COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029883-21**

Scott R. Murray	Employee
North Shore Medical Center Salem Hospital	Employer
Mass. General Brigham Incorporated	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Preston.

APPEARANCES
Alan Pierce, Esq., for the employee
Pauline A. Jauquet, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from the administrative judge's decision awarding § 34 benefits based upon an average weekly wage calculated by including wages from concurrent employment with the Town of Marblehead Fire Department on the date of injury, June 25, 2021. Finding error in the decision's outcome, we reverse.

This case was presented to the administrative judge on a Statement of Agreed facts.[1] The employee is a mental health specialist at North Shore Medical Center Salem Hospital (Salem Hospital), who also works as a Lieutenant for the Marblehead Fire Department. On the date of injury, July 25, 2021, the employee sustained a right shoulder rotator cuff tear while working at Salem Hospital. Following surgery, he was able to return to full duty work at both jobs. He was out of work from November 7, 2021, until August 6, 2022, and was paid weekly § 34 benefits during that time in the amount of $482.86, based upon an average weekly wage of $804.77 calculated solely from his earnings at Salem Hospital. (Exhibit 3.)

[1] The parties do not dispute these facts as presented. (Employee br. 1; Ins. br. 1-3.)

On December 7, 2021, the employee filed a claim seeking re-calculation of his average weekly wage to include his fire department wages. This began a procedural journey[2] that ultimately resulted in the claim being heard at a § 10A conference on January 17, 2023. The resulting order required the self-insurer to adjust the employee's average weekly wage to include his fire department wages.

On the self-insurer's appeal, the only issue at hearing was the calculation of the average weekly wage and whether the employee's wages as a firefighter should have been included as "concurrent employment."[3] Accordingly, the parties submitted hearing briefs in support of their legal arguments on the issue of concurrent wages, and provided stipulated facts in lieu of witness testimony.[4]

The judge's decision issued on October 18, 2023, and was concise. There is only one sentence that can be construed as legal analysis: "There is no exclusionary language in any document presented and submitted by the parties wherein I am precluded from finding entitlement to payment of Section 34 benefits based solely on the Employee's combined wages." (Dec. 4.) The judge found that the Town of Marblehead Fire

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[2] The December 7, 2021, claim was withdrawn by the conciliator. An appeal of the withdrawal to the Senior Judge resulted in the affirmation of that withdrawal. A second claim was filed on April 13, 2022, which was also withdrawn by the conciliator and, again, appealed to the senior judge who, again, summarily affirmed the withdrawal of the claim. In recognition of the fact that the senior judge's disposition could not be appealed to the reviewing board, the parties were afforded an additional opportunity to brief the issues. On August 26, 2022, the senior judge sent the claim forward to Dispute Resolution for a § 10A conference. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in board file).

[3] G. L. c. 152 § 1(1) states, in relevant part:

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.

[4] The § 11A Impartial Examination was waived as there were no medical issues in dispute.

Department and the North Shore Medical Center both provided workers' compensation coverage as mandated by Chapter 152. Finding concurrent employment, the judge ordered that the benefits claimed were to be paid based upon the combined wages of both employers, yielding an average weekly wage of $3,522.00. (Dec. 4.)

The judge's lack of significant analysis would ordinarily leave us with no meaningful way to determine whether correct rules of law have been applied to the stipulated facts in this case. Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). However, as the relevant facts in this case are stipulated by the parties, we find that the applicable statutes and precedent necessitate reversal of the judge's order that included earnings from the Town of Marblehead Fire Department in the average weekly wage calculation.

The Joint Statement of Agreed Facts submitted by the parties, and entered as Exhibit 3, contains the following stipulations:

> 2. On July 25, 2021, the Employee was concurrently employed[5] in a full-time capacity for the town of Marblehead and was a Lieutenant in their Fire Department.
> 3. The Employee, as a member of the Marblehead Fire Department, was covered for work-related injuries under G.L. c. 41, § 111F.

(Ex. 3.) The self-insurer correctly argues that fire department members such as the employee are covered by G. L. c. 41 § 111F,[6] and are excluded from coverage under

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[5] We take "concurrently employed" in this context to literally mean that the employee was employed by the town of Marblehead during the same time period that he was employed at Salem Hospital, and that the parties did not intend to stipulate to eligibility for concurrent employment benefits pursuant to c. 152 § 1.

[6] G.L. c. 41, § 111F states, in relevant part:

> Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for

Chapter 152.[7] The statute makes it abundantly clear that both police and fire departments are treated differently when it comes to compensation for work injuries. (G.L. c. 41 § 111F.) They are not part of the workers' compensation statute, G.L. c. 152, as other workers in the Commonwealth are. It is a separate system, and the Department of Industrial Accidents has no jurisdiction over claims arising under Chapter 41 § 111F. Therefore, concurrent wages from that system are not applicable as "concurrent employment" defined by G.L. c. 152 § 1. At its most basic, the concept is simply that if the "concurrent employment" is with an employer who is not statutorily required to provide for the payment of workers' compensation under Chapter 152, there cannot be any resulting benefit to a potential claimant under Chapter 152.

There is ample precedent excluding the consideration of wages and benefits derived from systems apart from Chapter 152 in the calculation of the employee's average weekly wage, and the employee raises no argument causing us to part with or reconsider our prior extensive discussion and analysis of this issue in Lubofsky v. Lowe's Home Centers, Inc., 29 Mass. Workers' Comp. Rep. 109, 111-118 (2015). As we stated there:

> Acceptance of the employee's argument would potentially require that average weekly wage calculations include concurrent wages earned not only by employees

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> any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter.

[7] The employee argues that Massachusetts is a state that has "carve out" provisions, placing police and firefighters "into a parallel system" (Employee br. 5), and then citing only a brief passage from an unofficial publication as authority, but without any other legal precedent or analysis as to relevancy. To the extent the employee specifically cites G. L. c. 152, § 10C (entitled "Collective bargaining agreements; binding obligations and procedures") as representing the "carve out" provision relevant to this case, (Employee br. 6), the employee never sought to, or admitted, such an agreement in evidence. We note our agreement with the self-insurer that it is the employee's burden to produce evidence in support of his position. Ginley's Case, 244 Mass. 346, 348 (1923).

> of the federal government, but also by employees of out-of-state employers not participating in the Massachusetts workers' compensation system; by police officers and firefighters, whose compensation is provided under G. L. c. 41, § 111F; by employees of counties, cities, and towns who have not accepted chapter 152; see G.L. c. 152, § 69; and by other non-covered workers. See G.L. c. 152, § 1(4).
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> We recognize that the purpose of the concurrent employment provision is not to benefit insurers by keeping insurance premiums down, or even foreseeable, but to more fairly compensate employees for their lost earning capacities. Sellers [Case, 452 Mass. 804] at 811-814 [(2008)]. In addition, we are sympathetic with the employee's argument that denying his request to include his federal wages in his average weekly wage calculation fails to fully serve this purpose. However, the Legislature chose to limit the basis of an employee's compensation to employment with employers subject to chapter 152. We may not amend a statute's language or infer legislative intention where the language is clear. [citations omitted]. Section 1(1) is explicit that concurrent wages may be factored into average weekly wage where an "employee is employed in the concurrent service of more than one insured employer or self-insurer." Section 1(6) defines an "insured" employer as one which "has provided by insurance for the payment to his employees by an insurer of the compensation provided *by this chapter*, or is a self-insurer." Id. (emphasis added). The USPS is not such an employer.

Lubofsky, at 118-119. The Town of Marblehead, in its capacity as the employer of a firefighter such as Mr. Murray, is also not such an employer.

The employee's argument for consideration of his Marblehead Fire Department wages essentially rests on the self-insurer's coverage of *other* employees under chapter 152. There is no evidence or testimony as to the extent of the self-insurer's obligations to any other employees or contractors, nor is there any evidence of other insurance coverage obtained or funded for any other purpose. The only relevant evidence in this regard comes from two of the nine stipulations submitted in the Joint Statement of Agreed Facts. The first is "the Employee, as a member of the Marblehead Fire Department, was covered for work-related injuries under G. L. c. 41, § 111F."[8] The other is, "on July 25, 2021, the

[8] Exhibit 3, Stipulation No. 3.

Town of Marblehead was self-insured for workers' compensation under G. L. c. 152."[9] As we have already made clear, the employee's coverage pursuant to § 111F relieves the town of Marblehead from all other workers' compensation obligations under c. 152 to this employee. There is no evidence or argument that the self-insurer is, in any way, in violation of Chapter152 due to a lack of coverage for this, or any other, town employee. G. L. c. 152, §69.[10] Indeed, as set forth in detail in the self-insurer's brief, (Self-ins. br. 14-16), § 69 and the cases cited, repeatedly, and expressly, exclude police officers and firefighters from coverage under Chapter 152.

On the other hand, it is clear that the self-insurer does have an obligation to cover other employees who are not members of the town police or fire departments pursuant to c. 152. And, indeed, again there is no evidence that they have not properly done so. These two obligations to employees that are legally different in kind, are independent and unrelated. There is no evidence, stipulation or statutory language before us that imposes any responsibility to the employee from the self-insurer pursuant to Chapter 152.

Accordingly, we reverse the judge's order requiring the employee's average weekly wage calculation include concurrent earnings from the Town of Marblehead Fire Department.

So ordered.

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[9] Exhibit 3, Stipulation No. 5.

[10] G. L. c. 152, §69 states, in relevant part:

> The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive, shall include all employees of any such city or town, except members of a police or fire force, who are engaged in work being done under a contract with the state department of highways, and shall include other employees except members of a police or fire force, regardless of the nature of their work…. The terms laborers, workmen and mechanics, as used in sections sixty-eight to seventy-five, inclusive, shall, if the city council or the town meeting so votes, also include such elected or appointed officers of the city or town, except the mayor, city councillors, selectmen or members of the police or fire force….

Bernard W. Fabricant
Administrative Law Judge

Catherine W. Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **July 7, 2025**