COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 024386-00

Carmen Maldonado	Employee
Tubed Products, Inc.	Employer
ACE American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

APPEARANCES
William J. Doherty, Esq., for the employee
Charles C. Donoghue, Esq., for the insurer

COSTIGAN, J. In an appeal that verges on the frivolous, the insurer argues that the administrative judge erred in adopting the § 11A impartial medical examiner's opinion on causal relationship. Inasmuch as that opinion was given in response to a proper hypothetical question which assumed facts found by the judge, not once but twice, the insurer's appeal is devoid of merit.

The same causal relationship finding, based on the same hypothetical question posed to the impartial medical examiner, was made in a prior decision filed in 2002.[1] In the present § 34A claim, the administrative judge simply took judicial notice of that prior decision, and then found the employee permanently and totally incapacitated, based on the same impartial physician's 2004 iteration of his original causal relationship opinion, and the requisite disability analysis under Scheffler's Case, 419 Mass. 251 (1994). We affirm the decision.

The insurer's liability was established by the judge's earlier decision, filed on February 4, 2002, which found that the employee injured her back at work on February 3, 2000.

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[1] References herein to the 2002 decision, of which the administrative judge took judicial notice, are designated, "Dec. I." References to the 2004 decision before us on appeal are designated, "Dec. II."

Although the impartial physician opined the employee had a sedentary work capacity with restrictions against sitting, standing or walking for more than thirty minutes at a time, (Dec. I, 4), the judge credited the employee's testimony as to her pain, symptoms and physical restrictions, (Id. at 3), and he considered her vocational profile,[2] to find she was totally incapacitated and entitled to § 34 benefits. (Id. at 4.)

The second round of litigation was initiated by the insurer's complaint for modification or discontinuance of weekly compensation, which was denied at the § 10A conference. The employee's claim for § 34A permanent and total incapacity benefits was joined at hearing. (Dec. II, 2.)

On May 7, 2003, the employee underwent an impartial medical examination by Dr. Marc Linson, who had also conducted the § 11A examination in the prior proceeding. (Dec. II, 2-3; Dec. I, 4.) With respect to the impartial physician's opinion, the judge found:

> Dr. Marc Linson, while expressing the same reservations as to causal relationship that he did in the first hearing (and despite which, based on my findings of fact at that hearing, causal relationship was established) opines that [the employee] continues to be capable of sedentary work with restrictions as to prolonged standing, walking, or sitting. She would be only capable of lifting minimal weights and minimal bending. (See Stat. Ex. # 1, p. 2-3) These are essentially the same as found in the first decision. (Dep. p. 15, line 17 to p. 16, line 9.) Dr. Linson suggests these restrictions are permanent. (Dep. p. 16, lines 10-12.)

(Dec. II, 2-3.)[3] The judge further found:

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[2] The employee, then thirty-eight years old, was schooled through the eleventh grade, and had not obtained a G.E.D. She had never done office or cashier work. Her past work history was as a nurse's aide, a housekeeper and a packer. Prior to her industrial injury, she had worked for the employer as a machine operator for five years. (Dec. I, 2, 5, 6.)

[3] In his earlier decision, the judge found that Dr. Linson, "when presented with a hypothetical question based on the facts as outlined above [in the decision] . . . does opines [sic] that the injury would be casually [sic] related to the work injury. (Pages 24-26 generally, and p. 27, line 11-23)." (Dec. I, 4.)

> Very little has changed since the first hearing in this case. Primarily, the changes are the new symptoms noticed by the employee in her foot and toes, and Dr. Linson's opinion that the restrictions are probably permanent.
>
> In the first decision, I found that these physical restrictions (without even taking into account the new symptoms in the foot) led to a finding of total disability. As the doctor suggests they are now permanent, I find that the disability is now both permanent and total.

(Dec. II, 3.) The judge therefore awarded the employee § 34A benefits. (Dec. 4.)

Pared to its essence, the insurer's curious argument is that the judge erred by being consistent: he made the same causal relationship finding in 2004 as he had in 2002. Apparently the insurer is not deterred by the fact that the prior hearing decision was summarily affirmed by the reviewing board in response to its earlier appeal on the very same ground.[4] The insurer's argument acquires no merit upon repetition; rather, it invites scrutiny under § 14.[5] Because the employee has not invoked § 14, however, we choose not to apply it.

First and foremost, the 2002 hearing decision determined *liability* for the employee's injury, which necessarily includes the attendant finding of *initial* causal relationship. That liability finding is *res judicata* as to the present § 34A proceeding. See Perkins's Case, 278 Mass. 294, 299 (1932)(further inquiry into the merits of the original controversy, both as to liability and compensation for the period covered, is at an end in the absence of fraud or mistake). Of course, in the context of its modification/discontinuance complaint, and in defense of the employee's § 34A claim, the insurer was free to argue that causal relationship between the employee's work injury and her claimed ongoing incapacity had

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[4] 17 Mass. Workers' Comp. Rep. 668 (2003).

[5] Section 14 of G. L. c. 152, as amended by St. 1991, c. 398, § 36, provides in pertinent part:

> (1). . . [I]f any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted or defended by an insurer without reasonable grounds:
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> (a) the whole cost of the proceedings shall be assessed upon the insurer.

ceased to exist. Indeed, the insurer raised the issue of causal relationship in its defense sheet. (Ins. Ex. 1.)[6] However, its argument on appeal challenges only Dr. Linson's *original* assessment of causal relationship, not the pertinent question of the *present* status of causation. The insurer contends that it was improper for the judge to afford "undue credibility" to the impartial doctor's causal relationship opinion, first given in answer to the hypothetical question posed by the employee at the doctor's 2001 deposition, which accurately reflected the facts found by the judge in his 2002 decision. (Insurer br. 5.) "Dr. Linson's testimony makes clear that his responses to the hypothetical situation posited by the employee [in the 2001 deposition] were not intended to reflect his opinion as to Ms. Maldonado's actual situation." Id.

The point lost on the insurer is that it is the responsibility of the judge -- not the impartial physician -- to find the facts and determine the "actual situation." Indeed, we have concluded that it is reversible error for a judge to cede that fundamental role as trier of fact to the impartial physician:

> Where, as here, the impartial physician's misgivings as to causation were based on a history not adopted by the judge, the judge appropriately ignored those misgivings. Indeed, it would have been reversible error for the judge to abdicate her fact-finding authority by crediting the impartial doctor's uncertainty and questions concerning the history the employee gave him.

Faieta v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 10 (2004), citing Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342 (2003).

Contrary to the insurer's argument, unsuccessful the first time but insistently advanced again in this appeal, the impartial physician's "misgivings" regarding the absence, in certain of the employee's medical records, of a history of work injury, are not fatal to the employee's claim. In both proceedings, the employee properly challenged the doctor's opinion of no causal relationship with a hypothetical question which assumed facts other than those perceived by the § 11A examiner. Once the judge found those facts in his 2002 decision, which acquired *res judicata* status by virtue of the summary affirmation of that decision under § 11C, the employee had only to adduce from Dr. Linson that his

[6] In his decision, the administrative judge first correctly identified the issues in controversy as "Disability and Extent Thereof" and "Causal Relationship," (Dec. II, 1), but then stated that, "[t]he only issue is the extent of disability resulting from the employee's work injury." (Dec. II, 2.)

begrudgingly-given opinion of initial causation remained his opinion of continuing causation in 2003. The employee did so:

> Q. And again, based upon the hypothetical, your opinion would be that Ms. Maldonado's need for medical treatment disability [sic] is that the work injury would be the [sic] major, but not necessarily predominant cause of that?
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> A. *Yes, if the hypothetical is, in fact , true*, which I have no evidence to believe it is, *then she was hurt at work, in this hypothetical, and the work injury is responsible as a major causal factor for her back difficulty, surgery, need for medical care and subsequent disability.*

(Dep. II, 13.)(Emphasis added.)

The insurer's challenge to the finding of permanent and total incapacity is likewise without merit. "It is well-established that a judge may consider an employee's pain to find total incapacity despite a medical opinion that the employee has some physical ability to work." Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 318-319 (2003), citing Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990). That is exactly what the judge did in 2002. Given that the impartial medical examiner's opinion regarding the employee's work capacity and physical restrictions on May 7, 2003 was "exactly the same as it was May 30, 2001," (Stat. Ex. 1), except that the restrictions were now permanent, (Dep. II, 16), and given that the employee's vocational profile had not changed for the better, we see no error in the judge's finding of permanent and total incapacity.

The decision is affirmed. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee in the amount of $1,312.21.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: August 18, 2005