COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 055581-95**

Debra A. Holmes	Employee
BayBank	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Carroll)

APPEARANCES
Janet Simons, Esq., for the employee
Marguerite S. O'Neill, Esq., for the insurer

LEVINE, J. The insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits resulting from an accepted industrial injury on December 1, 1995. Finding merit in the insurer's appeal, we reverse the decision and recommit the case for a hearing de novo.

The employee injured her neck in the course of her employment with the employer bank. On April 1, 1996, the employee underwent a cervical discectomy with a C4-5 fusion. (Dec. 5.) The employee also had a fusion at the C5-6 level due to a 1992 non-work-related motor vehicle accident. (Employee Exhibits 2 and 3.)[1] The insurer accepted the claim and paid § 34 benefits. (Dec. 2; June 29, 1999 Tr. 4, 73-74.) On April 24, 1998, a conference took place on the employee's claim for § 34A benefits.[2] Both parties appealed the conference order, and hearings were held on November 2, 1998 and June 29, 1999. (Dec. 2.)

[1] The judge allowed additional medical evidence due to the complexity of the medical issues. (Dec. 3.)

[2] Under the recent decision of Slater's Case, 55 Mass. App. Ct. 326 (2002), an employee need not exhaust § 34 benefits to be eligible for § 34A benefits.

On July 14, 1998, the employee underwent an impartial medical examination pursuant to G. L. c. 152, § 11A(2). The impartial physician, Dr. Carlos Kase, diagnosed probable right C4,5,6 radiculopathy, as indicated by slight asymmetry in deep tendon reflexes in the upper extremities and probably some degree of sensory involvement of the right arm. However, Dr. Kase also found a number of features upon examination that pointed to "a gross element of exaggeration of her deficits." (Dec. 5-6; Impartial Medical Report, 3.) The doctor opined that there was a likely causal connection between the work injury of December 1, 1995 "and the neck symptoms leading to right cervical discectomy" in April 1996. (Dec. 6; Impartial Medical Report, 3.) Beyond that date, he had difficulty causally relating her present symptoms to the industrial injury. (Dep. 33-35.)

After the impartial physician's examination, and consistent with his suggestion, the employee treated at the pain treatment center of the Brigham and Women's Hospital. (Dec. 7; Impartial Medical Report, 3.) Dr. Edgar Ross, who treated her there, opined that, as of November 8, 2000, the employee was disabled from working due to her work-related right neck and shoulder pain, and loss of sensation in her right upper extremity. (Dec. 7; Employee Exhibits 2 and 3.) The judge adopted the opinions of both the impartial physician and Dr. Ross without qualification. Based on those opinions, along with the opinion of the employee's vocational expert, the judge concluded that the employee was permanently and totally incapacitated. (Dec. 7-8.)

The insurer argues that the decision is arbitrary and capricious in that there is no medical opinion of permanent and total disability in evidence. The opinion of Dr. Kase, the impartial physician, does not support a finding of permanent and total disability. His opinion, in fact, only causally related the employee's complaints up to and including the April 1, 1996 neck surgery. Moreover, the doctor could not give an opinion as to the extent of the employee's present medical disability, and stated only that "limitations may be imposed" in a general sense. (Dec. 6.)

However, we disagree with the insurer with regard to the opinion of Dr. Ross, the employee's treating physician at the pain treatment center. Dr. Ross did opine that the

employee's total disability would last indefinitely as of the rendering of his opinion on November 8, 2000:

> This is a 45 year-old female status post motor vehicle accident with C5-6 fusion and status post work injury with a C4-5 fusion with ongoing symptoms of severe right neck and right shoulder pain and also complete sensory loss of her right upper extremity. These symptoms are likely due to her injury at C4-5. She has been evaluated by [a] surgeon and was told that surgery is not an option at this time. She has been treated with physical therapy without success and has been taking Percocet occasionally for pain. She is currently unable to work due to her pain and, I believe, because of her right shoulder pain and also her sensation lost in her right upper extremity. She is disabled because of these symptoms and unable to resume her job.

(Employee Exhibit 2, pages 3-4 and Exhibit 3.) This medical opinion supports the employee's claim for § 34A benefits, when viewed in conjunction with the fact that the employee was on § 34 temporary total incapacity benefits in January 1998, from which time there was no evidence of any change in her medical status. (June 29, 1999 Tr. 23-30.) See Hernandez v. Crest Hood Foam Co., Inc., 13 Mass. Workers' Comp. Rep. 445, 450-451 (1999). Carelus v. Four Seasons Hotel, 16 Mass. Workers' Comp. Rep. (2002)(no change in condition in more than ten months). To prevail on a § 34A claim, the employee need only prove a total disability that will continue for an indefinite period, even if improvement is possible at some remote time. Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939); Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997).

However, we cannot affirm the award of permanent and total incapacity benefits for the employee's chronic neck and upper extremity pain. The insurer argues, and we agree, that the judge's subsidiary findings on the adopted medical evidence are inconsistent and inaccurate as to the testimony of Dr. Kase, the impartial physician. That doctor's opinion, summarized above, does not support a finding of permanent and total incapacity; furthermore, he opined that there was causal relationship only until the April 1, 1996 neck surgery. Although Dr. Ross' opinion supports the employee's claim, we cannot know to what extent the judge's findings were affected by his erroneous view of

the impartial medical testimony. See O'Neil v. E.G.& G., 9 Mass. Workers' Comp. Rep. 72, 73 (1995). Specific and definite subsidiary findings are required in order to ensure proper appellate review of hearing decisions. See, e.g., Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187, 191-192 (2001). Were the administrative judge still serving the department, the remedy here would be a simple recommittal for clarification of his findings with respect to the conflicting medical opinions that were adopted as to the employee's disability status and causal relationship thereof. See O'Neil, supra. However, as the judge who conducted the hearing no longer serves the department, we must recommit the case for a hearing de novo on the employee's entire claim for permanent and total incapacity benefits.

We vacate the decision. In light of this disposition, we need not address the insurer's other arguments. We do note, however, that the employee introduced no medical evidence that causally related her psychological condition to the 1995 work injury. Thus, the insurer's argument that the employee did not prove her psychological condition was work-related also has merit, and the award of § 30 medical benefits for treatment of that disorder cannot stand. However, since we otherwise recommit the entire case for a hearing de novo, that claim should be revisited as well.

The case is transferred to the senior judge for reassignment to a new administrative judge for a hearing de novo.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **August 1, 2002**