

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 006365-91

Oscar Henry
S & S Construction Co.
Travelers Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Hernandez.

APPEARANCES

Alan S. Pierce, Esq., for the employee
Frances D. O'Toole, Esq., for the insurer at hearing
Richard P. Bock, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from a decision denying his claim for § 34A permanent and total incapacity benefits. Because the judge's incapacity analysis is internally inconsistent, we recommit the case for further findings on that issue.

The employee, a construction laborer, suffered an industrial injury to his lower back and right knee on January 21, 1991. The insurer accepted liability for the back and right knee injuries. (Dec. 6-7.) The employee has never returned to work as a construction laborer and has not attempted less physically demanding employment. (Dec. 7, 16.)

Dr. Brian McKeon's adopted opinion is that the employee's current right knee pain is due to the progressive degeneration of the medial femoral chondral cartilage. (Dec. 10-12.) He opined that in the years since the injury, the cartilage started to slough off causing progressive damage. (Dep. 12.) The employee developed left knee pain, which Dr. McKeon opined was caused by a medial meniscus tear resulting from the employee's awkward gait, in turn a result of his right knee injury. (Dec. 8, 11; Dep. 23.) Relying on Dr. McKeon's opinion, the judge found

the employee's left knee medial meniscal tear causally related to the 1991 work injury, and ordered the insurer to provide the proposed arthroscopic procedure pursuant to §§ 13 and 30. (Dec. 16, 19.) Despite acknowledging that the employee had no work experience other than heavy labor, the judge concluded the employee retained the same \$200 weekly earning capacity assigned since 1999. The judge also awarded the employee medical benefits for any psychological condition causally related to the industrial injury. (Dec. 16-18.)

The employee argues on appeal that the judge's finding of only partial incapacity is internally inconsistent with his finding that the employee's left knee condition developed as a result of the accepted right knee impairment. The judge arguably found the employee's medical condition had worsened since 1999.¹ Therefore, the employee submits, it was error for the judge to conclude, without a supporting vocational analysis, that his assigned earning capacity of \$200 remained unchanged. We agree.

Once partial incapacity has been established, medical worsening is the key to an employee's proof of permanent and total incapacity. See Foley's Case, 358 Mass. 230 (1970). The employee's long-standing back and right knee impairments had been the foundation of his \$200 weekly earning capacity for almost a decade. Added to those impairments, the judge found a causally related left knee impairment and a work-related psychological condition. (Dec. 8.) Given the minimal earning capacity assigned, these findings require an analysis and explanation of what, if any, realistic occupational prospects remain for this vocationally limited employee.

Accordingly, we recommit the case for further findings on the extent of the employee's incapacity.

So ordered.

¹ This interpretation is also supported by the judge's sole adoption of Dr. McKeon's opinions, which unequivocally establish medical worsening. (Dec. 10-11, 16-18.) Nonetheless, on recommitment the judge should make findings specifically addressing the issue of worsening. This is also applicable to the evidence of worsening in the employee's right knee as well, which the judge failed to address.

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Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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