COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 027158-13**

Camilo Diaz Puntiel — Employee
Demoulas Supermarket — Employer
Demoulas Supermarket — Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Harpin and Calliotte)

This case was heard by Administrative Judge Bean.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Richard N. Curtin, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

LONG, J. The employee appeals from a decision denying his claim for § 34A benefits. He argues that the administrative judge erroneously awarded § 35 benefits because: 1) the judge awarded § 35 benefits during a period for which the self-insurer had paid § 34 benefits; 2) the judge misunderstood the employee's burden of proof as the employee was only required to establish there had been no improvement in his condition to prove entitlement to § 34A benefits; and, 3) the judge failed to perform an adequate analysis in determining the employee's earning capacity. For the following reasons, we recommit the case to the judge for further findings.

The employee was fifty years old at time of hearing, having emigrated in 1985 from the Dominican Republic at the age of eighteen. (Dec. 299.) He is married with five children, but lives alone. The employee speaks English and Spanish well and worked as a meat cutter and an assistant manager in the employer's meat department. (Dec. 299-300.) In addition to cutting meat, the employee was responsible for managing meat department employees, training new employees, controlling inventory, and ordering stock. When his manager was on vacation, the employee ran the meat department. On

October 14, 2013, the employee injured his back while pulling a box of chicken at work. He continued to work for the next few days before going out of work. (Dec. 300.)

The self-insurer initially denied the employee's claim for § 34 benefits.[1] Following a § 10A conference on December 1, 2014, the judge ordered the self-insurer to pay § 34 benefits at the rate of $1,040.14 per week from December 2, 2013, and continuing. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file). The self-insurer appealed this initial conference order, and an impartial examination was performed by Dr. Ralph Wolf on February 19, 2015. Rizzo, supra. (Employee br. 1.) Addressing the employee's work capacity, Dr. Wolf noted, "Any full time sitting or driving activity with a minimal amount of walking should be possible now and for the long term future, regardless of future treatment." (Ex. 3.) On September 3, 2015, prior to the scheduled § 11 hearing on the employee's claim, the self-insurer withdrew its appeal of the conference order, and thereafter paid the employee's available § 34 benefits to their exhaustion on December 6, 2016. Rizzo, supra. (O.A. Tr. 36.)

On May 2, 2016, the employee filed a claim for § 34A benefits, which is the subject of this appeal. Rizzo, supra. (Employee br. 2.) A § 10A conference on this claim was held on July 14, 2016, before the same administrative judge who had ordered § 34 benefits following the 2014 conference. Following the 2016 conference, the judge ordered § 35 benefits to begin prospectively, on December 7, 2016, and continuing. Rizzo, supra Cross appeals were filed by the parties. A second impartial examination was conducted on September 14, 2016, by Dr. Ralph Wolf, who offered a diagnosis of a lumbar disc protrusion, causally related to the employee's October 14, 2013, industrial accident. Dr. Wolf found the employee to be disabled from his meat cutter job and able to perform lighter work, with no prolonged standing or walking and no lifting of more than ten pounds. Dr. Wolf also found the employee could sit and drive, with a small

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[1] Although the judge's decision does not relate the procedural history prior to the filing of the 2016 claim which is the subject of this appeal, it is recounted due to its relevance to the parties' arguments and our decision.

amount of walking, and that the employee's symptoms might resolve if he underwent recommended decompression surgery. (Ex. 3; Dec. 299, 302.) A § 11 hearing was conducted on March 9, 2017, and April 20, 2017. (Dec. 299.) In his hearing decision the judge found the employee had been partially disabled since his industrial accident on October 14, 2013, and ordered the payment of § 35 benefits from October 14, 2013, to the present and continuing, assigning an earning capacity of $440.00 per week. (Dec. 303.)

On appeal, the employee argues the judge erred by ordering § 35 benefits from October 14, 2013, through December 6, 2016, because the self-insurer was obligated to, and in fact did, pay § 34 benefits for this period of time. We agree.

The obligation to pay §34 benefits arose as a result of the initial conference order and the self-insurer's later withdrawal of its appeal of that order. The employee sought § 34A benefits only from December 7, 2016, and continuing, (Ex. 1, Employee's Hearing Memorandum), making any change in the benefits prior to that date outside of the issues before the judge for decision. Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)(judge's determination of issues not raised by the parties is error). Moreover, "the self-insurer stipulates that the employee was entitled to § 34 incapacity compensation until December 6, 2016, which has been paid in full." (Insurer br. 21.)

The self-insurer argues that, due to its stipulation, this error is harmless. We do not agree because we cannot tell whether it affected the judge's view of the employee's burden of proof in his § 34A claim and the judge's award of § 35 benefits for the period actually claimed. O'Rourke v. New York Life Insurance, 30 Mass. Workers' Comp. Rep. 303, 309 (2016)(error not harmless where it appears to be a factor in judge's finding); Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers' Comp. Rep. 200, 205 (2000)(error not harmless where reviewing board cannot tell how much it affected judge's crediting of witness' testimony which was crucial to determination of liability).

The employee also contends that "[t]he procedural history of this case is important and central to this appeal" (Employee br. 1) in that it affects his burden of proof. The employee argues:

> The practical effect of the decision of the self-insurer not to go forward with their appeal from the award of Section 34 benefits at the earlier Conference, was to establish said level benefits as res judicata at least as of the time of their withdrawal of appeal on September 15, 2016.[2] Accordingly, the employee asserts that since the self-insurer had accepted the totality of the employee's disability on the date it withdrew its appeal from the original Conference Order, that in essence, the employee would have the burden of showing that his disability was now permanent and further that there had been no improvement in his condition since September 15, 2016.

(Employee br. 4.)

Quoting from Locke's treatise, the employee argues that where the employee has exhausted his temporary total incapacity benefits, " 'the insurer would have the burden of proof that the employee's condition has changed for the better and that he is no longer totally disabled as a result of the injury, and a decision dismissing a claim for permanent and total incapacity should be subject to reversal where there is no evidence of such improvement.' " (Employee br. 4; L. Locke, Workmen's Compensation § 345 [2d. ed. 1981].)[3]

We first note that res judicata is not applicable here. "Because medical conditions are rarely static, we view the issues of the nature and extent of present incapacity as always open to further claims and beyond the reach of the res judicata doctrine." Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 407 (1994). Moreover, it is a basic tenet of our law that the employee retains the burden of proving each and every element of his claim. Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996); Ginley's Case, 244 Mass. 346, 347 (1923); Sponatski's Case, 220 Mass. 526 (1915); Russell, supra. The fact that the employee has been receiving total incapacity compensation from a conference order, the appeal of which was withdrawn by the self-insurer, does not relieve

[2] The employee cites the wrong date, September 15, 2016, for the self-insurer's withdrawal of its conference appeal. The withdrawal of appeal was processed in the DIA's OnBase system on September 3, 2015, over one year prior to the date alleged by the employee. Rizzo, supra.

[3] We note that, in the revision of Locke's treatise, this sentence continues after a semi-colon: "however, this is not the case." Nason, Koziol and Wall, Workers' Compensation, § 18.19 (3rd ed. 2003).

him of the burden of proving that he continues to be totally incapacitated at the time of his § 34A claim. Certainly, he does not have to prove a worsening of his condition. Cf. Foley's Case, 358 Mass. 230 (1970) (following hearing decision finding employee partially disabled, the burden in subsequent § 34A claim was on employee to prove a worsening of his condition which was not due to age). However, his argument that the burden shifts to the self-insurer to show improvement in the employee's condition where the employee has received total incapacity benefits to exhaustion is simply incorrect. See supra note 3, citing Nason, Koziol & Wall, Workers' Compensation § 18.19 (3rd ed. 2003), citing Courage v. General Electric, 7 Mass. Workers' Comp. Rep. 212 (1993)(rejecting the employee's suggestion above). In Courage, supra, we addressed the arguments the employee makes here:

> [The employee] then suggests that in the specific instance when § 34 benefits are exhausted and the employee seeks § 34A benefits, the burden shifts to the insurer to prove that "the employee's condition has changed for the better, and that he is no longer totally disabled as a result of the injury" . . . . There is no such shifting of the burden of proof. See Reddam v. United Beef Company, 6 Mass. Workers' Comp. Rep. 217 (1992). *The employee confuses the burden of going forward which is on the insurer when discontinuance of benefits is in issue, with the burden of persuasion, which remains on the employee at all times as to each element of his claim.* See Katzl v. Leaseway Personnel Corp., 4 Mass. Workers' Comp. Rep. 131 (1990); Sponatski's Case, 220 Mass. 526 (1915). In this case, the burden was on the employee to prove continuing *total* incapacity to perform work of more than a merely trifling nature. Frennier's Case, 318 Mass. 635 (1945). The hearing judge determined that he failed to do so.

Courage, supra at 213; emphases added. See also Reddam, supra at 218 ("[t]he burden of proving continuing total disability was on the employee").

The employee's position is that he need only show no improvement in his condition where, as here, the two impartial physician reports, of February 19, 2015, Rizzo, supra, and September 14, 2016 (Ex. 3; Dec. 299), document the employee being in the same physical condition, with the same extent of partial disability. The employee argues that he need not prove he is totally disabled, even where the only medical evidence is of partial disability, because the insurer accepted that he was totally

incapacitated up to the exhaustion of the § 34 benefits on December 6, 2016, and his physical condition has not changed since that time. As we have noted, however, the burden of proof always remains on the employee, even in a complaint for discontinuance, to show that his *total* disability has continued. Courage, supra.; Reddam, supra.; Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 683 (1995). This the employee has failed to do.

Our holding appears, at first glance, to be inconsistent with our holding in Wicklow v. Fresenius Med. Care Holdings, Inc., 31 Mass. Workers' Comp. Rep. 167 (2017), that the employee must show " 'that the same level of impairment continues following the exhaustion of § 34 benefits.' " Id. at 181, quoting Andrews v. Southern Berkshire Janitorial Service, 16 Mass. Workers' Comp. Rep. 439, 441 (2002). Prior to the decision at issue in Wicklow, supra, there had been another hearing decision in that case awarding § 34 benefits. In the decision on appeal, "the judge credited the employee's testimony that formed the foundation for the uncontradicted prima facie medical opinion that the *employee continues to be permanently and totally disabled*," while stating legally insufficient reasons for rejecting that opinion. Wicklow, supra, at 181; emphasis added. Holding that the employee did not need to prove a worsening of her condition, we reversed the second decision awarding § 35 benefits, and ordered the insurer to pay § 34A benefits. The key was that the employee had provided testimonial and uncontradicted medical evidence that she continued to be *totally* disabled. Such evidence is lacking in the present case. See Listaite v. Worcester Telegram & Gazette, 17 Mass. Workers' Comp. Rep. 485 (2003). [4] In addition, there had been findings of fact

[4] In Listaite, supra, we held that, where an employee is receiving § 35 benefits pursuant to an agreement to pay compensation, he need not prove a "worsening" of his medical condition in order to prove entitlement to permanent and total incapacity benefits. An agreement " 'stands in a position analogous to an unappealed conference order, as it is similarly unsupported by findings of fact and a judicial decision on the merits. . . . [A]lthough the employee clearly had the burden to prove his entitlement to permanent and total incapacity benefits, "worsening" was not part of that burden.' " Id. at 488.

In Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69 (2005), we essentially extended this position to § 34 agreements. We held only that, where an employee had been receiving § 34 benefits pursuant to a § 19 agreement, such agreement established that the

and rulings of law in the previous decision from which the continuance of such total disability could be measured.

Moreover, incapacity for work is determined not just by medical factors, but by many other non-medical factors as well. See Scheffler's Case, 419 Mass. 251, 256 (1994). Thus, the employee's further argument that, because Dr. Walsh's two reports are almost identical, the employee has proven his condition is the same, does not satisfy his burden to prove each and every element of his claim for permanent and total disability.[5]

The employee next asserts that the judge did not conduct a proper vocational analysis. At hearing, the employee's expert testified that the employee was totally disabled from a vocational perspective, while the self-insurer's expert testified that the employee could return to light duty work, making $11.00 - $17.00 per hour. (Dec. 301.) The judge appeared to adopt the testimony and opinion of the self-insurer's expert when he assigned a minimum wage earning capacity of $440.00 per week; however, he wrote, "I also relied in part on both of the vocational experts." (Dec. 301.) Generally, an administrative judge possesses discretion to use his own judgment and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. Sylva's Case, 46 Mass. App. Ct. 679, 681-82 (1999). However, in the present case, the judge made a specific finding that he relied upon vocational expert testimony from two experts, each of whom provided apparently incongruous opinions. Adopting two inconsistent expert opinions causes the decision to be internally inconsistent, and thus arbitrary and capricious, requiring recommittal for further findings.

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employee was, indeed, totally incapacitated for the time period covered by that agreement," id. at 73, and he need not prove a "worsening" to be entitled to § 34A benefits. Id. In stating, "[t]otal is total," we noted that, "[t]here is no range of total from which to calculate any change in the employee's status to qualify for permanent and total incapacity benefits." Id. We did not adopt the employee's position here, that prior receipt of temporary total incapacity benefits reduces his burden of proof; to the extent Sicaras may be interpreted in this way, we reject any such interpretation.

[5] Although Dr. Wolf's first report was admitted into evidence (Ex. 3; Tr. 3), the judge did not appear to use it as a point of comparison to determine the employee's medical impairment prior to his claim for § 34A benefits. We see no reason why he could not do so.

See Sourdiffe v. U. of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(adoption of two inconsistent medical opinions requires recommittal). The judge also failed to provide sufficient information as to what particular opinions he adopted, so we are unable to determine whether correct rules of law have been applied to facts that could be properly found. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). In such a case a recommittal is necessary. Ellison v. NPS Energy Services, Inc., 23 Mass. Workers' Comp. Rep. 263, 264 (2009)(judge's failure to perform adequate vocational analysis requires recommittal).

Accordingly, we reject the employee's argument that he has a lower burden of proof, and hold that, in this case, where he has received § 34 benefits to exhaustion pursuant to an unappealed conference order, he retains the burden of proving both total and permanent incapacity. However, because we cannot tell to what extent the judge's mistaken order of § 35 benefits going back to the date of injury, may have played in the judge's determination of incapacity benefits, we nevertheless vacate the judge's decision and recommit the case for him to re-evaluate the extent of the employee's incapacity. If the judge determines the employee is partially incapacitated, he must perform a more complete vocational analysis, indicating what parts, if any, of the two expert vocational opinions he has adopted. In the interim, the underlying conference order and its obligations remain effective until the filing of a hearing decision after recommittal.[6]

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7) to defray the reasonable costs of counsel. If such fee is sought, the employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.

[6] LaFleur v. MCI Shirley, 25 Mass. Workers' Comp. Rep. 393, 396 n.5 (2011).

So ordered.

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Martin J. Long
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: July 12, 2018