COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017551-93**

Carmela Triolo	Employee
Commonwealth of Massachusetts Hospital School	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
William H. Murphy, Esq., for the Employee at hearing
Paul M. Moretti, Esq., for the Employee on brief
Lisa T. Pappey, Esq., for the Self-Insurer at hearing
Marian C. Grimes, Esq., for the Self-Insurer on brief

CARROLL, J. The employee appeals the decision of an administrative judge in which her claim for § 34A permanent and total incapacity benefits was denied. On appeal, the employee contends that the administrative judge mischaracterized the § 11A examiner's medical opinion. After a review of the evidentiary record, we reverse an error made by the judge and recommit the decision to the administrative judge for additional findings.

Carmela Triolo, almost 70 years old at the time of hearing, was employed by the Massachusetts Hospital School as a dietary aide. Mrs. Triolo also earned income as a dressmaker, operating out of her home. (Dec. 2-4.) In January 1992, she injured her right knee in a slip and fall incident while in the course of her employment at the Massachusetts Hospital School. She returned to work following arthroscopic surgery, but fell at work again on April 15, 1993, striking her head on a sink.[1] (Dec. 4.) The

[1] Among the symptoms experienced by the employee as a result were headaches, dizziness and nausea/vomiting. (Dec. 4.) In May 1996, the employee began to cry easily, refused to leave the confines of her home and experienced feelings of depression. She sought psychiatric treatment in August 1996. (Dec. 5.)

self-insurer accepted the claim and paid total incapacity benefits, pursuant to G.L. c. 152, § 34, until said benefits exhausted in April 1996. Thereafter, the employee filed a claim for permanent and total incapacity benefits pursuant to G.L. c. 152, § 34A. (Dec. 2.)

The employee's claim was denied after a conference held pursuant to G.L. c. 152, § 10A. The employee appealed to a hearing de novo. (Dec. 2.)

Pursuant to § 11A, on February 10, 1998, Mrs. Triolo was examined by Dr. Gigi N. Girgis. (Dec. 2.) Dr. Girgis had performed a previous examination in January of 1996, and both reports were admitted into evidence[2] along with the deposition of Dr. Girgis. (Dec. 1, 2.) Neither party contested the adequacy of the impartial examiner's medical opinions.[3] As the employee was receiving psychiatric treatment, the parties were allowed to submit their respective psychiatric evidence in lieu of a second impartial examiner.[4] The reports of Dr. George Gardos and the deposition of Dr. Paul M. Hardy were submitted on behalf of the employee; the deposition of Dr. J. Peter Strang was submitted on behalf of the self-insurer. Id.

As a result of Dr. Girgis' examination of January 1996, the § 11A examiner opined that the employee was a complicated patient who sustained a minor head injury in April 1993 that exacerbated a previous migraine history and persistent dizziness. Further, she opined that the neurological exam was normal and that the employee's

[2] The January 1996 report will be referred to as Rep. I and the February 1998 report will be referred to as Rep. II.

[3] The employee did, however, request permission to depose a Dr. Fishbaugh prior to the deposition of the § 11A examiner. The judge did not rule on the motion, but rather requested that the employee file reconsideration on the motion, if necessary, after the § 11A examiner's deposition was conducted. Reconsideration of that motion was not raised following the § 11A deposition. (Dec. 2.)

[4] Although there was no specific ruling of complexity, the judge allowed additional medical evidence only on the additional specialty of psychiatry seemingly by agreement of the parties at conference. (Tr. 5, 10.)

disability period was approximately six months or so. The impartial examiner was unclear as to the reason for the employee's prolonged disability. Ultimately, the § 11A physician opined that any then existing disability was due to forgetfulness, which in turn was the product of a degenerative dementing process as opposed to a posttraumatic process. (Rep. I, 4-6; Dep. of § 11A examiner, 15-20; Dec. 6.).

After the second impartial examination, conducted in February 1998, the § 11A physician opined that the employee showed abnormalities in her mental status above and beyond simple deficits with depression. The examiner noted that the employee was quite depressed. She formed a diagnosis of post-concussive syndrome complicated by headaches and dizziness. (Rep. II, 2-3; Dep. of § 11A examiner, 47-50; Dec. 6.) Further, the impartial examiner suggested that the employee's depression was associated with a dementing process. (Rep. II, 3; Dep. of § 11A examiner, 25, 58; Dec. 7.) The impartial examiner also opined that the employee was permanently and totally disabled and that the posttraumatic depression was a major but not necessarily a predominant cause of her disability. (Rep. II, 3; Dep. of § 11A examiner, 51, 53, 80; Dec. 7.) Finally, the impartial examiner recommended a second neurological test to determine if there had been any improvement in the employee's dementia two years post-psychiatric treatment. (Dep. of § 11A examiner, 59; Dec. 7.)

Dr. George Gardos was the first psychiatrist to actively treat the employee following her April 1993 work injury. That treatment was rendered from August 1996 to January 1998. (Dec. 5.) Dr. Gardos opined that the employee suffered from major depression and that the 1993 work injury was a significant causative factor. He further opined that the employee's memory problems may be the result of depression or signs of organic brain impairment. (Employee Ex. 2; Dec. 6.)

Dr. Paul M. Hardy, a specialist in behavioral neurology, began treating the employee in December 1997. (Dep. of Dr. Hardy, 6-7; Dec. 7.) In January 1998, the doctor initiated a regimen of antidepressant medication. (Dep. of Dr. Hardy, 17; Dec.

8.) Despite his efforts, Dr. Hardy stated that the employee would, on occasion, fail to take her medication as prescribed. (Dep. of Dr. Hardy, 20; Dec. 8.) Dr. Hardy diagnosed major depression, posttraumatic concussive headache syndrome and a negative inter-action between the headaches, the depression and the post-concussive syndrome. (Dep. of Dr. Hardy, 24; Dec. 8.) It was Dr. Hardy's opinion that, collectively, these conditions rendered the employee totally disabled from gainful employment.[5] (Dep. of Dr. Hardy, 24-26, 59, 73; Dec. 8-9.) Dr. Hardy also opined that nothing in the employee's medical picture was indicative of dementia. (Dep. of Dr. Hardy, 28-29; Dec. 8.)

Dr. J. Peter Strang, a board certified psychiatrist, examined the employee on behalf of the self-insurer. (Dec. 9.) He opined that there was no objective evidence of a neurocognitive disorder or of any diagnosable affective disorder. Further, Dr. Strang stated that the diagnostic tests likewise failed to reveal any positive findings indicative of any specific neurologic or neurocognitive disorder. (Dep. of Dr. Strang, 16-19; Dec. 10.) Dr. Strang opined that the employee's subjective symptoms were not causally related to the April 1993 work incident, (Dep. of Dr. Strang, 21-22), but would, in part, be an expression of depression. (Dep. of Dr. Strang, 52, 53; Dec. 11.) Dr. Strang was also of the opinion that the employee did not suffer from dementia. (Dep. of Dr. Strang, 57-58, 69; Dec. 11.) Ultimately, Dr. Strang opined that the employee's capacity to work was marginal. (Dep. of Dr. Strang, 69-70; Dec. 11.)

After considering all the medical evidence, the administrative judge determined that the § 11A medical opinion retained its prima facie weight. (Dec. 12.) Accordingly, the judge adopted the impartial physician's medical opinion over the other medical

[5] Although Dr. Hardy acknowledged a 1995 automobile accident, unrelated to work, he opined that the effects of that event were temporary in nature and that the employee returned to baseline condition in a relatively short timeframe. (Dep. of Dr. Hardy, 25-28, 38-39; Dec. 4-5; Dec. 8-9.) Somewhat inconsistent with his earlier opinion, as to the effects of the automobile accident, Dr. Hardy later opined that the automobile accident played a role in the employee's then current depression. (Dep. of Dr. Hardy, 61.)

evidence offered. The judge addressed G.L. c. 152, § 1(7A), to determine if the work incident remained a major cause of the employee's incapacity. (Dec. 12.) She stated that the § 11A examiner answered this question in the negative where she had opined that "Mrs. Triolo's posttraumatic depression was *a major* but not necessarily predominant cause of her disability early on but not later on." (Dec. 12.)(Emphasis in original.) The judge was also persuaded by the impartial examiner's opinion that the headaches were not a major cause of Mrs. Triolo's disability and that the employee's subjective symptoms had endured longer than would be expected. Finally, the judge adopted the § 11A examiner's medical opinion that the employee's depression was consistent with dementia and thus not compensable under the Massachusetts Workers' Compensation Act, G.L. c. 152. (Dec. 12.)

Accordingly, the judge found that the employee had failed to meet her burden to prove that she remained disabled as a result of her April 1993, work-related injury. The self-insurer was ordered to continue the payment of reasonable and necessary medical expenses associated with the employee's April 1993 work-related injury. The balance of the employee's claim was denied and dismissed. (Dec. 13.)

The employee raises several issues on appeal. First, the employee contends that the administrative judge mischaracterized the § 11A medical opinion. (Employee's brief, 28.) Next, the employee maintains that where her symptoms have continued to the same extent while she received § 34 total incapacity benefits, she should be entitled to § 34A permanent and total incapacity benefits. (Employee's brief, 32.) Finally, the employee asserts that she is entitled to counsel fees, as she should have prevailed at hearing. (Employee's brief, 36.) Our address of the employee's first issue is dispositive of this case.

In her decision, the judge stated that "Dr. Girgis agreed that Mrs. Triolo's posttraumatic depression *is a major* but not necessarily predominant cause of her disability early on but not later on. (Dec. 7.) (Emphasis of "depression" and "early on but not later on" is added.) This is error. Despite much discussion regarding

posttraumatic depression, there is nothing in the deposition, or in the impartial examiner's reports, to support the judge's determination that the employee's posttraumatic depression was a major cause of the employee's disability "early on but not later on." (Dec. 12.)

The judge relied on this erroneous determination: "I find that Dr. Girgis provided the more persuasive medical evidence and answered the questions when she opined that Mrs. Triolo's posttraumatic depression was *a major* but not necessarily predominant cause of [the employee's] disability early on but not later on." (Dec. 12.) (Emphasis in original.) The judge clearly erred when she misstated the impartial examiner's medical opinion by using the phrase "posttraumatic depression" when the impartial examiner had used the phrase "post-traumatic headaches." Compare Dec. 12 (posttraumatic depression) with Dep. of § 11A examiner, 53 (posttraumatic headaches). It is impossible for us to determine what impact this error had on the totality of the judge's deliberations. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993) (judge must address the issues in a case such that on review it can be determined with reasonable certainty whether correct rules of law have been applied to facts that could be properly found); Ballard's Case, 13 Mass. App. Ct. 1068-1070 (1982) (decision must set forth conclusions adequately supported by subsidiary findings to enable proper appellate review).

We must, therefore, reverse the erroneous finding of posttraumatic depression "early on but not later on" and return the case for further findings on the issue of what if any continuing effect the April 15, 1993 injury at work has on the employee's disability.[6]

The interpretation of the doctor's opinion on causal relationship is, in the first instance, for the administrative judge to determine. Wax's Case, 357 Mass. 599

[6] For cases in the area of mental impairment following a physical injury see for example, Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997), Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997).

(1970). The mental impairment aspect of this case is further complicated by the fact that there was extensive medical testimony regarding dementia which arose after the work injury and resulting depression. "[W]here medical conditions emerge after an industrial injury, judges must look 'with something akin to tunnel vision and . . . narrowly focus on and determine the extent of . . . harm . . . that is causally related solely to the work injury.'" Simoes v. Town of Braintree School Dept., 10 Mass Workers' Comp. Rep. 772, 774 (1996), quoting Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 683 (1995). Therefore, the compensation for incapacity may be "limited to incapacity caused not by the blend of the work injury and the after-occurring malaise, but by the work-related condition alone." Id. at 774, citations omitted; see also Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997), quoting A. Larson, The Law of Workmen's Compensation, § 13.11 (a), pp. 3-623 (1996)(" 'The issue . . . is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications.' "); see also L. Locke, Workers' Compensation §§ 308, 667 (2d ed. 1981)(discussing compensability of injuries where inseparable conditions, both work-related and non work-related, combine to result in incapacity).

On recommittal, the administrative judge should reconsider all of the medical evidence presented, and may take additional medical testimony, to the extent she deems necessary, in order to properly address the issue at hand. The error noted herein is reversed and the case is recommitted for further findings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **August 17, 2000**
MC/jdm

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Susan Maze-Rothstein
Administrative Law Judge