COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026857-21**

Eileen Campbell	Employee
Boston Medical Center	Employer
Boston Medical Center	Self-Insurer

REVIEWING BOARD AMENDED DECISION
(Judges Long, Fabiszewski and O'Leary)

The case was heard by Administrative Judge Ricciardone.

APPEARANCES
Walter J. Korzeniowski, Esq., for the employee
Kevin N. Santos, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

LONG, J. The self-insurer appeals from the administrative judge's decision awarding § 34A, permanent and total incapacity benefits, from November 7, 2022, to date and continuing, and §§ 13 and 30 medical benefits for the employee's left thumb injury. Finding merit in the self-insurer's argument regarding the employee's non-appeal of the § 10A conference order, we vacate only that part of the decision ordering § 34A benefits prior to March 7, 2023, and affirm in all other respects.

The employee, Eileen Campbell, was 69 years old at hearing. In 1989, she began working for the self-insured employer as a nurse. In 1998, she was assigned to the float pool, which involved location changes with each shift. This position required her to care for pre- and post-operative trauma patients and her duties included lifting, pulling and transferring patients, wound care, dispensing medications and tracheotomy care. She also pushed stretchers, used syringes and squeezed ampoule bags and blood pressure pumps. (Dec. 5.) On October 1, 2021, the employee's left minor thumb was injured after a patient grabbed, twisted, pulled and bent the thumb backwards. The employee had a prior work injury in June of 2018, when she fell and landed on her face and left hand,

resulting in stitches on her face and requiring the use of a hand brace for a few months before returning to work full duty in October of 2018. (Dec. 5.)

The claim for the injury of October 1, 2021, was accepted by the self-insurer and, on November 9, 2022, the employee filed a claim for § 34A, permanent and total incapacity benefits, from November 7, 2022, to date and continuing. On February 17, 2023, the self-insurer filed a motion to join a modification/discontinuance request to that claim, which was allowed on March 6, 2023. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file.) On March 7, 2023, a § 10A conference was held before the administrative judge. The Form 140 conference memorandum indicated ongoing § 34, temporary total incapacity benefits, had been paid from October 2, 2021, with § 34A benefits being claimed from November 7, 2022, to date and continuing. The self-insurer raised defenses of disability, extent of disability, and causal relationship to work. It also specifically denied § 34A payments and raised § 1(7A) as a defense. Rizzo, supra. On March 8, 2023, the administrative judge ordered § 34A benefits from March 7, 2023, to date and continuing, and denied the self-insurer's discontinuance/modification complaint. The insurer appealed the conference order, and the employee did not. An impartial examination per § 11A was conducted by Christian Sampson, M.D., on June 18, 2023, and the employee's motion to strike his July 3, 2023, § 11A report was denied. The judge allowed additional medical evidence due to the medical complexity and inadequacy of Dr. Sampson's causation opinions. (Dec. 3.)

At the hearing held on October 27, 2023, the employee claimed § 34A, permanent and total incapacity benefits from November 7, 2022, to date and continuing and § 13A attorney's fees. The self-insurer again raised as defenses, disability and extent of incapacity, causal relationship and § 1(7A) as to a pre-existing condition.[1] The parties

[1] The self-insurer also denied liability for any claim of cumulative use/trauma. However, the employee did not make a separate claim for any cumulative use/trauma injury. The employee

submitted additional medical evidence, and the employee submitted a November 7, 2022, vocational report of Rhonda Jellenik, MA, CR, LRC. Following the hearing, the parties deposed Dr. Sampson on January 17, 2024, and the transcript of the deposition was also entered into evidence. (Dec. 1.)

The judge's hearing decision, issued on March 13, 2024, ordered § 34A benefits from "November 7, 2022, to date and continuing," and denied the self-insurer's February 17, 2023, complaint to modify/discontinue benefits. (Dec. 12.) In the decision, the judge relied upon the medical opinions of Christian Sampson, M.D., Eagen Deune, M.D. and Stanley Hom, M.D. and the Jellenik vocational opinion, together with the employee's credited hearing testimony, to find the employee permanently and totally incapacitated.

The self-insurer initially argues the judge's decision is flawed due to improper reliance upon the November 7, 2022, vocational report because "[i]t is upon the date and content of this report that the Administrative Judge seized to make the changeover from § 34 to § 34A, to characterize the incapacity from 'temporary' to 'permanent,'[2] and to

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did assert that any pre-existing osteoarthritis was caused by repetitive activities at work as a rebuttal to the self-insurer's § 1(7A) defense. (Dec. 3, fn.1.)

[2] Citing Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 236 (1997), the self-insurer also argues that "the date on which benefits are changed must correlate to a change in the employee's medical or vocational status, not a purely procedural date that is arbitrary and lacks evidentiary support.". (Self-insurer br., 6.) However, Sanchez and the cases cited therein outline that:

> [A]s a general practice, an administrative judge should avoid utilizing a purely procedural date not grounded in the evidence as the date to terminate benefits. See e.g., Sullivan v. Commercial Trailer Repair, 7 Mass. Workers' Comp. Rep. 8 (1993)(utilization of the decision filing date to terminate benefits was improper); Rossi v. Mass. Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101 (1993)(inappropriate to terminate benefits as of the hearing date without subsidiary findings explaining why that date would be proper). The key is that the date utilized by the administrative judge to terminate benefits must contain some evidentiary basis.

Sanchez at 236-237.

"Such is not the case with total incapacity benefits. A glib truism is nonetheless accurate: 'Total is total.' There is no range of total from which to calculate any change in the employee's status

consign the ultimate factfinding to an individual whose opinion does not carry the necessary weight as an expert." (Self-insurer br., 6.) The self-insurer argues that its interpretation of the medical and vocational opinions should carry the day because Dr. Sampson "imposed no restriction upon the employee's typing," citing pages 9 and 10 of the doctor's deposition in support. However, later in the deposition, Dr. Sampson testified that standard future treatment for the employee would include splinting of the affected hand:

Q. And with respect to that splint that you refer to, would that interfere with – or could that interfere with an individual's ability to type?

A. It could, yes.

Q. And can you describe that interference?

A. It would limit thumb movements, and you – you may have to exclude use of the thumb because of the – the bulk of the splint interfering with use of the keyboard.

(Depo., pg. 11.)

Given the documented weight and repetitive movement restrictions, as well as the testimony of both the employee and Dr. Sampson, we disagree with the self-insurer's contention, which essentially claims the vocational opinion adopted by the judge is "not grounded in the medical evidence or the employee's testimony, and it was error to rely upon her report." (Self-insurer br., 10.)

The judge did not abrogate her duty to conduct a thorough and reasoned vocational analysis as she detailed the employee's education, work history, duties and computer skills while adopting the employee's following credible testimony:

> that since her workplace injury, she experiences daily ongoing pain that runs from the top of her thumb to her forearm on the left side. There is no predictability as to when it will strike, and it can be shooting pain or aching pain. She experiences difficulty with dressing herself, specifically with buttons, pulling up her pants, or tying her shoes. She cannot carry plates with her left hand and cooking is difficult. She cannot use her left thumb to pinch or grip without pain. She does not do any household chores.

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to qualify for permanent and total incapacity benefits." Sicaris v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73 (2005).

(Dec. 9.)

The judge adopted the Jellenik report findings that the employee "cannot perform repetitive left-hand activities, particularly gripping, grasping and pinching" and "has an inability to perform frequent to constant handling and fine finger dexterity tasks" which "would preclude her from even entry level, sedentary and light occupations," (Dec. 8.) and "that due to the Employee's advanced age, education, work experience and residual physical limitations, the Employee is permanently and totally vocationally disabled". (Dec. 10.) Generally, an administrative judge possesses discretion to use [her] own judgment and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. Puntiel v. DeMoulas Supermarket, 32 Mass. Workers' Comp. Rep. 99, 107; See Sylva's Case, 46 Mass. App. Ct. 679, 681-82 (1999). In this instance, the judge chose to utilize the vocational expert testimony and additionally performed her own adequate and independent vocational analysis, addressing the relevant factors of age, education and work experience. See Scheffler's Case, 419 Mass. 251, 257 (1996). We view the vocational findings to be complementary and consistent and find no error in the judge's reliance upon the report.

The self-insurer's valid appellate argument lies in its objection to the date chosen by the judge, November 7, 2022, to commence payment of § 34A benefits. Because the employee did not appeal the §10A conference order, where § 34A benefits were ordered from March 7, 2023, to date and continuing, the self-insurer argues "[t]hus, she could not do better at hearing than at conference." Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99, 104 (2017); Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 200 (2017); Blanco v. Alonso Constr., 26 Mass. Workers' Comp. Rep. 157, 160 n.6 (2009). We agree with the self-insurer on this point, especially when the employee took no remedial steps to cure the non-appeal of the conference order. Pursuant to G.L. c. 152, §10A(3), a party's failure to timely appeal a conference order:

> Shall be deemed to be acceptance of the administrative judge's order and findings, except that a party, who by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and equity require it. ...

Without an appeal of the conference order, the best the employee could do after hearing was to collect §34A benefits from March 7, 2023, forward. (Staff, at 104.) The employee disagrees on this point and argues that the order to pay §34A benefits between November 7, 2022, and March 6, 2023, should nonetheless be upheld because the self-insurer:

> cannot raise for the first time on appeal an issue to which it failed to object to at hearing. As in Aceto's Case, 33 Mass. Workers' Comp. Rep. 277, 281 (2019), the employee's claim for §34A benefits commencing November 7, 2022, was listed on the employee's claim form 110, the conference memorandum, the pre-hearing conference memorandum and the hearing memorandum. ... The insurer's failure to object at any time after all of that is an effective waiver of that issue on appeal. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections however meritorious, not raised below are waived on appeal).

(Employee br. 3.)

Aceto's Case is clearly distinguished from the present case since employee's counsel in Aceto did, in fact, petition the commissioner for a late appeal that was allowed, but the administrative judge failed to address the §34A issue that was properly before the court at hearing. As previously noted, no such action was taken by the employee in the instant case. What the employee overlooks is, in addition to filing its February 17, 2023, discontinuance/modification request, the self-insurer did, in fact, raise disability and extent of incapacity as issues at both the conference and the hearing, while disputing the payment of any claimed §34A benefits. Moreover, the employee's attempt to evade the consequences of the non-appeal ignores § 10(A)'s "clear legislative intent to establish a system which narrows the issues as the litigants proceed through the dispute resolution process … ." Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418(2009). Additionally, and because of the foregoing points, the procedural error did

not manifest until the issuance of the hearing decision, further negating the employee's "failure to object by the self-insurer" argument.

Given the allowance of the self-insurer's February 17, 2023, motion to join a discontinuance/modification request, the actual period in dispute is from February 17, 2023, forward. See Picardi v. Bradlee's, Inc., 11 Mass. Workers' Comp. Rep. 43 (1997). The judge relied upon and adopted Dr. Hom's February 22, 2023, medical opinion and Dr. Sampson's testimony provided during his deposition on January 17, 2024, which are within the period in dispute and support the judge's denial of the self-insurer's request. Accordingly, we vacate that much of the decision ordering the payment of §34A benefits between November 7, 2022, and March 6, 2023, and otherwise uphold the decision.

Pursuant to §13A(6), the insurer shall pay employee's counsel an attorney's fee of $1,900.55.

So ordered.

Martin J. Long
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Kevin B. O'Leary
Administrative Law Judge

Filed: **February 3, 2025**