COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 042615-04**
Donald Kendrick, Jr.	Employee
Grus Construction Personnel	Employer
Continental Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Israel M. Sanchez, Esq., for the employee at hearing
James N. Ellis, Esq. for the employee on appeal
John J. Canniff III, Esq., for the insurer at hearing and on appeal

HARPIN, J. The employee appeals from a decision on recommittal from the Appeals Court, reversing the administrative judge's order that the employee file an earnings report more than once every six months. The court remanded the case for a determination of the amount of benefits due the employee for the period from October 19, 2006 through December 14, 2006. Kendrick Jr.'s Case, 76 Mass.App.Ct. 1129 (2010)(Memorandum and Order Pursuant to Rule 1:28). We agree with the employee that the administrative judge erred by failing to award § 35 benefits and § 8(5) penalties for the closed period in question, pursuant to the decision of the Appeals Court. We also agree the judge erred by dismissing the employee's withdrawn claim for § 36 benefits. Regarding the judge's denial of § 35 benefits after the closed period, we reverse and recommit for further findings.

The employee, fifty-two years old at the time of the hearing, sustained a work-related injury on December 7, 2004. (Dec. III, 5-6.)[1] His causally related injuries were a

[1] The first hearing decision of October 4, 2006, is hereinafter referred to as "Dec. I"; the second hearing decision of December 28, 2007, as "Dec. II"; and the third hearing decision of March 14, 2013, which is the subject of this appeal, as "Dec. III."

thoracolumbar sprain/strain, bilateral knee sprain, a bilateral shoulder sprain, and a left elbow contusion/sprain. (Dec. I, 6.) The insurer paid § 34 benefits, on a without prejudice basis, from the date of injury until March 10, 2005, when the employee returned to work for another employer. (Dec. I, 4.) In the first decision filed October 4, 2006, the judge found the employee partially disabled since his return to work; he also found the employee did not sustain any new injury while so working. The judge ordered the insurer to pay partial incapacity benefits based on actual wages earned for the weeks the employee worked. For the weeks the employee did not work, the judge ordered the insurer to pay $306.00 per week, based on an earning capacity of $135.00. (Dec. I, 6-8.) The employee appealed, and on September 24, 2007 we summarily affirmed the decision.[2]

While that appeal was pending, the employee filed a new claim for § 8(5) and § 14 penalties, alleging the insurer failed to make the payments ordered in the decision in a timely manner. (Dec. II, 4.) In his second hearing decision, dated December 27, 2007, the judge found the insurer was not subject to § 8(5) penalties for terminating the employee's benefits from October 18, 2006 to December 15, 2006, as his entitlement to those benefits depended on the employee's supplying wage information for the period, which he did not do, despite having provided an earnings report on October 18, 2006. (Dec. II, 9.) The judge further found the insurer properly suspended the ordered weekly benefits on and after December 15, 2006, as the employee had failed to attend a scheduled § 45 examination (IME) on that date, or the rescheduled examination on January 9, 2007.[3] (Dec. II, 8.) Finally, the judge found the employee's attorney had pursued the claims without a reasonable basis and had misrepresented testimony and

---

[2] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)

[3] G.L. c. 152, § 45 provides, in relevant part: "If the employee refuses to submit to the examination [requested and paid for by the insurer] or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited."

evidence, warranting the assessment of penalties and costs against employee's counsel. (Dec. II, 10, 13.) The employee appealed this decision. After our summary affirmance, the employee filed an appeal with the Appeals Court.

In Kendrick Jr. supra, the Appeals Court affirmed our decision in part and reversed it in part. The Court held that the insurer "wrongly suspended payments for October 19, 2006 through December 14, 2006," by requiring that the employee file an earnings report more frequently than once every six months. Kendrick, supra; see § 11D(1). The court acknowledged that, without weekly reports, the insurer would have no way of knowing whether the employee was working, but instructed that the remedy was for the insurer to reduce weekly benefits pursuant to § 11D(2) once the overpayment became apparent, not to "erode the statutory mandate." Id. The court reversed the holding in the second decision that the insurer did not violate § 8(5) by suspending payments for those three months, and recommitted the case for the judge to "determine the payments due and owing to the employee" for that period. Id. For the period after December 15, 2006, the court held the insurer correctly suspended benefits pursuant to § 45, due to the employee's failure to attend the scheduled IME's. Accordingly, the court affirmed that part of the decision requiring "forfeiture from December 15, 2006, to the date of attendance at a rescheduled IME." Id.

On recommittal,[4] the judge found the employee failed to prove lost wages from October 19, 2006 to December 14, 2006, the closed period in question. He therefore denied any benefits for that period. The judge also found the employee had forfeited benefits from December 29, 2007, (the day after the second hearing decision, and the date from which the employee claimed further benefits), to March 30, 2010, (the date of the IME the employee attended). He further found the employee's increased pain after March 30, 2010 was no longer causally related to the 2004 industrial accident, but was due to aggravations suffered while working for subsequent employers. (Dec. III, 8-9.)

[4] Prior to the recommittal the employee had filed claims for benefits from December 29, 2007, and for § 36 benefits. (Dec. III, 4.) Those claims and the recommittal were heard and decided by the judge together.

Therefore, the judge ruled the employee did not have any causally related incapacity or permanent loss of function under § 36. (Dec. III, 9-10.)

We address the employee's arguments on appeal seriatim.

The employee first argues the judge erred as a matter of law in not awarding § 35 benefits from October 19, 2006 through December 14, 2006, as the Appeals Court's decision required the awarding of such benefits. He also claims the Court "specifically found that the Insurer made an illegal termination under § 8(5),"[5] and the judge erred in failing to award penalties pursuant to that section. (Employee's br. 10.) We agree the judge erred, but not for the reasons argued by the employee.

The Appeals Court recommitted the case for a determination of "the payments due and owing to the employee for the period from October 19, 2006, through December 14, 2006." Kendrick, supra. Because, in his first decision, the judge had determined the employee was partially incapacitated beginning on March 5, 2005, and had assigned him an earning capacity, he was required to find "a change in the employee's medical or vocational status that is supported by the evidence" to modify or discontinue the employee's weekly benefits. Bennett v. Modern Continental Constr., 21 Mass. Workers' Comp. Rep. 229, 231 (2007), and cases cited. The judge made no findings of a medical or vocational change, but nonetheless authorized termination of the employee's § 35 benefits based on the employee's testimony that he could not recall whether he worked during that three-month period, and the employee's lack of credibility. (Dec. III, 8.) These findings do not provide an adequate basis for terminating or modifying the employee's benefits. Accordingly, we reverse the decision insofar as it affirms the insurer's termination of benefits, and reinstate the benefits awarded in the first decision at

[5] General Laws c. 152, § 8(5) states, in part:

> Except as specifically provided above, if the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty payment equal to twenty per cent of the additional compensation due on the date of such finding.

the rate of $306.00 per week based on an earning capacity of $135.00.[6] In addition, the insurer is ordered to pay a 20% penalty on the total amount ordered, as directed by G. L. c. 152, § 8(5).[7]

Next, the employee challenges the judge's dismissal of his claim for § 36 benefits, which had been joined on the first day of hearing. (Tr. I, 6.)[8] On April 27, 2012, the third day of testimony, the employee filed several motions, one of which was for the withdrawal of his § 36 claim. (Tr. III, 2.) Over the objection of the insurer, who argued that the matter had been tried by consent, if nothing else, (Tr. III, 21), the judge allowed the motion.[9] It was error thus to find the employee did not have any permanent loss of

[6] We order § 35 benefits for the closed period and a § 8(5) penalty, as a further remand to make a determination that the judge already failed to make would be a waste of judicial resources.

[7] Although the Appeals Court reversed the denial of a § 8(5) penalty, the employee was not automatically entitled to it. A § 8(5) penalty is due only "if the insurer terminates, reduces or fails to make any payments required under [chapter 152] *and additional compensation is later ordered*." (Emphasis added.) The penalty is equal to twenty percent of the additional compensation due on the date of such finding." G. L. c. 152, § 8(5). Thus, an award of additional compensation is a pre-requisite to the imposition of the § 8(5) penalty, and the amount of the penalty is determined by the amount of additional compensation later ordered. The judge incorrectly failed to award the § 35 benefits; thus the penalty is due. Lafleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 191 (2014)(penalty provisions are to be strictly construed).

[8] The transcript of the first day of hearing on January 31, 2012, is denominated as "Tr. I.;" the second, on March 1, 2012, as "Tr. II.;" and the third, on April 27, 2012, as "Tr. III."

[9] The colloquy between the judge and the employee's attorney was as follows:

> Judge: My recollection was that – that 36 was not brought as part of the original claim or at the conference and that it was put in at the hearing.
>
> Mr. Sanchez: It was put in by my error at that time.
>
> * * * *
>
> Judge: And it doesn't appear to have been addressed by the impartial physician. So what I'm left with is the employee's medicals in that regard and the insurer's medicals. I am going to allow the motion. I -- I think that if it does come up again I would – I would prefer to have it addressed by an impartial physician, and I'm going to allow the motion to withdraw.

(Tr. III, 24-25.)

function, (Dec. III, 11), as the issue was no longer up for decision. Horr v. G&C Concrete Const., 25 Mass. Workers' Comp. Rep. 207, 211(2011), citing Gleason v. Toxicon Corp., 22 Mass Workers' Comp. Rep. 39, 41 (2008).

We find no merit in the employee's third argument, that the judge erred by failing to reconsider the suspension of benefits from December 15, 2006 until the employee attended the independent medical exam on March 30, 2010. In his second decision the judge specifically ordered that "the employee forfeit benefits for the period since they have been suspended and that benefits be recommenced prospectively if employee attends an examination and provides an affidavit with regard to his work status." (Dec. II, 13.) He found "that the employee and/or his counsel has intentionally disregarded the rights provided to the insurer under Section 45 of the Act," and "that the insurer has been severely prejudiced by the refusal of the employee to attend the examinations and has lost the ability to defend the claim on the issue of present disability since December 15, 2006." (Dec. II, 9.) This finding was upheld by the Appeals Court: "Accordingly, so much of the decision of the reviewing board as required forfeiture from December 15, 2006 to the date of attendance at a rescheduled IME is affirmed." Kendrick, supra. The employee did not attend the IME and submit an affidavit regarding his work status until March 30, 2010. Accordingly, the judge appropriately found the employee had forfeited his weekly benefits until that date.

Finally, the employee argues the judge's failure to award § 35 benefits after March 30, 2010, when the employee finally attended an IME, was error. The employee raises two points on this issue: first, that since the termination of benefits resulted from a technical violation of the statute, as opposed to a finding regarding disability, once he attended the IME his benefits should have been reinstated; second that the judge erred by applying the successive insurer rule to find the employee's out-of-state work activities aggravated his prior work injury, thus cutting off causal relationship to the original injury. The employee maintains these later activities should be considered non-work activities, since out-of-state employers do not meet the definition of "employer" in

Chapter 152; or that, even if they are considered work-related activities and the successive insurer rule applies, the insurer has not proven a sufficient aggravation.

We agree with the employee that the judge applied an incorrect causation standard in determining whether to award benefits after March 30, 2010. As discussed above, the judge had ordered that "benefits be recommenced prospectively if the employee attends an examination and provides an affidavit with regard to his work status." (Dec. II, 13.) The employee attended the re-examination on March 30, 2010, and provided an affidavit of earnings dated February 2010. (Dec. III, 8.) In his third decision, the judge noted the employee had attended the IME and he was questioned regarding the affidavit of earnings, which was admitted into evidence. (Ex. 13.)[10] However, despite the fact that the employee satisfied the judge's prior pre-requisites for reinstatement, the judge did not find the insurer was required to reinstate benefits. Of course, the judge was free to find, based on credible evidence, that the employee was no longer incapacitated as a result of the 2004 industrial injury.[11] Here, however, the judge analyzed the case under the inapplicable successive insurer causation standard, rather than considering whether the employee had any continuing disability related to the 2004 injury.

The judge found the employee's shoulder condition had worsened subsequent to 2004, due to aggravations suffered when the employee was performing his regular duties as an electrician for other unspecified employers at unspecified times. (Dec. III, 9.) The judge found the employee had right shoulder surgery on April 17, 2007 for tendinopathy with a delamination tear of the right shoulder, and a second surgery on January 15, 2009

[10] In the affidavit, the employee stated that he worked for a company called Construction Labor Group located at 349 South Port, Virginia Beach, Virginia from April 7, 2008 through June 22, 2008 performing electrical modifications and additions. His rate of pay was $17.00 per hour and his total earnings at that job were $5,716.25. Those were the only earnings he received for the years 2008, 2009 and 2010. He said he did not continue with the job because he was unable to perform it due to his physical injuries. (Ex. 13.)

[11] It is the employee's burden to produce evidence on all the elements of his claim, Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996), citing Ginley's Case, 244 Mass. 346, 348 (1923), and Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), including that he was and is incapacitated from some work. Martin v. Town of Swansea, 12 Mass. Workers' Comp. Rep. 447 (1998).

for a partial rotator cuff tear, synovitis, labral, impingement and foreign body. The judge found that because the compensable shoulder injury was diagnosed as a shoulder strain in the first hearing decision, the two surgeries indicated a worsening of the right shoulder condition. (Dec. III, 9.)

> Based on the employee's testimony and his medical records, I find that it is more likely than not that the worsening of his right shoulder condition is related to the aggravations that the employee suffered while working subsequent to 2004. This is consistent with the medical opinion of the impartial physician, which I adopt that the increase in symptoms while in the course of employment for a subsequent employer were [sic] an aggravation of his condition and something that would make it worse. . . .
>
> Due to the lack of credible evidence presented by the employee, I do not find that his current limitations are more likely than not related to the 2004 accepted work related injury. I find that during his poorly documented work activities with several employers performing the full duties of an electrician that his worsening symptoms and conditions were aggravations causing potential liability of the subsequent employers' insurers for workers compensation benefits. I do not find that the employee has met his burden of proof that he continues to suffer a compensable injury with regard to the current employer and insurer. . .

(Dec. 9-10.) He concluded: "I find that it is more likely than not that the employee has sustained a work related aggravation of his conditions at a subsequent employer breaking the chain of causation to the accepted work related injury." (Dec. III, 10.) He found the employee did not have any incapacity as a result of the accepted work related injury. Id.

The problem with this finding is that, to the extent the judge found the causal chain was broken, Dr. Oladipo's report and deposition testimony do not support it.[12] Furthermore, there were no successive insurers joined to the employee's claim, and the insurer did not raise successive insurer liability as an issue. Thus, the judge erred in

[12] Dr. Oladipo's § 11A report and deposition testimony, upon which the judge relied, do not support a finding that causation between the employee's 2004 injury and his incapacity after 2007, had been broken by subsequent events. Dr. Oladipo testified that what he was calling an aggravation was "not a new pathology, it . . . just the [e]ffect of the earlier injury." (Dep. 28.) He further agreed that "a worsening of the baseline condition in pain or symptomatology is what [he] considered to be an aggravation." (Dec. 30.) Nowhere did he state that causal relationship to the employee's shoulder condition had been broken by any subsequent activities.

finding that the aggravations in the employee's symptoms and/or condition while working after 2004 were sufficient to cut off the insurer's liability. See Remillard v. TJX Companies, Inc., 27 Mass. Workers' Comp. Rep. 97, 102-103 (2013)(where no successive insurer in case, employee claimed injury only on original date, and insurer did not raise liability or defend on ground that employee suffered a new injury for which a successive insurer was liable, insurer waived right to argue successive insurer liability on appeal.); see also Blanco v. Alonso Constr., 26 Mass. Workers' Comp. Rep. 157, 160-161 (2012)(error for judge to allow insurer to argue successive insurer defense while denying employee motion to join successive insurers).

Because there is no successive insurer to whom liability may be shifted, the employee remains entitled to benefits to the extent his incapacity is causally related to his 2004 industrial injury. See Remillard, supra, at 103 ("Causal relationship to the original injury is not severed simply because the employee may have suffered a later injury"); see also Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007). On recommittal, the judge must determine whether the employee has any disability that is causally related to his original injury. See Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412 (2001), quoting Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 165, 158 (1991) "causal chain is not broken if intervening activity 'is a normal and reasonable one and not performed negligently'"). See also Nason, Koziol & Wall, supra at § 10.14 ("if the employee engages in reasonable and normal movements or activities and thereby reactivates or aggravates a compensable injury, the insurer will be obliged to pay compensation for the consequences").

Accordingly, we recommit the case for the judge to make findings, supported by the evidence, on whether the employee continued to be disabled from March 30, 2010, forward, by his 2004 industrial injury, and if so, to what extent. We reverse the judge's finding that the employee was not entitled to § 35 benefits and a § 8(5) penalty from October 19, 2006 through December 14, 2006, and order § 35 benefits for that period at the rate of $135.00 per week, and a 20% penalty on those benefits pursuant to § 8(5). We

also reverse the judge's dismissal of the employee's § 36 claim. We affirm the decision as to the other issues raised by the employee.

Because the employee appealed the hearing decision and prevailed in part, an attorney's fee may be appropriate under §13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

_____
William C. Harpin
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: **March 4, 2016**