COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 024465-18 003861-15**
Carlos Fuentes	Employee
Whole Food Market, Inc.	Employer
ACE American c/o Gallagher Bassett	Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Fabricant)

The case was heard by Administrative Judge Dooling

APPEARANCES
Peter Georgiou, Esq., for the employee
Alicia M. DelSignore, Esq., for the insurer

LONG, J. The insurer appeals from the administrative judge's decision awarding ongoing § 34, temporary total incapacity benefits, and §§ 13 and 30 medical benefits for treatment associated with the employee's diagnosis of major depressive disorder. We reject the insurer's arguments regarding res judicata and collateral estoppel; however, for the reasons that follow, we vacate the decision and recommit to the judge for further findings of fact regarding the employee's underlying orthopedic injury.

The employee, Carlos Fuentes, immigrated to the United States from El Salvador in 1998 and was 43 years old at the time of the most recent hearing held on December 5, 2022. He injured his back on January 23, 2015, as he was pulling a 150-pound bowl of dough on a dolly while employed at Whole Foods. The employee returned to work on March 25, 2015, and on September 7, 2018, he sustained a second injury to his back caused by lifting a 62-pound container onto a scale. The employee has not returned to work since September 7, 2018. (Dec. II, 5.)[1]

[1] There have been two hearing decisions in this case. The first, issued January 13, 2020, is hereinafter referred to as "Dec. I", and the current decision on appeal, issued March 29, 2023, is referred to as "Dec. II."

The current claim, alleging psychiatric injury stemming from the physical injuries, was filed after a prior administrative judge issued a hearing decision on January 13, 2020, establishing liability for the September 7, 2018, physical injury.[2] (Dec. I.) The employee did not claim or allege any emotional/psychiatric component in the original claim. The initial decision ordered "the insurer to pay a closed period of Section 34 benefits from September 8, 2018, to April 5, 2019, at the rate of $457.13 based on average weekly wage of $761.88." Id. The employee appealed the initial hearing decision, and the Review Board issued its summary disposition on March 1, 2021, affirming that decision. (Exhibits 18, 19, Dec. II, p. 4.) No further appeals were filed by the employee following the summary disposition of the initial decision. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file.) In the initial decision, the administrative judge made the following rulings of law, that were unsuccessfully challenged by the employee and summarily affirmed by this board:

> Whereas I have adopted the opinions of Dr. Doorly that "…whatever a [sic] muscular ligamentous sprain injury Mr. Fuentes sustained as a result of lifting the heavy barrel of molasses at work on September 7, 2018 has resolved by this time", and "It is my opinion that he should be returned to the workforce for a regular 40-hour work week." I do not find the employee to be disabled from gainful employment as of April 5, 2019.

(Dec. I, 10.)

The employee's current claim, alleging a psychiatric injury commencing on February 11, 2020, was the subject of a §10A conference on March 23, 2021, held before the judge who issued the initial decision. The resulting conference order, issued on April 1, 2021, denied the employee's claim for compensation and allowed the insurer's motion to join a complaint for recoupment, reserving that issue for hearing. The employee

[2] While there are two dates of injury and separate board numbers for each, the initial decision found "that the employee's lumbar sprain is causally related to the industrial accident of September 7, 2018." (Dec. I, 10.) Also, in footnote 3 of the initial decision, the judge notes that "Neither party submitted medical treatment records associated with the industrial accident of January 23, 2015." (Dec. I, 5.)

timely appealed the conference order and a new hearing was held before the current administrative judge on December 5, 2022. At this hearing, the employee claimed §34 benefits from February 11, 2020, to date and continuing, §§13 and 30 medical benefits, to include psychiatric treatment, and §36 benefits were reserved. The insurer denied disability and extent of incapacity; causal relationship; entitlement to §§13 and 30 and §36 benefits; and raised the affirmative defenses of collateral estoppel and res judicata; §1(7A) as it relates to mental or emotional injuries; and also recoupment pursuant to 11D(3) for an overpayment in the amount of $13,126.10. (Dec. II, 3). The employee was examined on May 20, 2021, by an impartial psychiatrist, Michael Kahn, M.D., and the judge allowed the employee's motion to submit additional medical records based upon medical complexity, which only the employee took advantage of.

On March 29, 2023, the judge issued the hearing decision currently under appeal. He found the insurer responsible for the psychiatric injury, and ordered § 34 benefits from February 11, 2020, to date and continuing, and §§ 13 and 30 medical benefits for treatment associated with the employee's diagnosis of major depressive disorder. The judge made the following medical findings:

> The employee was initially seen on February 11, 2020, at Massachusetts General Hospital General Health, for "depression and anxious mood due to chronic and severe back pain." (Exhibit 9). The employee testified that he sees a psychologist twice a month for ongoing psychological treatment. Since February 11, 2020, the employee has treated with Beth Muccini, LICSW, at Massachusetts General Hospital Chelsea Behavioral Health, for "symptoms of depression and anxiety, with chronic pain as the primary precipitant." Id. Ms. Muccini diagnosed the employee with "major depressive disorder, recurrent episode with anxious distress." The employee is taking duloxetine, gabapentin, and amitriptyline. (Exhibit 5).
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> Dr. Michael Rater examined the employee on May 19, 2020, and September 6, 2022. (Exhibit 5). After reviewing the medical records of Dr. Rater, I adopt his opinion as follows:
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> Dr. Rater, on May 19, 2020, in part opines:

- The employee's diagnosis is "major depressive disorder, moderate, without psychotic features, and somatic symptom disorder." (Exhibit 5).

- The employee's disability is the result of the work accidents of 2015 and 2018. Id.

Dr. Rater, on September 6, 2022, in part opines:

- The employee's diagnosis is "major depressive disorder, moderate, without psychotic features, and somatic symptom disorder." (Exhibit 5).
- The employee's condition is "moderate to severe with a resolution not occurring." Id.
- The employee continues to meet medical necessity criteria for ongoing counseling. Id.
- The employee's duloxetine medication is reasonable, appropriate, and medically necessary to treat his condition. Id.
- The employee does not have a work capacity due to his depression. Id.
- The employee's inability to work is permanent at the time of his examination given the length of time he has been out of the workforce, and the fact that his symptoms have remained the same with no indication of resolution as of the time of his examination.
- The employee's "inability to work and his need for treatment and the symptoms of his psychiatric condition are causally related to his work accident in 2018." Id.

The employee testified that, notwithstanding Judge Segal's findings to the contrary, he continues to experience pain in his back. (Exhibits 6, 7, 8, 13, *See also* Exhibit 18).

(Dec. II. 6-7.)

The judge's General Findings included the following:

> The employee sustained a psychiatric work injury that is causally related to his work injuries suffered in 2015 and 2018. (Exhibit 5 and 18). I credit and adopt the employee's testimony that as a result of this injury, he continues to suffer with a major depressive disorder. I adopt the medical opinions referred to in this decision, specifically Dr. Rater's opinion, and the credible testimony of the employee [in concluding that]. … I adopt Dr.

> Rater's medical opinions that the February 11, 2020, psychiatric injury has rendered the employee totally disabled from work.

(Dec. II, 10.)

Under Rulings of Law, the judge found:

> I find that on February 11, 2020, the employee suffered a mental and psychiatric injury, and the cause of such disability is the employee's 2015 and 2018 back injury sustained while employed at Whole Foods. I rely on the credible testimony of the employee and the adopted medical opinions to support this finding.
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> I adopt the medical opinions as referred to, supra, and the credible testimony of the employee in concluding that …the employee is totally incapacitated from performing any work of a remunerative nature and has been totally disabled from February 11, 2020, to date and continuing. … I adopt the medical opinions referred to in this decision, specifically Dr. Rater's opinion, and the credible testimony of the employee in concluding that the employee's present mental and psychiatric disability is causally related to his work injuries suffered in 2015 and 2018. I further find that the predominant contributing cause standard of the third sentence of § 1(7A) does not apply.

(Dec. II, 11-12.)

The judge ordered §34 benefits from February 11, 2020, to date and continuing, §§13 and 30 medical expenses for treatment associated with the employee's diagnosis of major depressive disorder, and that the insurer was entitled to recoup an overpayment in the amount of $9,919.69. The insurer initially argues the judge erred in causally relating the employee's claimed psychiatric condition to the 2015 and 2018 work injuries because there is no foundation for the psychological diagnosis that is advanced as sequelae of a physical injury which no longer exists. (Insurer br. 5.) While the insurer's premise is valid, given the paucity of findings regarding the employee's compensable orthopedic injury, we recommit the case to the judge for further findings consistent with this opinion.

We have previously noted:

> When a psychiatric disability is caused by a compensable physical injury, as opposed to the injury being solely psychiatric in nature, only simple "as is" causation is required to support a finding of incapacity. Cornetta's Case, 68 Mass.

> App. Ct. 107 (2007). However, we are presented here with a situation where the judge found the underlying causally related physical injury had run its course and no longer had an effect on the employee's physical condition.
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> There are limits to causally relating a mental condition that is the result of a physical injury.

Pickett v. Boston Software Corp., 32 Mass. Workers' Comp. Rep. 133, 138 (2018).

Additionally:

> This case concerns… the psychological sequelae of a physical injury. Accordingly, the causal relationship of the psychological injury rises or falls on the causal relationship of the physical injuries the employee suffered as a result of the work accident. Sfravara v. Star Market Co., 15 Mass. Workers' Comp. Rep. 181, 184-185 (2001)(psychologist's causation opinion was contingent on impartial orthopedist's opinion causally relating employee's pain to the work injury); see LaFlash v. Mt. Wachusett Dairy, 18 Mass. Workers' Comp. Rep. 254, 261 (2004)(psychiatrist's causation opinion was contingent on expert medical opinion employee had chronic orthopedic and neurological illness, including a chronic pain component).

O'Rourke v. New York Life Insurance, 30 Mass. Workers' Comp. Rep. 303, 308 (2016).

In the present case, the employee's work incapacity associated with his orthopedic back injuries had ended as of April 5, 2019, by virtue of the prior hearing decision, which was appealed by the employee and summarily affirmed by the reviewing board.[3] The expert psychiatric opinion relied upon by the judge, Michael Rater, M.D., does not address the orthopedic aspect of the back injuries in any meaningful way. Without a medical opinion addressing how the status of the employee's initial orthopedic injury, which had run its course, has changed to now support a finding of re-emergence of the

[3] Of note, the insurer did not appeal the prior hearing decision so that liability for the employee's back injuries has been established, rendering its argument that res judicata/collateral estoppel applies to these proceedings moot, which will be addressed below. See, G.L. c.152, § 16.

orthopedic incapacity and causally related pain, [4] a derivative psychiatric claim cannot survive. (See Sfravara and LaFlash, supra.) Here, the hearing judge *appears* to find that the underlying causally related physical injury and pain, (which had run its course as found by the prior hearing judge), was now embarking on a new course of debilitation and worsened incapacity. (Dec. II, 6-7.) While the judge credits the employee's testimony that his physical and emotional conditions have worsened since the prior proceeding, in a complex medical claim such as this one, much more is required.

> Although, in determining causal relationship, a judge need not rely on expert medical testimony alone, and may give decisive weight to the employee's credible testimony, Wilson's Case, 89 Mass. App. Ct. 398, 400-401 (2016), he cannot make causation findings in complex medical cases without any supporting medical evidence, Pollard v. M.B.T.A., 35 Mass. Workers' Comp. Rep. 7, 17-18 (2021), citing Stewart's Case, 74 Mass. App. Ct. 919 (2009), nor can he rely on his own knowledge of medical matters to form his judgment. Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999)

O'Meara v. Boston Medical Center, Mass. Workers' Comp. Rep. (01/20/2023).

The judge here generally references "Exhibits 6, 7, 8, 13, *See also* Exhibit 18", with neither an analysis of the records nor an indication of which expert opinion is relied upon to support the re-emergence of causally related orthopedic incapacity, after the date

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[4] In addition to finding the employee no longer incapacitated from the industrial injury, we note the prior judge expressly adopted Dr. Doorly's opinion regarding the employee's pain; specifically, that:

Mr. Fuentes is not a good candidate for interventional pain management or surgical intervention in my opinion. It is also my opinion that physical therapy, muscle relaxants and analgesics are unlikely to be of great benefit. He does not have clear-cut neurological deficits or positive nerve tension signs. His exam reveals inconsistencies . . . His Waddell's signs were positive. In my experience individuals with a presentation like Mr. Fuentes benefit most from evaluation by a pain psychologist and treatment with behavior modification, biofeedback and similar noninvasive methods, to include antidepressant and anxiolytic medication when appropriate.

(Dec. I, 8.)

of the close of the evidence in the first hearing. [T]he reviewing board cannot perform its appellate function in this case because the issues are not addressed with clarity such that we can, with reasonable certainty, determine whether correct principles of law have been applied to facts that could properly be found. Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Recommittal is required for the judge to analyze the additional medical records and determine whether the underlying orthopedic injury again became incapacitating after the close of the record in the previous case, and whether it remained so at the time the psychological injury emerged. If an orthopedic incapacity can properly be supported with the medical records in evidence, then the issue of the derivative psychiatric claim can be addressed.

The insurer also raised collateral estoppel/res judicata as an affirmative defense, which the judge addressed in the decision. We agree with the judge's conclusion that the affirmative defense did not apply, but not because the psychiatric claim was not litigated by the parties in the prior litigation, as discussed by the judge. (Dec. II, 8-9). The result reached here is grounded in both statutory and case law precedent that address issue and claim preclusion in the realm of Massachusetts workers' compensation, since:

> Once liability was established for the [back injury], the employee could bring a new claim for incapacity causally related to the work injury for the period after the close of evidence of the first hearing. In Lopes v. Lifestream, 25 Mass. Workers' Comp. Rep. 121, 124-125(2001), we explained:
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> [T]he employee was free to claim, based on evidence developed after the close of the evidence in the first hearing, that she became incapacitated as a result of her work-related neck injury. '[A] new claim or complaint on present incapacity or causal relationship between the original work injury and the present incapacity presents a new and different issue from that of original liability, and as such is not barred from adjudication by the prior judgment.' Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997). See also Vetrano v. P.A. Milan Co., 2 Mass. Workers' Comp. Rep. 232, 234-235 (1988); Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406-407 (1994).

McCarthy v. Peabody Properties, Inc., 29 Mass. Workers' Comp. Rep. 31, 38-39 (2015).

Moreover, the statute itself requires this result as 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.

See Orlofski v. Town of Wales, 24 Mass. Workers' Comp. Rep. 333, 336 (2010), (where liability had been established for a back injury, a final unappealed decision concluding the employee failed to meet his § 1(7A) burden of proving the work incident remains 'a major cause" of his incapacity and need for treatment due to that injury, did not bar a later claim for compensation, specifically medical benefits, for the back injury from a date subsequent to the close of the record in the prior decision.)

While the judge correctly ruled that the employee's claim was not precluded by way of res judicata and/or collateral estoppel, the evidence adopted did not address the original orthopedic injury and we therefore vacate the decision and recommit to the judge to make further findings of fact and rulings of law with respect to the employee's initial orthopedic injury as outlined above. In the meantime, the conference order is restored. See Lafleur v. MCI Shirley, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So, ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine W. Koziol
Administrative Law Judge

Filed: **March 7, 2024**