COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040798-96**

Rainey D. Slater	Employee
G. Donaldson Construction	Employer
Eastern Casualty	Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Esther C. S. Dezube, Esq., for the Employee
John A. Smillie, Esq., for the Insurer

SMITH, J. This case involves interpretation of the following language in G.L. c. 152, § 34A, as appearing in St. 1991, c. 398, § 60:

> While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, **following payment of compensation provided in sections thirty-four and thirty-five**, a weekly 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 supplied.) The issue before the reviewing board is whether an employee who has been totally incapacitated since his injury must receive payment of one hundred fifty-six weeks of § 34 total incapacity benefits before he can collect § 34A benefits. Concluding that § 34A requires such benefit exhaustion, we affirm the judge's decision to dismiss, as premature, the employee's § 34A claim.[1]

[1] In light of the facts found by the judge, infra, we assume that the insurer commenced payment of § 34A benefits on October 22, 1999, the date Slater's § 34 benefits became exhausted. The issue raised by Slater in this appeal did not become moot after that date, because entitlement to § 34A benefits is a prerequisite to the collection of § 34B cost of living benefits and the weekly benefit rate under § 34A is higher than under § 34.

Rainey D. Slater received a severe traumatic brain injury arising out of and in the course of his employment for Donaldson Construction on October 22, 1996. (Dec. 4-5.) As a result, he suffers from significant cognitive defects, which will prevent him from ever returning to gainful employment. (Dec. 5.) The insurer accepted his original liability claim and commenced payment of § 34 benefits. Pursuant to § 34, Slater was entitled to be paid one hundred and fifty-six weeks of total incapacity benefits. Section 34 payments would have expired on October 22, 1999. (Dec. 7.)

Prior to receipt of the full duration of weekly benefits provided by § 34, Slater filed the present claim for § 34A benefits from November 24, 1997. After a § 10A conference, the judge denied the claim, and the employee appealed to a hearing de novo. (Dec. 1- 2.)

Although Mr. Slater did not testify at hearing, he did appear with his attorney. The parties stipulated to the industrial injury dated October 22, 1996, to a base average weekly wage of $743.88 and to the employee's total incapacity. (Dec. 2-3, 6.) Based on his observations, the administrative judge noted that "Mr. Slater is clearly severely incapacitated in his functioning." (Dec. 6.) The judge also noted that this incapacity was a permanent condition. After reviewing the medical evidence submitted by the employee, the judge determined that the permanency of this incapacity commenced as of November 24, 1997. Id. The judge denied and dismissed the § 34A claim, as premature, because Slater had not, as yet,[2] exhausted the statutory one hundred and fifty-six weeks of compensation under § 34. (Dec. 7- 9.)

Slater appeals, raising only one issue. He contends that an employee who is permanently and totally incapacitated need not exhaust § 34 benefits as a prerequisite to obtaining benefits pursuant to § 34A. (Employee's brief, 1.) We disagree.

We must interpret the workers' compensation act according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language. Scheffler's Case, 419 Mass. 251, 255 (1994). Thus, we first address the

[2] The judge's decision was filed on March 22, 1999.

plain meaning of the statutory language: "following payment of compensation provided in sections thirty-four and thirty-five." The dictionary definition of the word "following" is "next after," "subsequent to." I Webster's Third International Dictionary 883 (1981). The word "following" is used in that sense throughout the workers' compensation act.[3] The plain meaning of the word "payment" is "the discharge of a debt." Id., Vol. II at 1659. However, the meaning of the subsequent phrase, "compensation provided in sections thirty-four and thirty-five,[4] is ambiguous. Sections 34 and 35, as amended in 1991, provide for weekly benefit payment amounts and various maximum benefit payment durations.

Where statutory language is unclear, we consider the words of the 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. Scheffler's Case, supra. We look to the scheme that the Legislature has enacted. Letteney's Case, 429 Mass. 280, 284 (1999).

We therefore examine the main objective of the 1991 reform. As the court declared in Taylor's Case, 44 Mass. App. Ct. 495 (1998), the 1991 Legislature's intention in its wholesale revision of the workers' compensation act was to save costs:

> The 1991 revisions to c. 152 reversed the historically upward trend in workers' compensation rates. The reductions in compensation rates under the 1991 legislation were sweeping and systemic, and came in response to declining economic conditions and rising costs of workers' compensation insurance. See Locke, Workers' Compensation Reform Act § 1.0 (Supp. 1995). There is no indication that the Legislature intended to spare any aspect of the prior rate structure from its design to improve the business climate by lowering workers' compensation benefits.

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[3] See, e.g., § 8(4) ("no sooner than sixty days following the referral"); § 10(4) ("following a conciliation"); § 11B ("following the close of testimony"); § 12 ("following a rescript"); § 15 ("following the date of such injury"); § 25N ("following the end of the group's fiscal year"); § 65 (5) ("following the determination"); and § 69B ("following an injury").

[4] Compare, e.g. §§ 23, 25A, 41 (where the context indicates payment of any compensation), with §§ 25B, 63, 75 (where the context indicates payment of all compensation).

Id. at 500-501 (footnotes omitted). Interpreting § 34A to require exhaustion of the maximum benefit entitlement under § 34 accomplishes this cost-saving purpose, as it prolongs the period of payments under the lower weekly rates provided by § 34,[5] and delays the onset of COLA benefits, which under the 1991 reform act no longer adjusted § 34 payments. G.L. c. 152, § 34B, as amended by St. 1991, c. 398, § 61.

Another major goal of the 1991 reform was to reduce the huge backlog of cases by improving insurance adjusting practices and adjudicatory efficiency. Press Release of Joint Committee on Commerce and Labor, Nov. 5, 1991. The system redesign was explicitly aimed at lowering costs through increased efficiency while better serving seriously injured workers. Summary of Weld-Cellucci Bill, Governor's Legislative Packet for St. 1991, c. 398. Interpreting § 34A to require exhaustion of the maximum benefit entitlement under § 34 accomplishes this backlog reduction purpose by delaying litigation of § 34A claims.

We next focus on the mischief that the specific amendment to § 34A was designed to cure. Section 60 of St. 1991, c. 398, reinserted an exhaustion requirement, which had been deleted in 1985. Lazarczyk v. General Electric Co., 7 Mass. Workers' Comp. Rep. 170, 171 (1993). The pre-1985 exhaustion language, enacted by St. 1976, c. 474, § 12, provided for 34A benefits: "following payment of the maximum amount of compensation provided in sections thirty-four and thirty-five, or either of them . . . ." St. 1976, c. 474, § 12. At that time, the maximum cap was a dollar amount computed by combining the payments made under each section. The 1991 exhaustion language, "following payment of compensation provided in sections thirty-four and thirty-five," reflects the fact that the new maximum caps in §§ 34 and 35 limit the duration, rather

[5] Under § 34, an employee is paid 60% of his average weekly wage. G.L. c. 152, § 34, as amended by St. 1991, c. 398, § 59. Under § 34A, an employee receives the old rate of two-thirds of his average weekly wage. G.L. c. 152, § 34A, as amended by St. 1991, c. 398, § 60.

than the amount, of benefits.[6] The exhaustion language covers both situations where an employee has been consistently totally incapacitated since his injury, see Constant v. Family Planning Council, 11 Mass. Workers' Comp. Rep. 550 (1997) (exhaustion requirement fulfilled by payment of one hundred and fifty-six weeks of § 34 benefits), and where an employee has received some periods of partial as well as total compensation. See G.L. c. 152, § 35, as amended by St. 1991, c. 398, § 63.

The inclusion of § 35 benefits in the language of § 34A's makes sense when viewed in statutory context. A totally incapacitated employee need not exhaust the full duration of § 34 benefits if he has received § 35 partial incapacity benefits. For such a claimant, the durational limitation is less. He may receive § 34A benefits upon receipt of only three hundred sixty-four weeks of §§ 34 and 35 benefits combined, rather than the full four hundred and sixteen weeks [7] otherwise provided by §§ 34 and 35. G.L. c. 152, § 34A, as amended by St. 1991, c. 398, § 60, and G.L. c. 152, § 35, as

[6] Section 34 provides in pertinent part: "The total number of weeks of compensation due the employee under this section shall not exceed one hundred fifty-six." G.L. c. 152, § 34, as amended by St. 1991, c. 398, § 59.

Section 35 provides in pertinent part: "The total number of weeks of compensation due the employee under this section shall not exceed two hundred sixty; provided, however, that this number may be extended to five hundred twenty if an insurer agrees or an administrative judge finds that the employee has, as a result of a personal injury under this chapter, suffered a permanent loss of seventy-five percent or more of any bodily function or sense specified in paragraph (a), (b), (e), (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanently life-threatening physical condition, or contracted a permanently disabling occupational disease which is of a physical nature and cause . . . Where the insurer agrees or the administrative judge finds such permanent partial disability as is described in this paragraph, the total number of weeks the employee may receive benefits under both this section and section thirty-four shall not exceed five hundred twenty. Where there has been no such agreement or finding the 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.

[7] The sum of one hundred and fifty-six weeks of § 34 benefits, plus two hundred and sixty weeks of § 35 benefits.

amended by St. 1991, c. 398, § 63, last sentence. [8] Thus the 1991 reform purpose of more speedily providing benefits to the seriously injured, while holding down costs, is implemented by these provisions.

Slater contends that requiring an exhaustion of § 34 benefits prior to payment of § 34A benefits would result in an absurd and irrational delay of payment of § 34B cost of living adjustment (COLA) benefits. (Employee's brief, 6, 8, 10.) We recognize that receipt of § 34A benefits triggers entitlement to COLA benefits, which are not provided with receipt of §§ 34 or 35 benefits. However, we are not persuaded that delay of the COLA payments is absurd or irrational. Instead, we believe that such delay is exactly what the Legislature intended. And, given the 1991 Legislature's cost saving focus, we see no legislative intention to permit a totally incapacitated employee to receive the higher weekly payment provided by § 34A before the collection of all the applicable benefits available under §§ 34 and 35.

The 1991 legislative history supports our interpretation. The exhaustion requirement was first suggested in § 67A of the Bump/Pines Bill. It merely provided: "following payment of compensation provided in section thirty-four." One commentator, Leonard Y. Nason, observed that § 67A "[p]rovides that permanent and total disability benefits may not be sought prior to exhaustion of § 34 benefits and that COLA will not attach until 36 months after the injury. This is to reduce litigation for P & T [§ 34A permanent and total incapacity] claims, especially as it relates to the lump sum exclusion restriction." Nason, Initial Review of the Bump/Pines WC Bill 13 (Legal Information Systems, Inc., Nov. 13, 1991).

The staff of the Workers' Compensation Advisory Council similarly reported that § 67A of the Commerce and Labor Draft, Senate 1741:

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[8] This last sentence in § 35 limits the entitlement to § 35 partial incapacity benefits where § 34 benefits have been received. An individual who has received the full duration of § 34 benefits, may only receive two hundred and eight weeks of § 35 partial compensation, rather than the regular § 35 partial compensation duration of two hundred and sixty weeks. See note 6, supra.

> Appears to require that employee exhaust temporary total benefits (156 weeks) before receiving perm/total benefits.
> Comment:
> Similar to pre-1985 changes although that required the payment of the maximum amount under § 34 and § 35 before a worker could collect § 34A. This language states that following payment of compensation under § 34 a person can get § 34A. It would appear that it intends that following payment of § 34 for the maximum period, a person may get § 34A. The intent is to decrease disputes that a case is under § 34A because even though these cases are about 2-3% of the total entered, they are heavily contested. After exhausting § 34 an insurer might be in a better position to accept the case. The flip side is that the employee who is perm/total may have to file again to get benefits.

Competing workers' compensation reform proposals were made that did not contain any exhaustion provisions. See H. 5609 and H. 6357. As the reform debate continued, the Weld bill was amended by Representatives Bump and Finneran to include the present exhaustion language, "following payment of compensation provided in sections thirty-four and thirty-five." Journal of the House, Wednesday, Dec. 11, 1991, 1416. The provision as amended became H. 6377, § 60. Staff commentary on this language indicates that "[t]his would appear to require any person seeking Perm. Tot. to exhaust other benefits first before applying for § 34A." Workers' Compensation Advisory Council Staff, Initial Comments, House Ways and Means Bill, House 6377, as Amended and Engrossed by the House, 119.

The exhaustion provision became law as St. 1991, c. 398, § 60. According to Catherine Koziol, author of the Massachusetts Practice series on workers' compensation, "[t]he changes made in this section were intended to preclude an employee from claiming Section 34A benefits from the onset of disability, as existed prior to the reform of 1991, and to return to the pre-1985 law's requirement that benefits payable under Sections 34 and 35 be exhausted prior to eligibility for benefits under Section 34A." Koziol, Massachusetts Workers' Compensation Reform Act, as Amended (2000 ed.), § 8.5 at 195. Koziol further opined that "[I]t does not seem that the legislature intended that a permanently and totally disabled employee be denied eligibility to Section 34A

benefits until he exhausts the lower amounts payable under Section 35." Id. at 196. We concur in her balanced interpretation.

Slater cites Constant, supra, for the proposition that an injured employee need not exhaust § 34 benefits prior to seeking § 34A benefits. (Employee's brief, 4.) However, Mr. Constant had been paid his full § 34 entitlement. The sole question before the reviewing board in Constant was whether a totally incapacitated employee, who had exhausted his § 34 entitlement, also had to exhaust § 35 partial incapacity payments before becoming entitled to § 34A benefits. We found such a construction absurd. The Constant decision was based on the practical reality that a totally incapacitated employee is not partially incapacitated. Section 35, which governs benefits for partially incapacitated employees, was simply inapplicable to Constant's situation. In Constant, we expressly did not reach the issue presented here: whether the exhaustion of § 34 benefits was a prerequisite to obtaining § 34A benefits. 11 Mass. Workers' Comp. Rep. at 554, n.6.

Because the judge's decision that Slater could not obtain § 34A benefits before exhausting his benefit entitlement under § 34 was legally correct, we affirm it. G.L. c. 152, § 11C.

So ordered.

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Suzanne E. K. Smith
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: April 14, 2000

MCCARTHY, J., dissenting I would reverse the decision and award the § 34A benefits to which the employee is undisputably entitled, but for the exhaustion requirement imposed by the administrative judge.

To read the disputed statutory phrase as an exhaustion requirement, one must add the word, "maximum," to the Legislature's 1991 amendment to § 34A – "following payment of [*maximum*] compensation provided in sections thirty-four and thirty-five." Such an interpretation, however, is suspect in the face of a pre -1985 version of § 34A, which expressly required exhaustion of temporary total incapacity benefits by reference to "the maximum amount of compensation provided in sections thirty-four and thirty-five[.]" The absence of the pesky adjective in the 1991 amendment is made no less curious by drawing a distinction between the aggregate quantitative cap in effect prior to 1985 and the current duration-based maximums. There are maximum numbers of weeks under the current versions of § 34 and 35, just as there were maximum amounts of money under pre -1985 versions of those statutes. Why, then, did the Legislature leave out "maximum" from the 1991 amendment if it intended an exhaustion requirement?

The answer has to be that, whatever the Legislature meant by inserting the 1991 amendment to § 34A, it certainly did not mean for it to be an exhaustion requirement. "[T]he use of different language in related statutes dealing with the same subject matter ordinarily indicates that different meaning were intended."[9] Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 823, n. 8 (1998), citing 2B Singer, Sutherland Statutory Construction § 51.02 (5th ed. 1992). We should, " . . . decline to imply language which the Legislature has omitted." Beeler v. Downey, 387 Mass. 609, 617 (1982).

The "legislative history" here does not dissuade me from applying the usual canons of statutory construction. If the much-ballyhooed "cost-saving" purpose behind the

[9] It seems reasonable to consider the 1976 version of § 34A and the 1991 version of § 34A as "related statutes dealing with the same subject matter."

1991 revisions to c. 152 – see Taylor's Case, supra – is the overriding rationale for an interpretation of § 34A that requires exhaustion, perhaps we should also overrule our "beneficent" interpretation of § 34A in Constant v. Family Planning Council, 11 Mass. Workers' Comp. Rep. 550 (1997). Constant stands for the proposition that an employee who has received the maximum in § 34 benefits need not receive § 35 benefits before being eligible for 34A benefits. Id. at 554. Imagine the cost savings if an employee not only had to exhaust § 34, but also had to go through four or more years of § 35 at no more than 45% of his average weekly wage prior to receiving 66 2/3% of average weekly wage under § 34A plus cost of living adjustments under § 34B![10] An economic explanation for requiring exhaustion would have pushed Constant, supra, in the opposite direction.[11] Then there's the Bump/Pines bill, which provided: "following payment of compensation provided in section thirty-four." The language of this proposed bill adds nothing to the analysis. Finally, we have a gaggle of commentators, whose opinions, for me, are of dubious merit in interpreting the Legislature's intent.

If the Legislature actually did mean for its 1991 amendment to § 34A to provide an exhaustion requirement, let it say so directly. Paraphrasing from Justice O'Connor's brusque and cogent dissent in Neff v. Commissioner of Dept of Industrial Accidents, 421 Mass. 70 (1995):

> By declaring that the Legislature intended to say [maximum compensation under §§ 34 and 35] when the Legislature did not say that, and when it is clear that the Legislature knows precisely how to that that – [see 1976 version of § 34A] – the [reviewing board] violates the canon of statutory construction that says that, if an omission from a statute was intentional, no court can supply it; if the omission was due to inadvertence, an attempt to supply it would be tantamount to adding to a statute a meaning not intended by the Legislature. [Citations omitted.] Since the Legislature knows how to [provide an express exhaustion requirement for § 34A] the fact that it never expressly provided [for such in the 1991 amendment to § 34A] could suggest a legislative intent *not* [to require exhaustion].

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[10] Under certain circumstances it would take ten years to exhaust § 35.

[11] Indeed, the reference to Nason & Wall, Massachusetts Workers' Compensation Reform Act, as Amended (1995 Ed.) § 8.5 at 187 in the majority opinion requires exhaustion of § 34 and
§ 35!

Id. at 79, O'Connor, J., dissenting. Continuing, "I believe that, even if the [reviewing board] is right in concluding what the Legislature meant to provide or 'would have' provided, the [reviewing board] is wrong – exceeds its authority – in supplying the un-expressed provision." Id. at 78, O'Connor, J., dissenting.

Because we do not have the authority to insert the word, "maximum," into the 1991 amendment to § 34A, I would reverse the administrative judge's finding of an exhaustion requirement and award § 34A benefits to Mr. Slater.

Accordingly, I dissent.

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William A. McCarthy
Administrative Law Judge

Filed: April 14, 2000