COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014320-98**

Russell Steeves	Employee
Star Market Co., Inc.	Employer
Star Market Co., Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Levine)

APPEARANCES
James F. Fitzgerald, Jr., Esq., for the employee
Michael J. Grace, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals the decision of an administrative judge in which the employee was awarded § 34A permanent and total incapacity benefits, payment of reasonable and necessary medical treatment and attorney's fees. It contends that the hearing judge was without the authority to award § 34A benefits. We agree. Additionally, the self-insurer contends that it was improper for the judge to consider the employee's unrelated pre-existing heart condition in finding total incapacity. Again, we agree. After appellate review, we recommit the case for further findings consistent with this decision.

Russell Steeves, was a fifty-six year old, married, father of two adult children, at the time of the judge's decision. Upon graduation from high school in 1965, Mr. Steeves commenced employment with Star Market as a meat cutter. In fact, his entire adult, employment experience has been with Star Market. Mr. Steeves was promoted to assistant meat manager in 1970 and then to meat manager in 1972. In addition to his managerial duties in the meat department, Mr. Steeves was required to lift and cut meat on a daily basis. Frequently the meat to be lifted weighed up to 100 pounds. (Dec. 470.)

In 1987, Mr. Steeves suffered a heart attack. Following the incident, he opted to perform the less demanding duties associated with the position of meat cutter. However, in 1989, he again assumed the role of meat manager and continued in that capacity up through 1995. At some point during the 1993 calendar year, Mr. Steeves sought a job modification due to his heart condition. He was given a fifty-pound lifting restriction. In 1995, Mr. Steeves left the employ of Star Market for four months. He later returned as a deli clerk where he cut and stocked meat and lifted items weighing between ten and sixty pounds on a frequent basis. (Dec. 470-471.)

On April 21, 1998, within the scope of his employment, Mr. Steeves removed hams from an oven. The hams slid on the tray he was carrying and he shifted his body in an attempt to prevent them from falling off the tray. As a result, he felt severe pain in his back. He immediately reported the incident, but remained on the job as the deli department was understaffed that day. Two days later, the pain was so severe that he stopped working. In September 1998, Mr. Steeves underwent back surgery. He attempted to return to work in April 1999. Lifting restrictions of ten pounds and mandatory fifteen-minute breaks every thirty minutes were implemented for his benefit. In reality, he received few of his breaks. Mr. Steeves quit four days later due to pain. (Dec. 471.)

The self-insurer paid § 34 temporary, total incapacity benefits from April 22, 1998 to April 12, 1999. Thereafter, the self-insurer discontinued the employee's weekly benefits and the employee filed a claim for further weekly compensation. Following a § 10A conference, the administrative judge ordered the payment of § 35 partial incapacity benefits commencing April 13, 1999. The employee appealed that decision to a hearing de novo before the same administrative judge. (Dec. 469.)

Pursuant to § 11A, Dr. Donald R. Pettit examined Mr. Steeves on February 28, 2000. Id. The impartial examiner noted that the employee had extensive abnormalities in his lumbar spine, not uncommon in an individual of the employee's age and stature, and that he had not recovered from the September 1998 surgery. (Rep. 2; Dep. 13, 18, 20, 25; Dec. 472.) Moreover, Dr. Pettit questioned the need for surgery

as there was no mention of a herniated disc in the medical records and no herniation found during the procedure. (Dep. 20, 21-22; Dec. 472.) The doctor detected scar tissue along the sides of the employee's spine resulting in radicular pain down both legs. (Dep. 14, 15; Dec. 473.)

Although Dr. Pettit stated that he could not make a definitive diagnosis, he did find failed back syndrome. (Rep. 2-3; Dep. 8, 20; Dec. 473.) He opined that the employee could work a forty-hour week with the following extensive restrictions: lift no more than ten pounds on an infrequent basis and no more than five pounds on a consistent basis, avoid any reaching, bending, kneeling, squatting or climbing and the requirement that the employee be permitted to sit and stand as needed. (Rep. 3; Dep. 15-17, 32, 35; Dec. 473.) Finally, the doctor causally related the employee's disability to his 1998 work injury. (Rep. 3; Dep. 7, 8; Dec. 473.)[1]

Vocational experts, Carol Falcone for the employee, and Nancy Segreve for the self-insurer testified. (Dec. 473-474.)

Ms. Falcone interviewed the employee on June 20, 2000. In considering Dr. Pettit's recommended restrictions, we note that Ms. Falcone opined these restrictions equate to sedentary employment and that Mr. Steeves cannot sustain such employment in the open labor market without some type of skill enforcement. (Tr. 54-57; Dec. 473-474.)

The judge determined that the employee was permanently and totally incapacitated. (Dec. 474.) To support his conclusion, the judge stated that he relied on the employee's credible testimony, the medical opinions of the impartial examiner and the persuasive vocational opinions of Carol Falcone. (Dec. 474-475.) The judge reflected that he had performed the requisite analysis as set forth in Frennier's Case, 318 Mass. 635 (1945), and Scheffler's Case, 419 Mass. 251 (1994), in reaching his conclusion. He further stated that, among other factors considered, was the employee's heart condition. (Dec. 475.) Accordingly, the judge ordered the self-insurer to pay: (a)

[1] The employee's motion to declare the § 11A medical report inadequate was denied. (Dec. 469.)

§ 34A permanent and total incapacity benefits from April 12, 1999 and continuing; (b) reasonable and necessary medical expenses; and (c) counsel fees. (Dec. 476.)

The self-insurer's main contention, on appeal, is that the administrative judge was without the authority to award § 34A permanent and total incapacity benefits. (Self-insurer's brief, 10.) Exhaustion of § 34 temporary, total incapacity benefits is a prerequisite to an award of § 34A permanent and total incapacity benefits. Slater v. G. Donaldson Constr., 14 Mass. Workers' Comp. Rep. 117, 118 (2000). As the employee had not exhausted § 34 benefits prior to the award of § 34A benefits, such award was premature.[2] Therefore, this portion of the administrative judge's decision must be reversed. Id. at 118.

A second error raised by the self-insurer requires recommittal to the judge.[3] Our concern stems from the judge's reliance on the employee's pre-existing cardiac condition to find total incapacity rather than partial disability as opined by the § 11A medical expert. (Dec. 475.) The judge stated that: "The employee is also limited by his cardiac condition . . . . His pre-existing cardiac condition, combined with his credible complaints of debilitating pain, prevent him from obtaining and sustaining work . . . ." (Dec. 475.) It was improper for the judge to consider the employee's unrelated cardiac condition when determining the employee's work capacity. See Hummer's Case, 317 Mass. 617, 620, 623 (1945) (an administrative judge may only rely on symptoms and limitations caused by the work injury in assessing an earning capacity). From our review of the evidentiary record, we cannot determine what impact the improper consideration of the employee's cardiac condition had upon the earning capacity

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[2] The self-insurer also contends that the employee never filed a claim for § 34A benefits and therefore the award was improper on that basis as well. (Self-insurer's brief, 10.) We note that the transcript, dated June 29, 2000, references § 34 benefits as does the employee's claim form (Department Form 110), dated June 23, 1999. Later, on August 16, 1999, employee's counsel submitted a new Form 110, wherein both § 35 and § 34A were referenced. Regardless, the award of § 34A benefits is reversed as premature. Slater, supra at 118.

[3] We summarily affirm the decision in all other respects.

analysis conducted by the judge. Therefore, we must recommit the case to the administrative judge for further findings. Ballard's Case, 13 Mass. App. Ct. 1068 (1982)(hearing judge must set forth sufficient findings to enable proper appellate review).

The award of § 34A permanent and total incapacity benefits is reversed as premature. On recommittal, the judge should determine whether § 34 temporary, total incapacity benefits are appropriate for the work related back condition alone. During the pendency of the recommittal, the conference order awarding § 35 with an earning capacity of $184.38 per week is reinstated.

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **June 7, 2002**
MC/jdm