COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037158-09**

Francisco Flores Martinez	Employee
Georges Renovations LLC	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Calliotte, and Long)

The case was heard by Administrative Judge Poulter.

APPEARANCES
David K. Chivers, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

HARPIN, J. The insurer appeals from a decision awarding the employee §§ 35 and 34A benefits. We reverse, and recommit to a new administrative judge.

The employee, thirty-two years old on the date of the hearing, was born in the Dominican Republic, came to the United States in 2000, and moved to the Springfield area around 2002. (Dec. I, 3; Dec. II, 3.)[1] He attended high school in Springfield, but left in the tenth or eleventh grade and has not earned a diploma or a GED. Id. After working at a McDonald's from 2000 to 2003, the employee began working for the employer in 2004 as a carpenter/laborer. Id.

On October 26, 2009, the employee was on a roof as part of his work for the employer, manipulating a sheet of plywood. The plywood was pulled away from him by a gust of wind, but he was able to hold onto it, causing him to feel pain in his right shoulder. (Dec. I, 3.) On that date the employee went to the Bay

[1] The first decision, filed by Judge Poulter on August 22, 2012, will be referred to as "Dec. I." The second decision, filed on August 22, 2016, will be referred to as "Dec. II." The findings on the industrial accidents from the first decision were incorporated by reference in the second decision. (Dec. II, 4.)

State Medical Center and complained of a dislocated shoulder, but he was able to return to work. (Dec. I, 4.) He worked for three more weeks, until November 19, 2009, when he felt a pop in his right shoulder after a bathtub slipped that he was moving with a fellow employee, putting the whole weight of the tub onto his arms. Id. The employee went to Mercy Hospital the next day, but had no treatment, as the waiting time at the emergency room was too long. Instead, he took some pills for the pain and returned to work the next day. Id. He told his boss of the incident and the pain in his arm. Id. The employee continued working for the next eight months. He returned to Mercy Hospital on July 13, 2010, because his shoulder was still bothering him and it was beginning to pop in and out of the socket, especially while sleeping. He was missing work because of the pain. Id. He continued working sporadically until November 10, 2010, when he again went to Mercy Hospital, where he was diagnosed as having a shoulder strain. Id. Aside from two attempts to return to work in 2011, the employee has not worked. (Dec. I, 4; Dec. II, 4.) On March 3, 2011, the employee had a right shoulder Bankart procedure performed by Dr. Michael Craig. (Dec. I, 4.)

The employee filed a claim for § 34 benefits on January 20, 2011.[2] The claim was the subject of a conference before Judge Poulter on April 12, 2011, after which she ordered the payment of those benefits from that date and continuing. (Dec. I, 2.) A § 11A impartial examination was held with Dr. Charles Kenny on June 22, 2011. Dr. Kenny diagnosed a right shoulder strain, with chronic instability and recurrent dislocations. (Dec. I, 5.) The doctor gave his opinion that the employee's shoulder condition was causally related to the November 19, 2009, work incident, and that the employee was permanently and partially disabled. Id.

A hearing was held on September 26, 2011, with the decision filed eleven months later, on August 22, 2012. The judge found the employee suffered

[2] Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

industrial accidents on October 26, 2009, and November 19, 2009, and adopted Dr. Kenny's opinions on causal relationship and permanent partial disability. (Dec. I, 6.) However, she found the employee to be temporarily totally incapacitated, based on what she termed his "difficulty being understood in English," and his lack of a high school degree or GED. (Dec. I, 7.) She awarded him § 35 benefits from October 26, 2009, to November 10, 2010, and § 34 benefits thereafter. Id. The insurer appealed the decision to the reviewing board, where it was affirmed. Flores Martinez v. George's Renovations, LLC, 28 Mass. Workers' Comp. Rep. 73 (2014).

Following the first hearing, the employee returned to work for the employer for one week, in late 2011, but left because he was unable to lift a hammer due to pain. (Dec. II, 4.) After that attempt the employee worked for a month at a company in Westfield, Massachusetts, lifting boxes onto pallets, then wrapping the pallets.[3] By the end of the month he could not lift his arm above shoulder height because of pain, although he could lift 20 to 30 pounds below shoulder height, but not repetitively or for "too long." Id. He began an OEVR approved vocational plan, but that was closed when he became incarcerated. Id. He testified at the second hearing that he felt he could work and could run his own home improvement business, which he had tried to start, as long as he did not perform any physical labor. Id.

In 2014, the employee filed a claim for § 34A and §§13 and 30 benefits, which was heard by the judge at a conference on April 28, 2014. The judge ordered maximum § 35 benefits, from November 11, 2013[4] and continuing. (Dec.

[3] The judge wrote that this work took place "on or about February 2011," (Dec. II, 4), but the employee did not testify to any particular date or even year. (See Tr. 22-24.) All that can be gleaned from the transcript is that the month-long work took place after the employee attempted to work at the employer, which makes the judge's date of February, 2011 untenable.

[4] The conference order itself contains this date. Rizzo, supra. In the decision the judge listed the beginning date as "November 11, 2015." (Dec. II, 2.)

II, 2). Only the insurer appealed. Dr. Charles Kenny was again assigned as the impartial physician under § 11A. He examined the employee on December 2, 2014, three and a half years after his initial examination, and wrote a report on that date, which the judge deemed adequate. Id. At the hearing on March 4, 2015[5] the employee moved to open the medical records, but after he failed to renew the motion following the deposition of Dr. Kenny, the judge denied it. (Dec. II, 3.) After adopting the opinions of Dr. Kenny that the employee had a good result from shoulder surgery, was able to use his right arm normally, should perform no repetitive work overhead or over-shoulder height with that arm, and could do whatever he could tolerate with the right arm, the judge turned to a vocational analysis. (Dec. II, 5.) She found the employee spoke little English, had no high school credentials, and had a background as a laborer, "but at best he is unable to work consistently above the shoulder level on the right side." (Dec. II, 6.) She

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[5] The employee raised § 34A as a claim at the hearing, despite having not appealed the judge's conference order of § 35 benefits. This was discussed at the beginning of the hearing, at which time the judge stated "we're back *de novo*," which the employee's attorney responded to by stating "I would argue it's still in front of you." (Tr. 4.) The judge replied, "I got it. I just wanted to make sure that I was right about that." Id. The hearing then took place, with § 34A in issue. The judge's ruling was in error. The insurer did not argue, then or in this appeal, that the employee's failure to appeal the conference order precluded him from raising § 34A at the hearing. Under Karamanos v. J.K. Luncheonette, 5 Mass. Workers' Comp. Rep. 405, 407 (1991), an issue raised at the conference by the non-appealing party, and denied in the order, could still be raised and decided at the hearing, under the theory that the hearing was *de novo* and was a distinct proceeding, requiring a judge to decide whatever issues were raised at that time. However, we rejected such an outcome in Vallieres v. Charles Smith Steel, Inc., 23 Mass. Worker's Comp. Rep. 415, 418 (2009), and overruled Karamanos. We noted that pursuant to 1991 reforms, a party's failure to appeal a conference order prevents them from raising any issue at the hearing, with the only issues up for decision being those raised by the appealing party. Thus, had the insurer objected to the § 34A claim being in issue at the onset of the hearing, the judge would have been prevented from hearing testimony and making a decision on that claim. Because there was no objection, we will treat the § 34A claim as having been tried by consent. Cannava v. City of Medford, 31 Mass. Workers' Comp. Rep. 183,191 (2017) (issues tried by consent are validly determined, even if not properly raised at the onset of the hearing).

found the employee to be permanently and totally incapacitated, and awarded him § 34A benefits retroactive to November 11, 2013, and continuing, with the exception of the period of the month of February, 2015,[6] when he attempted to return to work, for which the judge awarded him § 35 benefits. Id. Only the insurer appeals.

The insurer first argues that, while issues of credibility are the sole responsibility of the hearing judge, Lettich's Case, 403 Mass. 389 (1988), "the Reviewing Board is free to make its own determination as to the weight of the evidence," (Insurer br., 4), especially where the judge found both the employee and the impartial physician credible. We reject this contention. The 1991 reforms of Chapter 152 withdrew the authority of the reviewing board to weigh evidence or determine if the decision under review was warranted by the facts.[7] Instead, the board now is limited to reversal of a decision "only if it determines that such administrative judge's decision is beyond the scope of his authority, arbitrary or capricious, or contrary to law." Added by St. 1991, c. 398, § 31.

We have held a number of times that the elimination of the language regarding our authority to weigh evidence means just that -- that our review was then, and is now, limited to determining if an error of law is present or if a judge's

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[6] There is no evidence that the employee's month-long attempt to return to work took place in 2015, but as the insurer did not raise this in its appeal, we consider the issue waived.

[7] Prior to the 1991 reform of The Workers' Compensation Act, G. L. c. 152, § 11C stated, in part, as follows:

> The reviewing board shall reverse the decision of a member only if it determines on the basis of such member's written opinion and on an examination of a written transcript of the hearing, that the member's decision is beyond the scope of his authority, arbitrary or capricious, contrary to law, or unwarranted by the facts. *The reviewing board may weigh evidence*, but may not review determinations by the member who conducted the hearing regarding the credibility of witnesses who have given testimony.

(Emphasis added).

decision is not supported by the facts found by him or her. This appellate analysis includes a determination whether the judge mischaracterized the opinions or facts that were found. At no time may the reviewing board weigh the evidence found credible by the judge. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge"). See also Connerty v. MCI Bridgewater, 31 Mass. Workers' Comp. Rep. 129, 134 (2017); Hilane v. Adecco Employment Services, 17 Mass. Workers' Comp. Rep. 465, 470 (2003)("Where it is the duty of the administrative judge to weigh the evidence and find the facts, we have no power to find facts or revise findings of fact made by the judge unless they are infected with error or wholly lacking in evidentiary support").

The insurer next argues the judge's vocational analysis was insufficient, as it was not carried out in accordance with Frennier's Case, 318 Mass. 365 (1945). In particular, the insurer argues the judge did not properly consider in her vocational analysis the employee's fluency in English and Dr. Kenny's opinion that the employee had only minimal physical restrictions. We agree the judge's vocational analysis is flawed. The judge found the employee to be "physically permanently partially disabled," based on Dr. Kenny's adopted medical opinion and the employee's testimony. (Dec. II, 5.) She cited to the doctor's deposition testimony, finding that the employee's surgery "ended in a good result," and that he was "able to use his arm normally." Id. The only restriction placed on the employee's ability to work by the doctor was that he should perform no repetitive work overhead or above shoulder height with his right arm. Otherwise, the employee could work an eight-hour day and do whatever he could tolerate with his right arm. Id.; (Dep. of Dr. Kenney, 19.) The insurer's first contention is that this single physical restriction was insufficient to prevent the employee from working in "remunerative employment of any kind within his ability to perform." (Insurer br. 5, citing Frennier's Case, supra, at 463.) We do not agree, as, under the right

circumstances, a single physical restriction, such as an employee's inability to perform repetitive overhead or above -the-shoulder work, could support a finding of permanent and total incapacity. Scheffler's Case, 419 Mass. 251, 256 (1994)("physical handicaps have a different impact on earning capacity in different individuals"). However, we agree that the judge's incapacity analysis in this case was insufficient to support such a finding.

The employee's burden in claiming § 34A benefits, after exhausting § 34 benefits, does not require that he "show a worsening of the disabling condition, but [he] must demonstrate only that the same level of impairment continues following the exhaustion of § 34 benefits." Andrews v. Southern Berkshire Janitorial Services, 16 Mass. Workers' Comp. Rep. 439, 441 (2002). The judge found the employee had a good result from shoulder surgery and had regained the normal use of his right arm, except for minimal limitations of no overhead or above shoulder work. (Dec. II, 5.) The judge then turned to the other prong of an incapacity analysis, the vocational state of the employee. "It is the judge's exclusive responsibility to conduct a vocational analysis, and [she] is charged with determining how the employee's medical limitations, in combination with her age, education, work experience, training and other relevant factors, impact [the employee's] ability to work and earn wages." Greene v. Ethyl Products, 23 Mass. Workers' Comp. Rep. 95, 98 (2009), citing O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 22 (2004), citing Scheffler's Case, supra, and Frennier's Case, supra at 639. Here the judge failed to properly assess how the employee's minimal medical restrictions, as set by Dr. Kenny, combined with his vocational factors, to determine if "the employee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character." Frennier's Case, supra, at 318.

The judge conducted what she termed a Frennier analysis by reviewing the employee's "age, education, experience and other transferable skills." (Dec. 5.) She found that the employee has no high school diploma or GED; "speaks little

English" and has "difficulty in being understood in English;" and was unsuccessful in his attempts to re-enter the workforce. Id. The judge found the employee could not work at his prior position as a laborer, because he was "unable to work consistently above the right shoulder level on the right side." (Dec. 6.) She concluded that he required retraining or assistance in finding work, and that without that "he will be unable to find employment in the open labor market." (Dec. 5-6.)

The judge made inadequate findings based on the record evidence to support these conclusions. She made no findings why the employee was prevented from performing *any* remunerative work, not just his prior work as a laborer, nor why retraining was required for such less physical work. Hansel v. City of Boston School Dept., 15 Mass. Workers' Comp. Rep. 360, 369-370 (2001)(findings are necessary on whether an employee can perform work of a less remunerative kind from his present job). In addition, the employee's rehabilitation program was closed due to his incarceration and subsequent inability to attend his rehabilitation appointments. (Dec. 5; Tr. 32, 45-46, 49.) The employee testified that he was ready to go back to vocational rehabilitation, but had not contacted OEVR "yet" to reschedule it. (Tr. 47.)

Next, we agree with the insurer that the judge's findings regarding the employee's difficulty speaking English are not adequately supported, where the employee testified at the hearing in English, without an interpreter, and at no time during the course of the hearing was any mention made of any difficulty he had in understanding the questions put to him or in making himself understood in English. In the first decision the judge found the employee "has difficulty making himself understood in English." (Dec. I, 3, note 1.)[8] In the second decision the

[8] The judge made the following findings in Dec. I on the employee's language skills:

> "Mr. Martinez is quite young but speaks little English and has no high school diploma or GED. Although he can take instruction in English, I have observed that he has difficulty being understood in English. These factors

judge found the employee "speaks little English, and although he can take instruction in English, I have observed that he has difficulty being understood in English." (Dec. II, 5.) The similarity between the two findings, without any indication that the judge was performing a new analysis of the employee's English acuity, coupled with the lack of any indication from the judge that the employee's language skills, or lack thereof, continued without change from his prior appearance, calls into question whether she considered that issue anew. Language ability, like incapacity, is fluid. Here, three and one half years elapsed between the first and second hearings. The employee's English-speaking ability could have changed for better or for worse during that time.. Insofar as the judge factored it into her vocational analysis, she needed to clearly re-evaluate whether the employee's language skills had changed.

In Saia v. Grow Associates, Inc., 31 Mass. Workers' Comp. Rep. 45, 47 (2017), we held that "when a judge seeks to rely upon observations of an employee at hearing to assist in assessing the employee's physical capacity, such observations should be put on the record to address . . . due process and appellate

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> combined with his physical limitations make him unemployable in the open labor market at this time.

(Dec. I, 7.)

The insurer appealed the first decision on causal relationship grounds but did not object to the judge's finding on the employee's English acuity. We affirmed the decision. Martinez, supra, at 76. While the English acuity finding was also made in Dec. I, such an ancillary finding does not rise to the level of a "final determination of all issues involved in the establishment of the right to compensation" and does not enjoy protection from further review as the "law of the case." See Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39, 47 (2013("law of the case" does not apply to changes which may take place in the condition of the employee). The employee's burden was to demonstrate that he remained as impaired in 2015 as he was in 2012, thus requiring the judge to make new findings in the second decision on this issue.

concerns." Cf. Mastrangelo v. Ametek Aerospace, 7 Mass. Workers' Comp. Rep. 184, 186-188 (1993)(judge may rely on observations of employee to support finding of incapacity). However, we have not up to now considered whether a judge's observations regarding an employee's English language skills must be similarly put on the record. Cf. Coelho v. National Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 521 (1998)(upholding a judge's finding that the employee could speak better English than he claimed based on the judge's own observations of the employee's testimony, as supportive of an earning capacity assignment). The judge's failure to call attention to what she felt was the employee's difficulty at a time when the insurer could respond, raises a due process concern. We hold that where, as here, a judge makes written findings of an employee's lack of English fluency based on her undisclosed observations at the hearing, and uses those observations in her determination of the extent of the employee's incapacity, the same line of reasoning set forth in Saia applies. Under these circumstances, therefore, the judge should have put her observations on the record.

The paucity of findings on how the employee's alleged lack of language skills impacted his ability to return to the workforce is compounded by the lack of contemporaneous notice to the parties that the judge was including her observations of those skills in her conclusions. Further, the judge's failure to explain why retraining was required before the employee could perform any remunerative work, especially given his minimal physical limitation, makes her conclusion of permanent and total incapacity unsustainable. Recommittal is the appropriate action in such a case. Anastasio v. Perini Kiewit Cashman, 19 Mass. Workers' Comp. Rep. 102, 104 (2005)(recommittal required when reviewing board "cannot determine whether the judge conducted an appropriate individualized assessment of the employee's ability to obtain and retain remunerative work of a substantial and non-trifling nature.")

We therefore recommit the matter for further findings on the extent of the employee's incapacity, taking into account the employee's minimal physical disability, with appropriate findings to be made on the Frennier factors, with specific reference to the record evidence. As the administrative judge is no longer with the department, the case is forwarded to the senior judge for reassignment to a new judge. That judge may consider the transcript of the prior hearing and may take further testimony on the extent of the employee's incapacity, if appropriate.

So ordered.

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **April 9, 2019**