COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035970-12**

David Roberts Employee
Thomas G. Gallagher, Inc. Employer
Old Republic Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Maureen Counihan, Esq., for the employee
Patrick M. Jamison, Esq., for insurer at hearing and on appeal
David M. O'Connor, Esq., for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision denying its complaint to modify or discontinue the employee's § 34 benefits, and ordering it to continue paying those benefits through their statutory exhaustion, immediately followed by payment of § 34A benefits from June 19, 2016, and continuing. (Dec. 83.) We affirm the judge's decision.

The employee is a thirty-eight year old union pipefitter who possesses a GED, a Master Pipefitter license and a Master Process Pipefitter license. (Dec. 79.) The employee has attention deficit disorder as well as a learning disability. (Dec. 79.) He worked as a pipefitter since 1998, becoming a foreman pipefitter in 2010. (Dec. 79.) Even as a foreman, the employee performed "much of the same work as the pipefitters under his supervision," which he described as "heavy work with much overhead work." (Dec. 79-80.) The employee worked "40-48 hours a week" and earned an average weekly wage of $1,988.38. (Dec. 80.)

On September 11, 2012, the employee sustained a work-related injury to his left minor shoulder. He reported the injury, began medical treatment, and continued to work in pain. (Dec. 80.) Eventually, the employee's injury caused him to leave work on June

19, 2013, and the insurer commenced payment of § 34 benefits. (Dec. 80.) Conservative treatment failed to improve the employee's condition, and he underwent two surgical procedures, as well as a course of work hardening which was performed in May of 2015. (Dec. 80.)

The insurer filed a complaint to modify or discontinue the employee's weekly benefits, which was heard by the judge at a § 10A conference on July 8, 2015. (Dec. 79.) The judge's July 9, 2015, order denied the insurer's complaint, and the insurer appealed. (Dec. 79.) On September 1, 2015, the employee was examined, pursuant to § 11A(2), by orthopedic surgeon, Dr. Kenneth J. Glazier. (Dec. 79.) On December 2, 2015, a rehabilitation review officer from the Department of Industrial Accident's Office of Education and Vocational Rehabilitation (OEVR), found the employee suitable for vocational rehabilitation services. As a result, pursuant to G. L. c. 152, §§ 30E-30H, an "Individual Written Rehabilitation Plan" was developed for the employee in January of 2016. (Dec. 81.) The judge allowed the employee's motion to join a claim for § 34A benefits at the March 9, 2016, hearing. (Dec. 79.)

The judge made the following pertinent findings of fact:

> I find that the employee is totally and permanently disabled within the meaning of the relevant case law. In making this determination, I rely on the credible testimony of the employee and Laurie Martin, his vocational case manager and the persuasive medical opinions of Dr. Kenneth J. Glazier. I make this finding despite the fact that the impartial doctor disabled him only from strenuous work and overhead work, without commenting on light or sedentary work, and that the employee conceded that he could perform the tasks of some light or sedentary, low paying jobs. The employee made nearly $2000 a week in his prior job. With the OEVR endorsed training program that he will soon begin at Wentworth College, he will have the opportunity to make that kind of money again at the conclusion of the program in two years. This is an intensive program that would make working at a light or sedentary job difficult or impossible even if the job is only part time work. He will be carrying a full work load of classes with extensive homework and his continuing self-directed rehabilitation sessions several times a week at the gym. He will seek to complete this aggressive course of study despite his ADD and learning disability that resulted in him leaving high school in the tenth grade. He did later earn his GED. To insist on immediately returning the employee to a light or sedentary job would condemn the 38 year old employee to a 25 year career

> as an unskilled menial laborer, after 16 years as a high wage earning union tradesman. I note that the impartial doctor did not expressly find a light or sedentary work capacity. I assign as the date of the start of his § 34A compensation the date of the expiration of his § 34 compensation, June 19, 2016.

(Dec. 82-83.)

The insurer argues the judge erred because, 1) the evidence does not support a conclusion that the employee is permanently and totally disabled; 2) he failed to analyze the employee's earning capacity properly; and 3) his conclusions are based on internally inconsistent findings. (Ins. br. 6-15.) The insurer seeks reversal of the decision, dismissal of the employee's § 34A claim, and "requests that this Board declare that . . . the employee's earning capacity reflect his abilities to perform work as of September 1, 2016,[1] and be no less than the Massachusetts minimum wage of $10.00 per hour for 40 hours." (Ins. br. 16.)

The insurer's arguments, and its requested relief, ignore the judge's finding that the employee could not perform even a part-time job because of the time-intensive schedule his vocational rehabilitation plan will require. (Dec. 82.) The judge's findings show he conducted precisely the type of analysis mandated by the relevant case law, none of which the insurer refers to or attempts to distinguish. Satoris v. Business Express, 11 Mass. Workers' Comp. Rep. 644, 647 (1997); Atherton v. Steinerfilm, Inc., 11 Mass. Workers' Comp. Rep. 114 (1997). "The relevant question was whether the employee could spend well over forty hours each week in a mandatory program of vocational rehabilitation, and still be able to earn [$400.00] per week in addition to that activity." Satoris, supra at 647 (§ 35 award reversed and § 34 benefits reinstated where assignment of full-time earning capacity and performance of mandatory vocational rehabilitation plan "was implicit finding that the employee was capable of holding the equivalent of two jobs").

[1] The insurer's reference to "September 1, 2016," appears to be a scrivener's error. (Ins. br. 16.) We assume the insurer is requesting that modification begin on September 1, 2015, which is the date Dr. Glazier examined the employee. (Dec. 79.)

Because the judge found the employee could not work while participating in his vocational rehabilitation program, granting the insurer's request for a full-time minimum wage earning capacity would force the employee to forego participation in that program.[2] The practical result is akin to converting the vocational rehabilitation plan from a retraining plan, to a plan with the limited goal of returning the employee to work at a full-time minimum wage position. This result is contrary to the Act for a number of reasons.

First, the assessment of what constitutes a proper vocational rehabilitation plan is a determination made by OEVR, and the approval of such a plan is not reviewable in this, collateral matter. G. L. c. 152, § 30H. Thus, the employee's rehabilitation plan would remain in effect regardless of the outcome of this case. Second, employees who refuse to participate in vocational rehabilitation after being found suitable for such benefits face a fifteen percent reduction in weekly compensation benefits during the period of refusal. G. L. c. 152, § 30G. Thus, the employee cannot choose non-participation without incurring a penalty. Third, "the mere fact that 'a vocational rehabilitation plan has been created for [the employee], and [he] is willing to attempt it' . . . would not ordinarily render [him] ineligible for permanent and total incapacity benefits and serves no basis for decreasing [his] entitlement to benefits." Atherton, supra at 117 (internal citations omitted); G. L. c. 152 § 35D(5)("[t]he fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under this chapter.")

When it is possible, vocational rehabilitation seeks to return the injured employee to work in a job that pays "as near as possible," to his or her pre-injury wage. G. L. c.

[2] We observe that in this case, the employee's average weekly wage of $1,988.38 exceeded the $1,135.82 state average weekly wage on the date of injury by $825.56. Revised Circular Letter 339, October 4, 2011-effective October 1, 2011. As a result, the employee receives the same amount of money, under §§ 34 and 34A, $1,135.82 per week. The assignment of a $400.00 per week earning capacity would yield a § 35 compensation rate equivalent to 22.2% of the employee's pre-injury average weekly wage.

152, § 1(12).[3] "It shall be the policy of the department to encourage and assist in the development of voluntary agreements between injured employees and insurers *to provide and utilize vocational rehabilitation services when necessary to return such employees to suitable employment*." G. L. c. 152, § 30E(emphasis supplied.) The goal of vocational rehabilitation and the department's policy simply cannot be met by undermining the vocational rehabilitation process.

The employee's vocational rehabilitation case manager, Laurie Martin, opined the employee is not capable of substantial gainful employment without retraining. (Tr. 78, 90.) The judge expressly stated that he relied on the "credible testimony of . . .Laurie Martin" in making his determination that the employee "is totally and permanently disabled [sic]." (Dec. 82.) In light of Ms. Martin's testimony, the judge's findings adopting the opinions of Dr. Glazier, and his findings concerning the employee and his vocational rehabilitation program, there was no error in concluding that the employee is permanently and totally incapacitated.

> Complete physical or mental incapacity of the employee is not essential to proof of total and permanent disability within the meaning of the statute. It is sufficient if the evidence shows that the employee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character, and regard must be had to the age, experience, training and capabilities of the employee.

Frennier's Case, 318 Mass. 635, 639 (1945).

The insurer also appears to argue the employee did not prove his entitlement to permanent and total incapacity benefits because he will be finished with the program in

[3] General Laws c. 152, § 1(12), defines "vocational rehabilitation" as:

> nonmedical services reasonably necessary at a reasonable cost to restore a disabled employee to suitable employment as near as possible to pre-injury earnings. Such services may include vocational evaluation, counseling, education, workplace modification, and retraining, including on-the-job training for alternative employment with the same employer, and job placement assistance. It shall also mean reasonably necessary related expenses.

two years. The permanency of the employee's disability was established by the judge's earlier findings:

> The employee's shoulder has not recovered. He now has permanent restrictions that limit him to lifting no more than ten pounds occasionally up to shoulder level. He cannot lift any weight out away from his body or over his head and he cannot do any overhead work with his left arm. He can never return to pipefitting work.

(Dec. 80.) To the extent the employee's vocational factors are anticipated to improve with the completion of the two-year vocational rehabilitation program, we do not see the hoped-for, two-year timeframe, as prohibiting a finding of permanency within the meaning of § 34A. Atherton, supra at 117 ("the judge is not at liberty to speculate on possible future changes based on retraining that has not occurred"). Moreover, the insurer may always refile its complaint if there is a change in the employee's medical or vocational status, whether that change is the completion of the program or the employee's failure to participate. Paltsios's Case, 329 Mass. 526, 529 (1952)("An award for weekly compensation for permanent and total disability can be changed from time to time to correspond to the changes in the earning capacity of the employee.")

Accordingly, we affirm the judge's decision. The insurer shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,613.55.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***December 21, 2016***