COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033904-95**

Stanley E. Walker	Employee
Town of Barnstable	Employer
Town of Barnstable	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan)

APPEARANCES
Richard N. Curtin, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
Kathleen A. Moore-Kocot, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee § 36 specific injury benefits at a rate adjusted by the application of § 51A.[1] The self-insurer contends that § 51A did not apply to the employee's claim, because it had already paid some amount of the § 36 entitlement claimed. We agree that § 51A should not have been applied in the manner it was, and reverse the decision. However, we order that it be applied in the manner discussed below.

This case, having as its subject an industrial accident on August 7, 1995, has been litigated extensively, with the Supreme Judicial Court, on December 28, 2004, issuing a decision reversing the reviewing board's, and Appeals Court single justice's, decisions. Walker's Case, 443 Mass. 157 (2004). The issue in all of those decisions has been whether Mr. Walker's § 36 entitlement, based on brain damage, was subject to the maximum payment of 105 times the average weekly

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

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

wage in the commonwealth (SAWW), as provided in § 36A.[2] The Supreme Judicial Court concluded that the legislature did not intend § 36A's brain damage provision to apply to living employees:

> [T]he limitation on unpaid compensation for specific injuries involving brain injury contained in the second paragraph of § 36A is operative only on the death of the employee. Walker is entitled to receive compensation for specific injuries for his losses of bodily function and disfigurement under § 36.

Id. at 170.

The Supreme Judicial Court remanded the case for further proceedings. Id. At the hearing on remand before the administrative judge, the parties stipulated that the employee's impairments under § 36 totaled 117.76 weeks, (Amended Dec.), and that he was entitled to the maximum $15,000 amount due for disfigurement under § 36(k). (Dec. 2.) This measure of § 36 entitlement being undisputed, the questions left to litigate were the applicable SAWW, i.e., whether § 51A applied, and which date of decision constituted "the final decision on such claim." § 51A.

The judge concluded that § 51A applied to the employee's claim for

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[2] General Laws c. 152, § 36A, as most recently amended by St. 1991, c. 398, § 70, provides, in pertinent part:

> In the event that an injured employee who has become entitled to compensation under section thirty-six dies before fully collecting the said compensation, the balance remaining shall become due and payable in a lump sum to his dependents, or if none, to his surviving issue. . . .
>
> Where any specified loss, losses or disfigurement under section thirty-six is a result of an injury involving brain damage, payment in total under that section for the sum of such loss, losses or disfigurement resulting from said brain damage shall not exceed an amount equal to the average weekly wage in the commonwealth at the date of injury multiplied by one hundred and five. In no event shall payments be made under this section to any employee where the death of such employee occurs within forty-five days of the injury.

§ 36 benefits because 1) it was a claim separate from his concurrent receipt of § 34A permanent and total incapacity benefits, and 2) the self-insurer's payment of $61,494.30, on the 2002 order of the reviewing board, was pursuant to the provisions of the brain damage paragraph of § 36A, not § 36. Therefore, the judge reasoned that no compensation had been paid on the § 36 claim. (Dec. 3-4.) We agree with his first conclusion, but disagree with the second.

The plain language of § 51A directs the judge to consider payment on the particular claim in controversy, not the industrial injury as a whole. Cases construing § 51A support this interpretation. See, e.g., Mugford's Case, 45 Mass. App. Ct. 928, 929 (1998)(§ 51A applies to § 34A claim for permanent and total incapacity benefits, after payment of § 34 temporary total incapacity benefits); Hanson's Case, 26 Mass. App. Ct. 988, 989 (1988)(same). In the present case, the judge concluded correctly that § 36 was a claim separate from the weekly incapacity benefits being paid to the employee.[3] (Dec. 3.)

However, in our view, the $61,494.30 paid by the self-insurer on July 1, 2002, pursuant to the reviewing board's May 15, 2002 order, was indeed a payment of § 36 benefits, albeit capped by the § 36A maximum for brain damage. Section 36A expressly references and operates in tandem with § 36. There are no specific losses to be paid to § 36A beneficiaries other than those set out in § 36. See footnote 2, supra. The present case presents a stronger argument against

[3] Madariaga's Case, 19 Mass. App. Ct. 477 (1985), is at odds with the cases cited above. In Madariaga, the court affirmed the board's denial of a § 51A adjustment of the compensation rate for a § 36A award. Id. at 482. Its reasoning was that, while the insurer had not paid on the disputed § 36A claim, it was paying the claimant weekly § 31 death benefits by agreement, and had paid § 33 burial benefits Id. at 477-478 & n.1. The court therefore appears to have treated the case as one which presented an overall "claim" for death benefits, albeit under various sections. "We perceive no legislative intention in the words [of] § 51A . . . to make any separation of 'compensation' based upon the section of c. 152 under which particular compensation was paid." Id. at 482 n.7. In any event, the Appeals Court later did draw a bright line between payments made under one section and claimed and awarded under another. See Mugford, supra and Hanson, supra.

§ 51A's application than Conte v. P.A.N. Constr. Co., 51 Mass. App. Ct. 398 (2001). In that case, the Appeals Court held that payment of another state's benefits, *equivalent* to those sought under c. 152, foreclosed the application of § 51A. Id. at 400-401. Here, the § 36A benefits paid were not just equivalent to § 36 benefits; they *were* § 36 benefits. Section 36A simply imposes a *maximum* entitlement to § 36 benefits due to brain damage, even given the reviewing board's mistake in applying that maximum to a living employee's § 36 entitlement. Contrast G. L. c. 152, § 31(maximum payment of 250 times SAWW for dependents of deceased employee, subject to specified occurrences mandating divestment). Section 36A contains underlying § 36 losses for brain damage *up to* that maximum; a lesser award would certainly be possible, which award would consist of an amount reflected in the applicable § 36 subsections.

Moreover, the pronouncement of the Supreme Judicial Court in Walker, supra, clarified what the statutes had always meant, notwithstanding the reviewing board's and single justice's erroneous interpretations. "The effect of . . .subsequent decisions is not to make new law but only to hold that the law always meant what the court now says it means." Fleming v. Fleming, 264 U. S. 29, 31-32 (1924). "[T]he law declared by [the SJC] had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration [of the reviewing board] will be viewed as if it had never been, and the reconsidered declaration as law from the beginning." Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 365 (1932). Both of these United States Supreme Court decisions are cited as authority for the Supreme Judicial Court's pronouncement of the same rule of law in City of Chelsea v. Richard T. Green Co., 318 Mass. 85, 87 (1945): "The [latter] case did not change the law. It merely decided what had been the law all the time, even during the period when the [earlier] case was thought to state the law."

Here, the Supreme Judicial Court has stated that any specific injury benefits payable to a living employee are payable exclusively under § 36 without regard to

the § 36A limitation, brain damage notwithstanding. As such, the $61,494.30 paid by the self-insurer after the issuance of the reviewing board decision on May 15, 2002 were § 36 benefits; the reviewing board's "discredited declaration" that the payment was pursuant to § 36A must now be "viewed as if it had never been." Great Northern Railway Co., supra.

However, consistent with the holding of McLeod's Case, 389 Mass. 431, 434 (1983)(§ 51A not waived by employee's failure to address it in proceedings being reviewed on appeal), we have a long-standing rule of law that § 51A is self-operative. Zhang v. Midtown Home Health Srvcs. Inc. 19 Mass. Workers' Comp. Rep. 260, 261 (2005); Arruda v. George E. Keith Co., 5 Mass. Workers' Comp. Rep. 14, 15 (1991). As such, "it does not matter that the employee [apparently] did not raise the issue" (Zhang, supra) before the reviewing board in 2002. Our decisions (Walker v. Town of Barnstable, 16 Mass. Workers' Comp. Rep. 176 (2002) (effectively) and 16 Mass. Workers' Comp. Rep. 316 (2002) (specifically)) awarded the employee $61,494.30. On July 1, 2002, the self-insurer paid $61,494.30 pursuant to the first of these two decisions. *At that time*, "no compensation [had] been paid prior to [that] final decision[4] on [the § 36/36A] claim." § 51A. The fact that the Supreme Judicial Court reversed the reviewing board decision is irrelevant to whether § 51A should have been applied to that award at that time. Section 51A necessarily looks back, to see whether compensation has been paid on the claim; appellate review of that award has no bearing on the statute's applicability. In other words, the "final decision" for § 51A purposes is any decision awarding benefits on a claim for which "no

[4] According to the representations made at oral argument, in response to the May 15, 2002 reviewing board decision, the insurer paid $61,494.30 on July 1, 2002. An amended decision filed on July 30, 2002 specifically stated such benefits were awarded. Walker, II, supra at 321.

compensation has been paid" previously.[5]

We therefore reverse paragraph 1 (as amended) of the November 30, 2005 decision on review. In its place, we order that the § 36 benefits awarded effectively by the May 15, 2002 decision (and paid on July 1, 2002) be recalculated pursuant to § 51A (i.e. 117.76 times the SAWW - $890.94 - in effect on the May 15, 2002 filing date of that first decision), plus applicable interest. The self-insurer shall pay the employee the difference, if any, between the total of those amounts and the $61,494.30 it paid pursuant to the 2002 decision, with a credit for the amounts paid, if any, under the November 30, 2005 decision. Although on the self-insurer's appeal we reverse the judge's decision, the employee still prevails at hearing under our decision, and we therefore leave intact the hearing fee ordered on November 30, 2005. Moreover, pursuant to § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **November 30, 2006**

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Mark D. Horan
Administrative Law Judge

[5] Offers to pay compensation are not the equivalent of payment of compensation and are thus irrelevant to the application of § 51A to an award of benefits claimed but not previously paid. At least for this reason, we strike so much of the self-insurer's brief as references such offers to pay.