COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 033828-03

Alexander Okraska	**Employee**
Universal Plastics	**Employer**
AIM Mutual Insurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Teresa Brooks Benoit, Esq., for the employee at oral argument
Kimberly Davis Crear, Esq., for the insurer

HORAN, J. The employee appeals from a decision authorizing the insurer to discontinue his § 34 total incapacity benefits. We affirm the decision.

Because the issues raised are, in large part, based upon the procedural history of the case, we summarize it.[1] On October 21, 2003, the employee fell at work and injured his back and right shoulder. The insurer accepted the case and commenced payment of § 34 benefits. On November 18, 2005, the employee filed a § 36(j)[2]

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[1] We glean these facts from our review of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] General Laws c. 152, § 36(j), provides:

> For each loss of bodily function or sense, other than those specified in preceding paragraphs of this section, the amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed the average weekly wage in the commonwealth

claim seeking $4,811.46 for a permanent functional loss to his back and right leg.[3] The insurer denied the claim and, based on the reports of Dr. Richard Anderson dated December 28, 2005 and January 17, 2006 ─ which opined the employee was no longer disabled *and* that he suffered from no functional loss ─ it moved to join a complaint to discontinue or modify the employee's § 34 benefits. The judge denied the insurer's motion and, on March 21, 2006, the parties appeared before him at a § 10A conference to address the employee's § 36(j) claim. In defense of the claim at conference, the insurer submitted Dr. Anderson's reports. The judge's conference order of March 22, 2006 awarded the employee the $4,811.46 claimed in loss of function benefits.[4] The insurer did not appeal that order. See G. L. c. 152, § 10A(3).[5]

> at the date of injury multiplied by thirty-two; provided, however, that the total amount payable under this paragraph shall not exceed the average weekly wage in the commonwealth at the date of injury multiplied by eighty.

[3] General Laws c. 152, § 36(i), provides:

> For any permanent but partial loss of use of a member, whether leg, foot, arm, or hand, such sum in proportion to the amount applicable in the event of amputation or permanent, total loss of use of said member as the said partial loss bears to the total loss of use of said member.

[4] The conference order does not specify the percentage loss of function for either the employee's back or right leg. However, the employee's § 36(j) claim was duly accompanied by an affidavit pursuant to 452 Code Mass. Regs. § 1.07(2)(i), which articulated that based on the November 8, 2005 report and opinion of Dr. Roland Caron, the employee had a ten percent loss of function to his whole person, which translated into a seventeen percent functional loss of the lumbosacral spine.

[5] General Laws c. 152, § 10A(3), provides, in pertinent part:

> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . .

On March 29, 2006, the insurer filed a complaint to discontinue or modify the employee's benefits based on the aforementioned reports of Dr. Anderson. On May 19, 2006, the employee countered by filing a claim for "psychological depression and anxiety." On July 12, 2006, he moved to join that claim to the insurer's pending discontinuance complaint. The next day, the judge denied the employee's motion without prejudice. At the § 10A conference on the insurer's complaint, both parties submitted numerous medical reports and records. In a second conference order filed on June 24, 2006, the judge assigned the employee an earning capacity of $95 per week, and awarded § 35 partial incapacity benefits at the rate of $173.79 per week as of September 1, 2006. Both parties appealed the order.

On September 5, 2006, the employee underwent a § 11A impartial medical examination by Dr. Eugene Leibowitz. Dr. Leibowitz found no objective evidence of disability and opined the employee's lumbosacral strain "should have persisted for no longer than two to three weeks." (Stat. Ex. 1, p. 2.) The doctor placed no physical restrictions on the employee, except to encourage a gradual increase in his "work regime that should persist for two to four weeks." Id. Dr. Leibowitz did not relate any of the employee's complaints to his work injury. Id. At his May 9, 2007 deposition, the doctor stood by the opinions contained in his report. (Dep. 11-12.)

On May 22, 2007, the employee filed a motion to strike Dr. Leibowitz's report as inadequate, and to allow the submission of additional medical evidence. Essentially, the employee argued that because Dr. Leibowitz's opinion fell outside the properly framed medical issue in dispute, his opinion should be rejected in favor of other medical evidence. See Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997)(where impartial examiner addressed medical issues not in dispute, judge erred by refusing to allow the introduction of additional medical evidence). The employee maintained Dr. Leibowitz's opinion was flawed because he failed to acknowledge that the employee suffered from a work-related permanent functional loss. The doctor was estopped from so opining, the employee posited, because the insurer failed to appeal the conference order awarding him § 36(j) functional loss benefits. The judge denied the employee's motion, adopted the opinion of Dr. Leibowitz, and authorized the insurer to discontinue the employee's compensation effective May 9, 2007. (Dec. 3.)

The employee raises two issues on appeal. First, he renews his objection to the judge's denial of his motion to allow additional medical evidence due to the inadequacy of Dr. Leibowitz's report.[6] Second, he maintains the judge erred by permitting the insurer "to use a previously litigated and discounted medical report." (Employee br. 1.) We address these arguments in turn.

The employee argues that because the unappealed March 22, 2006 conference order established his entitlement to loss of function benefits, Dr. Leibowitz was legally obligated to base his disability assessment upon that fact. Instead, the employee argues, Dr. Leibowitz "testified that his findings as to disability *were based on the finding* [that] there was no permanent functional loss." (Employee br. 9; emphasis added.) For the reasons that follow, the judge's adoption of Dr. Leibowitz's opinion was proper.

The medical issue in dispute at the June 24, 2006 conference was the employee's present disability. Dr. Leibowitz addressed the issue squarely, and found no disability. (Dep. 8.) When he was asked if the employee had any permanent loss of function relative to his industrial accident, he said no. Id. However, the doctor did *not* say, as the employee alleges, that his disability opinion was *based on* his opinion that the employee did not suffer from any permanent loss of function. The doctor's testimony was as follows:

> Q: The findings in your report that he was not disabled at the time
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> of your examination would be made also with the finding that
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> there was no permanent loss of function as a result of that accident, is that correct?

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[6] On appeal, the employee also argues Dr. Leibowitz's report was inadequate because he admitted at deposition that he could not address the psychological medical issues associated with the employee's claim for depression and anxiety. We need not address this argument in light of the judge's refusal, without prejudice, to join that claim. In his brief, the employee does not challenge the judge's decision to deny joinder.

A: That's correct.

(Dep. 8.) Thus, Dr. Leibowitz's testimony was that he made both findings at the time he examined the employee; the doctor did not say he based one finding on the other. Had employee's counsel informed the doctor about the prior § 36(j) adjudication, and asked him to assume it as the law of the case, i.e., that the insurer had accepted the degree of the employee's functional loss, a different medical opinion, and a different result, may have resulted. Cf. Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(and cases cited). However, no such question was ever posed. Moreover, had Dr. Leibowitz been given the opportunity, he may have offered an explanation as to how the employee's loss of function may have changed over time, or how such an impairment may not have necessarily required a finding of medical disability.

See Lauble's Case, 341 Mass. 520, 523 (1960)(no bar to an award of § 36 benefits where "there is a possibility that the claimant's condition will improve" [citations omitted]); Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 318 (2003) (impartial medical examiner differentiated between a medical impairment and a medical disability); see also G. L. c. 152, § 37(which requires only a showing of a prior "physical impairment" to combine with a personal injury under the act to cause a "disability which is substantially greater"). In the end, the record does not support the argument advanced by the employee. Dr. Leibowitz's report squarely addressed the issue of the employee's present disability; it was not inadequate as a matter of law. Accordingly, the judge was not required to strike it and allow the admission of additional medical evidence. G. L. c. 152, § 11A(2); Viveiros's Case, 53 Mass. App. Ct. 296 (2001).

The employee next contends the insurer should not have been permitted to file its complaint for discontinuance based on Dr. Anderson's reports. He argues the doctrine of collateral estoppel should have prevented the insurer from using those reports because they contained opinions which were rejected by the judge at the March 22, 2006, § 36(j) conference. It is true the judge could not have adopted Dr. Anderson's opinion to award § 36(j) benefits, as the doctor opined the employee suffered from no permanent functional loss. However, the issue of the employee's present disability was not joined, and therefore not addressed, by the judge at that first conference. Simply put, collateral estoppel does not bar the use of Dr.

Anderson's opinion on the employee's present disability because the issue at the first conference was functional loss, and the issue at the second conference was present disability.[7] Dr. Anderson's opinion on the employee's present disability was not considered until the second conference. In any event, in his hearing decision, the judge did not adopt Dr. Anderson's opinion.[8] There was no error. The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 29, 2009**

[7] Collateral estoppel "precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." Stowe v. Bologna, 415 Mass. 20, 22 (1993). See also Martin v. Ring, 401 Mass. 59 (1987)(applying defensive collateral estoppel to industrial accident board decision).

[8] Nor could he have, as it was not in evidence.