COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056465-94**

Theodore Nadeau	Employee
Boston University	Employer
Boston University	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
James A. McDonald, Jr., Esq., for the employee
Diane J. Bonafede, Esq., for the self-insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge concluded that the self-insurer's unilateral termination of G. L. c. 152, § 35, partial incapacity benefits, after paying the maximum § 35 entitlement, "was proper and was not an illegal discontinuance." (Dec. 9.) See G. L. c. 152, § 8(2)(g). The employee contends that the judge erred, as his date of injury was April 14, 1989, and he should have been able to receive up to 600 weeks of § 35 payments, rather than the 260 weeks that the self-insurer had paid him pursuant to the 1991 amendment to § 35. Compare St. 1985, c. 572, § 44, with St. 1991, c. 398, § 63. Because the employee's return to work triggered the application of § 35B as interpreted by the Massachusetts Appeals Court in Taylor's Case, 44 Mass. App. Ct. 495 (1998), we affirm the decision.

The employee suffered, and the self-insurer accepted, an industrial injury to his back, which incapacitated him as of May 22, 1989. The employee's average weekly wage at the time of the injury was $453.60. After some periods of total incapacity and light duty work, the employee returned to full duty as a receiver in the mailroom in August 1990.[1] On June 9, 1994, the employee experienced the onset of right groin pain

[1] On January 23, 1991, the employee sustained a "new injury" to his back while lifting a box of paper, which disabled him for about two weeks. The employee soon went back to full duty work. (Dec. 2.) This injury is not germane to the analysis of the issues in this case.

while lifting a 50-pound box. While the employee went on light duty assignment in the mailroom, he had to eventually cease working as of September 23, 1994. The self-insurer paid a without prejudice closed period of § 34 benefits through November 17, 1994, and the employee then filed a claim for benefits in December 1994. (Dec. 1-2.) In that claim, the employee alleged ongoing total incapacity related to the April 14, 1989 industrial injury. An administrative judge ordered payment of § 34 benefits at the rate of two-thirds of the employee's 1994 average weekly wage of $576.00 by a conference order, which the self-insurer appealed. Prior to the commencement of the de novo hearing, however, the parties reached an agreement that called for payment of § 35 benefits from July 18, 1995 and continuing at the rate of $300.00 per week. That compensation rate reflected the employee's 1994 average weekly wage of $576.00, an earning capacity of $126.00 per week, and the use of the two-thirds multiplier applicable to the employee's 1989 industrial injury. After the self-insurer filed a complaint for discontinuance of benefits in 1996, the parties once again executed an agreement to pay compensation, this time at the weekly rate of $257.33, which reflected the same 1994 average weekly wage of $576.00, a higher earning capacity of $190.00, and the 1989 two-thirds multiplier. (Dec. 3.)

The self-insurer discontinued the payment of benefits, effective July 18, 2000, by filing its Notification of Acceptance, Resumption, Termination or Modification of Weekly Compensation form, with the explanation, " 'Section 35 benefits have been exhausted.' " (Dec. 4. quoting from Employee Ex. 1) The employee then filed the instant claim for reinstatement of benefits, and a penalty for illegal termination. (Dec. 4.)

The judge posed the question presented by the employee's claim: "[W]hether the employee's entitlement to § 35 partial incapacity benefits had expired due to the application of § 35B or whether the employee was entitled to receive the balance of the 600 weeks of § 35 benefits permitted by the statute at the time of the occurrence of his April 14, 1989 industrial injury?" (Dec. 4.)

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. . . .

Because we can do no better than the judge in explaining the historical vicissitudes of § 35B, in general, and its particular application to this case, we quote his legal discussion largely verbatim:

> At its essence, § 35B is intended to encourage returns to work after injuries by its treating of any subsequent worsening forcing the person to again leave work as a new injury.[2] For the most part, this provides an advantage to re-injured workers. The new benefits are calculated upon the most recent average weekly wage, presumably higher than the earlier average weekly wage. [See Puleri v. Sheaffer Eaton, 10 Mass. Workers' Comp. Rep. 31, 35-40 (1996).][3] There often is a new and higher state average weekly wage in effect, making for a higher maximum weekly benefit. . . . Traditionally, employees fought for, and their insurers often fought against, the application of § 35B to their particular cases.
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> Then, the benefit reductions contained within the 1991 rewriting of the workers' compensation law turned the effects of this provision upside down for a while. Effective with injuries occurring after December 23, 1991, the weekly benefit rate was 60% of the average weekly wage instead of two-thirds. Section 34 benefits were available for only 156 weeks instead of 260. Section 35 benefits were available for only 260 weeks instead of 600 and were capped at 75% of the employee's § 34 rate. If all these things were to be applied to new periods of disabilities related to pre-December 23, 1991 injuries, it could work out to the detriment of some re-injured workers.
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> For a period of time, that effect was forestalled. In an effort to save the beneficial intent of § 35B for all to whom it applied, a number of generous § 35B

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2 Our only disagreement with the judge's reasoning goes to a matter that does not affect the disposition of this appeal. Whereas § 35B provides that compensation for a recurrence ("subsequent injury") within its scope shall "be paid at the rate in effect at the time of the subsequent injury," our view, in dicta, has been that this statutory language does not mean that an entire new clock of benefit entitlement starts to run with such a subsequent injury. Rainville v. Roy's Towing, 9 Mass. Workers' Comp. Rep. 662, 664 (1995). The employee's appeal does not go to this point, however, and the self-insurer did not appeal the decision.

3 Citation added here and in paragraph 8 of quoted language from the judge's decision.

> interpretations came to be used. These interpretations, which found a sensitive and supportive ear with a majority of the Industrial Accident Reviewing Board, tended toward making § 35B an elective proposition -- giving employees the opportunity to determine whether or which aspects of the post-1991 benefit matrix would apply to their [recurrence].[4]
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> Those machinations were brought to a halt by the Appeals Court decision in Taylor's Case, 44 Mass. App. Ct. 495, 691 N.E. 2d 997 (1998). Taylor's Case clearly announced that the word "shall" in § 35B means "shall" and that the application of § 35B in all its respects was not elective but mandatory. Section 35B was held to require that the new rates in effect at the time of the [recurrence] be used to determine all aspects of benefit payments and entitlements, regardless if that increased or decreased one's benefits.
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> This did not present a problem for those whose original injuries and subsequent[recurrences] either both occurred before December 23, 1991 or both occurred after December 23, 1991. For those persons, § 35B worked smoothly as designed. But, for one specific group of injured workers – those who were originally injured before December 23, 1991 and then suffered a [recurrence] after December 23, 1991 – § 35B could well serve to reduce their weekly benefit and reduce the number of weeks for which those benefits could be received after the recurrence of disability. Mr. Nadeau, unfortunately for him, fell into that category.
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> When Theodore Nadeau was first injured in 1989, G.L. c. 152 provided for a partially incapacitated employee to receive § 35 benefits for up to 600 weeks. The legislature substantially reduced that to 260 weeks in 1991. As Taylor's Case eventually made clear, when Mr. Nadeau sustained either a new injury or a recurrence of his 1989 injury after December 23, 1991, his new period of disability was required to be . . . [subject to] the new rates and durations for benefits set out in the 1991 revision of the law. . . . When he went out of work in 1994, irrespective of whether that was the result of a new injury or merely a recurrence of the old, the proper application of § 35B called for the post-1991 benefit durations to govern. When Mr. Nadeau and BU agreed for him to begin receiving § 35 benefits as of July 18, 1995, the proper application of § 35B called for those benefits to have the post-December 23, 1991 maximum run of 260 weeks, or about 5 years. That duration of eligibility ran into July 2000. The self-insurer's stoppage of the § 35 benefits was carried out at the correct moment. . . .

[4] The judge uses the term "re-injury." We prefer to use the statutory term "recurrence." See G. L. c. 152, § 35B.

> It is clear from the history of this case that § 35B was applied to Mr. Nadeau's incapacity that began in September 1994. Even after his disability was deemed a recurrence of his 1989 injury by Judge McKinnon's order and accepted as that by the 1995 agreement, the basis for calculation of Mr. Nadeau's benefits was his 1994 average weekly wage. Section 35B is the vehicle by which the $576.00 1994 average weekly wage came to be used instead of the $453.60 1989 average weekly wage.
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> Mr. Nadeau's circumstances were complicated by the pre-Taylor confusion over how to apply § 35B to the situations of persons whose original injury date and re-injury date straddled the 1991 revisions to the workers' compensation law. [See, e.g., Puleri, supra; Kelly v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 428 (1996).] Because of that confusion, Mr. Nadeau and others were, at first, afforded the best of both worlds. He was allowed to use his later, higher average weekly wage in combination with the earlier, more advantageous two-thirds multiplier. That formulation was sought by the employee and was ordered in 1995 by Judge McKinnon. The parties appear to have continued to calculate Mr. Nadeau's weekly § 35 rate by using a two-thirds multiplier for the entire run of his receipt of those benefits. The July 1995 agreement that set the § 35 benefits at $300.00 explicitly paid at the 2/3 rate. The June 1998 agreement that set the § 35 at $257.33 per week, while not explicit as to its manner of calculation, makes most sense when viewed as an increase of the earning capacity to $190.00 and a calculation of § 35 using a 2/3 multiplier.
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> [N]one of [the] orders or agreements has any bearing on the number of weeks that the § 35 benefits, whatever their weekly amount, were to go on being paid. Just because Mr. Nadeau may have received more per week than G.L. c. 152 calls for him to have received does not mean that a separate, parallel error has to be made regarding the duration of payments. The use of the old two-thirds multiplier did not bring with it any requirement or obligation to have those benefits run for the old 600-week duration. There was never any order or agreement that explicitly set any particular amount of time for the § 35 benefits to run, much less the 600 weeks sought by the employee. BU's shutoff did not run afoul of any agreement between the parties to pay longer than would ordinarily be paid for a 1994 [recurrence] because there was no such agreement. And it did not violate any order to pay longer because there was no such order. I find Boston University's July 2000 shutoff occurred at the point that Mr. Nadeau had received his full 260-week run of § 35 benefits that the law has been read to provide for his circumstances.

(Dec. 5-9) (footnotes added).

The decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

Filed: **October 24, 2003**

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge