COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 022066-12 003541-16**

Patrick Heilig	Employee
Verizon	Employer
New Hampshire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol, and Long)

The case was heard by Administrative Judge Rose.

APPEARANCES
Daniel P. Napolitano, Esq., for the employee at hearing and on appeal
Susan G. McDonald, Esq., for the employee on appeal
Wayne Todd Huston, Esq., for the insurer

FABRICANT, J. The case is presented on cross-appeals from a decision in which the administrative judge denied the employee's claim of a second injury dated April 18, 2013, and ordered § 34 benefits from January 1, 2016, through January 26, 2017, followed by ongoing § 35 benefits, from January 27, 2017, based on an August 2, 2012, industrial injury. For the reasons that follow, we vacate the award of § 34 benefits for the period from January 1, 2016, to January 27, 2017, and order payment of maximum partial incapacity benefits for that time period. We affirm the decision on all other issues.

The employee began working for the employer on September 30, 1996, as a lineman. His duties included driving a line truck, installing telephone poles and wires, digging holes, and troubleshooting. (Dec. 4.) On August 2, 2012, he was in the course of his employment when a four-foot high retaining wall he was standing on collapsed, causing him to fall and land on his right shoulder. The employee continued to work but ultimately required right shoulder surgery. He then returned to light duty work in early January 2013, and on April 18, 2013, he left work. (Dec. 5; Tr. 35, 44.)

The insurer voluntarily paid the employee § 34 temporary total incapacity benefits commencing on September 13, 2012.[1] The insurer filed a complaint for discontinuance or modification of the employee's § 34 benefits on February 16, 2015.[2] At the § 10A conference on May 13, 2015, that complaint was denied by a different judge, who awarded the employee § 34A permanent and total incapacity benefits beginning on January 1, 2016. (Dec. 2.) The insurer appealed that order. By stipulation of the parties, the employee joined a claim for an additional injury to the same shoulder, occurring on April 18, 2013, the employee's last day of work. A hearing de novo took place on February 22, 2017. (Dec. 2, 3.)[3]

The employee underwent an impartial examination performed by Dr. Victor Conforti on June 16, 2015. On motion of the employee, the judge found the medical issues to be complex, and additional medical evidence was admitted. (Dec. 2, 3.)

The judge adopted the January 27, 2017, narrative report of Dr. Brian McKeon over the other medical evidence admitted. Dr. McKeon's report was submitted by both parties and gives an extensive overview of the employee's medical history. (Dec. 3-5.) In particular, he notes that the employee underwent a labral debridement open subpectoralis tenodesis and a subacromial decompression and distal clavicle resection related to the August 2012 industrial accident. (Insurer Exhibit 1, Employee Exhibit 5.)

The judge also adopted Dr. McKeon's opinion that the employee's problems with neck pain are unrelated to his industrial injury, that he should be on an independent exercise program, and that no further procedures or physical therapy are indicated for the right shoulder. The judge then adopted Dr. McKeon's opinion that

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[1] Insurer's Notification of Payment, DIA Form 103. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (judicial notice taken of board file).

[2] Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation. Rizzo, supra.

[3] Rizzo, supra.

the employee has a work capacity that would allow him to work as an administrative assistant, although he could not return to his career as a lineman. (Dec. 5.)

Regarding the vocational assessment, the judge found the reports of the insurer's vocational expert, Susan Chase, probative. He adopted her opinion that the employee had transferrable skills to successfully engage in various, less physically demanding, administrative positions earning wages specific to his residence in Homosassa, Florida. (Dec. 6, Statutory Ex. 10.)[4]

The judge also credited the employee's testimony that he has some degree of pain and range of motion problems involving his right major arm and shoulder. However, he found the employee's complaints of extreme pain and physical limitations to be exaggerated and not credible. The judge further found that, after the employee returned to light duty work following surgery, his testimony regarding increased symptoms of unbearable pain while moving boxes was not credible, and that no injury occurred on April 18, 2013. (Dec. 5-6.)

Based on the medical opinions of Dr. McKeon, the assessments of the insurer's vocational expert, and the testimony of the employee, the judge ordered: 1) commencement of § 35 in the amount of $671.32 based on an earning capacity of $400.00 per week, and an average weekly wage of $1,518.86 from the date of Dr. McKeon's report, January 27, 2017, and continuing; 2) a reduction in the award of § 34A benefits from January 1, 2016 through January 26, 2017, to § 34 benefits; 3) denial of the employee's claim of a second industrial injury on April 18, 2013; and, 4) the denial of the employee's claim for physical therapy pursuant to §§13 and 30. (Dec. 6.)

On appeal, the employee first argues that the judge's credibility findings, as well as his review and adoption of expert reports in denying liability for the April 18,

[4] Some of the vocational alternatives included select team assembler and select inspector positions, as well as customer service representative, information clerk and dispatcher with wages ranging from $10.00 to $15.00 per hour, as opposed to the $11.00 per hour minimum wage in the Commonwealth at that time. (Dec. 6.)

2013 injury, were arbitrary, capricious and incorrect as a matter of law. (Employee br., 19-24.) We disagree.

There is ample support for the judge's findings on liability and disability as well as earning capacity in the established record.[5] "Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). Deference is given to the evaluation of the credibility of witnesses appearing live before an Administrative Judge. Ighodaro v. All- Care Visiting Nurse Assn., 12 Mass. Workers' Comp. Rep. 415, 417 (1988). See also Lettich's Case, 403 Mass. 389, 394 (1988).

It is the judge's prerogative to determine the probative value of expert testimony and to decide which of conflicting opinions to adopt. Antoine v. Pyrotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993), citing Amon's Case, 315 Mass. 210 (1943). The judge's findings will be sustained where there is evidential support that is free from error of law. Harris v. Totten Pond Food Serv., 7 Mass. Workers' Comp. Rep. 107, 109 (1993), citing Woolfall's Case, 13 Mass. App. Ct. 901, 1070-1071 (1982), and cases cited.

The employee cites Gleason v. Trial Courts-Court Officers, 31 Mass. Workers' Comp. Rep. 113 (2017) for support of the argument that a judge's failure to consider certain medical evidence was error. (Employee br., 25.) However, unlike the instant case, in Gleason, it was impossible for the board to ascertain whether the judge reviewed medical submissions dated subsequent to the end date of the listed exhibit. Here, the judge specifically noted that it was after careful consideration of the extensive medical evidence in the case that he accepted and adopted the opinions of Dr. Brian McKeon. (Dec. 5.) The judge's credibility determinations were based on the record and reasonable inferences drawn therefrom. We see no reason to disturb

[5] Overall in its cross appeal, the insurer does not take significant issue with the judge's decision or findings on liability and disability/earning capacity. (Insurer brief 9-10.)

his determinations. See Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001).

The final issue raised by both parties is that the judge's § 34 order commencing on January 1, 2016, and running through January 26, 2017, was beyond the statutory allowance.[6] (Employee rebuttal brief, 2, Insurer rebuttal brief, 2.) Since compliance with this order would compel the insurer to pay beyond the permissible statutory period of § 34, we vacate that award. However, doing so leaves the employee with a gap in benefits from January 1, 2016, until January 27, 2017, when § 35 benefits were ordered by the judge to commence. Relying on the judge's finding that there was no credible basis for the conference order for § 34A benefits as of January 1, 2016, (Dec. 6, Insurer br. 14), and given the expiration of the employee's § 34 weekly benefits, the insurer asks that the reviewing board order § 35 weekly benefits for the one-year gap in payment.

The employee seeks an amendment to the judge's order reflecting payment of § 35 beginning on January 1, 2016, reverting to § 34A following his September 16, 2016, right shoulder surgery. (Employee Reply br., 5-6.) See, e.g., Maraia v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 401 (2011)(presumptive validity of award of total incapacity benefits for a reasonable time following surgery). "The employee's argument that a reasonable period of total incapacity may be presumed after surgery is correct, see Maraia, supra, but we do not accept the general premise that permanent *and* total incapacity may reasonably be presumed following a surgical procedure." Rivera v. Dept. of Corrections, 29 Mass. Workers' Comp. Rep. 99, 105 (2015) (award of closed period of § 34A benefits following surgery required reversal as contrary to statutory scheme to award higher amount of weekly benefits simply because entitlement to lesser amount has exhausted).

[6] M. G. L. c. 152, § 34 states in pertinent part:

> The total number of weeks of compensation due the employee under this section shall not exceed one hundred fifty-six."

The lack of findings supporting an award of § 34A benefits precludes an allowance of the employee's request for such an amendment to the judge's order. However, it is well established that where there are findings in support of a § 34 award, an award for the "lesser included" § 35 benefits is permissible for the same award period. Bracchi v. Ins. Auto Auctions, 22 Mass. Workers' Comp. Rep. 287 (2008).[7]

Accordingly, we vacate the decision regarding the award of § 34 benefits beyond the statutory period, and instead award § 35 benefits in the amount of $683.49, based upon an average weekly wage of $1,518.86, for the same period from January 1, 2016 to January 26, 2017. The decision is affirmed as to all other issues.[8]

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **August 29, 2019**

[7] An employee's failure to claim § 35 partial incapacity benefits in the alternative does not bar a judge's award of such benefits. Tredo v. City of Springfield School Dept., 19 Mass Workers' Comp. Rep. 118 (2005).

[8] Following the payment of the maximum partial incapacity benefits pursuant to § 35 from January 1, 2016 to January 26, 2017, payments pursuant to § 35 shall continue as previously ordered, reflecting the finding of an earning capacity of $400.00.