

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 045699-89

Kenneth L. Hays
North Shore Assoc. of Retarded Citizens
Fidelity & Casualty Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith¹)

APPEARANCES

Alan Pierce, Esq., for the employee
Paul Fisher, Esq., for the insurer

MCCARTHY, J. Kenneth Hays, now fifty-five years of age, injured his back at work on August 16, 1989. The case was accepted and § 34 benefits were paid to exhaustion. Thereafter, Mr. Hays was awarded § 34A benefits. Empowered by G.L. c. 152 § 8(2)(j), the insurer stopped paying weekly benefits for about six months while Hays was incarcerated. Benefits under § 34A were resumed after his release and the insurer then filed a discontinuance complaint. The complaint was denied at conference and then went to a full evidentiary hearing. We have the case on appeal by the insurer from a decision denying the complaint to terminate weekly benefits.

The insurer in its brief contends that the evidentiary record would support a finding of an earning capacity. While the ultimate factual question is a close one, we cannot say that the judge was arbitrary or capricious, or wrong as a matter of law when he denied the complaint to terminate § 34A benefits.

A § 11A examiner found permanent loss of function and opined that while he could work full-time, Hays should not lift, bend, stoop, climb or kneel. (Dec. 5.) The

¹ Judge Smith no longer serves as a member of the reviewing board.

judge found the employee to be a credible witness. (Dec. 7.) According to Hays, the work he did while in jail was not physically demanding. (Tr. 43-47). This work, as described by Hays, does not seem to exceed the physical restrictions set by the § 11A physician. The insurer's effort to terminate § 34A benefits was based in part on that work. (Insurer Brief 1).

The question whether Hays is permanently and totally incapacitated was fully litigated earlier. A decision favorable to the employee was filed on September 15, 1994. The judge expressly found that since the decision was filed, the employee's symptoms have worsened. Gramolini's Case, 328 Mass. 86, 88 (1951). He is now in constant pain, has difficulty sleeping and "weakens quicker." (Dec. 7.) Given these findings, we cannot say that the judge erred as a matter of law. We therefore affirm the decision and direct the insurer to pay counsel fees of \$1,000.00 under § 13A.

So ordered.

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: **September 22, 2000**