COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001224-21**

Ismael A. Martinez	Employee
Solid Waste Solutions	Employer
AIM Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and O'Leary)

The case was heard by Administrative Judge Daniels

APPEARANCES
Lauren Van Iderstine, Esq., for the employee at hearing and on appeal
Kimberly Davis Crear, Esq., for the insurer at hearing
James D. Chadwell, Esq., for the insurer on appeal

LONG, J. The employee appeals from the administrative judge's decision awarding ongoing § 34 temporary total incapacity benefits but denying ongoing §§ 13 and 30 medical benefits. We vacate the hearing decision with respect to the denial of §§ 13 and 30 medical benefits and otherwise affirm the decision.

The employee, Ismael Martinez, was fifty-two (52) years old at the time of hearing, married with two children, and worked as a loader operator for Solid Waste Solutions for 2 -3 years prior to his industrial accident. The position required lifting up to 100 pounds, frequent pulling of heavy items, and that the employee be quick on his feet. (Dec. 3, 4). On January 4, 2021, as a dump truck was unloading, the employee was struck by a heavy steel door and sent flying 9 to 10 feet, landing on his left side on the concrete floor. The employee was in pain but tried to work the next day. He was unable to work and went to the Holyoke Emergency Room, where x-rays were taken of the employee's shoulder, neck, mid-back, and left knee. The employee subsequently received additional treatment from his primary care physician, a chiropractor, Michael Ackland, M.D., and Marc Friedberg, M.D. Dr. Ackland ordered an MRI of the right shoulder and administered a cortisone injection that provided short relief and physical

therapy was ordered. The employee saw Dr. Friedberg, who sent him for MRIs of both the back and neck. Dr. Friedberg also administered six injections in the employee's neck and four in his back, which resulted in only limited relief in his neck. As of the hearing date, the employee still treated with Dr. Friedberg every 5-6 weeks and two months prior Dr. Friedberg recommended additional physical therapy. (Dec. 4-5.). The employee's claim for compensation was the subject of a § 10A conference on October 6, 2021, and the judge awarded § 34, temporary total incapacity benefits, from January 23, 2021, to January 23, 2022, followed by ongoing § 35 benefits at the rate of $324.20, which reflected an earning capacity of $540.00 per week applied to the employee's average weekly wage of $1,080.34. The judge also awarded medical benefits pursuant to §§ 13 and 30, and both parties filed timely appeals. (Dec. 2.) The employee was examined by impartial examiner R. Scott Cowan, M.D., on March 15, 2022. At the hearing on May 9, 2020, the employee filed a motion to allow additional medical evidence, which was opposed by the insurer, but allowed by the judge who found the medical issues complex.

At the hearing, the employee claimed § 34 benefits from January 23, 2021, to date and continuing, and §§ 13 and 30 medical benefits for treatment with Dr. Friedberg and Dr. Ackland. The insurer denied disability, extent of incapacity, entitlement to §§ 13 and 30 medical benefits, and causal relationship. They also raised the affirmative defense of § 1(7A), citing aggravation of underlying degenerative joint condition of the glenohumeral joint and aggravation of cervical spondylosis. (Dec. 2-3.) The employee was the only witness to testify at the hearing, and records of Dr. Friedberg, Dr. Ackland, Rebecca Morrisette, PA-C at Trinity Health and records from Holyoke Medical Center were submitted as additional medical records by the employee. (Dec. 6.) The insurer submitted a June 3, 2021, report of Robert Warnock, M.D., and a May 25, 2022, report of Marc Linson, M.D., as well as a May 15, 2021, MRI report from Shields MRI. (Dec. 7.)

After considering the employee's testimony and examining the exhibits, the judge awarded the employee § 34 benefits from January 24, 2022, to date and continuing but denied additional medical treatment, stating "[p]er Dr. Cowan's opinion, I find the

employee is at maximum medical improvement and the insurer does not have to pay for additional medical treatment." (Dec. 11.) The judge ordered "[t]he Insurer does not have to pay for any additional medical bills/treatment after the date of this decision." (Id.) The employee's sole issue on appeal alleges the judge's denial of further medical treatment was not grounded in the medical evidence. We agree and vacate the termination of §§ 13 and 30 medical benefits.

The employee correctly notes that "as a general practice, an administrative judge should avoid utilizing a purely procedural date not grounded in the evidence as the date to terminate benefits." Sullivan v. Commercial Trailer Repair, 7 Mass. Workers' Comp. Rep. 8 (1993)(utilization of the decision filing date to terminate benefits was improper); Rossi v. Mass. Water Resources Authy., 7 Mass. Workers' Comp. Rep. 101 (1993)(inappropriate to terminate benefits as of the hearing date without subsidiary findings explaining why that date would be proper). (Employee br. 17-18.) When the judge used the decision filing date as the basis to terminate the insurer's statutory obligations pursuant to §§ 13 and 30, he ran afoul of this well-established rule**.** The decision does not provide a subsidiary finding as to why medical benefits should cease, and the expert support cited by the judge, Dr. Cowan's finding of maximum medical improvement, does not address the issue of entitlement to future medical treatment. A judge's finding regarding the reasonableness or necessity of medical treatment must be based on expert medical testimony. See Santana v. Belden Corp., 5 Mass. Workers' Comp. Rep. 356, 358 (1991). Dr. Cowan's opinion on maximum medical improvement does not close the door to future medical treatment. In fact, just prior to providing his opinion on maximum improvement, Dr. Cowan stated that "[t]reatment rendered to Mr. Martinez including chiropractic care, injection management, and conservative measures, in my opinion have been reasonable, necessary and accident related," which would appear to keep the door open for future treatment. The only adopted medical opinion specifically addressing future medical treatment was that of Dr. Warnock, who opined, "additional treatment was necessary in the form of physical therapy for 4 weeks and pain

management for possible trigger-point injections." Although his opinion was rendered in June 2021, it clearly contravenes the judge's termination of the medical benefits on the arbitrary date of the hearing decision, which has no medical support.

> "Although a medical examination date or report may support a decision to commence, terminate or modify weekly benefits, a judge's order must not over reach. In addition, where the evidence shows specific contested treatment or services rendered were neither reasonable nor necessary, he may deny past treatment, but the judge may not deny future treatment if both causally related to, and reasonable and necessary for the aftermath of an industrial accident. As stated above, health and infirmity are dynamic, changing conditions. An employee may be capable of remunerative work, but may still need medical treatment in the present or at some future point in time. Colon v. Andover Courtyard/Marriott, 9 Mass. Workers' Comp. Rep. 9 (1995); see Pagnani v. DeMoulas/Marketbaskets, 9 Mass. Workers, Com. Rep. 4 (1995); see also M.G.L. c. 152, § 16. … As with future incapacity for an industrial injury, future medical benefits always remain open."

Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172-173 (1995).

This is not to say that §§ 13 and 30 medical benefits can never be terminated when based upon an expert medical opinion. (See Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76 (1996)(Nothing arbitrary or capricious in the judge's adoption of the impartial examination date for the termination of "reasonable" chiropractic, osteopathic and massage care). However, there we also noted:

> "[W]e must make clear that the judge's determination of this issue in this case in no way forecloses the employee from claiming § 30 medical benefits in the future. Just as the issue of present incapacity is always subject to being raised by the insurer in a request for discontinuance or modification of benefits, see Himmelman v. A. R. Green & Sons, 9 Mass. Workers' Comp. Rep. 99 (1995), so too is the issue of "reasonable" medical treatment always on the table. This is particularly true where the employee continues to be partially incapacitated, and presumably is attempting to reenter the work force in some capacity. It would not be unreasonable for such an employee to be checked by a physician at regular and reasonable intervals to mark his progress or deterioration. In no way, therefore, do we interpret the judge's determination of the medical benefits at issue in this case to forever bar the employee from making a § 30 claim related to this injury in the future."

Tenerowicz at 78. Where, as here, the employee has been found by the judge to be temporarily totally disabled, and where the judge also credited Dr. Warnock's opinion that "additional treatment was necessary in the form of physical therapy for 4 weeks and pain management for possible trigger-point injections" (Dec. 7), the termination of medical benefits as of the date of the hearing decision is the sort of over reach cautioned against in Fragale. Coupled with the arbitrary selection of the hearing decision date to terminate medical benefits, this aspect of the decision is contrary to law.

Finding no medical evidence or expert opinion in the record to support the termination of future adequate, reasonable and causally related medical treatment, there is no need to recommit the matter for the judge to address the issue. We vacate the decision as to the termination of §§ 13 and 30 benefits and affirm in all other respects.

Pursuant to G.L. c. 152, § 13A(6), employee's counsel shall submit a fee agreement for our approval.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Kevin B. O'Leary
Administrative Law Judge

Filed: **October 12, 2023**