COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020288-15**

Paul Brouillette	Employee
Safelite Auto Glass	Employer
Ace American Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

The case was heard by Administrative Judge O'Neill.

APPEARANCES
Michael Lynn, Esq., for the employee
JoAnn D. Walter, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

KOZIOL, J. The parties cross-appeal from a decision ordering the insurer to pay the employee § 34 temporary total incapacity and § 30 medical benefits from the date of injury, August 5, 201[5],[1] to July 19, 2017, the day before the § 11A examination, and discontinuing payment of all incapacity and medical benefits after July 19, 2017. (Dec. 14.) We summarily affirm the decision regarding the issues raised by the employee on appeal. We agree in part with the insurer that, in light of the facts found by the judge, the order terminating payment of § 34 benefits on July 20, 2017, was arbitrary and capricious and cannot stand. However, the decision does not contain sufficient findings of fact for us to grant the relief requested by the insurer: issuance of an order discontinuing "benefits on November 10, 2016, the date the [insurer's] complaint was filed." (Ins. br. 11-12.) Accordingly we vacate the judge's order and recommit the matter for further findings of fact.

[1] The judge's order instructs the insurer to pay § 34 weekly incapacity benefits from "August 05, 2016," which appears to be a scrivener's error.

The employee was injured in the course of his employment as a glass installer for Safelite Auto Glass, when he was involved in a motor vehicle accident on August 5, 2015. The insurer commenced payment of § 34 benefits. On November 10, 2016, it filed a complaint to modify or discontinue payment of those benefits based on the September 27, 2016, report of its independent medical examiner, Dr. Steven Sewall. (Dec. 6.) The matter came before a different administrative judge for a § 10A conference, and that judge ordered modification of the employee's benefits to § 35 partial incapacity benefits from March 21, 2017, and continuing, at the rate of $349.59 per week based on an assigned earning capacity of $250.00 per week. (Dec. 4.) Both parties appealed and, pursuant to § 11A, the employee was examined by orthopedic surgeon, Dr. Michael J. Murphy, on July 20, 2017.

A de novo hearing was held before the present judge on October 10, 2017. At that time, the judge found the matter medically complex and Dr. Murphy's report inadequate regarding the issue of § 1(7A). (Dec. 5.) The parties subsequently deposed Dr. Murphy and submitted their additional medical evidence. (Dec. 2-5.)

The judge found the employee had a longstanding history of non-work-related low back problems, including an L4-S1 spinal fusion when he was eight years of age. (Dec. 7.) He had one work-related back strain while doing pushups during training for the Department of Corrections in 1998, but he did not lose any time as a result of that incident and "only had symptoms for about a week"; the judge found "the employee recovered from his prior work injury." (Dec. 7, 13.) In 2003, the employee had a tumor removed from his lower back, and, thereafter, he sustained two low back injuries in non-work-related motor vehicle accidents in 2003, and again in 2008, when he treated "for four to six months." (Dec. 7.) The judge did "not entirely credit the Employee's testimony regarding his history of back pain prior to the August 5, 2015, accident, as the medical records demonstrated he was not symptom free and, in fact, treated often in the years leading up to the industrial injury." (Dec. 12.) However, we cannot discern from the decision whether the judge did or did not credit the employee's testimony about his

ability to function and his complaints of pain from the date of the accident, August 5, 2015, through the date of hearing.[2]

The judge adopted two of Dr. Sewall's opinions expressed in his September 27, 2016, report: specifically, that "the Employee suffered from a flare-up of pre-existing facet joint arthritis of his back," and "the Employee returned to his pre-accident level of function." (Dec. 12; Ex. 10[a].) The judge also adopted a number of Dr. Murphy's opinions. (Dec. 11.) Relevant to our discussion, the judge adopted Dr. Murphy's opinions that, 1) when he saw the employee on July 19, 2017, the employee "had reached maximum medical improvement and any impairment would be based on the Employee's pre-existing conditions and not from the industrial accident;" and, 2) "the need for further SI injections, sacral fusion and possible spinal cord stimulator would not be related to the industrial injury sustained in August 2015." (Dec. 11.) Based on Dr. Murphy's opinions, the judge terminated the employee's weekly benefit as of the July 20, 2017, § 11A examination. (Dec. 14.) She also concluded that the employee's "treatment for low back pain with left SI joint pain has been reasonable and appropriate pursuant to §§ 13 and 30 up until July 19, 2017" and that his "need for treatment subsequent to July 19, 2017" was "no longer related to the industrial injury sustained on August 5, 2015." (Dec. 12-13.)

The insurer argues that, because the judge adopted the opinion of Dr. Sewall that the employee "returned to his pre-accident level of function," (Dec. 12), the date of termination of the employee's benefits had to begin on November 10, 2016, the date the insurer filed its discontinuance request, based on Dr. Sewall's September 27, 2016, report. (Ins. br. 11-12.) This argument has surface appeal, but, given the insufficient

[2] In regard to that timeframe, the decision contains multiple recitations of the employee's testimony, interspersed with a couple of statements that may be viewed as findings of fact. Yet, within the context of the paragraph in which they appear, these statements may just as easily be interpreted as further recitations of testimony. (Dec. 8.) The judge made no credibility findings about the recited testimony. Evers v. City of Boston, 11 Mass. Worker's Comp. Rep. 636, 638 (1997)("judge's recitations of employee's testimony, without any findings as to what parts [she] finds credible or persuasive, do not constitute adequate subsidiary findings of fact. As a result, we are unable to determine whether the judge's conclusions were based in the evidence found as fact, and untainted by error of law").

findings of fact, cannot carry the day. Where Dr. Murphy's opinions focused on a lack of causal relationship between the August 5, 2015, injury and any disability and need for medical treatment, the adopted portion of Dr. Sewall's opinion addresses only the employee's ability to function, or the extent of his disability. Yet the judge adopted both doctors' opinions without any further findings or analysis explaining her basis for relying on Dr. Murphy's opinion in setting the date of termination of weekly benefits. There may be legally sound reasons for terminating benefits as of the date of Dr. Murphy's opinion; however, the decision could also be based on a mischaracterization of Dr. Sewall's opinion.[3] Without additional findings of fact, we cannot determine whether correct rules of law have been applied. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); Ballard's Case, 13 Mass. App. Ct. 1068 (1982)(specific and definite findings are required to enable proper appellate review).

Lastly, the insurer merely argues that "benefits" should have been terminated as of the date it filed its complaint to discontinue, November 10, 2016. To the extent it is arguing that medical benefits also must terminate as of the date of the filing of its discontinuance request, we disagree. The adopted opinion of Dr. Sewall discusses only the employee's ability to function, not the status of his need for medical treatment. Even where the employee is no longer entitled to weekly benefits, the employee may still be entitled to medical benefits under §§ 13 and 30. Tigano v. ACME Boot Co., 8 Mass. Workers' Comp. Rep. 145, 148 (1994). We do not disturb the judge's order terminating entitlement to medical benefits as of the date of Dr. Murphy's adopted opinion supporting that order.

The order terminating the employee's § 34 benefits effective July 20, 2017, is vacated and the matter is recommitted for further findings of fact and rulings of law

[3] While Dr. Sewall's adopted opinion that "the employee returned to his pre-accident level of function" is not very precise and without more, may be interpreted to mean a number of different things, Dr. Sewall's report further elaborates "the examinee is capable of returning to his regular work without restriction." (Ex. 10[2].) While the judge is free to adopt portions of a doctor's opinion she is not free to mischaracterize that opinion. Hovey v. Shaw Industries, Inc., 12 Mass. Workers' Comp. Rep. 442, 443 (1998).

consistent with this decision. Because the employee prevailed on the issue of his entitlement to medical benefits through the date of the § 11A examination, pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's attorney a fee in the amount of $1,654.15.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **September 12, 2018**