COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026531-10**

Donna Barone	Employee
Life Care Center of West Bridgewater	Employer
Old Republic Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Levine and Koziol)

The case was heard by Administrative Judge Rose.

APPEARANCES
William J. Doherty, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on appeal
Christopher L. Maclachlan, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision awarding a closed period of § 35 benefits followed by ongoing § 34A benefits. We agree with the insurer that the modification from partial to permanent and total incapacity status was not based on competent evidence of a change in the employee's condition. Therefore, we reverse the award of § 34A benefits.

The employee, age fifty-four at the time of hearing, had over twenty years of experience in the food service industry. At the time of her injury, she was employed as a chef/supervisor for the employer.[1] (Dec. 3-4.) On October 7, 2010, she injured her left minor shoulder and neck at work. The insurer ultimately accepted liability for both body parts, (Dec. 2), and the employee underwent surgeries to her neck and shoulder. (Dec. 4.)

[1] Following high school up to the date of injury, she was also employed in the construction field, doing physical labor. However, she has not claimed any concurrent wages from this work. (Dec. 3.)

On January 7, 2013, the insurer filed a complaint to modify or discontinue benefits,[2] which was denied following a conference. The judge allowed the employee's motion to join a § 34A claim for hearing. (Dec. 2.) The insurer appealed.

At the February 11, 2014 hearing, the employee claimed § 34A benefits, or in the alternative § 35 benefits, from October 8, 2013, to date and continuing. She made no claim for further surgery. (See Ex. 1.) However, the employee testified that "she was hoping for more surgery, not doing well, and was awaiting an MRI to discuss surgery." (Dec. 2; see Tr. 29-30.) At the close of testimony, the judge asked the parties to explore the issue of the MRI and whether surgery was in the offing. (Tr. 92-93.) On May 9, 2014, when no agreement had been reached, the employee filed a motion to join the issue of medical treatment, including cervical surgery. (Dec. 3; see "Employee's Motion to Join Issue of Medical Treatment to Hearing.") On June 3, 2014, after holding one status conference and unsuccessfully attempting to schedule another, the judge sent the parties an e-mail denying the employee's post-hearing motion to add a new claim for surgery. Sua sponte, the judge opened the medical record for additional medical evidence to be submitted by June 6, 2014. By e-mail dated June 4, 2014, the judge reiterated his ruling denying the employee's motion to join a further claim for surgery, and he extended the close of evidence to July 14, 2014. See Rizzo, supra. On July 2, 2014, the parties deposed the § 11A examiner, Dr. Charles Kenny, who examined the employee on July 25, 2013. The insurer submitted additional medical evidence, but the employee did not. Id.

In his decision, the judge found, "there is no judicial economy to add this new issue [of surgery] at the eleventh hour. Therefore the Motion was denied." Id. The judge adopted Dr. Kenny's diagnoses of cervical sprain/strain with radiculitis, status post anterior cervical discectomy and fusion; and left shoulder rotator cuff tear, status post arthroscopy. He further adopted Dr. Kenny's opinion that the work injury was a major

[2] The employee was receiving § 34 benefits at the time of conference on May 2, 2013. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permitting judicial notice of board file).

cause of the employee's ongoing disability and need for treatment, despite her pre-existing conditions. In addition, the judge adopted Dr. Kenney's opinion that the employee had permanent partial restrictions of lifting twenty pounds occasionally, ten pounds frequently, but no constant lifting, no work above shoulder level with her left upper extremity, and no positioning of her head more than fifteen minutes without changing position. (Dec. 4.)

The judge credited the employee's complaints of chronic pain in her left shoulder and neck, chronic headaches, stiffness in her neck, and occasional numbness in two fingers of her left hand. He did not credit her complaints that her medication had disabling side effects. (Dec. 4.) Based on her actual physical activities, her credible complaints, the orthopedic restrictions, as well as her age, education, training, background and experience, the judge found the employee "partially disabled and capable of part-time minimum wage employment in the open labor market from January 7, 2013 through the date of the hearing . . . February 11, 2014." (Dec. 5.) The judge continued:

> On that date the *employee credibly testified that she was exploring the option of further surgery*. As such, the employee would then be unemployable in the open labor market. No reasonable employer or personnel manager could hire an individual who would need time off in the near future, and the results of which are unpredictable. . . . I therefore find the employee eligible for § 34A benefits commencing the date of the hearing, *and the issue of whether the requested surgery is reasonable and necessary under § 30 is left for another claim.* I note that *Dr. Kenny was asked questions about the surgery at deposition; however, I specifically ruled previously that this issue was not going to be joined to the present claim.*

(Dec. 5; emphasis added.) The judge awarded § 35 benefits based on a part-time minimum wage weekly earning capacity of $160.00, from January 7, 2013, to February 11, 2014, and § 34A benefits from February 12, 2014 (the day after hearing), and continuing. Id.

On appeal, the insurer argues that the award of § 34A benefits was arbitrary and capricious because it was based solely on the employee's "hope" that she would have surgery, and not on any actual change in her incapacity status. As such, the insurer

maintains, the basis for the § 34A award is purely speculative. We agree that the decision is arbitrary and capricious.

"[F]indings as to when an employee's incapacity, whether total, partial, temporary, or permanent, begins or ends must be grounded in the evidence found credible by the judge." Hibbard v. Henley Enters., Inc., 28 Mass. Workers' Comp. Rep. 1, 5-6 (2014), and cases cited. "In addition, the date chosen by the judge to . . . modify benefits must be based on some change in the employee's medical or vocational condition." Bowie v. Matrix Power Services, Inc., 23 Mass. Workers' Comp. Rep.351, 353 (2009). The employee has failed to produce competent evidence of a change in the extent of her incapacity. The judge's finding that, on the day following the hearing, the employee's incapacity status changed from partial to permanent and total rests entirely on the employee's testimony that she and her physician believed she needed surgery, and that she hoped to have surgery. However, there are a number of problems with using this "possible surgery" as a basis for a § 34A award. First and foremost, surgery was not at issue in the hearing, nor does either party challenge the judge's ruling to that effect.[3] Consistent with his ruling that surgery was not at issue, the judge did not consider or adopt any medical evidence that the possible surgery was reasonable and causally related to the employee's work injury. The judge found only that, as of the date of hearing, the employee was "exploring the option of further surgery." (Dec. 5.) It is inherently inconsistent, and thus arbitrary and capricious, for the judge to rule that the issue of surgery is not part of the employee's claim, and then award the employee § 34A benefits from the date of hearing based on a future "hoped-for" surgery.

Moreover, February 12, 2014, the day after the employee testified and the date chosen by the judge to modify the employee's benefits, is of no evidentiary significance in proving a change in the employee's medical or vocational condition. Whether the surgery would ever take place, and, if so, when, was entirely speculative, making any

[3] In fact, the employee argues that the judge properly exercised his discretion in ruling surgery would not be an issue in the case. (Employee br. 5-6.)

award of benefits based on that unperformed surgery speculative as well. The surgery had neither been scheduled, nor approved by Utilization Review.[4] Insofar as the judge attempted to base his determination that the employee's incapacity had changed because of vocational factors, without hearing the § 30 issue, the judge's determination that the employee "would need time off in the near future" in order to have surgery was equally speculative.

Here, the judge's finding the employee will be permanently and totally incapacitated following unscheduled, unperformed, unapproved surgery, about which no determination regarding reasonableness or causal relationship has been made, is pure conjecture. Absent such surgery, there is no other basis in the decision which would support a change in the employee's condition from partial to permanent and total incapacity. We reverse the award of § 34A benefits, beginning February 12, 2014. As there has been no showing of a change in the employee's incapacity status, the award is modified to order payment of § 35 benefits from January 7, 2013, and continuing.

So ordered.

Carol Calliotte
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***September 11, 2015***

[4] As the judge noted, according to the employee's motion to add surgery as an issue, there was an ongoing Utilization Review dispute. (Dec. 3.)