COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 060657-80

Scott Wadsworth	**Employee**
New England Concrete Pipe Co.	**Employer**
Continental Insurance Co./CNA	**Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Constantino.

APPEARANCES

J. Channing Migner, Esq., for the employee
Martin T. Sullivan, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits as of the date of a 2003 recurrence of a 1980 industrial injury. The insurer challenges the decision on several fronts. Finding merit in three, namely, the administrative judge's erroneous application of the average weekly wage adjusting provisions of § 51,[1] his mishandling of the rate-

[1] General Laws c. 152, § 51, provides:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage. A determination of an employee's benefits under this section shall not be limited to the circumstances of the employee's particular employer or industry at the time of injury.

enhancing provisions of § 35B,[2] and his ruling on the insurer's recoupment claim, we reverse the decision in part.

The employee severely injured his right dominant hand while working for the employer on December 12, 1980, when he was twenty-three years old. The injury limited the function of his hand, and resulted in several surgeries and frequent pain treatments. (Dec. 6-7.) Nonetheless, the employee successfully re-entered the work force in 1995, and worked until increasing pain in his hand forced him to stop in 2003. (Dec. 16-17.) Having long since exhausted the statutory maximum available for § 34 total incapacity benefits, in 2004 the employee filed a claim for § 34A permanent and total incapacity benefits, recalculation of his pre-injury average weekly wage pursuant to § 51, re-calculation of weekly incapacity benefits pursuant to § 35B, § 30 medical benefits, and § 36 loss of function and disfigurement benefits.[3] (Dec. 2.)

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[2] General Laws c. 152, § 35B, provides, in pertinent part:

> 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. . . .

[3] The employee also reserved a claim for doubling of compensation under G. L. c. 152, § 28, which provides, in pertinent part:

If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

Suffice it to say the adopted medical evidence easily carried the employee's burden of proving permanent and total incapacity.[4] We affirm the decision in that regard, and turn to the judge's findings on the employee's claims for average weekly wage and incapacity benefit enhancement.

Section 51

The judge found that the employee went to vocational high school, where he received training in automobile mechanics, metal work, drafting and welding. The judge noted the employee's young age at the time of his work injury. (Dec. 20.) These findings were an appropriate prelude to a § 51 determination, but the judge's analysis then went astray: he proceeded to make findings relative to the training and classroom work the employee undertook *after* his work injury. (Dec. 20.) The judge used these activities to conclude that the employee was involved in the skill acquisition necessary to gain the benefit of § 51's rate enhancement. This was error. Such post-injury activities are not part of the § 51 analysis, as the statute plainly speaks to the employee's vocational profile "when injured."[5] G. L. c. 152, § 51; see Etienne v. G.M.C. Masonry Corp., Inc., 14 Mass. Workers' Comp. Rep. 51 (2000).

Moreover, because "economic projections under § 51 [must] reflect expectations regarding skill development and job progression," Sliski's Case, 424 Mass. 126, 135 (1997), we agree with the insurer that the employee failed to prove these predicates to the statute's application. Nothing in the evidence established that the employee's wages would have increased due to the acquisition of any particular skill anticipated at the time of his injury. Even if there were such a showing, there is no evidence of any time frame within which such increase reasonably might be

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[4] The judge recounted in detail the medical and vocational opinions of a number of experts, (Dec. 7-15), ultimately adopting the opinions of the § 11A impartial medical examiner, Dr. Eui K. Chung, the employee's treating psychologist, Deborah Rosenberg, Ph.D., and Dr. Jonathan A. Kost, the employee's treating pain specialist.

[5] However, acquisition of skills post-injury is relevant to the issue of post-injury earning capacity. See G. L. c. 152, § 35D(1-4).

expected. See Starr v. Maltby Co., Inc., 23 Mass Workers' Comp. Rep. ___ (February 2, 2009); Hughes v. D & D Electrical Contractors, 11 Mass. Workers' Comp. Rep. 314, 316 (1997).

Here, the judge simply applied the statute to increase the employee's wages as of July 1, 2003, the first day of claimed permanent and total incapacity.[6] That finding is not "anchored in the evidence," Makris v. Jolly Jorge's Inc., 4 Mass. Workers' Comp. Rep. 360, 362 (1990), and therefore is arbitrary and capricious. Moreover, the judge's decision is devoid of any subsidiary findings explaining the $900 average weekly wage on which he based his award of § 34A benefits. (Dec. 22.) Because the employee testified his last earnings before he became totally incapacitated in 2003 averaged $586 per week, "[s]ometimes more, sometimes less," (7/13/06 Tr. 71), we are compelled to conclude the $900 wage was assigned pursuant to the judge's application of § 51, rather than pursuant to § 35B. Because the judge made no findings concerning the employee's status when he was injured that would allow for the inference of wage increases based on skill acquisition in his career, we reverse the application of § 51 to increase the employee's average weekly wage. G. L. c. 152, § 11C.

Section 35B

The insurer's second argument -- that the judge erred in applying § 35B to the employee's claim to utilize his significantly higher 2003 average weekly wage and, in turn, increase his weekly incapacity benefit -- likewise has merit. The judge's findings are succinct:

> I find that § 35B applies to this case. I find that Mr. Wadsworth's condition that developed from the industrial injury did worsen to leave Mr. Wadsworth totally disabled as of July 1, 2003.

[6] The judge's identification of the employee's § 34A claim as tracking from January 1, 2003 appears to be a scrivener's error. (Dec. 2.) He later correctly identified July 1, 2003 as the date on which the employee again became totally disabled, (Dec. 21), and he awarded § 34A benefits from and after July 1, 2003. (Dec. 22.)

> Mr. Wadsworth received compensation during the period of 1980 to 1988 for the industrial injury.
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> Mr. Wadsworth returned to work for many years.
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> Mr. Wadsworth then suffered a new period of incapacity as of July 1, 2003.

(Dec. 21.) In the usual course, the provisions of § 35B would establish the date of that "subsequent injury" as the operative date for calculation of the employee's benefit entitlement. In construing the provisions of § 35B, the appellate courts have consistently placed great weight on the "subsequent injury" as the focal point of the statute. "Under § 35B . . . the employee's right to compensation at the increased rate and the insurer's burden to pay it originate in the change in the employee's condition subsequent to his return to work." Don Francisco's Case, 14 Mass. App. Ct. 456, 463 (1982).

The "rate in effect at the time of the subsequent injury" has been held to include the statutory maximums set by the legislature for both weekly and aggregate total and partial incapacity benefits. Bernardo's Case, 24 Mass. App. Ct. 48 (1987); Barbaro v. Smith & Wesson, 9 Mass. Workers' Comp. Rep. 652 (1995). It has also been held to include the employee's more recent average weekly wage. Taylor's Case, 44 Mass. App. Ct. 495 (1998); Barone v. East Boston Savings Bank, 14 Mass. Workers' Comp. Rep. 93 (2000), citing Puleri v. Sheaffer Eaton, 10 Mass. Workers' Comp. Rep. 31 (1996), rev'd in part on other grounds, Taylor's Case, supra.

We have determined that the judge erred by applying the provisions of § 51 to establish the employee's average weekly wage as $900. The only other mechanism for finding a higher average weekly wage as of July 1, 2003 is provided by § 35B and, as we have noted, the employee testified his wage at that time was $586. However, the employee's recurrence of disability occurred while he was employed in Connecticut, receiving wages that could not, as a matter of law, be used as a basis for calculating his incapacity benefits. See Letteney's Case, 429 Mass. 280 (1999).[7] To the extent out-of-state earnings cannot be the basis of an initial award

[7] The employee testified that several years after his 1980 injury, in May or June of 1984, he returned to work for his Massachusetts employer, New England Concrete

of benefits, we consider that such earnings also cannot be used for a § 35B rate adjustment at the time of the "subsequent injury." As the court stated in Letteney:

> Compensation to the employee measured by earnings outside the Massachusetts workers' compensation system constitutes a liability for which neither the employer nor any other Massachusetts employer has provided. It may be said that this happens whenever an employee receives a higher award than that measured by the last wage the employee earned from the employer for whom he worked at the time he sustained the injury. That would not be a valid objection. The later Massachusetts employer paying the higher wage would presumably have paid premiums based on that higher wage. Although that later employer would not be liable for the higher award, its participation in the general system may be supposed, at least roughly, to work out in the long run when it must pay higher compensation for subsequent earnings of its employee earned elsewhere in the system. Self-employment, out-of-state employment, and other excluded employment are not within the system and thus this long-run equilibrium cannot take place.
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> . . .
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> [A]ll Massachusetts employers participate in a common system, and thus . . . it would be unfair to measure their obligations by events occurring outside of that system.

Id.at 285-286. Although Letteney addressed out-of-state earnings claimed to be the basis for a benefit computation pursuant to § 35C[8], we see no relevant distinction

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Pipe, doing welding, but that he lasted only two or three weeks due to difficulty with his hand. (5/12/06 Tr. 58-60.) Thus, although he had been receiving compensation, he did not satisfy the two-month return to work requirement in § 35B, as to the last wages he earned in Massachusetts.

[8] General Laws c. 152, § 35C, provides:

> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or

between that section and § 35B, insofar as the above reasoning applies. See Camara's Case, 71 Mass. App. Ct. 8, 14 n.12 (2007); Eifler v. Flintkote, Inc., 13 Mass. Workers' Comp. Rep. 394, 398-399 (1999)(under § 35C, last Massachusetts wages earned by employee -- in 1966 -- and not later wages from self-employment, governed widow's claim under § 31). Applying the rationale in Letteney, supra, we hold that an employee's average weekly wage from out-of-state earnings cannot be used to compute the "rate in effect" at the time of a "subsequent injury" under § 35B.

Therefore, the employee's § 34A weekly benefit must be based on his original $309.65 average weekly wage as of the December 12, 1980 injury, [9] (Dec. 3), which date likewise governs the attendant § 34B cost-of-living adjustments to which he may be entitled. We reverse as contrary to law the judge's finding that under § 51, the employee's average weekly wage was $900, and we vacate his award of § 34A benefits at the rate of $600 per week, effective July 1, 2003.

The Insurer's Recoupment Claim

Although recoupment is not listed in the decision as an issue raised by the insurer, (Dec. 2-3), the insurer contends that at hearing, it sought recoupment of more than

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> section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.
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> For purposes of adjustment to compensation under sections thirty-four B and thirty-five F for employees subject to this section, the first date of eligibility for benefits rather than the date of injury shall be used for purposes of computing such supplemental benefits.

[9] Because the basic formula for calculating permanent and total incapacity benefits under § 34A -- two-thirds of the employee's average weekly wage before the injury -- was unchanged by the 1991 reforms to c. 152, and because the employee's § 34A rate of $206.43 is less than the statutory maximum rate of $245.48 in effect on the date of his injury, application of § 35B does not serve to increase his weekly permanent and total incapacity benefit.

$33,000 in weekly incapacity benefits paid to the employee from 1985 to 1988, "in excess of the 1980 statutory cap" of $45,000. (Ins. br. 16-17.) It also argued to the judge that when the employee stopped working in July 2003, the insurer mistakenly paid him weekly incapacity benefits based on his out-of-state earnings, amounting to an overpayment of almost $150 per week, for some three years. (Ins. br. 17-18.) The insurer's hearing memorandum, (Ex. 3), confirms that recoupment of overpayments was raised as an issue. The judge's decision on the issue, however, is conclusory: "I do not determine that the insurer is entitled to recoupment." (Dec. 21.) Given the utter dearth of subsidiary findings, this denial of recoupment is arbitrary and cannot stand. We vacate the denial of recoupment and, as the administrative judge no longer serves on the industrial accident board, we reserve to the insurer the right to renew its claim in a separate complaint for recoupment, filed with this department or in the superior court. [10]See Anderson v. D & D Electrical Contr., 23 Mass. Workers' Comp. Rep. ___ (March 23, 2009).

Moreover, this decision gives rise to an even greater overpayment. 452 Code Mass. Regs. § 1.24 requires us to "specifically address the manner or method of recoupment." [11] Consistent with the provisions of G. L. c. 152, § 11D(3), the

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[10] If a judge determines that any of the insurer's pre-hearing overpayments were made pursuant to a conference order or decision of an administrative judge, the insurer may recover such overpayments pursuant to G. L. c. 152, § 11D(3). If a judge determines that any of the pre-hearing overpayments were made without a conference order or hearing decision, that judge must apply the equitable recoupment principles addressed in Brown v. Highland House Apts., 12 Mass. Workers' Comp. Rep. 322 (1998). See Camara v. DPW Mass. Hwy. Dep't, 22 Mass. Workers' Comp. Rep. 81-82 (2008).

[11] The regulation provides, in pertinent part:

> Where an employee is receiving weekly benefits by . . . decision, and a subsequent . . . decision filed pursuant to M.G.L. c. 152 authorizes retroactive reduction of the weekly compensation rate, but does not terminate weekly benefits, the . . . decision shall specifically address the manner or method of recoupment of such overpayment by the insurer.

insurer may reduce the employee's ongoing § 34A adjusted benefit by not more than thirty percent per week, until the overpayment created by this decision is recouped.

Accordingly, we reverse the judge's decision applying §§ 51 and 35B to the employee's claim, and we vacate his award of § 34A benefits at the weekly rate of $600. The insurer is to pay the employee § 34A benefits at the rate of $206.43, based on his pre-injury average weekly wage of $309.65, from and after July 1, 2003, plus all applicable cost-of-living increases under § 34B to which the employee may be entitled, subject to the above-noted reduction for recoupment.

Because the employee has prevailed on the issue of his entitlement to permanent and total incapacity benefits, pursuant to § 13A(6), we order the insurer to pay employee's counsel a fee in the amount of $1,495.34.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **March 30, 2009**