COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 040850-96**

Antoinette Buonanno	Employee
Greico Bros.	Employer
Arrow Mutual Liability Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and McCarthy)

APPEARANCES
Mark J. Kelly, Esq., for the employee on appeal
Susan F. Kendall, Esq., for the employee at hearing
John A. Morrissey, Esq., for the insurer

LEVINE, J. The insurer appeals from a decision of an administrative judge awarding the employee § 34A permanent and total incapacity benefits for her October 10, 1996, work-related knee injury. The insurer argues that the judge's finding of a vocational worsening was not supported by the evidence and that the application of the presumption of retirement under § 35E bars the award. We summarily affirm the decision as to the § 35E issue. We reverse the award of § 34A benefits and restore the benefits to which the employee is entitled under § 35.

The employee, age 67 at the time of hearing, was born in Italy and has lived in the United States since 1966. The employee worked for the employer as a stitcher of garments from that time until she tore her meniscus in 1996. She has a third grade education; she speaks little English and cannot read English.[1] (Dec. 2-3.) In an earlier, September 1998 hearing decision, a different administrative judge awarded the employee a closed period of § 34 benefits and ongoing § 35 benefits. The present judge took judicial notice of that prior decision. (Dec. 2; January 23, 2001 Tr. 65-66.)[2] In that 1998

[1] There is a discrepancy between the judge's finding of a third grade education and the prior administrative judge's finding of a fifth grade education. We note that the number "3" appears to be changed to "5" in the appropriate space on the employee's current biographical data sheet.

[2] The present judge mistakenly gave that earlier decision a date of September 3, 1997. (Dec. 2.)

decision, the prior administrative judge adopted the opinion of the § 11A physician, Dr. Richard Warnock, who diagnosed a meniscal tear in the employee's left knee with degenerative arthritis in the medial compartment, and probable osteoarthritis of the right knee and ankle. The doctor found the employee to be partially disabled, and capable of performing sedentary jobs, with the option of sitting or standing as needed. The doctor did not believe that the employee could return to her job as stitcher. However, the administrative judge determined that she could return to part time work in the "swatch room" at a job consisting of stapling swatches of fabric to cardboard, and based his assignment of a $138.53 weekly earning capacity on that job offer. (September 10, 1998 Dec. 686-689.)

Subsequently, the insurer filed the present complaint to discontinue the employee's § 35 benefits, to which the employee joined her claim for § 34A benefits. The conference proceeding maintained the status quo; the case was appealed to a full evidentiary hearing. (Dec. 2.)

The employee was again examined by Dr. Warnock pursuant to the provisions of § 11A(2). The doctor again diagnosed the employee with degenerative arthritis, left knee, with a meniscal tear causally related to the workplace injury. The meniscal tear aggravated the employee's pre-existing arthritic condition. The doctor again opined that the employee could work in a sitting position, with the ability to sit or stand at will; she was restricted as to stairs and lifting. He opined that the employee had reached a medical end result and that her condition was permanent. The judge adopted the doctor's medical opinions. (Dec. 4-5.)

The employee introduced the expert vocational testimony of Paul Blatchford, who administered aptitude, dexterity and literacy tests. Mr. Blatchford concluded that the employee was unemployable. (Dec. 4.) The judge adopted Mr. Blatchford's opinion. (Dec. 6.)

The judge concluded that the employee had made out a case of permanent and

total incapacity, based on a vocational worsening.[3] She noted the vocational and medical factors set out above, and stated that the employee was unable to obtain remunerative employment of more than a trifling nature in the open labor market. (Dec. 5-6.) "While she may have been able to transfer her skills to an available job that would meet her medical restrictions in 1997 [sic], the employee's vocational expert has convinced me that she could not do so in 1999." (Dec. 6.) The judge therefore denied the insurer's complaint to discontinue or reduce weekly benefits, and awarded the employee § 34 benefits until exhaustion, and ongoing § 34A benefits thereafter. (Dec. 7.)

The insurer argues that the judge's finding of a vocational worsening is unsupported by the evidence, when viewed in comparison to the prior decision that established the employee's earning capacity at $138.53 per week. We agree.

The judge's finding of a "vocational worsening," which was the sole basis for her changing the employee's compensation from partial to permanent and total, took into account the very factors, under Frennier's Case, 318 Mass. 635 (1945), that the prior administrative judge had considered. Indeed, the historical factors of education, training and work experience, by their very nature, *cannot* worsen.[4] The employee had the same elementary school education,[5] inability to read English, and difficulty speaking it, and thirty-one years of experience doing piecework in the garment industry in 2000-2001 as she had in 1998.[6] As a general proposition, vocational worsening can be factored into incapacity analysis only insofar as it reflects the *external* factors delineated in the court's adoption of Locke's analysis in Scheffler's Case, 419 Mass. 251 (1994): " 'the nature of

---

[3] The judge did not find that the employee's medical condition had worsened.

[4] Some of those factors could, of course, improve; e.g., by re-education or retraining.

[5] See n.1, supra.

[6] The employee was 65 years old at the time of the first decision, (September 10, 1998 Dec. 685), and 67 years old at the time of the present decision. (Dec. 2.) This change was not significant to the present judge who simply pointed out that the employee was "in her sixties," (Dec. 5) -- just as she was at the time of the first decision. Compare Foley's Case, 358 Mass. 230, 232 (1970)(advancing age not relevant to the employee's proof of medical worsening).

the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospects of the employer, and the strength or weakness of the economy.' " Id. at 256, quoting L. Locke, Workmen's Compensation, § 321 (2d ed. 1981). See Lally v. K.L.H. Research & Dev., 9 Mass. Workers' Comp. Rep. 427, 429 (1995). There was no evidence of business climate change introduced in the present case. As such, the finding of vocational worsening was unsupported by the record evidence and must be reversed.

The judge relied on the employee's expert vocational witness, Paul Blatchford, whose testimony had not been presented in the 1998 hearing: "While she may have been able to transfer her skills to an available job that would meet her medical restrictions in 1997 [sic], the employee's vocational expert has convinced me that she could not do so in 1999." (Dec. 6.) The judge's reliance on the expert testimony was erroneous. Mr. Blatchford based his opinion that the employee was unemployable on the very same medical restrictions and Frennier vocational factors as existed at the time of the employee's 1998 hearing. A better presentation of the employee's vocational case ("changed evidence") does not constitute the "changed circumstances" that are required to support an increase in compensation. See L. Locke, supra at § 496. Thus, the judge's reliance on Mr. Blatchford's expert vocational testimony to increase compensation was error.

At the root of the reasoning of the court in Foley's Case, supra, which established that the employee must show a "worsening" in her medical condition to support a change from § 35 to § 34A benefits, is the proposition that res judicata applies to workers' compensation proceedings.[7] See Longerato's Case, 352 Mass. 284, 287 (1967);

[7] The provisions of G. L. c. 152, § 16, are not relevant to the present case:

> When in any case before the department it appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injury for which he received compensation; provided, however, that if the board shall determine that the petition for

Sargeant's Case, 347 Mass. 250, 252 (1964). Its application to the present case means that the 1998 incapacity adjudication based on the employee's medical restrictions combined with her vocational profile -- both essentially unchanged at the later hearing -- is a settled fact not subject to revision. Although res judicata is not followed when medical disability or causal relationship or Scheffler vocational conditions change, we see no reason to disregard the doctrine as to the Frennier factors, which, as already pointed out, do not worsen. To disregard res judicata in such a context as the present case would run counter to the approach of the Supreme Judicial Court, which adopted for workers' compensation cases the common law approach to newly discovered evidence as the exception to the otherwise binding effect of prior findings in decisions on the merits. See Sabbagh's Case, 346 Mass. 504, 506-507 (1963)(res judicata as to findings on prior medical evidence no bar to rehearing on basis of medical evidence not available at time of prior hearing; i.e., newly discovered under "sound practice and settled principles concerning a new trial at common law"); Johnson's Case, 242 Mass. 489, 495-496 (1922)(same); Vouniseas' Case, 3 Mass. App. Ct. 133, 139-140 (1975)(no abuse of discretion in declining to rehear issue of loss of hearing absent newly discovered evidence). See also Coughlin v. Coughlin, 312 Mass. 452, 454 (1942)(spousal support decree not subject to modification on basis that petitioner's case inadequately presented at hearing, where "new evidence" submitted in support of modification was either available or readily ascertainable to petitioner at time of earlier hearing).[8] In the present

---

> such rehearing is without merit or frivolous, the employee or his dependents shall not thereafter be entitled to file any subsequent petition thereof except for cause shown and in the discretion of the member to whom such subsequent petition may be referred; and, provided further, that, in the event of the death of the employee, such a petition for a rehearing shall be filed within three months from the time of his decease and within one year from the date of the finding terminating his compensation.

But cf. Carmody's Case, 333 Mass. 249 (1955), relying on the predecessor to § 16.

[8] Newly discovered evidence sufficient to warrant a rehearing must be "important evidence of such a nature as to be likely to have a material effect upon the result, which could not reasonably have been discovered before the trial by the exercise of proper diligence . . . ." Lopes's Case, 277 Mass. 581, 586-587 (1931).

case, Mr. Blatchford's opinion on how the employee's vocational profile rendered her unemployable was readily ascertainable at the time of the 1998 hearing. Its addition to the employee's case in the present hearing could not assist the employee in the absence of changed circumstances that would support a modification of the employee's incapacity status from partial to total. See Foley's Case, supra.

Accordingly, we reverse the award of permanent and total incapacity benefits and restore the § 35 benefits as ordered in the 1998 hearing decision.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

FEL/kai
Filed: **March 12, 2003**