COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 029591-04

Anthony Orlofski	**Employee**
Town of Wales	**Employer**
MIIA SIG	**Insurer**

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Horan)

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 appeal
Kimberly Davis Crear, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

KOZIOL, J. The employee appeals from the judge's decision denying and dismissing his § 30 claim seeking payment of medical bills for treatment he alleged to have received for his September 13, 2004, accepted low back injury. The appeal raises two issues, only one of which we address as it is dispositive: did our reversal of the judge's prior decision awarding the employee ongoing § 35 partial incapacity and § 30 medical benefits for his back injury bar the employee from further pursuing a claim for payment of medical benefits for the accepted injury? Because our prior decision did not bar the employee from pursuing a subsequent claim for payment of medical benefits, we reverse the decision and recommit the case for further proceedings.

This case has a complex procedural history. The insurer accepted liability for a low back injury the employee sustained at work on September 13, 2004. On February 14, 2007, the judge issued a decision awarding the employee ongoing § 35 partial incapacity benefits and § 30 medical benefits for "medical services related to the [employee's] chronic back pain," but denying the employee's claim for benefits

based on alleged psychiatric and emotional injuries. (2/14/07 Dec. 5.) The parties cross-appealed from that decision.

While their appeals were pending before us, the employee filed the instant claim seeking § 30 medical benefits for payment of expenses allegedly incurred for treatment of his low back complaints. The judge denied that claim at conference and the employee appealed. (5/11/09 Dec. 2.) The employee then underwent a § 11A impartial medical examination performed by Dr. Alan Bullock, whose deposition was taken on November 17, 2008.[1] Following Dr. Bullock's deposition, the employee moved to admit additional medical evidence and the judge denied that motion.

On May 6, 2009, we issued our decision affirming the judge's denial of the employee's emotional distress claim, and reversing and vacating the remaining award of benefits because the employee failed to meet his burden of proving the work injury remained a major cause of his medical impairment and treatment. Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 184 (2009).[2] [2] The employee appealed our decision and the Appeals Court affirmed. Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(Memorandum and Order Pursuant to Rule 1:28).

On May 11, 2009, the judge filed this decision. (5/11/09 Dec. 3.) In it, the judge stated the issue in controversy was "whether medical treatment for the employee's back pain *from June 2005 forward* continues to be related to his work injury of

[1] Doctor Steven Silver performed the § 11A examination of the employee in conjunction with the first hearing. (2/14/07 Dec. 3.)

[2] Specifically, we held that Dr. Silver's opinions, which provided the sole medical evidence regarding the employee's physical injury, were "self-contradictory" and "internally inconsistent" and could not be considered prima facie evidence. Under the circumstances, reversal was required because the employee had failed to move for the submission of additional medical evidence at hearing. Id. at 180-181.

September 13, 2004." [3] (5/11/09 Dec. 2; emphasis supplied.) Without making any findings on the merits of the employee's claim for payment of medical expenses, the judge made a single finding based on our decision: "there can be no continuing claim for [medical] benefits as the finding of ongoing causally related physical capacity [sic] was reversed." (5/11/09 Dec. 2.) The judge then denied and dismissed the employee's claim for payment of medical benefits. (5/11/09 Dec. 3.)

The employee argues the judge erred in ruling he was barred from pursuing a claim for payment of medical benefits. [4] The insurer cites to § 16 and argues the judge was correct in concluding the reviewing board decision barred the employee's claim for subsequent medical treatment, and further asserts the claim fails in any

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[3] Neither party challenges the judge's statement of the issue in dispute, although the decision and record provide no indication as to when the June 2005 date was proffered by the employee as establishing the commencement of the period in dispute. (5/11/09 Dec. 2.) The record shows that an employee's hearing memorandum was not entered as an exhibit at hearing; the judge's decision states that the parties "stipulated to the anticipated testimony of the employee," but no stipulations are listed, recited, or adopted as facts in the decision. (Id.) Furthermore, the medical bills submitted by the employee show charges for dates of service from the date of injury, September 13, 2004, through 2008. (Employee Ex. 2.) We observe that Dr. Silver's § 11A examination, conducted in connection with the first hearing, was performed on June 1, 2005. Orlofski, supra at 177.

[4] Because the judge's first decision specifically ordered the insurer to "pay for medical services related to the [employee's] chronic back pain," (2/14/07 Dec. 5), we disagree with the employee's assertion that there is no identity of issues between the two cases because the first claim dealt only with his claim for weekly incapacity benefits. (Employee br. 12, 14.) Moreover, we note that below, the employee acknowledged as much in his March 23, 2009, written closing argument to the administrative judge. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

event because the employee did not show a change in his condition.[5] (Ins. br. 11-16.) In Orlofski, supra, we concluded that the employee had failed to prove "a major" causal relationship for this "combination" injury, and reversed the award of both ongoing § 35 weekly and § 30 medical benefits for the employee's chronic back pain. Significantly, however, the insurer had accepted liability for the employee's back injury. Id. at 176. General Laws c. 152, § 16, provides, in pertinent part:

> When in any case before the department it appears that compensation has been paid or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee . . . may have further hearings as to whether his incapacity . . . is or was the result of the injury for which he received compensation.

The term "incapacity" appearing in § 16 is a term of art which includes both medical and vocational considerations. See Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291 (2009). The medical aspect of "incapacity" is not susceptible to final determination, since medical conditions, and their corresponding treatment, are mutable. Cf. Ames v. Town of Plymouth, 19 Mass. Workers' Comp. Rep. 150, 155-156 (2005)(hearing decision finding that non-symptomatic employee had not proved ingestion of asbestos fibers will not bar further litigation, if symptoms develop or tests indicate medical change). As a result, by virtue of the application of § 16, the earlier reviewing board decision does not bar a further claim for compensation, including payment of medical benefits, so long as the claim seeks benefits from a date subsequent to the close of

[5] The insurer also argues the employee's underlying claim is deficient because it lacks specific documentation and fails to show compliance with the requirements of utilization review. (Ins. br. 8.) Because the judge made no findings of fact regarding the merits of employee's underlying claim, we express no comment regarding these arguments.

the record in the prior decision.[6] See Adams v. Town of Wareham, 20 Mass. Workers' Comp. Rep. 207, 209 (2007)(where claim initially accepted, subsequent proceedings may not challenge that establishment of liability); Kareske's Case, 250 Mass. 220, 224 (1924)(with insurer's acceptance, "basic questions of liability under the law are not open for further consideration of different determination").

The insurer further argues the employee's claim must fail because he failed to show "how the industrial injury somehow regained its status as the 'major but not necessarily predominant cause' after it had been judicially determined otherwise." [7] (Insurer's br. 9-10.) Under the circumstances, we disagree.

Our decision was rendered well after the close of the hearing record in the instant case, at a time when the parties were waiting for the judge to issue his second hearing decision.[8] However, our reversal of the judge's first decision dramatically altered the legal landscape of this case. Indeed, at all times relevant to the

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[6] The judge's February 14, 2007, decision does not state when the record closed, and the board file only shows that the judge allowed the employee's motion to enlarge the time period for submission of Dr. Silver's deposition transcript through July 7, 2006. See Rizzo, supra. On recommittal, the date of the close of the record will need to be determined.

[7] We do not endorse the insurer's incorrect recitation of the § 1(7A) standard as requiring the employee to provide proof that the work-related injury remains "the major" rather than "a major" cause of the employee's need for medical treatment. Accordingly, we address its argument only insofar as it applies to the broader principle asserted.

[8] On March 3, 2009, in response to the employee's second motion to submit additional medical evidence, filed after the parties had taken Dr. Bullock's deposition, the judge issued a written ruling denying the employee's motion and stating, "final submissions of briefs or arguments should be filed by March 27, 2009." As noted supra in footnote 4, the employee's written closing argument is dated March 23, 2009.

employee's litigation of this claim for the payment of medical benefits, the parties and the judge were completely unaware that, at the very least, the employee would be foreclosed from seeking payment of his medical expenses incurred during the time period encompassed by the judge's first decision. Then, without further input from the parties and within two working days of our decision,[9] the judge issued his decision in the present case, denying and dismissing the claim solely on the basis of our decision. Under the circumstances, due process considerations require reversal of the decision and recommittal to afford the employee the opportunity to litigate his claim in light of our reversal of the judge's earlier decision awarding the employee § 30 medical benefits.

As noted above, we do not address the employee's second claim on appeal, that the administrative judge erred in denying his motion for additional medical evidence where Dr. Bullock's opinion inadequately addressed the issue of § 1(7A) "a major" causation. (Employee br. 10-12.) Because the matter must be heard by a different administrative judge,[10] the employee is free to renew his motions on recommittal. We reverse the decision, and recommit the case for a hearing de novo.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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[9] We observe that May 6, 2009 was a Wednesday and May 11, 2009 was the following Monday, resulting in the passage of only two working days between the issuance of these decisions.

[10] Because the administrative judge no longer serves in the department, the recommittal proceedings must be de novo.

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Mark D. Horan
Administrative Law Judge

Filed: ***December 20, 2010***