COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022491-97**

Stephen P. Devaney	Employee
Webster Engineering	Employer
National Union Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein and Carroll)

APPEARANCES
Elaine R. Pulgini, Esq., for the employee
Eugene M. Mullen, Jr., Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which an administrative judge denied his claim for further weekly compensation benefits attributable to an accepted industrial injury. Among other contentions, the employee argues that the judge erred by failing to make findings supporting his termination of the employee's weekly benefits as of the date of the impartial examination. Because this contention has merit, we recommit the case for further findings.[1]

The employee's stipulated industrial accident of June 12, 1997 gave rise to this claim for G.L. c. 152, § 34 weekly and § 30 medical benefits. (Dec. 2-3.) Mr. Devaney was knocked off a trailer when he was struck by a wooden beam; he sustained injuries to his back, left leg and left side as a result of the fall. (Dec. 5.) Prior to the hearing and pursuant to § 11A(2), the employee was examined by an impartial physician. The impartial doctor examined the employee on March 9, 1998, and diagnosed " 'chronic back pain of unknown etiology.' " (Dec. 7.) The doctor noted that the employee demonstrated no evidence of instability, according to the clinical examination and

[1] The employee also argues that the judge failed to provide the impartial physician with updated medical reports.

diagnostic studies. Id. The § 11A examiner opined that the employee would suffer no permanent disability as a result of the accident, and that he should be encouraged to undertake a work-hardening program to slowly reenter the work force.[2] (Dec. 7-8.) The judge, sua sponte, declared the § 11A physician's report inadequate, due to its failure to address the extent of disability and the causal relationship. (Tr. 16-17.) The employee introduced reports of his treating physician, Dr. John Mahoney, and the insurer introduced reports of its expert physician, Dr. Norman Pollock. (Dec. 6-7.)

The judge did not credit the employee's testimony regarding his reported limitations on bending, stooping, lifting and carrying. (Dec. 8.) The judge concluded, based on his adoption of the impartial examiner's opinion, that "the employee was not totally disabled beyond March 9, 1998[,]" the date of the § 11A examination. (Dec. 10.) The judge awarded § 34 temporary total incapacity benefits from the date of injury until the impartial examination, along with medical benefits for treatment of the diagnosed condition. (Dec. 10-11.)

The employee on appeal argues that the judge's decision is flawed because it does not set out the reasons for terminating the employee's benefits as of the date of the impartial examination. We agree that the subsidiary findings of fact are silent as to why the judge terminated the benefits when he did. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)("A decision cannot stand in the absence of a foundation for the judge's ultimate conclusion denying benefits").[3]

[2] It is unclear from the decision and record whether an EMG/nerve conduction test conducted two months prior to the examination was included in the materials reviewed by the impartial doctor. (Dec. 6.) The results of that procedure indicated acute left S1 and L5 motor radiculopathy. Id. The employee forwarded the report, along with updated reports from his treating doctor, to the judge for inclusion in the materials to be reviewed by the impartial physician. (Employee's brief, 6-8.)

[3] The employee's appeal does not challenge the judge's findings for the period prior to the date of the impartial examination. The insurer did not cross appeal. See Saugus v. Refuse Energy Systems Co., 388 Mass. 822, 831 (1983)("failure to take a cross appeal precludes a party from obtaining a judgment more favorable to it than the judgment entered below").

Despite the misgivings the judge expressed at hearing as to aspects of the impartial report, (Tr. 16-17), he nevertheless adopted the report. However, in adopting the § 11A report, the judge appears to have mischaracterized it. The doctor stated the following regarding the employee's present disability: "It is my impression that he will suffer no permanent disability as a result of this accident. Furthermore, I believe he should be encouraged to be on a work-hardening program with every effort made to make him get back slowly into a work program, protecting his back while doing so." (Impartial medical exhibit, 2.) This evidence "falls short of [warranting] a finding that . . . disability ended at that time [of the examination]." Roderick's Case, 342 Mass. 330, 334 (1961). Indeed, a regimen of work hardening would not be in the context of an immediate return to full duty employment; the doctor's statement stresses a slow return to work. The judge's use of the impartial examination date for the termination of compensation benefits is therefore erroneous. We recommit the case for the judge to make further findings on the extent of the employee's post-examination incapacity. The judge must decide whether the employee is entitled to continuing § 34 benefits or to § 35 benefits. To the extent that the employee did not explicitly claim § 35, such partial incapacity benefits are in dispute as a matter of law in a § 34 claim for temporary total incapacity benefits. On recommittal, the judge must award the "lesser included" § 35 benefits if the evidence and his subsidiary findings of fact so warrant. Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 171-172 (1995).[4]

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

So ordered.

[4] The judge should also clarify the status of the EMG and treating doctor's reports, which the employee claims were not forwarded to the impartial physician. If necessary, the parties can obtain an addendum to the doctor's report commenting on those documents.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **December 1, 2000**