COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 59920-90

Paul Manzi	Employee
Beverly Housing Authority	Employer
Public Service Mutual Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Thomas J. Roccio, Esq., for the employee
Paul Matthews, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits pursuant to G. L. c. 152, § 34A. We recommit the case for the judge to make findings of fact with regard to critical evidence in support of the award of benefits.

The employee suffered a right hemorrhagic cerebrovascular accident at work on October 25, 1990, while excavating a tract of land using a pick and shovel. The result was left-sided weakness. He spent one week in an acute care facility and was transferred to the New England Rehabilitation Hospital for inpatient management. He then underwent outpatient and occupational therapy for approximately six months and completed rehabilitation in 1991. (Dec. 4.)

The August 27, 1993 hearing decision of a different administrative judge established that the insurer was liable for the employee's work-related injury, and that the employee was partially incapacitated on a continuing basis from May 22, 1991, with a weekly earning capacity of $150. (Exhibit 6.)

In 2002, the employee claimed total incapacity benefits under either § 34 or § 34A. The insurer raised causal relationship and extent of disability, if any, in defense of the claim. (Dec. 2.) The employee was examined by Dr. Scott Masterson, the impartial physician appointed pursuant to § 11A(2), on August 2, 2002. Dr. Masterson found the employee to

have multiple significant restrictions in terms of use of his left upper and left lower extremities, based on his causally related medical condition, and opined that the employee would be limited in any activities that entailed regular usage of both hands, especially those that would involve left-handed dexterity or power gripping. He further opined that the employee was limited in overhead activities and reaching to push or pull, and that his left lower extremity and gait problem would limit the employee from anything but short distance walking on level ground in a controlled environment. The employee was absolutely unable to do any climbing of ladders or stairs, or to regularly walk on uneven ground. Finally, the doctor opined that the employee's balance issues would limit him from being around moving machinery or other dangerous equipment. (Dec. 5-6; Impartial Medical Report, Exhibit 1.) Dr. Masterson concluded: "Based solely on the medical issues, there are significant work limitations and he would have a permanent partial disability." (Exhibit 1.)

The judge adopted Dr. Masterson's opinions, but did not adopt his opinion that the employee could perform work activities within the above-mentioned physical restrictions. (Dec. 6.) The judge found, with regard to the employee's vocational profile:

I find that while having an associate's degree in architectural engineering, the employee's work history is in heavy labor and maintenance that are now beyond his capability. He has no particular office or clerical work training or a [sic] held a job in the field of architectural engineering. Combine [sic] with the fact that the degree itself is over forty years old, it is clear, that the degree is vocationally useless to him today.

I find that the employee's lack of further education, lack of training or work outside of a field where he can clearly no longer perform and his severe physical restrictions, prevents him from engaging in any occupation and performing any work for compensation or profit. I further find that the employee's disability prevents him from performing remunerative work of a substantial and not merely trifling character. In making this finding, I have taken into consideration the subsidiary findings as well as the employee's age, education, work experience, the employee's symptomatology related to the industrial injury.

. . .

The employee's disability may not be permanent in the sense that it is life long, however, in light of the [sic] Dr. Masterson's opinion that the employee has achieved maximum

medical improvement with no expectation of improvement, there is no doubt that the employee's job disability is a permanent one.

(Dec. 7-8.) Accordingly, the judge awarded the employee permanent and total incapacity benefits. (Dec. 9.)

The insurer argues on appeal that the decision is unsupported by the evidence adduced at the hearing, and therefore must be reversed. (Ins. br. 7.) Upon review, we consider the case appropriate for recommittal for further findings of fact on one issue to which the insurer obliquely alludes.[1] (Ins. br. 8.)

The judge did not make any findings with respect to the prior adjudication of partial incapacity by a different administrative judge in the 1993 hearing. In order to support a claim for permanent and total incapacity benefits after such an adjudication of partial incapacity has been made, "the burden . . . was upon [the employee] to prove he was now totally incapacitated as a result of his accident." Foley's Case, 358 Mass. 230, 232 (1970). Foley established that the employee's proof thus required a showing of a "change in the employee's condition . . . not due to advancing age." Id. Foley characterized the "change" necessary for a move from a prior judicial finding of partial incapacity to total incapacity as "deterioration." Id. Cf. Lee and other cases cited in footnote 1, supra, (no need to show worsening when partial incapacity payments based on unappealed conference order or §

[1] In the 1993 hearing decision, the parties stipulated to, and the prior judge said she adopted, a $125.00 earning capacity (Exhibit 6, p. 3). However, the judge in her decision found the employee had a $150.00 earning capacity (Exhibit 6, pp. 8, 10). It is to the stipulation, rather than the judge's finding, that the insurer points its arguments on appeal. However, apparently neither party appealed the 1993 decision. Although a stipulation and/or unappealed conference order of partial incapacity does not trigger the requirement that a worsening be shown in order to change from partial to total incapacity benefits, a hearing decision finding only partial incapacity, such as we have here, does trigger the rule that in order to support a change from partial to total incapacity benefits, an employee must prove a worsening. See, e.g., Lee v. General Investment and Development, 18 Mass. Workers' Comp. Rep. 211, 212 (2004)(rule applies only when the partial incapacity benefits were ordered in a hearing decision on the merits of the employee's claim); Hovey v. Shaw Indus., 16 Mass. Workers' Comp. Rep. 136 (2002) (no "worsening" required where employee was receiving §35 under an agreement to pay compensation); Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660 (1996)(no "worsening" required following payment of § 35 benefits under an unappealed conference order).

19 agreement, rather than hearing decision with factual findings on all issues pertinent to award and determination of earning capacity).

As a general rule, proof of worsening or deterioration must be supported, at least in part, with medical evidence.[2] See, e.g., Foley, supra; McEwen's Case, 369 Mass. 851, 854 (1976); Desrosiers v. Lakeville Hospital, 17 Mass. Workers' Comp. Rep. 549 (2003); Souza v. Harvard University, 17 Mass. Workers' Comp. Rep. 248, 249-250 (2003). However, we have recognized that vocational worsening may also satisfy Foley. Buonanno v. Greico Bros., 17 Mass Workers' Comp. Rep. 91, 94 (2003)(vocational worsening can be factored into incapacity analysis insofar as it reflects external factors, not the employee's personal vocational history). See Lally v. K.L.H. Research & Development, 9 Mass. Workers' Comp. Rep. 427, 429-430 (1995)(recommittal for findings on whether termination of long-time post-injury employment was a circumstance which reduced employee's vocational options); Desrosiers, supra. See generally Scheffler's Case, 419 Mass. 251, 256 (1994)(listing some of the external vocational factors that can affect incapacity analysis). To the extent that such external vocational factors may be found to have caused a vocational worsening, we have determined that such worsening alone may support an employee's burden of showing a Foley worsening.

On recommittal, the judge must consider the employee's burden of proof:

[2] As the comparison between the employee's medical condition at the time of the prior hearing and that which existed at the time of the present hearing is necessary for a proper Foley analysis, the possibility of opening the record to include the 1992 deposition of Dr. Baker - upon whose opinion the prior partial incapacity finding was based - might be explored on recommittal. (Exhibit 6.) We do note that the judge found the § 11A medical evidence in the present case to be adequate under the statute. (Dec. 2.) However, he may reconsider that ruling in light of the standard of proof he is now being required to apply. Moreover, a question as to statutory inadequacy might arise with regard to the assessment of disability in 1992, a topic upon which the present decision is silent. We do not address whether Dr. Masterson's opinion is adequate for that purpose. Finally, due to the passage of time, the opinion may now be inadequate. The judge may, in his discretion, allow additional evidence.

> The employee is claiming § 34A permanent and total incapacity benefits; he had previously been awarded only § 35 partial incapacity benefits. Because the employee is seeking an increase in the benefit level since the last adjudication, he must establish that his condition has deteriorated between the date of the prior evidentiary hearing, when he was found to be only partially incapacitated, and the date on which the evidence is heard in this case. Foley's Case, [supra at 232-33]; McEwen's Case, [supra at 854]. The deterioration must be due to the industrial accident, rather than merely to advancing age. Foley's Case, at 232. Either the employee's medical or vocational condition must have worsened. Lally, [supra at 429].

Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 231 (1998).

Accordingly, we recommit the case for further findings of fact consistent with this opinion.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: June 29, 2005