

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 35284-97

Luis Burgos
Superior Abatement, Inc.
AIU Insurance

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES

Jay E. Macklow, Esq., for the employee
Charles C. Donoghue, Esq., for the insurer

MCCARTHY, J. Luis Burgos was forty-one years old at the time of the § 11 hearing. A native of Puerto Rico, he completed the tenth grade of school before moving to the United States in 1975. He has worked as a farm laborer, machine operator and asbestos remover. As an asbestos remover he was required to swing a twenty-five pound sledgehammer, use a jackhammer and shovel heavy construction waste material. (Dec. 4, 6, 7.)

On August 5, 1997, Burgos was moving a pallet loaded with over 1200 pounds of demolition waste with a hand jack when he felt back pain. He rested for about twenty minutes and then reported the incident to his supervisor who placed him in a light duty job stapling plastic sheets. Mr. Burgos did this work until he was laid off on August 13, 1997. (Dec. 4.) He then worked one day, August 18, 1997, for a different employer. When he told the new employer of his sore back, he was assigned a light duty job hanging plastic sheets. He has not worked since August 18, 1997. (Dec. 5.) He collected unemployment benefits until October 20, 1997. (Dec. 7.)

Because he lacked health insurance, Burgos initially attempted to self-treat his injury. (Dec. 5, 7.) However, on August 19, 1997 he went to the Worcester Memorial

Hospital emergency room where he was diagnosed with a back sprain. He was directed to make an appointment with an internist, Dr. Sundari Shobi of Lincoln Primary Care. In October 1997, Dr. Shobi prescribed a course of physical therapy. Mr. Burgos did not have the therapy because he did not have health insurance coverage to pay for it. (Dec. 7.) The employee saw a chiropractor, Dr. Robert Day and at the time of the hearing the employee was treating with a primary care physician, Dr. Arrism, on an as needed basis. (Dec. 5.)

The insurer resisted the employee's claim for weekly benefits and the case came on for conference under § 10 of the Act. Following the conference, an order was issued directing payment of weekly temporary total incapacity benefits under § 34 of the Act from October 21, 1997 to November 4, 1997 followed by partial incapacity benefits under § 35 from November 5, 1997 and continuing. Both parties appealed the conference order and the case was assigned to a different administrative judge for a full evidentiary hearing.¹

Mr. Burgos was examined under the provisions of § 11A of the Act by Dr. Charles Paquette, an orthopedic surgeon. Doctor Paquette's report and deposition provide the only source of expert medical opinion in evidence at the hearing. Following his examination on April 29, 1998, Dr. Paquette reported that Mr. Burgos was suffering "persistent back pain with underlying degenerative changes." (Dec. 5.) Doctor Paquette felt that the medical end had been reached and the employee's " 'impairment is based purely on subjective symptoms with underlying degenerative changes being antecedent to his injury.' " (Dec. 5, 6.) Dr. Paquett was of the opinion that there was nothing serious enough to preclude Mr. Burgos from returning to his work. (Dec. 6; Dep 20.)

In his hearing decision the judge found that Mr. Burgos had sustained a personal injury arising out of and in the course of his employment on August 5, 1997. He found further that the employee was temporarily totally incapacitated from the date of the

¹ On the first day of hearing and before any evidence was taken, the employee withdrew his appeal. (Tr. 11.)

industrial injury until May 22, 1998 and partially incapacitated from May 23, 1998 to the date of the filing of the decision and continuing thereafter. The insurer was directed to pay weekly benefits for these periods of incapacity together with medical expenses under § 30, counsel fees under § 13A and interest under § 50 of the Act. We have the case on appeal by the insurer who raises three issues on appeal.

First, the insurer points out that the employee received unemployment compensation benefits until October 20, 1997. Notwithstanding his finding that the employee received these benefits until October 20, 1997 (Dec. 7), the judge directed the insurer to pay weekly incapacity benefits from August 5, 1997 to May 22, 1998. Chapter 152 § 36B provides that, “no benefits shall be payable under § 34 or § 34A for any week in which the employee has received or is receiving unemployment compensation benefits.” The judge’s order then is in direct contravention of this statute.

Next, the insurer argues that the judge acted arbitrarily and capriciously when he ordered twenty-nine weeks of temporary total benefits under § 34 for a period where the claim was for partial incapacity benefits. The employee’s claim for weekly benefits appears on page 8 of the transcript. The claim is set out as “ Section 34 benefits from October 21 to November 4th, and Section 35 partial incapacity benefits as of November 5th, 1997, . . . and continuing.” The judge, however, directed payment of temporary total incapacity benefits beyond the ending date of November 4, 1997 and ordered those benefits paid until May 22, 1998. The parties had framed the boundaries of their disagreement when they set out the specific claims and the defenses raised. We agree that the judge erred when he expanded the parameters of the dispute. Ruiz v. Unique Applications, 11 Mass. Workers’ Comp. Rep. 399 (1997).

The third and final issue raised by the insurer centers on the opinion of the § 11A examiner, Dr. Paquette. The insurer contends that the judge acted arbitrarily in awarding weekly benefits in contravention of Dr. Paquette’s opinion. It was Dr. Paquette’s view that Mr. Burgos was physically capable of returning to work on April 29, 1998, the date of the impartial examination. However, Dr. Paquette did not have an opinion with

respect to the employee's medical disability prior to the date of his examination.² When a medical question is beyond the realm of a lay person's general knowledge, expert testimony is needed. Josi's Case, 324 Mass. 415, 418 (1949). Expert medical opinion was needed in this case where there were underlying degenerative spinal changes which were present before the industrial injury. The judge found that Mr. Burgos never experienced back symptoms prior to the August 5, 1997 injury, that Mr. Burgos was a sincere and credible witness; that he experiences back pain and that he experiences pain lifting and needs to sit down after walking fifteen minutes. (Dec. 7.) These findings standing without supporting expert medical opinion do not support the judge's award of incapacity benefits. Given his ultimate conclusion and award of weekly benefits, the judge obviously found merit in Mr. Burgos' claim. The judge should have allowed the presentation of additional medical evidence either sua sponte or in response to the employee's motion. See George v. Chelsea Housing Authority, 10 Mass. Workers' Comp. Rep. 22 (1996). To foreclose further medical testimony where such testimony is necessary to present fairly the medical issue is grounds for reversal or recommitment. O'Brien's Case, 424 Mass. 16, 22-23 (1996).

For the reasons set out above, the decision of the hearing judge must be reversed and the case recommitment to the hearing judge for further proceedings consistent with this opinion.

So ordered.

Filed: **July 20, 2000**

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

² Employee counsel moved for permission to introduce the medical testimony covering the period from the date of the claimed injury until the impartial examination. The judge denied this motion. This was error.

Luis Burgos
Board No. 35824-97

Suzanne E.K. Smith
Administrative Law Judge