COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002796-22**

Olga Herrera	Employee
Pace Industries, LLC	Employer
Arrow Mutual Liberty	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Long and O'Leary)

The case was heard by Administrative Judge Bean.

APPEARANCES
Maria Isabela Orlacchio-Garcia, Esq., for the employee
John A. Morrissey, Esq., for the insurer

FABRICANT, J. The insurer appeals from the administrative judge's decision awarding § 34 temporary total incapacity benefits from the date of injury, February 2, 2022, to the present and continuing, and §§ 13 and 30 medical benefits for the partial amputation of the employee's left thumb. Of the issues raised on appeal by the insurer, we find merit regarding the error in the period of time awarded for § 34 benefits. Accordingly, for the reasons addressed below, we vacate that portion of the decision awarding § 34 benefits from the date of injury, February 2, 2022, until March 16, 2023, and affirm the remainder of the decision.

The employee, Olga Herrera, was, at the time of hearing, a 57 year-old divorced mother of three adult children. She is a native of Medellin, Colombia and arrived in the United States in 2017. She has a sixth-grade education and has worked as an assembler and machine operator since her arrival in the United States. (Dec. 15 Bean 87.)

The employee's industrial accident occurred on February 2, 2022, her second day on the job operating a machine on the assembly line for the employer. After reporting to her supervisor that her machine was not working properly, her supervisor stood next to her at the machine and assembled two pieces as she observed. The supervisor then had

the employee assemble the next piece. As she did this, the machine malfunctioned, cutting off the top of her left thumb. (Dec. 15 Bean 87.)

On February 11, 2022, she had surgery on the thumb and subsequently received a course of physical therapy from March 2022 to July 2022. She continued to suffer from pain in her thumb, fingers, hand, elbow and shoulder, and stiffness in her arm. On October 25, 2022, she underwent carpal tunnel surgery, followed by another month of physical therapy. She last saw her doctor on January 9, 2023. (Dec. 15 Bean 88.)

Following the employee's industrial accident, the insurer began timely benefit payments of $476.63 pursuant to § 34. A Form 106 Modification of Benefits filed on April 6, 2022, increased the employee's § 34 benefit payments to $577.43 based upon a recomputation of the employee's average weekly wage. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file.)

On July 12, 2022, the insurer filed a Form 106 Notification of Termination, citing the employee's failure to respond to the employer's June 29, 2022, good faith written job offer in response to her treating physician's release to return to work with restrictions. This resulted in the employee filing a Form 110 Employee's Claim on July 25, 2022, for § 34 benefits from July 19, 2022, to February 2, 2025. The original § 10A conference for the employee's claim occurred on November 29, 2022. The resulting conference order of November 30, 2022, placed the employee on a closed period of § 35 benefits at the rate of $420.00 per week, based upon an average weekly wage of $962.38 and an earning capacity of $262.38 from July 19, 2022, to October 24, 2022, followed by § 34 benefits of $577.43 per week, from October 25, 2022, to January 01, 2023, and § 35 benefits at the rate of $420.00 per week, based on an earning capacity of $262.38 from January 2, 2023 to date and continuing. Neither party appealed the November 30, 2022 order. Rizzo, supra.

After being cleared for full duty work by her treating physician, the employee attempted to return to work on February 27, 2023, working for the employer as a packer.

After about 60 to 90 minutes, she reported that she could not continue due to the pain, and was then given another job carrying quarter-pound metal sheets a few steps using her right hand. However, she also stopped this job after an hour due to pain, and did not return. (Dec. 15 Bean 88.)

On March 15, 2023, the insurer filed a Form 108 Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation, seeking modification or termination of the employee's § 35 benefits.[1] On June 6, 2023, the employee filed a Motion to Join a Claim for § 34 Temporary Total Disability Benefits to the Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation. The § 10A conference on the Insurer's Complaint was held on August 14, 2023, resulting in an order of § 35 benefits to be paid from August 14, 2023, to date and continuing, along with commensurate benefits pursuant to §§ 13 and 30.[2] Both parties appealed that order.[3]

Prior to the hearing the insurer withdrew its appeal. The bench conference prior to the April 24, 2024, hearing clarified the contested issues as follows:

> The Judge:
> The issues before me are disability, extent of disability and failure to mitigate.
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> Currently, the employee is receiving section 35 partial disability compensation based on an earning capacity of $300, which leaves a weekly compensation rate of $397.43.

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[1] Pursuant to §§ 8(2)(k) and 36B, the insurer subsequently filed a Form 107 Notification of Termination of Weekly Compensation on April 21, 2023, due to the employee's failure to file for unemployment benefits pursuant to the insurer's written request of February 1, 2023. On May 4, 2023, the insurer filed a Form 107 Notification of Resumption of Weekly Compensation following receipt of the denial of unemployment benefits dated March 18, 2023. The benefits set forth in the first conference order, pursuant to § 35, were resumed at the rate of $420.00.

[2] The resultant order of August 18, 2023, increased the claimant's earning capacity to $300.00, resulting in a § 35 benefit rate of $397.43 per week, based upon an average weekly wage of $962.39.

[3] While the insurer promptly appealed this Order, the employee's appeal was filed beyond the 14-day period mandated by statute, thus requiring the employee to petition the Director of the Department for an exception as required pursuant to G.L. c. 152 § 10A(3). That petition was allowed by the Director on December 7, 2023.

> The employee is seeking Section 34 temporary and total disability compensation from the date of the industrial injury, February 2, 2022, to the (sic) date and continuing. And is seeking medical benefits pursuant to Sections 13 and 30.
>
> The Insurer is seeking a denial of all employee's claims. Now –
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> Attorney Morrissey:
> --actually, Your Honor, we are not contesting partial disability on this one. We withdrew our appeal.
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> The Judge:
> All right. So basically you're looking at status quo and a failure to mitigate, which would impact her 34 claim but not her 35 claim.
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> Attorney Morrissey:
> Yes, Your Honor. In fact, we anticipate potentially establishing that the $300 earning capacity could be revisited based upon the modified duty job offer that was extended…
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> The Judge:
> All right. So if I find the modified duty job offer to be a good offer that the employee could, in fact, do then you would be asking for an earning capacity of that wage?
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> Attorney Morrissey:
> Yes, Your Honor.
>
> And it still would not put her at a position where she would be earning at her average weekly wage, so it would keep her on a partial but at a lower rate based upon the earning capacity.

(Tr. Pp. 4-5.)

The administrative judge's decision awarded § 34 temporary and total incapacity benefits from the date of injury, February 2, 2022, to the present and continuing, and §§ 13 and 30 medical benefits for the partial amputation of the employee's left thumb. (Dec. 15 Bean 91.)

The insurer's appeal broadly claims that a reversal of the decision is warranted because it is "arbitrary, capricious, against the weight of the evidence, and contrary to

law." In support of its appeal, the insurer cites the employee's "failure to mitigate," as well as the failure of either party to appeal the original 2022 order which placed the employee on § 35 as of January 2, 2023.[4] (Insurer br. 1.)

We first address the significance of the parties' failure to appeal the original 2022 order, which the insurer only references for the argument that "the employee had the burden of establishing a worsening. . . ." (Insurer br. 1.) The insurer's "worsening" assertion finds no support in the law since a § 10A conference order contains no findings on the extent of incapacity from which a "worsening" medical condition can be determined. Lee v. General Investment and Development, 18 Mass. Workers' Comp. Rep. 211 (2004)(employee not required to prove worsening from unappealed conference order to qualify for compensation). Instead, the true significance of the parties' mutual failure to appeal the 2022 order lies in the fact that neither party may revisit time periods prior to the date of that order with a more advantageous outcome than originally provided.[5] Pursuant to G.L. c. 152, § 10A(3), a party's failure to timely appeal a conference order is deemed to be acceptance of the administrative judge's order and findings.[6] The employee's Motion to Join a Claim for § 34 was filed on June 6, 2023, and included the March 17, 2023, report of Dr. Hillel D. Skoff, which the judge credited

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[4] We note that the insurer's appellant brief consists entirely of proclamations of how the evidence and testimony should be evaluated and considered, devoid of any legal citations or case precedent proffered in support.

[5] This is also applicable to the insurer assertion at the bench conference that "we anticipate potentially establishing that the $300 earning capacity could be revisited based upon the modified duty job offer that was extended…" if that statement was meant to convey the belief that the judge could award a lower benefit to the employee for the periods prior to the date of the issuance of the order. (Tr. 4-5).

[6] We have recently re-affirmed the principle that a party cannot do better at hearing than at conference, where the order has not been appealed, in Campbell v. Boston Medical Center, ___ Mass. Workers' Comp. Rep. ___ (2025), citing Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99, 104 (2017); Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 200 (2017); and Blanco v. Alonso Constr., 26 Mass. Workers' Comp. Rep. 157, 160 n. 6 (2009).

in his findings. However, the motion was silent as to the date the employee sought for commencement of those benefits.[7] (Dec. 15 Bean 89.) Because commencement of incapacity must be grounded in the evidence, Dr. Skoff's March 17, 2023, report date is the earliest that any award of § 34 benefits can be assigned and any additional award of § 34 benefits prior to March 17, 2023, must be vacated.

The merits of the judge's finding that the employee continues to be temporarily totally disabled are well documented in the evidence and thoroughly examined by the judge in his decision. The judge specifically cites the August 7, 2023, report of Stanley Hom, M.D., the March 17, 2023, report of Dr. Skoff, and the September 21, 2023, § 11 A report of Mark Berenson, M.D. Of these reports, only Dr. Skoff's finds the employee to be temporarily totally disabled "from returning to any type of industrial work at this time." (Dec. 15 Bean 89, citing Ex. 11.) While also finding merit to the opinions of Dr. Berenson and Dr. Hom that the employee is partially disabled and able to perform sedentary work, the judge appropriately considers evidence of the employee's age, education, work experience, language skills, lack of a driver's license and her "credible complaints of pain." (Dec. 15 Bean 89-90.) There need not be unanimity amongst the opinions of medical experts. The employee correctly cites Flores v. Royal Hospitality Services, Inc., 35 Mass. Workers' Comp. Rep. 133, 138 (2021), citing Clarici's Case, 340 Mass.495 (1960), for the proposition that the judge has wide discretion as to the adoption of any medical opinion presented. We thus find no error.

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[7] The employee's June 6, 2023, filing also included the November 16, 2022, report of Andrew Terrono, M.D., which is disqualified for this purpose by 452 CMR §1.07(2)(f), which states in relevant part:

> Claims for benefits under M.G.L. c. 152 §§ 34, 34A and 35 shall be accompanied by a copy of a physician's report or record *not more than six months old* that describes the extent and duration of the employee's physical or emotional incapacity for work and which relates said incapacity to the claimed industrial injury.
>
> Emphasis added. We also observe that his report issued prior to the date of the previous conference order.

Likewise, the insurer's argument that the judge seemingly ignored the evidence proffered by the testimony of Pace Industries employee Barbara Losier, (Tr. II, 41 et. seq.), as well as three written light duty job offers (Exhibits 4, 5, and 6.), is not persuasive. Ms. Losier testified that she has worked in the HR department of the employer since 2021, and was responsible for creating the light duty job offers which purportedly aligned with the restrictions listed in the employee's various medical reports. She also testified that she had no special vocational training or certification. (Tr. II, 41-50, 58.) As we have previously made clear, there is no requirement that the judge's decision contain a recitation of all evidence presented. Flores, supra, citing Clark v. Longview Associates, 24 Mass. Workers' Comp. Rep. 253, 257 (2010). The decision clearly lists the three light duty job offers as exhibits, as well as confirming Barbara Losier as a witness. (Dec. 15 Bean 86, 87.) This, coupled with the judge's appropriate analysis of vocational factors, provides no basis for a finding that the judge failed to consider that evidence. Once again, we find no error.

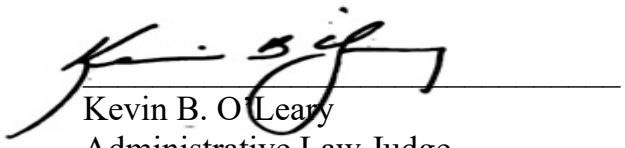
Accordingly, we vacate that portion of the decision ordering the payment of additional §34 benefits before March 17, 2023, and otherwise uphold the decision.

Pursuant to §13A(6), the insurer shall pay employee's counsel an attorney's fee of $1,900.55.

So ordered.

Bernard F. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge



Kevin B. O'Leary
Administrative Law Judge

Filed: **May 7, 2025**