COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035789-02**

Patrick Breslin	Employee
American Airlines Corp.	Employer
Insurance Co. of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Chivers.

APPEARANCES
Seth J. Elin, Esq., for the employee
John J. Canniff, III, Esq., for the insurer

FABRICANT, J. The parties cross-appeal from a decision on recommital by the reviewing board for further findings on the extent of the employee's incapacity. We summarily affirm the decision as to the judge's termination of § 30 benefits for chiropractic treatment, the only challenge advanced by the employee on appeal. The insurer argues the judge has again failed to perform a reasoned incapacity analysis and provide subsidiary findings to support an award of § 35 benefits at the maximum rate. We disagree, and affirm the decision.

In Breslin v. American Airlines, 22 Mass. Workers' Comp. Rep. 215 (2008), we recommitted this case because the judge's termination date for weekly incapacity payments, thirty days after the issuance of that earlier decision, was not based in the record evidence. We concluded the thirty day prospective termination was speculative as to the employee's successful recovery from his legitimate and disabling psychogenic disorder, and therefore arbitrary and capricious under § 11C. Id. at 219.

The judge on recommittal followed the directives of the reviewing board, and revised his incapacity assessment to award weekly incapacity benefits for the continuing

psychogenic disorder. (Dec. 3-4.) In the earlier proceeding,[1] the judge ordered the insurer to pay § 34 benefits from August 1, 2005, until their exhaustion on September 7, 2005.[2] Having heard further testimony from the employee regarding his return to full time work on February 11, 2008, the judge awarded § 35 benefits at the maximum rate from September 8, 2005 to February 11, 2008. (Dec. 3, 5.)

The insurer contends the judge's award of § 34 benefits, based primarily on the exclusive medical evidence derived from the § 11A medical examination on September 6, 2005, Breslin, supra at 217, cannot stand. (Ins. br. 10.) We disagree. The impartial medical evidence supports a continuing work-related total disability for the time period in dispute. The impartial physician's opinion, adopted by the judge, (Dec. 3), was that the employee's musculoskeletal psychogenic overlay was the likely source of his subjective symptomatology, which rendered him incapable of returning to his pre-injury job.

The insurer further argues the award of maximum partial incapacity benefits from the exhaustion of § 34 until the employee's return to work is unsupported by the judge's findings. While we agree the decision lacks the specific vocational analysis customarily required to support the assignment of an earning capacity, Frennier's Case, 318 Mass. 635 (1945), such analysis is not required here. The judge's finding of total incapacity is supported by the employee's testimony and the opinions of the § 11A impartial physician. (Dec. 3, 4). The statutory exhaustion of § 34 total disability benefits prior to recovery from a proven total incapacity does not require additional findings for the lesser award of maximum available benefits pursuant to § 35.

> 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. An employee's failure to claim § 35 incapacity benefits in the alternative does not bar a judge's award of such benefits. Tredo v. City of Springfield School Dept., 19

---

[1] The insurer's original complaint to modify benefits was filed on February 3, 2005, and thus, the insurer could not challenge the employee's total disability status before that date. Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995)(order of discontinuance may go back no further than the date the request was filed).

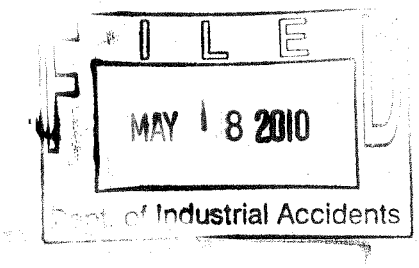
[2] As the employee had received §34 benefits since his September 7, 2002 injury, those benefits would exhaust on or about September 7, 2005.

> Mass. Workers' Comp. Rep. 118 (2005). The only requirements that must be satisfied are that the period in question is a period in which benefits are sought, and that the employee has shown that he is incapacitated. Id. at 123; Fallon v. Department of Revenue, 19 Mass. Workers' Comp. Rep. 298, 299 n.1 (2005) (judge may award "lesser included" § 35 benefits only for period in which some incapacity is alleged).

Bracchi v. Ins. Auto Auctions, 22 Mass. Workers' Comp. Rep. 287, 288-289 (2008) ("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.").

Accordingly, we affirm the award of § 34 and § 35 benefits. Pursuant to § 13A(6), the insurer shall pay employee's counsel an attorney's fee of $1,497.28.

So ordered.



Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge