COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021065-97**

Walter Paschal	Employee
Lechmere Company, Montgomery Ward Corp.	Employer
Reliance Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Levine)

APPEARANCES
Seth J. Elin, Esq., for the employee on appeal
Karen S. Hambleton, Esq., for the employee at hearing
John J. Canniff, Esq., for the insurer on appeal
Susan Kendall, Esq., for the insurer at hearing

WILSON, J. The employee appeals from a decision in which an administrative judge awarded him ongoing partial incapacity benefits for an industrial injury to his knee. The employee contends that the judge erred by reducing his § 34 weekly benefits for total incapacity to § 35 benefits for partial incapacity as of the date the § 10A conference order issued, that the modification of benefits was arbitrary and capricious, and that a § 13A(5) attorney's fee was due. We disagree, and discuss each point in turn in affirming the decision.

In the course of his work as a truck driver, the employee injured his left knee delivering a refrigerator on February 5, 1997. (Dec. 3.) The insurer accepted the injury, for which the employee underwent arthroscopic surgery twice, on July 7, 1997 and in June 1998. (Dec. 2-3.) The surgeries did not result in the relief sought, and the employee continued to experience debilitating pain in his knee. (Dec. 3-4.) Because of his knee pain, the employee has difficulty walking, sitting, standing and driving. (Dec. 4.)

The insurer filed a complaint for modification or discontinuance, which resulted in a § 10A conference and Order of Modification dated May 20, 1999. In that order, the

judge assigned a weekly earning capacity of $210.00. (Dec. 1, 8.) The employee appealed to a hearing de novo, and filed a Motion to Join Claim under § 34A. The judge allowed the motion. (Dec. 1.) The insurer stipulated at hearing that the employee could not return to his work as a truck driver. (Dec. 3.)

The employee underwent an impartial medical examination pursuant to G.L. c. 152, § 11A, on September 9, 1999. (Dec. 2.) The impartial physician opined that the employee had significant problems with his left knee joint, having had two surgeries, with debridement of damaged portions of the meniscus, and debridement of damaged articular cartilage. The impartial examiner opined that the employee had a permanent impairment of his left knee, which was causally related to the industrial injury of February 1997. Agreeing that the employee should never go back to truck driving, the doctor did state that the employee could do a sedentary job, where he could get up and move around, and where he would avoid lifting, climbing, or repeated squatting or bending. Absent a total knee replacement, the doctor opined that the employee was at a medical end result. (Dec. 6-7.) The judge adopted the opinions of the impartial physician. (Dec. 7.)

The insurer introduced the testimony of a vocational expert, who had performed a transferable skills analysis and labor market survey. The vocational expert opined that there were several entry level positions that the employee was capable of performing, which fit the impartial physician's limitations as sedentary jobs in which the employee could sit or stand at will. The jobs identified by the expert included security receptionist, cashier, telemarketer, van driver, dental model maker and assembly worker. (Dec. 5.) The expert opined that jobs such as these were available on the open job market, and that individuals with the employee's education (eighth grade), physical restrictions and age (fifty-five) could be placed in the identified positions. (Dec. 5-6.) The judge adopted the testimony of the vocational expert. (Dec. 7.)

Based on the opinions of the impartial physician and vocational expert, the judge concluded that the employee was no longer totally incapacitated. (Dec. 7-8.) The judge

therefore denied the employee's claims for either § 34 or § 34A benefits,[1] and awarded § 35 benefits for partial incapacity from the date the conference order issued, May 20, 1999, at the same rate as had been awarded in that order. (Dec. 8.)

The employee argues that the conference order issuance date, May, 20, 1999, is not an evidentiary date to which a modification of benefit entitlement may attach. We acknowledge that general proposition. See, e.g., Lavoie v. Zayre Corp., 13 Mass. Workers' Comp. Rep. 76, 79 (1999). The instant case, however, presents an exception to that rule. The judge's reduction in benefits was based on her adoption of the § 11A physician's medical opinions, along with the vocational expert's opinion as to the employee's foreseeable prospects in the open job market. (Dec. 7-8.) The impartial physician testified in detail as to his review of all the medical records forwarded to him, which covered the employee's prior period of incapacity from the February 1997 industrial injury until the impartial examination on September 9, 1999. (Dep. 7-17; Dec. 6.) The doctor also testified explicitly that his own findings at the examination were consistent with the surgical findings of the employee's treating doctor from June 1998. (Dep. 16.) We have concluded, on facts such as these, that the § 11A physician's opinion suffices to provide medical evidence for the prior period of claimed incapacity. Hernandez v. Crest Hood Foam Co., 13 Mass. Workers' Comp. Rep. 445 (1999). In that case we stated that the impartial report "could be rationally read to cover the entire period of claimed incapacity. It provided a detailed report of the medical records that had been forwarded for review. As reported, they were consistent with the conclusions about diagnosis and work limitations that the impartial doctor reached." Id. at 451. See also Miller v. Metropolitan Dist. Comm'n, 11 Mass. Workers' Comp. Rep. 355, 357 n.3 (1997). The same reasoning applies here. The instant § 11A physician's opinion of

[1] Slater v. G. Donaldson Construction, 14 Mass. Workers' Comp. Rep. 117 (2000), in which we concluded that employees must exhaust § 34 benefits before receiving § 34A benefits under the 1991 amendments to those sections, had not issued at the time of the hearing or filing of the decision.

sedentary work capacity certainly could be read to apply to the period of contested incapacity prior to his September 1999 examination. As such we see no merit to the employee's complaint on appeal, because he was not harmed in any way by judicial error in the assignment of the conference order date for modification of his benefits. See Lamb v. Louis M. Gerson Co., Inc., 11 Mass. Workers' Comp. Rep. 584, 588-589 (1997)(party must be harmed by error to successfully argue it as issue on appeal); Hutchinson v. Hutchinson, 6 Mass. App. Ct. 705, 710-711 n.6 (1978)(appellate claim of error without harm held meritless). Indeed, it was as advantageous a date as he reasonably could have expected, given the judge's adoption of the impartial physician's opinion. Since the insurer, who arguably did have a colorable appeal on this issue, did not cross appeal from the hearing decision, May 20, 1999, the date the conference order issued, as opposed to the earlier filing date of the complaint to discontinue or modify, was an appropriate date on which the judge could modify benefit entitlement. See Lamb, supra at 588-589; 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' ").

We also find no merit to the employee's other two arguments. The judge's assessment of the employee's earning capacity based, as it was, on the § 11A physician's clearance for sedentary work, the vocational expert's testimony as to jobs that the employee could perform, and the appropriate factors of age, education, training and work experience under Frennier's Case, 318 Mass. 635 (1945), was not erroneous. "The extent of earning capacity is a question of fact solely within the province of the administrative judge to decide." Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490 (1998). See Mulcahey's Case, 26 Mass. App. Ct. 1, 3-4 (1988). Likewise, the judge's omission of an attorney's fee under § 13A(5) was correct. No hearing fee is due when the employee is the only party appealing a conference order, and he gains nothing from that hearing that was not already awarded in the conference order. 452 Code Mass. Regs. § 1.19(4). See Green v. Back Bay Restaurant Group, 12 Mass. Workers' Comp. Rep. 470, 471 (1998), aff'd, Green's Case, 52 Mass. App. Ct. 141, 145 (2001). As in Green,

"[t]he hearing decision [here only] maintained the conference-ordered § 35 benefits . . . ." Id. "Because Mr.[Paschal's] appeal did not result in increased benefits, he did not prevail for the purposes of § 13A and, therefore, his attorney was not due a fee." Id.

The decision is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **September 21, 2001**

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge