COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 014627-87

Andrew Gerakaris	Employee
Administrative Office of the Trial Court	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, Horan & Fabricant)

APPEARANCES

Louis C. deBenedictis, Esq., for the employee
Brian T. Mulcahy, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision awarding permanent and total incapacity benefits to the employee for an accepted 1987 work injury. The self-insurer argues that the administrative judge erred by denying its request to place into evidence testimony of two witnesses regarding their observations of the employee from 1992 to 1999. As the claim for § 34A benefits did not commence until 2003, we see no abuse of discretion. The self-insurer also argues that the judge mischaracterized the impartial physician's opinion with respect to the causal connection between the employee's hearing loss and the 1987 work injury. We agree, and recommit the case as a result.

The employee struck his head in a slip and fall injury on stairs at work on February 4, 1987, and lost consciousness. His symptoms consisted of pain in his upper shoulders, neck and back; blurred vision; loss of balance; ringing in his ears; hearing loss in his right ear; and nausea. The self-insurer paid the employee temporary incapacity benefits under §§ 34 and 35 from the date of injury until 2004.

In 2003, when he claimed § 34A permanent and total incapacity benefits, the employee's symptoms were dizziness, loss of balance, nausea, ringing in his ears, and lack of stereophonic hearing. (Dec. 5-7.)

The employee underwent an impartial medical examination on February 25, 2004. Dr. Sadru Hemani, board certified in otolaryngology, opined that the employee's dizziness was causally related to the 1987 work injury. The doctor noted that the employee's hearing loss apparently followed the occurrence at work, but he did not causally relate

that condition to the injury. He opined that the employee was totally disabled as of the time of his examination, (Dec. 7-8; Dep. 12), and hearing loss was a factor in his opinion of degree of disability. (Dep. 13.)

The judge adopted the opinions of the impartial physician. [1] (Dec. 8.) The judge concluded that the employee was permanently and totally incapacitated, on account of the causally related conditions of dizziness and hearing loss. (Dec. 10-11.)

The judge's conclusion that the employee's hearing loss was causally related to his 1987 work injury was not supported by the medical evidence. Indeed, the impartial physician specifically testified that he could not causally relate that impairment to the work injury. [2] (Dep. 12.)

The inclusion of hearing loss within the medical disability that the judge contemplated in his permanent and total incapacity award was erroneous. We therefore reverse the judge's award of incapacity benefits and recommit the case for further findings on the extent of the employee's incapacity, absent the hearing loss. See Hummer's Case, 317 Mass. 617, 620, 623 (1945); Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003); Rodriguez v. Western Staff Srvs., 13 Mass. Workers' Comp. Rep. 91 (1999).

So ordered.

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Martine Carroll
Administrative Law Judge

[1] Because the judge denied the self-insurer's § 11A motion to declare the impartial medical opinion inadequate and allow the introduction of additional medical evidence, the impartial opinion was the sole medical opinion in evidence. (Dec. 3.)

[2] Although the judge did not rule on the employee's objection to the question as being 'leading', the self-insurer correctly points out that leading questions are entirely permissible in questioning the impartial doctor who is the board's witness, not the witness for either party. Further, the employee misstates the testimony of Dr. Hemani - he did not testify that he would have 'no reason to disagree with . . . Dr. Vernick', whose report was reviewed by Dr. Hemani and was marked for identification at the deposition, (Dep. 51), but is not in evidence. Dr. Hemani's actual testimony regarding Dr. Vernick's opinion, (Dep. 53), is not a retraction of his own clear opinion that he couldn't state to a reasonable degree of medical certainty that the employee's hearing loss is causally related to his February 1987 work injury.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: March 23, 2006