]COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026601-21 041417-20**

Abdul J. Mohsin	Employee
Tamaz, Inc.	Employer
Travelers Insurance Co	Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Long and O'Leary)

The case was heard by Administrative Judge Rose

APPEARANCES
Marcel L. Emond, Jr., Esq., for the employee at hearing and on appeal
Edward McCarthy, Esq., for the insurer at hearing and on appeal

FABISZEWSKI, J. The employee appeals from the administrative judge's decision awarding the employee § 34 temporary total incapacity benefits followed by a period of § 35 temporary partial incapacity benefits and § 30 medical benefits.[1] On appeal, the employee raises several arguments, three of which require us to vacate the judge's decision and recommit the case for further findings of fact and rulings of law.

The facts pertinent to the issues raised on appeal are summarized below. In February 2020, the employee began working for the employer as a cashier in a convenience store. (Dec. 4; Tr. 20.) His duties included working the cash register, stocking the coolers and shelves with beverages, bags of ice and other products, mopping the floor and removing trash from the store. (Dec. 4; Tr. 20-21.) Approximately three weeks into his employment, the employee experienced pain in his lower back after lifting

[1] The administrative judge ordered the insurer to pay § 34 temporary total incapacity benefits in the amount of $600.00 per week from May 14, 2021, to August 23, 2022, followed by § 35 temporary partial incapacity benefits in the amount of $258.00 per week based on an earning capacity of $570.00 per week from August 24, 2022, to December 31, 2022, and § 35 temporary partial incapacity benefits in the amount of $240.00 per week based on an earning capacity of $600.00 per week from January 1, 2023, to date and continuing. (Dec. 8.)

cases of water. (Dec. 5). He reported this injury to his boss but was told to not inform the hospital that the injury was work-related. (Dec. 5.) He received medical treatment, which improved but did not eliminate his pain.

On June 15, 2020, the employee was lifting cases of energy drinks when he again felt severe pain in his lower back, radiating down his right leg. (Dec. 5.) He reported the latest incident to his boss and was again advised not to inform his medical providers that the injury happened at work. He received medical treatment, which provided temporary relief, and continued to work. On May 10, 2021, the employee once again experienced back pain radiating down his left leg while lifting cases of product. (Dec. 5.) Despite the pain, he continued to work until May 13, 2021, when the pain became so severe while working that he was taken by ambulance to the hospital. (Dec. 5-6.)

The employee filed claims for benefits for both the June 15, 2020, date of injury and the May 13, 2021 date of injury.[2] Rizzo, supra. Pursuant to the employee's motion, both claims were joined and on March 22, 2022, a §10A conference was held. Id. Regarding the May 13, 2021 injury, the administrative judge issued an order awarding § 35 benefits at the maximum partial rate of $376.44 based on an average weekly wage of $836.54 from March 22, 2022, to date and continuing, with the employee's claim for § 30 benefits denied. Id. The administrative judge denied the employee's claim for the June 15, 2020 date of injury. Id. Both parties timely appealed from the order awarding the employee benefits, and the employee filed a timely appeal from the order denying his claim. Id.

Pursuant to § 11A(2), the employee was examined by R. Scott Cowan, M.D., on August 23, 2022. (Dec. 1.) On January 4, 2023, the employee filed a motion to submit

[2] On October 5, 2021, the employee filed a claim for benefits for the May 13, 2021, date of injury (DIA No. 026601-21), seeking § 34A benefits, or, in the alternative, § 34 benefits from May 14, 2021, to date and continuing, plus benefits pursuant to §§ 13/ 30 and 13A. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) On December 30, 2021, the employee filed a claim for benefits for the June 15, 2020, date of injury (DIA No. 041417-20), seeking benefits pursuant to §§ 13/ 30 and 13A. Id.

additional medical evidence based on the inadequacy of Dr. Cowan's report and the complexity of the medical issues. Rizzo, supra. The administrative judge found Dr. Cowan's report inadequate and authorized the submission of additional medical evidence based on the complexity of the medical issues. (Dec. 2.) On January 17, 2023, a hearing was held and on March 28, 2023, the hearing decision was issued. (Dec. 1, 8.) The administrative judge ordered the insurer to pay § 34 temporary total incapacity benefits in the amount of $600 per week from May 14, 2021, to August 23, 2022, followed by § 35 temporary partial incapacity benefits in the amount of $258.00 per week based on an earning capacity of $570.00 per week from August 24, 2022, to December 31, 2022, and § 35 temporary partial incapacity benefits in the amount of $240.00 per week based on an earning capacity of $600.00 per week from January 1, 2023, to date and continuing, plus § 30 generally. (Dec. 8.) The employee filed a timely appeal.[3]

On appeal, the employee raises several arguments, two of which relate to the administrative judge's interpretation and reliance on the adopted medical evidence. First, the employee asserts that the administrative judge erred by mischaracterizing the § 11A opinion of Dr. Cowan because Dr. Cowan's opinion extended only to the June 15, 2020, date of injury. (Employee Br. 6.) Second, the employee argues that the administrative judge failed to adopt a work-related diagnosis regarding the May 13, 2021, date of injury from the admitted medical evidence. (Employee Br. 7.)

"Where a medical issue is beyond the realm of a lay person's knowledge, expert testimony is needed to establish disability and causal relationship between a claimed incapacity and an industrial injury." Miller v. Metropolitan District Comm'n, 11 Mass. Workers' Comp. Rep. 355, 357 (1997), citing Josi's Case, 324 Mass. 415, 418 (1949). Additionally, an administrative judge must "address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law

[3]Although not explicitly referenced in the decision, it appears that the administrative judge awarded benefits based on the May 13, 2021, date of injury, as that was the only injury under which the employee claimed weekly benefits. Additionally, the insurer had been previously ordered to pay weekly benefits for this date of injury at the § 10A conference.

have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). If the record is insufficient to allow for appellate review, the case must be recommitted for further findings of fact and rulings of law necessary for the board to complete its duties. Id.

In the decision, the administrative judge adopted "certain opinions" of Dr. Cowan, specifically the diagnosis of myofascial strain of the lumbar spine and probable aggravation of an underlying degenerative disc condition at the L4-5 level and that the medical treatment was reasonable, necessary and related. (Dec. 6.) He also adopted Dr. Cowan's opinion that the employee exhibited signs of symptom magnification. In his report, Dr. Cowan opined, in relevant part:

> It is my opinion…that Mr. Abdul Mohsin was injured at work on 06/15/20, lifting a product to put on shelves at a convenience store. That injury, in my opinion, was a myofascial strain of the lumbar spine and a probable aggravation of an underlying degenerative disc condition at the L4-5 level subsequently identified on MRIs. The care Abdul Mohsin received for that injury…[is]reasonable, necessary and injury-related….He had another event on 05/13/2021, at work. The details of that event are unclear. It is not cited as the date of injury. As such, in my opinion, care following 05/13/2021, though reasonable and necessary in my opinion were not related to any work injury sustained on 06/15/2020.

Exhibit 4.

As the employee correctly points out, Dr. Cowan's opinion is limited to the June 15, 2020, date of injury.[4] (Exhibit 4; Employee Br. 6.) Indeed, Dr. Cowan doesn't even discuss the employee's incapacity because it does not address the alleged injury of May 13, 2021, or the employee's present disability at all. In his report, Dr. Cowan indicated that the May 13, 2021, injury was not listed as a date of injury, and, therefore, not before him for his review, stating that "…care following 05/13/21, although reasonable and necessary in my opinion were (sic) not related to any work injury sustained on

[4]The Form 461 Conflict Disclosure, which was completed by Dr. Cowan, listed only the June 15, 2020, date of injury, although the administrative judge clearly found that an injury occurred in May 2021, leading the employee to leave work on May 13, 2021. (Ex. 4; Dec. 5-6.)

06/15/2020." (Ex. 4.) Accordingly, believing that the scope of his expert opinion was limited to the employee's June 15, 2020, date of injury, Dr. Cowan provided neither an opinion nor a diagnosis regarding the employee's May 13, 2021, date of injury. (Ex. 4.) While we do not find that this is a mischaracterization of the evidence, as argued by the employee, we agree that it was error to use the adopted portions of Dr. Cowan's report as a basis for a determination of disability. As the administrative judge found, Dr. Cowan's opinion is inadequate because it doesn't address the employee's present disability at all. (Dec. 2.) The only other medical opinion adopted by the administrative judge was a portion of the opinion of William Mulroy, M.D. (Dec. 7.) Specifically, the administrative judge noted "I accept and adopt the opinion of Dr. William Mulroy that the industrial injury was a major cause of the aggravation of the pre-existing conditions." Id. However, in his report, Dr. Mulroy opined that the employee's "work activities were a major cause of the aggravation of the pre-existing conditions…" (Ex. 4.) Thus, it is unclear whether the industrial injury referenced by the administrative judge with respect to Dr. Mulroy's opinion was the June 15, 2020, date of injury or the May 13, 2021, date of injury, or perhaps even both. Additionally, none of the adopted portions of Dr. Mulroy's medical opinion address incapacity or extent.

Next, the employee argues that the administrative judge's decision to reduce the employee's weekly benefits from § 34 temporary total incapacity benefits to § 35 temporary partial incapacity benefits as of the date of the § 11A impartial examination was arbitrary and capricious. (Employee Br. 8.) The employee argues that the administrative judge's failure to make findings to include a work-related diagnosis for the May 13, 2021, date of injury resulted in a flawed analysis regarding earning capacity. We agree.

"Findings as to when an employee's incapacity, whether total, partial, temporary or permanent, begins or ends must be grounded in the evidence found credible by the judge." Barone v. Life Care Center of West Bridgewater, 29 Mass. Workers' Comp. Rep. 151, 154 (2015), quoting Hubbard v. Henley Enters, Inc., 28 Mass. Workers' Comp. Rep. 1, 5-6 (2014). Further, "the date chosen by the judge to…modify benefits must be based

on some change in the employee's medical or vocational condition." Barone at 154, quoting Bowie v. Matrix Power Services, Inc., 23 Mass. Workers' Comp. Rep. 351, 353 (2009). Here, the medical evidence adopted by the administrative judge did not include any opinion on incapacity or the extent thereof. Absent a medical opinion on physical impairment, there is no foundation upon which to perform a vocational analysis pursuant to Scheffler's Case, 419 Mass 251 (1994).

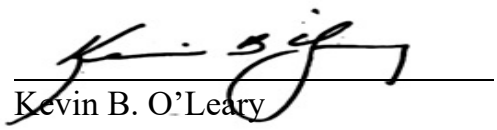
The administrative judge found that given the employee's "surgery and subsequent recovery," the employee was totally disabled from May 14, 2021, through August 23, 2022, which was the date of the impartial examination. However, the decision does not contain any evidence to support a finding that there was a change in the employee's medical or vocational condition on the date of the impartial examination. Accordingly, the administrative judge's decision on earning capacity must be reversed.

We recommit the case the matter for further findings of facts consistent with this opinion. The underlying conference order is reinstated. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014). Pursuant to G.L. c. 152, § 13A(7), employee's counsel is due a fee and shall submit a fee agreement for our approval.

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Martin J. Long
Administrative Law Judge



Kevin B. O'Leary
Administrative Law Judge

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