COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013683-10**

George J. Carson	Employee
National Grid USA Service Company	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Preston.

APPEARANCES
Daniel C. Finbury, Esq., for the employee
Jean Shea Budrow, Esq., for the insurer at hearing
Margo Sutton, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from an administrative judge's decision denying and dismissing its complaint for modification or discontinuance of § 34 temporary total incapacity benefits. We affirm, but address the insurer's argument that the decision is arbitrary and capricious because the judge made inconsistent findings.

The employee, a sixty-year-old plumber, injured his right knee on June 15, 2010, when a water heater fell against him, pinning him in his truck. (Dec. 4.) On November 24, 2010, he underwent a right knee arthroscopy with a partial medial meniscectomy, followed by physical therapy. (Dec. 5.) He has not returned to work.

The insurer paid compensation from the date of injury, and eventually accepted liability. (Insurer's Notification of Payment, dated June 29, 2010; Temporary Conference Memorandum, dated September 1, 2011).[1] On May 27,

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

2011, the insurer filed a complaint to discontinue § 34 benefits, (Tr. 4), which the judge denied following a § 10A conference. The insurer appealed. (Dec. 2.)

On December 1, 2011, Dr. Mark Gilligan performed an impartial examination pursuant to § 11A. (Ex. 1.) The submission of additional medical evidence was allowed due to the complexity of the medical issues. Only the employee submitted supplemental evidence, which included the reports of his treating physician, Dr. Alfred Hanmer. (Dec. 2; Ex. 12.)

The judge adopted Dr. Gilligan's medical opinion that, despite the employee's pre-existing, asymptomatic, degenerative knee condition, the work injury remains a major cause of his ongoing disability. (Dec. 6.) "[S]ince his industrial accident . . . [he] has had continuing discomfort of the right knee with reduced range of motion, pain with physical activity, and limitations regarding prolonged standing, bending, squatting, climbing." (Dec. 5.) The judge credited Dr. Gilligan's opinion that the employee has been partially disabled since May 10, 2011,[2] and unable to perform "work that requires heavy lifting and deep crouching on a regular basis." (Dec. 6.) He found that Dr. Gilligan's opinion of partial disability is related to physical limitations, not to vocational factors. (Dec. 7.) The judge further adopted Dr. Gilligan's specific restrictions that the employee is "unable to lift and carry more than 40 pounds, unable to perform repetitive bending and squatting and . . . should avoid ascending and descending stairs." (Dec. 6.)

In the section of the decision entitled, "Rulings of Law," the judge also adopted "the credible testimony of the Employee," and found:

> Everyday [sic] he experiences elevated high level knee pain with walking. The pain interrupts his sleep every 2-3 hours and he is

[2] Dr. Gilligan chose May 10, 2011, because it was the date on which Dr. Hanmer released the employee to return to work. However, Dr. Gilligan notes that the employee saw Dr. Hanmer again on June 20, 2011, because he was unable to return to work secondary to ongoing symptoms. (See Ex. 1, § 11A report; Ex. 12.) Dr. Gilligan reported that the employee states he has pain with prolonged standing, bending and squatting and with stairs. (Ex. 1.)

> restricted in carrying, even infrequently, more than 10-15 pounds. Driving is limited to occasional brief local trips. Stair climbing intensifies the knee pain. He requires ice and/or meds for his elevated knee pain and the soreness. His knee condition is worsening, not improving.

(Dec. 8.)

The judge rejected the reports and testimony of three investigators hired by the insurer, and found the testimony of the insurer's vocational expert similarly unhelpful. (Dec. 8.) He found that, although the employee has skills in plumbing, pipefitting, fire sprinklers, and oil burner installation/maintenance, he cannot physically perform the work required by jobs in those fields. In addition, he has no marketable sedentary job skills which would allow him to perform clerical, computer or other office work. (Dec. 7.) The judge found: "*Pain and soreness* from even limited prolonged standing/sitting/walking, especially on uneven terrain, prevents the Employee from performing, and sustaining any employment, even full or part-time sedentary work." (Dec. 8; emphasis added.) The judge concluded that the employee is "unable to perform any work because of his ongoing *debilitating right knee pain* and loss of function." (Dec. 7; emphasis added.)

On appeal, the insurer argues that the decision is arbitrary and capricious because the judge made internally inconsistent findings with respect to the employee's lifting restrictions. The insurer characterizes as irreconcilable the judge's adoption of Dr. Gilligan's statement that the employee is "unable to lift or carry more than forty pounds," (Dec. 6), and his finding that the employee was "restricted in carrying, even infrequently, more than 10-15 pounds." (Dec. 8.) The employee maintains there is no inconsistency, directing us to his testimony regarding pain, which was credited by the judge, as well as to his testimony that he could lift ten to fifteen pounds, as found by the judge. (Tr. 28.)

It is a basic tenet of our case law that an internally inconsistent decision is arbitrary and capricious, requiring recommittal. Cunha v. Bridgewater, 23 Mass.

Workers' Comp. Rep. 331, 337-338 (2009). Unless a judge's general findings "emerge clearly from the matrix of his subsidiary findings," Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), we cannot perform our appellate function of determining whether the judge correctly applied the law to facts supported by the evidence. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Thus, where a judge adopts two conflicting *medical* opinions on disability, the case must be recommitted for him to reconcile the conflict in the medical evidence or choose one medical opinion over the other. Cunha, supra; see Fahy v. Prestige Stations, Inc., 9 Mass. Workers' Comp. Rep. 87, 89-90 (1995) (recommittal necessary where reviewing board is left with doubts as to logic and consistency of disability findings).

This case does not, however, present two conflicting medical opinions. Instead, there is a medical opinion contrasted with the employee's testimony reflecting his pain and his own estimate of lifting limitations. In such a case, it is well-established that a judge may give "decisive weight to the credible testimony of the worker about his *limitations*," and thereby overcome even the prima facie status of the impartial opinion. Dalbec's Case, 69 Mass. App. Ct. 306, 313-314 (2007)(emphasis added), citing Scheffler's Case, 419 Mass. 251, 260 (1994). Thus,

> a judge may credit an employee's complaints of pain to award total incapacity benefits in the face of a medical opinion of partial disability. See, e.g., Brown v. Northeast Underpinnings, Inc., 22 Mass. Workers' Comp. Rep. 329, 331 (2008), *aff'd sub nom*. Brown's Case, 76 Mass. App. Ct. 1105 (2009)(Memorandum and Order pursuant to Rule 1:28); Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65 (1990). Indeed, it is error for an administrative judge to defer to an impartial physician's opinion regarding the credibility of the employee's subjective complaints of pain and limitations. Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 347 (2003).

Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25, 28 (2011).

While the judge did not explicitly reject Dr. Gilligan's forty-pound lifting restriction, we infer from his findings crediting the employee's testimony of "high level" and "debilitating" knee pain, (Dec. 8), that he did, in fact, discount those restrictions in favor of the employee's testimony as to how much he could lift without pain.[3] The employee even addressed the forty-pound lifting restriction in his testimony:

> Yeah, I can lift the weight. That isn't what my problem is. My problem is the pain and the stress it puts on my knee.

(Tr. 68.) This testimony effectively reconciled any discrepancy in the judge's findings regarding the employee's ability to lift. Thus, the judge in effect found the employee could lift ten to fifteen pounds infrequently, based on the employee's credible complaints of pain and his estimate of his restrictions.[4] The judge then performed a detailed vocational analysis, concluding the employee cannot perform any of the jobs for which he is qualified, and that he has no marketable skills which would allow him to perform sedentary work. Accordingly, he found the employee remained totally incapacitated.[5]

Although the judge's findings might have been more explicit, they sufficiently reveal his reasoning. Recommittal is not required.[6]

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[3] Dr. Gilligan acknowledged that he could not comment on the level of pain the employee was experiencing because pain is a subjective measurement. (Dep. 73.)

[4] The employee testified that, when he shopped for groceries, he could comfortably carry "10, 15 pounds maybe tops." (Tr. 28.) Contrary to the insurer's assertion, the judge's finding the employee could lift ten to fifteen pounds infrequently does not mischaracterize his testimony.

[5] We note that the employee need not prove a worsening of his condition to be entitled to continued total incapacity benefits. See, e.g., Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. ___ (2012).

[6] Our holding here is not intended to give administrative judges general license to be less than explicit in their incapacity findings. We affirm the decision here because it is apparent the judge adopted not only the employee's testimony regarding his pain, but also his testimony regarding his lifting restrictions, in coming to the conclusion the employee

The decision is affirmed. Pursuant to G.L. c. 152, § 13A(6), we order the insurer to pay employee's counsel an attorney's fee of $1,563.91.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **June 13, 2013**

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was totally incapacitated. See Sawyer's Case, 315 Mass. 75, 76 (1943)(decision of board is to stand unless unsupported by evidence, including all rational inferences the testimony permits); Howze v. Massachusetts Bay Transp. Auth., 25 Mass. Workers' Comp. Rep. 159, 161 (2011)(judge's findings, including all rational inferences permitted by the evidence, will be upheld unless a different findings is required as a matter of law).