

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 060358-94

John Colageo
It's A Dog's Life
Liberty Mutual Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

APPEARANCES

James A. McDonald, Jr., Esq., for the employee
Thomas A. Boyle, III, Esq., for the insurer at hearing
Dennis M. Maher, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from a decision in which the administrative judge terminated his entitlement to § 34A permanent and total incapacity benefits. The employee argues that the insurer failed to meet its burden of showing improvement in the employee's condition. We disagree, and affirm the decision.

The insurer requested discontinuance of § 34A benefits being paid for the employee's November 1, 1994 industrial injury to his right major wrist, when a large dog sat on his hand while the employee was working as a groomer. (Dec. 4-5.) The physical restrictions noted by the impartial physician in his report of December 21, 2005 limited lifting, pushing, pulling, or repetitive activities with the right hand and wrist, with weight limitations approximating twenty pounds, due to chronic scapholunate dissociation with multiple surgeries, including a right wrist fusion. This diagnosis, and the diagnoses of chronic regional pain syndrome and narcotic dependence, are all causally related to the employee's 1994 work injury. The impartial physician opined that the employee has reached a medical end result.¹ (Dec. 6; Stat. Ex. 1.)

¹ Although the judge denied the employee's motion for additional medical evidence based upon the alleged inadequacy of the § 11A report, he allowed the parties to introduce additional medical evidence based on the complexity of the medical issues. (Dec. 3.) The employee's appellate argument charging error in the judge's denial of his motion, therefore, is misguided. As the admission of additional medical evidence was the very

The judge found that the insurer's investigative evidence indicated the forty-two year old employee's capacity to function in the open labor market. Having conducted a vocational analysis and considered the insurer's vocational expert testimony, the judge concluded the employee could work full time in an entry level, light duty job, and that his incapacity was partial. (Dec. 6-7.) Accordingly, the judge authorized the insurer to cease payment of permanent and total incapacity benefits as of the date of its complaint, May 6, 2005. (Dec. 8.)

The employee argues the judge failed to hold the insurer to its burden of producing evidence of an improvement in the employee's medical or vocational status, in order to support its request for termination of § 34A benefits. E.g., Slater v. G. Donaldson Constr., 17 Mass. Workers' Comp. Rep. 133, 137-138 (2003), citing Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994).

Our review of the record indicates otherwise. Contained in Insurer's Exhibit 5, introduced on March 31, 2006 pursuant to the judge's allowance of additional medical evidence, are additional medical reports commissioned by the insurer pursuant to M. G. L. c. 152. § 45. One, a January 25, 2005 report of Dr. Albert Fullerton, states that the employee had reached a medical end result; that his treatment and use of narcotics was excessive; and that he was then capable of returning to his previous work. In a July 5, 2005 addendum to his report, Dr. Fullerton set out restrictions on the employee's return to work: that he not lift more than 25 pounds frequently, or more than 50 pounds occasionally, with no repetitive work using his right hand. (Ins. Ex. 5.) Moreover, the insurer introduced investigative evidence indicating that the employee functions within the impartial physician's medical restrictions, without difficulty, in public. (Dec. 6.) Both of these evidentiary showings support the insurer's burden of production, thereby calling upon the employee to prove continuing permanent and total incapacity. Himmelman v. A.R Green & Sons, 9 Mass. Workers' Comp. Rep. 99, 101 (1995). Finally, the judge's adoption of the impartial physician's medical limitations, and the doctor's opinion that the employee was partially disabled, along with the employee's vocational profile, were sufficient to support the judge's termination of the employee's § 34A benefits. The judge was simply not convinced that the employee could not perform remunerative work in the open labor market. As this was the judge's factual finding to make, we will not disturb it.

result sought by the employee, we are puzzled by his insistence that the judge erred in his reason for allowing such evidence.

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We summarily affirm the decision with respect to all other issues on appeal.

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: December 11, 2007