COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO: 047563-98**

Michael A. Andrews	Employee
Southern Berkshire Janitorial Service	Employer
Savers Property and Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Maze-Rothstein)

APPEARANCES
Thomas J. Donoghue, Esq., for the employee
Alec E. Cybulski, Esq., for the insurer

MCCARTHY, J. The insurer appeals from a decision of an administrative judge awarding § 34A permanent and total incapacity benefits, making several arguments. First, the insurer alleges that the § 11A medical examiner did not offer an opinion on whether the employee was permanently and totally incapacitated. Second, the insurer contends that the judge failed to consider the vocational testimony and labor market survey it submitted. In addition, the insurer argues that the judge erred by failing to address a motion requesting a finding of complexity and a motion to vacate the hearing decision. Finding no error, we affirm the decision.

Michael Andrews, who was forty-three years old at the time of the hearing, has a high school education and was doing janitorial work when injured. He had previously worked as a welding fabricator, landscaper and electroplater. On July 22, 1998, he fell from a ladder injuring his left shoulder and low back. He underwent physical therapy and eventually had surgery on his shoulder. (Dec. 2-3.) The insurer accepted the case and began paying § 34 temporary total incapacity benefits. (Dec. 4, Tr. 3.)

The insurer filed a complaint for modification or discontinuance, which was denied at conference. The insurer appealed to a de novo hearing; Mr. Andrews moved to

join a claim for § 34A permanent and total incapacity benefits. The judge allowed the motion over the insurer's objection. (Dec. 1-2.)

At the hearing, the insurer sought to have the report of the impartial medical examiner, Dr. Steven A. Silver, declared inadequate or the medical issues complex. The judge found the § 11A report adequate and the issues non-complex, (Dec. 3, Tr. 9), but stated that after the deposition of the impartial examiner the insurer could file a motion arguing inadequacy of the report and/or complexity of the medical issues. Id.

Doctor Silver, the impartial examiner, opined that the employee had suffered a chronic lumbar strain and was status post decompression subacromial bursitis. He opined that since his first examination on December 16, 1999, the employee had suffered further loss of motion of his shoulder as well as further difficulty with his lower back. The doctor rated Mr. Andrews' current disability as moderate to marked and opined that it was causally related to his work injury. Doctor Silver concluded that Mr. Andrews had not reached a medical end result with respect to either his left shoulder or his low back. (Dec. 4-5.)

In his hearing decision, the judge credited the employee's testimony that he is in constant pain and engages in minimal activities throughout the day, such as watching TV. The judge found that Mr. Andrews has difficulty standing and sitting and needs a cane for walking. He takes pain medication on a daily basis and can drive for only short periods of time. The employee believed that he was unable to perform any kind of work, and, crediting his testimony, the judge concluded that the employee was totally disabled from any type of work "at this time." (Dec. 4, 5.) The judge then ordered the insurer to pay § 34A benefits beginning on July 1, 2001. (Dec. 6.)

The hearing decision was issued on September 12, 2001. (Dec. 6.) That same day, the insurer prepared a motion requesting a finding of medical complexity and seeking to submit additional medical evidence. (Insurer's Motion Requesting Finding of Medical Complexity dated September 12, 2001.) The judge did not address that motion. The insurer then filed a motion to vacate the hearing decision and allow additional

medical evidence due to the complexity of the medical issues. (Insurer's Motion dated September 28, 2001.) The judge also did not act on that motion.

On appeal, the insurer first argues that the medical evidence does not support a finding of permanent and total incapacity. We disagree. To prevail on a § 34A claim the employee must persuade the judge that his incapacity will continue for some indefinite period of time, even though recovery is possible at some remote time. Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939); Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 231 (1998). The employee need not show a worsening of the disabling condition, but must demonstrate only that the same level of impairment continues following the exhaustion of § 34 benefits. Woodman v. Sun Life of Canada, 16 Mass. Workers' Comp. Rep. 116, 118 (2002), citing Goden v. Phalo Corp., 9 Mass. Workers' Comp. Rep. 720, 721 (1995). Here, the impartial examiner opined that the employee's condition had worsened since his previous examination on December 16, 1999, in that he had suffered further loss of motion of his shoulder and had further difficulty with his lower back. Doctor Silver categorized the employee's disability as moderate to marked, and opined that he had not reached a medical end result. (Statutory Ex. 1.) When viewed in conjunction with the fact that Mr. Andrews had been receiving § 34 benefits since July of 1998, this medical opinion supports the employee's claim for § 34A benefits. See Holmes v. BayBank, 16 Mass. Workers' Comp. Rep. ____ (August 1, 2002) (medical opinion supports § 34A claim when viewed in conjunction with the fact that the employee had been receiving § 34 benefits and there was no evidence of any change in medical status). See also Crowley v. Analogic, 16 Mass. Workers' Comp. Rep. ___ (June 25, 2002) (findings of worsening and more pain following a period of total incapacity are difficult to reconcile with the assignment of even a modest earning capacity).

In addition, the judge specifically credited the employee's testimony regarding his "constant pain," "minimal daily activities," difficulty standing and sitting, his need for a cane when walking, his ability to drive for only short periods of time, and his "daily pain

medications."[1] (Dec. 4.) We have held that a judge may consider an employee's complaints of pain in assessing his ability to work. Tremblay v. Art Cement Prods. Co., Inc., 13 Mass. Workers' Comp. Rep. 236, 239 (1999). "In fact, a judge's findings regarding an employee's pain may permit a finding of total incapacity even where the medical testimony is that the employee is partially medically impaired." Greci v. Visiting Nurses Assoc., 12 Mass. Workers' Comp. Rep. 462, 465 (1998). Here, the combination of the medical opinion showing a worsening of the employee's condition while he was receiving § 34 benefits and the judge's crediting of the employee's testimony regarding his pain and limitations supports a finding of permanent and total incapacity. On the facts found by the judge in this case, we are not willing to conclude that the finding was arbitrary, capricious or legally erroneous simply because neither the judge nor the impartial medical examiner used the phrase, "permanent and total."[2]

The insurer also argues that the decision is nevertheless arbitrary and capricious because the judge failed to consider or in any way address the labor market survey or vocational testimony submitted by its vocational expert. We disagree. The judge listed the labor market survey and the curriculum vitae of the vocational expert as exhibits. (Insurer Exhibits 1 and 2.) We have held that a judge does not have to specify his reasons for rejecting a vocational expert's testimony. Coelho v. National Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998). Nor does he have to even mention it:

> . . . [A]n administrative judge possesses discretion to use his own judgement and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. See Sylva's Case, 46 Mass. App. Ct. 679, 681-82 (1999). The judge is required neither to adopt the testimony of an expert vocational witness *nor to mention that expert's evaluation* in reaching a conclusion on earning capacity. Id.

---

[1] The employee testified that his daily pain medications consisted of 40 milligrams of OxyContin three times a day, and two five-milligram tablets of Oxy-I.R.s, which are immediate release medications, three times a day. (Tr. 15.)

[2] It is always open to the insurer to file another complaint to terminate or modify weekly benefits.

Carraturo v. Springfield Wire, Inc., 16 Mass. Workers' Comp. Rep. ___ (May 29, 2002). (Emphasis added.) Thus, the fact that the judge did not discuss the vocational testimony does not necessarily lead to the inference that he did not consider it. The judge's testimony that this janitor with a high school education and a history of physically heavy work had medically worsened while receiving § 34 benefits, was in constant pain, took daily prescription pain medications and walked with the aid of a cane evidently persuaded the fact finder that a vocational capacity was unrealistic.

Finally, the insurer argues that the case should be recommitted for the administrative judge to rule on its motion for a finding of medical complexity submitted the day the decision was issued and its motion to vacate the hearing decision and allow additional medical evidence. The insurer points out that the judge, while finding the impartial report adequate and the medical issues non-complex, (Dec. 3, Tr. 9), had indicated that he would allow insurer counsel to re-file its motion after the deposition if he still felt the opinion was inadequate or the medical issues complex. (Tr. 9.) The judge noted that "the insurer was allowed a series of extensions to exercise his right to engage the impartial medical examiner to be deposed for purposes of cross-examination. The deposition was held on August 23, 2001 and submitted as evidence." (Dec. 3.) The insurer contends that it received the deposition transcript on September 4, 2001, and mailed its motion requesting a finding of medical complexity on September 12, 2001, which happened to be the same day the judge issued his decision.

The insurer does not argue that the record was closed prior to the date set by the judge, and we see no evidence that this was the case. At the hearing, the judge set June 4, 2001, for the receipt of the doctor's deposition, as well as findings and/or draft decisions. (Tr. 52.) He then granted the insurer an extension until July 6, 2001, for "Dr Silver's deposition, findings and rulings." (May 21, 2001 ruling on insurer's motion for extension dated May 18, 2001.) On July 30, 2001, he granted a final extension until September 4, 2001. (Ruling dated July 30, 2001 on insurer's letter seeking extension dated July 27, 2001.) Though the judge in his final ruling did not specifically indicate that the extension referred to both the receipt of the deposition transcript and proposed findings and rulings,

we think it was clear given his previous rulings. Since the insurer failed to follow the timeline set by the judge, we see no error in the judge issuing his decision eight days after all documents were to have been submitted and three weeks after the impartial physician was deposed. Compare Stasinos v. Cherry, Webb and Touraine Specialty Stores, 16 Mass. Workers' Comp. Rep. 123 (2002) (reviewing board recommitted case for § 11A motion hearing where administrative judge's decision was issued prior to scheduled § 11A motion hearing, and it was clear that decision had been issued prematurely).

Moreover, in its motion for a finding of complexity, the insurer seeks to have submitted the report of Dr. Vincent R. Giustolisi, dated July 29, 1999, and cites its difficulty securing that report as a reason for the delay in filing its motion. While the insurer may have had difficulty securing that report, it was clearly in the insurer's possession prior to the impartial deposition, and was, in fact, identified as an exhibit. (Silver Dep. 3.) There is no apparent reason why the insurer could not have moved for a finding of complexity immediately after the deposition of the impartial examiner on August 23.

The insurer also argues that the judge should have ruled on its September 28th motion to vacate the hearing decision and allow additional medical evidence due to complexity. While the judge had jurisdiction to rule on the motion, see Howard v. Beacon Construction, 11 Mass. Workers' Comp. Rep. 290 (1997), in these circumstances, where the basis for the motion to vacate is the same as the basis for the previous untimely motion (i.e., that the judge did not allow the insurer sufficient time to file its motion for complexity after the deposition), we see no support for the proposition that the judge was required to rule.[3]

[3] The insurer's motion to vacate the decision also alleges that the judge's award of § 34A benefits from July 1, 2001, which the judge said was the date the employee's § 34 benefits expired, was incorrect since the insurer did not begin paying § 34 benefits until November 1998. The insurer does not address this issue in its brief. See 452 Code Mass. Regs. § 1.15(4)(a)3 (reviewing board need not decide questions or issues not argued in the brief). If the parties cannot resolve this issue by agreement, the insurer may file a complaint seeking appropriate relief.

The decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee of $1,321.63.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **November 27, 2002**

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge