

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 057504-98

John L. Cronin
Consolidated Fabricators
Liberty Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Fabricant)

APPEARANCES

Paul L. Durkee, Esq., for the employee
Nicole M. Edmonds, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee temporary total incapacity benefits. Of the arguments presented on appeal, we address one and otherwise summarily affirm the decision. Because we consider that the judge's subsidiary findings of fact and vocational analysis soundly supported his award of benefits, we affirm the decision.

Mr. Cronin, age sixty-one (61) at the time of hearing, has a 9th grade education.¹ His work from 1982 to 1997 was as a glazer/fabricator, a heavy, strenuous and exertional job. In 1997, he became a saw operator doing repetitive heavy lifting. On February 25, 1998, the employee had an industrial accident resulting in multiple injuries to his upper and lower extremities, knees, hips, back and neck, when he was struck by very heavy sheets of steel and knocked to the ground. (Dec. 3.) The insurer accepted the injury. (Dec. 2.) After returning to work at his regular shift, the employee went to second shift with lighter duties in August, 1998. (Dec. 3; Tr. 19-25, 57, 58.) However, even at the modified, lighter duty job, the employee could not keep up with production due to constant pain. (Dec. 3-4.) The employer terminated the employee in October 2002, at which time the

¹ Although the administrative judge states that the employee has a GED, the employee testified he did not have a GED. (Tr. 7.)

employee received unemployment compensation benefits for several months.² The employee then claimed § 34 benefits, commencing with the termination of unemployment benefits on July 6, 2003. (Dec. 2.)

The judge awarded § 35 partial incapacity benefits as a result of the § 10A conference, which order both parties appealed to a hearing de novo. (Dec. 1.) The employee underwent an impartial medical examination pursuant to the provisions of G. L. c. 152, § 11A(2). The impartial physician opined that the employee suffered from a permanent partial disability due to the multiple contusions and tendonitis of various body parts resulting from his industrial accident. The doctor noted that further EMG study would be appropriate for the employee's continuing complaint of right leg weakness. The doctor felt that the employee was not yet at a medical end result. He restricted the employee to working in a modified environment so long as he avoided repetitive bending, twisting and lifting more than 25 pounds, with the ability to stand up, walk and sit and change positions. The judge adopted the impartial physician's opinions.³ (Dec. 5.)

The judge credited the employee's complaints of worsening pain over the time in which he was performing the second shift lighter duty with the employer, and that the employee worked with that constant pain by persevering and taking medication. The judge did not credit the testimony of the employer's witnesses that the employee was let go due to a work shortage, and found instead that the employee was simply terminated due to his injuries and inability to do substantial work. (Dec. 3-4.) The judge found that the employee was incapacitated from all work due to his constant pain, his inability to walk for more than 10-12 minutes, his need to take pain medication, and his need to lie down several times a day. (Dec. 4.) The judge then specifically found:

[T]he employee was able to perform the modified adjusted work until he was terminated because it accommodated his necessary restrictions up to that time. He had ready access to equipment to move material. He could work at a slower pace and rest during the shift and no unloading was required and production requirements were less. No such job has been identified on the open labor market

² Although there is no record evidence that the employee received unemployment compensation benefits, counsel for the employee acknowledged that this was the case. (Tr. 4.)

³ The judge allowed additional medical evidence due to the complexity of the medical issues, see § 11A(2), but did not adopt any of the parties' submissions. (Dec. 1, 5.)

to allow this employee to return to the labor force. The employee has only limited transferable skills as referred to and the last twenty years he has done nothing but heavy exertional strenuous work. He has no skills that permit him that I find will allow [sic] any other employment since he was terminated.

(Dec. 4.) The judge therefore awarded the employee the continuing § 34 benefits claimed.

(Dec. 7.) The insurer's argument that we address is that the judge's subsidiary findings of fact fail to support his conclusion that the employee is totally incapacitated, given that he worked full time after his injury and then collected unemployment benefits. (See n.1, supra.) We disagree. The judge's findings sufficiently describe how the employee came to be unable to perform substantial and non-trifling work.

Although the employee had a second shift, modified duty job, his pain continued in his knees, back, hip and arm. Walking became more painful; he needed medication for pain; he had difficulty keeping up. (Dec. 3-4.) The judge found that the employer terminated the employee from that position, assigned another employee to take over the employee's duties, and that he was the only employee let go at that time. (Dec. 4.)

The judge found that the employee could perform the modified duty job, which included significant accommodations for his pain and lack of productivity. However, he also found that "[no] such job has been identified on the open labor market to allow this employee to return to the labor force." (Dec. 4.) Moreover, the employee had only limited transferable skills, having performed almost exclusively heavy and strenuous work for the last 20 years. The judge found security work not suitable given the employee's overwhelming physical restrictions, especially in that he must rest several times during the day or night. (Dec. 4-5.)

Based on the restrictions of the § 11A physician and the employee's credible testimony on his pain, the judge concluded, that the employee was not even capable of a light duty or sedentary job, given his need for rest and pain medication throughout the day. Cf. Wheeler v. Yellow Freight Sys., Inc., 17 Mass. Workers' Comp. Rep. 194 (2003)(judge discredited employee's testimony on need to take pain medication). We see no deficiencies in the judge's vocational analysis. See Scheffler's Case, 419 Mass. 251, 256-258 (1994); Frennier's Case, 318 Mass. 635, 639 (1945).

We reject out of hand the insurer's contentions that the second shift job was not "modified" duty. The judge found that it was, based on the employee's credited testimony, and the insurer's references to the testimony of the employer's witnesses - not credited by the judge - do not advance its argument.

The insurer also contends that the employee's receipt of unemployment compensation benefits from the time he was fired until July 6, 2003 is further evidence of his ability to work during the period commencing with the termination of those unemployment benefits. We do not agree. Receipt of unemployment compensation benefits is consistent with partial incapacity. G. L. c. 152, § 36B(2). The judge's findings as to the post-injury modified job held by the employee until he was fired (due to his increasing inability to perform even that job), establish the employee's partial incapacity prior to his receipt of unemployment compensation benefits.⁴ While receiving unemployment compensation benefits the employee could have also claimed partial workers' compensation benefits, but chose not to do so.⁵ As noted above, the judge's findings that the employee had no capacity to earn in the general labor market as of July 2003 were supported by the evidence, and not tainted by error of law. See generally Bradley's Case, 56 Mass. App. Ct. 359, 361-365 (2002)(discussing coordination of benefits under unemployment and workers' compensation systems) and supra at 362, n.5, quoting 4 Larson's Workers' Compensation Law § 84.05 (1999): "At first glance the two [systems] may appear mutually exclusive; but the inconsistency disappears when the special meaning of disability in workers' compensation is remembered, involving . . . the possibility of some physical capacity for work which is thwarted by the inability to get a job for physical reasons."

⁴ We note, however, the employee was being paid his wage while working less than full duty. See Sardinha v. Woodman Corp., 19 Mass. Workers' Comp. Rep. 6 (2005)(earning full pay for less than full duty not a bar to findings of lesser earning capacity in the general labor market when light duty job ended).

⁵ Under G. L. c. 152, § 36B(2), "[a]ny employee claiming or receiving benefits under section thirty-five who may be entitled to unemployment compensation benefits shall upon written request from the insurer apply for such benefits . . . Any unemployment compensation benefits received shall be credited against partial disability benefits payable for the same time period"

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Accordingly, the decision is affirmed. Pursuant to § 13A(6), employee's counsel is awarded a fee of \$1,312.21.

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: August 11, 2005