COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042454-01**

Susan Conley	Employee
Deerfield Academy	Employer
NEEIA Compensation, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Poulter.

APPEARANCES
James F. Dolan, Esq., for the employee
Douglas F. Boyd, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision modifying her weekly incapacity benefits from permanent and total under § 34A, to § 35 partial incapacity benefits of $91.78 per week, based on an average weekly wage of $472.89 and a $320 earning capacity, as of February 2, 2011. The employee raises two related claims of error: 1) the insurer failed to meet its burden of production to show an improvement in the employee's physical or vocational condition; and 2) the adopted medical evidence did not support a finding that the employee's physical condition had improved after the 2006 decision placing the employee on § 34A benefits. We agree reversal is required as a matter of law and, therefore, we reverse the modification order and deny and dismiss the insurer's modification complaint.

This case has been the subject of two prior hearing decisions issued by a different judge.[1] In the second decision, that judge concluded the employee was permanently and totally incapacitated and entitled to § 34A benefits from August 31, 2005 and continuing. (Dec. II, 5.) In regard to the employee's disability, the prior judge found:

[1] The previous judge issued hearing decisions on December 28, 2004, (Dec. I), and September 20, 2006, (Dec. II.)

> Dr. Steven Silver, the impartial physician, opines that Ms. Conley continues to have a marked partial permanent disability related to her work injuries. As a result she cannot do any job that involves lifting more than fifteen pounds, or any work involving ambulation. She cannot do any repetitive work with her left shoulder. She should be able to sit through an eight-hour day without difficulty.

(Dec. II, 3.)[2] Notwithstanding the employee's partial disability status, that judge made the following findings and conclusions:

> In my previous decision, it was suggested that, while Ms. Conley might well have a difficult time finding a job in the open labor market, (and was found totally disabled at that time) without evidence at [sic] some sort of more extensive vocational counseling and job search, it would be difficult to show a permanent total disability.
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> Since that time, Ms. Conley has undergone a reasonable course of retraining aimed at finding a job in computers, a far more suitable field given her injuries that [sic] her previous work as a security guard. However, even with the retraining, a reasonable and fairly large job search has not resulted in any offers of employment. I am therefore now persuaded that, given her "marked partial disability" Ms. Conley is in fact totally disabled from substantial employment in the open labor market.

(Dec. II, 5.) Thus, he concluded that despite the employee's "marked partial disability" and her completion of a vocational rehabilitation program, the employee's attempts to find work were unsuccessful and as a result, she was entitled to § 34A permanent and total incapacity benefits. (Id.) That decision was not appealed and is the law of the case.

The sole issue in dispute at the present hearing on the insurer's complaint to modify or discontinue the employee's § 34A benefits was the extent of the employee's incapacity. "We have consistently held that the modification or

[2] The first hearing concerned the insurer's complaint to modify or discontinue the employee's § 34 benefits; Dr. Kuhrt Weineke was the § 11A physician whose report was the only medical evidence in the case. (Dec. I, 1, 3.) In regard to her § 34A claim, Dr. Steven Silver was the § 11A impartial physician whose report was the only medical evidence in the case. (Dec. II, 1, 3.) In regard to the insurer's present complaint to modify or discontinue the employee's benefits, pursuant to § 11A, the employee was again examined by Dr. Weineke. (Dec. III, 1, 4-5.)

discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence." Bennett v. Modern Continental Constr., 21 Mass. Workers' Comp. Rep. 229, 231 (2008). The insurer had the initial burden of producing evidence of either an improvement in the extent of the employee's disability, her vocational status, or both. Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 154 (2010)(to meet its burden, insurer "must produce evidence of improvement in employee's medical or vocational status, or a lessening of the degree of incapacity"); See Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555, 560 (1997)("The necessary evidence can be medical or vocational").

In regard to the employee's present level of disability, the judge found:

> The insurer's request for modification is predicated on the insurer establishing that Ms. Conley has an increased capacity to work since being placed on M.G.L. Chapter 152, § 34A benefits in 2005. According to Dr. Wieneke's 11A report, Ms. Conley has improved from an orthopedic perspective. Her shoulder has improved considerably and her knee is now stable.
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> Dr. Wieneke, the 11A physician opined, and I adopt the opinion based on his examination of Ms. Conley in February of 2011, that Ms. Conley is able to work full-time in a sedentary position.
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> I do not credit Ms. Conley's reports of the severity of her pain and disability and therefore cannot rely on Dr. Wieneke's report where it relies solely on Ms. Conley reports of pain and disability. Thomas Brommage's Case, 917 N.E. 2d 256 (2009).
>
> I find that Ms. Conley can drive for 25 minutes. I find that she is capable of indoor sedentary work, such as answering a telephone, or, acting as a dispatcher in a security, medical or livery setting. I find based on Ms. Conley's testimony that there are retail opportunities in her town, although they are limited.
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> Based on her education and vocational rehabilitation training, I find Ms. Conley has skills in the area of production technology and at a minimum, basic computer skills. I have no information before me regarding pay rates for dispatchers, computer work or production technology work. Therefore, I find

> Ms. Conley capable of earning minimum wage at a full-time sedentary position.

(Dec. III, 6.)

The employee argues that the judge's inherent conclusion that the insurer met it burden of production to show improvement in her disability status since the 2006 decision was based on erroneous factual findings and misapplication of the law. First, the employee argues the judge erred in finding the employee's "shoulder has improved considerably," and she further erred by concluding, based on that finding combined with the fact that the employee's knee was now stable, that the extent of the employee's disability had lessened. (Dec. III, 6.) Second, the employee argues the judge erred in finding that any of Dr. Wieneke's opinions were "solely" based on the employee's discredited "reports of pain and disability," and she erred in concluding that her credibility determinations supported a conclusion that the employee's disability status had improved. We agree.

The pertinent question at issue in the case was whether the extent of the employee's disability had changed for the better. Dr. Wieneke did not opine that the employee's shoulder "has improved considerably." (Dec. III, 6.) Rather, he opined only that the *motion* of the employee's left shoulder had improved substantially. (Dep. 6.) Nonetheless, he consistently opined that the restrictions on the employee's activities remained the same as they were when he last evaluated her in 2003. (Ex. I, 2, 3; Dep. 9, 27-28, 33-34, 38.) Similarly, although Dr. Wieneke opined that the employee's knee was stable, her activities were still subject to the same restrictions he imposed in 2003. (Ex. I, 2, 3; Dep. 7, 9, 35, 37, 41.) A mere improvement in the range of motion of a joint or the stability of a joint, without a medical opinion stating those improvements translate into a change in the extent or degree of disability, is insufficient to support the judge's conclusion that the extent of the employee's disability had somehow improved. Greene v. Ethyl Prods., 23 Mass. Workers' Comp. Rep. 95, 99 (2009)(expert medical opinion addressing effects of change required).

The fact remains that the medical evidence[3] regarding the extent of the employee's disability did not show an improvement in the employee's disability status. As Dr. Wieneke's February 7, 2011, report states:

> My evaluation, on 10/14/2003, was performed for the DIA Impartial Unit and found her partially disabled, capable of performing work as a security officer. I indicated she should avoid overhead lifting, stairs, cramped unusual positions, working on her hands and knees or crawling. I indicated that she was a sedentary to light duty worker, capable of working full time.
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> . . .
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> She is presently capable of full-time work in a sedentary to light duty position. She should avoid cramped unusual positions, working on hands and knees, climbing or descending ladders, working at heights. She should avoid inclement weather, particularly, in the winter. She is presently capable or [sic] returning to work full-time as a security guard in an indoor setting.
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> I note that she had a functional capacity evaluation in 2003, which cleared her for a return to work. Nothing has happened since to change this result and recommendation.

(Ex. I, 2, 3.) Dr. Wieneke did not change his opinion at deposition. In addition, the hearing decision awarding the employee § 34A benefits was based on a disability opinion that is virtually identical to that of Dr. Wieneke's. As Dr. Wieneke noted, "Dr. Silver, on 09/26/2005, placed her in a light duty category, indicated that she should avoid walking and noted that she should avoid repetitive motion activities with her left shoulder, although she was capable of sitting eight hours a day." (Ex. I, 2.) The threshold burden of showing an improvement in the level of the employee's disability was not met here as the judge expressly adopted Dr. Wieneke's similar

[3] At the hearing, the employee moved to submit additional medical evidence consisting of a post-impartial medical examination from shoulder surgeon, Dr. Sumner Karas, who the employee contended recommended further treatment, including surgery. While the transcript of the hearing indicates that the judge reserved ruling on the motion at the time, (Tr. 6-15, 60), her decision indicates at some point she allowed the motion and Dr. Karas's report of February 10, 2011, was entered in evidence on behalf of the employee. (Dec. III, 3.) The judge did not adopt or discuss any of Dr. Karas's opinions in her decision, and the insurer did not submit any additional medical evidence. (Dec. III, 3-7.) However, nothing in Dr. Karas's note could be construed as providing evidence of an improvement in the employee's disability relative to her shoulder. (Employee Ex. 1.)

opinion that the employee "is able to work full-time in a sedentary position." (Dec. III, 6.)

> In regard to the employee's complaints of pain, the judge found:
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> Ms. Conley testified, and I find that she can drive for 25 minutes, but that she needs to stretch her left knee after that amount of time before she can continue. Ms. Conley testified, and I find that she takes Ibuprofen to relieve her pain and that she occasionally needs to take Tylenol with codeine for a flare up.
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> Ms. Conley testified that the condition of her shoulder and knee are "worse" than they were in 2006, if anything. She was unclear as to the percentage of her worsening of her left shoulder or the decrease in mobility she claims to experience. She testified that she thinks her knee is less stable. I find Ms. Conley to be exaggerating the nature and extent of her pain and disability in both her knee and her left shoulder, and I do not credit her testimony in that regard.

(Dec. III, 5.) The decision shows the judge believed the employee had some level of pain, including episodes of flaring pain that require the use of Tylenol with codeine, but she discredited the employee's testimony that her pain and disability were w*orse* than they had been in 2006. (Dec. III, 5.) Although the judge did not credit all of the employee's complaints of pain, that fact did not support the modification of benefits for three reasons.

First, nothing in Dr. Wieneke's report or his deposition testimony indicates that any of his disability opinions were based "solely" on Ms. Conley's "reports of pain and disability." (Dec. III, 6.) Rather, both his report and deposition testimony lead to the opposite conclusion. Contrary to the employee's discredited testimony that her disability and pain had worsened since 2006, Dr. Wieneke opined the employee had no instability in her knee and her shoulder range of motion had "improved substantially." (Dep. 6, 7.) Yet, Dr. Weineke's reason for continuing to require restrictions on the employee's use of her knee was unrelated to pain, (Dep. 35, 37, 41); and he simply was never asked why, in light of the increased range of motion, he continued to impose the same restrictions on the use of her shoulder. Where the disability opinion is unchanged, we cannot speculate as to why that is so.

Second, the employee did not have the burden to show a worsening of her condition in this round of litigation, nor could her failure to show a worsening of her condition constitute evidence of, or support an inference of, improvement in that condition. Bennett, supra, at 231. Third, while it is well established that even where a partial disability exists, an award of total incapacity benefits may be upheld based on the judge's consideration of the employee's credited complaints of pain, MacEachern v. Trace Constr. Co., 21 Mass.Workers' Comp. Rep. 31, 36 (2007); Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25 (2011)(judge must make her own credibility findings regarding complaints of pain and where they are credited, judge may award total incapacity benefits "in the face of a medical opinion of partial disability"), the prior judge's decision awarding the employee § 34A benefits was not based on such findings or conclusions. (Dec. II, 5.) Under the circumstances, the judge's findings discrediting the employee's testimony regarding the worsening of her pain and disability did not support her conclusion that there had been an improvement in the employee's incapacity thereby warranting modification of her weekly benefits.

The other factor which could support a change in the employee's incapacity status would be evidence of an improvement in the vocational aspect of the case. However, the insurer failed to produce any such evidence. There was no evidence that the labor market presented any new opportunities that were previously unavailable to the employee, or that the employee had obtained any new marketable skills since the 2006 decision awarding her § 34A benefits. Cf. Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94 (2003)(where vocational profile did not change between hearings and there was no evidence of change in business climate, judge erred in finding worsened vocational status).

Because there was no evidence meeting the insurer's threshold burden of production, the insurer's complaint to modify or discontinue the employee's weekly benefits failed as a matter of law and should have been denied and dismissed. Accordingly, we reverse the decision and reinstate the employee's § 34A benefits as

of February 2, 2011, and continuing. The insurer may credit itself with any payments made during the relevant timeframe. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7).[4] If such fee is sought "employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until said fee agreement is reviewed and approved by this board." Buduo v. National Grange Mut. Ins. Co., 24 Mass. Workers' Comp. Rep. 101, 109 (2010).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***September 11, 2012***

[4] General Laws, c. 152, § 13A(7), provides, in pertinent part:

> [s]ubject to the approval of the reviewing board, such fee shall be an amount agreed to by the employee and [her] attorney.