

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 038493-00

Kenneth Whalen
Ryder Integrated Logistics
Ryder Systems, Inc.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

This case was heard by Administrative Judge McManus.

APPEARANCES

Samuel Lovett, Esq., for the employee
William C. Harpin, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits as of the date his § 34 benefits were exhausted. The self-insurer argues the administrative judge improperly shifted the burden of proving the extent of incapacity during the three year period between § 34 benefit exhaustion and the date of the § 11A impartial medical examination, (the so-called "gap" period), and that no medical evidence established the employee's entitlement to § 34A benefits during the gap period. We agree with the self-insurer's arguments, reverse the decision in part, vacate the award of § 34A benefits during the gap period only, and recommit the case for further findings.

In 2006, the employee claimed § 34A benefits for his accepted July 19, 2000 work injury. The self-insurer had paid § 34 benefits until exhaustion (July 18, 2003), and maximum § 35 benefits thereafter. The employee submitted to an impartial medical examination pursuant to § 11A on October 16, 2006. In his written report, the § 11A examiner opined that the employee's medical disability is permanent and total. (Dec. 6-7). Although the parties were permitted to introduce additional medical evidence on the ground of medical complexity pursuant to G. L. c. 152, § 11A(2), (Dec. 3), no evidence addressed the employee's disability during the three year gap period prior to the impartial medical examination. (Dec. 7-8.)

The judge found the employee permanently and totally incapacitated "from July 19, 2003, the date his § 34 temporary total disability benefits were exhausted." (Dec. 8.) The judge continued:

In so finding, I note that there is no adopted expert medical evidence that would indicate that this Employee was not totally disabled, following the date of injury or that he improved at any time since. The adopted testimony of the Employee, himself, concerning his complaints of pain and disability, further supports this finding.

(Dec. 8.) The judge concluded, "[t]he date of award for these [§ 34A] benefits is July 19, 2003, the date of exhaustion of the § 34 benefits, as there is no credible evidence that the Employee was not totally disabled and incapacitated prior to this exhaustion, or that his medical and/or vocational condition improved at any time subsequent to his accepted industrial injury." (Dec. 11.)

The self-insurer argues that the judge's conclusion constitutes burden shifting in that she relieved the employee from the burden of proving the extent of his incapacity for the three year gap period by focusing on the lack of evidence supporting the self-insurer's position. See Powers v. Brockton District Court, 15 Mass. Workers' Comp. Rep. 47, 50 (2001)(finding that insurer offered no evidence to support its position in litigation erroneous); see also Whelan v. Brigham & Women's Hosp., 17 Mass. Workers' Comp. Rep. 279, 281-282 (2003), citing Ginley's Case, 244 Mass. 346 (1923)(finding that no medical evidence indicated ability to return to full time work improper, but harmless in itself given other evidence).

While the reviewing board has allowed for semantic slips which hint of burden shifting, (see Whelan, supra), the practice should be avoided. Here, the judge has placed undue emphasis on the lack of evidence of a capacity to work by putting that factor first in the reasoning supportive of her permanent and total incapacity finding. (Dec. 8.) Moreover, she repeated this error in her general finding that § 34A benefit entitlement began with the exhaustion of § 34 benefits. (Dec. 11.) It would appear that the burden shifting analysis was a key piece of the judge's reasoning and was not in the nature of a harmless semantic slip. We therefore reverse the decision and recommit this case for incapacity findings which are not the product of impermissible burden shifting.

It should be noted that the burden shifting might reasonably have been found harmless, had the judge offered other reasons to support her finding of permanent and total incapacity during the period in question. See Whelan, supra. While the required evidentiary support for a finding of permanence is slight, there nevertheless needs to be something in the record to support such a

finding. See Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 388 (2001); Atherton v. Steinerfilm, Inc., 11 Mass. Workers' Comp. Rep. 114, 117 (1997).

"Permanent" need not be eternal, see Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939), but it must be an inference that can be rationally drawn from the evidence, not speculation.

Accordingly, we reverse the decision in part and vacate the award of § 34A benefits only during the three year gap period prior to the § 11A examination. We recommit the case for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: October 13, 2009