COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009222-14**

Stephen Blomberg	Employee
H and M Bay, Inc.	Employer
Zurich American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul S. Hughes, Esq., for the employee
Joseph M. Spinale, Esq., for the insurer at hearing
Michael T. Henry, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision ordering it to pay the employee ongoing § 34 temporary total incapacity benefits for a work-related March 11, 2014, cervical injury, beginning on February 26, 2015, a few days after the employee left work. The insurer first argues that the judge's finding the employee was totally incapacitated due to his cervical injury is arbitrary and capricious. We summarily affirm the decision as to that argument. The insurer also argues the judge erred in calculating the employee's average weekly wage based on his prospective earnings as of the date he left work. We agree, and recommit the case for further findings of fact using the appropriate method of wage calculation.

The employee, sixty-five years old at hearing, suffered a lifting injury on March 11, 2014, arising out of and in the course of his employment as a warehouse worker. After seeking treatment at an emergency room, and missing work for two days, he returned to light duty work on March 15, 2014. Except for a two-and-one-half-month

period following unrelated hernia surgery on April 12, 2014,[1] the employee continued to work for eleven months after his injury. During this period, the employee had MRI's of his lower back and neck, underwent physical therapy, and had epidural steroid injections at the L5-S1 level. On February 20, 2015, his manager told him he was "putting him on disability," effective the following Monday.[2] (Dec. 4.)

The employee filed a Form 110 claim for workers' compensation benefits alleging a date of injury of March 11, 2014, and listing February 26, 2015, as his first day of total or partial incapacity to earn wages. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of board file). Following a § 10A conference, the judge ordered the insurer to pay § 34 benefits from February 26, 2015, to date and continuing, based on an average weekly wage of $866.00. The insurer appealed to hearing. (Dec. 2.)

On February 27, 2016, Dr. Charles Kenny examined the employee pursuant to § 11A. As the only medical evidence, his report and deposition testimony were thus prima facie evidence. (Dec. 2.) Dr. Kenny opined that the employee had pre-existing cervical and lumbar degenerative disc disease, status post two lumbar spine surgeries in 1989 and 1990. He did not believe that the employee suffered a low back injury of any significance on March 11, 2014, and opined that his lumbar condition was causally related to the natural progression of his severe pre-existing degenerative condition, rather than to the March 11, 2014, work incident. (Dec. 6-9.)

Based, in part, on a cervical MRI of April 21, 2014, Dr. Kenny diagnosed the employee with cervical sprain with left foraminal protrusion at C6-7, causally related to the March 11, 2014, work injury. (Dec. 5-6.) Addressing § 1(7A), which was raised by

[1] The employee testified that he did not receive any workers' compensation benefits during the time he was out of work. (Tr. 70.) Moreover, there is no claim the hernia or the resulting surgery and disability are related to his work injury. (Dec. 11-12.)

[2] The employee received short-term disability benefits from April 1, 2015, until September 1, 2015, but testified he had to pay this money back to the disability carrier after workers' compensation benefits were ordered at conference. (Dec. 4.)

the insurer, he found that the work injury of March 11, 2014, combined with his pre-existing condition to become a major cause of his cervical complaints, disability and need for treatment, on the date of injury, March 11, 2014, and remained so as of the time of his examination. (Dec. 6-7.) Dr. Kenny limited the employee to occasional lifting of 10 pounds, and recommended he avoid positions requiring prolonged, extreme or awkward head positions, as well as work above waist level. (Dec. 7.) The judge found that those restrictions would preclude the employee from performing not only his warehouse job, but any of his prior jobs, which involved driving, carpentry, and bartending. The judge concluded, "this 65-year-old Employee has been totally disabled at all times since the effects of his industrial injury of March 2014 caused his Employer to conclude, and to instruct him, that he needed to 'go on disability' in February 2015." (Dec. 10.)

The judge then determined that basing the employee's average weekly wage on his projected earnings at the time he left work in February 2015, rather than on his earnings during the 52 weeks before his March 11, 2014, injury, or even on his earnings during the 52 weeks before he left work in February 2015, was the best method for determining his "probable future earnings." Gunderson's Case, 423 Mass. 642, 644-645 (1996); see also Morris's Case, 354 Mass. 420 (1968), and Bembery v. M.B.T.A., 17 Mass. Workers' Comp. Rep.476 (2003). Because the employee had received a 2% hourly wage increase, effective January 19, 2015, a month before he left work, the judge based the employee's average weekly wage on a forty-hour per week schedule at that new rate.[3] (See Ex. 12 [admitted at hearing, Tr. 67, but not listed as an exhibit in decision].) Accordingly, he found the employee's average weekly wage was $865.78. (Dec. 10-13.)

Regarding average weekly wage, the insurer argues on appeal that "[t]he judge attempted to fashion an equitable remedy in a situation uncalled for by the circumstances." (Insurer br. 9.) The insurer maintains that the judge acted contrary to law by failing to determine the employee's average weekly wage consistent with the

[3] We note that the wage schedule provided by the employer for the 52 weeks prior to March 11, 2014, (Ex. 11), does not indicate the employee's earnings were consistently, or even mostly, based on a forty-hour week schedule.

provisions of § 1(1), which specify he should use the employee's earnings in the twelve months prior to his date of injury. Further, the insurer states, the cases upon which the judge relied are distinguishable, and there are no wage enhancement provisions, such as §§ 35B or 35C, which would apply. We agree.

The statute is clear. Section 1(1) prescribes that an employee's average weekly wage be based on his earnings over the twelve months "immediately *preceding* the date of injury. [4] Id. (Emphasis added.) The alternative methods of calculating average weekly wage are to be used only where "by reason of the shortness of time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wage as above defined . . . ." Here, the judge failed to state why it is "impracticable" to follow the method required by statute, and we can find no reason why it would be. The only date of injury claimed is March 11, 2014. (Ex. 2, for identification, Employee's Hearing Memorandum; Employee's claim form 110.) Rizzo, supra. The employee was working for the employer during the entire year before his injury. Although the employee testified that his pain increased after March 11, 2014, as he did "all the things that aggravated it" at work, (Tr. 86; Employee br. 7, 21), he never sought to amend his claim to allege a new or cumulative injury to his neck on the date he stopped working. Moreover, the judge did not find the employee suffered a new injury or aggravation, nor did he adopt medical

[4] "Average weekly wages" is defined, in relevant part, as,

> the earnings of the injured employee during the period of *twelve calendar months immediately preceding the date of injury*, divided by fifty-two. . . . Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is *impracticable* to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months *previous to the injury*, was being earned by a person in the same work by the same employer . . . .

G. L. c. 152, § 1(1). (Emphasis added.)

evidence to that effect.[5] Accordingly, it is the employee's earnings during the twelve calendar months prior to the date of injury, March 11, 2014, which are relevant to determining his average weekly wage, not his prospective earnings at the time he became eligible for benefits. See Remillard v. TJX Companies, Inc., 27 Mass. Workers' Comp. Rep. 97, 103 (2013) (where employee claimed only one date of injury and insurer did not defend at hearing on ground employee suffered a new injury after she returned to work for which successive insurer was liable, question of whether the employee suffered a new injury was not before the judge).[6] See also Nason, Koziol & Wall, Workers' Compensation § 9.11 (3rd ed. 2003)("When the injury results from an accident or other event which occurs at a single moment of time, the date of injury is the time of the occurrence, even if incapacity or death is considerably delayed").

The cases cited by the judge in support of his determination that "a fair approximation of future earning capacity" overrides the statutory language are exceptions to the rule and do not apply to this case. In Gunderson, supra, the employee suffered an industrial injury, and months later received a *retroactive* pay increase that was effective ten months prior to the employee's injury. The court distinguished the date wages were "earned" from the date they were "received" in holding that wages *earned* at the time of injury but paid retroactively were properly considered in determining the employee's average weekly wage for the period prior to his date of injury. Id. at 644-645. See § 1(1)("the *earnings* of the injured employee during the period of *twelve calendar months immediately preceding the date of injury*, divided by fifty-two). Thus, Gunderson is not really an exception to the rule stated by § 1(1), because the employee earned the increased wage during the fifty-two weeks prior to his injury. In the other cases cited by

[5] We note that, while the employee's appellate brief mentions the employee's testimony about his worsening pain while working, (Employee br. 7, 21), the employee does not advance on appeal a theory that he suffered a new or cumulative injury or aggravation as of the date he left work.

[6] Because no new injury was alleged, there was no testimony regarding whether the insurer on the risk on March 11, 2014, was even the insurer on the risk at the time the employee left work eleven months later.

the judge, the employee's prospective earnings as of the date of injury were properly used to determine his average weekly wage, where the employee had only one day of full-time employment, Morris, supra, or where he had recently changed from part-time to full-time employment. Bembery, supra. Here, there was no evidence that the nature or terms of the employment relationship changed, except for a non-retroactive 2% raise the employee received on January 19, 2015, ten months after his injury occurred. (Ex. 12; Tr. 47-49; 67-68; see Dec. 10.) The factors in Morris and Bembery (increase in wages due to change in employment status *before the injury)* are thus not present in this case. Consistent with these holdings, we recently reversed a judge's decision that calculated average weekly wage based on a new job the employee had accepted but had not yet commenced on the date of injury. Harris v. Massachusetts General Hospital, 29 Mass. Workers' Comp. Rep. 139, 144 (2015). Here, the employee claimed, and the judge found, that he had but one injury on March 11, 2014, and did not receive a raise until months after that injury. Thus, the judge should have determined the employee's average weekly wage pursuant to § 1(1), based on the twelve-month period prior to March 11, 2014.

In further support of calculating average weekly wage using the statutory method prescribed by § 1(1), the insurer points out that the Legislature has provided by statute for situations in which the employee's wages on his date of eligibility for benefits, rather than his date of injury, are applicable. One of these statutory provisions is § 35B,[7] which both the insurer and the employee cite in support of their positions. We agree with the insurer that it is not applicable here.

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[7] General Laws c. 152, § 35B provides, in relevant 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. . . .

(Emphasis added.)

> "[I]t is established that 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."

Taylor's Case, 44 Mass. App. Ct. 495, 499 (1997), quoting Johnson's Case, 318 Mass. 741, 746-747 (1945)(citations omitted). "[Section] 35B is a legislative remedy for the disparity which would otherwise exist between wages lost and compensation received in those situations where an employee returns to work but, because of a prior compensable injury, his ability to perform his duties changes while his compensation benefits remain the same." Don Francisco's Case, 14 Mass. App. Ct. 456, 462 (1982). However, "the language of § 35B, . . . by the plain and ordinary meaning of the words used, has application *only* to employees who are injured not less than two months *following the date of their return to work after being unemployed because of a compensable injury*." Id. at 460. (Emphasis added). Moreover, on its face, § 35B requires that, an employee "has been receiving compensation" for an industrial injury. The judge here did not find, nor did the employee testify, that the employee had ever been unemployed because of his March 11, 2014, injury, or had ever received compensation for it, prior to going out of work eleven months later. (See Tr. 70-71.) The statutory predicates have not been met for § 35B's application. See Connor v. Automatic Rolls of New England, 20 Mass. Workers' Comp. Rep. 225, 230- 231 (2006)(once statutory predicates are met ["a) employee had been receiving benefits under c. 152; b) returned to work for a period of not less than two months; and c) has a subsequent period of claimed incapacity"], the judge must perform a § 35B analysis). [8]

[8] In Taylor's Case, supra, the court held that the language of § 35B was mandatory, thus requiring that it be applied where the statutory requirements are fulfilled. In Taylor, there was no question that the employee suffered a "subsequent injury in the form of a recurrence" of his original injury, when he went out of work for five months after the injury, and then returned to

While the employee's position--that it would be more consistent with § 35B to base his average weekly wage on the date of eligibility for benefits, rather than on the earlier date of injury--may have some surface appeal, it is important to remember that § 35B was designed to apply only in the specific set of circumstances it enumerates. To expand § 35B to situations it does not include would ignore the plain language of the statute, " 'which is not to be enlarged or limited by construction unless its object and plain meaning require it.' " Don Francisco's Case, supra at 459, quoting Johnson's Case, supra at 746-747 (1945).

Similarly, § 35C, which the insurer references, is not applicable, by its terms, to the employee's situation. It provides that an employee's compensation shall be based on his date of eligibility for benefits, rather than his date of injury, where *at least five years have elapsed between the date of injury and the disabling effect of that injury*. Here, only eleven months elapsed between the employee's injury and his eligibility for benefits. [9]

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work for over a year, eventually becoming unable to work at all. Here, the judge found the employee was only out of work for two days after his March 11, 2014, injury, which is not long enough to qualify for §§ 34 or 35 benefits. Thus, it was impossible for him to meet the § 35B requirements for wage enhancement.

[9] Other statutory provisions allowing for a method other than that specified in § 1(1) to enhance an employee's average weekly wage are similarly inapplicable. Section 51 provides for the use of prospective wages to enhance an employee's average weekly wage where the employee demonstrates "that he was on a path before his injury that, for a person of his age and experience under natural conditions, likely would have led to a wage increase in the open labor market based on the acquisition or development of skills, education, or work experience, or from anticipated job progression such as the transition from an apprentice to a journeyman to a master." Wadsworth's Case, 461 Mass. 675, 682 (2012). "A simple promotion well into a career does not qualify as a likely wage increase under [§ 51]. Harris, supra at 144. Certainly, a raise under similar circumstances would not satisfy the requirements for a § 51 wage increase. Section 51A, which provides for consideration of compensation paid on the date of decision rather than date of injury where no compensation has been paid before the final decision on a claim, is also clearly inapplicable. This provision benefits those employees at the high end of the wage scale, where their benefits are capped by the state average weekly wage in effect on their date of injury. It also benefits those at the very bottom of the wage scale, where their average weekly wage is above the state minimum on the date of injury, thereby requiring payment of § 34 benefits at a rate of 60% of the employee's average weekly wage, but later drops below the state minimum when the employee leaves work and becomes entitled to benefits, requiring

These wage enhancement provisions demonstrate that when the Legislature intends to grant employees relief from §1(1)'s statutory mandates of calculating average weekly wages, it has done so.

Where there is no applicable statutory provision which would accomplish the result the employee and the judge espouse, and, where the employee has not claimed, and the judge has not found, a new injury, we vacate the decision as to average weekly wage, and recommit the case for the judge to determine the employee's average weekly wage consistent with our holding in this opinion.[10] We affirm the decision as to other issues raised by the insurer.

Pursuant to § 13A(6), the insurer shall pay a fee to the employee's attorney in the amount of $1,680.52. So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

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payment of § 34 benefits in an amount equal to the employee's average weekly wage. G. L. c. 152, § 34.

[10] We note that the judge stated the employee's average weekly wage, based on the wage schedule submitted by the employer, was $764.33. (Dec. 10 and n. 3; see Ex. 11.) The insurer, in its brief, initially states the average weekly wage is $764.33 (Insurer br. 4) and later that it is $749.64. (Insurer br. 10.) The employee assumes it is $749.64. (Employee br. 21.) The judge should clear up any discrepancy in the computation of the employee's average weekly wage, taking additional evidence, in his discretion, if necessary.