

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 009368-98

Robert B. Whitaker
Agar Supply Company, Inc.
Agar Supply Company, Inc.

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, Levine & Maze-Rothstein)

APPEARANCES

Michael A. Rudman, Esq., for the employee
Scott E. Richardson, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on brief

CARROLL, J. The self-insurer appeals from the decision of an administrative judge awarding a closed period of § 34 temporary total incapacity benefits and ongoing § 35 temporary partial incapacity benefits arguing that the award of § 34 benefits for a period beyond that claimed by the employee was error. We agree.

Robert Whitaker was forty-eight years old at the time of hearing. A graduate of Blue Hill Regional Vocational Tech, he has worked as a truck driver and delivery person. His job for Agar Supply Company required him to drive to various locations in Massachusetts, Rhode Island, New Hampshire and Connecticut delivering cases of meat products. The cases weighed between forty and one hundred and ten pounds. (Dec. 5.)

On March 24, 1998, while making a delivery, Whitaker lost his footing causing him to strike his neck and shoulders and fall down a flight of stairs on his back. Though feeling intense leg and back pain, he attempted to finish his scheduled deliveries. That evening he presented to Mount Auburn Hospital complaining of low back soreness, stiffness in his legs, and neck and left shoulder pain. A subsequent MRI revealed central disc herniations and degenerative changes, a question of protrusion of the L5-S1 disc on

the left side as well as a tendinitis condition of the supraspinatus tendon, including a possible tear of the left shoulder tendon. (Dec. 7, 8, 9.)

The employee underwent a course of physical therapy which brought improvement of his neck and left shoulder symptoms, although his back remained unchanged. The employee remained out of work until June 1999 when he began working two to three hours at a time, one day per week as a field representative, a job requiring little lifting or bending. (Dec. 9, 12.)

The employee filed a claim which the self-insurer resisted. Following a § 10A conference, the self-insurer was ordered to pay § 34 weekly temporary total incapacity benefits from March 25, 1998 to October 2, 1998 and ongoing § 35 weekly temporary partial incapacity benefits thereafter. The self-insurer appealed to a full evidentiary hearing. (Dec. 3.)

At the hearing, the employee claimed entitlement to § 34 benefits from March 25, 1998 to October 2, 1998, and § 35 benefits from October 3, 1998 forward. The self-insurer contested liability, disability and extent thereof, causal relationship and entitlement to medical benefits. (Dec. 3, 10.) Pursuant to § 11A, the employee was examined by Dr. Thomas Redner on January 8, 1999. Dr. Redner, whose opinion the administrative judge adopted, opined that the employee's neck, shoulder and back injuries were causally related to his March 24, 1998 industrial injury and restricted the employee from lifting, bending, pulling and loading and from sitting in a truck for more than ten to fifteen minutes. (Dec. 2, 11, 12.) Neither party deposed Dr. Redner. (Dec. 4.)

The employee moved for the submission of additional medical evidence to cover the gap period, that time between the claimed industrial injury and the § 11A examination. The employee's motion was allowed, prompting the submission of the treatment records of Drs. Chernak, Sakerllarides and Djerassi from March 24, 1998 through December 29, 1998. (Dec. 2, 4.)

In her decision, the administrative judge found that the employee had suffered an industrial injury on March 24, 1998. She ordered the self-insurer to pay § 34 benefits from the date of injury to the "date in June 1999" when the employee commenced part-

Robert B. Whitaker
Board No. 009368-98

time work and § 35 benefits thereafter with an assigned earning capacity equal to the employee's actual earnings. (Dec. 12, 14.) The self-insurer appeals, arguing that the judge erroneously awarded § 34 benefits beyond the closed period sought by the employee.

Mr. Whitaker claimed entitlement to § 34 benefits from March 25, 1998 to October 2, 1998. (Dec. 3; Employee exhibit 2.) The judge awarded § 34 benefits from March 25, 1998 to June 1999, some eight months beyond the claimed period. Awarding benefits beyond the claimed period amounts to raising an issue not requested by the parties, something a judge is not generally free to do. Cf. Taylor's Case, 44 Mass. App. Ct. 495, 497-498 (1998). However, a claim may be deemed amended where the parties try it by consent. Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243 (1997). Thus, had the medical and vocational evidence supported an expanded award of § 34 benefits, that award may have been allowable. Hall v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 467, 469 (1997). Such was not the case here. The parties set the parameters of their dispute when they stated their claims and defenses and no medical or vocational evidence was presented that would support the extended award of total temporary incapacity benefits.¹ On the evidence presented, the judge erred by expanding the boundary of the dispute. See Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. ____ (July 20, 2000) (judge erred in awarding benefits in excess of those claimed where no medical or vocational evidence was presented to support same).

The award of § 34 benefits is further flawed. While the judge did not identify the exact weeks for which the employee received unemployment benefits, she found the employee collected unemployment benefits "beginning in October 1998." (Dec. 11.) Section 36B states, "No benefits shall be payable under section thirty-four or thirty-four A for any week in which the employee has received or is receiving unemployment compensation benefits." (Emphasis added.) The judge's award of § 34 benefits during a

¹ As noted in the text above, although the impartial examiner, who examined the employee on January 9, 1999, gave restrictions, he did not opine that the employee was totally medically disabled. (Exhibit 1; see Dec. 11-12.) We also note that the employee started looking for work "approximately March 1999." (Dec. 12.)

Robert B. Whitaker
Board No. 009368-98

period when the employee was collecting unemployment benefits is statutorily prohibited.²

We reverse that portion of the administrative judge's decision awarding § 34 benefits beyond October 2, 1998 and recommit the case to the administrative judge to make further findings in accordance with this decision, i.e. an earning capacity evaluation for the period between October 2, 1998 and June 1999 that specifically addresses the requirements of § 36B.

So ordered.

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: **November 17, 2000**
MC/jdm

² The award of § 35 partial incapacity benefits are, of course, allowed during the receipt of unemployment benefits; however, the finding must be more precise to address this issue.