

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS
BOARD NO. 038295-21**

Dennisse Cepeda
JetBlue Airways Corp.
Starr Specialty Insurance Company

Employee
Employer
Insurer

AMENDED REVIEWING BOARD DECISION
(Judges O’Leary, Koziol and Fabiszewski)

The case was heard by Administrative Judge Ricciardone.

APPEARANCES

Michael C. Akashian Esq., for the employee
Kathleen M. Greeley, Esq., for the insurer

O’LEARY, J. The insurer and employee filed cross-appeals from the administrative judge’s decision awarding the employee §§34 and 35 incapacity benefits. The administrative judge ordered the insurer to pay §34 total incapacity benefits at the weekly rate of \$388.63 from September 17, 2022, to March 16, 2025, based on an average weekly wage of \$647.71, followed by §35 benefits at the weekly rate of \$28.63 from March 17, 2025, to date and continuing, based on an average weekly wage of \$647.71 and a minimum wage earning capacity of \$600.00/week (Dec. 14-15.) On appeal, the insurer raises two arguments. First, the insurer argues that the administrative judge erred in finding the employee’s ongoing neck and shoulder injuries causally related to her industrial accident. Second, the insurer argues the administrative judge erred in determining that the employee was totally disabled following her industrial accident. The employee appeals on the grounds that the finding of a weekly minimum wage earning capacity of \$600.00 under §35 is unsupported by law. We summarily affirm the administrative judge’s decision with respect to the issues raised by the insurer’s appeal, but agree with the employee that the administrative judge incorrectly calculated the employee’s §35 partial incapacity benefits due upon the exhaustion of her entitlement to §34 total incapacity benefits, and order payment of those benefits at the maximum rate. Accordingly, we vacate only that portion of the decision related to the calculation of the employee’s earning capacity under §35 and

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order the insurer to pay the employee maximum §35 benefits from March 17, 2025, to date and continuing.

The employee sustained an industrial injury on September 30, 2021, when she tripped over a golf bag while working for JetBlue Airways Corp., falling backward and using her right arm to prevent striking her head. (Dec. 6.) The employee began to lose time from work, and the insurer commenced payment of §34 benefits on March 16, 2022, terminating those payments on September 16, 2022. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). The employee then filed a claim for the resumption of §34 benefits. Id. Following a §10A conference, the employee was awarded §34 benefits at the rate of \$388.63 per week based on an average weekly wage of \$647.71 from September 17, 2022, to date and continuing, plus medical benefits under the provisions of M.G.L. c.152, §§13 & 30. The administrative judge also ordered the insurer to pay for a cervical MRI. The insurer appealed and the parties appeared for a hearing de novo on March 7, 2025. Rizzo, supra.

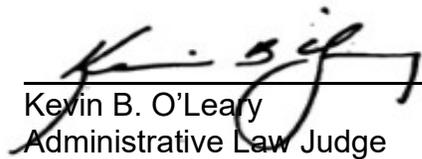
At the hearing, the parties stipulated that the employee “has received, Section 34 benefits from March 17, 2022, to date.” (Dec. 4.) The insurer contested the employee’s entitlement to §34 benefits from September 17, 2022, and continuing. Id. In her decision, the administrative judge adopted the opinions of David Janfaza, M.D., Andrew Schoenfeld, M.D., Morgan Jones, M.D., and N. George Kasparyan, M.D., and credited the employee’s testimony regarding her ongoing neck and right shoulder symptoms and functional limitations. (Dec. 9-10.) The administrative judge found the employee temporarily totally incapacitated from gainful employment since September 17, 2022, and that her incapacity is causally related to the industrial injury. (Dec. 12.)

The determination of the extent of an employee’s incapacity, including the acceptance or rejection of vocational testimony, lies within the judge’s discretion. Scheffler’s Case, 419 Mass. 251, 256 (1994). These findings are supported by the evidence the judge chose to credit and disclose no error of law. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 591 (2000). The administrative judge’s findings are adequately supported by the credited evidence and are not arbitrary or capricious.

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We turn now to the employee's argument regarding the §35 award. Although the administrative judge found that the employee has been and remains totally incapacitated from gainful employment, she assigned an earning capacity of \$600.00 per week upon the exhaustion of §34 benefits and awarded §35 benefits on that basis. This creates an internal inconsistency between the judge's findings and the relief ordered. Where a judge finds that an employee remains totally disabled after the statutory exhaustion of §34 benefits, the proper remedy is an award of § 35 benefits at the statutory maximum rate. Marino v. MBTA, 7 Mass. Workers' Comp. Rep. 140, 141-42 (1993); Liberman v. McLean Hosp., 17 Mass. Workers' Comp. Rep. 1, 2 & 6 (2003)(continued total disability after exhaustion of §34 benefits required imposition of maximum §35 award and recommitment unnecessary as record supported only one result). In such circumstances, the assignment of an earning capacity that results in a compensation rate other than the statutory maximum rate available under §35 is inconsistent with the finding that an employee remains totally incapacitated after the exhaustion of temporary total benefits. We vacate that portion of the decision wherein the employee is assigned a \$600.00 per week minimum wage earning capacity, as the applicable law to the administrative judge's findings requires an award of maximum §35 benefit. Accordingly, we order §35 benefits at \$291.47 per week, the maximum rate (\$388.63 x 75%) permitted by the statute, from March 17, 2025, to date and continuing. Because the employee has prevailed on appeal, pursuant to G.L. c. 152, §13A(6), Starr Specialty Insurance Company is ordered to pay employee's counsel a fee of \$1,964.82, plus necessary expenses.

So ordered.


Kevin B. O'Leary
Administrative Law Judge


Catherine Watson Koziol
Administrative Law Judge

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Karen S. Fabiszewski

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Administrative Law Judge

Filed: March 5, 2026