COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023476-95**

John Jackson	Employee
Raytheon Company	Employer
Raytheon Corp.	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Maze-Rothstein and McCarthy)

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Donald E. Wallace, Esq., for the self-insurer

WILSON, J. The self-insurer appeals the administrative judge's decision in which the employee was awarded G. L. c. 152, § 34, benefits for temporary, total incapacity and § 34A benefits for permanent and total incapacity, following a prior award of § 35 benefits for partial incapacity. After a review of the record, we recommit the decision to the administrative judge for further findings on medical worsening.

The employee, John Jackson, was a fifty-four year old, married father of two adult children at the time of the administrative judge's most recent decision.[1] The employee earned three technical school diplomas: welding in 1972, plumbing in 1979 and small engine repair in 1988. On May 9, 1978, he began employment with Raytheon Company welding computer cabinets. In 1986, Mr. Jackson was recognized as welder of the year and was credited with providing a suggestion that improved efficiency. (Dec. 43.)

On June 18, 1995, the employee arrived at the workplace at approximately

[1] The decision on appeal is dated October 24, 2001. The judge issued two prior decisions in this case dated August 27, 1998 and February 28, 2001.

6:00 a.m. to work an overtime shift. At approximately 1:15 p.m., while the employee was welding a 270 pound piece of metal perched on a table, it began to fall and the employee instinctively attempted to catch the piece before it hit the floor. As he caught the piece, the employee felt immediate back pain. He completed the shift and continued to work despite pain. On July 6, 1995, however, the employee left work due to pain. On six occasions, most recently in February 1998, the employee attempted to return to work on a light duty basis. Each attempt was unsuccessful, ranging from one to eighteen consecutive workdays. (Dec. 43.)

Initially, the self-insurer accepted the employee's claim and then filed a request to modify or discontinue benefits. At hearing, the employee was allowed to add a claim for § 34A benefits which was resisted by the self-insurer. On August 27, 1998, the administrative judge issued a hearing decision that concluded on the evidence that the employee was partially incapacitated, and ordered the self-insurer to pay § 35 benefits for partial incapacity from exhaustion of § 34 benefits in August 1998. Following an appeal, the reviewing board recommitted the case to the judge for a determination of the basis and a date when the employee's incapacity changed from total to partial. See Jackson v. Raytheon Co., 15 Mass. Workers' Comp. Rep. 28 (2001). On February 28, 2001, the judge issued a second decision in which he determined that January 7, 1998, the date of the impartial examination, was supportable as the date of the change in incapacity status. (Exh. 6.)

Prior to the recommittal of the original decision, the employee filed claims for compensation pursuant to §§ 34 and 34A. The claims were denied at conference and the employee appealed to a hearing de novo. On July 10, 2001, the matter was heard before the same judge. (Dec. 42.)

On October 30, 2000, the employee was examined pursuant to G. L. c. 152, § 11A, by Dr. Richard A. Alemian, whose report of that date and deposition were

admitted into evidence. (Dec. 41, 42.)[2] The medical examiner noted spasms in the employee's paraspinal musculature and that he was listing to the right, as well as inconsistencies in the examination. The medical examiner's diagnoses were spinal stenosis, degenerative arthritis of the lumbar spine and disc disease status post excision of the discs at L4-5 on the left and L5-S1 on the right. He causally related his diagnosis to the June 18, 1995 work incident, in that it exacerbated a pre-existing condition in the employee's back.[3] (Dec. 44-45.) The medical examiner opined that the employee was partially medically disabled and could perform sedentary activities if he is able to sit, stand and move about as needed. He specifically determined that the employee should avoid extended walking, climbing, running or jumping, as well as lifting more than five to ten pounds, bending, pushing or pulling. It was the examiner's final appraisal that the employee had some physical capacity for work. (Dec. 45.)

On September 24, 2001, the administrative judge allowed the parties to submit additional medical evidence to cover the gap period prior to the latest impartial report. (Dec. 42.) The employee offered the medical records of Dr. Arthur P. Carriere, his current treating physician, and the self-insurer offered the medical report of Dr. Charles DiCecca.[4] Dr. Carriere diagnosed degenerative disc disease and chronic radiculitis and opined that the employee was totally disabled as a result of the work injury. (Dec. 45.) Dr. DiCecca stated that the employee magnified his symptoms, exaggerated his difficulties and had a sedentary work capacity. He opined that the employee's low back problems were not related to the 1995 work incident. (Dec. 46.)

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[2] The prior report of the same impartial examiner, dated the day of his examination on January 7, 1998, was also entered into evidence. (Dec. 42.)

[3] Section 1(7A) and its elevated standard of "a major" cause was not raised by the insurer. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000).

[4] Dr. DiCecca had examined the employee, at the request of the self-insurer, on June 26, 2000. (Dec. 45.)

Vocational assessments were also entered into evidence. The employee submitted the assessment of Emmanuel Green, Ph.D., a vocational psychologist, and the self-insurer submitted the assessments of Amy Vercillo.[5] Dr. Green had interviewed the employee on two occasions and opined that from a vocational perspective, the employee could not return to any type of non-trifling work. (Dec. 46-47.) Ms. Vercillo stated that the employee had transferable skills involving the laying out of welding materials and equipment and repairing welding products and equipment. She believed that the employee could perform the duties of welding supervisor, welding machine feeder, parts cataloger, shipping checker, traffic clerk and scheduler and planner, if his job responsibilities were kept within a sedentary classification. (Dec. 47.)

In finding the employee permanently and totally incapacitated, the administrative judge relied on the credible testimony of the employee that his pain is worse than in 1998 and Dr. Green's vocational assessment. Id. Additionally, he adopted the § 11A examiner's opinion on continuing causation and his finding of a substantial permanent disability with limitations that permit only sedentary activities. The judge reasoned that, taken together, the impartial examiner's opinion, the employee's age, his labor-intensive work history, including six unsuccessful attempts to return to light duty, the persuasive vocational opinion of Dr. Green, and the medical opinion of Dr. Carriere warranted a finding of permanent and total incapacity. [6] (Dec. 47-48.) Hence, the judge ordered the self-insurer to pay § 34 benefits from April 26, 1999 through exhaustion and § 34A benefits thereafter. (Dec. 48.)

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[5] Ms. Vercillo wrote two vocational assessments: one dated February 29, 2000 and the second dated July 5, 2001. She never met with the employee, and relied on the § 11A examiner's medical reports as her source of medical information. (Dec. 47.)

[6] We note that although Dr. Carriere, the employee's treating physician, has continued to opine total medical disability over time, reporting "significant complaints of pain" on September 6, 2000 and "significant pain" on August 31, 1998, his medical opinion was admitted "for the limited purpose of filling the gap period." (Dec. 41, 42.) Any reliance by the judge upon that medical opinion beyond the gap period would constitute error.

As a general matter, this analysis would suffice to support the award of § 34 benefits for total incapacity followed by § 34A benefits for permanent and total incapacity. But where the employee has been collecting ongoing § 35 benefits for partial incapacity since January 7, 1998, pursuant to the August 1998 decision, we agree with the self-insurer that the change in earning capacity status from partial to total lacks support, absent an analysis and finding of worsening in the employee's physical condition sufficient to justify that change in benefits. The employee must show, and the judge's findings should illustrate, a work-related change or deterioration in his condition that reduces his ability to work. See Foley's Case, 358 Mass. 230, 232-233 (1970); L. Locke, Workmen's Compensation § 345 (2d. ed. 1992).

Although the judge credited the employee's complaints of increased pain, (Dec. 47), it is unclear whether he believed that the employee's physical condition had deteriorated from that he found when he previously awarded § 35 benefits commencing January 7, 1998.[7] An administrative judge need not utilize the word "worsening" in assessing the employee's condition, but he should use language that precisely addresses the issue. Taylor v. Congeneration Mgt. Co., Inc., 9 Mass. Workers' Comp. Rep. 392, 395 (1995). Certainly, the credibility determination regarding the employee's assertions of increased pain is within the exclusive province of the administrative judge, Ighodaro v. All-Care Visiting Nurse Ass'n, 12 Mass. Workers' Comp. Rep. 415 (1998), and a judge may consider the employee's pain to find total incapacity despite a medical opinion that the employee has some physical ability to work. Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990).

Nevertheless, the judge on recommittal needs to assess the effect of the pain on the employee's present condition and his physical ability to work by reviewing the medical and lay evidence before him, and comparing that to his

[7] As the employee seeks total incapacity benefits from April 5, 1999, (Dec. 40), his burden is to prove a deterioration in his medical condition sufficient to affect his capacity to work as of that date and continuing.

findings on the employee's condition at the time of the finding of partial incapacity. The deficiency in this case is that the administrative judge never clearly outlined a position as to the deterioration of the employee's medical condition and its effect on his ability to work. See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), citing Zucchi's Case, 310 Mass. 130, 133 (1941)(It is the duty of the administrative judge to make such specific and definite findings as will enable the reviewing board to determine with reasonable certainty whether correct rules of law were applied to facts that were properly found).

Accordingly, we recommit the decision to the administrative judge for further findings consistent with this opinion.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 8, 2003**

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge