COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017001-11**

Mae Roscoe	Employee
Brigham and Women's Hospital	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Tamara L. Ricciardone, Esq., for the self-insurer

KOZIOL, J. The self-insurer and the employee cross-appeal from a December 8, 2015, decision on recommittal that awarded the employee § 34 benefits, from "July 12, 2011 to date and continuing," as well as §§ 13 and 30 benefits for "reasonable related medical expenses . . . for the diagnosed condition, not including total knee replacement." (Dec. 19.) We affirm the decision, with the exception of the order to pay ongoing § 34 benefits, which we modify to conform to the 156-week limit prescribed by statute. G. L. c. 152, § 34.

Our prior decision sets forth, in detail, the underlying facts of this case and we review only those facts pertinent to this appeal. Roscoe v. Brigham and Women's Hospital, 28 Mass. Workers' Comp. Rep. 77, 79-80 (2014). In his first decision,[1] the judge found that as of July 6, 2012, the date of the impartial medical examination by Dr. James T. McGlowan, the employee was " 'partially disabled,' " and her " 'ongoing partial disability and incapacity [are] not related to her work injury of July 11, 2011.' " Id. at 84. The judge awarded the employee a closed period of § 34

[1] Hereinafter, we refer to the judge's June 11, 2013, decision as "Dec. I," and his December 8, 2015, decision as "Dec. II."

benefits, commencing from the date of injury, July 11, 2011, until July 6, 2012. Id. at 80.

Only the employee appealed the judge's first decision. She argued that the judge erred as a matter of law in denying her motion for a finding of inadequacy regarding Dr. McGlowan's report. We agreed, because Dr. McGlowan's report was "ambiguous, confusing and inconsistent . . . [and] cannot be accorded exclusive, prima facie status." Id. at 83. The judge permitted the introduction of gap medical evidence for the period prior to Dr. McGlowan's examination. Id. at 79-80. However, in his decision the judge erroneously relied on certain gap medical opinions to support his ongoing disability and causal relationship findings. Id. at 83-84. He further erred by basing those findings, in part, on a medical opinion contained in a record that was not admitted in evidence at all. Id. at 84.

These errors caused us to vacate the judge's findings that "the employee 'continues to be partially disabled,' and her 'ongoing partial disability and incapacity [are] not related to her work injury of July 11, 2011.' " Id. at 84. Because the employee's first appeal challenged only so much of the decision as failed to award benefits to her after July 6, 2012, we upheld the decision awarding the employee § 34 benefits from July 11, 2011, until July 6, 2012. Id. at 79, 80, 85. We recommitted the matter "for the admission and consideration of additional medical evidence, and further findings." Id. at 85.

On recommittal, the employee submitted the report of Dr. George Whitelaw, who examined the employee on July 2, 2015, (Employee Ex. 2), and whose opinions the judge adopted to support his award of ongoing § 34 benefits. (Dec. II, 14-15, 18, 19.) On appeal, the self-insurer argues the judge erroneously exceeded the scope of the remand by finding the employee remained totally disabled; he erred by relying on Dr. Whitelaw's report of July 2, 2015, which was written after the close of the evidence in the underlying hearing; and, as a result, the self-insurer was prejudiced. We disagree.

Because he previously erred by denying the employee's § 11A(2) motion, on recommittal, the judge was required to admit additional medical evidence addressing the employee's entitlement to benefits from July 6, 2012, and continuing. The judge then had to reexamine all the evidence and determine the extent of the employee's disability after that date and whether it was causally related to the injury. This is precisely what he did.

Although the self-insurer argues the judge erred in admitting and relying upon Dr. Whitelaw's report of July 2, 2015, the self-insurer did not object to the admission of that report. Indeed, the record shows the self-insurer also submitted medical records and reports which were dated after the judge's first decision. (Dec. II, 13; Self-ins. Exs. 4, 5, and 6.) Because the self-insurer never objected to the admission of the evidence, and availed itself of the same opportunity to submit post-hearing records, it was not prejudiced by the judge's consideration of Dr. Whitelaw's report.

However, the self-insurer is correct that the judge erred in awarding ongoing § 34 benefits in excess of the 156-week statutory limit.[2] (Self-ins. br. 14.) Because the judge awarded the continuous payment of § 34 benefits from July 11, 2011, (Dec. I) and continuing, (Dec. II),[3] the employee's entitlement to § 34 benefits exhausted on July 11, 2014. "It is well-established that a judge, faced with a claim for § 34 incapacity benefits only, may award 'lesser included' § 35 benefits for the same period." Bracchi v. Insurance Auto Auctions, 22 Mass. Workers' Comp. Rep. 287, 288 (2008). The ongoing award of § 34 benefits is based on Dr. Whitelaw's opinions in his July 2, 2015, report, which post-dated the employee's exhaustion of § 34

[2] General Laws, Chapter 152, § 34, states in pertinent part:

> The total number of weeks of compensation due the employee under this section shall not exceed one hundred fifty-six.

[3] Although the judge stated in his second decision that he was awarding benefits from July 12, 2011 to date and continuing, our discussion supra, shows we previously affirmed the award of § 34 benefits from the date of injury, July 11, 2011 through July 6, 2012. Thus the only timeframe in issue on recommittal was from July 6, 2012, and continuing. Roscoe. at 85.

benefits. Accordingly, the record supports modification of the judge's order to require payment of maximum partial incapacity benefits from July 12, 2014, and continuing. "Where § 34 benefits have been exhausted, it would be contrary to the Act's humanitarian purpose, Young v. Duncan, 218 Mass. 346, 349 (1914), to deny benefits to a more seriously injured worker while granting benefits to those less seriously injured." Bracchi, at 289.

The employee's cross-appeal lacks merit. She argues the judge erred at the December 6, 2012, hearing by admitting in evidence, over her objection, the report of the insurer's vocational expert, Rhonda Jellenik. (Employee br. 8-9). She claims the judge further erred in his first decision, by relying upon Ms. Jellenik's testimony and her report to award the employee a closed period of benefits. The employee never objected to Ms. Jellenik's testimony. (Tr. 31-45.) She also failed to raise these arguments in her first appeal from the judge's original decision, so they are waived. [4] The decision is affirmed as modified.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: ***October 24, 2016***

[4] The employee argues her failure to raise these arguments in her prior appeal should be excused. She asserts that because the first decision failed to find that she was entitled to any weekly benefits after July 6, 2012, her arguments about the vocational evidence were rendered moot at that time. We disagree. As we discussed, supra, her appeal from the underlying decision sought recommittal on several grounds pertaining to the judge's handling of the medical evidence. Clearly, any evidentiary issues pertaining to the vocational evidence were highly relevant then, and should have been raised at that time.