COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 080213-00**

Steven Svonkin	Employee
Falcon Hotel Corp.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

APPEARANCES

John D. Ross, III, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which an administrative judge awarded the employee § 34 total incapacity benefits until exhaustion, and ongoing § 35 partial incapacity benefits thereafter, for an accepted work injury. For the reasons that follow, we recommit the case for further findings.

On December 15, 2000, the employee, a then thirty-five year old assistant banquet manager, suffered a mid-back injury when he slipped on a wet floor and fell at work. He continued to work, on modified duty, until he underwent a T8-9 discectomy and fusion on July 2, 2002. He has not returned to work since the surgery. (Dec. 2.)

The insurer accepted liability for the employee's injury and commenced payment of § 34 benefits as of the date of surgery. (Id.) In late August 2003, the employee filed a claim for § 34A permanent and total incapacity benefits from and after August 14, 2003.[1] Following a § 10A conference, at which the insurer's

[1] Because the judge's decision fails to set forth the date on which the employee's § 34A claim commenced, we take judicial notice of the claim form itself contained in the Board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). We also note that the employee was not required to exhaust the statutory maximum entitlement for temporary total incapacity before claiming permanent and total incapacity benefits. See Slater's Case, 55 Mass. App. Ct. 326 (2002).

motion to join its complaint for modification or discontinuance of benefits at hearing was allowed, the administrative judge denied the § 34A claim and ordered the insurer to continue paying § 34 benefits. Both parties appealed the conference order.

Pursuant to § 11A, the employee underwent an impartial medical examination by Dr. Samuel J. Brendler on May 14, 2004.[2] The impartial physician opined that the employee's thoracic pain could not be traced to any objective neurological abnormalities. (Dec. 3; Statutory Ex. 1, p. 3.) However, the doctor was unequivocal in his opinions as to disability and causation: "At present he is totally disabled because of the back pain which was caused by the accident of 15 Dec. 2000." (Statutory Ex. 1, p. 3.) Dr. Brendler recommended weight reduction, a graduated program of physical and mental exercise, and behavioral modification to bring the employee out of his sedentary and isolated lifestyle and return him to gainful employment. (Stat. Ex. 1, p. 3; Dep. 30-33.) "If

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[2] The employee's claim put at issue the extent of his incapacity from and after August 14, 2003, some nine months *prior* to the impartial medical examination. Thus, there was a potential "gap" period which the judge acknowledged by allowing the parties to file any post-§ 11A deposition motions as to inadequacy or complexity by a certain deadline. (Tr. 33-34.) Neither party moved for the admission of additional medical evidence.

> [W]e have not adopted a per se rule regarding adequacy or inadequacy of the § 11A medical report regarding the pre-examination period. . . . The doctor's opinion could support the inference that the employee's medical status, from the commencement of his claim . . . until the impartial examination . . . was essentially unchanged.

Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366 (2003). Here, we cannot determine whether the judge drew such an inference, but the insurer's appeal does not challenge the award of § 34 benefits prior to the §11A examination: "[T]he insurer respectfully requests a reversal of the Administrative Judge's Decision and the entry of a finding on behalf of the Insurer denying and dismissing the Employee's Claim for Section 34A, *and allowing the Insurer's request for Discontinuance of Benefits. Said Discontinuance should commence with the date of the Departmental Impartial Examination.* (Insurer br. 9; emphasis added.) Therefore, the sufficiency of the medical evidence for the judge's award of § 34 benefits up to the date of the impartial medical examination is not an issue before us.

he remains in this sedentary condition for an additional year, he will, in my opinion, never return to gainful employment." (Statutory Ex. 1, p. 3.)[3]

The judge concluded that the employee was not permanently and totally incapacitated, and that eventually he should be able to return to work, as the impartial physician purportedly opined.

> This is a troublesome case. Mr. Svonkin suffered a work injury which led to major surgery. Since that time *he has had continued pain*, and therefore adopted what the impartial physician refers to as a sedentary lifestyle. While he does have pain, the impartial physician opines that there is no particular reason why Mr. Svonkin could not return to some form of work. But given his history and course of treatment, the impartial opines that the chance of a successful return to work is low, due more to reasons that are outside the physical realm.
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> The employee bears the burden of persuasion for very [sic] element of his case. In this matter I am simply not persuaded that Mr. Svonkin is totally and permanently disabled. According to the impartial physician, he should physically be able to return to work. While this might be a difficult process, Mr. Svonkin is still too young to just give up on, given the physical ability to do some type of work.

(Dec. 4; emphasis added.) For these stated reasons, the judge denied the § 34A claim; awarded § 34 benefits prospectively until exhaustion of the statutory maximum, a few weeks after the June 14, 2005 filing date of the decision; and then awarded continuing § 35 partial incapacity benefits based on an assigned earning capacity of $175.00 per week. (Dec. 3-4.)

On appeal, the insurer argues that the impartial medical evidence does not support any award of incapacity benefits. The insurer does not, however, argue that the entire award of weekly incapacity benefits should be vacated, but only that benefits should be discontinued as of the date of the § 11A examination. See footnote 2, supra. We do not agree. Dr. Brendler opined in his report, and reiterated in his deposition testimony, that the employee's pain was totally

[3] At deposition, however, the doctor acknowledged this was a "statistical statement," not a medical opinion. (Dep. 33.)

disabling and causally related to his work injury. (Statutory Ex. 1, p. 3; Dep. 30-32.) Although the doctor did state there was no objective neurological basis for the employee's pain, (Dep. 23), he never contradicted or recanted his opinion on the causal connection between the employee's pain and his work injury, and that the pain was *totally* disabling at the time of the examination. Cf. Perangelo's Case, 277 Mass. 59, 64 (1931). There was no expert medical opinion to the contrary.

How the administrative judge construed that sole medical opinion to conclude that the employee remained totally disabled for nine months after the impartial medical examination, and then acquired the capacity to work, is indecipherable to us. As the impartial physician's opinion was the only medical opinion in evidence, it constitutes "prima facie evidence of the employee's medical condition, and the judge is bound to accept it, Murphy v. Commissioner of the Dept. of Indus. Acc., 415 Mass. 218, 224 (1993), unless to do so would deprive a party of due process of law. O'Brien's Case, 424 Mass. 16, 24 (1996)." Bajrami v. Perini Kiewit Cashman, 19 Mass. Workers' Comp. Rep. 254, 257 (2005).

It is well-established that a judge may reject uncontroverted medical opinion only if he clearly and sufficiently states the reasons for doing so in findings with adequate support in the record. Galloway's Case, 354 Mass. 427 (1968). For example, had the judge disbelieved the employee's testimony about his pain, unless that credibility assessment was arbitrary or capricious, he permissibly could have rejected the impartial physician's opinion of total disability, as that opinion was based entirely on the employee's reported pain. Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002). Cf. Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Cmp. Rep. 312, 318-319 (2003), citing Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990)(judge may consider employee's pain to find total incapacity despite medical opinion of partial disability).

The judge, however, did *not* disbelieve the employee: "Since that surgery he has had continued pain. . . ." (Dec. 4.) Thus, we cannot discern the basis for the judge's seeming acceptance of the impartial physician's total disability opinion up to the non-evidentiary date of § 34 benefit exhaustion, and then his rejection of that opinion in finding the employee acquired an earning capacity thereafter. As the expert medical opinion remained the same, the modification of benefits could be explained by some change for the better in the employee's personal vocational status, but the judge made no such finding, and we see no evidence in the record of such a change. Cf. Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94 (2003)(vocational worsening can be factored into incapacity analysis insofar as it reflects external factors, not the employee's personal vocational history). The judge's statement that the employee "is still too young to just give up on," simply does not suffice as the vocational analysis the judge is required to make. See Scheffler's Case, 419 Mass. 251, 256 (1994); Frennier's Case, 318 Mass. 635, 639 (1945).

That said, the employee has not appealed from the judge's decision. He does not challenge either the assignment of an earning capacity or the date on which it was assigned. The employee characterizes the judge's decision finding his total incapacity ended precisely when he exhausted § 34 benefits as rational, allowing the employee "a short respite to adjust from his sedentary lifestyle to make a change of mind and body to attempt to return to work." (Employee br. 8.) Thus, notwithstanding our concerns about the insufficiency of the judge's findings as to the employee's ability to work, and the lack of supporting medical evidence, those issues are not before us. Having failed to appeal the decision, the employee cannot receive a greater award of benefits on recommittal. Andre v. F.C. Construction Co., 19 Mass. Workers' Comp. Rep. 124, 128 (2005), citing Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005).

Thus, we are left with the insurer's argument that the judge erred by using the date of § 34 benefit exhaustion to modify the employee's weekly incapacity

benefit to partial. The insurer is correct. "Factual findings as to when incapacity, be it total or partial, begins or ends must be grounded in the evidence found credible by the judge." Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997). The date on which the § 34 statutory maximum was to exhaust is wholly irrelevent to the issue of the extent of the employee's incapacity. There were two evidentiary constants available to the judge: the impartial physician's expert medical opinions, formulated on May 14, 2004, and the employee's testimony, given at the October 26, 2004 hearing. The judge could not properly use the impartial physician's disability opinion to support both an award of total incapacity benefits commencing nine months *before* the impartial medical examination, and the modification of weekly compensation to partial incapacity benefits commencing on or about July 2, 2005, some fourteen months *after* the § 11A examination.

"It is the settled duty of the hearing judge to make such specific and definite findings based upon the evidence reported as will enable this board to determine with reasonable certainty whether correct rules of law have been applied." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). On the decision before us, we cannot make that determination. Therefore, recommittal is appropriate for further subsidiary findings, anchored in the evidence, as to when the employee's total incapacity ended and he became physically able to work with the earning capacity assigned. See Betty v. Olsten Health Care, 10 Mass. Workers' Comp. Rep. 623, 624 (1996).

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 15, 2006**