COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 053704-98**

James Allen	Employee
Luciano Refrigeration	Employer
Legion Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
William J. Keller, Jr., Esq., for the employee
Richard M. Stanton, Esq., for the insurer on appeal
Donald E. Hamill, Jr., Esq., for the insurer at hearing

CARROLL, J. The insurer appeals two aspects of the administrative judge's decision. First, the insurer contends that the judge erred in awarding § 34 temporary total incapacity benefits beyond the period claimed by the employee. We agree that the employee did not claim § 34 benefits for almost three weeks during which the judge awarded them, but nevertheless find no error because the employee submitted medical evidence which supported the judge's award. Second, the insurer maintains that the judge awarded ongoing § 35 benefits erroneously because the employee failed to present any medical evidence to substantiate incapacity after his surgery. We disagree with the insurer that the employee did not present medical evidence after his surgery which could support a partial incapacity, but agree that the judge failed to comment on that evidence. We therefore recommit the case for the judge to make specific findings on the medical evidence presented post surgery. In all other respects, the decision is affirmed.

James Allen, age forty-seven at the time of hearing, had attended one year of college and was trained as a truck driver, motorcycle mechanic and locksmith. At the time of his industrial injury, he was a long distance truck driver whose duties included loading and unloading tractor-trailers. On September 22, 1998, while stepping off the

back of a truck, he lost his balance and fell forward, landing on his head and neck. He continued to drive for several days, but by September 30, was forced to discontinue work because of pain resulting from his injuries. (Dec. 4-5.)

The employee treated with several doctors and, on February 9, 2000, underwent a C6-7 diskectomy and fusion. (Dec. 6.) He returned to work as an independent contractor for Bill's Locksmith on May 2, 1999, earning less than he had earned while working for the employer. (Dec. 8-10.)

Following a conference order awarding a closed period of § 34 weekly benefits and ongoing § 35 benefits, the insurer appealed to a hearing de novo. (Dec. 2.) On January 11, 2000, prior to hearing or surgery, the employee was examined by Dr. David Crowley pursuant to § 11A. At hearing on June 22, 2000, the judge allowed the employee's motion to introduce additional medical evidence because the employee had had surgery on February 9, 2000, which was after the impartial examination, and because the impartial report did not address the extent of incapacity for the period prior to the examination on January 11, 2000. (Dec. 3.) Both the employee and the insurer submitted additional medical evidence, (Dec. 1), but neither deposed the impartial physician. (Dec. 3.)

In his decision, the judge found the employee's testimony regarding the incident causing his injury to be credible. (Dec. 5.) He adopted the diagnosis of the impartial physician, Dr. Crowley, that the employee sustained an avulsion fracture at C6-7, a lumbar strain, and cervical radiculopathy secondary to aggravation of his pre-existing degenerative disc disease. He further adopted Dr. Crowley's opinion that the employee was partially disabled and should be restricted from heavy lifting and long distance truck driving. Finally, in accordance with Dr. Crowley's opinion, he found that the employee was a candidate for surgical intervention and was not at a medical end result. (Dec. 6, 7.)

The judge went on to award the employee § 34 temporary total incapacity benefits from September 22, 1998 through January 19, 1999, the date on which, according to the judge, Dr. Ortolani, one of the employee's physicians, opined that he was capable of light

duty work. (Dec. 6, 10.) The judge ordered § 35 benefits from January 19, 1999 until February 9, 2000, when the employee had surgery. He then awarded § 34 benefits from the date of surgery, February 9, 2000, until May 2, 2000, when the employee returned to work for Bill's Locksmith. Finally, he ordered ongoing § 35 benefits beginning May 2, 2000. (Dec. 10.)

In its appeal, the insurer first contends that the judge erroneously awarded § 34 benefits for almost three weeks during which the employee claimed only § 35 benefits. Here, the employee claimed § 34 benefits only until December 31, 1998, but the judge awarded § 34 benefits until January 19, 1999. (Dec. 2; Tr. 3-4.) We do not agree that there was error in the judge's award. A judge is not generally free to award benefits beyond the period claimed, since doing so amounts to raising an issue not requested by the parties. Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000). However, there may be circumstances when a claim is deemed amended and an issue is tried by consent. Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. 417, 419 (2000), citing Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243 (1997). Thus, if the medical and vocational evidence supports an expanded award of § 34 benefits, that award may be allowable. Jenney v. Waltham-Weston Hosp. & Medical Center, 15 Mass. Workers' Comp. Rep. 54, 57 (2001); Whitaker, supra at 419, citing Hall v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 467, 469 (1997). Such is the case here. The employee submitted, without objection, the office notes of Dr. Ortolani, his treating neurologist, upon which the judge based his award of § 34 benefits. The judge wrote:

> Dr. Ortolani ordered an MRI, and on December 10, 1998, diagnosed the employee as having a herniated disk at the C6-C7 level, and opined the employee was not capable of working at that time. Considering the medical evidence I find the employee was totally disabled from September 22, 1998, until January 19, 1999, at which time, Dr. Ortolani considered the employee to be capable of performing light duty work, no lifting over twenty pounds, and no prolonged driving (Ex. 3, tab 7).[1]

[1] The office note actually releasing the employee to light duty work is dated February 18, 1999, rather than January 19, 1999. Dr. Ortolani's January 19 note states that, "He is getting close to

(Dec. 6; footnote omitted.) There was no medical evidence submitted suggesting that the employee's incapacity changed from total to partial as of December 31, 1998. See Luiza Lobo v. Browning Winchester Arms Inc./U.S. Repeating Arms, 15 Mass. Workers' Comp. Rep. 125, 127 (medical report which does not evidence improvement in employee's medical condition cannot support a reduction or termination in benefits). The evidence adopted by the judge supported a finding of total incapacity at least up to January 19, 1999, a period of less than three weeks beyond that claimed by the employee. We find no error in an award of § 34 benefits until that date.[2] Hall, supra at 469. Compare Burgos, supra (judge erred in awarding benefits twenty-nine weeks beyond those claimed by the employee where the only medical evidence supplied by the impartial examiner did not comment on incapacity during that time period); Whitaker, supra (judge erred in awarding benefits eight months beyond period claimed, where no medical or vocational evidence was presented to support the award).

Second, the insurer maintains that the employee failed to present any medical evidence supporting incapacity after his surgery on February 9, 2000 or his return to work on May 2, 2000. The insurer only contests the award of ongoing partial incapacity benefits after May 2, 2000, however. (Ins. Brief 7-8.) The insurer is correct that the only medical evidence *cited* by the judge following the employee's return to work is the report of the insurer's examiner, Dr. Subranamian, who opined that the employee could return to his previous job as a truck driver. (Dec. 8.) However, Dr. Subranamian's report was not the only medical evidence *admitted* following the employee's surgery or his return to

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being released to light duty-type employment. May be [sic] by the next visit, if not, within two months." However, since the employee has not cross-appealed, he cannot achieve a more favorable result on appeal than that ordered below. Saugus v. Refuse Energy Systems Co., 388 Mass. 822, 831 (1983).

[2] The de minimis nature of the period for which benefits were awarded but not claimed (nineteen days) is also notable. See Repucci v. Ace Generator Co., 9 Mass. Workers' Comp. Rep. 257, 259 n.3 (1995) (difference between date for modification chosen by judge and date of medical examinations was de minimis).

work. The employee submitted three office notes by Dr. Michael Hill, the employee's surgeon, subsequent to his surgery, one of which, dated May 26, 2000, was subsequent to his return to work earlier in May. (Exh. 3, tab 16.) Those notes, while not unambiguous, could support a finding of incapacity beyond May 2, 2000, when read in conjunction with the other medical and lay testimony submitted. See Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995) (ambiguous medical opinion as to causal relationship can be bolstered not just by other expert opinion, but by lay testimony as well).

However, we cannot tell whether the judge relied on Dr. Hill's notes or, in fact, on any medical evidence in reaching his conclusion that the employee was partially incapacitated after May 2, 2000. He seems to have taken into account the fact that, as of May 2, the employee was working as a locksmith earning less than his pre-injury wages as a truck driver, (Dec. 7-8), but that fact alone is insufficient to establish the employee's entitlement to § 35 partial incapacity benefits. A conclusion on incapacity at any particular time ordinarily requires expert medical testimony. Relihan v. Department of Indus. Accidents, 12 Mass. Workers' Comp. Rep. 308, 310 (1998). Of course, where there is conflicting medical evidence, the judge is free to credit the testimony of one medical expert over another, Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999). However, "we should be able to look at the[] subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion. His general finding that the employee was [ ] partially disabled must emerge clearly from the matrix of his subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). Here, we cannot tell on what medical evidence, if any, the judge relied in his award of § 35 benefits beyond May 2, 2000.[3] Though the judge recited Dr. Subranamian's opinion, he did not specifically credit or discredit it. Moreover, he did not even mention Dr. Hill's notes. Therefore, we recommit this case for the judge to

[3] We note that the impartial report, which the judge adopted, dealt with an earlier time period prior to the surgery and is therefore inapplicable to determining extent of incapacity for the period after May 2, 2000.

reconsider his award of § 35 benefits after May 2, 2000, and to make specific findings regarding the medical and other bases for his determination of incapacity after that date. Due to the passage of time, the judge may take additional evidence as is necessary to do justice.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **October 5, 2001**
MC/jdm