COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039154-08**

Nelson Andrade	Employee
Surface Works, Inc.	Employer
Public Service Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant and Koziol)

The case was heard by Administrative Judge Taub.

APPEARANCES
Joyce E. Davis, Esq., for the employee
Elizabeth C. Fliss, Esq., for the insurer at hearing
Peter M. McElroy, Esq., for the insurer on appeal

LEVINE, J. The employee appeals from an administrative judge's decision awarding him a closed period of § 34 benefits and ongoing § 35 benefits. The employee argues that the lifting restrictions found by the judge were internally inconsistent and erroneously based on lay, rather than medical, testimony. We affirm the decision.

In 1998, the employee immigrated to the United States from Brazil, where he had attended school for six years. Since arriving in this country, he has worked only for the present employer, a cleaning contractor for construction sites in commercial and residential properties. His job involved vacuuming, washing walls, windows and floors, and removing construction debris and furniture. At the time of hearing, he was sixty years old and testified with the assistance of an interpreter. (Dec. 3.)

On October 20, 2008, the employee was seen in a hospital emergency room for longstanding pain in his legs, and bilateral pins and needles in both upper extremities. On November 14, 2008, he left work after developing pain in his low back while squatting and cleaning windows. (Dec. 3-4.) On May 8, 2009, he had a right carpal

tunnel release, which did not provide much relief for his hand and wrist symptoms. (Dec. 4.)

The employee's claim for compensation resulted in a conference order awarding § 34 temporary total incapacity benefits from November 15, 2008, through May 7, 2009, and medical benefits for "flares of the employee's back and knee conditions, but not for the carpal tunnel syndrome." (Dec. 2.) The employee appealed to an evidentiary hearing. Dr. Murray Goodman conducted an impartial medical examination pursuant to § 11A. The judge allowed the parties to submit additional medical evidence due to the complexity of the medical issues. Id.

In his hearing decision, the judge found the employee suffered industrial injuries to his back and to both hands and wrists, but not to his knees. (Dec. 8, 9.) The judge relied on Dr. Goodman's opinion to find that the employee's lumbar strain was causally related to his work. (Dec. 8; see Dec. 5.) He further adopted the opinion of Dr. James Gibbons that, by the time he saw the employee on October 19, 2009, the work-related back strain was "no longer the cause of any symptoms of which the employee complained." (Dec. 8.)

With respect to the employee's hand and wrist injuries, the judge found that the employee's repetitive manual work for the employer was a major cause of his bilateral carpal tunnel syndrome,[1] based on the opinions of Dr. Andrea Wagner, who examined the employee on August 19, 2009, and August 17, 2010,[2] and Dr. Edward Kowaloff. (Dec. 5, 8-9.) However, adopting Dr. Gibbons' opinion that the employee's knee complaints were attributable to his pre-existing osteoarthritis, and not to an aggravation caused by his work for the employer, the judge denied the employee's claim of a work-related knee injury. (Dec. 9.)

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[1] The judge found the employee suffered an industrial injury to his hands and wrists on October 20, 2008, (Dec. 9, 11, 12), even though the employee claimed benefits beginning November 15, 2008. Neither party contests this finding.

[2] The decision lists the second examination as being August 17, 2009. (Dec. 6.) This is a scrivener's error. (See Employee Ex. 4, Dr. Wagner's report dated October 7, 2010.)

Turning to extent of incapacity, the judge found the employee was totally incapacitated due to *both* his lumbar strain *and* bilateral carpal tunnel syndrome from November 15, 2008, through October 18, 2009, when Dr. Gibbons opined the work-related back strain had resolved. (Dec. 8, 10, 11.) Beginning on October 18, 2009, the judge found the employee partially incapacitated due to his *carpal tunnel syndrome alone*:

> I adopt the opinion of Dr. Wagner that the employee could not repetitively grip or grasp and required a restriction on how much he lifted. However, I diverge from her opinion on the amount of that lifting restriction. Dr. Wagner suggested the employee's limit be 10 pounds. The employee testified that his limit was 10 kilograms. Thus, the employee allowed he could lift greater than 20 pounds. I credit that aspect of Mr. Andrade's testimony and find his lifting needs to be limited to 10 kilos.

(Dec. 10.)

The judge awarded the employee temporary total incapacity benefits from November 15, 2008, through October 18, 2009, based on his bilateral carpal tunnel syndrome and lumbar strain. There is no issue on appeal as to this finding. Beginning October 19, 2009, when the employee's lumbar strain resolved, the judge awarded ongoing partial incapacity benefits, based solely on the carpal tunnel condition. (Dec. 11-12.) Crediting the employee's testimony, the judge found the employee had a twenty-two pound lifting restriction, and was prohibited from gripping and grasping repetitively. With these restrictions, the judge found the employee could work two shifts per week earning minimum wage, $125.00 per week. (Dec. 10.)

On appeal, the employee contends that the judge's finding that he had a ten kilogram, or twenty-two pound, lifting restriction, is internally inconsistent because the judge first adopted Dr. Wagner's opinion that the employee's carpal tunnel condition limited him to lifting no more than ten pounds, (Dec. 10), but later adopted the employee's testimony that he could lift more than twenty pounds. Id. There is no reversible error.

First, as of the October 19, 2009 date, the judge did not, in fact, rely on Dr. Wagner's lifting restrictions, but specifically stated that he "diverge[d]" from her opinion on that issue and adopted the employee's testimony. (Dec. 10.) Moreover, the judge could not properly rely on Dr. Wagner's ten pound lifting restriction because it was based, in part, on the employee's knee condition, which the judge found was not causally related to his employment.[3] The judge acknowledged this in his recitation of the medical opinions, stating: "Dr. Wagner opined that Mr. Andrade was partially disabled as a result of his bilateral carpal tunnel syndrome and symptomatic osteoarthritis of the knees. She thought the employee . . . should not lift or carry more than 10 pounds." (Dec. 6.) However, later in his decision, the judge erroneously attributed Dr. Wagner's ten pound lifting restriction to the employee's carpal tunnel condition alone: "I adopt that much of the opinion of Dr. Wagner . . . as to find that the carpal tunnel condition required Mr. Andrade to . . . not lift or carry more than 10 pounds . . . ." (Dec. 10.) Because Dr. Wagner's opinion was clearly based both on a causally related condition (bilateral carpal tunnel syndrome) and on a non-causally related condition (osteoarthritis of the knees), the judge could not have relied on it as a basis for the employee's lifting restrictions.[4]

The employee argues, however, that it was error for the judge to rely on the employee's lay testimony, rather than a medical opinion, to establish that he could lift twenty-two pounds. We disagree. While medical experts may properly opine with regard to an employee's ability to perform certain tasks, such as lifting, see Scheffler's Case, 419 Mass. 251, 257 (1994), it is well-established that a judge may give "decisive weight to the credible testimony of the worker about his limitations," and overcome even the prima facie status of the impartial opinion. Dalbec's Case, 69

[3] In both her August 21, 2009 report and her October 7, 2010 report, Dr. Wagner opined that the employee was partially disabled as a result of his bilateral carpal tunnel syndrome and symptomatic osteoarthritis of the knees, and imposed ten pound lifting restrictions based on those conditions. (Dec. 6; see Ex. 4.)

[4] This also would be true as to the § 34 finding. As pointed out above, there is no appeal of the § 34 award.

Mass. App. Ct. 306, 313-314 (2007). The employee cites no medical evidence, other than Dr. Wagner's reports, to support his burden of proving his lifting restrictions. Particularly in the absence of any competent medical opinion addressing the employee's lifting restrictions based solely on his bilateral carpal syndrome, the judge permissibly based his finding -- that the employee could lift approximately twenty-two pounds -- on the employee's own testimony.

The employee also argues that the date chosen to modify benefits from total to partial is arbitrary because the employee's testimony did not differentiate between his lifting ability before and after that date. However, as noted above, the judge based the date to end § 34 benefits, in part, on Dr. Gibbons' opinion that the employee's lumbar strain was no longer symptomatic as of October 19, 2009, leaving carpal tunnel syndrome as the only disabling condition causally related to the work injury. The judge's choice of a date to begin § 35 benefits thus was not arbitrary, as it was grounded in the evidence.

Finally, the employee maintains that the judge ignored his testimony that he could only lift ten kilos *occasionally*. However, the employee did not so testify. Rather, he testified that he sometimes left the house for two hours, and carried "10 kilograms, more or less." (Tr. 33-34.) The employee also points to Dr. Wagner's opinion that the employee could lift only "occasionally." (See Employee Ex. 4, October 7, 2010 report of Dr. Wagner, p. 3.) However, as noted above, Dr. Wagner's lifting restrictions are irrelevant since they are based, in part, on a condition the judge found not causally related to the employee's work. The judge appropriately based the employee's lifting restrictions on the employee's own testimony.

The employee also argues that the assigned earning capacity based on minimum wage was arbitrary. We disagree, and summarily affirm the decision with respect to that issue. See Clark v. Longview Assocs., 24 Mass. Workers' Comp. Rep. 253, 257 (2010).

Accordingly, we affirm the decision.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **June 26, 2013**