COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052615-91**

Barbara A. Desrosiers	Employee
Lakeville Hospital	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and McCarthy)

APPEARANCES
David G. Sullivan, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits. The self-insurer argues a number of issues. One of its contentions – that regarding the evidence of and findings on "worsening" – merits discussion. We affirm the decision.

The self-insurer accepted liability for the employee's back injury while working as registered nurse on September 29, 1991. (Dec. 3-4.) As a result of an earlier hearing decision by a different administrative judge, the self-insurer was ordered to pay ongoing partial incapacity benefits. (Dec. 2, 11.) That order was based on the judge's vocational assessment tied to the employee's ability to work on a limited basis out of her home for a family owned business, or in a job that was near her home where driving would be limited to thirty minutes or less. (Dec. 11.) The employee claimed § 34A permanent and total incapacity benefits as of October 7, 1999, and was placed on § 34 temporary total incapacity benefits per conference order as of May 24, 2000. The self-insurer appealed to a full evidentiary hearing. (Dec. 2.)

The judge ruled that the medical issues in the case were sufficiently complex to warrant the submission of the parties' additional medical evidence, pursuant to G.L. c. 152, § 11A(2). In pertinent part, the employee introduced the deposition testimony of her

treating physician, Dr. Vincent Iacono. (Dec. 1-2.) The judge, who adopted the opinions of Dr. Iacono (Dec. 10, 13), found as follows:

> Dr. Iacono first met with the employee in his office on October 3, 1991 and has continued to treat Ms. Desrosiers since. He initially diagnosed the employee with disc disease of the spine with lumbar radiculopathy. He ordered a series of diagnostic studies that confirmed his diagnosis. Because the employee complained of additional symptoms Dr. Iacono referred the employee to Dr. Kieval, a rheumatologist, who also continues to treat the employee for inflammatory arthritis and other ailments. Dr. Iacono had last seen the employee in March 2001. At that time she complained of neck and low back pain that worsened with weather change, increased activity, including activities of daily living. The employee's pain reportedly increased with sitting or standing for more than thirty minutes. Dr. Iacono placed restrictions on her walking, climbing, driving, bending, stooping and performing usual everyday activities. He opined that the employee was unable to perform the duties of a nurse supervisor and he doubted that she could work at all. He felt that she would need to rest after five minutes and that she would be unable to do anything for any length of time. He further opined and agreed with the prior impartial medical examiner that the injury of September 1991 aggravated her underlying condition to the point of disablement. He also felt that the employee continues to suffer from the same disease process. He also was of the opinion that the condition from which the employee suffered in 2001 resulted from the 1991 work-related injury superimposed on a pre-existing condition that was quiescent at the time and that her current disc problems were caused by that injury. Finally he believed that the employee's condition had worsened during the period of time that he treated her and that she had suffered a permanent loss of function of the spine.

(Dec. 8-9.)

The judge's adoption of Dr. Iacono's opinion was the foundation for his conclusion that the employee was permanently and total incapacitated. (Dec. 12.) In addition, the judge credited the employee's testimony that the home-based job that the first administrative judge used to find that the employee had an earning capacity no longer existed. Moreover, he credited the employee's testimony that her symptoms had progressively worsened since that decision and that she did very little driving, thereby putting into doubt the first judge's use, for earning capacity purposes, of a "job that was near to her home where her driving would be limited to thirty minutes or less." (Dec. 11-12.) The judge concluded, in finding that the employee was entitled to § 34A benefits:

> An employee is entitled to permanent and total disability benefits if it is shown that the physical injury is likely to continue for the foreseeable future and that the incapacity for earning wages is total. Additionally, the fact that at some time in the future there is a possibility that the employee's condition will improve does not bar awarding of Section 34A benefits. It is clear that the employee has consistently treated for her injury since the date of its occurrence. It is also clear that her condition has continuously worsened throughout her course of treatment.

(Dec. 12.)

The self-insurer contends, among other things, that the judge erred by adopting the opinion of Dr. Iacono regarding the worsening of the employee's medical condition, and argues that the doctor offered no explanation of what specific medical conditions he found to be disabling. (Self-insurer's brief, 6-7.) On the contrary, a review of his deposition reveals that Dr. Iacono's testimony could not be clearer as to what he found to have worsened: her back and radicular leg conditions. (Dep. 12-14.) The severe physical restrictions on which the doctor placed the employee, (Dep. 19-21), were related to those conditions. (Dep. 56.) The back and leg conditions were *caused by the 1991 injury superimposed on a pre-existing quiescent condition.* (Dep. 56-57.) As this injury occurred prior to the addition of the § 1(7A) heightened causal standard for injuries that combine with pre-existing non-work-related conditions, this medical opinion easily suffices to satisfy the employee's burden of proving a worsening of her work-related medical condition. See Massarelli v. Acumeter Labs, 10 Mass. Workers' Comp. Rep. 703, 706-707 (1996)(industrial accidents occurring prior to December 23, 1991, that combine with pre-existing non-work-related conditions, not subject to § 1(7A) heightened standard of "a major" causation). That worsening is exactly what the employee had to show to prove her transition from partial to total incapacity in her claim for § 34A benefits. Foley's Case, 358 Mass. 230 (1970); Souza v. Harvard University, 17 Mass. Workers' Comp. Rep. 248, 249-250 (2003). Moreover, the employee also made a showing of a "vocational worsening" of the sort that we have recognized as proper in § 34A adjudication. See Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94 (2003)(vocational worsening can be factored into incapacity analysis insofar

as it reflects external factors, not the employee's personal vocational history); Lally v. K.L.H. Research & Dev., 9 Mass. Workers' Comp. Rep. 427, 429-430 (1995)(recommittal for findings on whether termination of long-time post-injury employment was a circumstance which reduced employee's vocational options). There was no error. We summarily affirm the decision as to all other arguments on appeal.

The decision is affirmed. Pursuant to § 13A (6), the employee's attorney is awarded a fee of $1,276.27.

So ordered.

_____
Martine Carroll
Administrative Law Judge

Filed: **December 1, 2003**

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge