COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012343-06**

Paul Barbosa	Employee
Framingham Welding & Engineering Corp.	Employer
Arbella Protection Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
James N. Ellis, Esq., and Rickie T. Weiner, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
David M. Bae, Esq., for the insurer at hearing
Teri A. McHugh, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing his claim for further weekly partial incapacity benefits, which was filed after a different administrative judge found, in a prior hearing decision,[1] that the employee's work-related incapacity had ceased. (Dec. I, 8-9.) We affirm.

The relevant procedural history of the case is as follows. On May 5, 2006, the employee suffered a low back injury while working for the employer. The insurer paid the employee closed periods of § 34 and § 35 benefits until September 6, 2006, when he returned to regular work. Shortly thereafter, the employee underwent hernia surgery which was not work-related. On November 15, 2006, the employee changed jobs and began working for the City of Woonsocket, R.I. (Dec. I, 4-5.)

The employee filed a claim seeking § 35 benefits from November 15, 2006, to date and continuing. He argued that his work-related injury caused him to seek

[1] We refer to the first hearing decision, filed on April 8, 2009, as "Dec. I"; we refer to the second hearing decision, filed on September 11, 2012, as "Dec. II."

lighter, and lower paying, work for the City. (Dec. 5.) A different administrative judge disagreed:

> I do not find that the employee is partially disabled from November 15, 2006, and continuing as claimed.
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> . . .
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> The employee's decision to seek another job was motivated by factors other than incapacity resulting from the work-related injury. The loss of wages, therefore, is not due to his incapacity. The employee has worked full time as a laborer with the City of Woonsocket ever since voluntarily leaving his position with the employer. He is capable of performing his job with the employer but chooses not to.

(Dec. I, 8-9.) The judge denied and dismissed the employee's claim. Id. at 9. The employee appealed. On February 9, 2010, we summarily affirmed the judge's decision. The employee appealed our decision, which the Appeals Court affirmed. Barbosa's Case, 78 Mass. App. Ct. 1129 (2011)(Memorandum and Order Pursuant to Rule 1:28).

Undaunted by these three strikes, the employee filed claims[2] for additional compensation benefits.[3] At the conference on May 9, 2011, the employee claimed

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[2] Three claims were filed seeking additional compensation. On April 15, 2009, the employee's claim sought § 34 and § 35 benefits for injuries to his "low back, right leg, groin" from June 30, 2008, to date and continuing. The employee later withdrew this claim at conciliation. On December 16, 2009, the employee claimed, inter alia, § 35 benefits from April 8, 2009, to date and continuing. This claim was also withdrawn at conciliation. On March 11, 2010, the employee filed the present claim for § 35 benefits from April 8, 2009, to date and continuing, along with §§ 1, 7, 8 and 13A. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file).

[3] See General Laws c. 152, § 16, which provides, in pertinent part:

> When . . . it appears that compensation has been paid . . . no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee . . . may have further hearings as to whether his incapacity . . . is or was the result of the injury for which he received compensation; provided, however, that if the board shall determine that the petition for such rehearing is without merit or frivolous, the

only § 35 benefits from the filing date of the first decision, April 8, 2009, owing to his May 5, 2006, work-related back injury. (Form 140, Temporary Conference Memorandum dated May 9, 2011). The insurer raised, inter alia, the defenses of causal relationship and extent of disability. Id. The judge denied the employee's claim, and he appealed. (Dec. II, 3.)

Prior to the second hearing,[4] the employee was examined by an impartial medical examiner, Dr. Osama A. Al-Masri.[5] See G. L. c. 152, § 11A(2). At the hearing, Dr. Al-Masri's report was entered into evidence as Exhibit 1; he was deposed following the employee's testimony. (Dec. II, 2.) The judge allowed the parties to offer additional medical evidence on complexity grounds. The employee submitted the medical reports of Dr. Vincent Birbiglia, Dr. Ronald Romero, and Dr. Stephen Saris, along with physical therapy records and hospital records.[6] (Dec. II, 2-4; Ex. 7-12.)

At the second hearing the judge took judicial notice of the first hearing decision as the law of the case. (Dec. II, 3.) See e.g., Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. ___ (March 1, 2013), and cases cited. He correctly framed the main issue as follows:

> In order to prevail in the instant claim for benefits since April 9, 2009, the Employee must demonstrate a worsening of his work-related medical condition or [a] deterioration in his vocational status. The credibility of the Employee is a primary focus.

> employee . . . shall not thereafter be entitled to file any subsequent petition thereof except for cause shown and in the discretion of the member to whom such subsequent petition may be referred. . . .

[4] Prior to the employee's testimony the insurer filed motions to dismiss his claim on "res judicata and collateral esptoppel" grounds, and moved to bifurcate the hearing. (January 2, 2012, Tr. 5.) The judge denied these motions. (Dec. II, 6.) See n. 3, supra.

[5] Dr. Al-Masri was not the impartial medical examiner at the first hearing.

[6] These doctors were not deposed. The insurer did not offer any additional medical evidence. (Dec. II, 4, n.1.)

(Dec. II, 8.) The judge then rejected the employee's testimony "that his physical problems are more intense or more frequent now than at the time of the first Hearing." (Dec. II, 9.) The judge correctly noted that Dr. Al-Masri "could not render an opinion as to whether the Employee's condition had worsened since the Employee's first Hearing." (Dec. II, 10.) He also adopted Dr. Al-Masri's opinion,[7] that the employee's work for the City "aggravated the May 2006 industrial injury."[8] (Dec. II, 10; Dep. 37-44, 47-48.) The judge concluded that the employee's

> work in the [City's] Sewer Department for a year and a half 羊*after leaving the Employer but prior to the first Hearing* 羊was sufficiently aggravating as to sever the legal requisite causal connection between (a) his industrial injury of May 5, 2006 and (b) his claimed incapacity beginning in April 2009.

(Dec. II, 10; emphasis added.) Accordingly, the judge denied the employee's claim due to his failure to establish "a worsening of his work-related medical condition or deterioration in his vocational status since April 9, 2009."[9] (Dec. II, 11.)

The employee raises two issues on appeal. First, he argues the judge should not have addressed whether his work, performed for the City *prior* to the first hearing, constituted an intervening event sufficient to sever the causal relationship between his work-related back injury and his incapacity after April 9,

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[7] Dr. Al-Masri's opinion was given at his deposition, after the insurer's counsel related the *prior* judge's observations of the employee performing work for the City, which work was depicted in videotapes admitted in evidence at the first hearing. (Dec. I, 2; Ex. 5.)

[8] The employee does not argue that the judge mischaracterized any of Dr. Al-Masri's opinions.

[9] The record in this case fails to reveal any attempt by the employee to demonstrate what we have previously referred to as a "vocational worsening." See e.g., Manzi v. Beverly Housing Auth., 19 Mass. Workers' Comp. Rep. 180 (2005); Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 93-94 (2003).

2009. (Employee br. 13.) Second, the employee posits the judge erred by permitting insurer's counsel to cross-examine Dr. Al-Masri with the prior judge's "observations"[10] respecting the videos[11] of the employee working for the City in 2007, where those videos were in evidence only at the first hearing. (Employee br. 15.)

We need not delve into the issues presented, as any claimed error is harmless in light of the employee's failure to produce medical evidence that his back condition worsened to cause incapacity *after* the prior finding that his incapacity had ceased, and that such worsening was causally related to his May 5, 2006, industrial injury. An employee who claims incapacity benefits following a hearing decision terminating them must produce medical evidence of a worsening of his work-related medical condition or vocational status to create a dispute respecting his further entitlement to weekly incapacity benefits.[12] Gaetani v. Fluors Constructors, Inc., 7 Mass. Workers' Comp. Rep. 384, 386 and n.1 (1993) (following hearing decision terminating his weekly benefits, employee, in subsequent claim filed under § 16, must "sustain his burden of proving a change in his physical condition"). G. L. c. 152, § 16; See Lopes v. Lifestream, Inc., 25 Mass. Workers' Comp. Rep. 121, 123 n. 6 (2011)(employee required to produce

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[10] We note these "observations" were also "findings of fact" by the judge at the first hearing. (Dec. I, 4-6.)

[11] These videos were admitted into evidence without objection at the first hearing. (Dec. I, 6; Ex. 5.) The judge at the second hearing decided he would not view the video evidence from 2007. (Dec. I, 4.) Of course, the first judge's findings respecting that evidence were known to the second judge, as he had taken judicial notice of the first hearing decision. See discussion, supra.

[12] An insurer is similarly constrained, for when it "seeks to discontinue total incapacity benefits . . . [it] must produce evidence of improvement in the employee's medical or vocational status, or a lessening of the degree of [his] incapacity, in order to meet its burden of producing evidence sufficient to create a dispute." Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 154 (2010), and cases cited; Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. 261 (2012).

evidence of incapacity due to causally related neck injury following decision of closed period of disability). Here, none of the medical opinions in evidence is premised on the finding made in the first hearing decision that the employee's work-related incapacity ceased prior to April 9, 2009.[13] (Dec. I, 8-9.) See Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(doctor's opinion failed to address whether the employee's condition had changed, and erred by rejecting established initial causal relationship); see also Grant, supra (discussion of law of the case doctrine and the insurer's burden of production). And none of the doctors opine that, on or after April 9, 2009, the employee suffered a recurrence of incapacity owing to his work for the employer. Moreover, even if, arguendo, the medical evidence could be viewed as satisfying the employee's burden of *production*, it remains true that he also must carry the burden of *proof* on all elements of his claim. Sponatski's Case, 220 Mass. 526 (1915). Ultimately, the judge found that he failed to do so:

> Dr. Al-Masri opined that he could not render an opinion as to whether the Employee's condition had worsened since the Employee's first Hearing. The limitations put upon the Employee . . . in 2007 are remarkably similar to the limitations placed on him by Dr. Al-Masri. My review of the additional medical records reflects ongoing back pain, but *does not persuade me that the Employee's condition worsened since the Employee's first Hearing.*

(Dec. II, 10; emphasis added.) Because he rejected the employee's testimony that "his physical problems are more intense or more frequent now than at the time of his first Hearing," (Dec. II, 9), the judge was under no obligation to adopt a medical opinion premised on that testimony. Brommage's Case, 75 Mass. App. Ct. 825 (2009). Rather, the judge found it more likely that if the employee

[13] Employee's counsel was apparently cognizant of this burden, as he repeatedly urged Dr. Al-Masri to opine that, subsequent to the first hearing decision, the employee's condition had worsened, and that his incapacity related back to the May 5, 2006, industrial accident. However, Dr. Al-Masri would not so state. (Dep. 18-25.) Rather, he agreed with insurer's counsel that the type of work the employee performed for the City could have, or would have, aggravated his back injury. (Dep. 43-44, 47-48.)

experienced back pain subsequent to the first hearing, it was caused by his work for the City, not the employer. (Dec. II, 10.)

Under §16, the employee's claim for further compensation benefits, filed subsequent to a decision terminating them, is a petition for a rehearing. Because we determine, as the judge did below, that the employee's claim is without merit, "the employee or his dependents shall not . . . be entitled to file any subsequent petition [for benefits] except for cause shown and in the discretion of the member to whom such subsequent petition may be referred. . . ."[14] See footnote 3, supra.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: May 29, 2013

[14] See General Laws c. 152, § 10A(1), which provides, in pertinent part:

> On referral from the division of administration of a claim for compensation . . . said claim or complaint shall be immediately assigned to an administrative judge. Except where events beyond the control of the department make such scheduling impracticable, the administrative judge assigned to any case referred to the division of dispute resolution shall retain exclusive jurisdiction over the matter and any subsequent claim or complaint related to the alleged injury shall be referred to the same administrative judge.