

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 029143-19

Jennifer Shumaker
MCIFR M.C.I. Framingham
Commonwealth of Massachusetts

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION (Judges Fabiszewski, Koziol and O'Leary)

The case was heard by Administrative Judge Ricciardone.

APPEARANCES Paul S. Danahy, Esq., for the employee Robin Borgstedt, Esq., for the self-insurer

FABISZEWSKI, J. The self-insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits, medical benefits pursuant to §§ 13 and 30, plus an enhanced attorney's fee pursuant to § 13A(5) . The insurer raises several issues on appeal. We affirm the decision in all respects but address one of the insurer's arguments that warrants discussion, specifically, whether the administrative judge relied on legally insufficient evidence in reaching her decision.

The facts pertinent to the issues raised on appeal are summarized below. On October 25, 2019, the employee was a forty-nine year old correction officer who injured her right (dominant) upper extremity while working for the employer when she attempted to restrain an inmate. On August 1, 2022, the administrative judge issued a prior hearing decision based on the employee's initial claim for benefits, ordering the self-insurer to pay § 34 temporary total incapacity benefits from October 20, 2020, to date and continuing, plus benefits pursuant to §§ 13 and 30, including treatment for her right upper extremity, neck and complex regional pain syndrome.¹ Rizzo v. M.B.T.A., 16 Mass.

¹ The August 1, 2022, decision is hereinafter referred to as "Dec. I." On December 22, 2023, the administrative judge issued the hearing decision which is the subject of the appeal in this matter,

Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). On October 17, 2022, the employee filed a claim seeking § 34A permanent and total incapacity benefits, or, in the alternative, temporary partial incapacity benefits, from October 22, 2022, and continuing, plus benefits and interest pursuant to §§ 13, 13A. Rizzo, supra. On December 20, 2022, the administrative judge issued a § 10A conference order awarding the employee a closed period of § 34A benefits, followed by ongoing § 35 benefits.² (Dec. II, 3.) Both parties filed timely appeals. Pursuant to § 11A(2), the employee was examined by James T. McGlowan, M.D., on February 10, 2023. Rizzo, supra. On March 7, 2023, the administrative judge allowed the employee's motion for submission of additional evidence, based on a finding of medical complexity as well as the inadequacy of the impartial examiner's opinion regarding the diagnosis of chronic regional pain syndrome. (Dec. 11, 5.); Rizzo, supra.

A hearing *de novo* was held on May 18, 2023. Rizzo, supra. On July 17, 2023, the self-insurer moved to re-open the hearing and submit additional evidence, specifically surveillance and updated medical records, which was allowed. (Dec. II, 4.) On October 24, 2023, the employee filed a motion for an enhanced attorney's fee. On December 22, 2023, the administrative judge issued a decision ordering the self-insurer to pay § 34A permanent and total incapacity benefits at the rate of \$1,020.05 per week, based on an average weekly wage of \$1,530.08, from October 20, 2022,³ to date and continuing, along with an enhanced attorney's fee. (Dec. II, 14.)

hereinafter referred to as "Dec. II. The transcript from the second hearing is hereinafter referred to as "Tr. II."

² Per the conference order, the self-insurer was ordered to pay § 34A benefits at the rate of \$1,020.05 per week, based on an average weekly wage of \$1,530.08, from October 22, 2022 to October 22, 2023, plus ongoing § 35 benefits at the maximum rate of \$688.54 from October 23, 2023, to date and continuing. Additionally, the self-insurer was ordered to pay attorney fees and medical benefits pursuant to §§ 13A and 30. (Dec. II, 3.); Rizzo, supra.

³ Although the employee requested § 34A benefits to commence on October 22, 2022, the judge erroneously awarded those benefits from October 20, 2022. In its brief, the self-insurer made a general argument that the judge's decision contained "several factual errors of varying importance," indicating that the judge's purported lack of attention to detail may have affected

On appeal, the self-insurer argues that the administrative judge relied on legally insufficient evidence in finding that the employee was permanently and totally disabled. (Self-Ins. br. 25.) Specifically, the self-insurer argues that the administrative judge erred in adopting and relying on portions of the opinion of George Whitelaw, M.D. in his report dated July 11, 2022, as this report pre-dates the period of permanent and total incapacity claimed by the employee. Id. For the reasons discussed below, we find no error in the judge's decision.

The timeline of events is important to our analysis in this case. The hearing for the employee's claim for § 34 benefits was held on March 21, 2022. (Dec. I, 3.) The record was closed on July 6, 2022, and the hearing decision awarding the employee benefits pursuant to § 34 was filed by the judge on August 1, 2022. (Dec. I, 3,14.) On July 11, 2022, after the close of the record for that hearing, but prior to the issuance of the judge's decision, the employee was examined by Dr. Whitelaw. (Dec. II, Ex. 5.) Consequently, the report was neither submitted into evidence nor considered by the administrative judge in her August 1, 2022, decision. Rizzo, supra.

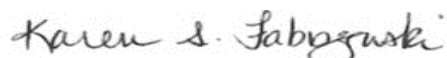
On October 17, 2022, the employee filed a claim seeking § 34A benefits, or, in the alternative, § 35 benefits, to commence upon the exhaustion of § 34 benefits. When the employee filed for these benefits on October 17, 2022, she included a copy of Dr. Whitelaw's July 11, 2022, report in support of her claim, Rizzo, supra., as required by 452 Code Mass. Regs. § 1.07(2)(f), which states, in relevant part:

Claims for benefits under M.G.L. c. 152, §§ 34, 34A and 35 shall be accompanied by a copy of a physician's report or record not more than six months old that describes the extent and duration of the employee's physical or emotional incapacity for work and which relates said incapacity to the claimed industrial injury.

the outcome of the case. (Self-Ins. br. 23.) Although the self-insurer gave several examples of alleged errors, none of which we find consequential, the self-insurer neither identified nor argued the commencement date of § 34A benefits as one of those errors. Therefore, we do not address it.

452 Code Mass. Regs. 1.07(2)(f). Dr. Whitelaw's July 11, 2022, report satisfied the filing requirements under the regulation because, at the time of filing, the report was less than six months old. Accordingly, it could be used to establish incapacity as of the date of filing of the claim. To prevail on her claim for § 34A permanent and total incapacity benefits, "[t]he employee need not show a worsening of the disabling condition, but must demonstrate only that the same level of impairment continues following the exhaustion of § 34 benefits." Andrews v. South Berkshire Janitorial Services, 16 Mass. Workers' Comp. Rep. 440, 441 (2002). "A conclusion on incapacity at any particular time has to be in part based on expert medical testimony." Dunham v. Western Massachusetts Hospital, 10 Mass. Workers' Comp. Rep. 818, 823 (1996). Here, the judge relied on the opinion of Dr. Whitelaw, as well as the other adopted medical evidence, including the expert opinion of Keisha Dodman, M.D., to determine that the employee remained disabled and was permanently and totally incapacitated from gainful employment following the exhaustion of her § 34 benefits. (Dec. II, 13.) Thus, finding no merit to the self-insurer's arguments, we affirm the decision of the administrative judge. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of \$1,900.55, plus necessary expenses.

So ordered.

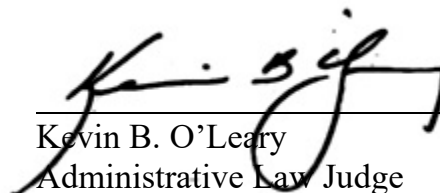


Karen S. Fabiszewski
Administrative Law Judge



Catherine Watson Koziol
Administrative Law Judge

Filed: September 26, 2025



Kevin B. O'Leary
Administrative Law Judge