COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 17441-96**

Leo Paul Laliberte	Employee
Mass. Temps, Inc.	Employer
American Policyholders	Insurer

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

APPEARANCES
Michael A. Torrisi, Esq., and Paul M. Moretti, Esq., for the employee
Donald E. Hamill, Esq., for the insurer

MAZE-ROTHSTEIN, J. On April 26, 1996, while working as a trash collector, Leo Paul LaLiberte emptied a couple of oil-laden barrels into the "hopper" of his truck. (Dec. 4; May 14, 1997 Tr. 11.) Some of the oil got on his boots. Id. The truck proceeded to the next stop at about twenty-five miles per hour. Id. The employee stood on the outside of the truck in his usual position. Id. The truck hit a bump causing Mr. LaLiberte to slip off and strike his elbow on the pavement. Id. His neck, back and right elbow were x-rayed at a hospital emergency room. (Dec. 5.)

When injured, Mr. LaLiberte was thirty-nine years old. (Dec. 4.) His prior work life included: commercial fishing, laborer work, painting, carpentry, sheet rocking and yard work. Id.

The 1996 injury was not accepted by the insurer and became the subject of a disputed claim for G.L. c. 152, § 34, weekly temporary total incapacity and medical benefits. A § 10A conference resulted in an award of weekly benefits for a closed period. The employee's appeal of that order gave rise to a hearing de novo. The hearing decision awarded him a closed period of § 34 weekly temporary total incapacity benefits followed by a closed period of § 35 weekly temporary partial incapacity payments. We have the employee's appeal from that decision. Finding merit in his argument that the termination

date for § 35 benefits lacks evidentiary support, we reverse the § 35 termination date and affirm the remainder of the decision.

After the 1996 injury, the employee treated conservatively. (Dec. 5-6.) An orthopedic surgeon prescribed narcotic medications and injected the employee with cortisone. Id. He also had an MRI, physical therapy and other medications. Id. An orthopedic surgeon and a psychiatrist evaluated Mr. Laliberte for the insurer. Id. See G. L. c. 152, § 45.

Pursuant to G. L. c. 152, § 11A, an orthopedic doctor examined the employee. That physician opined that the employee had suffered a back sprain, superimposed on degenerative disk disease with symptoms related to his April 26, 1996 industrial accident. (Dec. 6.) The symptoms themselves were disproportionate to the objective findings. The doctor believed that the employee had become addicted to his narcotic prescriptions. Orthopedically, the employee was at an end point with residual medical disability that would prohibit regular lifting over twenty pounds. (Dec. 7.) When confronted at the deposition with the employee's theretofore-unrevealed history of prior back injuries, the § 11A doctor remained steadfast in his opinions. (Dec. 8.)

Based on the insurer's motion, the judge allowed the parties to submit additional medical evidence.[1] The employee offered the reports of two doctors, as well as two MRI reports and the emergency room records. The insurer submitted the February 13, 1998 report of a psychiatrist. (Dec. 1-2, 10.)

On April 2, 1998, the hearing decision issued wherein the employee was found to have suffered an industrial injury on April 26, 1996 that was totally incapacitating for a time and continued to be partially incapacitating. (Dec. 15.) Despite these findings, the insurer was ordered to pay § 34 weekly temporary total incapacity benefits from April 26,

[1] Section 11A of the Act allows for the submission of additional medical evidence upon a finding by the administrative judge that the impartial medical report is inadequate or that the medical issues involved are complex. G. L. c. 152, § 11A. Here, the judge found the matter of the effect of the employee's narcotic medication ingestion led to complexity of the medical issues. (Dec. 9-10.) In addition, he found the § 11A report inadequate as to the time from the April 26, 1996 injury date to the date of the § 11A examination. Id.

1996 to March 10, 1997 and § 35 weekly temporary partial incapacity benefits from March 11, 1997 to July 31, 1998. (Dec. 16.)

One of the employee's arguments on appeal has merit. He argues that the prospective date chosen to end his § 35 benefits is inconsistent with earlier findings, speculative and wholly lacking in evidentiary support. We agree.

With respect to incapacity, the judge stated "I find and adopt the opinion of [the § 11A doctor] that the Employee was totally disabled for a period of time and continues to be partially disabled." (Dec. 15; emphasis supplied.) As the award of § 35 benefits was commenced on the March 10, 1997 § 11A exam date and continued beyond the filing date of the decision, we read "partially disabled," (Id.), to refer not to medical disability but to actual incapacity for work. The judge's finding of continuing partial incapacity, (Id.), is irreconcilable with his order terminating partial incapacity benefits. (Dec. 16.) For this reason, the decision cannot stand. Howe v. Rocky Meadow Cranberry, 9 Mass. Workers' Comp. Rep. 704, 706 (1995).

The question then becomes, on what evidence did the termination of benefits rest? There is nothing in the adopted medical testimony to support a prospective termination of benefits. In his report, the § 11A doctor stated:

> He is probably at an end point. I do feel he should probably be restricted from lifting over 20 pounds on a regular basis; but, with those restrictions, he should be able to work on a full-time basis. I do feel that his narcotic medication, including the Valium, should be stopped; and he may, in fact, require treatment for withdrawal. Once he is off the narcotic medications, I do think it might be reasonable to consider a Physical Capacity Evaluation regarding his back.

(Statutory Exhibit 1, p. 2.)

There is nothing in this statement, which the judge adopted, (Dec. 7, 15), that supports a cut-off of benefits at some future date.

Nor does the opinion of the insurer's expert psychiatrist, which the judge also adopted, (Dec. 15.), support the July 31, 1998 cut-off date. That doctor opined that the employee probably needs a tapered detoxification from the prescribed narcotics over a

two to four week period. (Dec. 14.) There is nothing in the record to indicate that such tapered detoxification efforts had commenced or had even been scheduled.[2] The date chosen to terminate § 35 benefits lacks any evidentiary support and thus is arbitrary. See Jantuah v. Montachusett Opportunity Council, Inc., 10 Mass. Worker's Comp. Rep. 810, 811 (1996); Cannistraro v. Lucas Indus. Inc., 10 Mass. Worker's Comp. Rep. 709, 710 (1996). Because the medical evidence as found by the judge can only support one result, we reverse that portion of the decision terminating §35 benefits rather than recommit the case for further findings on incapacity. See Goden v. Phalo Corporation, 9 Mass. Workers' Comp. Rep. 720, 721 (1995); G. L. c. 152, § 11C. The insurer must continue to pay § 35 benefits at the rate set by the hearing judge unless and until further proceedings are brought to alter the employee's entitlement to benefits.

The remainder of the decision, including the award of § 35 benefits commencing March 11, 1997, is affirmed.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: May 25, 1999

[2] Indeed, the judge found that the employee "needs" a tapered detoxification and "should begin a course of antidepressant medication prior to undertaking a tapering of the use of Valium and Vicodin." (Dec. 15, 16.) (Emphasis added).