**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO.:** 044411-00

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| Fatbardh Jaho | **Employee** |
| Sunrise Partition Systems, Inc. | **Employer** |
| Eastern Casualty Insurance Co. | **Insurer** |

## REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

The case was heard by Administrative Judge Dike.

## APPEARANCES

Joseph M. Burke, Esq., for the employee
Thomas M. Dillon, Esq., for the insurer

**COSTIGAN, J.** The employee appeals from a decision in which the administrative judge found him permanently and totally incapacitated for a closed period, and then assigned him an earning capacity, based on inferences the judge drew from viewing him on surveillance videotapes. We agree with the employee that those inferences were impermissible, and the modification of his incapacity benefits was unsupported by subsidiary findings anchored in the evidence. Because the judge's finding of permanent and total incapacity as of October 24, 2003 is amply supported by the expert medical opinions he adopted, we affirm that finding. However, we reverse the judge's finding that the employee acquired an earning capacity as of August 14, 2005, as that finding is unsupported by any evidence of medical or vocational improvement.

The employee, an Albanian immigrant who could speak but not read or write English, (Dec. 3), had worked as a laborer for the employer for less than a month, before he was involved in a hit-and-run motor vehicle accident on October 23, 2000. (Dec. 4.) He sustained injuries to his right knee, neck and low back, and developed a psychiatric disorder which he claimed resulted from his injuries. (Dec.

4-5.) The insurer ultimately accepted the physical injuries,[1] paid § 34 total incapacity benefits and, in January 2002, filed a complaint to discontinue weekly compensation. In September 2002, following a § 10A conference, a different administrative judge denied the insurer's complaint and ordered it to pay for the employee's proposed right knee surgery. The insurer appealed. (Dec. 2; Employee br. 2.)

Pursuant to § 11A, the employee underwent a second impartial medical examination by Dr. Maddix, (see footnote 1, supra), on December 12, 2002. (Dec. 2, 4-5.) The doctor opined that as of the date of the examination, the employee was totally disabled, and would remain so until scheduled right knee surgery was performed and the employee recuperated for at least three months.[2] He causally related the employee's disability to the industrial accident.

In September 2003, the employee's motion to join a claim for § 34A permanent and total incapacity benefits was allowed.[3] By agreement of the parties, the employee

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[1] Initially the insurer denied that the motor vehicle accident occurred in the course of the employee's employment. In March 2001, following a conference on the employee's claim, the insurer was ordered to pay § 35 partial incapacity benefits and medical benefits. Both parties appealed and the employee submitted to the first of what was to be three § 11A impartial medical examinations by Dr. Forrest N. Maddix. After receipt of the doctor's report but prior to hearing, the parties entered into an agreement whereby the insurer accepted liability for the motor vehicle accident and agreed to pay the employee § 34 total incapacity benefits retroactive to the date of injury. (Employee br. 1-2.)

[2] The judge noted that the employee told Dr. Maddix his neck and low back complaints were getting worse, but the doctor found that although spinal range of motion was restricted, there were no definitive disc ruptures revealed on MRI, and the employee's neck range of motion was only slightly restricted. (Dec. 4-5.)

[3] We take judicial notice of the document contained in the Board file. Rizzo v . M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

underwent a third impartial medical examination by Dr. Maddix on November 6, 2003. By then, the employee had undergone right knee surgery, but the outcome had been disappointing due to degenerative changes resulting from the significant delay in treatment between the date of injury and the surgery. As to disability, the doctor testified at deposition that the employee was physically able to lift and carry approximately twenty-five pounds, although he acknowledged that was an arbitrary designation better left to determination by a physical therapist who could test the employee's functionality in a safe manner and setting. (Dec. 5-6.)

Based on the complexity of the medical issues presented by the employee's claim, the judge allowed additional medical evidence as to the employee's psychiatric condition. The employee submitted the August 18, 2003 report of his treating psychiatrist, Dr. Esther Valdez, (Ex. 4), and her deposition testimony. The judge found:

> Dr. Valdez . . . has been treating the employee since October 2001, approximately one year after the industrial accident. Her opinion was that the employee suffered from a generalized anxiety disorder, post traumatic stress syndrome and depression. She found that the employee's psychiatric conditions were causally related to the industrial accident [footnote omitted] and that the employee's ongoing physical injuries and symptoms continued to exacerbate his psychiatric conditions and recovery. She found that his mental state was further affected by his concerns and fears regarding his difficult financial situation. I adopt the opinions of Dr. Valdez as of the date of her report.

(Dec. 6.) The judge did not adopt the opinions of Dr. Alfred G. Jonas, the insurer's psychiatric expert. ( Id.)

> At hearing, through the testimony of its private investigator, the insurer introduced surveillance videotapes showing the employee present at a soccer field where the Albanian United soccer team was playing. The judge found: "In both videos the employee walked freely and without any significant impairment sometimes on uneven ground. He was also seen crouching or squatting and rising from a squat position without any apparent difficulty or

distress." (Dec. 7.) As to the footage recorded on June 3, 2007, the judge specifically noted:

> [T]he employee walked about freely and at one point picked up and carried a cooler. During this time he appeared to be observing a soccer game that was in progress. He did not partake in the game but did engage with at least one player at one point. Most significantly the employee stood for the entire, or nearly the entire, period. At one point he did press his hand into his low back, as if he had some low back discomfort. Even so it was clear that the employee was able to stand at least the entire period of time, approximately one hour and forty-five minutes.

( Id.)

Adopting the opinions of Dr. Maddix and Dr. Valdez as to the employee's physical and psychiatric conditions respectively, the judge found:

> [T]he employee remained totally disabled well after February 8, 2002, the date the insurer seeks to terminate his § 34 benefits. I further find that the employee's prognosis was that the conditions did not seem likely to improve and his total disability appeared indefinite. As such I find that he was totally disabled and then totally and permanently disabled as defined by §§ 34 & 34A of The [sic] Act.

(Dec. 9.) Then the judge took the field and engaged in a game of impermissible inference:

> The evidence of the employee's actual activity cannot be ignored, however. Based on the testimony of Michael Gale as well as my own observations of the employee's activities in the video surveillance leads me [sic] to conclude that the employee's physical condition was by the time that the videos were taken substantially better than it had been when Dr. Maddix examined him on November 6, 2003. I adopt Mr. Gale's testimony that the tape marked as August 14, 2007 was the activity that he actually observed on August 14, 2005. As such I find that on this date the employee was significantly more

> capable and that by this date he could move fluidly and freely and more importantly stand and walk for significant periods of time.
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> Based on the employee's age, education and background I find that the employee was no longer permanently disabled as of August 14, 2005. By that date he had the physical ability to engage in a number of work activities on at least a part time basis. While he may not been [sic] able to lift and carry heavy stock he could perform many of the other essential functions of a pizza maker, line cook, grocery clerk or bagger.[4] At no point did Dr. Valdez indicate that the employee's psychiatric injuries were disabling in and of themselves. She did not provide any restrictions whatsoever to his activities based on this condition. She only indicated that they combined with his significant physical impairments in 2003 to totally disable him at that time.
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> Even so I do find that his continued difficulties, both physically and psychologically, would limit his ability to return to full-time employment. Additionally, Dr. Maddix testified that any lifting of the employee's restrictions would best be done incrementally and slowly. The employee seems to have, in a way, done this on his own accord, by increasing his activity level in a social and sporting venue. A venue in which he had substantial control over how often and how long he would attend. I adopt his testimony that he did not engage in this activity every weekend but only on occasion. I conclude, therefore, that as of August 14, 2005 the employee could engage in work beyond a trifling nature by returning to the labor force on at least a part time basis. I assign him an earning capacity of $200.00 as of that date.

(Dec. 9-10.) The employee cries foul, and we agree. A decision will be upheld if it is supported not only by direct evidence of the facts but by reasonable inferences

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[4] Citing to the employee's testimony, the judge found the employee's previous job of pizza maker was "heavy physical work," but that he also delivered pizzas at times. (Dec. 4.) The judge made no subsidiary findings as to what the "essential functions" of the other three jobs were.

drawn from them. Sawyer's Case, 315 Mass. 75, 76 (1943); Von Ette's Case, 223 Mass. 56, 60-61 (1916). The inferences drawn by the judge here were not reasonable, and cannot stand.

"We have consistently held that the modification or discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence." Bennett v. Modern Continental Constr., 21 Mass Workers' Comp. Rep. 229, 231 (2008), and cases cited. Although it is "perfectly permissible to place . . . videotapes alongside medical records, oral history, medical tests and results of examination as the medical expert work[s] toward reaching an opinion on causal relationship and medical disability," Peroulakis v. Stop & Shop, 12 Mass. Workers' Comp. Rep. 93, 96 (1998), the videotapes at issue here were never presented to Drs. Maddix and Valdez for the simple reason they did not exist when the doctors were deposed.[5] Thus, it was error for the judge to substitute his conclusory assessment of the employee's videotaped activities for the requisite expert medical opinion of improvement in the employee's physical and/or mental conditions. See Miller v. Metropolitan Dist. Comm'n, 11 Mass. Workers' Comp. Rep. 355, 357 (1997)(medical evidence necessary to support change in incapacity award based on change in medical status). Moreover, the employee's videotaped activities, as they are described by the judge, fail to demonstrate the employee had an improved

[5] The two videotapes relied on by the judge were taken on August 15, 2005, (Dec. 7-8, 10), and June 3, 2007. (Dec. 7). Dr. Maddix had been deposed on March 10, 2004, and Dr. Valdez on May 5, 2005. We take judicial notice of those deposition transcripts contained in the board file. Rizzo, supra. The employee was the only witness to testify at the December 20, 2004 hearing and "the record was thereafter closed," (Dec. 2), presumably after the submission of Dr. Valdez's May 5, 2005 deposition testimony. Pursuant to a motion filed by the insurer, the record was re-opened and both the insurer's investigator and the employee testified at a continued hearing on September 18, 2007. The insurer did not, however, seek to re-open the medical evidence to further depose either Dr. Maddix or Dr. Valdez, or to introduce updated opinions from its own medical experts addressing the videotape evidence.

vocational capacity. See Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555, 560 (1997)(change in incapacity status may be supported by vocational improvement evidence).

Lastly, the judge's incapacity analysis was flawed by his mischaracterization of Dr. Valdez's opinion as to the employee's psychiatric disability. The judge found that Dr. Valdez never opined the employee's psychiatric injuries were disabling in and of themselves. (Dec. 10.) The doctor's testimony at her May 5, 2005 deposition speaks for itself:

> Q.: Based upon your evaluations of Mr. Jaho during the course of your treatment of him, his clinical presentation, your experience, knowledge and training as a board certified psychiatrist do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Jaho currently remains disabled?
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> A.: Yes.
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> Q.: What is that opinion?
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> A.: I believe that Mr. Jaho is disabled by both his psychiatric symptoms and from my understanding from [sic] his medical problems as well.
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> Q.: **Let's limit your considerations to the psychiatric symptoms.** With respect to the psychiatric symptoms, do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Jaho is totally disabled?
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> A.: Yes. **It's my opinion that he is totally disabled at this time.**
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> Q.: Doctor, based upon the same factors as I've previously enumerated do you have an opinion within a reasonable degree of medical certainty as to whether or not his disability is permanent?
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> A.: As far as I'm able to speak, I think Mr. Jaho has had long-term symptoms. I don't see any reason to believe that his symptoms will change or that he will become less disabled over time, that is, based on the period of time I've been seeing him.

Q.: So is it your opinion that he's permanently disabled?

A.: Yes.

(Valdez Dep. 12; emphasis added.) A judge is not free to mischaracterize expert medical opinion. Breslin v. American Airlines, 22 Mass. Workers' Comp. Rep. 215, 218 n.2 (2008), citing LaGrasso v. Olympic Deliv. Serv., 18 Mass. Workers' Comp. Rep. 48, 58 (2004).

Even assuming *arguendo* that the employee's activities at the soccer field somehow spoke to the extent of his physical disability, the judge offered no explanation as to how the videotape evidence overcame Dr. Valdez's adopted expert medical opinion of permanent and total psychiatric disability. See LaFlash v. Mount Wachusett Dairy, 18 Mass. Workers' Comp. 254, 264-265 (2004)(Horan, J., concurring.) Therefore, having found the employee was permanently and totally incapacitated through August 13, 2005, the judge's determination that the employee acquired an earning capacity on August 14, 2005, was arbitrary and capricious, and cannot stand.

Accordingly, we affirm the judge's finding the employee was permanently and totally incapacitated as of October 24, 2003, as that finding is amply supported by the expert medical opinions the judge adopted. The finding that the employee acquired an earning capacity, and was therefore only partially incapacitated, from and after August 14, 2005, is without evidentiary support and we reverse it. We vacate the award of § 35 benefits and order the insurer to pay the employee § 34A benefits from August 14, 2005 to the filing date of this decision and continuing. The insurer may credit itself for the partial incapacity benefits paid pursuant to the judge's decision, but it shall pay § 50 interest on the difference between the § 35 benefits paid and the § 34A benefits we now award. See Sloan v. Construction Materials Serv., Inc., 23 Mass. Workers' Comp. Rep. ___ (2009).

Because the employee, and not the insurer, appealed the hearing decision, and the employee has prevailed, an attorney's fee is due under G. L. c. 152, § 13A(7). That statute provides, in pertinent part: "[s]ubject to the approval of the reviewing board, such fee shall be an amount agreed to by the employee and his attorney." Accordingly, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be

due and collected from the employee unless and until said fee agreement is reviewed and approved by this board.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 18, 2009**