COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS. 037671-14
009689-16
009699-16

Daniel Vargas	Employee
General Electric Co.	Employer
Electric Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Calliotte and Long)

The case was heard by Administrative Judge Bean.

APPEARANCES
Judson L. Pierce, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from the administrative judge's order dismissing his claims for weekly compensation benefits pursuant to §§ 34, 35 and 34A. (Dec. 656.) We recommitted the judge's previous decision for further findings on, inter alia, whether the employee's retirement was voluntary or involuntary, and the effect that determination would have on his claim for benefits. We now affirm the judge's findings on recommittal that the employee's retirement was voluntary, along with the dismissal of the employee's claims for weekly benefits.

The employee worked for the employer as a machinist for more than thirty years. (Dec. I,[1] 293.) The parties stipulated that the employee suffered three separate industrial accidents during that time: 1) on February 26, 2010, he hurt his back and neck after slipping on a wet floor; 2) on July 17, 2013, he experienced pain in his right elbow, arm and neck while tightening fixtures, and; 3) on September 29, 2014, his last scheduled day

[1] References throughout to "Dec. I" refer to the judge's first decision of May 17, 2017. References to "Dec. II" refer to the most recent decision of June 27, 2019.

of work before his retirement, he reported to the Lahey Clinic complaining of back pain. (Dec. I, 291, 293-295.) Although surgery was suggested following the first incident, the employee declined and opted to live with his pain. Following treatment for the second incident, the employee continued to work with restrictions, and did not miss any time from work. After reporting pain on September 29, 2014, his final day at work, the employee continued to treat for back, neck and arm pain while in retirement. (Dec. I, 295.)

In 2014, as a sixty-year-old employee with at least fifteen years of service, the employee became eligible for a retirement buyout package negotiated by his union and the employer. The package included a monthly pension of $4,800 per month, and a one-time bonus payment of $100,000. (Dec. I, 294.) The retirement package which he accepted was not effective until October 1, 2014, conditional upon his termination from service on September 30, 2014. (Exh. 13.) The employer's human resources manager testified that eligibility for the package required that the employee be on "active payroll" on September 30, 2014, and that someone who was disabled at that time (i.e. not on "active payroll") would not be eligible for the package. Vargas, supra, n.1.

The employee's original claim was denied in the August 4, 2016, conference order. Following the employee's appeal of that order, the judge's May 17, 2017, hearing decision found the employee to be partially disabled after retiring, and assigned a $440 weekly earning capacity. (Dec. II, 651.) The insurer raised three issues in its appeal of that decision. First, it argued that the judge did not list, reference, or discuss the deposition of the § 11A examiner, and did not rule on the objections raised at that deposition. Vargas v. General Electric Co., 33 Mass. Workers' Comp. Rep. 29 (2019). We agreed, noting that the employee also concurred on this point, and recommitted the case to the judge for further consideration of the omitted evidence, further findings on that evidence, and rulings on the objections asserted at the deposition of the § 11A examiner. Id. at 33. Next, the insurer argued that the judge failed to consider § 35D[2] in

[2] General Laws c. 152, § 35D states, in relevant part:

determining the employee's earning capacity, in light of the fact that the employer always accommodated the employee's restrictions without wage loss, and his modified job continued to remain available to him at the time of retirement. Id. at 32. We again agreed that, while the issue had been properly raised, the judge failed to adequately address it. Id. at 33. Finally, citing McDonough's Case, 440 Mass. 603, 604 (2003), and Baribeau's Case, 62 Mass. App. Ct. 1115 (2004) the Insurer argued that the judge failed to consider the question of whether the employee's "voluntary" retirement precluded any award for wage replacement benefits pursuant to the statute. Id. Again, we agreed that the issue had been properly raised and not adequately addressed, and recommitted the case for further findings on whether the employee's retirement was voluntary or involuntary, and what effect such a determination would have on his claim for benefits. Id. at 33.

On recommittal, the judge accepted additional briefs from the parties on the issues being considered but refused to take any additional testimony. (Dec. II, 651-652.) Among the relevant findings of fact, the judge found as follows:

> In 2014 the employer sought to change the method by which its employees were paid, substituting an hourly wage for the piece work compensation plan that had been in place since 1995. This change would substantially reduce the pay . . . the employee and other employees who were being paid as piece workers, would receive. The employee's union negotiated a buy out for older employees, seeking to induce them to retire as the new payment plan went into

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> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
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> (2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it. . . .
>
> . . .
>
> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.

> effect. To be eligible, an employee had to be 60 years old and have 15 years of service with GE. He also had to be working, not out on disability. Of the 182 piece workers at GE 54 were eligible for the buyout and 47 of them accepted it. The employee was one of the 47 who accepted the buyout and retired. In taking the buyout, the employee received a bonus of $100,000 and a pension of $4,800 a month ($57,600 a year). Exhibit 29, page 294.
>
> The employee explained his reasoning for accepting the buyout and retiring from GE. He was having difficulty doing his job which required lifting, bending, pushing and pulling. He was working in pain every day. . . . Nine of the [last] ten weeks [at GE before he retired] he worked a full week (39 or more hours) with three weeks over 60 hours worked. He averaged more than $4000 a week. . . . The employee insists that, but for his industrial injuries he would have continued to work even after piece work was discontinued. The hourly work would have been less stressful. Exhibit 29, line 294. At the 2017 hearing he stated that he had worked in pain for years. *He left work because he had reached the age of 60 and "it was time to retire[.]" He "could not continue to injure himself at work[.]" He believed that he would not be able to continue working much longer with or without the retirement package.* Exhibit 29, pages 294-295. He now asserts that he was forced to accept the retirement package as he could not continue working due to his injuries. His retirement was involuntary. Employee's brief, page 2.

(Dec. II, 652-653; emphasis added.) After making the required ruling on the § 11A deposition, the judge agreed with the employee that § 35D was not applicable in this case, as the employer did not offer the employee a job within his medical restrictions at his prior wage. (Dec. II, 655.) However, the judge disagreed with the employee that his retirement was involuntary:

> I agree with the insurer that the employee is not entitled to wage replacement benefits because there were no wages to replace. The Supreme Judicial Court in McDonough and the Appeals Court in Baribeau held that the employee is not entitled to wage replacement compensation if he is retired and not receiving wages. There are no wages to be replaced. The employee's argument that his retirement was "involuntary" was not persuasive. As I noted in my original decision, the employee stated that he retired because it was time to retire" and he did not want to "continue to injure (himself) at work." Exhibit 29, pages 294-295.

(Dec. II, 655.) The judge denied the employee's claims for §§ 34, 35 and 34A weekly indemnity benefits. (Dec. 656.) The employee has appealed, arguing that the judge abused his discretion by not allowing additional testimony regarding the nature of the employee's retirement, and that the judge erred in failing to award §§ 13 and 30 benefits. (Employee's br. 2, 5 and 7.) We disagree.

With respect to his determination not to allow additional testimony, the judge made the following findings:

> After the remand the parties met with me for a status conference and I allowed them to submit briefs on the issues of the case. The employee, in his brief, asked for the opportunity to offer further testimony. The insurer opposed the request. I brought the parties back to argue the matter on June 20, 2019. The employee sought more testimony on two issues: whether § 35D applied, arguing that because the method and amount of compensation was changed by the employer at the time that the employee accepted the employer's retirement package, § 35D did not apply; and to describe the employee's post decision actions (or inactions) in attempting to return to work, after accepting the employer's retirement package. I denied the employee's request for further testimony, noting his objection. *The employee's testimony in the earlier proceeding included substantial testimony on the § 35D issue, and exhaustive testimony on his physical impairments and his perceived inability to continue working. The record closed with the verbal issuance of that ruling.*

(Dec. 651-652; emphasis added.)[3]

It is well settled that an administrative judge has broad discretion in setting procedures for matters before him. Saez v. Raytheon, 7 Mass. Workers' Comp. Rep. 20, 22 (1993). Moreover, the judge has broad discretion on matters of record closure. See Kerr v. Palmieri, 325 Mass. 554, 557 (1950) (general proposition that granting of a motion to permit additional evidence after trial has been closed rests with discretion of

[3] Neither the status conference nor the June 19, 2019, argument on the employee's request for additional testimony was transcribed. "We have repeatedly urged judges and practitioners alike to 'conduct all but the most extraneous of trial business on the record.' " Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009), quoting from Hill v. Dunhill Staffing Systems, Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002). The better practice would have been to do so. However, the parties have not argued that any error occurred by not putting these proceedings on the record.

the judge). An abuse of discretion has been defined as including an arbitrary determination, capricious disposition, or whimsical thinking. Davis v. Elevated Ry., 235 Mass. 482, 496-497 (1920). The judge's finding that there had already been exhaustive testimony on the issues on which the case had been remanded was neither arbitrary, capricious nor whimsical. The employee's arguments that the judge abused his discretion by refusing to allow further testimonial evidence after recommittal are without merit. The employee merely asserts that the judge somehow required additional evidence to review before drawing his conclusions, despite the judge finding the hearing record replete with testimony from the employee regarding the issues and circumstances of his retirement. (Employee br. 5-7; Dec. 652.) Neither the hearing record, nor the employee's brief on appeal, specifies the necessity of requiring the admission of additional testimony or evidence, or conversely, why adjudication of those issues would be deficient without additional evidence. The employee simply argues that additional testimony would have allowed him to "give further detailed information on this crucial point." (Employee br. pp. 5-7.) We are unaware of any requirement that the employee be afforded the opportunity to make the same point more emphatically. The judge, within his discretion, permissibly determined such testimony was not necessary.

To the extent the employee argues that the judge erred in finding his retirement was voluntary, thus precluding his right to weekly incapacity benefits, we see no reversible error. The judge found, "The employee's argument that his retirement was 'involuntary' was not persuasive." The finding is appropriately supported by the cited evidence, including the fact that he retired because he was 60 and "it was time to retire." (Dec. II, 653.) It is well settled that the judge is the sole arbiter of witness credibility. Lettich's Case, 402 Mass. 389, 394 (1988). In Martinelli v. Chrysler Corporation, 28 Mass. Workers' Comp. Rep. 35 (2014), we upheld a judge's denial of incapacity benefits to an employee who retired after working for years with medical restrictions imposed by his doctor, based on the judge's disbelief of the employee's testimony that his acceptance of a retirement package was motivated by increased pain, or his alleged incapacity:

> "Having voluntarily and freely chosen to remove himself from his employment in exchange for a $75,000 package, without any showing that he could not have continued to remain in that position, the Employee has not persuaded me that he is entitled to workers' compensation weekly benefits . . . . Having left a position of employment where he was capable of working full-time plus overtime, it is disingenuous for the Employee to seek workers' compensation benefits because he claims that he cannot find another one."

Martinelli, supra at 37, quoting from Dec. 10. We found the situation in Martinelli analogous to that in Baribeau v. General Elec. Co., 14 Mass. Workers' Comp. Rep. 263 (2000), aff'd Baribeau's Case 62 Mass. App. Ct. 1115 (2004)(Memorandum and Order Pursuant to Rule 1:28, where the court held, "the administrative judge's . . . finding that the employee left the job voluntarily [perhaps encouraged to do so by the retirement incentive program] rather than because he was unable to work is based on a credibility determination that the administrative judge was in the best position to make). See Aetna Life & Cas. Ins. Co. v. Commonwealth, 50 Mass. App. Ct. 373, 374 (2000)." Baribeau's Case, supra. As in Baribeau and Martinelli, "the administrative judge could permissibly find that the employee chose not to earn wages although he was capable of doing so," Martinelli, supra at 38, citing Vass's Case, 319 Mass. 297, 300 (1946),[4] based on finding unpersuasive the employee's testimony that he retired due to his inability to continue working because of his injuries.

The employee's argument also appears to concede that, when he retired, the employee was capable of working, and that retirement was, at that time, his choice:

[4] McDonough's Case, supra, which the judge relies on for the proposition that "[T]he employee was not receiving wages, therefore there were no wages to replace," (De. II, 654), is not apposite to the instant case. McDonough's Case involved a latent injury under the provisions of § 35C, in which, years after his retirement and last date of exposure, the employee died and a claim for § 31 benefits was made. The court held that, because the employee had retired in 1991 and earned no wages in the year before his death, "there was no loss of earning, and, consequently, no replacement benefits were warranted." Id. at 606. Here, the employee's claim is not a § 31 claim based on a latent injury, but a claim for indemnity benefits based on alleged injuries up to his last day of work, which immediately preceded the date of his retirement. Vargas, supra, n. 3. Nonetheless, as discussed, infra, we think the judge's reliance on Baribeau's Case, supra, adequately supports his decision.

> Therefore, had [the employee] continued working with restrictions and thus worked less hours, the self-insurer would have been forced to pay Section 35 benefits. The fact that the employee *chose* to leave work entirely does not free the self-insurer of [the] obligation it would have had otherwise.

(Employee br. 6; emphasis added.)

The employee argues that the fact that the employer planned to change the method of payment from piecework to hourly after the employee retired meant that he would have to work more hours to earn the same amount of money, which he would not have been able to do because of his injuries, thus entitling him to § 35 benefits. Again, we agree with the insurer that the judge's disbelief of the employee's testimony that he retired due to his injuries and inability to continue working is dispositive here. Further, the assertion that the self-insurer would have been obligated to pay Section 35 benefits is speculative and dependent on several assumptions, not the least of which is that the self-insurer would have refused to make specific accommodations for the employee's restrictions, which the § 11A physician had opined were reasonable.[5] While there is no evidence regarding whether there would be accommodations for this future job, it was not necessary for the judge to address that issue because the employee opted to retire well before that new job actually existed. Had the employee continued to work at this new position, only to later be found partially or fully disabled as a result of his compensable injury, benefits would then be appropriate. That did not occur. Accordingly, neither the change in the method of payment nor the § 11A medical opinion requires a finding the employee suffered an impairment of his ability to earn wages due to his industrial injuries or that he retired due to such impairment.

Finally, we turn to the employee's argument that the judge erred in not awarding §§ 13 and benefits. (Employee br. p. 7.) The judge's original decision of May 17, 2017,

[5] The judge noted that Dr. Morley ultimately stated that "[t]he restrictions the employee worked under in his last months on the job – no heavy pushing or pulling and lifting no more than 20-30 pounds at a time [-] were reasonable restrictions for a man with the employee's physical condition." (Dec. II, 654; Dep. 28.)

ordered "the insurer pay for all reasonable and necessary medical treatment related to the industrial injuries of February 26, 2010, July 17, 2013 and September 23, 2014 pursuant to sections 13 and 30." (Dec. I, 297; Insurer. br., 19.) The March 5, 2019, reviewing board decision vacated the "award" from the judge's original decision without further specificity. Vargas, supra at 33. The judge's second decision omitted any order for §§ 13 and 30 medical benefits. However, in his remand decision, the judge did "adopt all of the subsidiary findings made in my original decision . . . except for those expressly changed by this decision," (Dec. II, 652), thus leaving the award of medical benefits intact. Moreover, because the industrial accidents were accepted, and there were no specific claims for medical bills in dispute, the employee's general entitlement to reasonable and causally related medical benefits was not affected by the judge's denial in his remand decision of incapacity benefits. Finally, the self-insurer does not dispute that the judge's §§ 13 and 30 award remains in effect. (Insurer br. 19.) To the extent there is any lack of clarity on this issue, we now make it clear that the "award" of §§ 13 and 30 benefits causally related to the three accepted dates of injury in the first hearing decision was not vacated by our prior decision in Vargas, supra.

We therefore affirm the June 27, 2019, decision of the administrative judge.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **April 6, 2021**

Martin J. Long
Administrative Law Judge