COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRAIL ACCIDENTS **BOARD NO. 33904-95**

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

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

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

WILSON, J. The employee appeals from a decision of an administrative judge denying his claim for § 36 benefits for specific losses of function related to an industrial brain injury, anoxic encephalopathy. For the reasons that follow, we affirm the decision.

The facts of the case are straightforward, undisputed and tragic. The employee suffered debilitating brain damage as a result of heat stroke on August 7, 1995. The self-insurer accepted the injury. The employee claimed specific injury benefits under § 36 (e), (g) and (k) for corresponding losses of function, which claim the self-insurer denied.[1] The self-insurer defended the claim on the basis that, among other things, the appropriate loss-of-function benefits for the employee's brain injury were those provided in § 36A, and capped at 105 times the state average weekly wage on the date of injury. See infra. After a § 10A conference, the judge denied the employee's claim, and the employee appealed to a full evidentiary hearing. (Dec. 1.)

As a result of that hearing, the judge concluded that § 36A applies to this case and that the employee had not met the burden of proving that he had reached maximum medical improvement necessary to receive brain injury benefits under § 36A. (Dec. 6.)

[1] The employee's claim covered total loss of use of his arms pursuant to § 36(e), total loss of use of his legs pursuant to § 36(g) and bodily disfigurement pursuant to § 36(k).

The employee's medical restrictions resulting from his injury are severe. Suffice it to say that the judge found the employee to be in a near-vegetative state, being completely unable to do anything without the assistance of another person. (Dec. 2.) The employee introduced evidence of his treating physician, Dr. William N. Fenney, who opined that the employee had suffered a cardiac arrest with brain injury after having developed dehydration at work, and that he further sustained stroke symptoms after his cardiac arrest. As a result, the employee suffered anoxic encephalopathy, involving the death of brain tissue, and resultant permanent losses of function. The doctor had not seen any improvement in the employee's condition in the four years in which he had treated the employee for his brain injury, and opined that there was no chance of such improvement. He further opined that the employee's medical condition would deteriorate in the future. (Dec. 3; Dep. 21-25.)

The judge adopted the opinion of Dr. Fenney that the employee's multiple losses of function, attributable to his brain damage, were causally related to his work injury. (Dec. 3.) Moreover, the judge relied on Dr. Fenney's opinion, and found that the employee had not reached a "maximum medical end result" – which in his case would only be attained with his death – even though he had reached "maximum medical improvement" with regard to the claimed losses of function.[2] (Dec. 4.) Nonetheless, the judge concluded:

> While Dr. Fenney's letter or report dated February 3, 1998, stated, in part: "Mr. Walker, who, prior to the accident, was the supervisor for the Town of Barnstable, Public Works now is *completely dysfunctional*. . ."(emphasis added), it did not provide the language required by the statute, e.g., maximum medical improvement. Dr. Fenney also provided a breakdown of the loss of function and disfigurement which would be more appropriate if § 36 rather than § 36A were applied. However, as indicated in Employee's brief, inasmuch as Employee's request was under § 36 for the individual losses of function, presumably he did not

[2] 452 Code Mass. Regs. § 1.07(i) provides, in pertinent part:

> All claims for functional loss under the provisions of M.G.L. c. 152, § 36 or § 36A shall include a physician's report which indicates that a maximum medical improvement has been reached and which contains an opinion as to the percent of permanent functional loss according to the American Medical Association's guide to physical impairment.

> want a letter stating that he had reached a maximum medical improvement because, as Employee contended in his brief and via Dr. Fenney's testimony, his condition will worsen over time. Thus, under his argument, he probably would be entitled to additional benefits in the future if § 36 were applicable.
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> . . .
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> Based on the medical evidence as adduced on Employee's behalf which was the only medical evidence in the case, I find that Mr. Walker's injury and losses of function are due solely to the brain damage he sustained on August 7, 1995, as a result of the work incident. Thus, I find that § 36A, and not § 36, applies to this case.
>
> Therefore, I further find that because Employee has not met the requirement of 452 C.M.R.§ 1.07(i)1 as it relates to §§ 36 and 36A, as outlined above, Employee has failed to meet his burden of providing proof that he has reached maximum medical improvement for which he would be entitled to benefits under § 36A, were he seeking benefits under that section.

(Dec. 5-6.)

The employee asserts a two-pronged challenge of the decision. First, the employee contends that the judge erred by concluding that he had not reached maximum medical improvement. We agree. In a case where the only medical evidence established that the employee had no chance of improvement – and would be deteriorating for the rest of his life – the evidence is susceptible of only one interpretation: This employee's "maximum medical improvement" has come and gone. Barring the employee's claim for specific injury benefits is not a fair and rational result where there cannot be such "improvement."[3]

More difficult is the second question of whether § 36A limits the employee's claim for § 36 benefits due to brain injury. General Laws c. 152, § 36A, provides in its entirety:

> 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

[3] Nonetheless, in view of our disposition of the employee's second argument, see infra, the error is harmless.

> to his dependents, or if none, to his surviving issue, then to surviving parents, or if no surviving parents then to surviving brothers and sisters. If there are none of the persons described in the preceding sentence remaining to receive such compensation, then the balance of compensation remaining at the death of the employee shall be paid into the special fund in the custody of the state treasurer established under section sixty-five, to be used for the purposes and in the manner prescribed in said section sixty-five.
>
> *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.

(Emphasis added). The employee argues, based on a thorough review of the legislative history of § 36A and the case law interpreting the statute, that the second paragraph applies only to employees with specific injury claims based on brain damage *who have died prior to collecting such benefits*, as stated in the first paragraph. As he is still living, the employee argues that he is entitled to the full amount of loss-of-function and disfigurement benefits available under § 36(e), (g) and (k). We disagree.

We acknowledge the strength of the employee's argument that the insertion of the brain damage provision into § 36A in 1981 could be considered *contextually*, as relating to the theretofore exclusive subject matter of that statute, death. See Bender v. Automotive Specialties, Inc., 407 Mass. 31, 33 (1990)(Legislature's *placement* of amendment within certain paragraph of statute informed court's interpretation of its meaning; i.e., that the amendment referred to and modified the subject matter of that paragraph). As such, the provision would have the effect of capping § 36 entitlements stemming from brain damage only insofar as the employee had died. Under this interpretation, the brain damage provision would function only as a specific qualification to the distribution plan of the first paragraph of § 36A.

The self-insurer counters that the brain damage provision in the second paragraph of § 36A, by its plain language, simply applies to every specific injury claim stemming

from brain injury, regardless of the life or death of the employee: "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 . . . ." (Emphasis added). The strength of this argument is apparent. When statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise. Hashimi v. Kalil, 388 Mass. 607, 609 (1983).

Nevertheless, we do not consider that the brain damage provision, given its placement in § 36A, is subject to a simple, plain meaning reading. We might even have agreed with the employee's contextual argument, were it not for later amendments to §§ 36 and 36A that cast a shadow onto his interpretation. We refer to St. 1991, c. 398, §§ 68 and 70. Section 68 amended the introductory paragraph to § 36, and added the following pertinent language (in italics): "In addition to all other compensation to the employee shall be paid the sums hereinafter designated for the following specific injuries; *provided, however, that the employee has not died from any cause within thirty days of such injury."* Section 70 replaced the last sentence of § 36A, which barred payments "under this section for an injury resulting in instantaneous death" with the following: "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."

The conflict between the thirty day window of non-compensability due to death under § 36, and the forty-five day window of non-compensability due to death under § 36A, poses serious interpretive problems. First, it is of primary importance to the understanding of this issue to remember that no § 36 benefits are payable upon the death of the employee, *but for the application of § 36A*. Indeed, prior to the original enactment of § 36A in 1949, (St. 1949, c. 519), entitlements for § 36 compensation died with the employee. See Burns's Case, 218 Mass. 8, 13 (1914); Cherbury's Case, 251 Mass. 397,

398-399 (1925). The scope of § 36A was then clarified in 1981, when the Legislature added the instantaneous death exemption as the last sentence to the statute.[4]

Then, due to the 1991 amendments that introduced the different window of non-compensability provisions of §§ 36 and 36A, it became necessary to seek an harmonious interpretation. "Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect." County Comm'rs. Of Middlesex County v. Superior Court, 371 Mass. 456, 460 (1976). There is only one way to avoid the conflict between the thirty day window of non-compensability under § 36 and the forty-five day window of non-compensability under § 36A: The forty-five day provision does not apply to the substantive specific compensation entitlements of § 36, payable to dependents and heirs under § 36A, but only to the brain damage provision contained in the same paragraph as the forty-five day provision.[5]

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[4] That provision stated: "In no event shall payments be made under this section for an injury resulting in instantaneous death." Whether the provision applied to all of § 36A, or only the second paragraph (addressing the brain damage provision enacted contemporaneously) was never resolved by the courts. However, whatever the correct interpretation would have been, there was no corresponding provision in § 36 at that time, and therefore, no conflict to resolve.

[5] This must be so, notwithstanding the reference in the § 36A forty-five day bar to "payments . . . made under this *section*." (Emphasis added). In addressing the conflict between the §§ 36 and 36A windows of non-compensability, Koziol has referred to the use of "section" as a legislative mistake:

> It is fairly clear that benefits under Section 36 are no longer payable to an employee unless he survives at least 30 days after the injury. What is not clear, however, is whether benefits payable under Section 36A require an employee to survive at least 45 days in order to be entitled to Section 36 benefits or whether the 45 day limitation is limited to only those losses of function which are the result of an injury involving brain damage. It would appear that the legislature intended to make a distinction between losses of function involving brain damage and other forms of loss of function. The legislature's use of the word "section" in its amendment to Section 36A creates the ambiguity and might be corrected if the word, "section" were replaced with the word "paragraph." In this way, the legislature's intention can be clarified.

C. Koziol, Massachusetts Workers' Compensation Reform Act, As Amended § 8.12 (2000 ed.) (Supplementing L. Locke, Workmen's Compensation (2d ed.)).

Thus, § 36 claims in general – including those payable to dependents or heirs via § 36A – are barred by the employee's death within thirty days of injury, and specific compensation claims caused by brain damage are barred by the employee's death within forty-five days of injury. The conflict between §§ 36 and 36A is resolved. Or is it? The employee argues that § 36A does not apply to his § 36 claims, as he is still alive. But if that is the case, the conflict between the thirty day and forty-five day provisions again rears its ugly head. For example, consider an unlikely – but theoretically possible – claim for § 36 specific compensation by a living employee suffering from a brain injury, which comes before an administrative judge for a conference on the fortieth day after the injury.[6] The insurer's defense of the claim, unless waived, would be that the claim is anticipatory, in that the forty-five day window of non-compensability has not yet elapsed. If the present employee's argument is correct – that living brain damaged employees are not subject to the provisions of § 36A – then the defense is meritless. We, however, do not think that the defense is meritless, because to so hold is to impermissibly read the forty-five day provision as meaningless surplusage. See Commonwealth v. Woods Hole, Martha's Vinyard & Nantucket S.S. Auth., 352 Mass. 617, 618 (1967)("None of the words of a statute is to be regarded as superfluous"). The inevitable conclusion is that the § 36A brain damage forty-five day provision would apply to that living hypothetical employee to bar his § 36 claim at that time. We cannot see that it would be a viable interpretation to then say that § 36A *ceased to apply* to that employee, as of the forty-sixth day post-injury.

Accordingly, we must conclude that – the employee's persuasive arguments notwithstanding – the cap on § 36 benefits in the § 36A brain damage provision applies to both living and dead employees. Recognizing as we do that the result we reach is subject

[6] While we recognize that 452 Code Mass. Regs. § 1.07(i) mandates that "[n]o claim for functional loss may be filed sooner than six months following an injury or the latest surgery resulting from the injury," we do not think it is relevant to the theoretical basis for our interpretation. Insofar as it would ever be challenged as an unauthorized limitation on an employee's right to redress a § 36 claim prior to 180 days having elapsed, by making impossible the application of that section, see G. L. c. 152, § 5, the regulation would be unenforceable.

to further review in the courts of the Commonwealth, we only echo the frustration of the Supreme Judicial Court regarding § 36A, as expressed over the years: "It is unfortunate that a statute of such vital importance has not been phrased in unmistakably clear language." Henderson's Case, 333 Mass. 491, 494 (1956). "Almost [fifty] years later we find ourselves still faced with the dilemma of giving 'a reasonable and intelligent purpose to § 36A' " Bagge's Case, 369 Mass. 129, 135 (1975), quoting Henderson, supra at 495.

The decision is affirmed. So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 15, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge