COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045362-96**

Roger Piekarski	Employee
National Non-Wovens	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy, and Maze-Rothstein)

APPEARANCES
Donald W. Blakesley, Esq., for the employee
Kimberly Davis Crear, Esq., for the insurer

LEVINE, J. The insurer appeals the decision of an administrative judge interpreting the interplay between receipt of partial incapacity benefits under § 35 of the workers' compensation statute and receipt of unemployment benefits. The insurer argues that § 36B requires that unemployment benefits be deducted from the awarded § 35 weekly partial incapacity benefits, rather than, as the judge ruled, from the amount of § 34 benefits that would be payable, had the employee been entitled to them. We agree with the insurer and reverse the decision on this issue.

Roger Piekarski began working for the employer as a line machine operator in 1973. On September 24, 1996, he injured his back at work. He continued to work off and on for about a year until, in December of 1997, while trimming his Christmas tree, he severely aggravated his back. (Dec. II,[1] 2.) After the hearing on the employee's claim for weekly incapacity benefits, an administrative judge found, in accordance with § 1(7A), that the employee's work injury continued to be a major cause of Mr. Piekarski's ongoing

[1] Hereinafter, Decision II refers to the decision, here on appeal, issued July 6, 2001. Decision I refers to the previous decision issued August 24, 1999.

back pain and problems. In a decision dated August 24, 1999, he awarded § 35 temporary partial incapacity benefits from January 5, 1998 and continuing at the rate of $169.72 per week based upon an average weekly wage of $557.87 and an earning capacity of $275.00 per week. (Dec. I, 4-6.) The insurer appealed to the reviewing board. (Dec. II, 2-3.) Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407, 409 (2000).

During the pendency of the appeal, Mr. Piekarski was terminated from his position with the employer and collected unemployment benefits in the amount of $187.00 per week between October 22, 1998 and May 31, 1999. (Dec. II, 3.) The employee filed a new claim to determine how § 36B, which addresses the interplay between partial incapacity benefits and unemployment benefits, affected his weekly compensation benefits. (Insurer brief, 2; Employee brief, 1; Dec. II, 1, 2.) A conference order, issued pursuant to § 10A, awarded the employee § 35 benefits during the subject period. The insurer appealed to a hearing de novo, at which the facts were agreed to. (Dec. II, 1.)

In the meantime, the reviewing board recommitted the judge's earlier decision awarding § 35 benefits. In the decision before us on appeal, the judge addressed both the subject of the recommittal and the employee's claim under § 36B. However, the only issue now raised relates to § 36B.

General Laws c. 152, § 36B, as added by St. 1985, c. 572, § 47A, reads as follows:

> (1) No benefits shall be payable under section thirty-four or section thirty-four A for any week in which the employee has received or is receiving unemployment compensation benefits.
> (2) Any employee claiming or receiving benefits under section thirty-five who may be entitled to unemployment compensation benefits shall upon written request from the insurer apply for such benefits. Failure to do so within sixty days after written request shall constitute grounds for suspension of benefits under said section thirty-five. *Any unemployment compensation benefits received shall be credited against partial disability benefits payable for the same time period, or, if for a period of time for which partial disability benefits have already been paid, shall be credited against any future partial disability benefits which are or may become payable.*

(Emphasis added.)[2]

The judge rejected the insurer's argument that the language of § 36B requires that the unemployment benefits ($187.00 per week) be credited against, or deducted from, the partial disability benefits ($169.72 per week), resulting in no § 35 benefits being owed. Instead, the judge ruled that:

> [A] more equitable reading of the statute would require that the amount of unemployment paid be deducted from the rate payable under Section 34 benefits. The insurer would still be responsible for the difference between the Section 34 benefit and the Section 35 benefit, but only up to the amount of the Section 35 benefit. This avoids any double recovery by an employee on unemployment benefits, but it would also avoid a double penalty for becoming unemployed. It would still "credit" the insurer with the unemployment benefit as required under Section 36B.

(Dec. II, 4-5.) The judge thus subtracted the employee's unemployment benefit of $187.00 per week from his § 34 temporary total incapacity rate of $334.72, to get $147.72, which he found to be the weekly amount of § 35 benefits the insurer owed the employee. (Dec. II, 5, 6.) The judge reasoned that his formula protected "the injured employee who has returned to work at a significantly lower paying job within his restrictions, but who then is later laid off and paid unemployment benefits based on that much lower rate of pay." (Dec. II, 5.)

The insurer argues that a plain reading of § 36B, as well as its intent and purpose, requires that unemployment benefits be deducted from § 35 partial incapacity benefits to determine the residual amount of § 35 benefits owed. The employee counters that the term "credit" is ambiguous and permits the application of some formula other than a

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[2] The relevant part of the unemployment statute, G. L. c. 151A, § 25, as amended by St. 1985, c. 572, § 6A, reads as follows:

> [N]o benefits shall be paid to an individual under this chapter for –
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> . . .
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> (d) Any period with respect to which he is receiving or has received or is about to receive compensation for total disability under the workers' compensation law of any state . . . , but not including payments for certain specified injuries under section thirty-six

simple dollar-for-dollar reduction. He further maintains that the insurer's formula is fundamentally unfair, essentially eliminating the payment of partial compensation to all but the highest wage earners who are collecting unemployment benefits.

The plain meaning of the statute and case law compel us to agree with the insurer. Our interpretation of § 36B is guided by well-established principles:

> The work[ers'] compensation act is to be construed broadly, rather than narrowly, in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design. . . . But it is also settled that, in construing a statute, its words must be given their plain and ordinary meaning according to the approved usage of language . . . and that the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it. Johnson's Case, 318 Mass. 741, 746-747 (1945) (citations omitted).

Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998). See Jinwala v. Bizarro, 24 Mass. App. Ct. 1, 4 (1987)(if the language of a statute is clear and unambiguous, it must be construed as written). Section 36B requires that "any unemployment compensation benefits received *shall be credited against partial disability benefits* payable for the same period of time . . ." (emphasis added). "The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation." Hashimi v. Kalil, 388 Mass. 607, 609 (1983). The relevant dictionary definition of "credit" is "deduction of a payment made by a debtor from an amount due." The American Heritage Dictionary 338 (2^{d} College ed. 1984). We have accepted this plain meaning in the past. In Alicea v. Russell Harrington Cutlery, 9 Mass. Workers' Comp. Rep. 581, 588 (1995), we affirmed a judge's order to offset unemployment benefits against § 35 benefits that were due. In Rogers v. Universal Prods, Inc., 12 Mass. Workers' Comp. Rep. 198, 202 (1998), we observed that

> If an employee is forced by the residual effects of her injury to leave her current job, and can only obtain less remunerative labor, then she is entitled to § 35 partial incapacity benefits. Garrigan's Case, 341 Mass. 413, 416-417 (1960). In that circumstance, the judge must determine the amount of unemployment benefits the employee received and credit those payments

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of chapter one hundred and fifty-two.

> against the partial incapacity benefits otherwise payable for the same period. G.L. c. 152, § 36B(2).

In Cathline v. J&D Truck, Inc., 12 Mass. Workers' Comp. Rep. 343 (1998), an administrative judge ordered the insurer to pay the employee § 35 benefits using the amount of unemployment benefits the employee collected as the earning capacity in fixing the weekly partial rate. We reversed that order because it

> "effectively equate[d] the amount of unemployment benefits with the employee's earning capacity. That is inapposite to the statute's directive, that '[a]ny unemployment compensation benefits shall be credited against partial disability benefits payable for the same time period' . . . , and puts the cart before the horse."

Id. at 346. First, the employee's earning capacity must be determined based on the employee's medical impairment and vocational factors. Thereafter, "the unemployment compensation benefits come into play, either as a credit against partial incapacity benefits or as a bar to total incapacity benefits." Id. See also L. Locke, Workmen's Compensation, § 8.13, at 216 (Koziol Supp. 2000)(section 36B "calls for a dollar-for-dollar reduction in partial benefits . . .").[3]

The purpose of the statute also leads to the same result. In Smith v. American Tissue Mills, 10 Mass. Workers' Comp. Rep. 450 (1996), the employee appealed from a judge's order that the insurer credit the amount of unemployment benefits against the § 35 benefits it had been ordered to pay. The employee argued it was unconstitutional to differentiate between injured workers who find work within their earning capacity and still receive § 35 benefits, and injured workers who do not work but who have their workers' compensation benefits reduced by the amount of unemployment benefits received. (The judge's rationale here is similar. See Dec. II, 4.) Although we recognized

[3] For an example in a different context of the phrase "credit against" meaning a deduction from an amount due, see Rosenberg v. Merida, 428 Mass 182 (1998)(Non-custodial parent "who is receiving disability income from the Social Security Administration should receive a 'credit against' his child support obligation for the benefits paid by the Social Security Administration to his minor children as a result of his disability." Id. at 183. There should be "a dollar-for-

our authority is more limited when constitutional issues are raised, Smith, supra at 452, we nevertheless rejected the employee's argument: " 'it was not intended [by the legislature] that the industry should be saddled with the double burden of paying [unemployment] benefits and [workers'] compensation during the same period in which an employee is not earning wages.' " Id. at 453, quoting Pierce's Case, 325 Mass. 649, 658 (1950). "[T]he . . . long held legislative rationale has withstood the test of time despite the apparent disparity pointed to by the employee." Smith, supra at 453. It is for the legislature, not the reviewing board, to change the clear mandate of the statute.[4]

Therefore, we reverse the decision of the administrative judge insofar as it orders § 35 partial incapacity benefits of $147.72 per week between October 22, 1998 and May 31, 1999. During that period, unemployment compensation shall be credited dollar-for-dollar against partial disability benefits pursuant to § 36B. In all other respects, the decision is affirmed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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dollar credit . . . against the support obligation." Id. at 195).

[4] When Pierce's Case was decided, G. L. c. 151A, § 25(d)(3), prohibited the payment of unemployment benefits during any period in which the employee was to receive total or partial workers' compensation benefits, unless the employee's partial incapacity resulted from one of the specific injuries set out in G. L. c. 152, § 36. Now an employee can receive partial incapacity benefits while collecting unemployment benefits (subject to a credit), without regard to whether the partial incapacity is caused by a specific injury under § 36.

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Filed: **June 14, 2002**

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Susan Maze-Rothstein
Administrative Law Judge