COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 053009-00; 032432-01

Gerald Sourdiffe	Employee
University of Massachusetts/Amherst	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

APPEARANCES

Katherine Lamondia-Wrinkle, Esq., for the employee
Marian C. Grimes, Esq., for the self-insurer

COSTIGAN, J. The parties cross-appeal from a decision in which the administrative judge denied the employee's claim for § 34A permanent and total incapacity benefits but awarded him ongoing § 35 partial incapacity benefits for two distinct industrial injuries. At the time of the hearing, the employee was receiving partial incapacity benefits for a December 2000 work-related aggravation of a 1989 compensable respiratory injury. He also alleged a right knee injury at work in June 2001. The self-insurer challenges the judge's finding that the statutory maximum periods of incapacity for each injury ran consecutively rather than concurrently. The employee cites internal inconsistencies in the judge's adoption of medical evidence, and also argues the judge erred in assigning a higher earning capacity as of the date of the § 11A impartial medical examination. For the reasons that follow, we affirm the decision as to the self-insurer's appeal and the employee's earning capacity argument, but we recommit the case for further findings on the expert medical evidence.

In 1989, the employee, a carpenter and asbestos abatement worker, sustained a work-related exacerbation of his pre-existing allergies which caused him to leave work on or

about June 12th. The self-insurer paid workers' compensation benefits for five years.[1] After treatment with allergy shots, and with accommodations made by his employer, the employee was able to return to work in 1995. (Dec. 5.) Due to a change in the employer's policy for the wearing of protective respiratory gear, the employee suffered a further aggravation of his respiratory condition in late 2000. (Dec. 6.) The employee had shortness of breath and was subject to frequent sinus infections, (Dec. 7), but he continued to work. (Dec. 6.)

On June 8, 2001, the employee injured his right knee while working. (Dec. 6.) In October 2001, the employee underwent arthroscopic surgery. (Stat. Ex. 1; Tr. 68.) Pursuant to §§ 7 and 8 of the act, the self-insurer paid incapacity benefits without prejudice, initially § 34 benefits for six months, and then § 35 benefits, based on a $350 earning capacity, until January 5, 2002. The self-insurer terminated the without-prejudice payment of weekly incapacity benefits based on a treating physician's release of the employee to return to work.[2]

The employee did return to work on January 8, 2002, only to be told his employer no longer would accommodate either his respiratory limitations or his orthopedic impairment. The employee filed a claim, not for his right knee injury, but rather for his respiratory condition. He cited a December 1, 2000 date of injury, representing an alleged work-related exacerbation/aggravation of his allergies. The self-insurer denied the claim, but following a 2002 § 10A conference before a different administrative judge, the self-insurer was ordered to pay the employee partial incapacity benefits under § 35, at the weekly rate of $533.15, *for his respiratory condition only*, from and after January 7, 2002.[3] (Dec. 9.)

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[1] Based on the June 12, 1989 date of injury, the statutory maximum entitlement for total incapacity benefits was two hundred sixty (260) weeks. The parties agreed, and the judge found, that the employee collected § 34 benefits from June 12, 1989 to June 13, 1994, and thereafter returned to modified employment. (Dec. 4.)

[2] The judge's finding that the employee "was able to return to work in a modified and accommodated environment up until January 8, 2002," when he "left employment because of his knee injury," (Dec. 9), is unsupported by the record evidence. The employee worked in that modified and accommodated environment during the period from his 1995 return to work until his right knee injury of June 8, 2001.

[3] That conference order, of which we take judicial notice, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), makes no reference to the medical condition for which benefits were awarded. We note, however, that the parties agree the 2002 order

Over the ensuing years, even though he was not working, the employee's right knee complaints worsened, and on March 30, 2005, he resumed treatment with his orthopedic surgeon, Dr. John Corsetti. Dr. Corsetti diagnosed reflex sympathetic dystrophy and chronic regional pain syndrome causally related to the employee's June 8, 2001 right knee injury. (Dec. 8-9.)

Thereafter, citing both his orthopedic and his respiratory conditions, the employee filed a claim for § 34A permanent and total incapacity benefits from and after March 30, 2005.[4] In the alternative, he claimed § 34 benefits for his right knee injury or enhanced § 35 benefits[5] for his respiratory condition, from and after March 30, 2005. (Employee Ex. 1.) The self-insurer contested liability as to the right knee claim and raised the affirmative defense of "a major" causation under § 1(7A)'s "combination" injury provision.[6] (Dec. 2.)

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pertained to the employee's respiratory condition only, (Employee br. 1, Self-ins. br. 1), and the judge so found. (Dec. 5.) The parties also agree that based on the two hundred sixty-week statutory maximum period of entitlement for § 35 partial incapacity benefits applicable to the December 1, 2000 date of injury, the § 35 benefits awarded in the 2002 conference order would have exhausted on January 7, 2007, (Employee br. 1, Self-ins. br. 1), and the judge so found. (Dec. 5.)

[4] At hearing, the employee claimed only two dates of injury, December 1, 2000 and June 8, 2001. (Dec. 1, Employee Ex. 1.) The original respiratory injury of 1989 was not before the judge except by way of medical and procedural background.

[5] General Laws c. 152, § 35, provides in pertinent part:

> The total number of weeks of compensation due the employee under this section shall not exceed two hundred sixty; provided, however, that this number may be extended to five hundred twenty if an insurer agrees or an administrative judge finds that the employee has, as a result of a personal injury under this chapter . . . contracted a permanently disabling occupational disease which is of a physical nature and cause.

[6] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Addressing the employee's orthopedic claim, the judge adopted Dr. Corsetti's opinions as to diagnoses and causal relationship:

> After due review and consideration of all the evidence, I adopt the opinion of Dr. John Corsetti that the employee suffers from reflex sympathetic dystrophy and chronic regional pain syndrome of the right knee, causally related to the accident on June 9 [sic], 2001. Although the employee does have minor arthritis in his right knee, I find that there is no combination required to trigger 1(7)(a) [sic]. I adopt the opinion of Dr. Corsetti that the employee's physical exam is entirely consistent with intra-articular derangement or arthritis.

(Dec. 8.) As to the employee's disability, however, the judge adopted the opinion of the § 11A examiner, Dr. Armand Aliotta, who determined the employee had a full range of motion of his right knee, but would have limitations on ascending and descending stairs and, therefore, was partially disabled. (Id.)

Addressing the employee's respiratory claim, the judge found:

> I adopt the opinion of Dr. Burstein that the employee was and is unable to return to the type of carpentry and asbestos abatement work that he performed at the University of Massachusetts at Amherst. He cannot work in a dusty or moldy environment. However, in reference to his respiratory condition, he could certainly work in an office setting as a security guard manning a post with the option to sit or stand at will, or a retail clerk in a store, light assembly, or any of the numerous light to sedentary work [sic] in the open labor market which would not expose him to factors which would trigger his allergies.

(Dec. 9.) Based on both the employee's orthopedic disability and his respiratory limitations, the judge found the employee partially incapacitated and assigned a light duty

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The self-insurer also raised § 1(7A) in defense of the employee's respiratory claim, as to the December 1, 2000 date of injury. His 1989 respiratory injury was not part of the hearing, (see footnote 4, supra), but as a matter of law, § 1(7A) was inapplicable to that injury because it pre-dated the enactment of this substantive amendment to the act. See St. 1991, c. 398, §§ 14 and 106.

earning capacity of $600.00 per week, as of the May 24, 2006 date of the § 11A medical examination. (Dec. 11.)

The self-insurer argues the judge erred in finding that the employee's incapacity attributable to his right knee complaints did not commence until March, 30, 2005. We disagree. Following his October 2001 surgery, the employee did not treat for his knee complaints until March 30, 2005. To the extent that his knee was deteriorating over the course of those three plus years, we consider the judge's use of the March 30, 2005 date as analogous to the last day of work in a cumulative injury case. Moreover, although he found that the employee's "knee complaints arose to the level of contributing to his disability as of the date of initial treatment with Dr. Corsetti on March 30, 2005," (Dec. 10), the judge, "[c]iting the doctrine of Laches,"[7] found it was "inappropriate to establish a retroactive earning capacity dating back to March 30, 2005." (Dec. 11.)

The self-insurer cites Laverde v. Hobart Sales and Serv., 18 Mass. Workers' Comp. Rep. 214 (2004), for the proposition that the employee's benefit entitlement for his knee-related incapacity must run concurrently with his respiratory-related incapacity from January 8, 2002, until March 30, 2005. Laverde, however, is distinguishable, as it involved two independent diagnoses which were indisputably coincidental and contemporaneous in their disabling effects. Laverde's claim for *both* injuries had run from March 14, 1994, which represented both the last day of work for a cumulative knee injury, and the day a 1993 back injury recurred. Laverde attempted to maximize his entitlement to partial incapacity benefits by waiting to file his claim for the cumulative knee injury until after he exhausted his statutory entitlement to § 35 for his back injury. Id. at 215-216. We disagreed with the employee's approach, and concluded that such an "election" would allow the employee a double recovery for one partial incapacity caused by two independent injuries. Id. at 218-219.

Here, according to the judge's findings, there was no incapacity attributable to the employee's right knee injury between late 2001 and March 30, 2005. That finding evinces

[7] "The 'Doctrine of laches' is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as a bar in court of equity. [Citation omitted.]" Black's Law Dictionary, 6th Ed. (1990).

no error of law. We therefore reject the self-insurer's argument that the employee's knee-related incapacity necessarily ran concurrently with his respiratory-related incapacity.

As to the employee's appeal, we do not see merit in his argument that the judge's assignment of a higher earning capacity as of the May 26, 2006 date of the impartial medical examination is without support in the subsidiary findings of fact. While it is true that nothing changed for the employee, medically or otherwise, on May 26, 2006, that date nevertheless represents the first articulation of the expert medical evidence upon which the judge based his disability determination. See Peters v. Raytheon, 14 Mass. Workers' Comp. Rep. 229, 231 (2000); Betty v. Olsten Health Care, 12 Mass. Worker's Comp. Rep. 311, 313-314 (1998). Moreover, the employee does not argue the judge failed to make sufficient subsidiary findings of fact explaining the "factual source" of the earning capacity assigned. Compare Dalbec's Case, 69 Mass. App. Ct. 306, 316-317 (2007).

We specifically reject the employee's argument that the judge needed to support his increase to a $600.00 earning capacity with a finding that the employee's medical or vocational status had improved.[8] There had been no prior judicial finding -- based on evidence adduced at a hearing -- as to the employee's earning capacity. Therefore, the judge was writing on a clean slate in his incapacity analysis, and the employee's comparison of the higher earning capacity assigned in the 2006 hearing decision to the lower earning capacity implicitly represented in the 2002 conference order, (see footnote 8, supra), is inappropriate and irrelevant, as a matter of law. See Lee v. General

[8] We note that the judge who issued the 2002 § 10A conference order did not assign an earning capacity at all; rather, he simply directed the self-insurer to pay § 35 benefits at the rate of $533.15 per week, based on the employee's average weekly wage of $1,184.78. See footnote 3, supra. The employee suggests the § 35 rate awarded in that order represents a weekly earning capacity of $296.20. (Employee br. 6-7.) The self-insurer asserts the weekly earning capacity was $350.00. (Self-ins. br. 1.) However, the parties agree the compensation rate ordered represented the maximum partial incapacity benefit available under § 35, i.e., seventy-five per cent of the applicable rate for total incapacity under § 34. (Employee br. 6-7; Self-ins. br. 1.) Thus, the earning capacity represented by the maximum § 35 rate could be any amount up to, but not exceeding, $296.20.

Investment and Dev., 18 Mass. Workers' Comp. Rep. 211, 212-213 (2004)(unappealed conference order contains no findings based on evidence from which worsening [or improvement] comparison can be made); Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 72 (2005)(same as to § 19 agreement for § 35 benefits).

The employee further argues that the judge's handling of the medical evidence is flawed, because he adopted parts of two expert medical opinions which cannot be reconciled. This argument has merit. The judge adopted Dr. Corsetti's diagnosis that the employee suffers from reflex sympathetic dystrophy (RSD), but did not adopt his opinion that the condition totally disabled the employee. Rather, the judge adopted the opinion of the § 11A impartial orthopedic physician, Dr. Aliotta, that the employee was only partially disabled. (Dec. 8.) The problem is that Dr. Aliotta specifically found the employee did *not* suffer from RSD. (Dep. 22.) To the extent the judge's findings on the employee's knee-related incapacity are built on a foundation that Dr. Aliotta's adopted disability opinion excluded, we agree with the employee that the decision is internally inconsistent, and therefore arbitrary and capricious. Recommittal is appropriate on this basis. 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).

Accordingly, we affirm both the judge's earning capacity assignment and his determination that the statutory maximum periods of benefit entitlement for the employee's respiratory and knee conditions ran consecutively rather than concurrently. However, we agree with the employee that the judge mishandled the expert medical opinions he adopted, and therefore we recommit the case for further findings consistent with this opinion. Because the employee prevailed in defending against the self-insurer's argument on appeal, we award an attorney's fee in the amount of $1,495.34 pursuant to G. L. c. 152, § 13A(6).

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **November 24, 2008**