weekly payments because the employee's entitlement to benefits under Section 34 had been exhausted." (Dec. 11.) The judge adopted the opinions of the § 11A impartial medical examiner and the self-insurer's medical expert,[7] and found that

> the employee has fallen far short of establishing that he is permanently and totally incapacitated from substantial gainful employment as a result of his June 1986 work injury . . . [W]ere it not for his vision problems and the residual difficulties relating to his heart condition, the employee would have been capable of working at any number of occupations. At a minimum, he has been able to earn the minimum wage, which presently translates to about $250.00 per week. At the time his Section 34 benefits exhausted, the minimum wage was roughly $170.00 per week. As of June 5, 1991, he would have been entitled to Section 35 benefits at the rate of $130.52 per week.

(Dec. 10-11.) The judge, however, did not award the employee § 35 partial incapacity

---

[6] Section 14, as amended by St. 1991, c. 398, §§ 36 to 38, and in effect on and after April 28, 2000, provides in pertinent part:

> [I]f any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds: (a) the whole cost of the proceedings shall be assessed upon the insurer. . . .

[7] Because he deemed the impartial medical report inadequate, the judge allowed the employee's § 11A motion for additional medical evidence. (Dec. 1.) Both parties submitted additional medical evidence. (Dec. 3.) The judge expressly rejected the opinion of one of the employee's medical experts, Dr. John L. Doherty, Jr., that the employee was permanently and totally disabled. (Dec. 8-9, 10.)

benefits. He found that § 35E,[8] affirmatively raised by the self-insurer in defense of the employee's claim, barred payment of temporary partial incapacity benefits to the employee. The judge was not persuaded that the employee, whose pension rights would have vested in 1990 at the latest but perhaps earlier, (Dec. 12-13), "would have remained active in the labor market at any time after his entitlement to Section 34 benefits expired, on June 5 [sic], 1991." (Dec. 12.) The judge denied and dismissed all of the employee's claims.[9] Because we agree with the employee that the administrative judge erred in finding no illegal discontinuance of benefits, we reverse the decision in that regard.

We first take issue with the judge's finding that "[t]he City paid the employee Section 34 benefits at the rate of $243.85 until April 28, 2000, nearly nine years after his statutory right to those benefits expired." (Dec. 11.) By operation of statute, the employee could not receive more than 260 weeks of § 34 benefits. "The total number of weeks of compensation due the employee under this section *shall not exceed two hundred and sixty."* G. L. c. 152, § 34, as appearing in St. 1985, c. 572, § 42. (Emphasis added.) The word "shall" is plain and unambiguous; it is mandatory, not precatory. See Taylor's

---

[8] As amended by St. 1991, c. 398, § 66, § 35E provides in pertinent part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer *shall not be entitled to benefits under sections thirty-four or thirty-five* unless such employee can establish that but for the injury, he or she would have remained active in the labor market. The presumption of non-entitlement to benefits created by this section shall not be overcome by the employee's uncorroborated testimony, or that corroborated only by any of his family members, that but for the injury, such employee would have remained active in the labor market.

(Emphasis added.) This statute does not bar entitlement to § 34A permanent and total incapacity benefits.

[9] The judge also denied the self-insurer's claim, under § 11D, for recoupment of benefits it had paid the employee between July 5, 1991 and April 28, 2000. The judge correctly found that those payments were not made pursuant to an order or decision of an administrative judge, as required by the statute, but rather were made "voluntarily" by the self-insurer. (Dec. 14.) The self-insurer has not appealed that aspect of the decision.

Case, 44 Mass. App. Ct. 495, 499 (1998); Hashimi v. Kalil, 388 Mass. 607, 609-610 (1983). There is no statutory provision which authorizes either party, or both, or an administrative judge, to extend the 260-week limit on payment of § 34 benefits. The parties stipulated that the 260-week period ended on June 4, 1991. (Dec. 2.) Therefore, the weekly incapacity benefits, which the self-insurer continued to pay after that date, could not have been temporary total incapacity benefits under § 34.[10] What, then, were they?

The weekly benefit rate which the City paid to the employee between June 5, 1991 and April 28, 2000 equalled two-thirds of his pre-injury average weekly wage. Pursuant to St. 1985, c. 572, § 44, effective January 1, 1986 and applicable to the employee's date of injury, temporary partial incapacity benefits under § 35 would equal "two-thirds of the difference between [the employee's] average weekly wage before the injury and the weekly wage he is capable of earning after the injury, but not more than the maximum weekly compensation rate. . . ." As the existence of an earning capacity, even if nominal, is assumed for the purposes of § 35, the above-quoted calculation could not result in a benefit rate equal to that for temporary total incapacity under § 34, unless an employee's average weekly wage entitled him to the maximum compensation rate applicable to both § 34 and § 35 benefits. The employee's did not.[11] Accordingly, the weekly benefits paid by the self-insurer after June 4, 1991 could not have represented temporary partial

[10] We disagree with the administrative judge that the Appeals Court's decision in Mugford's Case, 45 Mass. App. Ct. 928 (1998), (Dec. 11), drives the result he reached. Mr. Mugford's entitlement to § 34 benefits exhausted in March 1988, but the insurer continued to pay him for nine *months,* until December 1988. In this case we are dealing with almost nine *years* of continuing payments. Moreover, the parties in Mugford stipulated that the overpayment was "inadvertent." There is no such stipulation here. Lastly, the overpayment by the insurer in Mugford did not affect the outcome of the case, which involved the applicability of § 51A to an *award* of § 34A benefits. Id. at 929 n.1. For the reasons set forth in this decision, the nature of the weekly incapacity benefits purportedly "overpaid" by almost nine years very much affects the outcome of the employee's claims for § 34A benefits and a § 8(5) penalty.

[11] The parties stipulated that the employee's pre-injury average weekly wage was $365.78, (Dec. 2), which yielded his § 34 rate of $243.85. The statutory maximum compensation rate applicable to his date of injury was $360.50. (D.I.A. Circular Letter No. 217, publ. September 18, 1985.)

incapacity benefits under § 35. There is but one other type of weekly incapacity benefit left.

Section 34A, as amended by St. 1985, c. 572, § 43, effective January 1, 1986, and applicable to the employee's date of injury, provided:

> While the incapacity for work resulting from the injury is both permanent and total during each week of incapacity, the insurer shall pay the injured employee *compensation equal to two-thirds of his average weekly wage before the injury*, but not more than the maximum weekly compensation rate nor less than the minimum weekly compensation rate.

(Emphasis added.) This calculation results in the same benefit rate as the employee was paid under § 34 -- $243.85. Therefore, based on the 260-week statutory maximum for payment of § 34 benefits, and the parties' stipulation that the employee exhausted that maximum on June 4, 1991, the only permissible conclusion is that the payments made by the self-insurer to Mr. Pezzulo after that date, and for the next almost-nine years, constituted permanent and total incapacity benefits under § 34A. It is irrelevant whether the self-insurer intended to pay § 34A benefits. Even if there was no conscious intent to waive its right to unilaterally terminate weekly benefits upon exhaustion of the statutory maximum, the inequity of allowing the self-insurer to do so almost nine years later compels us to bar the self-insurer from denying it paid the employee for permanent and total incapacity from and after June 5, 1991. See Rose v. Regan, 344 Mass. 223, 229 (1962). The self-insurer is presumed to know the law as to when temporary total incapacity benefits were exhausted, and what its statutory rights were at that time. The self-insurer "slept on its remedy" for almost nine years, if not longer.[12] "It cannot now be

[12] We note that the self-insurer offered into evidence a May 4, *1989* report of its medical expert, Dr. Richard E. Conway. ([Self-i]nsurer Ex. 4.) Dr. Conway's diagnosis of the employee was degenerative cervical disc disease without compressive neuropathy, with an apparent musculofascial injury to the neck and shoulder girdle. The doctor opined that when examined, the employee was able to carry out jobs that did not involve work above shoulder height, and did not require lifting more than ten pounds on a repeated basis. (Dec. 9.) Notwithstanding that opinion of only partial medical disability, the self-insurer did not offer the employee work within those restrictions, (Dec. 4), nor did it file a complaint to modify or discontinue the employee's weekly total incapacity benefits. Instead, it continued to pay those benefits for almost eleven years after receiving Dr. Conway's report, and then unilaterally terminated payment.

heard to complain of the loss resulting from its inaction." Sherr v. Peabody, 13 Mass. Workers' Comp. Rep. 43, 47 (1999), citing Brown v. Leighton, 385 Mass. 757, 760 (1982)(one who seeks equity must do equity; uninsured employer denied § 15 subrogation).

We acknowledge that, unlike many other sections of the Act,[13] § 8(2)(g) does not prescribe a time limit within which an insurer or self-insurer must act to avail itself of the right to unilaterally terminate payment upon exhaustion of the statutory maximums payable under §§ 34, 35 and/or 31. However,

> [t]he [industrial accident] board is not bound by strict legal precedent or legal technicalities, but, rather, governed by the practice in equity . . . The term 'in equity' is consonant with the liberal construction to be given to c. 152 and has been 'applied to supply a remedy [even] where there [may be] a gap in the statute.'

Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 267 (1985)(citations omitted.) The board's equitable powers "seem to extend to fashioning a remedy where the statute provides none, if such a remedy is 'necessary to dispose completely of the claim.' " Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 253 n.5 (1999), quoting Taylor's Case, supra at 498, quoting Utica Mutual, supra at 267. This case demands such a remedy.

Based on equitable considerations, we hold that an insurer's or self-insurer's right to act unilaterally under § 8(2)(g) does not exist indefinitely. We consider that the statute implicitly requires that the insurer or self-insurer terminate payment in a timely fashion, reasonably contemporaneous to the event of benefit exhaustion, so as to give the employee fair notice that he must then act in order to pursue further benefits. The facts of this case do not require us to draw a bright line as to timeliness. Even if we assume, for the sake of argument, that an insurer who is *nine months* late in terminating benefits, has acted in a timely fashion, see Mugford's Case, supra, we are unwilling to conclude, as did the administrative judge, that a failure to act for *almost nine years* is of no consequence.

[13] See, for example, §§ 6, 7, 8, 10A, 11C, 11D, 12, 13A and 41.

We hold that under either the doctrine of equitable estoppel,[14] or of estoppel by acquiesence,[15] the self-insurer is estopped from denying that the benefits it paid to the employee from June 5, 1991 until April 28, 2000 were, in fact, § 34A benefits.

That said, we conclude, as a matter of law, that the self-insurer's unilateral discontinuance of compensation payments on April 28, 2000 was illegal under § 8(2), and the judge's inquiry should have ended with such a finding. We agree with the

---

[14] The factors necessary for the application of equitable estoppel were recently identified by the Appeals Court:

> The effective application of that doctrine "requires: (1) '[a] representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made[;] (2) [a]n act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made[;] (3) [and d]etriment to such person as a consequence of the act or omission.' Cellucci v. Sun Oil Co,., 2 Mass. App. Ct. 722, 728 (1974)[, S.C., 368 Mass. 811 (1975)]." Boylston Dev. Group, Inc. v. 22 Boylston St. Corp., 412 Mass. 531, 542 (1992).

Donovan's Case, 58 Mass. App. Ct. 566, 568-569 (2003)(insurer estopped from relying on absence of its signature from lump sum settlement agreement signed by employee before his death; employee's withdrawal of appeal of conference order in reliance on oral settlement agreement constituted detriment). The administrative judge's findings that the employee presented to the City's personnel office every week to pick up his compensation check, that he was never questioned about his entitlement to those checks, that there was no suggestion he return to work, and that he was never offered a light duty job, (Dec. 4), warrant the conclusion that the self-insurer's conduct amounted to a representation to the employee that it considered him totally disabled from work and entitled to total incapacity benefits on an indefinite, ongoing basis. The employee argues persuasively that he "was induced not to file any claims for permanent and total disability benefits for well over nine years by the conduct of the self-insurer which continued to pay total disability benefits to him," and that there was a detrimental effect on his ability to prosecute that claim due to the passage of time occasioned by the self-insurer's conduct. (Employee Supp. Brief, 9.)

[15] The doctrine of estoppel by acquiescence is a form of quasi-estoppel, and may be the basis of an equitable estoppel. "The doctrine arises where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction and neglects to do so for such a time as would imply that he intended to waive or abandon his right." 31 Corpus Juris Secundum, Estoppel and Waiver, § 133. "It is a familiar principle of equity jurisprudence that long continued acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief upon his subsequent complaint of it." Uccello v. Gold'n Foods, Inc., 325 Mass. 319, 327-328 (1950), quoting Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495, 500 (1888).

employee that he should not have been required to file a claim for further benefits, and the adjudication of his incapacity should not have occurred, at least not how and when it did. See Slater v. G. Donaldson Constr., 17 Mass. Workers' Comp. Rep. 133, 137 (2003).

Although it is well-established that the burden of proving each and every element of a claim for permanent and total incapacity benefits is always on the employee, Slater, supra at 137, citing Lazarou v. Peabody, 13 Mass. Workers' Comp. Rep. 386, 390 (1999), it is axiomatic that the employee need not prove that which the insurer does not contest. In this case, the self-insurer's payment of weekly total incapacity compensation, for 465 weeks beyond the date of exhaustion of § 34 benefits, relieved Mr. Pezzulo of that burden, at least for that period of time. Moreover, because the self-insurer is estopped from denying that the employee was permanently and totally incapacitated between June 5, 1991 and April 28, 2000, in any future complaint for modification or discontinuance of weekly benefits, the self-insurer bears the burden of showing that the employee's medical condition improved after that latter date:

> The employee's burden of proof extends to essential facts on all elements of the claim of total and permanent incapacity under § 34A, and he must show that it is more likely than not that the facts warrant an award of compensation. See L. Locke, Workmen's Compensation § 502 at 598-599 (1981). The distinction between the burden of proof (or persuasion) and the burden of going forward with the evidence (or burden of production) has long been recognized. See P.J. Liacos, Massachusetts Evidence § 5.1 (6th ed.). The burden of going forward with the evidence requires the party who asserts a fact to come forward with some evidence of the fact, see Lawrence v. Commissioners of Public Works, 318 Mass. 520, 527 (1945), sufficient to convince a judge that a reasonable jury could find that the fact exists. See P.J. Liacos, id. at 196. Hence when the insurer seeks discontinuance of § 34A benefits, the insurer must go forward with evidence of improvement in the employee's condition or a lessening of the degree of incapacity in order to meet its burden. (citation omitted.)

Slater, supra at 137. As in Slater, the instant case "was skewed in such a way that it was impossible for the judge, [having wrongly found no illegal discontinuance], to frame the issues in a way that was fair because [in the hearing held], the employee had the burden of production. That burden properly belonged to the [self-] insurer." Id. at 138. It was,

and remains, the obligation of the self-insurer to file a complaint to modify or discontinue the weekly compensation it was, and now will be, paying the employee, and any relief to be granted may attach only as of the date such complaint is filed with the department. Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995).

We affirm the administrative judge's denial of the employee's § 14 penalty claim, not because "[t]he City's defenses were, for the most part, persuasive," as the judge found, (Dec. 12), but because the issue presented by the unique facts of this case is one of first impression. The judge did not award the § 50 interest claimed by the employee because he did not award any weekly incapacity benefits. (Dec. 14-15.) However, although benefits are awarded in this decision, the employee is not entitled to § 50 interest. See Cugini v. Braintree School Dept., 17 Mass. Workers' Comp. Rep. ___ (July 17, 2003)(award of interest against municipality barred under doctrine of sovereign immunity); Russo's Case, 46 Mass. App. Ct. 923 (1999).

In all other respects, the decision of the administrative judge is reversed. The self-insurer is ordered to pay the employee the § 34A benefit he was receiving, retroactive to April 29, 2000 and continuing; the applicable § 34B COLA adjustments on that weekly base § 34A benefit; medical benefits under §§ 13 and 30; and the penalty for illegal discontinuance of compensation pursuant to § 8(5). Pursuant to § 13A(5), the self-insurer is ordered to pay to employee's counsel an attorney's fee in the amount of $4,499.73 and, upon its receipt of satisfactory documentation, to reimburse employee's counsel his hearing-related costs. So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

Filed: **December 30, 2003**