COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056938-00**

John MacEachern	Employee
Trace Construction Co.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Fabricant)

APPEARANCES
Chester L. Tennyson, Jr., Esq., for the employee
Nicole M. Edmonds, Esq., for the insurer at hearing and on brief
Thomas E. Fleischer, Esq., for the insurer at oral argument

COSTIGAN, J. The insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits and § 36 benefits for permanent loss of function of the right major arm. The insurer does not challenge the finding of permanent and total incapacity *per se*, but rather the award of § 34A benefits retroactive to a date some six months prior to the initial date claimed by the employee. As to the § 36 award, the insurer argues that the judge misconstrued the expert medical opinion he adopted to find a 100 percent permanent loss of function of the employee's right major arm. Finding merit in only the first of the insurer's arguments, we vacate so much of the award of § 34A benefits as the employee did not claim, and we affirm the award of § 36 benefits, for the following reasons.

The employee sustained multiple serious injuries when he fell fifteen feet through a ceiling onto the floor below on August 22, 2000, while working as a construction laborer for the employer. He underwent several surgeries to his right major hand and wrist. The judge found:

> [I]t is unlikely that [the employee] will ever regain use of his right major hand. There is no prognosis for further improvement. He is left with a grotesque, white-purplish, blotted, spastic, cold, cadaveric hand.

(Dec. 3.)

The insurer accepted liability for the employee's injury and paid § 34 total incapacity benefits and medical benefits. Its complaint for modification of weekly compensation, and the employee's § 36 claim, were denied following a § 10A conference in October 2002, and both parties appealed. Prior to the hearing de novo, the employee was allowed to join a claim for § 34A permanent and total incapacity benefits or, in the alternative, § 35 partial incapacity benefits. Because the insurer withdrew its appeal of the conference order,[1] the hearing proceeded on the employee's claims only. (Dec. 1.)

On February 11, 2003, the employee underwent an impartial medical examination by Dr. Anthony R. Caprio. The administrative judge described Dr. Caprio's assessment of the employee's loss of function claim:

> Dr. Caprio opines that the employee has undergone a series of operations and intensive physical therapy and is left with severe restricted motion, violaceous painful deformed *hand, which is totally useless*. . . . Dr. Caprio opines that *the employee's right hand is completely useless* as a functioning extremity and he will have to become left hand dominant and trained to use his left hand. . . .
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> Dr. Caprio regarding the claim for Section 36 benefits for permanent loss of function of his right major arm opines that *the employee has a permanent loss of function of the right hand which equates to 100% of the right major arm by virtue of the fact that the arm is "useless" and takes into consideration the loss of any functional strength and the applicable AMA guidelines.*

(Dec. 4; emphases added.) The insurer challenges the judge's interpretation of Dr. Caprio's opinion on permanent loss of function. Certainly the record reflects that Dr. Caprio's opinions as to permanent impairment were many and varied, and he

[1] The insurer's "Notification of Withdrawal of Claim or Complaint" form, dated August 29, 2003, one week after the employee's § 34 benefits were exhausted, was received by the department on September 4, 2003. We take judicial notice of this document, contained in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

acknowledged considerable difficulty in applying the American Medical Association "Guides to the Evaluation of Permanent Impairment" (AMA Guides) to which our statute refers.[2] (Dep. 31-32, 41-44, 50-52.) However, in our view, Dr. Caprio ultimately expressed an opinion which accurately reflected, and conformed to, the AMA Guides, and which fully warranted the judge's finding of a 100 percent loss of function of the employee's right major arm:

> A. It really amazed me, I was looking in the book last night, how little it gives you -- see, the hand is the major part of the whole upper extremity. It doesn't matter if you have a good elbow or shoulder, *if you don't have a hand for all intenses [sic] and purposes, you don't have an arm. So the hand is the major part. So in the hand part, there's very little difference between the hand and the upper extremities, maybe a couple of points difference.*

(Dep. 50)

According to the AMA Guides, 5th Ed. (2001), of which we take judicial notice, a 100 percent impairment of the hand (major or minor) converts to a 90 percent impairment of the upper extremity. Id. at 439. (See Table 16-2, entitled "Conversion of Impairment of the Hand to Impairment of the Upper Extremity.") Thus, Dr. Caprio was correct when he stated that "the hand is the major part of the whole upper extremity," and "there's very little difference between the hand and the upper extremities, maybe a couple of points difference." (Dep. 50.) Moreover, the AMA Guides provide for consideration of pain factors in determining the extent of impairment. (See, generally, § 16.5e entitled "Complex Regional Pain Syndromes (CRPS), Reflex Sympathetic Dystrophy (CRPS I), and Causalgia (CRPS II)." AMA Guides, supra at 495-496. Based on his extensive

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[2] General Laws c. 152, § 36(2), provides:

> Where applicable, losses under this section shall be determined in accordance with standards set forth in the American Medical Association Guides to the Evaluation of Permanent Impairments. Nothing in this section shall adversely affect the employee's rights to compensation which is or may become due under the provisions of any other section.

review of the medical records provided to him[3] in conjunction with his physical examination of the employee, Dr. Caprio agreed with Dr. Graf's RSD diagnosis, which he also called chronic complex pain syndrome, (Ex. 1, 7) and chronic pain syndrome. (Dep. 14-15.)

Based on those pain factors, and the 90% functional loss, the judge rationally read the doctor's opinion as determining a 100 percent permanent impairment of the employee's right major arm. We will not reverse a judge's factual findings unless they are wholly lacking in evidentiary support. Phillips v. Armstrong World Indus., 5 Mass. Workers' Comp. Rep. 383, 384 (1991). The impartial medical evidence the judge adopted, and indeed the opinion of the insurer's own medical expert,[4] support the judge's conclusion that the employee's

[3] Dr. Caprio reviewed the reports of Drs. Shufflebarger, Graf, Nicoletta, Paly and Kolb and the medical records of Physiotherapy Atlantic and Beverly Hospital. X-rays of the right forearm showed a displaced fracture of the distal radius and the employee underwent an open reduction with internal fixation with application of a bone graft. As Dr. Caprio noted, "It's the distal radius . . . that caused this guy a lot of problems." (Dep. 7.) The employee eventually developed post traumatic degenerative and early arthritic changes in the right wrist. Dr. Graf suspected reflex sympathetic dystrophy (RSD) of the right wrist and forearm, and Dr. Shufflebarger likewise diagnosed chronic ongoing RSD. In his § 11A report, Dr. Caprio noted all of the above history, as well as the July 10, 2002 report of Dr. Shufflebarger, in which the doctor "felt the patient was incapable of basically feeding himself, brushing his teeth or doing other types of things with his right upper extremity . . . . (and was) getting progressively worse." (Ex. 1, 5.) Dr. Caprio found the employee incapable of shaking hands, and incapable of picking up keys or loose change with his right hand. (Ex. 1, 6.)

[4] Additional medical testimony was authorized due to the complexity of the medical issues involved. (Dec. 2.) Notwithstanding the provisions of 452 Code Mass. Regs. § 1.11(6)("a party may offer as evidence medical reports prepared by physicians engaged by said party. . . ."), the employee's submission included two reports by Dr. John V. Shufflebarger, who apparently evaluated the employee twice on behalf of the insurer. In his July 10, 2002 report, Dr. Shufflebarger wrote of the employee:

> He comes in today with a request for a comment on *his loss of function of the right upper extremity, which I find to be 100%* for all intensive [sic] purposes. He is right-handed and is unable basically to feed himself or even brush his teeth with his right upper extremity. The problem is a culmination of loss of function in both sensation, range of motion and a *complex pain syndrome* which he is suffering from. (Ex. 5; emphasis added.)

arm is virtually useless. Therefore, we affirm his award of § 36 (1)(e) benefits in the amount of $32,236.67.[5] Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273, 276 (1999), citing Reis v. Anchor Motor Freight Inc., 9 Mass. Workers' Comp. Rep. 82, 84-85 (1995)(if a factual finding is supported by competent evidence in the record and is based upon correct legal principles, we must affirm it). See also, Buck's Case, 342 Mass. 766 (1961)(if there is any evidence, including rational inferences of which evidence is susceptible, upon which findings could have been made, we do not disturb the findings unless they are vitiated by some error of law); Scheffler's Case, 419 Mass. 251 (1994).

As to the § 34A award, in finding the employee permanently and totally incapacitated, the judge rejected Dr. Caprio's opinion that the employee's disability was partial, and that he "is capable of doing any job that a 'one-handed' man can do." (Dec. 4; Dep. 40-41.) The judge performed a thorough vocational analysis, Scheffler's Case, supra, and determined that the employee, whose work experience was limited to non-skilled jobs involving heavy, strenuous and intensive physical labor, (Dec. 3), had no transferable skills for work using only his left minor upper extremity. Against the backdrop of the employee's diagnosed chronic pain syndrome, and his credited testimony regarding that pain and his physical restrictions, the judge properly determined the employee was permanently and totally incapacitated from gainful employment. Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 370 (2005), citing Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990)(judge's belief of employee's complaints of pain may provide basis for

[5] General Laws c. 152, § 36(1)(e), provides, in pertinent part:

> For the amputation or permanent, total loss of use of the major arm, a sum equal to the average weekly wage in the commonwealth at the date of injury multiplied by forty-three. . . .

The judge's award of $32,236.67 represents the $749.69 average weekly wage in the commonwealth on the employee's August 22, 2000 date of injury, multiplied by 43.

finding of total incapacity in face of medical opinion of only partial disability). Indeed, the insurer does not challenge the finding of permanent and total incapacity *per se*, but rather the award of § 34A benefits for a period not claimed by the employee, that is, from February 11, 2003 through August 22, 2003. We agree this was error.

It is the administrative judge's responsibility to "set forth the issues in controversy, the decision on each, and a brief statement of the grounds for each such decision." G. L. c. 152, § 11B. The record reflects that the employee claimed § 34A benefits or, in the alternative, § 35 benefits, from and after August 23, 2003, that is, upon the exhaustion of the 156-week statutory maximum entitlement for § 34 benefits. (Employee Ex. 2.) The administrative judge acknowledged the parameters of the employee's claim. "And the employee's claims for 34A or 35 in the alternative would commence on August 23, 2003 to date and continuing." (Tr. 4.) "The Employee's claims are: 1) Section 34A, permanent incapacity benefits from August 23, 2003 to date and continuing. 2) Section 35, partial incapacity benefits from August 23, 2003 to date and continuing. . . ." (Dec. 2.)

It is established that § 34 total incapacity benefits need not be exhausted before § 34A permanent and total incapacity benefits may be claimed and awarded. Slater's Case, 55 Mass. App. Ct. 326 (2002). Moreover, as a general principle, factual findings as to when incapacity, be it total or partial, temporary or permanent, begins or ends must be grounded in the evidence found credible by the judge. Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 196 (2005), citing Skalski v. Phoenix Home Life, 13 Mass. Workers' Comp. Rep. 114, 116 (1999); but see Valler v. K. Trucking & Sons, Inc., 19 Mass. Workers' Comp. Rep. 295 (2005)("Because the insurer does not now argue that the § 34A award [per se] is unsupported, we think the actual [§ 34] exhaustion date is the only appropriate date in the evidence for the commencement of such permanent and total incapacity benefit payments.")

However, such factual findings as to incapacity are not dispositive of what the award of incapacity benefits should be. They are two different things. In the absence of a motion by the employee to amend his claim, or some indication in the record that § 34A entitlement during this period was tried by consent, Freeman v. University of Mass., Boston, 18 Mass. Workers' Comp. Rep. 138 (2004), the judge should not have awarded § 34A benefits for a six-month period not claimed. We are not putting form over substance when we restrict a judge to deciding the claim(s) presented for adjudication, and nothing more. "It is not a judge's function to be the trial strategist for any litigant[,]" any more than it is a judge's duty "to interfere with trial counsel's strategy." Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). "Where there is no claim, and therefore, no dispute . . . the judge strayed from the parameters of the case and erred in making findings on [an] issue not properly before him." Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31, 32 (2006), quoting Medley v. E.F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994).

Here, prior to hearing, the insurer withdrew its modification complaint, filed on February 22, 2002,[6] and continued to pay the employee § 34 benefits to statutory exhaustion on August 22, 2003, thereby conceding total incapacity for that eighteen-month period. The employee claimed § 34A benefits only from and after August 23, 2003. Thus, *there was no medical issue in dispute prior to August 23, 2003*. Certainly permanency was not at issue. "The parties had framed the boundaries of their disagreement when they set out the specific claims and defenses raised. We agree that the judge expanded the parameters of the dispute." Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000), citing Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997).

[6] We take judicial notice of the document contained in the board file. See Rizzo, supra.

Based on the insurer's withdrawal of its modification complaint, the employee is entitled to the § 34 benefits he was paid from the filing date of the complaint to statutory exhaustion. See Valler, supra. The employee is also entitled to § 34A benefits thereafter. However, for the reasons set forth, we vacate the award of § 34A benefits for the period from February 11, 2003 through August 22, 2003.[7] The award of § 36(1)(e) in the amount of $32,236.67 is affirmed.

Pursuant to § 13A(6), the insurer is to pay employee's counsel a fee in the amount of $1,407.15.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **February 15, 2007**

[7] Before the insurer acts to effect recoupment under § 11D(3), it should note, as we do, that there is no impediment to the employee filing a claim for that same six-month period of § 34A benefits, and/or for § 36(k) benefits, based on the disfigurement to his hand so vividly described by Dr. Caprio and the judge.