COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017706-18**

Kenneth F. Bergstrom	Employee
Wyman-Gordon Company	Employer
Ace American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Fabricant and Koziol)

The case was heard by Administrative Judge Sherry

APPEARANCES
Ronald F. Belluso, Esq., for the employee
W. Todd Huston, Esq., for the insurer

FABISZEWSKI, J. The insurer appeals from the administrative judge's decision awarding the employee a period of § 34 temporary total incapacity benefits followed by § 34A permanent and total incapacity benefits and medical benefits pursuant to §§ 13 and 30.[1] On appeal, the insurer raises six arguments, four of which we summarily affirm. Because we find merit in two of the insurer's arguments related to the judge's failure to address the insurer's defense pursuant to § 35E and the commencement date ordered for the award of § 34A benefits, we vacate the administrative judge's decision and recommit the case for further findings of fact and rulings of law consistent with this decision.

The facts pertinent to the issues raised on appeal are summarized below. On June 28, 2018, the employee was a sixty-three year old plumber who injured his left knee in a fall from a ladder while working for the employer. (Dec. 6.); Rizzo v. M.B.T.A., 16

[1] The administrative judge ordered the insurer to pay § 34 temporary total incapacity benefits in the amount of $906.03 per week from January 1, 2020, to June 27, 2021, followed by § 34A permanent and total incapacity benefits in the amount of $1,006.70 per week from June 28, 2021, to date and continuing, plus medical expenses pursuant to §§ 13 and 30. (Dec. 24.)

Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). He continued to work in a light duty capacity, with no loss of pay, until October 4, 2018, when he underwent a left knee arthroscopy, partial medial meniscectomy and synovectomy. (Dec. 6,10.) After surgery, despite some improvement in range of motion and strength, the employee continued to experience pain, swelling, tenderness and effusion in his left knee. (Dec. 10,11.) On or about April 25, 2019, the employee caught his foot on the rim at the bottom of the shower and felt increased pain in his left knee. (Dec. 6.) The employee underwent an MRI in July 2019 which revealed post-operative changes, as well as a tear to the lateral meniscus and arthritis. (Dec. 12.)

In 2017, prior to his industrial injury, the employee communicated with Deb Harmon, the employer's Manager of Human Resources and Benefits, regarding retirement. (Dec. 7, Tr. I, 129.) By letter dated September 27, 2017, Ms. Harmon provided the employee with information regarding the calculation of his retirement benefits at age sixty-five, along with an explanation of benefit options. (Ex. 7.) However, the employee never filed for retirement, established a retirement date or executed any retirement documents. (Dec. 7.)

The insurer accepted liability for the employee's injury and paid § 34 temporary total incapacity benefits following the employee's October 2018 surgery through December 31, 2019, followed by § 35 temporary partial incapacity benefits. (Dec. 5, 6.) On June 24, 2019, the insurer filed a Complaint for Modification, Discontinuance or Recoupment of Compensation (Form 108), seeking to discontinue benefits based on the report of James Nairus, M.D., dated May 31, 2019. Rizzo, supra. On August 25, 2019, a §10A conference was held before Administrative Judge Matthew F. King, who, on August 29, 2019, ordered a modification of benefits from § 34 to § 35, at the rate of $678.78 per week, based on an average weekly wage of $1,510.05. (Dec. 3.) Both parties filed timely appeals. On September 9, 2019, Judge King allowed the employee's Motion to Join a Claim for Left Knee Surgery. Pursuant to § 11A(2), the employee was examined by John Corsetti, M.D., on October 31, 2019.

On October 7, 2020, Judge King allowed the insurer's Motion to Join G.L. c. 152, § 35E to the insurer's complaint to discontinue benefits.[2] Rizzo, supra. On October 23, 2020, Judge King allowed the Employee's Motion to Submit Additional Medical Evidence based on complexity. The case was subsequently assigned to the present administrative judge. Rizzo, supra. On March 22, 2022, the judge allowed the employee's Motion to Join a Claim for § 34A benefits and the insurer's Motion to Join a Claim for Recoupment, which also referenced the applicability of § 35E. (Dec. 3.) A hearing *de novo* was held on April 5, 2022, and June 16, 2022. (Dec. 3.) At the close of testimony on the second day of hearing, the judge gave the parties permission to submit additional medical evidence post-hearing. (Tr. II, 31-32.)[3] In July 2022, the employee's treating physician, Daniel Quinn, M.D., opined that the employee was a candidate for a medial compartment arthroplasty. (Dec. 13.) On March 29, 2023, the administrative judge issued a decision denying the insurer's request to discontinue weekly benefits and request for recoupment and ordering the insurer to pay § 34 temporary total incapacity benefits at the rate of $906.03 per week, based on an average weekly wage of $1,510.05, from January 1, 2020, through June 27, 2021, followed by § 34A permanent and total

[2] G.L. c. 152, § 35E states:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market. The presumption of non-entitlement to benefits created by this section shall not be overcome by the employee's uncorroborated testimony, or that corroborated only by any of his family members, that but for the injury, such employee would have remained active in the labor market. Claims for compensation, or complaint for modification, or discontinuation of benefits based on this section shall not be filed more than once every twelve months.

G.L. c. 152, § 35E.

[3] The transcript from the first date of hearing on April 5, 2022, is referenced as "Tr. I" and the transcript from the second day of hearing on June 16, 2022, is referenced as "Tr. II".

incapacity benefits at the rate of $1,006.70 per week, based on an average weekly wage of $1,510.05, from June 28, 2021, to date and continuing. (Dec. 24.)

On appeal, the insurer argues that the administrative judge's decision failed to address the insurer's defense pursuant to § 35E. (Ins. br. 7.) The insurer also argues that the administrative judge erred in ordering § 34A benefits commencing June 28, 2021, asserting that no such benefits were claimed by the employee to commence on that date. We agree.

Section 35E applies only to employees receiving § 34 or § 35 benefits and is not applicable in situations where the employee is receiving benefits pursuant to § 34A. Lombardo v. Titan Roofing Co., 31 Mass. Workers' Comp. Rep. 25, 34 (2017). "Section 35E creates a rebuttable presumption requiring termination of an employee's §§ 34 or 35 benefits upon eligibility for certain age-dependent benefits. Rebuttal requires the employee to show that, but for the injury, he would have remained active in the labor market." Searcy v ACE American Insurance Co., 35 Mass. Workers' Comp. Rep. 155, 160 (2021), citing Bamihas v. Table Talk Pies, 9 Mass Workers' Comp. Rep. 595 (1995).

The insurer argues that the administrative judge misapplied the law and did not address its § 35E defense. (Ins. br. 9, 10.) The employee does not dispute that § 35E was properly raised by the insurer, but asserts that the administrative judge adequately addressed the insurer's defense and found it inapplicable. (Employee br. 5, 9.) In his decision, the administrative judge listed the defense as one of the issues in controversy stating, "if the employee is partially disabled, whether § 35E applies to preclude benefits" and finding that, "[s]ection 35E does not apply, as I have determined that [the employee] remained temporarily totally disabled from January 1, 2020, and is permanently and totally disabled after June 28, 2021." (Dec. 5, 23.) Thus, it appears that the judge may have believed, incorrectly, that receipt of § 34 benefits precluded the application of § 35E. Beyond this statement however, the decision lacks findings regarding the predicate facts of the defense and provides no legal analysis. Because the hearing decision does not contain sufficient findings for us to determine whether the administrative judge applied the correct rules of law, we recommit the case for further findings of fact and

rulings of law to address this issue. See, Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Next, the insurer argues that the administrative judge erred in ordering § 34A benefits from June 28, 2021, when the employee's claim for such benefits was from the exhaustion of § 34 benefits, which would have been in October 2021. (Ins. br. 12.) In the decision, the administrative judge states:

> I adopt the medical opinions referenced above, the vocational opinion of Rhonda Jellenick, MA, CRC, LRC, and the credible testimony of the Employee in concluding that the Employee is permanently and totally incapacitated from performing any work of a remunerative nature from January 1, 2020 to date and continuing (which is the date from which the employee claimed those benefits pursuant to § 34, with § 34A after June 28, 2021.)

(Dec. 21.) In the Joint Pre-Hearing Memorandum filed by the parties prior to the hearing, the employee claimed § 34A benefits from June 28, 2021, to date and continuing. (Ex. 1.) However, at hearing, the employee indicated that he was seeking § 34A benefits "from the date of exhaustion of § 34 benefits." (Ex. 3; Tr. I, 4.). In his decision, the administrative judge found that the employee worked, without loss of pay, until his October 4, 2018, surgery. Thus, the employee's benefits pursuant to § 34 would not exhaust until October 2021. See, G.L. c. 152, § 34. We have long recognized "the clear legislative intent to establish a system which narrows the issues as litigants proceed through the dispute resolution process." Vallieres v. Charles Smith Steel, Inc., 23 Workers' Comp. Rep. 415, 418 (2009). Accordingly, the award of § 34A benefits prior to the exhaustion of § 34 benefits claimed by the employee at hearing, must be vacated. See, O'Rourke v. New York Life Ins. Co., 35 Mass. Workers' Comp. Rep. 125 (2021).

Accordingly, we vacate the decision and recommit this case for further findings of fact and rulings of law on the two issues addressed in this opinion. The underlying conference order is reinstated. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***May 28, 2025***