

## MEMORANDUM DECISION

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IN THE  
**Court of Appeals of Indiana**

David Vass,  
*Appellant-Plaintiff*

v.

Barklay Purkans, LLC,  
*Appellee-Defendant*

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March 14, 2024

Court of Appeals Case No.  
23A-EX-2090

Appeal from the Worker's Compensation Board of Indiana  
The Honorable Linda Peterson Hamilton, Chairperson  
The Honorable Douglas W. Meagher, Board Member  
Trial Court Cause No.  
C-228703

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**Memorandum Decision by Chief Judge Altice**

Judges Weissmann and Kenworthy concur.

**Altice, Chief Judge.**

## **Case Summary**

[1] David Vass appeals the decision of the Full Worker’s Compensation Board of Indiana (the Board). He challenges the Board’s determination that he reached maximum medical improvement (MMI) on December 12, 2017, and thus was not entitled to additional temporary total disability (TTD) benefits, which he argued should be extended into March 2023.

[2] We affirm.

## **Facts & Procedural History**

[3] In February 2014, while working for Barklay Purkans, LLC (Employer), Vass suffered a work related injury to his right knee that culminated in a total knee replacement in March 2017. Dr. Douglas Lowery performed the knee replacement surgery and provided post-operative care, which included treating Vass for continued knee pain.

[4] After several routine follow-up appointments with Dr. Lowery, Vass returned on September 21, 2017, complaining of pain along the outside of his knee. Dr. Lowery ordered an x-ray and a bone scan and gave Vass an injection to help relieve the pain, but he explained to Vass that his symptoms “might just be episodic and will be something he lives with.” *Exhibits Vol. 1* at 35. Dr. Lowery

released Vass to work with no restrictions, except that he could not operate heavy equipment while on narcotics.

[5] Vass returned to Dr. Lowery on October 30, 2017, after having the bone scan. Dr. Lowery found “nothing significant on the bone scan” and noted “some soft tissue inflammation but this is to be expected.” *Id.* at 32. He gave Vass “a Toradol injection to try and calm things down.” *Id.* Again, Vass was released with no work restrictions.

[6] At a follow-up appointment on November 27, 2017, Vass reported that the injection was not helpful and that although Dr. Lowery had released him to return to work, Vass believed there was “no way” he could work. *Id.* at 29. Dr. Lowery noted that Vass’s knee had been thoroughly evaluated and all studies had been inconclusive regarding an explanation for the continued pain. Dr. Lowery was puzzled that the Toradol injection did not help at all, and he explained to Vass that a functional capacity evaluation (FCE) was needed to objectively determine what limitations he might have regarding work. In his progress notes, Dr. Lowery indicated: “We can not [sic] with clear judgment say he can’t work, we don’t have a medical orthopedic reason other than his pain and pain is subjective.” *Id.* at 30. Accordingly, he ordered an FCE and released Vass to return to work with no restrictions.

[7] After Vass failed to appear for the FCE, Dr. Lowery placed him at MMI on December 12, 2017. He described Vass’s complaints of pain as “subjective” but noted that Vass had experienced a mild motion deficit. *Exhibits Vol. 3* at 5. Dr.

Lowery assigned a 31% permanent partial impairment (PPI) of the right leg (12% of the whole body).

[8] Vass saw Dr. Robert Malinzak on March 6, 2018, for an independent medical evaluation. Vass reported to Dr. Malinzak that he had been released to work by Dr. Lowery but that he could not work “because his knee bothers him too much.” *Id.* at 16. Dr. Malinzak’s examination of the knee revealed “good motion” and “mild swelling” but “[n]o severe pain” or other signs of infection. *Id.* Dr. Malinzak also reviewed certain medical records provided by Vass, including x-rays from September 2017 and the October 2017 bone scan. Ultimately, Dr. Malinzak could not make a diagnosis and instead called for additional testing, providing in his report:

Patient *could* have an infection, painful total knee replacement, loosening or fracture. It is unfortunate he still has pain after total knee replacement by Dr. Lowry [sic]. It is possible that his original injury and despite subsequent treatment *he may have permanent impairment or require further treatments*. Patient should be allowed to perform activities that are not painful. We typically recommend no repetitive lifting over 20 lbs. *It is possible additional treatment may be necessary depending on the diagnosis*.

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PLAN: At this time, I recommend [blood tests], aspiration, injection with lidocaine. Send the aspiration for cell count, Gram stain and culture. He could consider antiinflammatory [sic] topicals, maybe even knee bracing. At this point, I do not know how he would be able to work, but certainly more workup could be considered for his particular problems.

*Id.* (emphases added).

[9] Thereafter, Vass saw Dr. Lowery on April 3, 2018, and continued to complain of knee pain. Upon a full examination, Dr. Lowery found that Vass's knee "was normal" and had full range of motion. *Id.* at 7. A blood test was ordered to check for infection, and later that month, Vass returned to Dr. Lowery's office to see a nurse practitioner. Vass had mild swelling and pain on the lateral side of his right knee. A blood test was again ordered, as the previous one had been delayed by a sinus infection. Vass was released to work with no restrictions and informed that he would be notified if the lab results came back elevated. Despite being contacted by Dr. Lowery's office, Vass did not return for aspiration of the knee and injections because, according to Vass, he could not afford to travel to the appointments after Employer "cut [his] benefits." *Transcript Vol. 2* at 12.

[10] On September 25, 2018, a hearing was held before a Single Hearing Member of the Board to address Vass's claim for additional worker's compensation benefits. Vass sought additional medical treatment for his injury and additional TTD benefits, which Employer had last paid on October 28, 2017. The parties entered stipulated facts and medical exhibits into evidence, and Vass offered brief testimony at the hearing. Vass testified that his knee was still very painful and that he was sure that he needed more medical treatment.

[11] On December 26, 2018, the Single Hearing Member concluded: 1) Vass's injury reached MMI on or before December 12, 2017; 2) he was not entitled to

additional TTD benefits; 3) he sustained a 31% PPI of his right leg; and 4) the FCE ordered by Dr. Lowery and the other tests suggested by Dr. Malinzak were “necessary to determine [Vass’s] permanent restrictions and need for additional medical services[.]” *Appendix* at 16. Based on these conclusions, the Single Hearing Member awarded Vass PPI benefits of \$20,400 and, as relevant here, ordered Employer to

provide and arrange the FCE ordered by Dr. Lowery and the additional medical testing suggested by Dr. Malinzak, preferably under their supervision and direction. They or a duly-designated physician(s) shall determine [Vass’s] permanent restrictions and his need for additional medical services for treatment of his stipulated injury; specifically, any additional medical services necessary to limit or reduce the 31% PPI of his right leg.

*Id.* The Single Hearing Member expressly “retain[ed] jurisdiction over this matter” and scheduled a pre-trial conference for March 4, 2019. *Id.*

[12] Employer filed an application for review by the Board of the Single Hearing Member’s December 2018 decision. Though the request was timely filed, on January 31, 2019, the Chairman of the Board determined that “the issue is not ripe for appeal”<sup>1</sup> and remanded the case to the Single Hearing Member “with [Employer’s] right to appeal preserved by its application.” *Id.* at 12.

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<sup>1</sup> The record does not contain Employer’s application for review or otherwise indicate what issue Employer sought to appeal.

[13] Throughout 2019, Vass resisted undergoing the FCE that was ordered by Dr. Lowery and provided by Employer as required by the Single Hearing Member's December 2018 decision. As a result, on January 9, 2020, the Single Hearing Member ordered Vass to appear for an FCE, which he did on March 5, 2020. The results of the FCE, however, were inconclusive (that is, his physical work tolerances could not be determined) because Vass refused to participate fully in the exam due to reported pain.<sup>2</sup>

[14] Dr. Lowery examined Vass for knee pain on April 28, 2020 (having last seen him a year earlier with instructions to follow-up after an FCE). He diagnosed Vass with iliotibial band (ITB) syndrome and recommended conservative treatment – topical rubs and oral medications - rather than surgery. Dr. Lowery did not believe ITB surgery would benefit Vass but indicated that it could be considered later as a last resort. He also explained to Vass that he would probably never “return to normal work.” *Exhibits Vol. 1* at 6. As for work restrictions, Dr. Lowery noted in his report, “No restrictions, at MMI, PPI to follow.” *Id.* Dr. Lowery made another entry later that day regarding PPI, noting that the FCE had been “unfortunately terminated” and then rating Vass's PPI of the right leg at 25%. *Id.* He did not explain (or acknowledge) the reduction in the PPI.

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<sup>2</sup> Shortly into the examination of his lower extremities, Vass “insisted that he did not intend to stand to participate in additional testing.” *Exhibits Vol. 1* at 22. The examiner encouraged him to continue and explained that the evaluation “would not yield significant results” if he did not at least attempt the additional testing. *Id.* at 15. When Vass made it clear that he would not do so, the test was terminated.

- [15] More than a year later, in June 2021, Dr. Lowery treated Vass’s ITB syndrome with an injection to reduce inflammation and pain. Vass then underwent a bone scan in November 2021, from which Dr. Lowery determined that there was no loosening of the prosthesis.
- [16] On October 21, 2022, Dr. Lowery responded in writing to questions posed by counsel for Vass. As summarized, Dr. Lowery indicated: ITB discomfort is “somewhat common” after a knee replacement; an ITB release procedure can alleviate discomfort when conservative treatment fails; the estimated charge for this procedure is \$1,888; and Vass’s ITB issues are due to his knee replacement and thus related to his original work injury. *Id.* at 11.
- [17] The Single Hearing Member conducted a hearing on February 6, 2023, to address, among other things, whether Vass was entitled to additional medical treatment, including the ITB procedure that was scheduled for four days later, and whether he was entitled to additional TTD benefits.
- [18] Vass testified briefly at the hearing, including that he was still in pain and that the ITB procedure would be a twenty-minute, outpatient surgery. The parties also submitted certain stipulated facts and exhibits. Vass, through his attorney, argued that he was not yet at MMI due to his ITB issues and that he was entitled to additional TTD benefits from October 29, 2017, through his period of recovery from the upcoming ITB procedure. Regarding TTD benefits, Employer’s attorney noted that there were no medical records in evidence



taking Vass off work any time after TTD benefits were stopped in October 2017 and that several indicate that he could in fact work.

- [19] Vass underwent the ITB procedure on February 10, 2023. Dr. Lowery noted on the Post Operative Work Status Form that Vass’s physical activities would be restricted for four weeks post-surgery.
- [20] On April 4, 2023, the Single Hearing Member issued its award concluding that the ITB surgery was “necessary to limit or reduce the 31% right leg PPI assigned by Dr. Lowery on December 12, 2017” and that Employer was “responsible for providing the surgery and any associated medical services.” *Appendix* at 10. Though granting Vass’s request for additional medical treatment, the Single Hearing Member denied his claim for additional TTD benefits based on its conclusion that he reached MMI on December 12, 2017.<sup>3</sup>
- [21] The next day, Vass filed an application for review by the Board, which was considered alongside Employer’s earlier application filed in January 2019. On August 11, 2023, the Board unanimously affirmed the Single Hearing Member’s decisions from December 2018 and April 2023. Along with findings of fact that align with the facts set out above, the Board issued the following conclusions of law and award:

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<sup>3</sup> Though not an issue on appeal, we note that the Single Hearing Member kept the PPI rating at 31%, noting that Dr. Lowery did not explain why he reduced it from 31% to 25%.

## CONCLUSIONS OF LAW

1. The ITB surgery performed by Dr. Lowery on February 10, 2023 was necessary to further limit or reduce the 31% right leg PPI assigned by Dr. Lowery on December 12, 2017 and reduced to 25% on April 28, 2020; and, Defendant is responsible for providing the surgery and any associated medical services.
  
2. All actions taken in this matter were solely and consequently related to [Vass's] February 12, 2014 injury. His entitlement to additional disability benefits for that injury ended when it reached MMI on December 12, 2017. There is no release from work by a treating physician for any reason after that date. His inability to resume work of the same kind and character that he performed when injured on February 12, 2014 does not create entitlement to additional disability benefits for that injury after it reached MMI.
  
3. The 31% PPI of [Vass's] right leg has now been reduced to 25% per the determinations of the same physician. Dr. Lowery did not specifically explain his reason(s) for lessening the impairment rating before the ITB surgery. No additional PPI rating has been submitted by either party since the ITB surgery. There is no evidence or reason for adjusting the compensation previously awarded to [Vass] for his PPI; nor any evidence or reason for revising the previous award of medical services necessary to limit or reduce his impairment.

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## AWARD

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that [Vass] shall take nothing by way of his claim for additional disability benefits.

IT IS FURTHER ORDERED that [Employer] shall continue to provide additional medical services necessary to limit or reduce [Vass's] right leg impairment caused by his stipulated injury.

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*Id.* at 4-5.

[22] Vass now appeals, contending that the Board erred in finding that he reached MMI in December 2017 and in denying his request for additional TTD benefits. We will provide more information below as needed.

### **Standard of Review**

[23] When reviewing a worker's compensation decision, we are bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. *Ind. Spine Grp., PC v. Pilot Travel Centers, LLC*, 959 N.E.2d 789, 791 (Ind. 2011); *see also* Ind. Code § 22-3-4-8(b) ("An award by the full board shall be conclusive and binding as to all questions of fact, but either party to the dispute may ... appeal to the court of appeals for errors of law under the same terms and conditions as govern appeals in ordinary civil actions."). Without reweighing the evidence or assessing witness credibility, we will examine the record only for any substantial evidence and reasonable inferences supporting the Board's findings and conclusion."

*Ind. Spine Grp.*, 959 N.E.2d at 791; *Senter v. Foremost Fabricators*, 137 N.E.3d 1027, 1031 (Ind. Ct. App. 2019). “To the extent the issue involves a conclusion of law based on undisputed facts, it is reviewed de novo.” *Ind. Spine Grp.*, 959 N.E.2d at 791.

## Discussion & Decision

[24] Vass’s appeal hinges on his argument that the Board erroneously concluded that his injury reached MMI in 2017 rather than after his ITB surgery in 2023.<sup>4</sup>

The phrase “maximum medical improvement,” also designated “quiescence” in the jargon of worker’s compensation, essentially means that a worker has achieved the fullest reasonably expected recovery with respect to a work related injury. *Cox v. Worker’s Comp. Bd.*, 675 N.E.2d 1053, 1054 (Ind. 1996). Once a worker’s injury has stabilized to a permanent and quiescent state, temporary disability ceases, and the extent of permanent injury resulting in a degree of impairment or total disability is determined pursuant to the schedules in Ind. Code § 22-3-3-10. *Kohlman v. Ind. Univ.*, 670 N.E.2d 42, 43-44 (Ind. Ct. App. 1996), *reh’g denied, trans. denied.*

*Perkins v. Jayco*, 905 N.E.2d 1085, 1088-89 (Ind. Ct. App. 2009).

[25] There is ample evidence in the record that Vass’s knee injury reached MMI by December 12, 2017. Dr. Lowery, his treating physician, first released Vass to

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<sup>4</sup> Employer argues that Vass is barred from challenging the MMI determination because he did not seek review of the Single Hearing Member’s December 2018 decision and it thus became “final and conclusive” under I.C. § 22-3-4-8(a). Employer did not assert this argument below, and the Board expressly reviewed the Single Hearing Member’s decisions from 2018 and 2023. Accordingly, we will address the appeal on the merits.

work with no restrictions (except for operating heavy equipment while on narcotics) on September 21, 2017, despite simultaneously treating him for knee pain. He was similarly released by Dr. Lowery with no work restriction at appointments in October and November 2017. On December 12, 2017, Dr. Lowery placed Vass at MMI with a 31% PPI and noted that his complaints of pain were subjective and that he had failed to appear for an FCE.

[26] Vass directs us to Dr. Malinzak's report from an independent medical evaluation in March 2018 as evidence that he could not return to work and his injury was not yet at MMI. Aside from this being an inappropriate request to reweigh the evidence, we note that Dr. Malinzak's report was inconclusive. He did not make a diagnosis or expressly determine whether Vass was at MMI.

[27] Later, Vass continued seeing Dr. Lowery for right knee pain, and each time he left with no documented work restrictions. Those appointments were in April 2018, April 2019, April 2020, and June 2021. And even after diagnosing Vass with ITB syndrome in April 2020, Dr. Lowery still reported Vass as being at MMI.

[28] During this time, Vass resisted undergoing an FCE, which was recommended by Dr. Lowery in December 2017 and ordered by the Single Hearing Member in December 2018 and then again in January 2020. When he finally appeared for an FCE in March 2020, he refused to fully participate in it and thus caused the results to be inconclusive. In its findings of fact, the Board stated: "The [inconclusive] FCE results are less determinative than [Vass's] persistent

resistance to undergoing the evaluation. In doing so, he has precluded evidence of his permanent physical restrictions and undermined his disability claim.”

*Appendix at 3.*

[29] Vass suggests that the undisputed fact that he had knee pain for years following his 2017 knee replacement, which ultimately led to ITB surgery in February 2023, necessarily establishes that he was not at MMI until after the ITB surgery. This argument, which Vass asserted below, was rejected by the Board.

[30] I.C. § 22-3-3-4(c) contemplates the potential need for treatment despite reaching MMI with an adjudicated PPI award, providing:

After an employee’s injury has been adjudicated ... on the basis of permanent partial impairment and within the statutory period for review in such case as provided in section 27 of this chapter, the employer may continue to furnish a physician or surgeon and other medical services and products, and the worker’s compensation board may within the statutory period for review as provided in section 27 of this chapter, on a proper application of either party, require that treatment by that physician and other services and products be furnished by and on behalf of the employer as the worker’s compensation board may deem necessary *to limit or reduce the amount and extent of the employee’s impairment.*

*Id.* (emphasis added). The statute grants the Board discretion to award additional medical treatment – palliative care – to reduce pain and limit the extent of an employee’s permanent impairment. *See Perkins*, 905 N.E.2d at

1090. This is precisely what the Board did here, and Vass has not established error in this regard.<sup>5</sup>

[31] Judgment affirmed.

Weissmann, J. and Kenworthy, J., concur.

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<sup>5</sup> Vass makes a confusing argument that the Board has discretion to award additional treatment under this statute only for new or changed conditions, not in situations like here where the ITB surgery was a direct consequence of the knee replacement. This is not a proper interpretation of the statute. *See generally Perkins*, 905 N.E.2d 1085 (remanding to the Board for a consideration of whether palliative care would reduce employee's pain and limit the extent of his impairment where employee's pain had not ceased despite being at MMI, which had been determined in the same award).