

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 017556-04

Alfred T. Fraser
Fraser Fish Limited
Granite State Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Dike.

APPEARANCES

Kenneth A. Pollenz, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal

HORAN, J. The insurer appeals¹ from a decision awarding the employee § 34² benefits to their statutory exhaustion, followed by an award of ongoing § 35³ benefits at the maximum rate. In

¹ Initially, the employee also appealed on the issue of average weekly wage. Following oral argument, the employee withdrew his appeal.

² 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.

³ General Laws c. 152, § 35, provides, in pertinent part:

light of the issue raised on appeal, and the employee's pending claim for § 34A benefits retroactive to the date of the statutory expiration of § 34 benefits, we recommit the case for further findings of fact.

The facts pertinent to this appeal are few. Following a hearing held on January 3, 2006, the evidence closed on July 3, 2006. In a hearing decision filed on November 16, 2007, the judge found that on April 9, 2004, the employee lifted a fryolater at work and "suffered multiple disc herniations." (Dec. 9.) The judge awarded the employee § 34 benefits "from May 1, 2004 to the date of their statutory expiration on May 1, 2007." He also awarded the employee § 35 benefits at the maximum rate "from May 2, 2007 to date and continuing. . . ." The judge did not assign the employee an earning capacity, however, noting that his entitlement to § 34 benefits had expired "prior to the issuance of this [d]ecision." (Dec. 12.) Indeed, as the evidence closed prior to the expiration of § 34 benefits, the judge lacked an evidentiary basis upon which to assign the employee an earning capacity after July 3, 2006.

The insurer raises one issue on appeal. It contends the award of § 35 benefits is contrary to law, as it was unaccompanied by the assignment of an earning capacity. It asks us to overrule our decision in Marino v. M.B.T.A., 7 Mass. Worker's Comp. Rep. 140 (1993), and its progeny, which support the award of § 35 benefits in circumstances like those present here. We need not address this issue presently, however, because the employee's claim for § 34A benefits, retroactive to the date his § 34 benefits expired, is pending before a different administrative judge.⁴

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. . . .

The total number of weeks of compensation due the employee under this section shall not exceed two hundred sixty. . . .

⁴ Judge Dike no longer serves on the industrial accident board.

Accordingly, we recommit the case to the new judge to address the issue of the employee's entitlement to incapacity benefits after May 1, 2007.⁵

So ordered

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **November 2, 2009**

⁵ In view of these circumstances, the new administrative judge may, in the exercise of her discretion, invite the parties to reconvene before her to discuss issues arising from our decision and order of recommittal. Of course, the insurer is entitled to a credit equal to the amount it paid the employee following the expiration of his § 34 benefits.