COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 053251-98 & 036671-09**

Dennis Martinelli	Employee
Chrysler Corporation	Employer
Wausau Business Insurance Company	Insurer[1]
The Insurance Company of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Jennifer N. Seich, Esq., for the employee at hearing
Brian C. Cloherty, Esq., and William A. Hanlon, Esq., for the employee on appeal
Margo A. Sutton, Esq., for Wausau Business Insurance Company
Peter J. Riordan, Esq., for The Insurance Company of the State of Pennsylvania

HORAN, J. The employee appeals from a decision denying and dismissing his claim for §§ 35, 34 and 34A benefits from May 1, 2009, to date and continuing, and ordering The Insurance Company of the State of Pennsylvania (ICSP), to pay § 30 benefits for treatment of his left shoulder injury. We affirm.

The employee's claims against Wausau Business Insurance Company (Wausau), and ICSP were denied at conference, and he appealed. (Dec. 4.) Prior to the hearing, the employee underwent a § 11A impartial medical examination by Dr. John R. Corsetti. (Ex. 1.) Dr. Corsetti issued his report on June 17, 2011; he was later deposed. (Ex. 1; Dec. 4.) Neither party moved to submit additional medical evidence. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file).

[1] "The record contains mention of *Liberty Insurance Company* and *Liberty Mutual Insurance Company.* All such mention shall be deemed to refer to the named insurer Wausau Business Insurance Company." (Dec. 1, n.1.)

At the hearing, Wausau accepted liability for two injury dates, June 30, 1996 and July 24, 1998. It also agreed that it had "paid for four surgical procedures involving the Employee's shoulder/upper extremity, that § 34 benefits have been exhausted, and there remains about one year of § 35 benefits."[2] (Dec. 2.) Wausau raised the defenses of disability, causal relationship, the successive insurer rule, and denied the employee's entitlement to § 30 benefits. Id. ICSP denied successor insurer liability for an April 30, 2009 injury date, which was when the employee last worked for the insured.[3] Id. ICSP also raised the defenses of disability and causal relationship, and denied the employee's entitlement to medical treatment. Id.

In his decision, the judge found the employee worked as a laborer for the employer from May, 1978, until he retired at age forty-nine on May 1, 2009, when he accepted a retirement package from the employer.[4] (Dec. 5-6; Ex. 4.) From 2003, until his retirement in 2009, the employee performed adjusted work within the work-related medical restrictions imposed by his doctor. (Dec. 5-6.)

> Prior to his retirement, the Employee did not seek medical attention for his shoulder for many years, and he did not miss any work days because of shoulder pain. To the contrary, the Employee accepted virtually all overtime opportunities throughout his career.

(Dec. 6.) While the judge credited the employee's testimony that "his shoulder pain increased while performing his work duties" in his last year of work, (Dec. 9), and adopted Dr. Corsetti's opinion that the employee's "work duties from 2003 through 2009 contributed at least one percent to aggravating and exacerbating his underlying

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[2] The parties stipulated these benefit payments were attributable to the July 24, 1998 injury date. (December 19, 2011 Tr. 7-8.)

[3] Wausau's workers' compensation coverage expired on April, 1, 2008; ISCSP insured the employer from that date, including the employee's last day of work. (Dec. 8.)

[4] For his thirty plus years of service, the employee received $50,000, a $25,000 credit towards the purchase of a Chrysler motor vehicle, and approximately $3,800 a month. (Dec. 6.)

condition and therefore necessitating his current need for treatment,"[5] (Dec. 7), the judge did not credit the employee's testimony that his acceptance of the 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.

(Dec. 10; emphasis in original.) Accordingly, the judge dismissed the employee's claim for weekly incapacity benefits. (Dec. 11.) The employee's appeal raises three issues; we address two, and otherwise summarily affirm the decision.

First, the employee argues the evidence fails to support the judge's finding that the employee voluntarily removed himself from his employment. We disagree. This case is analogous to Baribeau v. General Elec. Co., 14 Mass. Workers' Comp. Rep. 263 (2000), where

> [t]he judge found that the employee was not entitled to incapacity benefits, as his earnings at the time of his retirement matched his average weekly wage. He also concluded that the employer had accommodated the employee and provided him with modified work, consistent with the restrictions set by the impartial physician, at no loss of pay. But for the employee's personal decision to retire, unrelated to his ability to perform the modified job, the judge determined that he would have been earning his pre-injury wage. [] Hence, the judge denied the employee's claim for further incapacity benefits.

Id. at 264. We affirmed, holding that "[i]n the case at hand we have 'an employee who, although capable of doing so, chose . . . not to earn wages.'" Id. at 265, citing

[5] Based on these findings, the judge found ICSP liable "for payment of all medical treatment of the Employee's shoulder condition following his retirement from Chrysler Corporation." (Dec. 11.) ICSP did not appeal the decision, and the employee does not challenge this finding on appeal. Accordingly, the judge's finding is tantamount to a finding of an April 30, 2009 injury date. See Trombetta's Case, 1 Mass.App.Ct. 102 (1973)(finding of new injury not precluded by lack of a disabling incident during most recent employment).

Vass's Case, 319 Mass. 297, 300 (1946). Our decision was affirmed in Baribeau's Case, 62 Mass.App.Ct. 1115 (2004)(Memorandum and Order Pursuant to Rule 1:28), where the court held,

> [t]he 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).
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> No evidence required a finding that the employee resigned because he was about to be laid off; because the job ceased to exist; because his earning capacity was about to undergo a sudden change; or for any reason that would render his decision less than fully voluntary. See Bajdek's Case, 321 Mass. 325, 329 (1947). After his injury, he earned as much as before, thereby warranting a finding that his earning capacity had not been reduced. See G.L. c. 152, § 35D(1) ("the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following: (1) The actual earnings of the employee during each week"). The administrative judge could permissibly find that the employee chose not to earn wages although he was capable of doing so. See Vass's Case, 319 Mass. 297, 300 (1946).

Id.

The judge did not deny the employee's claim solely because he chose to accept an early retirement package. See LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301 (2010)(application and receipt of retirement benefits no bar to claim for incapacity benefits); Arslanian v. Department of Mental Retardation, 21 Mass. Workers' Comp. Rep. 83 (2007)(same); Tredo v. City of Springfield, 19 Mass. Workers' Comp. Rep. 118 (2005)(same); Chinetti v. Boston Edison Co., 13 Mass. Workers' Comp. Rep. 328 (1999)(same); see also Seymour's Case, 6 Mass.App.Ct. 935, 936 (1978)(voluntary employment termination does not, ipso facto, warrant denial of compensation claim). Rather, the judge did not credit the employee's testimony that his condition had worsened and forced him to leave a job he had long performed within his medical restrictions. Compare Arslanian, supra. Furthermore, Dr. Corsetti opined he could not say, despite the employee's reports of increased pain,

that his anatomical condition worsened after 2008. (Dep. 19.) See Foley's Case, 358 Mass. 230 (1970)(following receipt of partial incapacity benefits awarded pursuant to a hearing decision, showing of worsening essential to claim for total and permanent incapacity benefits). Finally, there was no medical opinion in evidence to support a finding that the employee was disabled from performing the job he left in May, 2009. The employee had the burden of proof on all elements necessary to entitle him to an award of compensation. Sponatski's Case, 220 Mass. 526, 527-28 (1915). The judge found, as a matter of fact, the employee failed to carry that burden. There was no error.

Next, the employee argues the judge erred by failing to "identify ongoing related work restrictions that would affect the Employee's earning capacity." (Employee br. 1.) Because the judge found the employee could have continued to work after April 30, 2009, earning the same wages as before, no further earning capacity analysis was required. See G. L. c. 152, § 35D; Baribeau's Case, supra.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **April 1, 2014**