

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 017870-04**

Joseph Deburgo  
Walker Electric Inc.  
Travelers Indemnity Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabricant, Harpin and Koziol)

The case was heard by Administrative Judge Vieira.

**APPEARANCES**

Charles E. Berg, Esq., for the employee at hearing and on appeal  
David G. Braithwaite, Esq., for the insurer at hearing  
Paul R. Ingraham, Esq., for the insurer at hearing and on appeal

**FABRICANT, J.** The insurer appeals from a decision awarding the employee permanent and total incapacity benefits pursuant to § 34A, from November 5, 2012, to date and continuing. We vacate the decision and recommit for the judge to make findings whether the employee's condition has worsened, either medically or vocationally, sufficiently to support a § 34A award.

The employee fell at work on June 16, 2004, and sustained the following injuries: degenerative disc disease of the cervical spine with superimposed strain, degenerative disc disease of the lumbar spine with superimposed strain, A/C arthritis of the right shoulder, right shoulder impingement syndrome, right distal radius fracture with residual symptoms, and left wrist sprain with residual symptoms. (Statutory Ex. B.) Presently, the employee claims injury to his left shoulder, for which the insurer is currently disputing liability. (Dec. 6.)

The initial claims in this matter were previously tried at hearing on two occasions. A hearing decision was filed on June 29, 2007, before a different administrative judge, wherein a closed period of §34 temporary total benefits was ordered. A second hearing decision was filed on February 27, 2009, before the same judge, wherein the employee

was awarded §35 temporary partial incapacity benefits in the amount of \$279.12, based on an earning capacity of \$320.00 and an average weekly wage of \$785.21, from February 17, 2007 and continuing.<sup>1</sup> The decision was appealed to the reviewing board and was affirmed on May 5, 2010. The employee's §35 benefits having exhausted, his claim for §34 and/or §34A came on for conference under §10A of the Act on April 2, 2013. An order was filed on April 24, 2013, denying the claim. The employee appealed and the claim was heard at a *de novo* hearing on May 19, 2014. (Dec. 2-3.)

Dr. Parakrama Ananta, the impartial physician appointed pursuant to §11A(2), examined the employee on January 28, 2014. The judge found the report inadequate pursuant to G. L. c. 152, §11A. See Stafford v. Worcester Housing Authority, 10 Mass. Workers Comp. Rep. 339 (1996). The parties were given leave to submit additional medical evidence. (Dec. 4.)

Dr. Olarewaju Oladipo prepared two reports for the employee dated July 17, 2007 and November 17, 2014. Dr. Oladipo diagnosed persistent back pain with underlying degenerative disc disease; persistent neck pain with underlying degenerative cervical disc disease; bilateral shoulder pain related to shoulder tendinitis and impingement syndrome; right wrist pain due to a treated reduced fracture; and, resolved left wrist sprain.<sup>2</sup> Restrictions pertaining to the low back included no lifting of objects weighing over ten pounds, avoiding repetitive lifting, bending, squatting and no prolonged sitting or standing. He gave the employee restrictions prohibiting activity that requires repetitive turning of the neck or sitting in a position where the neck is flexed forward for a prolonged period. Dr. Oladipo also addressed the employee's right shoulder complaints and placed restrictions on overhead motions, or activities requiring the employee to operate at a height. He placed restrictions on repetitive use of the right and left wrists, although he did state he did not see that as a major limitation. Regarding the left

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<sup>1</sup> Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of board file).

<sup>2</sup> Dr. Oladipo's opinions were based on the employee's history of ongoing symptoms and the clinical assessment, which was indicative of underlying pathology, particularly with respect to the shoulders, cervical spine and lumbar spine. (Dec. 12.)

shoulder, Dr. Oladipo placed restrictions on overhead motion, heavy lifting, and activities that require the shoulder to be elevated for a prolonged time, such as driving in excess of two hours at a time. He concluded that the employee is at an end result, and those conditions would not be expected to improve significantly in the foreseeable future. He opined the employee was totally disabled as a result of the work related injury sustained on June 16, 2004, requiring long-term pain management treatment with medication and interventional procedures (epidural and facet joint injections), along with physical rehabilitation for his active shoulder symptoms. (Dec. 12-13.) The judge adopted Dr. Oladipo's opinion as to the causal connection between the employee's left shoulder and his workplace injury on June 16, 2004. (Dec. 4.)

As for the employee's vocational profile, the judge found:

given the Employee's limited vocational history, the fact that he does not have an electrician's license and could only work under a master or journeyman electrician and the physical limitations placed on the Employee[,] he is precluded from performing any meaningful work. The limitations placed on him include no repetitive bending, stooping, squatting, twisting, lifting more than ten pounds, sitting or standing more than half an hour at a time and driving more than two hours. Given the numerous restrictions, his lack of transferable skills, education and age, I find the Employee to be permanently and totally disabled.

(Dec. 13.)

Of the insurer's arguments on appeal, we find one persuasive.<sup>3</sup> The judge did not make any findings with respect to the prior adjudication and award of \$35 partial incapacity benefits at the 2009 hearing. A prior hearing decision finding only partial incapacity, such as we have here, triggers the rule that in order to support a change from partial to total incapacity benefits, an employee must prove a *worsening* of condition.

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<sup>3</sup> The insurer contests liability for the employee's left shoulder and raises the defense of §1(7A). The judge has sufficiently addressed the § 1(7A) issue such that we can determine with reasonable certainty that the correct rules of law have been applied to the facts that could be properly found. See Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45 (1993). To the extent the insurer's argument implies that the prior decisions, which did not discuss the left shoulder, prohibit the judge from now finding the employee's injury included the left shoulder, we note that the insurer did not raise collateral estoppel as an affirmative defense at hearing, (Dec. 3), therefore the issue is waived.

Manzi v. Beverly Housing Authority, 19 Mass. Workers' Comp. Rep. 180 (2005). Where a claim for §34A permanent and total incapacity benefits is made after an adjudication awarding §35 benefits, "the burden . . . [is] upon [the employee] to prove he [is] now totally incapacitated as a result of his accident." Foley's Case, 358 Mass. 230, 232 (1970). Thus, there is a required showing of a "change in the employee's condition . . . not due to advancing age." Id. The "change" necessary for a move from a prior judicial finding of partial incapacity to total incapacity is "deterioration." Id. See, e.g., Lee v. General Investment and Development, 18 Mass. Workers' Comp. Rep. 211, 212 (2004)(rule applies only when the partial incapacity benefits were ordered in a hearing decision on the merits of the employee's claim).

As a general rule, proof of worsening or deterioration must be supported, at least in part, with medical evidence. Manzi supra at 4, See, e.g., Foley, supra; McEwen's Case, 369 Mass. 851, 854 (1976); Desrosiers v. Lakeville Hospital, 17 Mass. Workers' Comp. Rep. 549 (2003); Souza v. Harvard University, 17 Mass. Workers' Comp. Rep. 248, 249-250 (2003). However, we have recognized that vocational worsening may also satisfy Foley. Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94 (2003)(vocational worsening can be factored into incapacity analysis insofar as it reflects external factors, not the employee's personal vocational history). To the extent that such external vocational factors may be found to have caused a vocational worsening, we have determined that such worsening alone may support an employee's burden in a Foley situation.

On recommittal, the judge must consider the employee's burden of proof and compare the employee's medical condition at the time of the prior hearing to that which existed at the time of the present hearing, and compare the employee's transferable skills and vocational findings appearing in the prior hearing decision (Exhibit C), to those which existed at the time of the present hearing. Accordingly, we vacate the award of § 34A benefits and recommit the case for further findings of fact consistent with this opinion.

So ordered.

**Joseph Deburgo**  
**Board No. 017870-04**

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Bernard W. Fabricant  
Administrative Law Judge

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Catherine Watson Koziol  
Administrative Law Judge

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William C. Harpin  
Administrative Law Judge

**Filed: November 27, 2018**