COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054585-95**

Kurt Scholl	Employee
Fixture Perfect	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Maze-Rothstein)

APPEARANCES
Stephen G. Gray, Esq., for the employee
Sheila S. Cunningham, Esq., for the insurer

LEVINE, J. The employee appeals from the decision of an administrative judge denying and dismissing his claim for further § 34 temporary total incapacity benefits. Finding merit in the appeal, we recommit the case for additional findings.

Kurt Scholl was thirty years old at the time of the hearing in this matter. Employed as a carpentry foreman, he sustained an industrial injury to his right knee on October 2, 1995. The insurer accepted liability and paid § 34 benefits. (Dec. 2, 4.)

On November 8, 1996, the insurer filed a complaint to modify or discontinue compensation. Following a § 10A conference on May 20, 1997, an administrative judge assigned the employee a weekly earning capacity of $150.00 and awarded § 35 partial incapacity benefits. The insurer appealed, but withdrew its appeal at the scheduled hearing. (Dec. 2.)

Realizing that he would not likely return to carpentry work, in the summer of 1996 the employee, on his own initiative, became a part-time student at Massasoit Community College. He became a full time student during the 1996-1997 and 1997-1998 academic years. Between class time, commuting and studying, the employee spent "thirty - forty hours per week in the pursuit of his education." (Dec. 4-5.)

In August 1997 the employee was deemed suitable for vocational rehabilitation services, and on March 10, 1998, he signed an Individual Written Rehabilitation Program

("IWRP").[1] The IWRP provided that from May 15, 1998 through May 15, 2000, the employee would pursue a degree in business administration; in addition, he would be provided job placement services upon completion of the formal training. In the summer of 1998, the employee enrolled as a full time student at U. Mass. Boston.[2] (Dec. 2, 5.)

On March 20, 1998 the employee filed a claim for § 34 benefits beginning September 2, 1997. The claim was denied at conference and the employee appealed to a hearing de novo. (Dec. 2, 5-6.) In his May 21, 1999 decision following the hearing, the judge found the employee to be partially medically disabled and assigned the employee a weekly earning capacity of $150.00, the same earning capacity assigned at the May 1997 conference. (Dec. 7, 8, 2.)

In the decision the judge made two rulings which the employee challenges on appeal. First, the judge ruled that the employee is estopped from seeking increased weekly incapacity benefits prior to March 20, 1998, the date he filed his present claim, because until that date the unappealed May 1997 conference order was in effect and accepted by the employee. (Dec. 5-6). Second, the judge ruled that the employee, who is partially medically disabled with a $150.00 weekly earning capacity, cannot be found totally incapacitated in the present circumstances even though he is enrolled in an IWRP. (Dec. 6-7, 8.) We agree with the employee that the judge committed error, and we recommit the case for further findings.

The employee first challenges the judge's ruling that the employee could not seek § 34 benefits prior to March 20, 1998 because of the unappealed May 1997 conference order awarding ongoing § 35 benefits. In his March 1998 claim, the employee sought

[1] General Laws c. 152, § 30G, provides that the department's office of education and vocational rehabilitation shall meet with each injured employee the office believes may require vocational rehabilitation services to return to suitable employment. 452 Code Mass. Regs. §4.07 sets out the procedure for design of an IWRP.

[2] After being deemed suitable for vocational rehabilitation, the employee was required to participate in the prescribed program or lose fifteen percent of his weekly benefits. G.L. c. 152, §30G.

§ 34 benefits beginning on September 2, 1997, when he became a full-time student. (Employee brief 2.)

In support of his position, the employee cites Russo's Case, 46 Mass. App. Ct. 923 (1999). There, the Appeals Court stated, "An unappealed conference order . . . 'does not bar a claim for further weekly benefits for any period of disability related to the same date of injury which occurs after the date of the unappealed conference order.' " Id. An unappealed conference order awarding ongoing benefits obviously cannot bind the parties forever into the future. "The conference order has no future res judicta effect regarding the level of incapacity that it sets. . . . Either party is free to seek review of the incapacity status anytime after the date of a conference order." Sellick v. Trailways of New England, 12 Mass. Workers' Comp. Rep. 384, 387 (1998). The judge here recognized that the employee's level of incapacity appropriately can be revisited. The only question presented is when in the future may the extent of the employee's incapacity be reviewed.

In Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995), we held that an insurer's complaint to discontinue payment of ongoing weekly benefits can at most result in an order of discontinuance going back "no further than the date the [complaint] was filed." This holding

> is a departure from our usual rule that a cessation date be grounded in the evidence, but is appropriate, as we view it to be consistent with principles of equity, Utica Mutual v. Liberty Mutual, 19 Mass. App. Ct. 262, 267 (1985), and the beneficent design of the Act. Young v. Duncan, 218 Mass. 346 (1914); Locke, [Workmen's Compensation] § 29 at pp. 33-34 (1981).

These same reasons for limiting discontinuances to the date the insurer files its complaint militate in favor of allowing the employee's claim for increased benefits to begin prior to the date the claim is filed; that is, increased benefits may begin on the date the evidence warrants without regard to the date when the claim is filed. For example, if an unappealed conference order awards ongoing § 35 benefits and the employee subsequently undergoes surgery resulting in a period of total incapacity, it would be unfair and contrary to the beneficent design of the act to deny the employee § 34 benefits

because he did not file his claim until after he recovered sufficiently from the surgery to consult an attorney.[3] The judge should have considered the employee's claim for § 34 benefits beginning September 2, 1997.

Next, the employee challenges the judge's finding that Satoris v. Business Express, 11 Mass. Workers' Comp. Rep. 644 (1997), is inapplicable to the present case. We agree with the employee that Satoris applies here. Satoris holds that the time the employee must devote to carrying out an IWRP is relevant in determining what earning capacity, if any, should be assigned an employee. Contrary to the judge's view, (Dec. 6-7), it does not matter whether the context for applying Satoris is an insurer's complaint to modify or discontinue compensation or an employee's claim for further benefits. What matters is that the employee's involvement in a rehabilitation program can affect an employee's earning capacity.

In Satoris, we held it arbitrary for the judge "to find that the partially incapacitated employee in [that case], in addition to devoting full time to a mandatory program of vocational rehabilitation, [had] the capacity to work enough additional time each week to earn $300.00." Satoris, supra at 646. We said that the judge effectively, but inappropriately, found that the employee was capable of holding the equivalent of two jobs. Id.[4]

In the present case, the judge found that when the partially disabled employee, on his own initiative, became a full time student at Massasoit Community College, he spent "30-40 hours per week in the pursuit of his education." (Dec. 5.) The judge also found that "in terms of time-commitment, the employee's status at U. Mass Boston was

[3] Cf. Russo's Case, supra, and Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660 (1996), where the employees did not seek additional benefits until after the closed periods of benefits awarded by the unappealed conference orders.

[4] We pointed out in Satoris that it is not unfair to the insurer that the demands of an IWRP ought to be considered in determining an employee's earning capacity. Successful completion of vocational rehabilitation may restore the employee to an earning capacity equal to his pre-injury average weekly wage and thus relieve the insurer from paying weekly benefits. Satoris, supra at 646.

comparable to that at Massasoit Community College." (Dec. 6.) The judge's finding that the employee spends a range of "30-40 hours" per week on his vocational rehabilitation lacks sufficient specificity for us to determine whether or not the assigned earning capacity was warranted. A forty hour commitment by the employee to his IWRP might not justify the assignment of an earning capacity, Satoris, supra, whereas a thirty hour commitment might justify assignment of an earning capacity. See G. L. c. 152, § 35D (5).[5] A judge's findings must be sufficiently specific so that we can discern the judge's logic for his conclusions. Rackliffe v. Sedgwick James, 12 Mass. Workers' Comp. Rep. 327, 331 (1998).[6] It is appropriate to recommit the case so that the judge can make specific findings as to the number of hours the employee has devoted to his rehabilitation program and then to make a finding as to the employee's earning capacity.[7]

We reverse the decision and hold that the employee may claim further benefits prior to March 20, 1998. We recommit the case for further findings as to the employee's

[5] An employee's earning capacity depends on that particular employee's situation, including his pre-injury work hours. Thus, most employees may work the traditional forty hour week, so that it likely would be inappropriate to assign an earning capacity based on more than a forty hour work week. On the other hand, if an employee's customary work week included overtime, an administrative judge could appropriately consider that factor in assigning an earning capacity. See, e.g., Kelley v. General Electric, 12 Mass. Workers' Comp. Rep. 476, 477-479 (1998) (employee was able to work overtime after the industrial injury just as he had before it;0 judge warranted in considering that factor in his analysis of the employee's earning capacity).

[6] The employee seeks § 34 benefits beginning on September 2, 1997. The employee's IWRP did not begin until May 15, 1998, although the employee was a full time student between September 2, 1997 and May 15, 1998. (Dec. 4.) In Satoris, the employee was enrolled in an IWRP during the period of time in dispute. Even though the dispute here includes a period of time when the employee was a full time student but not enrolled in an IWRP, the judge should consider that fact in determining the employee's earning capacity, if any, during that period of time, What is important in the judge's assessment of earning capacity is that the employee be found to be in a bona fide course of study which can lead to restoration of the employee's pre-injury average weekly wage. Where there is no IWRP, it is the judge's duty to determine the bona fides of both the rehabilitation activity and its time requirements. The judge's findings on these two matters will bear on the judge's assignment of an earning capacity.

[7] We also point out that there is no requirement of showing a worsening after an unappealed conference order. Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660, 662-663 (1996).

earning capacity beginning on September 2, 1997. The judge may take additional evidence as justice requires.

So ordered.

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

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