COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038362-16**

Linton Rattray	Employee
Fresenius Medical Care	Employer
American Casualty of Reading, PA	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Segal.

APPEARANCES
Kaylene Crum, Esq., for the employee
Paul M. Moretti, Esq., for the insurer on appeal
Thomas P. O'Reilly, Esq., for the insurer at hearing

FABRICANT, J. The parties appeal from a decision awarding the employee a closed period of weekly benefits pursuant to § 34, continuing weekly benefits pursuant to § 35, and medical benefits pursuant to §§ 13 and 30. The employee claims error in the adoption of certain vocational evidence alleged to be purely "medical" in nature, as well as error in the mischaracterization of the opinion of the § 11A impartial physician. The insurer, in turn, argues that the judge erred in awarding § 35 benefits and assigning a specific earning capacity without any underlying analysis in support of that award. For the reasons that follow, we vacate the award of § 35 benefits, recommit for further findings regarding disability and extent thereof from January 23, 2019 to date and continuing, and summarily affirm the judge's decision on all other issues.

At the time of his testimony, the employee was 65 years old. The employee immigrated from Jamaica where he graduated from high school, arriving in the United States on September 26, 1974. He began working for the employer, a company specializing in kidney dialysis supplies, on September 28, 1974. He has

held a number of different positions during his tenure with the employer, and beginning in 2011, the employee became an order picker in the warehouse. (Dec. 7; Tr. 23.) This required repeated lifting of items weighing up to 90 pounds which he would collect from the warehouse and prepare for shipping. (Dec. 7; Tr. 23-27.) He would typically fill six such orders per day, and he worked at this position until his accident on April 4, 2016. (Dec. 7; Tr. 28.)

On April 4, 2016, the employee reached for, and dropped, a 50-pound box of gloves while at work. When he tried to pick up the box from the floor, he was prevented from doing so due to pain in his right shoulder. (Dec. 7; Tr. 28-35, 64; Ex. 1.) After reporting the incident, he left work for the day, and has not returned. (Dec. 7; Tr. 28, 29 and 33.)

The May 17, 2018, § 10A conference on the employee's resulting claim for weekly incapacity and medical benefits yielded a conference order directing the insurer to pay § 35 benefits at the maximum rate of $487.93 per week, based upon an average weekly wage of $1,084.31,[1] from May 17, 2018 to November 16, 2018, as well as medical benefits pursuant to §§ 13 and 30 for "conservative" treatment.[2] (Dec. 2.)

Both parties appealed, and on April 1, 2019, the employee's motion to join a claim for § 34A permanent and total incapacity benefits was allowed. (Dec. 2.)[3] Following the hearing, the judge found that the employee sustained a compensable

---

[1] The parties stipulate that the employee's average weekly wage is $1,084.31. (Dec. 5.)

[2] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of documents in board file).

[3] The employee's claim includes § 34 benefits from April 5, 2016 to exhaustion on April 2, 2019, §34A benefits from March 29, 2019 to date and continuing, § 35 benefits from April 5, 2016, and §§ 13 and 30 medical benefits, with a reservation of § 36 benefits. The insurer denies liability, disability, extent of incapacity, causal relationship, entitlement to §§ 13 and 30 medical benefits and proper notice. The insurer also seeks the application of § 1 (7A). (Dec. 3.)

injury to his right shoulder over time due to "repeated, heavy lifting duties." She further found he suffered a compensable injury to the right shoulder on April 4, 2016 when the 50-pound box of gloves fell out of his right hand and he then tried to pick it up but "could not…because of pain in his right shoulder." (Dec. 7.) Based upon the stipulated average weekly wage of $1,084.31, the judge ordered § 34 total weekly incapacity benefits of $650.59 from April 5, 2016 to January 22, 2019, and § 35 partial weekly incapacity benefits from January 23, 2019 to date and continuing at the rate of $487.93.[4] (Dec. 5, 17.)

The employee's credited testimony is that he did not miss any time from work due to his right shoulder following a prior 2014 lifting incident. He saw a doctor about 6 weeks after this incident because he felt a "small pain," but felt "great" and continued working after receiving the first of what would be 3 injections to his shoulder prior to the claimed April 4, 2016 injury. (Dec. 12; Tr. 30, 34, 35 122-123.) Following the April 4, 2016 injury, the employee states that he was happy with the outcome of the June 23, 2016 surgery, and that it helped, to the point where he had not taken pain medications since right after the surgery. (Dec. 12-13; Tr. 104, 105, 122-123, 125.)

The adopted medical evidence included the § 11A report and deposition of the impartial physician, Hillel D. Skoff, M.D., the report and deposition of treating orthopedic surgeon Barry S. Saperia M.D., and the treatment records of orthopedic surgeon Kai Mithoefer, M.D.[5] Adopted from Dr. Mithoefer's records were his opinion that the surgery he performed on June 23, 2016, a right shoulder arthroscopy

[4] This is the maximum benefit permitted pursuant to § 35, and, in essence, reflects an earning capacity of $271.07, although the judge does not reference earning capacity anywhere in her decision.

[5] After a hearing on the insurer's motion to open the medical record, the § 11A report of Dr. Skoff was deemed adequate by the judge. However, finding the medical issues to be complex, the judge allowed submission of additional medical evidence. (Dec. 2.) G. L. c. 152 § 11A (2).

with subacromial decompression and rotator cuff repair, was "required due to the lifting trauma at work." (Dec. 8; Ex. 22G.)

Dr. Saperia's initial evaluation on September 19, 2017, diagnosed the employee with:

1. Supraspinatus and subscapularis rotator cuff tears, secondary to work-related injury, right shoulder.
2. Internal derangement, secondary to work-related injury, right shoulder.
3. Residual impingement syndrome and subacromial bursitis, secondary to work-related injury, right shoulder.

(Dec. 8; Ex. 22D.) He also opined that the employee was temporarily totally disabled due to the work injury, basing causal relationship on the lack of any history of related pain, disability or need for treatment for the right shoulder prior to the claimed incident. (Dec. 8; Ex. 22D.) When Dr. Saperia learned of a prior 2014 lifting incident, he maintained, in a March 21, 2018 note, that the incident was "inconsequential" due to no indication of subsequent work limitations or restrictions. (Dec. 9; Ex. 22B.) Ultimately, at his November 15, 2019 deposition, Dr. Saperia testified that any pre-existing condition of the employee's right shoulder was due to heavy repetitive lifting at work. (Dec. 9; Saperia Dep. 72.)

Dr. Skoff's adopted opinion is consistent with Dr. Saperia's in that he says that if the reported 2014 incident was "the most important clinical event in the patient's shoulder history, it is unlikely that he would have been able to continue to work on a full-time, full-duty basis between 2014 and 2016 without medical notes to that affect." He concludes that the employee's repetitive job duties with the employer are the major cause of the right shoulder injury. (Dec. 10; Saperia Dep. 72.)

Finally, the judge credited the opinion of the insurer's vocational expert, Ann Marie Latella, MS, CRC, who noted that the employee has a lifting restriction "however, no restrictions have been placed upon his abilities to sit, stand or walk." Thus, Ms. Latella opined that the employee is capable of sedentary and light work activities. (Dec. 10; Ex. 21A.)

Citing the adopted medical evidence, the judge found the employee temporarily totally disabled from April 5, 2016, through January 22, 2019, and pointedly observed that there is no credible evidence in the record of any change in the employee's disability from the time of the accident until September 19, 2017. However, citing the adopted opinion of the vocational expert Ann Marie Latella, (who, in turn relied on the report of Dr. Skoff that the employee can perform light duty work "at or below the shoulder level"),[6] the judge found the employee "temporarily, partially disabled from January 23, 2019 to date and continuing," awarding the maximum permissible § 35 weekly benefits without further analysis or comment. The insurer argues that this award is arbitrary and unrelated to any evidence in the record.

We agree with the insurer that the finding of maximum partial incapacity is not supported by adequate subsidiary findings. Upon a determination of partial incapacity, G.L. c. 152 § 35D requires the computation of the weekly wage predicated upon the employee's actual weekly earnings, or the amount the employee is capable of earning.[7] We have consistently required specific analysis and findings on earning capacity pursuant to § 35D, most recently in O'Connor v. M.B.T.A, 35 Mass. Workers' Comp. Rep. ___ (April 14, 2021), citing Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 251 (2002), et. seq. Without

---

[6] In adopting the opinion of Dr. Skoff, the judge incorrectly quoted that opinion by stating the employee can perform light duty work "at or *above* the shoulder level." (Dec. 15; emphasis added). Because the judge also adopted the vocational opinion of Ms. Latella who relied upon Dr. Skoff's actual report stating "at or *below* the shoulder level," we find this to be an inadvertent, and thus harmless, error.

[7] M.G. L. c. 152 § 35D states, in relevant part:

> [T]he weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
>
> (1) The actual earnings of the employee during each week.
>
> . . . .
>
> (4) The earnings that the employee is capable of earning.

a concise explanation as to why the employee is only capable of earning $271.07 per week, we are unable to determine with reasonable certainty whether the judge applied "correct rules of law" to "facts that could be properly found." O'Connor, supra, citing Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

We therefore vacate the award of § 35 benefits from January 23, 2019, to date and continuing, summarily affirm the award in all other respects, and recommit the matter for further findings consistent with this opinion. Because the hearing judge is no longer with the department, we refer this case to the senior judge for re-assignment.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **June 11, 2021**