

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 009731-17

Philip Vo
M.B.T.A.
M.B.T.A.

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

This case was heard by Administrative Judge Williams.

APPEARANCES

Michael J. Powell, Jr., Esq., for the employee at hearing
Philip Vo, pro se on appeal
Paul A. Brien, Esq., for the self-insurer

KOZIOL, J. The parties cross-appeal from a hearing decision ordering the self-insurer to pay the employee weekly incapacity benefits consisting of § 34 total incapacity from April 26, 2017 to December 12, 2017, and § 35 partial incapacity benefits from December 13, 2017 and continuing, based on a minimum wage earning capacity.¹ The judge also ordered the self-insurer to pay §§ 13 and 30 medical benefits for treatment of the employee's left upper extremity, and ordered the self-insurer to credit itself with benefits it paid pursuant to the judge's October 26, 2017, conference order. (Dec. 10.) Finding no error in the judge's decision awarding the employee weekly incapacity and

¹ The self-insurer was ordered to pay the employee § 34 benefits at a rate of \$1,057.66 per week based on an average weekly wage of \$1,762.76 per week. The judge's award of § 35 benefits incorporated the statutory changes to the minimum wage, resulting in an order to pay varying amounts of § 35 benefits during the time period encompassed by the § 35 award. For the period from December 13, 2017 to December 31, 2017, the judge ordered the self-insurer to pay the employee § 35 benefits at a rate of \$841.66 per week based on a \$360.00 per week earning capacity. From January 1, 2018 to December 31, 2018, the self-insurer was ordered to pay the employee § 35 benefits at a rate of \$817.66 based on a \$400.00 per week earning capacity. From January 1, 2019 and continuing, the self-insurer was ordered to pay the employee § 35 benefits at a rate of \$739.66 per week based on a \$440.00 per week earning capacity. (Dec. 10.)

medical benefits as a result of his left upper extremity injury, we summarily affirm the decision as to all issues raised by the self-insurer on appeal and all but one of the issues raised by the employee on appeal. We therefore address only the employee's argument that he is entitled to the payment of interest on the benefits awarded at hearing.

The employee was employed as a bus driver for the self-insured employer when he was involved in a motor vehicle accident on April 26, 2017, while operating an M.B.T.A. bus. As a result of that accident, he filed a claim for § 34 benefits from April 26, 2017, and continuing, alleging injuries to his low back and left upper extremity, and seeking payment of medical benefits for treatment consisting of cubital tunnel syndrome surgery. The self-insurer denied the claim, and the matter proceeded to a § 10A conference. On October 26, 2017, the judge issued a conference order that required the self-insurer to pay the employee a closed period of § 34 temporary total incapacity benefits from the date of injury, April 26, 2017, through July 31, 2017, and denied the payment of treatment for the left cubital tunnel syndrome surgery. (Dec. 2.) Both parties appealed from the conference order. Pursuant to § 11A(2), the employee was examined by an orthopedic surgeon, Dr. George Whitelaw, and the matter proceeded to hearing. On July 31, 2019, the judge issued his decision that again awarded the employee § 34 total incapacity benefits from April 26, 2017, through July 31, 2017, and extended the period of payment of § 34 benefits through December 12, 2017, followed thereafter by an award of ongoing partial incapacity benefits under § 35, based on a minimum wage earning capacity. (Dec. 10.) The judge also ordered the self-insurer to pay "related medical treatment for the left upper extremity including but not limited to persistent left elbow pain, left hand tingling, numbness and surgical intervention." Id.

The employee acknowledges that he was awarded interest at the conference, and that the self-insurer paid the interest due from that award. On appeal he asserts that he also was entitled to an order of interest on the hearing award and that the judge failed to

order payment of interest in the hearing decision.² (Employee br. 1.) We agree that interest is due the employee on the additional benefits awarded in the hearing decision.

General Laws, c. 152, § 50, states:

Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

There was no need for the employee to separately claim entitlement to interest at the hearing because § 50 is self-operative. Long Van Le v. Boston Steel & Mfg. Co., 15 Mass. Workers' Comp. Rep. 75, 78 (2000); Charles v. Boston Family Shelter, 11 Mass. Workers' Comp. Rep. 203, 205 (1997). Indeed, “ ‘interest is awarded by law so that a person wrongfully deprived of the use of money should be made whole for his loss.’ ” Sloan's Case, 78 Mass. App. Ct. 121, 123 (2010), quoting Todino v. Town of Wellfleet, 448 Mass. 234, 239 (2007). Here, the judge clearly ordered payment of additional benefits beyond those already paid by the self-insurer pursuant to the conference order. Therefore, the judge should have included an order for payment of § 50 interest on the additional weekly benefits ordered in the hearing decision. Accordingly, we order the self-insurer to pay the employee \$50 interest on the additional benefits ordered by the hearing decision.

So ordered.



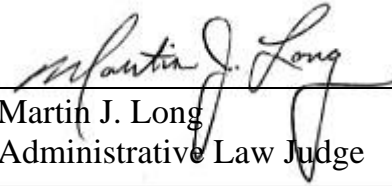
Catherine Watson Koziol
Administrative Law Judge

² The self-insurer did not file a reply brief challenging any of the arguments made by the employee on appeal.

Philip Vo
Board No. 009731-17

A handwritten signature in cursive script, reading "Carol Calliotte", written over a horizontal line.

Carol Calliotte
Administrative Law Judge

A handwritten signature in cursive script, reading "Martin J. Long", written over a horizontal line.

Martin J. Long
Administrative Law Judge

Filed: **June 7, 2021**