COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004078-17**

Donald Wasuk, Jr.	Employee
Verizon New England, Inc.	Employer
New Hampshire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Rose.

APPEARANCES
Joseph F. Agnelli, Jr., Esq., for the Employee
Wayne Todd Huston, Esq., for the Insurer

CALLIOTTE, J. Both parties appeal from a decision in which the judge awarded the employee § 35 partial incapacity benefits beginning the day after the insurer terminated weekly benefits made without prejudice, July 19, 2017, and found the insurer was not entitled to reimbursement for benefits paid during the pay without prejudice period. For the following reasons, we affirm the decision.

The employee, age fifty-five at the time of hearing, had worked for the employer as a splice service technician since 1987. The job was "very physically demanding," requiring frequent bending, twisting and overhead reaching. The employee had to climb telephone poles, sometimes using ladders weighing up to 100 pounds. He also had to go into underground tunnels which he accessed by moving 200-pound manhole covers with a lever. All his prior jobs involved heavy lifting, except for one as an apprentice for an eyeglass manufacturer from 1981 to 1984, which involved pick-up and delivery of prescriptions and eyeglasses for opticians. In 2011, the employee received an Associate's degree in communications. (Dec. 3-4.)

On February 9, 2017, the employee slipped on ice in a customer's parking lot, injuring his neck, left side and left lower back and hip. (Dec. 4.) He continued working until February 23, 2017. (Tr. 27.) The insurer paid the employee § 34 benefits without

prejudice from February 24, 2017 through July 18, 2017. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). On August 3, 2017, the employee filed a claim for § 34 temporary total incapacity benefits from July 19, 2017, to date and continuing. Following a § 10A conference, the insurer was ordered to pay the employee ongoing § 34 benefits beginning on July 19, 2017, as well as medical benefits. The insurer appealed. (Dec. 2.) Rizzo, supra.

At hearing, the employee claimed § 34 benefits from February 24, 2017, (the day after his last day of work), rather than from July 19, 2017 (when the insurer terminated without prejudice payments). (Dec. 3.) The insurer did not object to the new date from which benefits were claimed, (Tr. 4), nor could it, as it challenged liability, thus putting the entire period of disability at issue. In addition to liability, the insurer also challenged disability, extent of incapacity, and causal relationship, including § 1(7A), and denied entitlement to §§ 13 and 30 medical benefits. (Dec. 2; Tr. 4.)

In his decision, the judge found credible the employee's testimony that he has some degree of pain in his neck, thoracic and lumbar spine, but did not credit his complaints of severe debilitating pain and physical restrictions, lack of focus and inability to concentrate, or his testimony he had to take multiple naps per day. (Dec. 6-7.)

The judge declared the December 6, 2017, § 11A report of Dr. John Corsetti adequate, and the impartial physician's report and deposition testimony, taken on July 19, 2018, were the only medical evidence admitted. (Dec. 2-3.) The judge made the following findings:

> I accept and adopt Dr. Corsetti's opinion that the Employee's diagnosis is cervical, thoracic, and lumbar sprain/strain. Exhibit 4, pg. 3. Per subsequent M.R.I., the Employee also has a central annular tear with moderate, bilateral neural foraminal narrowing at C4-5, and mild bilateral foraminal narrowing at C3-4. Deposition of Dr. Corsetti, pg. 14. The Employee's fall at work on February 9, 2017 played a major role in producing his subjective symptoms. Id. pg. 20, Exhibit 4, pg. 4. While the doctor originally testified at deposition that the spurring seen on the M.R.I. is not related, the annular tear at C4-5 "could be". (legally insufficient opinion) Id., 16. However, he then later testified that in combination

> with the trauma, it did produce his symptoms. Id., 19. I accept and adopt Dr. Corsetti's opinions on causation, and his restrictions of no lifting over 5 pounds frequently, 10 pounds occasionally; no activities requiring repetitive neck rotation or flexion/extension such as driving at work; difficulty climbing or driving for any length of time; with the ability to sit or stand as needed with breaks as needed. Id., pgs. 17, 22, 27, 28. These restrictions were based on the Employee's subjective complaints as his exam was "quite benign". Exhibit 4, pg. 4.

(Dec. 6-7.) The judge then specifically found Dr. Corsetti's opinion satisfied the heightened causation standard of § 1(7A). Id. at 7.

Turning to extent of incapacity, the judge found as follows:

> The Employee is 55 years of age with an Associate's degree in Communication. His past employment, with the exception of an[] eyeglass delivery job, all involved heavy physical labor. He is an articulate intelligent person with an Associates Degree. While I accept some of his subjective complaints of pain and physical limitations, I have adopted the opinion of Dr. John Corsetti that he is capable of sedentary work within the restrictions given. His credible subjective complaints have been consistent since the date of injury with only some slight worsening. Therefore no gap expert opinion is necessary.

(Dec. 8.) The judge found no credible restrictions as to hours per week, but, as the employee has had "little to no experience with sedentary employment," the judge found him capable of working in only minimum wage positions. (Dec. 8-9.) The judge awarded § 35 benefits based on a full-time earning capacity of $440.00 per week, from July 19, 2017, to date and continuing, "July 18, 2017 being the end of the pay without prejudice payments." (Dec. 9.) He further found, "The insurer is not entitled to reimbursement of monies paid during that period. For payments thereafter, the Insurer is entitled to the statutory overpayment credit." Id. at 9.

On appeal, the employee first alleges that the judge's finding of partial incapacity as of July 19, 2017, is arbitrary and capricious, because there was no change in the employee's condition on that date. He then contends that, as a matter of law, the medical evidence requires a finding of total incapacity, on and after July 19, 2017. The insurer disputes the employee's arguments, and makes two arguments in its appeal. First, the insurer argues the judge erred by leaving the employee's total incapacity benefits in place

during the pay-without-prejudice period. Second, the insurer contends the judge erred in finding that the medical evidence satisfied § 1(7A)'s heightened causation standard.

We begin by addressing the employee's second argument that the prima facie medical opinion of Dr. Corsetti establishes, as a matter of law, that the employee was totally incapacitated beginning on July 19, 2017, and that the judge thus erred by finding the employee partially incapacitated beginning on that date. There is no merit to this argument. Dr. Corsetti clearly opined that, based on the employee's subjective complaints and limited objective findings, the employee had restrictions which would allow him to perform sedentary work tasks. (Dec. 7; Dep. 17, 24, 27.) While the judge accepted that the employee "has some degree of pain and subjective physical limitations," (Dec. 5-6), he permissibly found the employee's subjective "complaints of severe debilitating pain and physical restrictions not credible." (Dec. 6.) See Larti v. Kennedy Die Castings Inc., 19 Mass. Workers' Comp. Rep. 362, 370 (2005)(credibility findings are the sole province of the hearing judge and will not be disturbed unless arbitrary and capricious; thus, "a judge's disbelief of an employee's complaints of pain may provide a basis for rejecting a medical opinion of total disability"). Nonetheless, the judge adopted the restrictions Dr. Corsetti recommended. (Dec. 6-7.) The judge then performed a thorough vocational analysis, fully considering the employee's age, education, and work experience, to find the employee was capable of full-time sedentary work. (Dec. 8-9.) The impartial opinion in no way established the employee was totally incapacitated as a matter of law. See Scheffler's Case, 419 Mass. 251, 256 (1994)(§ 11A opinion is prima facie evidence only as to medical issues, not vocational issues); Nolette v. Leahy Excavating Company Inc., 34 Mass. Workers' Comp. Rep. ___, (2020). Nor was the judge's finding of partial incapacity and a sedentary work capacity, as of July 19, 2017, inconsistent with the § 11A opinion or with the judge's credibility findings.

The employee argues, however, that because he received § 34 benefits on a without prejudice basis from February 24, 2017, until July 18, 2017, the judge would have had to find a change in the employee's condition on the later date in order to award

partial incapacity benefits then. The employee contends that there was no evidence in the record to support a change from total to partial on July 19, 2017, because that date was simply the end of the pay without prejudice period. See e.g., Montero v. Raytheon Corp., 11 Mass. Workers' Comp Rep. 596, 597 (1997)(factual findings as to when incapacity, be it total or partial, begins or ends must be grounded in the evidence found credible by the judge; a purely procedural date does not satisfy this requirement). In support of its position, the employee cites the judge's finding that the employee's "credible subjective complaints have been consistent since the date of injury." (Dec. 8.) We find no merit to this argument.

The employee misconstrues the nature of payments made "without prejudice" during the first 180 days following disability.[1] Payments made during the pay without prejudice period are made " 'without prejudice to either party,' " which means " 'the insurer is not bound to acceptance of the underlying entitlement and the employee will not be subject to recoupment.' " Carragher v. Mass Boston/HRD, 31 Mass. Workers' Comp. Rep. 153, 157 n. 8 (2017), quoting Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73 n.2 (2005). Such payments have no binding effect. Thus, because there has been neither a prior finding of extent of incapacity nor an agreement as to that issue, there can be no requirement that the judge find a change in the employee's disability at the end of any period in which the employee was paid without prejudice.

[1] General Laws c. 152, § 152, § 8(1), states, in relevant part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed. The notice shall specify the grounds and factual basis for stopping or modifying payment of benefits and the insurer's intention to contest an issue and shall state that in order to secure additional benefits the employee shall file a claim with the department and insurer within any time limits provided by this chapter.

The employee contends, however, that the judge's finding that his complaints had been consistent since the date of injury supports his position that the judge's finding of partial incapacity as of July 19, 2017, was arbitrary and capricious. Again, the judge found:

> While I accept some of his subjective complaints of pain and physical limitations, *I have adopted the opinion of Dr. John Corsetti that he is capable of sedentary work within the restrictions given. His credible subjective complaints have been consistent since the date of injury with only some slight worsening.* Therefore no gap expert opinion is necessary.

(Dec. 8.) To the contrary, because we have upheld the judge's finding of partial incapacity on and after July 19, 2017, his finding that the employee's subjective complaints have been consistent since the date of injury, based on Dr. Corsetti's opinion and his own credibility findings, supports *only* the conclusion the employee was *partially* disabled during the prior pay without prejudice period. Indeed the judge acknowledged there was no need for an expert gap opinion in light of these findings.

This brings us to the insurer's first argument on appeal, which is essentially the flip side of the employee's argument, above. The insurer maintains that, because the judge found the employee partially disabled as of July 19, 2017, without finding any change in his condition on that date, it follows as a matter of law that the employee was partially disabled prior to that. Thus, the insurer maintains, the employee's benefits should be reduced to partial during the pay without prejudice period, and the insurer should be permitted to recoup overpayments it made during that time.

As noted above, the medical evidence and the judge's findings support only the conclusion that the employee was partially incapacitated from February 24, 2017, through July 18, 2017, the end of the pay without prejudice period. There is thus no need to recommit the case for the judge to make findings on this period See Rooney's Case, 316 Mass. 732, 739-740 (1944)(recommittal unnecessary when evidence can support only one result); Griffin v. M.B.T.A., 34 Mass. Workers' Comp. Rep. ___ (May 4, 2020)(where affirmed findings dictate just one conclusion regarding the time period in

dispute, there is no need to recommit for further findings of fact). Nor does our holding on this issue require reimbursement to the insurer of benefits paid without prejudice. First, the insurer made no claim for recoupment of benefits, either at hearing or below, and thus could not recover past benefits paid. See G. L. c. 152, § 11D(3).[2] More importantly, however, is the fact that the insurer may not recoup monies it paid during the pay without prejudice period. Carragher supra, citing Sicaras, supra (employee is not subject to recoupment of benefits made during the pay without prejudice period).[3] See also Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 233 (1998)(insurer may not recoup any benefits voluntarily paid without prejudice).[4]

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[2] General Laws c. 152, § 11D(3), provides:

> An insurer that has paid compensation pursuant to a conference order, shall, upon receipt of a decision of an administrative judge or a court of the commonwealth which indicates that overpayments have been made be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee. Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.

[3] We note that our decision in Carragher, supra, where we ordered recommittal, is distinguishable. There, the judge awarded § 34 benefits from the date of injury through the pay without prejudice period, and extending until the date of the § 11A examination. We recommitted the case for the judge to make further findings on the extent of incapacity during that period because he failed to adequately support his finding of total incapacity. In recommitting the case, however, we noted that there could be no recoupment of benefits during the pay without prejudice period, id. at 157, n. 8, meaning that only benefits paid beyond that period were potentially subject to recoupment. Here, because we have affirmed the award of § 35 benefits beginning July 19, 2017, the only benefits at issue were those paid without prejudice, which were not subject to recoupment, thus negating the need for recommittal.

[4] We acknowledge that there may be very rare instances which could support an order reimbursement to the insurer of benefits paid during the pay without prejudice period. See Carucci v. S & F Concrete, 13 Mass. Workers' Comp. Rep. 405, 411-412 (1999)(upholding judge' authority to order recoupment of benefits paid during without prejudice period under § 11D(1) and (2), where employee sent insurer false earnings report to secure benefits during pay without prejudice period). There was no misrepresentation here, or any other circumstances that would support reimbursement of benefits paid during the without prejudice period.

Accordingly, we do not disturb the judge's findings addressing incapacity only from July 19, 2017, and denying the insurer's request, made only on appeal, for recoupment of benefits paid prior to that.

The insurer's second argument is that the judge erred in finding the employee sustained his burden under the heightened causation standard of § 1(7A).[5] The insurer maintains that Dr. Corsetti failed to state, to the required degree of medical certainty, that the industrial accident remains a major cause of the employee's disability and need for treatment. The insurer is correct that the "a major cause" standard applies, as Dr. Corsetti testified that, "in combination with the trauma, it did produce his symptoms." (Dec. 6, citing Dep. 19.)[6] In support of its argument, the insurer points to allegedly equivocal or speculative deposition testimony in which Dr. Corsetti stated there was a "paucity of objective findings," (Dep. 10), and that, after reviewing a November 22, 2017, MRI of the cervical spine, "these kind of findings *can be* – or are very consistent with a *potential* ongoing, objective neck problem." (Dep. 15; emphasis added.) The judge acknowledged that certain of Dr. Corsetti's testimony was "legally insufficient," such as his opinion that while "the spurring seen on the M.R.I. is not related, the annular tear at C4-5 'could be,' " causally related. (Dec. 6, citing Dep. 16). However, referencing Dr. Corsetti's testimony on page 20 of his deposition, the judge found that "[t]he employee's fall at work on February 9, 2017, played a major role in producing his subjective symptoms." There, Dr. Corsetti was asked the following question, and answered accordingly:

> Q. So if we assume that prior to his fall in February of 2017, that Mr. Wasuk had no symptoms that he reported to you in December [sic] *now* had the symptoms

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[5] General Laws c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[6] Dr. Corsetti testified earlier, "So the preexisting arthritic foraminal narrowing combines with the trauma to create the symptoms." (Dep. 15.)

> that you elicited on exam in December, would it be fair to say that injured's [sic] fall at work on February 9th of 2017 *played a major role in producing these symptoms?*
>
> A. I think that's a reasonable statement, yes.

(Dep. 20; emphasis added.) Contrary to the insurer's assertion, the doctor's agreement with the statement of the employee's attorney is sufficient for the judge to find the employee met his burden of proving the industrial injury remains a major cause of his disability and need for treatment. This was Dr. Corsetti's final opinion, and the only instance in which he was asked to opine on the "a major cause" issue. See Perangelo's Case, 277 Mass. 59, 64 (1931)(opinion of expert is his final conclusion at the moment of testifying). It was neither equivocal nor inconsistent with his prior opinions.

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $1,705.66, plus expenses. So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: ***MAY 22, 2020***

Catherine Watson Koziol
Administrative Law Judge