

STATE OF MAINE
WORKERS' COMPENSATION BOARD
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RE: Marion N. Anair v. L.L. Bean, Inc.
WCB #: 05-003943 (2-18-05)

Within 25 days after issuing this decision, or 5 days after ruling on a motion for further findings, whichever is later, the hearing officer may request that the full Workers' Compensation Board review this decision. See 39-A M.R.S.A. Section 320.

Within 20 days after receiving this decision a party may file a motion asking the Board to find further facts and make further conclusions of law and file the appropriate decision if it differs from the original decision; within 15 days after filing the motion, the party shall file its proposed findings of fact and conclusions of law pursuant to section 318 of the Act. WCB R. Ch. 12, Section 5.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within 20 (twenty) days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. Section 322.

PURSUANT TO BOARD RULE CHAPTER 12 SECTION 19, ALL EVIDENCE AND TRANSCRIPTS IN THIS MATTER WILL BE DESTROYED IN 60 DAYS UNLESS (1) WE RECEIVE WRITTEN NOTIFICATION THAT ONE OR BOTH PARTIES WISH TO HAVE THEIR EXHIBITS RETURNED TO THEM OR (2) A PETITION FOR APPELLATE REVIEW IS FILED. THE 60 DAYS WILL NOT BEGIN TO RUN UNTIL ALL POST-DECREE MOTIONS HAVE BEEN DECIDED OR OTHERWISE DISPOSED.

MARION N. ANAIR
(Employee)

v.

L. L. BEAN, INC.
(Employer)

and

Maine Employers' Mutual Insurance Company (MEMIC)
(Insurer)

Pending before the Workers' Compensation Board is the Employee's PETITION FOR REVIEW OF AUTOMATIC DISCONTINUANCE involving an injury date of February 18, 2005. Through her petition, Ms. Anair seeks total incapacity benefits from

September 5, 2007 to the present and continuing with a credit for benefits paid. A provisional order was issued by the Board on September 27, 2007 pursuant to which Ms. Anair has been receiving partial incapacity benefits based on an imputed earning capacity of full-time at minimum wage. A hearing was held in this case on February 7, 2008. The parties have stipulated to an average weekly wage of \$603.74 with fringe benefits of an additional \$101.17.

Ms. Anair is a 60 year-old resident of Richmond, Maine. She is a high school graduate and in the past has worked in shoe factories, a convenience store, and a deli. In 1996, she began working for L.L. Bean as a picker. Shortly thereafter, she transferred to the packing department. Both jobs are upper extremity intensive.

Late in 2004, Ms. Anair developed left shoulder pain, in spite of being right-handed. Her shoulder gradually worsened and she reported a work injury on February 15, 2005. By that time, she was also having pain in her neck and left arm and having headaches. She was seen on site by L.L. Bean medical personnel and put on light duty. However, according to Ms. Anair, light duty also involved repetitive arm use and she continued to be symptomatic. She ultimately underwent a surgical fusion in July 2005.

Due to complications arising from surgery, Ms. Anair did not return to work until being released to light duty in October of 2005. L.L. Bean provided light duty work through its transitional work program. Ms. Anair testified that she continued to have symptoms in her left arm. Consistent with L.L. Bean's transitional work program, Ms.

Anair was laid off in April of 2006 and she was unable to return to her prior job. Although she applied for other jobs at L.L. Bean, she was not hired.

Ms. Anair looked for work after being laid off from L.L. Bean in 2006. However, she was unsuccessful in finding new employment. Late in 2006, however, L.L. Bean brought her back to work in the returns department. She worked there until January 2007 when she aggravated her arm handling a box. Ms. Anair has been out of work since. She continues to be symptomatic. In addition, she testified that she has become depressed as result of her injury and loss of employment. She has not looked for work.

The issues in this case are medical causation and the nature and extent of incapacity. As to causation, although there is no dispute that Ms. Anair injured her left shoulder on February 18, 2005, L.L. Bean/MEMIC disputes that Ms. Anair's neck problems were caused by her job at L.L. Bean. The medical records make clear that Ms. Anair suffered from a pre-existing degenerative condition in her cervical spine. Dr. Walleigh, Ms. Anair's treating neurosurgeon, opined that although she suffered from pre-existing problems, the repetitive work she did at L.L. Bean was "a catalyst in the generation of radicular pain."

Dr. Caldwell, who performed a §207 evaluation in this case, agreed that Ms. Anair's left shoulder problems are related to her work but opined that her neck pain and headaches were due to the cervical disk degeneration unrelated to work. He further

indicated that he believed whether she was working at her job, some other job, or not working at all, would not make a difference in her symptoms.

Dr. Walleigh responded that the degenerative changes present in Ms. Anair are ubiquitous in her age bracket and did not account for her symptoms. She again tied the development of radicular pain and the need for surgery to Ms. Anair's repetitive work.

As between the two medical providers opining on causation, the Board prefers that of Dr. Walleigh as her treating neurosurgeon. Inasmuch as Ms. Anair required extensive treatment by Dr. Walleigh subsequent to surgery due to complications, it strikes the Board that she has greater familiarity with Ms. Anair's situation.

As to the nature and extent of incapacity, the medical providers are also at odds. Dr. Caldwell has indicated that Ms. Anair has a full-time light duty work capacity. Dr. Walleigh, however, indicated that her incapacity is greater than that and that she will continue to have marked disability that would limit her ability to work.

The record also contains a functional capacity evaluation. Pursuant to that exam, she was given permanent restrictions on both arms and a number of activities. However, according to that evaluation, Ms. Anair does have a full-time work capacity, albeit limited. That evaluation appears to have been a valid assessment of Ms. Anair's abilities. Therefore, the Board adopts it as the best indicator of work capacity.

L.L. Bean/MEMIC urges the Board to find that Ms. Anair has an imputed earning capacity of \$600 a week, or, at least, \$360 a week. However, given Ms. Anair's work history, age, and education, I find that minimum wage (\$280) remains a more realistic earning capacity, as the Board found in the provisional order. Benefits are ordered continued at that rate. In addition, the Board is referring this matter to the office of medical and rehabilitation services for evaluation.

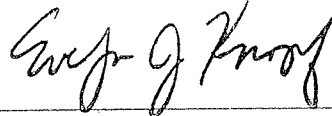
In summary, the Petition for Review is granted. Ms. Anair is entitled to continue to receive incapacity benefits based on the difference between her average weekly wage including fringe benefits as provided in 39-a MRSA §102(4)(H) and an imputed earning capacity of \$280 a week.

So Ordered.

Augusta, Maine

Dated: 6-18-08

WORKERS' COMPENSATION BOARD



Evelyn J. Knopf, Hearing Officer

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ATTEST



WCB CLERK