COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 073282-01
036759-03
035161-04

Richard O. Dupuis	Employee
Teddy Bear Pools, Inc.	Employer
CNA Insurance Co.	Insurer
A.I.M. Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

APPEARANCES

Charles R. Casartello, Jr., Esq., for the employee
Martin T. Sullivan, Esq., for CNA Insurance Co.
Kimberly Davis Crear, Esq., for A.I.M. Insurance Co.

FABRICANT, J. This appeal by the first insurer (CNA) in this successive insurer case presents the question of whether to apply the rate-adjusting provisions of G. L. c. 152, § 35B, where the employee's first period of incapacity resulted from a separate and distinct work injury.

The employee has documented a number of work related injuries, beginning with a burning sensation to the left shoulder in late 1999, recurring in 2000 and with burning in the right shoulder in 2001, and culminating with low back pain on September 7, 2001. Though he received some treatment for these injuries, the employee did not miss any work until he had surgery on his left shoulder in March 2003, returning to work on April 1, 2003. (Dec. 3.)

A subsequent work injury to his right knee in July 2003 resulted in surgery, but no lost time from work. In October 2003, a crush injury to the right hand resulted in surgery and lost time for which he received benefits from A.I.M. until March 8, 2004. During this time, the employee also had surgery on his right shoulder in December 2003 and remained out of work until March 24, 2004 as a result. (Dec. 3.)

Finally, the employee left work for the last time on October 1, 2004 due to pain in his neck, arms, hands, legs and shoulders. He has since had surgery to his neck on November 2, 2004, both shoulders in July and August of 2005, and his back on November 29, 2005. (Dec. 3-4.)

CNA paid for the employee's medical treatment in the fall of 2001, but the employee did not receive weekly benefits for his neck and back injuries, as he was not incapacitated from working at that time. The second insurer (A.I.M.) paid medical and weekly incapacity benefits for the shoulder injuries in 2003 and 2004. (Dec. 3.) Pertinent to the issue on appeal, the administrative judge ordered CNA to pay ongoing § 34 total incapacity benefits from October 1, 2004, based on the employee's 2001 back, shoulder and neck injuries.[1] The judge used the employee's average weekly wage at the time of his leaving work on October 1, 2004 to calculate the employee's § 34 benefits. (Dec. 1, 8.) CNA challenges the use of that average weekly wage as being contrary to the proper application of § 35B.

General Laws c. 152, § 35B, provides:

> 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, 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.

We agree with CNA that the judge's use of the employee's 2004 average weekly wage of $1,032.44 for the 2001 injury was an unstated application of § 35B's "subsequent injury" rate of compensation benefits. We also agree that the application was contrary to law. § 11C.

We first address the question of whether the employee's shoulder injuries, resulting in periods of incapacity in 2003 and in March 2004, can be the foundation for a § 35B "subsequent injury" as of the employee's October 1, 2004 incapacity. Certainly, the employee had returned to work for a period of more than two months, i.e., from March 24 to October 1. (Dec. 3-4.) During that time, the increase in the employee's neck and back pain, (Dec. 4), could be found to be the type of "deterioration in the employee's physical abilities culminating in the inability to work" that § 35B contemplates. Ottani v. Ottani Tree Serv., 9 Mass. Workers' Comp. Rep. 633, 638 (1995). See

[1] We summarily affirm the decision as to CNA's argument that the judge misapplied the successive insurer rule. There was medical evidence, adopted by the judge, directly connecting the employee's 2004 medical disability with the initial back and neck injuries, without aggravation from the employee's interceding work activities. (Dec. 7.)

Don Francisco's Case, 14 Mass. App. Ct. 456, 461 (1982)("change in the employee's physical or mental condition . . . occur[ring] at least two months after his return to work" is § 35B "subsequent injury").

At the outset, we note that § 35B refers to recurrences of prior injuries. However, that mere reference does not dispose of the issue; this case involves a recurrence in 2004 of the employee's 2001 injury. The question is whether there can be a recurrence of an injury, for purposes of § 35B, when the original injury did not result in lost time for which weekly incapacity benefits were paid. We answer "no" to that question.

In the present case the employee received only medical benefits for his initial 2001 work-related onset of neck, shoulder and back problems. He never received weekly incapacity benefits for that injury until the judge's decision ordered CNA to pay them commencing on October 1, 2004. Thus the outcome here is governed by our decision in Russo v. General Electric, 8 Mass. Workers' Comp. Rep. 52 (1994), where we concluded that "[a]n employee may not recover § 34 weekly wage replacement benefits at the § 35B rate when his only previous compensation entitlement has been medical benefits." Id. at 57. Put succinctly, an employee cannot satisfy the return to work requirement of § 35B without having left work in the first place.

Accordingly, we reverse the decision insofar as it applies the employee's higher average weekly wage in 2004, pursuant to § 35B. We order that the employee's § 34 benefits be calculated based on his 2001 average weekly wage, stipulated to be $835.21. (Dec. 1.) The insurer may recoup overpayments in accordance with the provisions of G. L. c. 152, § 11D(3).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 6, 2008**