COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 51641-96**

Eric R. Mansfield	Employee
Emery Worldwide Freight Corp.	Employer
Insurance Company State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Maze-Rothstein and Levine)

APPEARANCES
Martin B. Schneider, Esq. for the employee
Ellen Harrington Sullivan, Esq., for the insurer

MCCARTHY, J. An administrative judge's decision denying permanent and total incapacity benefits, and awarding § 35 partial benefits as of the exhaustion of § 34 temporary total benefits, is before us on cross-appeals. We summarily affirm the denial of the employee's claim for § 34A permanent and total incapacity benefits. We address the sole contention – advanced by both parties from different perspectives – that the judge's assignment of an earning capacity as of the date of exhaustion of § 34 benefits was erroneous, because there was no evidence connecting that date to an actual change in the employee's incapacity status. See Parker v. Shaw's Supermarkets, Inc., 12 Mass. Workers' Comp. Rep. 6 (1998). As to the employee, we consider that the judge's award of partial incapacity benefits after receiving the maximum § 34 entitlement to be consistent with the equitable principles set out in Marino v. M.B.T.A., 7 Mass. Workers' Comp. Rep. 140, 141-142 (1993)("Where, as here, § 34 benefits have been exhausted, it would be contrary to the humanitarian purpose . . . and lead to a result at odds with the purpose of the statute [citations omitted], to deny benefits to a more seriously injured worker while granting benefits to those less seriously injured"). We therefore do not see that the employee has any real standing to complain about the date of benefit reduction.

See Lamb v. Louis M. Gerson Co., 11 Mass. Workers' Comp. Rep. 584, 588 (1997)(party not aggrieved by an error has no standing to appeal that point). The insurer, on the other hand, articulates a sufficient reason for recommitting the case for a de novo hearing[1] on the extent of incapacity in the period prior to exhaustion of § 34 benefits.

The employee was injured at work on November 15, 1996, when he lifted a steel encasement used for ductwork and heard a snap in his neck. (Dec. 3.) The insurer paid § 34 benefits without prejudice until April 24, 1997. The employee filed claims for further § 34 benefits, and the conference proceeding resulted in an order of payment of § 34 benefits. The insurer accepted liability for the cervical injury by the time the full evidentiary hearing took place on September 22, 1999, and disputed only the extent of incapacity, causal relationship of the left shoulder condition and the issue of a § 1(7A) pre-existing condition. At the hearing, the judge allowed the employee to join a § 34A claim for permanent and total incapacity benefits as well as a claim for a left shoulder injury. (Dec. 2, 10.)

The employee was examined twice by an impartial physician pursuant to § 11A(2) on December 1, 1997 and on December 1, 1999. At the earlier examination, the employee reported symptoms of neck pain and numbness radiating mostly into his left upper extremity. The doctor diagnosed cervical radiculitis causally related to the November 15, 1996 injury. The doctor found that the employee exhibited extreme deconditioning with poorly developed upper extremity musculature, moderate limitation of flexion and lateral turning of his cervical spine, and moderate to severe extension limitation of the cervical spine. In the 1997 examination, the doctor could not opine as to the connection between the employee's noteworthy deconditioning and his industrial accident, as he did not know how much of the employee's deconditioning pre-existed the accident. The doctor opined that objective findings of osteophyte encroaching at the C4-C5 on the neuroforamina, and severe degenerative facet joint disease at multiple levels most likely did pre-exist the industrial accident. The doctor partially disabled the employee, and restricted him from lifting his left arm above his shoulder, lifting over 20-

[1] The administrative judge no longer serves in the department.

25 pounds, and repetitive reaching, pulling, pushing or bending. The doctor recommended an appropriate work hardening program prior to returning to physical work, due to the employee's extreme deconditioning. (Dec. 5-6.)

On re-examination two years later, the doctor noted no improvement in the employee's cervical radiculitis, and worsening as to his left shoulder, which exhibited tendonitis and probable detachment of the anterior left labrum. The doctor had no opinion regarding the causal relationship of the left shoulder to the work injury. (Dec. 6.) The doctor also noted that the employee was suffering a chronic pain syndrome. The doctor maintained the same restrictions as he had found in the first examination, specifically pointing out that the employee would have to build up the number of hours he could work at one time. In the opinion of the § 11A examining doctor, Mr. Mansfield was capable of work such as operating a cash register or collecting fees in a parking lot. (Dec. 6-7.) The judge adopted the opinions of the impartial physician as to the employee's cervical injury and resulting partial disability, and need for work hardening. (Dec. 10.)

In response to motions submitted by the parties, the judge allowed additional medical evidence, (Dec. 2), which was introduced in due course. The judge adopted the opinion of the employee's expert physician, Dr. James Wepsic, with regard to the employee's left shoulder tendonitis and symptoms, which the doctor causally related to the industrial injury. The employee also submitted reports of his expert psychiatrist, who opined that the employee was suffering from non-disabling depression causally related to his injury. The judge also adopted this opinion. (Dec. 10.)

The judge determined that the employee was temporarily totally incapacitated from November 15, 1996 to November 15, 1999, "given that his condition had worsened, according to [the impartial] Dr. Cantu, from the time he first saw him in December 1997 to the time of the second impartial examination in December 1999." (Dec. 10.) After pointing out that there was no medical evidence to support the employee's claim for permanent and total incapacity benefits, the judge denied the § 34A claim, noting that "[a]ll of the opinions indicated that he could perform work with limitations . . . ." (Dec.

10.) The judge also adopted the insurer's vocational expert to the effect that the employee could do entry level light work. (Dec. 5, 10.) The judge went on to evaluate the employee's prospects for returning to the work force:

> [I]t was apparent from the evidence, that Mr. Mansfield lacked the motivation to pursue treatment that would improve his condition and enable him to return to gainful employment within the defined restrictions. He has had ample time to pursue the recommended treatment, physical therapy and/or work hardening, and has failed to do so. However, Dr. Cantu opined that Mr. Mansfield should not be allowed to return to work until he had undergone work hardening for his deconditioning. Thus, the choice is Mr. Mansfield's.

(Dec. 10.) The judge awarded the employee ongoing § 35 partial incapacity benefits at the weekly rate of $233.81.[2] (Dec. 10-11.) See Marino, supra.

The insurer contends that the medical evidence adopted by the judge does not support her conclusion that the employee was totally incapacitated from the date of injury until November 15, 1999, the date of § 34 exhaustion, and that the exhaustion date was not an evidentiary event to which a change in incapacity status could attach. We agree with the insurer that the judge's findings do call into question the basis for her award of total incapacity benefits from the date of injury until November 15, 1999. On the one hand, the judge determined that the impartial physician's 1997 opinion supported the award of temporary total incapacity benefits, from the 1996 industrial accident and continuing. On the other hand, the judge then relied on the impartial physician's 1999 assessment that the employee had the *same* cervical restrictions, coupled with a causally related *worsening* in the left shoulder (adopted from Dr. Wepsic's opinion) as support for assigning an earning capacity and awarding partial incapacity benefits! These awards are contradicted by the subsidiary findings. We then are left wondering how the worsened condition supports a *partial* incapacity, as compared to the *total* incapacity awarded – to some extent – without the worsening added into the picture.

[2] The maximum weekly entitlement under § 35 would be 75% of the § 34 rate of $317.82 or $238.37

Because the record evidence does not support the judge's conclusions with respect to the extent and duration of incapacity, we recommit the case for a hearing de novo on that issue.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **September 21, 2001**

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge