COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 021002-01

Patrick McEneaney	Employee
Modern Continental Construction	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Horan, Koziol and McCarthy)

The case was heard by Administrative Judge Hernandez.

APPEARANCES

George N. Keches, Esq., for the employee at hearing and on appeal
William A. Hanlon, Esq., for the employee on appeal
Diane J. Bonafede, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying and dismissing his claim to adjust his § 34A[1] benefit award by the application of § 51A.[2] We affirm the decision.

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[1] General Laws c. 152, § 34A, provides:

> While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, following payment of compensation provided in sections thirty-four and thirty-five, a weekly compensation equal to two-thirds of his average weekly wage before the injury, but not more than the maximum weekly compensation rate nor less than the minimum weekly compensation rate.

[2] 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.

The case was tried on an agreed statement of facts. The employee was injured on March 19, 2001. (Dec. 1.) He received § 34 total incapacity benefits for the maximum statutory period.[3] He then filed a claim for § 34A permanent and total incapacity benefits.[4] Following a conference on that claim, he was awarded § 35 partial incapacity benefits at the maximum weekly rate of $662.79 from April 10, 2004, to date and continuing.[5] The insurer paid the § 35 benefits awarded at conference, and the employee appealed.

In a hearing decision filed on November 2, 2005, the judge awarded the employee § 34A benefits from April 10, 2004, to date and continuing. The insurer appealed,[6] and we summarily affirmed

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[3] General Laws c. 152, § 34, provides:

> While the incapacity for work resulting from the injury is total, during each week of incapacity the insurer shall pay the injured employee compensation equal to sixty percent of his or her average weekly wage before the injury, but not more than the maximum weekly compensation rate, unless the average weekly wage of the employee is less than the minimum weekly compensation rate, in which case said weekly compensation shall be equal to his average weekly wage.

The total number of weeks of compensation due the employee under this section shall not exceed one hundred fifty-six.

[4] The employee's November 7, 2003 claim form 110 requested benefits under § 35 and § 34A from March 19, 2004 to date and continuing. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of board file proper)

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

> While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

[6] We note that the employee's failure to appeal from this decision did not bar him from later pursuing a § 51A claim. McLeod's Case, 389 Mass. 431 (198)

the decision. On February 7, 2006, the employee filed a § 51A claim requesting payment of his § 34A benefit at the maximum compensation rate in effect on November 2, 2005 - the date of the hearing decision awarding those benefits.[7] The judge denied the claim at conference, and the employee appealed. (Dec. 2.)

In his hearing decision filed on October 16, 2007, the judge noted that, "[i]n the instant case, the employee did not file a claim for solely § 34A benefits, but rather filed a claim for § 34A and/or § 35 benefits . . . for a prospective period."[8] (Dec. 4.) He also found, "[t]he insurer . . . was ordered to pay and paid § 35 benefits in response to the employee's claim. An insurer is unable to simultaneously pay § 34A and § 35 benefits." (Dec. 5.) Because the employee had received § 35 payments during the litigation of his §§ 35/34A claim, the judge, after reviewing the applicable caselaw, concluded § 51A did not apply because "the insurer paid compensation to the employee without any gap in payment and in response to his claim for benefits" prior to the hearing decision awarding § 34A benefits. (Dec. 6.)

On appeal, the employee argues, as he did below, that because the insurer never paid § 34A benefits until after the hearing decision awarding same,[9] § 51A applies as a matter of law. The employee's argument turns upon the definition of "claim" as contemplated by § 51A. Essentially, he asks us to interpret "claim" as meaning "section claimed." Thus, the employee's argument goes, because § 34A benefits were not paid prior to the November 2, 2005 decision, § 51A

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[7] The employee's average weekly wage was $2,000 on his date of injury. The judge found the employee's § 34A benefit rate was capped at $830.89, the state average weekly wage in effect on his injury date. Had the judge applied § 51A, the employee's § 34A rate would have increased to $958.58, the state average weekly wage in effect when § 34A benefits were awarded by the decision filed on November 2, 2005. See footnotes 1 and 2, supra.

[8] Even if the employee had claimed only § 34A benefits, we would view such a claim as empowering the administrative judge to award § 35 benefits as a lesser included claim. Tredo v. City of Springfield Sch. Dept., 19 Mass. Workers' Comp. Rep. 118, 123 (2005); see also Devaney v. Webster Eng'g, 14 Mass. Workers' Comp. Rep. 359, 361 (2000); Kenner v. Carney Hosp., 10 Mass. Workers' Comp. Rep. 279, 281 (1996); Fragale v. MCF Indus., 9 Mass. Workers' Comp. Rep. 168, 171-172 (1995).

[9] There is no dispute that the hearing decision awarding § 34A benefits was the "final decision on such claim" for § 51A purposes. Walker's Case, 453 Mass. 358 (2009).

applies even though § 35 benefits were paid in response to the employee's claim for benefits *sub judice*. The insurer counters that such a construction is untenable, because acceptance of the employee's position would mean that § 51A would apply to a hearing decision awarding § 35 benefits even if the insurer pays § 34A benefits prior to a final decision awarding benefits at a *lower* § 35 rate. Thus, the only way an insurer could avoid this Catch-22 application of § 51A would be if it was ordered to pay, and paid, the same type of weekly incapacity benefit post conference *and* post hearing.

Both parties cite numerous cases interpreting § 51A in support of their respective positions.[10] None of these cases address the precise issue before us. Therefore, we consider the statutory language "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Hanlon v. Rollins, 286 Mass. 444, 447 (1934). The purpose of § 51A was first articulated in McLeod's Case, where the court held that the statute "reflects a legislative intent to avoid obsolescence of compensation rates by requiring benefits to be computed in accordance with the statutory rate in effect at the time of the final decision, *when no payments have been made during the period the claim has been contested*." 389 Mass. 431, 435 (1983)(emphasis added). Citing to this quoted language in McLeod, the court in Hanson's Case allowed for the application of § 51A to an award of § 34A benefits where the insurer had made no payments on the claim. 26 Mass. App. Ct. 988 (1998). However, there is no mention in Hanson whether § 35 benefits were ordered and paid during the pendency of the § 34A claim.

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[10] It is difficult to completely reconcile the holdings in these decisions. For example, in Madariaga's Case, 19 Mass. App. Ct. 477 (1985), the court concluded that §51A did not apply to a widow's claim for § 36A benefits, because prior to the advancement and litigation of that claim, the insurer had paid her benefits under §§ 31 and 33. Because the court could "perceive no legislative intention in the words from Section 51A . . . to make any separation of 'compensation' based upon the section of c. 152 under which particular compensation was paid," it declined to apply § 51A. Id. at 482-483 n.7. In Mugford's Case, 45 Mass. App. Ct. 928 (1998), the court rejected the argument that an insurer's prior payment of § 34 benefits meant that § 51A did not apply to the employee's subsequent claim for § 34A benefits. The same rationale appears to have been followed in Walker's Case, supra, as the parties' briefs in that case reveal the insurer accepted and paid the employee § 34 benefits to statutory exhaustion, and thereafter paid him § 34A benefits. In other words, for the entire time the employee's § 36 claim was litigated, he received weekly incapacity benefits under the act.

In Conte v. Pan Constr. Co., Inc., 51 Mass. App. Ct. 398 (2001), the court ruled § 51A did not apply where the insurer made no payments on the employee's § 34 claim advanced in Massachusetts prior to the final decision but, because concurrent jurisdiction existed in New Jersey, *had* made weekly payments of a lesser amount to the employee under a comparable law of that state. Relying on Madariaga and McLeod, the court noted that "by the time Conte's claim for § 34 benefits was allowed, he had already received substantial payments made under the similar provision of the New Jersey statute." Conte, supra at 401. It thus did not follow that "no compensation" had been paid in response to the employee's § 34 claim, as the insurer had provided the employee with a stream of weekly benefits during the pendency of his claim in Massachusetts, where he sought, and ultimately received, benefits at a higher rate. As in Conte, the employee here sought a higher amount of weekly incapacity benefits from the insurer while receiving ongoing weekly incapacity benefits at a lower rate from the same insurer. We discern no reason why the payment of a reduced benefit made under another state's compensation statute would serve to defeat the application of § 51A, while the payment of a reduced benefit under our own statute would not.[11]

In sum, the overriding principle we glean from the appellate decisions addressing § 51A is that the statute has no application where the employee is receiving weekly incapacity benefits at the time of the final decision on his pending claim for additional weekly incapacity benefits. See also Walker, supra at 362 ("[i]f an insurer fails to pay any compensation until a decision is issued awarding benefits on a claim, the insurer will be required to pay benefits using the average weekly wage on the date of the decision."); L.Y. Nason, C.W. Koziol, & R.A. Wall, Workers' Compensation § 18.30, at 103 (3d ed. 2003), as quoted in Walker, supra at 362:

> (§ 51A "was added in order to enhance benefits to those employees who had been deprived of compensation during protracted disputes and was intended to discourage

[11] The Conte court distinguished Mugford, supra, by indicating § 51A applied in that case because the employee, while receiving § 34 benefits, had claimed § 34A benefits and had not received § 34A benefits until after a hearing decision issued. Conte, supra at 401. What the Conte decision fails to reveal is that in Mugford, the employee's § 34 benefits had exhausted some eight months prior to the award of § 34A benefits, and the employee had been without weekly benefits, even with the inadvertent overpayment of § 34 benefits, for over a year prior to the issuance of the hearing decision awarding § 34A benefits. Mugford, supra at 929 n.1.

> insurers from unreasonably withholding payment of benefits until a 'final decision' of the board was issued").[12]

Lastly, our duty is to "interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." DiFiore v. American Airlines, Inc., 454 Mass. 486, 490-491 (2009). No such "clear meaning" compels us to adopt the employee's statutory interpretation. The legislature could have, but did not, employ the phrase "section claimed" in § 51A, or could have otherwise qualified § 51A's application by employing a phrase like "payments of any kind" as it did in § 50.[13] Accordingly, we conclude the word "claim" in the statute is best interpreted in the general sense, meaning the vehicle by which a controversy is brought before the adjudicatory arm of the department (via form 110), and thus encompasses pending claims for benefits that, as here, are "lesser included." See footnote 8,

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[12] We also note that in answering the question of which decision was the "final decision" for § 51A purposes, the Walker court's reasoning was unaffected by whether the self-insurer in that case had in fact paid § 36 or § 36A benefits. Likewise, here it matters not that the insurer paid § 35 in response to the employee's claim for benefits under §§ 35/34A; what matters is that it paid incapacity benefits in response to the employee's claim prior to the final decision on that claim.

[13] General Laws c. 152, § 50, provides:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.
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> We have held that the remedy for the employee's deprivation of funds resulting from situations where the employee is awarded § 35 benefits at conference, and later awarded § 34A benefits at hearing, is to require payment of interest, under § 50, on the difference between those benefits paid initially and those awarded subsequently. See Jaho v. Sunrise Partition Systems, Inc., 23 Mass. Workers' Comp. Rep. 185 (2009); Sloan v. Construction Materials Serv., Inc., 23 Mass. Workers' Comp. Rep. 169 (2009).

supra. As the Supreme Judicial Court observed, § 51A "does not contemplate dividing an employee's claim into two or more portions." Walker, supra at 364 n.5.

Therefore, on the facts of this case, § 51A does not apply, as it cannot be said that "no compensation" was paid on the employee's claim prior to the judge's "final" decision awarding an increase in benefits from § 35 to § 34A. McLeod, supra at 435. The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **October 16, 2009**