COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Employee: Rainey D. Slater
Employer: G. Donaldson Construction
Insurer: Eastern Casualty Insurance Co.
Board No.: 04079896

REVIEWING BOARD DECISION
(Judges McCarthy, Levine and Costigan)

APPEARANCES
Esther C. S. Dezube, Esq., for the employee
John A. Smillie, Esq., for the insurer

MCCARTHY, J. On October 22, 1996, Rainey D. Slater suffered an industrial injury arising out of and in the course of his employment. **[1]** The insurer accepted the case and began payment of weekly temporary total incapacity benefits under § 34 of the Act. The employee then filed a claim for § 34A weekly permanent and total incapacity benefits beginning November 24, 1997 and continuing. The insurer resisted payment of these benefits, contending that the employee must first exhaust the statutory maximum of three years of § 34 benefits before he could receive weekly permanent and total incapacity payments under § 34A. The § 34A claim was denied at a §10A conference and the employee appealed. At the evidentiary hearing the parties stipulated to the industrial injury of October 22, 1996. The parties also stipulated that the employee was totally incapacitated as a consequence of the accepted industrial injury. The parties agreed that a § 11A impartial physician's exam was not necessary, as there was no dispute over medical issues. (March 22, 1999 Dec. 2.) In his decision the hearing judge recited the opinions of two of the treating physicians **[2]** and took note of the stipulation that, "Mr. Slater is totally disabled." (March 22, 1999 Dec. 6.) He then made the following factual finding:

> Upon a review of the medical evidence (Exhibit # 3) I find that Mr. Slater is disabled and that his disability is a permanent condition. I acknowledge Mr. Slater's severe disability at this time, and that the employee has met his burden of persuasion to prove to me that Mr. Slater's present incapacity is

> permanent. In reviewing the medical evidence that is submitted by the employee, I find that Mr. Slater is permanently totally disabled as of November 24, 1997.

(March 22, 1999 Dec. 6.)

The hearing judge then turned to the legal issue facing him and determined that the language of § 34A did "indeed imply an exhaustion of § 34 benefits." (March 22, 1999 Dec. 8.) The judge determined that requiring the exhaustion of § 34 benefits prior to an award of § 34A benefits was not an irrational result and not inconsistent with the beneficent design of chapter 152. He noted again that the employee was permanently and totally disabled and went on to deny the claim for commencement of § 34A benefits as of November 24, 1997. (March 22, 1999 Dec. 8-9.) The employee appealed to the reviewing board, which, with one member dissenting, affirmed the hearing judge's decision to dismiss, as premature, the employee's claim for § 34A benefits. Slater v. G. Donaldson Constr., 14 Mass. Workers' Comp. Rep. 117 (2000). The employee appealed the reviewing board decision to the Appeals Court, which, in a June 24, 2002 decision, reversed the reviewing board. Slater's Case, 55 Mass. App. Ct. 326 (2002). In its decision, the court took note of the administrative judge's finding that the employee was "permanently totally disabled as of November 24, 1997." Id. As to exhaustion of § 34 benefits prior to an award of § 34A, the Appeals Court wrote:

> In view of the long-standing tradition of construing c. 152 in light of its beneficial purpose, we decline to add the word "maximum" to language contained in § 34A based on a general legislative intent to save costs or reduce a backlog. For us to insert such additional language requires a far clearer legislative directive.

Id. at 330.

The decision concluded with a remand to the Department of Industrial Accidents, "*to issue an order consistent with this opinion."* Id. (emphasis added.) **[3]**

As the employee's appeal wound its way through the reviewing board and the Massachusetts Appeals Court, the three-year maximum entitlement to § 34 was reached. **[4]** At that point the insurer voluntarily placed the employee on § 35 weekly partial incapacity benefits and Slater responded by filing a second claim for § 34A benefits.

This new § 34A claim was returned to the administrative judge who heard and decided the case earlier. Following a § 10A conference, the judge ordered payment of § 34A benefits. The order was appealed by the insurer. The full evidentiary hearing took place before the same judge on January 29, 2001; on April 30, 2002 the judge filed his decision denying the claim for § 34A benefits and directing payment of ongoing partial incapacity benefits under § 35.

The employee has again appealed to the reviewing board. Of the multiple issues raised by the employee, one is dispositive. **[5]** The employee correctly argues that he should not have been required to file a second claim for § 34A benefits given the finding by the Massachusetts Appeals Court. We agree.

Because the Appeals Court decision did not issue until after the administrative judge filed his second decision on April 30, 2002, we do not fault the administrative judge for proceeding as he did. However, the Appeals Court decision effectively voids the April 30, 2002 decision, which ordered payment of weekly partial incapacity benefits under § 35. Since the second hearing before the administrative judge never would have occurred but for the reviewing board error, we void that proceeding entirely. Mr. Slater should be receiving § 34A benefits.

In a claim for § 34A benefits, the burden is on the employee to prove each and every element of the claim. Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390 (1999), citing L. Locke, Workmen's Compensation § 502 (1980); see Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). The only obstacle to the employee's receipt of § 34A benefits at the March 22, 1999 hearing was the issue of exhaustion of § 34 benefits. The Appeals Court in its June 24, 2002 decision removed this obstacle and returned the case here with directions to "issue an order consistent with this opinion." There can be but one consistent order and we issue it. The insurer is directed to commence payment of § 34A benefits retroactive to November 24, 1997 and continuing.

The fact of a prior § 34A award does not prevent subsequent inquiry where the medical or vocational circumstances have changed. At any time after an award of § 34A benefits,

the insurer may seek to have them modified or discontinued. Vass's Case, 319 Mass. 297, 300 (1946); Gramolini's Case, 328 Mass. 86, 89 (1951); Barnard v. Nissen Baking Co., 12 Mass. Workers' Comp. Rep. 394 (1998). As we stated in Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994):

> The employee's burden of proof extends to essential facts on all elements of the claim of total and permanent incapacity under § 34A, and he must show that it is more likely than not that the facts warrant an award of compensation. See L. Locke, Workmen's Compensation § 502 at 598-599 (1981). The distinction between the burden of proof (or burden of persuasion) and the burden of going forward with the evidence (or burden of production) has been long recognized. See P.J. Liacos, Massachusetts Evidence § 5.1 (6th ed.). The burden of going forward with the evidence requires the party who asserts a fact to come forward with some evidence of the fact, see *Lawrence v. Commissioners of Public Works*, 318 Mass. 520, 527 (1945), sufficient to convince a judge that a reasonable jury could find that the fact exists. See P.J. Liacos, id. at 196. Hence where the insurer seeks discontinuance of § 34A benefits, the insurer must go forward with evidence of improvement in the employee's condition or a lessening of the degree of incapacity in order to meet its burden. Cf. *Ginley's Case*, 244 Mass. 346, 348 (1923). Fine distinctions notwithstanding, as a practical matter the insurer that goes forward without convincing evidence of an improvement in physical condition most likely initiated a complaint for discontinuance without basis, and is at high risk of losing the case at conference and hearing.

Given the sequence of the decisions, the case was skewed in such a way that it was impossible for the judge to frame the issues in a way that was fair because in the second § 34A hearing, the employee had the burden of production. That burden properly belonged to the insurer. As the insurer will presumably file a complaint to terminate or modify benefits, the complaint should be assigned to an administrative judge as expeditiously as possible. In Cubellis v. Mozzarella House, Inc., 9 Mass. Worker's Comp. Rep. 354 (1995), the reviewing board held that,

> If the medical evidence persuades the judge that disability ceased prior to the date the insurer filed its complaint to discontinue, the order of discontinuance may go back no further than the date the request was filed. See *Welch v. A.B.F. Systems*, supra. This is a departure from our usual rule that a cessation date be grounded in the evidence, but is appropriate, as we view it to be consistent with principles of equity, *Utica Mutual* v. *Liberty*

> *Mutual*, 19 Mass. App. Ct. 262, 267 (1985), and the beneficent design of the Act. *Young* v. *Duncan*, 218 Mass. 346 (1914); Locke, 29 Massachusetts Practice, § 29 at pp. 33-34 (1981).

Given the unique facts of this case, the hearing judge, on a future complaint to modify or discontinue, if he determines that the evidence warrants it, may modify or discontinue benefits retroactively to a date which precedes the filing date of the complaint.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: April 16, 2003

1The administrative judgedescribed it thus: "Mr. Slater sustained a tragic injury on October 22, 1996 while working for this employer when the hook end of a crane smashed into Mr. Slater's head." (March 22, 1999 Dec. 4.)

2 The judge wrote as follows:

MEDICAL OPINION

Mr. Slater sustained a traumatic brain injury as a result of the October 22, 1996 industrial injury. His diagnosed injuries are:

1. Closed head injury
2. Severe stressors
3. Depression secondary to head injury
4. Cognitive problems secondary to head injury

He suffers from chronic headaches, disarthia, memory problems, noise sensitivity, increased irritability, decreased frustration tolerance, poor, memory, and some depressive symptomatolgy consistent with depression secondary to head injury.

With regard to his long term prospects for recovery, Mr. Slater's treating neurologist, Dr. Vaccaro, on December 8, 1997, notes Mr. Slater's improvement, such as it was, and has plateaued with respect to all of his problems. Dr. Vaccaro notes that Mr. Slater will have

permanent disability in areas of cognitive functioning, including speech, complex attention, and new learning. Dr. Vaccaro further notes that Mr. Slater suffers continuing depression, irritability, chronic headaches, and continued discomort, none of which has so far responded to treatment in a any meaningful way. Dr. Vaccaro indicates that all of his problems will significantly interfere with and limit his ability to ever return to gainful employment. On November 24, 1997 Mr. Slater's treating behavioral neurologist, Dr. Thomas Sandson, notes that Mr. Slater's cognitive deficits in areas of speech production, psychomotor speed, complex attention, executive functioning, and new learning have not improved, and that many, if not all, of these deficits will never improve. Dr. Sandson states that these deficits will prevent Mr. Slater from ever returning to meaningful employment. Both doctors agree that Mr. Slater needs and will need to continue with the current level of intensive ongoing care even to maintain his current level of functioning. (March 22, 1999 Dec, 4-5.)