COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008459-94**

Anthony J. Laverde, Sr.	Employee
Hobart Sales and Service	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Levine)

APPEARANCES
Stephen J. Kehoe, Esq., for the employee
Frances R. O'Toole, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on appeal

MCCARTHY, J. The employee appeals from a 2002 decision of an administrative judge denying and dismissing his claim for § 35 partial incapacity benefits, commencing in 2001, due to a 1994 work injury to his knees. The employee argues that a prior insurer's payment to exhaustion of § 35 benefits for a 1993 back injury should not foreclose his claim to a full slate of benefits for the injury to his knees. We disagree for the reasons that follow. We therefore affirm the decision in large part, but recommit the case for the limited purpose of determining whether any § 35 benefits remain to be paid for the knee injury.

The employee suffered a cumulative injury to his knees while working for the employer for twenty-four years. The date of his knee injury was his last day of work, March 14, 1994, at which time Travelers Insurance Company (Travelers) provided workers' compensation insurance for the employer. (Dec. 6, 8.) The employee had already suffered a back injury while working for the employer on January 14, 1993, for which Liberty Mutual Insurance Company (Liberty) provided workers' compensation coverage. The employee received weekly benefits for his back, returned to work with the employer with restrictions, and later returned to regular duty. However, on March 14,

1994, he suffered a recurrence of his back injury, left work for good, and received § 34 temporary total incapacity benefits from Liberty. (Dec. 7.)

Later in 1994, the employee underwent treatment and surgery for accumulated trauma to both knees. The employee claimed medical benefits under §§ 13 and 30 for his knees, and the judge, in a prior hearing decision filed on April 30, 1999, ordered that Travelers was liable to pay for the claimed medical benefits.[1] (Dec. 8.) The impartial physician, Dr. Joel Saperstein, opined at that time that the employee's knee conditions were caused by cumulative work trauma, and that the employee was partially disabled as a result of the impairment to his knees. (Dec. 8-9.)

Meanwhile, the employee underwent vocational rehabilitation, and went back to work involving less physical rigor for a number of different employers. The employee earned varying amounts over the years, and actually exceeded his average weekly wage of $945.98 (as of his March 14, 1994 last date of employment) from June 2002 to December 2002.[2] (Dec. 4, 6.) After a period of total incapacity post-March 14, 1994, Liberty paid partial incapacity benefits for the employee's back impairment, until § 35 benefits were exhausted on October 15, 2000. (Dec. 14.)

Upon exhaustion of Liberty's § 35 benefits, the employee filed a claim against Travelers for § 35 benefits attributable to his knees. The judge denied the claim at the § 10A conference, and the employee appealed to a full evidentiary hearing. (Dec. 2.) At hearing the employee sought benefits as of the date of August 30, 2001, three days after the re-examination of the employee by the § 11A physician, Dr. Saperstein. (Dec. 3.) Dr. Saperstein again found the employee partially disabled, this time due to the back and *right* knee impairments.[3] Dr. Saperstein restricted the employee from returning to work

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[1] The judge took judicial notice of his earlier hearing decision and the impartial medical report in that proceeding. (Dec. 8-9.)

[2] We assume that the benefits were paid using the last date of employment average weekly wage, which would be applicable under the "subsequent injury" provisions of G. L. c. 152, § 35B.

[3] The judge disregarded Dr. Saperstein's tentative opinion on the left knee ("possibility of a relationship"), and asserted that the left knee was causally related as per his prior hearing

with the employer, and from prolonged ladder climbing, bending, stooping or lifting more than 20 pounds. (Dec. 9-10.) The judge allowed additional medical evidence for the period of disability in dispute prior to the impartial examination, even though there was no claim for any time prior to that August 27, 2001 examination. (Dec. 3.) However, the judge used the opinions of the employee's treating physicians, Dr. Harold Freedman and Dr. Robert Pennell, to answer the question whether the employee's knees were disabling factors while he was receiving benefits for his back from Liberty. The doctors both causally related the employee's partial disability as of March 15, 1994 to his knee impairment. The judge adopted those opinions, (Dec. 10-12), and credited the opinion of Dr. Saperstein as to the employee's present impairment, but for the tentative opinion on the left knee's connection to the employment. (Dec. 10.)

The judge then addressed whether the employee could receive a clean slate of § 35 benefits, payable for his March 14, 1994 knee injury:

> Section 35 benefits were . . . paid by Liberty [for his back incapacity] once the Employee found employment noted above. These benefits were based upon the difference in the wages earned by the Employee and his average weekly wage with the Employer. The Employee sustained an industrial injury to both knees while working for the Employer at the time he was disabled due to his back, however since the Employee was already being compensated for his back injury his knee injury was not considered as to whether it also contributed to his incapacity to earn his average weekly wage.
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> Crediting the Employee's testimony noted above, as well as Dr. Pennell and Dr. Saperstein's opinions, which I credited, that the Employee was partially disabled with respect to both knees on March 14, 1994, I find that this disability contributed to the Employee's incapacity to work for the Employer. The Employee's knee conditions impaired the Employee's earning capacity.
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> Although I credit the Employee's testimony that he left his job with the Employer because of his back condition, I find he did not return to this work due to both his back and knee conditions. In other words, if the Employee did not have a disability due to his back, he would nevertheless be unable to perform his work

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decision. Although this is error, because continuing causal relationship is always at issue in workers' compensation cases, no appellate issue is pressed relative to it.

> with the Employer due to kneeling and related movements. I find that his knee disability continued from his last day of employment and continues. Therefore, the Employee's receipt of section 35 benefits to exhaustion was based upon one [and] the same incapacity, to his back and knees.

(Dec. 12-13.) The judge therefore concluded that the employee had exhausted his § 35 benefits for his knee injury, as same had been paid by Liberty contemporaneously for the employee's back injury and incapacity. The judge reiterated that § 30 medical benefits continued to be available to the employee for his knees. (Dec. 15-16.)

The employee contends that he may still collect § 35 benefits for his knees. We disagree.

The fundamental difficulty in understanding the theoretical framework of this case results from its having flown under the radar of the successive insurer rule, which certainly would have applied to this case in the normal course. That rule was stated in Evans's Case, 299 Mass. 435 (1938):

> Where an incapacity results from the combined effect of several distinct personal injuries, received during successive periods of coverage of different insurers, the result is not an apportionment of responsibility nor responsibility on the part of either or any insurer at the election of the employee. The implication of the act is that only one of successive insurers is to make compensation for one and the same incapacity . . . . [T]he subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity.

Id. at 436-437. See Sliski's Case, 424 Mass. 126, 130-132 (1997)(declining to deviate from the "long and well-establshed" successive insurer rule).

The rule would apply to the present set of facts as follows: There are two distinct personal injuries, which occurred during successive periods of coverage by different insurers.[4] The subject incapacity is, of course, the employee's partial incapacity, as of the

[4] They are, in fact, "distinct," in that they involve two different dates, two types of injury (traumatic v. cumulative), and two different body parts. While the employee suggests that the successive insurer rule might not apply when two different body parts are involved, no authority has been cited – and we are aware of none – supporting that proposition. In fact, the language of Evans's Case, supra, includes such a possibility of two different body parts. The important consideration here is that the successive insurer rule addresses the responsibility of insurers for

March 14, 1994 date of the knee injury. Interestingly, this employee's two injuries do not so much "combine" to yield the resulting incapacity as they are *each* wholly responsible for "one and the same [partial] incapacity." Following the logic of non-apportionment, to the extent a slight contribution attributable to a successive insurer renders it responsible for an entire incapacity, see Rock's Case, 323 Mass. 428 (1948), *a fortiori* it must be responsible for an incapacity to which it could be found a 100% contributor. Indeed, the judge's findings are – and the evidence supports that – the employee's partial incapacity (from March 14, 1994 until Liberty's exhaustion of § 35 benefits) was just as attributable to his knee impairment as it was to his back impairment. Moreover, since Liberty simply paid the employee's § 35 benefits using his actual earnings as his earning capacity, no question or controversy ever arose as to how much was to be paid under § 35; it was essentially a liquidated sum. The upshot is that, had Liberty joined a discontinuance complaint to this claim against Travelers – see G. L. c. 152, § 15A – Travelers presumably would been ordered to pay the employee's partial incapacity benefits as of March 14, 1994. However, as the employee did not claim this, and Liberty apparently was in the dark as to the employee's new medical claim for his knee injury, and Travelers certainly had no interest in volunteering to pay incapacity benefits, it did not happen.

This being said, it is apparent to us that the employee here seeks to enforce exactly "the election" the successive insurer rule disallows: Where more than one industrial injury contributes to the employee's incapacity, "responsibility on the part of either or any insurer [is not] at the election of the employee." Evans's Case, supra. The employee *elected* to have Liberty continue paying partial incapacity benefits, as it was only too willing to do, and to look to Travelers only for medical benefits for the knees, for which Liberty certainly bore no responsibility. Such election cannot be used to convert benefits otherwise exhausted in the normal course of the successive insurer rule to a new

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an incapacity; any number of industrial injuries can contribute to that, and it stands to reason that they may involve any number of body parts.

entitlement. Cf. Taylor's Case, 44 Mass. App. Ct. 495 (1997)(court disfavors implied elections in construction of c. 152).

The employee's claim for partial incapacity benefits for his knee injury, commencing after exhaustion of the partial incapacity benefits Liberty paid for the back injury (one and the same incapacity as that attributable to the knee injury, as of March 14, 1994) actually seeks a double recovery for the same incapacity. Even though the employee has claimed it sequentially, rather than contemporaneously, the claim must still be denied.

In Mizrahi's Case, 320 Mass. 733 (1947), overlapping incapacities for independent work injuries involving fingers and hernia, under different compensation acts, were held to support only one recovery. The court stated:

> It is unnecessary to discuss at length the policy of the law in general against double recovery for the same injury or loss. We are not convinced that we must overlook that policy in this instance. Under our own act, where two injuries contribute to cause the same total incapacity, there is but a single recovery, and that is against the insurer who covered the risk at the time of the later injury. Evans's Case, 299 Mass. 435.

Mizrahi, supra at 736.

Like Mizrahi, the incapacity in the present case, although partial instead of Mizrahi's total, represents an indivisible whole for both injuries during the time that both injuries were independently the cause of such incapacity from March 14, 1994 until § 35 benefits being paid by Liberty were exhausted. This is because, as noted above, this employee's earning capacity was set based on his actual earnings during that period and this calculation has never been at issue in the proceedings. In Mizrahi, the court stated, in summary, "if double recovery is allowed for the same period of incapacity cases may arise in which double or even manifold payments must be made over long periods of time and not in accordance with the policy of any act." Id. at 737. Analogously, the employee here seeks to stretch the otherwise obvious double recovery for the period of § 35 already paid "over [a] long[er] period[] of time and not in accordance with the policy of [the] act." Id. The character of double recovery does not change by the employee's

impermissible election to claim payment of Travelers' § 35 benefits only after Liberty's identical § 35 payments were exhausted.[5]

Insofar as Kszepka's Case, 408 Mass. 843 (1990), stands for a different proposition from that which we conclude today, that case had as its subject specific language in § 48 (lump sum agreements) added by a 1977 amendment. Its holding explicitly does not extend to the double recovery ban for incapacity payments contemplated in Mizrahi.[6] See Kszepka, supra at 849, n.3.

Accordingly, we affirm the decision, but for one respect. We recommit the case for the parties or, if necessary, the administrative judge to determine whether any more § 35 benefits are available for the knee incapacity.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***September 2, 2004***

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Frederick E. Levine
Administrative Law Judge

[5] It is easier to understand this reasoning in a successive insurer case as properly applied. For instance, had Travelers been ordered to pay the § 35 benefits that Liberty ended up paying, there would be no question that Liberty could not be called upon to renew payments after Travelers' exhaustion, absent a worsening of the partial back disability sufficient to support a finding of total incapacity. See Foley's Case, 358 Mass. 230 (1970).

[6] Carrier v. Shelby Mut. Ins. Co., 370 Mass. 674 (1976), was effectively overruled by the Legislature's 1977 amendment to § 48. Kszepka, supra at 847.

COSTIGAN, J., concurring. The employee's original claim against Travelers sought only §§ 13 and 30 medical benefits for treatment and surgery to his knees, resulting from an alleged work-related cumulative trauma injury of March 14, 1994. Thus, the only issues to be determined by the administrative judge in the prior hearing were whether the employee had sustained such a work-related injury and, if so, whether the medical treatment at issue was reasonable, necessary and causally related to that injury. In his April 30, 1999 decision, the judge found in the employee's favor as to those two issues, (Dec. 8), but improperly expanded the controversy beyond that identified by the parties.

In finding that the employee's knee condition had rendered him partially disabled as of March 14, 1994, the judge exceeded the scope of his authority. "Where there is no claim and, therefore, no dispute, . . . the judge strayed from the parameters of the case and erred in making findings on issues not properly before [him]." Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994). That finding of partial disability was improper and should have been vacated, had the employee sought such appellate relief. However, he not only failed to appeal the 1999 decision, but even asked the judge to take judicial notice of that decision, in the adjudication of his subsequent § 35 claim against Travelers. Therefore, the employee waived his right to dispute that his knee condition rendered him partially disabled from March 1994 to at least October 15, 2000, that is, concurrent with his partially disabling back condition for which Liberty paid him § 35 benefits to exhaustion. See Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 674 (2000)(objections, issues and claims not raised below are waived on appeal regardless of merit). Given that waiver, I agree with the majority that, as a matter of law, the employee is not entitled to "a full slate" of § 35 benefits for his knee injury, and I concur with the limited order of recommittal.

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Patricia A. Costigan
Administrative Law Judge