

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 046419-05

Susan Keslof
Anna Jacques Hospital
Massachusetts Healthcare SIG

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Bean.

APPEARANCES

James H. Sandman, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from the second hearing decision in this case in which the administrative judge awarded the employee a closed period of § 34 total incapacity benefits, and ongoing § 34A permanent and total incapacity benefits. We reverse the decision insofar as it awards § 34 benefits for a period not claimed by the employee, and vacate only that part of the benefit award. We otherwise affirm the decision.

The employee, a registered nurse, injured her back at work on November 24, 2005. By hearing decision filed on November 14, 2007, the judge ordered the insurer to pay the employee § 35 partial incapacity benefits beginning on October 2, 2006. (Ex. 4, November 14, 2007 decision) Subsequently, the employee filed a claim for § 34A, or alternatively, § 34 weekly incapacity benefits, from May 16, 2008. (Dec. 869.)


Ultimately, the judge found the employee's condition had worsened since he issued his first decision, and awarded her § 34A benefits beginning on October 27, 2008, the date of the impartial physician's examination. (Dec. 874.) However, the judge also awarded the employee § 34 total incapacity benefits from November 14, 2007, the filing date of his first decision, through October 26, 2008. (Id.)


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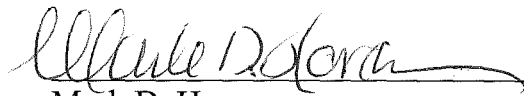
On appeal, the insurer does not challenge the § 34A award. See MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36 (2007)(employee's complaints of pain and vocational considerations may provide basis for § 34A award in face of medical opinion of only partial disability). Rather, it challenges the award of § 34 benefits. We agree there was no basis for that award for the period from November 14, 2007 to May 16, 2008, the date the employee claimed entitlement to § 34 or § 34A benefits. See Doucette v. TAD Technical Institute, 22 Mass. Workers' Comp. Rep. 99, 107 (2008), citing Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31 (2006)(where there is no claim and, therefore, no dispute, judge strays from parameters of case and errs in making findings on issue not properly before him).

Accordingly, we reverse and vacate only the award of § 34 total incapacity benefits from November 14, 2007 through October 26, 2008. The remainder of the decision is affirmed.

So ordered.


Bernard W. Fabricant
Administrative Law Judge


Patricia A. Costigan
Administrative Law Judge


Mark D. Horan
Administrative Law Judge

Filed:

