COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 23093-89**

Robert Berg Employee
City of Newton Employer
Self-Insured

REVIEWING BOARD DECISION
(Judges Smith, McCarthy & Wilson)

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Richard G. Chmielinski, Esq., for the self-insurer

SMITH, J. The employee, a permanent substitute teacher, appeals from the denial of his claim. Under G.L. c. 152, § 69, which made workers' compensation coverage potentially available for all school department personnel, no award is due without an election to provide coverage. The judge found that the City, in the exercise of its prerogative, did not elect to provide workers' compensation coverage for its substitute teachers. The decision is consistent with judicial precedent interpreting the terms "laborers, workmen and mechanics." We therefore affirm it.

It was undisputed that Robert Berg sustained a personal injury on March 14, 1989 arising out of and in the course of his employment as a substitute teacher. The injury occurred when he attempted to calm down students who were wrestling. (Dec. 2; Employee Ex. 1; Tr. 10.) The only question before us is whether Berg comes within the statutory classification of "laborers, workmen, and mechanics," or whether the City otherwise affirmatively elected to provide workers' compensation coverage for substitute teachers, as provided in G.L. c. 152, § 69.

Section 69 reads in pertinent part:

> "any . . . city. . . having the power of taxation which has accepted chapter eight hundred and seven of the acts of nineteen hundred and thirteen . . . shall pay to laborers, workmen, mechanics, and nurses, employed by it who receive injuries arising out of and in the course of their employment . . . , the compensation provided

> by this chapter. . . . Sections seventy to seventy-five, inclusive, shall apply to . . . any . . . city . . . having the power of taxation which has accepted said chapter eight hundred and seven . . . The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive, shall include all employees of any such city, . . . and shall include other employees . . . , regardless of the nature of their work, . . . of any such . . . city . . . to such extent as . . . such . . . city . . . , acting . . . through . . . the . . . city council . . . , shall determine, as evidenced by a writing filed with the department.

In other words, § 69 makes workers' compensation coverage elective for municipalities. Unlike a private employer, a city does not have to cover all its employees. It may elect to provide coverage on a limited basis. Coppola v. City of Beverly, 31 Mass. App. Ct. 209, 211 (1991).

On December 9 1913, the inhabitants of the City of Newton voted to accept workers' compensation coverage for laborers, workmen and mechanics, as provided by St. 1913, c. 807. (Dec. 4; Insurer Exs. 3 and 4; Tr. 39.) On April 17 1967, the City expanded workers' compensation coverage to include all employees except for elected and appointed officers and employees of the school department who were not "laborers, workmen, mechanics and foremen." (Dec. 4; Insurer Ex. 5; Tr. 41.) The employee asserts that he falls into the latter "laborers, workmen, mechanics and foremen" job classification and thus is covered. We disagree.

The terms, "laborers, workmen and mechanics," have historically been used in a restrictive sense to distinguish among classes of employees in government employment. See Lesuer v. City of Lowell, 227 Mass. 44 (1917). The words should be interpreted according to their ordinary dictionary definition. See Devney v. City of Boston, 223 Mass. 270, 272 (1916). A "laborer" ordinarily is a person without particular training who is employed at manual labor under a contract terminable at will; "workmen" and "mechanics" are users of tools in a manual occupation. Id.; Randall's Case, 331 Mass. 383, 385-386 (1954). The focus of the definitional inquiry is on the character of the work that a claimant is employed to perform. See White v. City of Boston, 226 Mass. 517, 520 (1917). A janitor who performed menial labor with his own hands was found to be a "laborer," id., as was a student nurse whose job required the performance of manual tasks such as giv-

ing baths to patients, cleaning utensils and other equipment, cleaning medicine closets and utility rooms, washing beds, preparing food, and serving meals. Brewer's Case, 335 Mass. 601 (1957). In sum, those governmental employees performing menial or physical tasks have been covered under these terms. Tracy v. Cambridge Junior College, 364 Mass. 367, 376 (1973). [1]

In contrast, governmental employees having distinct training or a profession have traditionally been excluded from the class of "laborers, workmen, and mechanics." A member of a trained and disciplined city fire department, Devney v. City of Boston, *supra*, and a university chief of police whose duties were principally administrative and supervisory, Randall's Case, *supra*, were not covered. Even under the less restrictive legislative scheme for private employers, the court has held that professional employees are not covered. Tracy, 364 Mass. at 376.

We find no support in the case law for the proposition that Berg's work as a substitute teacher fell under the definition of "laborer, workman, or mechanic of the school department." A teacher's vocation involves imparting knowledge to pupils through precept and demonstration, rather than performing manual labor or construction work. Lesuer, 227 Mass. at 45-46. We are unable to distinguish Berg's situation from that of the teacher of automobile mechanics in a vocational school, who was denied compensation. Lesuer, *supra*. Berg was hired as a "permanent substitute teacher." (Dec. 5; Tr. 21.) Deductions were taken from his paycheck for the Newton Teachers' Union. (Dec. 5; Tr. 22.) He worked fulltime, five days per week, [2] in a classroom for troubled youth. His job was to keep order in the classroom so that other teachers could actually teach. (Tr. 8; 23.)

Although the City of Newton accepted the Workers' Compensation Act, its obligation was limited to those workers specified by the language of its acceptance. Coppola v. City of Beverly, 31 Mass. App. Ct. at 212. It is clear from the City's coverage provision,

[1] An assistant librarian who performed secretarial, receptionist, stenographic and record keeping functions was properly classified as a laborer or workman under the less restrictive legislative scheme for private employers. G.L. c. 152, § 1(4)(a).

[2] Until he was hired as a permanent substitute teacher six weeks prior to his injury, Berg had worked sporadically when teachers were absent.

supra at 2, that generally school department employees were not covered. The exception language used by the City has a well-established meaning that does not include teachers. We agree with the administrative judge that the City did not elect to extend workers' compensation coverage to Berg's class of employee.

The alternate argument, that Berg was not performing a teaching function at the time of his injury, is similarly unpersuasive. The employee was hired as a teacher. (Dec. 4; Tr. 7.) An essential part of teaching is keeping order in the classroom. Berg was acting in the performance of his duty, within the course of his employment as a teacher, at the time of his injury. See Randall's Case, 331 Mass. at 384 (university police chief injured in quelling a disturbance not covered as a "laborer, workman or mechanic").

Only the employee appealed this decision. The sole issue raised by the employee was coverage. Although it did not appeal, in its response brief, the self-insurer argues that the judge erred in not ordering recoupment and § 14 penalties. (Insurer's Brief 13.) We decline to address these issues, as they are not properly before us. G.L. c. 152, § 11C; 452 Code Mass. Regs. 1.15(4)(a)(3) ("The Reviewing Board need not decide questions or issues not argued in the [appellant's] brief.").

The decision is not arbitrary or capricious or contrary to law. Consequently, we affirm it. G.L. c. 152, § 11C.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge