

# COMMONWEALTH OF MASSACHUSETTS

## DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS: 039977-05  
002696-08

Francis Marckini  
George B. H. Macomber Co.  
Arch Insurance Co.

**Employee**  
**Employer**  
**Insurer**

### **REVIEWING BOARD DECISION** (Judge Horan, Costigan and Koziol)

The case was heard by Administrative Judge Lewenberg.

### **APPEARANCES**

William H. Murphy, Esq., for the employee at hearing  
Paul M. Moretti, Esq., for the employee on appeal  
James P. McKenna, Esq., for the insurer at hearing and oral argument  
Byron G. Mousmoules, Esq., for the insurer on brief

**HORAN, J.** The insurer appeals from the judge's decision, challenging his ruling entitling the employee to potentially receive consecutive statutory<sup>1</sup> periods of § 34 total incapacity benefits, resulting from two industrial injuries occurring in different years, for an overlapping period of work-related total incapacity.<sup>2</sup> Because the judge set the date for commencement of the employee's entitlement to § 34 benefits for his 2004 back injury as the date following the statutory expiration

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<sup>1</sup> General Laws c. 152, § 34, provides, in pertinent part:

The total number of weeks of compensation due the employee under this section shall not exceed one hundred fifty-six.

<sup>2</sup> The judge found the employee's concurrent period of total incapacity commenced on October 29, 2008. (Dec. 11.) See discussion, infra.

of the employee's entitlement to § 34 benefits for his 2005 carpal tunnel injury, we reverse that aspect of the decision.

On April 29, 2004, the employee suffered a low back injury in a work-related motor vehicle accident. He missed six days of work, for which he received vacation pay, and treated conservatively. (Dec. 8.) On May 4, 2005, the employee suffered an electric shock injury at work, and developed bilateral carpal tunnel syndrome. In January 2006, he accepted an offer to return to light duty work. He performed light duty work until his employer went out of business. The employee subsequently underwent "a left carpal tunnel and ulnar release surgery on August 9, 2006 and the same on the right on April 26, 2007." (Dec. 7.) The employee was paid § 34 benefits for the 2005 injury, which the insurer eventually accepted. (Dec. 7-8.)

While receiving § 34 benefits for the carpal tunnel injuries he suffered in 2005, the employee's lower back condition, owing to his 2004 work-related automobile accident, worsened. His treating physician, Dr. Joel Saperstein, concluded the employee was totally disabled as a result of that condition as of October 29, 2008. (Dep. 67; Ex. 7, p. 4.)

In 2008, when the insurer filed a complaint to discontinue or modify the employee's § 34 benefits for his 2005 work-related carpal tunnel injuries, the employee filed a claim for § 34 benefits for his 2004 back injury. That claim was joined at the 2008 hearing on the insurer's complaint. (Dec. 3.)

In his March 23, 2009 decision, the judge found the employee continued to be totally incapacitated by his 2005 work injuries. The judge also found the employee was totally incapacitated by his 2004 work injury as of October 29, 2008, to date and continuing. (Dec. 11.)

The judge's findings pertinent to the issue on appeal follow:

At issue is what [sic] injury the employee should be paid on. The benefits for the 2005 injury have been paid since May 2006. They will run out this May. I have found that the employee continues to be totally disabled as a result of each injury. Employee wants me to order benefits on the 2004 injury going back to 2008. This would mean that the employee would be being paid benefits for the first injury even though he is still disabled from the second

injury. I find that as long as the second injury requires the payment of benefits there is no rational [sic] for the first to be obligated to pay benefits instead. If, however, when the Section 34 benefits expire for the 2005 date of injury the insurer does not voluntarily pay further total disability pursuant to Section 34A then I find that the employee is due Section 34 benefits for the 2004 injury since he continues to be totally disabled as a result of the 2004 compensable injuries [sic].

(Dec. 11.)

The judge erred by delaying the commencement of payment of § 34 benefits, attributable to the employee's incapacity arising from his 2004 injury date, until the employee's statutory entitlement to § 34 benefits for his 2005 injury date expired. This temporal "double recovery" is barred by long-standing policy. "Under our own act, where two injuries contribute to cause the same total incapacity, there is but one recovery." Mizrahi's Case, 320 Mass. 733, 736 (1947). "Like Mizrahi, the incapacity in the present case . . . represents an indivisible whole for both injuries *during the time that both injuries were independently the cause of such incapacity* . . ." Laverde v. Hobart Sales & Serv., 18 Mass. Workers' Comp. Rep. 214, 219 (2004)(Emphasis added).

[T]he employee here seeks to stretch the otherwise obvious double recovery for the period of [§ 34] already paid "over [a] long[er] period[] of time and not in accordance with the policy of [the] act." The character of the double recovery does not change by the employee's impermissible election to claim payment of [§ 34 based on the 2004 injury] only after [the 2005 injury's] identical [§ 34] payments were exhausted.

Id. at 220, quoting Mizrahi, supra at 737.

Because the judge adopted Dr. Saperstein's opinion that, as of October 29, 2008, the employee's total disability was causally related to his 2004 work injury, (Dec. 10-11), as a matter of law, the employee's entitlement to § 34 benefits causally related to his 2004 back injury commenced on October 29, 2008.

Accordingly, we reverse the decision insofar as it provides that the employee's § 34 benefits attributable to his 2004 work injury were to commence on "the date the

2005 Section 34 benefits expire," and order the insurer to commence payment of § 34 benefits for the 2004 back injury as of October 29, 2008. (Dec. 13.)

So ordered.

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Mark D. Horan  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

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Catherine Watson Koziol  
Administrative Law Judge

Filed: **December 21, 2010**