COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 028141-02

Robert Andre	Employee
F. C. Construction Corporation	Employer
Commerce & Industry Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Horan)

APPPEARANCES
Donald E. Wallace, Esq., for the employee
Thomas G. Bradley, Esq., for the insurer

COSTIGAN, J. The employee appeals from a decision in which an administrative judge awarded him § 35 partial incapacity benefits, rather than the total incapacity benefits he sought for his accepted low back injury, and then discontinued those benefits as of the date of the § 11A physician's deposition. The employee challenges the decision on two fronts. He argues that use of the deposition date for termination of benefits was improper. On the specific facts of this case, we disagree, for the reasons set forth. However, we do agree with the employee's other argument: although the judge allowed additional medical evidence for the "gap" period prior to the § 11A examination, he failed to make findings of fact regarding that evidence. For that reason, we recommit the case for further proceedings as to that period of disputed incapacity. Because the administrative judge who rendered the decision no longer serves with the department, the hearing on recommittal must be de novo.

The employee injured his back and lower extremities when he was struck by a motor vehicle while working on a sidewalk construction project on July 5, 2002. (Dec. 4.) The insurer paid weekly incapacity and medical benefits without prejudice from July 8, 2002 through August 22, 2002. The employee's claim for further benefits was denied following a § 10A conference, and the employee appealed. (Dec. 2.)

Pursuant to G. L. c. 152, § 11A, the employee underwent an impartial medical examination by Dr. W. Lloyd Barnard on May 14, 2003. The judge allowed the

employee's motion to introduce additional medical evidence on the basis of the impartial report's failure to address the employee's disability during the "gap" period of July 5, 2002 to the date of the examination. (Dec. 3.)[1] See George v. Chelsea Housing Auth., 10 Mass. Workers' Comp. Rep. 22 (1996). Only the employee offered such medical evidence, consisting of the records and reports of his treating physician, Dr. Kenneth Morrissey. (Dec. 1, 3; Employee Ex. 2.)

In his impartial medical report dated May 20, 2003, Dr. Barnard opined that when he examined the employee on May 14, 2003, Mr. Andre was not disabled and could return to his regular job as a concrete laborer. (Dec. 6.) However, the judge considered the doctor to have contradicted his reported opinion of no disability in handwritten notes the doctor made on the date of his examination of the employee. (Dec. 6-9; Ex. 2 to Dep.) Therefore, the judge concluded that the employee remained partially incapacitated for an additional five months beyond the § 11A exam. The judge discontinued § 35 benefits as of October 7, 2003, when Dr. Barnard testified at deposition and reiterated his opinion, stated in his report, that the employee could return to his former employment. (Dec. 6, 10.) We have the employee's appeal. G. L. c. 152, § 11C.

The employee contends that the judge erred in using the § 11A deposition date to terminate benefits, as that date has no evidentiary significance. That general proposition is correct. "Factual findings as to when incapacity, be it total or partial, begins or ends must be grounded in the evidence found credible by the judge." Montero v. Raytheon Corp., 11 Mass. Workers' Comp. Rep. 596, 597 (1997)(purely procedural date of when judge received deposition transcript irrelevant to when employee's incapacity began). Cf. Cubellis v. Mozzarella House, Inc. 9 Mass. Workers' Comp. Rep. 354 (1995)(when insurer seeks modification or discontinuance of weekly incapacity benefits, relief may be granted no earlier than date on which insurer filed complaint). Here, however, contrary to the judge's decision and the employee's argument, the impartial physician's opinion does not support an award of § 35 benefits after May 14, 2003. The doctor's opinion is

[1] Although the insurer paid weekly incapacity benefits from July 8, 2002 through August 22, 2002 on a without-prejudice basis, (Dec. 2), at hearing it accepted liability for the employee's industrial injury and did not challenge his entitlement to the § 34 benefits previously paid. (Ins. Ex. 1.) Thus, the judge's definition of the gap period as starting on the date of injury is incorrect, as are his inconsistent statements that liability was an issue raised by the insurer at hearing, (Dec. 2-3), and that the parties stipulated an industrial injury was sustained on August 22, 2002 [sic]. (Dec. 3.)

unequivocal: "The injury sustained as described by the patient is a potentially serious one, but my physical exam is unable to substantiate that. I, therefore, do not find him disabled, and [he is] able to do his regular job, this to a reasonable degree of medical certainty." (Barnard Rep. 3.) In response to hypothetical questions posed by the insurer, the doctor again stated, "I do not believe he is disabled for his job at present," and "I do think he could return to his regular job as a concrete laborer." (Id.)

As a matter of law, such expert medical evidence cannot support an award of ongoing § 35 benefits. Although it is axiomatic that the determination of incapacity to work involves more than a medical assessment of the employee's physical impairment, see Pappalardo v. J & A Builders, Inc., 12 Mass. Workers' Comp. Rep. 112, 114 (1998), citing Scheffler's Case, 419 Mass. 251 (1994), "some measure of medical disability is a *sine qua non* of loss of earning capacity, just as some measure of vocational deficit based on that disability is necessary for an award of compensation benefits." Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 186 (2003). Here, the inquiry ends with the doctor's opinion of no medical disability. Moreover, the doctor did not change his opinion while testifying at his deposition, such that the deposition date might be appropriate for termination of benefits. Cf. Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 237 (1997)(impartial doctor's first articulation of disability opinion at deposition supported termination as of that date).

That said, the insurer did not appeal the award of § 35 benefits for the period from the § 11A examination to the § 11A deposition, and the deposition date used by the judge is a more advantageous termination date for the employee than any other warranted by the § 11A medical evidence. Accordingly, we let stand the award of partial incapacity benefits from May 14, 2003 to October 7, 2003.[2] See Sanchez, supra.

The award of partial incapacity benefits from August 23, 2002 through May 13, 2003, however, must be reconsidered. The judge's allowance of additional medical evidence for the pre-impartial examination gap period was proper. Nothing in Dr. Barnard's report or deposition testimony can be construed as an opinion on the extent of the employee's disability prior to the § 11A examination on May 14, 2003. Cf. Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366 (2002)(impartial opinion of total disability and lay testimony together could support inference of no

[2] The judge's finding that "the employee is capable of returning to his regular job as of October 17, 2003," (Dec. 10; emphasis added), appears to include a typographical error.

change in employee's medical condition pre-examination). The reports and records of the employee's treating physician are the sole medical evidence on the issue of his disability prior to the impartial examination, and it was Dr. Morrissey's consistent opinion that the employee was totally disabled during that period. (Employee Ex. 2.) A judge may reject uncontroverted medical opinion only if he clearly and sufficiently states the reasons for doing so in findings with adequate support in the record. Galloway's Case, 354 Mass. 427 (1968); Borawski v. Gencor Indus., Inc., 17 Mass. Workers' Comp. Rep. 542, 546 (2003). Even if the judge duly considered the employee's medical evidence in finding him only partially incapacitated, he failed to explain why he did not adopt the sole expert medical opinion addressing that period of disputed incapacity.

Accordingly, we recommit the case for a hearing de novo on the limited issue of the extent of the employee's incapacity from August 23, 2002 to the date of the impartial medical examination, May 14, 2003. (See footnote 1, supra.) Because the insurer did not appeal the judge's decision, on recommittal the employee, who claims total incapacity benefits for that period, may not, in any event, be awarded less than the partial incapacity benefits already ordered -- § 35 benefits at the rate of $341.86 per week, based on an average weekly wage of $759.68 and the assigned earning capacity of $189.92. (Dec. 11.) See Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. ___ (January 13, 2005)(employee's failure to appeal award of partial incapacity benefits prevents him from receiving a greater award on recommittal). If the administrative judge does not adopt the exclusive medical evidence of total disability, he or she must explain why. Galloway, supra; Borawski, supra.

We transfer the case to the senior judge for reassignment to a new administrative judge to hear the parties de novo and decide the limited issue addressed in this decision.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____

Mark D. Horan
Administrative Law Judge

Filed: May 24, 2005