COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011780-10**

Farah Ahmed Gurey	Employee
Tables of Content, Inc.	Employer
Excelsior Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Levine)

The case was heard by Administrative Judge Novick.

APPEARANCES
Robert E. Frawley, Esq., for the employee
Boaz N. Levin, Esq., for the insurer at hearing
Margo Sutton, Esq., for the insurer on appeal

CALLIOTTE, J. The employee appeals from a decision awarding him a closed period of § 34 temporary total incapacity benefits. He argues the judge erred in finding there was no medical evidence of disability after December 1, 2010, and in terminating his benefits on that date. We agree.

The employee immigrated to the United States from Somalia in 2008. His only employment in this country has been as a dishwasher for the employer. On May 20, 2010, the employee slipped and fell at work, hitting his back. He was taken by ambulance to Beth Israel Deaconess Medical Center, where he was admitted for several days. He subsequently returned to the hospital for medical treatment and physical therapy. His primary care physician, Dr. Thomas Isaac, referred him to a pain clinic, but surgery has not been recommended. (Dec. 4-5.)

The insurer voluntarily paid § 34 benefits from May 21, 2010, through December 4, 2010. The employee claimed further temporary total incapacity benefits beginning December 5, 2010. Following a § 10A conference, the judge ordered the insurer to pay § 34 benefits from December 5, 2010, to February 9, 2011, and ongoing § 35 benefits

thereafter. Both parties appealed. At hearing, the insurer disputed disability and extent of incapacity, as well as causal relationship, but did not contest liability. (Dec. 2-5.)

On April 8, 2011, Dr. Howard Martin examined the employee pursuant to § 11A. The judge found the impartial report inadequate due to the fact that a potentially significant MRI was performed on September 1, 2011, after the § 11A examination. Both parties submitted additional medical evidence.[1] (Dec. 3.)

With respect to causal relationship, the judge adopted the opinion of Dr. Roberto Feliz, who saw the employee at the New England Baptist pain clinic on October 27, 2011. Dr. Feliz opined the employee experienced an acute sprain and strain injury on May 20, 2010, which aggravated and worsened his pre-existing degenerative lumbar spine condition. (Dec. 6-8.) He further opined that the employee's work injury "is and remains a major cause of the employee's ongoing lower back pain and disability."[2] (Dec. 7; Employee Ex. 14, report of Dr. Roberto Feliz.)

The judge then purported to adopt Dr. Isaac's opinion on extent and duration of incapacity. She first described Dr. Isaac's opinion as being "that the employee was unable to work as a result of his industrial injury from the date of his injury *to December 1, 2010*." (Dec. 7; emphasis added.) Later, she described it thus: "I adopt Dr. Isaac's opinion that *as of December 1, 2010*, the employee *remained* unable to work due to [his] industrial injury." (Dec. 8; emphasis added.) Consistent with her initial interpretation, however, she concluded: "There is no opinion in the record that provides an opinion as to

[1] Dr. Martin was deposed on January 13, 2012. He opined the employee "sustained a severe sprain or strain of his lumbar spine superimposed on degeneration within the lumbar spine." (Dec. 5-6.) However, he did not believe the work injury worsened the employee's underlying degenerative condition, to which he attributed the employee's continuing pain. Dr. Martin opined there was no ongoing disability causally related to the work injury, the effects of which would have resolved within three months. Id. The judge did not adopt Dr. Martin's opinion.

[2] The insurer did not raise §1(7A), and therefore the employee did not have the burden of proving his work injury "remains a major but not necessarily predominant cause of disability or need for treatment." G. L. c. 152, § 1(7A).

the extent [of] disability related to the employee's May 20, 2010 injury beyond this date [December 1, 2010]." Id. Accordingly, she awarded the employee § 34 benefits from May 20, 2010, until only December 1, 2010. (Dec. 8, 9.)

The employee argues the judge erred by terminating his weekly benefits on December 1, 2010, for the stated reason that there were no medical opinions in the record providing an opinion as to disability after that date. We agree.

First, contrary to the judge's statement, the record does contain a medical opinion of disability after December 1, 2010. Dr. Isaac's December 1, 2010 report, (Employee Ex. 8), on which the judge specifically relied, (Dec. 8), contains an addendum at the bottom of the page, dated December 9, 2010, which states:

> Mr. Gurey's back pain is a result of injuries he sustained on May 20, 2010 at work when he slipped on [a] wet floor onto his back. *He continues to be disabled and in need of treatment.*

(Employee Ex. 8; emphasis added.) In addition, the December 1, 2010 report does not support the judge's finding the employee was disabled only "*to* December 1, 2010." (Dec. 7.) Dr. Isaac wrote: "*At this time,* I feel [the employee] *is* unable to work due to significant back pain." (Employee Ex. 8; emphasis added.) The judge misconstrued Dr. Isaac's opinion. See Toppi v. Turner Constr. Co., 25 Mass. Workers' Comp. Rep. 89, 96 (2011), citing Zapata v. Demoulas Supermarkets, 18 Mass. Workers' Comp. Rep. 310, 315 (2004)(judge may adopt all, part or none of a medical opinion, but may not mischaracterize it). An expert opinion that an employee is unable to work on one day cannot, without more, be read to mean he is able to work the next day. This is because:

> [F]actual findings 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. MacEachern v. Trace Constr Co., 21 Mass. Workers' Comp. Rep. 31, 36-37 (2007), and cases cited. In addition, the date chosen by the judge to terminate or modify benefits must be based on some change in the employee's medical or vocational condition. Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 196 (2006).

Bowie v. Matrix Power Servs., Inc., 23 Mass. Workers' Comp. Rep. 351, 353 (2009). The adopted opinion of Dr. Isaac reflects no such change.

Absent further credited evidence that the employee's condition changed and improved after December 1, 2010, there is no basis for terminating benefits on that date.[3] The only other medical evidence adopted by the judge - Dr. Feliz's October 27, 2011 report - does not provide such support. To the contrary, although, as the judge found, Dr. Feliz does not express an opinion regarding extent of disability, his causal relationship opinion clearly presumes ongoing disability: "the injury of May 23, 2010 is and remains a major cause of Mr. Gurey['s] present ongoing lower back pain and disability." (Employee Ex. 14.)

Accordingly, we vacate the judge's finding there was no medical evidence of disability after December 1, 2010. We affirm the remainder of the decision. We transfer the case to the senior judge for reassignment to a different administrative judge[4] and a hearing de novo on the extent of the employee's incapacity after December 5, 2010.[5] Pending the issuance of a new hearing decision, the underlying conference order is reinstated. Lafleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 396 and n.5 (2011).

So ordered.

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[3] As noted above, the employee's claim was for § 34 benefits beginning on December 5, 2010; there was no dispute as to extent of incapacity prior to that date. For that reason as well, the judge's decision terminating benefits on December 1, 2010, was in error.

[4] Reassignment to a different administrative judge is made necessary by Judge Novick's untimely death less than a month after filing this decision.

[5] The judge did not make credibility findings pertaining to the employee's testimony about his complaints of pain, physical limitations, or his ability to work, nor did she perform a vocational analysis taking into account the employee's age, education, training and experience. See Scheffler's Case, 419 Mass. 251, 256 (1994). Following rehearing on the extent of incapacity after December 5, 2010, the new judge must address these issues.

Carol Calliotte
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed**: October 4, 2013**