COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 071461-91**

Amicle Oriol	Employee
LG Balfour Company	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy,Wilson and Smith[1])

APPEARANCES
Michael A. Rudman, Esq., for the employee
Thomas G. Brophy, Esq., for the insurer at hearing
Andrew P. Saltis, Esq., for the insurer on brief

MCCARTHY, J. At the time of the administrative judge's decision, Amicle Oriol, the employee, was fifty years old. (Dec. 5.) We note that he attended secondary school in his native Haiti, but left prior to receiving a diploma.[2] (Tr. 6-7, dated Feb. 26, 1998; Dec. 5.) While in Haiti, Mr. Oriol attended a mechanic training school for two years but did not complete the full three-year course. He also tutored preschool children in mathematics and reading for one year prior to entering the Haitian Air Force. (Tr. 7-10, dated Feb. 26, 1998.) While in the Air Force, Mr. Oriol worked as a welder. (Tr. 10-11, 13, dated Feb. 26, 1998.) He came to the United States in 1984 and in 1988 started work for Balfour as a mudwell polisher. (Tr. 14, dated Feb. 26, 1998; Dec. 5.)

[1] Judge Smith no longer serves as a member of the reviewing board.

[2] The employee testified that, at the time he discontinued his studies in Haiti, he was two classes short of obtaining a high school diploma. After coming to the United States, he attended classes to obtain a GED. At the time of the hearing, Mr. Oriol had not yet taken the necessary examination. (Tr. 6-7, dated Feb. 26, 1998.)

The parties stipulated that the employee was first injured on November 27, 1991.[3] He received § 34 benefits from that date to September 10, 1993. From September 11, 1993 to January 30, 1994, the employee received § 35 benefits based on an earning capacity of $180.00 per week. The employee returned to modified work with the employer on January 30, 1994. On December 9, 1996, the employee left work and has not returned since. (Dec. 3.)

The employee filed a claim for reinstatement of § 34 benefits as of December 9, 1996. Following a conference, the employee was awarded § 35 benefits from December 9, 1996 to date and continuing, based upon an assigned earning capacity of $225.00 per week. Although both parties appealed the conference order, the insurer withdrew its appeal prior to hearing. (Dec. 3.)

On August 27, 1997, the employee was examined by Dr. Merlino under the provisions of § 11A. (Dec. 8.) Both the medical report and the physician's depositional testimony were admitted into evidence. (Dec. 2.) The § 11A examiner opined that the employee's prior lumbar laminectomy and subsequent conservative care did not improve his subjective complaints of pain. The doctor's diagnosis was status post lumbar laminectomy with excision of L/4 disc and residual postoperative bilateral sciatic neuritis secondary to postoperative scarring at the L/5 nerve root. Further, the § 11A physician opined that the condition found on exam was causally connected to the November 27, 1991 job injury, (Dec. 8), and that the employee was capable of sedentary physical activity that did not involve heavy lifting and/or repetitive bending, stooping, twisting or reaching, with a maximum lifting capacity to ten to fifteen pounds repetitively and twenty-five to thirty pounds occasionally. At deposition, the § 11A physician further restricted the employee's physical activities by limiting sitting to ninety minutes and by having him avoid prolonged walking and standing. Doctor Merlino thought that Mr. Oriol was at a medical end result and his condition permanent. (Dec. 9.)

Additional medical evidence was allowed for the period prior to the impartial examination. (Dec. 7.) The reports of Dr. Massand, the employee's treating physician, were submitted on behalf of the employee. No additional medical evidence was offered by the insurer. (Dec. 2.) Over the course of treatment, Dr. Massand prescribed medication, physiotherapy and home exercises and administered cortisone at the S1 joint and sacroiliac joint.

[3] On November 27, 1991, Mr. Oriol sustained an injury to his lower back while in the scope of his employment. (Dec. 3.) At some point in 1992, Mr. Oriol underwent a lumbar laminectomy. (Dec. 6.)

Dr. Massand opined that the employee suffered from degenerative lumbar disc disease with bilateral sciatica, left more than right, with a questionable herniated disc recurrent in nature, lumbar and lumbosacral instability and radiculopathy of the L5 nerve root.[4] (Dec. 7.)

Mr. Albert Sabella, a vocational expert, was called by the employee to testify at the hearing. (Dec. 1.) Mr. Sabella testified that the employee can read at a high school level, has no light or sedentary transferable skills and, because of his heavy accent, light or sedentary employment requiring interpersonal contact was impracticable. The vocational expert concluded that the combination of Mr. Oriol's inability to communicate clearly in English with the medical restrictions imposed by the § 11A examiner eliminated virtually all sedentary or light duty work. (Dec. 10.)

The administrative judge adopted the medical opinion of the 11A medical examiner. (Dec. 11, 14.) Additionally, the judge credited the medical opinion of the employee's treating physician as to the employee's condition prior to the impartial examination. (Dec. 14.) The judge went on to find that ". . . job prospects are so limited for light or sedentary work given his English speaking problems that it is more probable than not, that he could not obtain work in the general labor market which is substantial and not trifling." (Dec. 11.) However, she also found that the employee could read and understand English and was capable of attending "language/speaking classes" to improve his English speaking skills. (Dec. 11, 14-15.) The judge then concluded that Mr. Oriol was temporarily totally incapacitated from work.

Based on the finding that improved oral communication skills would enable the employee to obtain gainful employment within his physical restrictions, (Dec. 12-13, 15-16), the judge ordered the insurer to pay the reasonable cost of vocational rehabilitation services for up to one year.[5] The judge also ordered payment of § 34 benefits from December 9, 1996 to June 29, 1999, § 35 benefits from June 30, 1999 and continuing, benefits pursuant to § 30 and legal fees

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[4] The treating physician also made numerous notations regarding the employee's abnormal left heel gait and left sided limp. (Dec. 7.)

[5] The Office of Education and Vocational Rehabilitation (OEVR) has exclusive jurisdiction and responsibility for determining eligibility for vocational rehabilitation and for developing appropriate programs. See §§ 30G, 30H. Of necessity then, the English language program envisioned by the judge would be the responsibility of OEVR. See Perry v. Cape Cod Hosp., 9 Mass. Workers' Comp. Rep. 43 (1995). The issue of the judge's lack of authority to directly order vocational services was not raised by the parties.

and costs to the employee. (Dec. 17-18.)[6] The judge directed the employee to make a good faith effort to participate in vocational rehabilitation and subsequent job placement, (Dec. 18), and noted that the failure of the employee or of the insurer to cooperate in vocational rehabilitation and job placement ". . . would be new evidence for a successor administrative judge to consider in any request to modify benefits." (Dec. 18.)

Cross appeals were taken but the employee later withdrew his appeal. The insurer, in its appeal to us, raises a single issue. The insurer contends that it was arbitrary and capricious and therefore error for the judge to order temporary total incapacity benefits until June 29, 1999, a year and six days from the June 23, 1998 filing date of the decision. The insurer maintains that the award of temporary total incapacity benefits should have ended no later than August 26, 1997, the date of the impartial physician's report. In support of its position, the insurer points out that the § 11A medical examiner found permanent partial medical disability but also felt that the employee was capable of performing light sedentary work.

We are not persuaded by the insurer's argument. The judge found that although the employee has the physical and mental capacity to perform light sedentary work, his inability to orally communicate effectively in the English language acts as a bar to such employment. This finding is grounded on the testimony of the vocational expert, Mr. Sabella. Sabella testified that the employee was capable of performing, ". . . some type of selective or isolated" sedentary work. (Tr. 25 5/4/98.) Mr. Sabella went on to testify that Mr. Oriol's ability to obtain employment was jeopardized by his heavy accent and inability to effectively communicate in English. The vocational expert concluded that given the medical restrictions and the communications barrier, Mr. Oriol ". . . for all practical purposes does not have a work capacity." (Tr. 22 5/4/98.) This medical and vocational testimony taken together adequately support the judge's finding that the employee was temporary totally incapacitated at the time of the hearing and when the decision was filed. The judge could have let the decision go at that and simply conclude that the employee was entitled to temporary total incapacity benefits to the date of the filing decision and continuing. Instead she attempted to fashion a remedy which would hopefully return the employee to the work force in a sedentary position after he had an

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[6] The decision was filed June 23, 1998.

opportunity to improve his oral English language skills.[7] She noted that the employee ". . . comes across as confident in himself (intellectually) and clear thinking. He has every skill necessary for interpersonal work except that his heavy accent interferes with his communication. His vocational rehabilitation needs are very specific. He needs to be able to speak English clearly and then he would be employable in light and sedentary work." (Dec. 11, 12.)

It is, of course, somewhat speculative to select a target of approximately one-year within which the employee is to improve his English and obtain sedentary work. But it is certainly no more speculative or arbitrary than an order of ongoing § 34 temporary total weekly benefits to continue indefinitely given the dynamic and changing nature of most medical conditions. Administrative judges more often than not issue such " open-ended" orders without challenge. Of course the insurer may at any time seek relief from its obligation by filing a complaint to terminate or modify the payment of weekly benefits if circumstances warrant such a filing.

The judge has clearly explained her conclusion in this case. In our view it was drafted with care and foresight. She has pointed out that it is open to the employee to file a claim for further weekly benefits or for the insurer to seek a further modification of them. The judge's decision is not arbitrary, capricious or contrary to law. Accordingly, we affirm it.

The insurer is ordered to pay a fee of $1,000.00 to employee counsel pursuant to the provisions of § 13A(6).

So ordered.

William A. McCarthy
Administrative Law Judge

Filed: **October 26, 2000**

Sara Holmes Wilson
Administrative Law Judge

[7] Again, it is the OEVR's responsibility to " . . . determine if vocational rehabilitation is necessary to return the employee to suitable employment." General Laws c. 152 § 30H.