COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037960-88**

Carol Lavoie	Employee
Zayre Corporation	Employer
Liberty Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
Brian R. Cunha, Esq., for the Employee at hearing
Honey Polner, Esq., for the Employee on brief
Paul J. Burke, Esq., for the Insurer at hearing
Thomas G. Brophy, Esq., for the Insurer at hearing
Andrew P. Saltis, Esq., for the Insurer on brief

MAZE-ROTHSTEIN, J. The insurer appeals a decision awarding the employee G.L.c. 152, § 35, weekly partial incapacity benefits, based on subsidiary findings of total incapacity. The employee's entitlement to § 34 temporary total incapacity weekly benefits had exhausted prior to the filing date of the decision. (Dec. 19.) The insurer contends that the award of partial incapacity benefits lacked the necessary evidentiary support. We disagree, because we consider that the judge had the equitable authority to make such a weekly benefits award. We affirm the decision.

The employee, Carol Lavoie, was fifty-four years old at the time the hearing record was re-opened in 1995. (Dec. 4.)[1] After completing high school, she worked as a stitcher, secretary, waitress, occupational therapist assistant, house cleaner and as a

[1] The matter was heard in 1993. (Dec. 2.) In 1995, the employee moved to reopen the record to update the medical evidence on her then current condition. Id. The motion was allowed. Id. The decision was filed thereafter.

substitute teacher. (Dec. 4.) For the employer, Zayre Corporation, she worked as an overnight stock clerk. Her duties included loading and unloading delivery trucks and stocking merchandise on shelves. (Dec. 4-5.)

On June 10, 1988, while unloading a truck, an air conditioner box slipped from the employee's hand and struck the inner aspect of her left knee as it fell. (Dec. 5.) She stopped work immediately due to pain in the left knee. She treated conservatively until November 1988, when arthroscopic surgery was performed on her knee. (Employee Ex. 3, p. 11; Dec. 5, 9.) Post-operatively, the pain did not abate. The employee was then referred for pain management treatment. (Dec. 5.)

Ms. Lavoie's recovery effort has spanned a number of years and an array of treatment modalities including: acupuncture, sympathetic blocks, steroid injections, surgical removal of a sympathetic nerve ganglion, physical therapy and various medications. (Dec. 5-8.)

The insurer accepted the injury as work related and paid workers' compensation benefits. (Dec. 2.) The weekly incapacity benefits were modified by a § 10A conference order on January 9, 1990. A decision, filed on April 2, 1990, continued § 35 partial incapacity benefits. The employee then filed a claim for increased benefits. The claim was denied after a § 10A conference. She appealed to a hearing de novo, but before it could be scheduled, the administrative judge who had issued the conference order left the department. The case was reassigned to another administrative judge.[2] (Dec. 2.) At the hearing, the medical opinions of doctors David E. Adelberg and William E. Dworet were admitted into evidence on behalf of the employee. (Dec. 1, 8-16.) Doctor James R. Lehrich submitted a report on behalf of the insurer, which was also entered into evidence. (Dec. 1, 16-17.)

Doctor Adelberg first saw the employee nine days after the work incident. (Dec. 8.) He initially diagnosed a resolving soft tissue injury to the knee. He recommended a

[2] As the conference order of June 17, 1992 was appealed on June 22, 1992, prior to the July 1, 1992 effective date implementing the § 11A medical examiner process, it did not apply to this case. See G.L. c. 152, § 11A, amended by St. 1991, c. 398, § 30.

knee support, use of crutches and activity restriction. Later he prescribed anti-inflammatory medication and physical therapy. Because the pain persisted, despite conservative treatment, arthroscopic surgery was performed in November, 1988. The surgery revealed a full thickness injury to the cartilage of the medial femoral condyle with loose shards of cartilage at the center of the lesion, which required surgical debridement. (Dec. 9; Employee Ex. 3.) Additional therapy did not quell the increased pain. Id. The doctor recommended a TENS unit to alleviate the unusual symptoms over the employee's lower extremity. Id. Due to persistent weakness in the knee and quadriceps musculature, the doctor gave the employee steroid and xylocaine injections. Id. The doctor's diagnosis, in addition to the knee damage, was secondary reflex sympathetic dystrophy (RSD) causally related to employee's work injury. He also opined that the severity of Lavoie's injury would prevent her from performing the duties of a store clerk. (Dec. 10-11; Employee Ex. 3.)

Doctor Dworet began treating the employee in April 1989, on a referral from Dr. Adelberg. Despite years of extensive acupuncture, pain medication and manipulative treatments, the doctor opined that the employee continues to suffer a total medical disability from RSD, with a poor prognosis. He causally related the condition to the June 1988 work injury (Dec. 15; Employee Ex. 2) and recommended continued acupuncture treatment. The doctor believed that the employee had reached a medical end result and will need indefinite, ongoing treatment due to the unpredictability of her condition. (Dec. 15-16; Employee Ex. 2.)

Doctor Lehrich, however, found no objective abnormalities to indicate a neurological basis for the employee's complaints. He opined that there may have been some initial nerve damage to the knee area and some localized RSD, but that there were no objective findings when he examined her. (Dec. 17; Insurer Ex. 2.) The doctor further opined that the employee's subjective complaints were psychiatric in nature, but that there was no neurological disability causally related to the June, 1988 injury. Id.

The administrative judge credited the employee's testimony and adopted the medical opinions of Drs. Adelberg and Dworet over that of Dr. Lehrich. (Dec. 18.) She

was persuaded that all of the employee's reported symptoms were caused by RSD resulting from the June 1988 work injury. (Dec. 18.) The judge determined that the employee was temporarily totally incapacitated from March 6, 1990 to the date of exhaustion of the § 34 temporary total benefits in 1993. However, acknowledging that § 34 benefits were exhausted prior to issuance of the subject decision in 1998, the judge ordered payment of § 35 partial incapacity benefits until the employee had the opportunity to file a claim for § 34A permanent and total incapacity benefits. (Dec. 19.) She then went on to award § 34 benefits and ordered payment of § 30 medical benefits including the acupuncture treatment. (Dec. 20.)

The insurer contends that the judge's order of § 34 temporary total incapacity benefits and the subsidiary findings supporting that order are inconsistent with her conclusion that "inasmuch as Employee's temporary total benefits may have exhausted by the filing of this order, based on Dr. Dworet's report of August 4, 1995, Insurer is to pay Employee § 35 benefits at her old rate from the date her § 34 benefits are exhausted . . . until Employee has the opportunity to file a further claim." (Dec. 19.) We disagree. We see no problem with the contingent award of §35 benefits, as it is within the judge's limited equitable power to ensure that the humanitarian design of the Act is effectuated.

As a general rule the "modification . . . of weekly incapacity benefits must be based on a change in the employee's medical or vocational status which appears in the record evidence." Demerritt v. Town of North Andover School Dep't., 11 Mass. Workers' Comp. Rep. 630, 633 (1997). In the present case, the findings are clear that the contingent award of § 35 benefits is not based on a change in the employee's status. However, we consider the decision to be within a narrow exception to the aforestated general rule. See Marino v. M.B.T.A., 7 Mass. Workers' Comp. Rep. 140 (1993). In Marino, the reviewing board considered an employee's claim for permanent and total incapacity benefits, which failed for the lack of proof of "permanence." As in the present case, the employee did prove his total incapacity, but was barred from § 34 benefits by reason of statutory exhaustion of those weekly benefits. Id. at 141.

"Where . . . § 34 benefits have been exhausted, it would be contrary to the Act's humanitarian purpose, Young v. Duncan, 218 Mass. 346, 349 (1914), and lead to a result at odds with the purpose of the statute, see Jinwala v. Bizzaro, [24 Mass. App. Ct. 1, 3 (1987)], to deny benefits to a more seriously injured worker while granting benefits to those less seriously injured. Accordingly, we deem it appropriate to apply § 35 to the facts of this case."[3] Marino, supra at 141-142. "The board is not bound by strict legal precedent or legal technicalities, but, rather, governed by the practice in equity. [Citations omitted.] The term 'in equity' is consonant with the liberal construction to be given to c.152 and has been *'applied to supply a remedy [even] where there [may be] a gap in the statute.'''* Utica Mutual Insurance Co. v. Liberty Mutual Insurance Co., 19 Mass. App. Ct. 262, 267 (1985). (Emphasis added.) The present decision indicates the need for the same type of equitable relief as fashioned in Marino to fill an analogous gap in available benefits.

Due to no act or omission by the employee, her claim for § 34 benefits was not resolved until over eight years after she had filed her claim -- five years beyond the limit of § 34 total incapacity benefits available to her by statute. The judge had no authority to order total incapacity benefits in excess of the statutory maximum. Vlachos v. Domenico Ins., 11 Mass. Workers' Comp. Rep. 278 (1997). See G.L. c. 152, § 34 (St. 1985, c. 572 , § 42). Under the circumstances, the contingent award of § 35 partial incapacity benefits was warranted.

We note, as a final matter, that judges should make all possible factual findings prior to making such "stop gap" § 35 awards as in the present case. Cf. McGhee v. TPS Construction, 12 Mass. Workers' Comp. Rep. 46, 48-49 (1998)(in § 34A claim, error to award § 35 benefits when judge failed to allow additional medical evidence pursuant to § 11A(2) after finding the statutory medical opinion did not address the disputed issue of permanency of the medical condition).

[3] Analogously, we have determined that partial incapacity benefits can be awarded, even though an employee did not request such relief in his claim, opting instead to seek §34 or § 34A benefits. Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 171 (1995).

Accordingly, we affirm the decision. We summarily affirm the decision as to all other issues argued by the insurer.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

Filed: March 22, 1999

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge