COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018597-03**

Donna Adams	Employee
Town of Wareham	Employer
Town of Wareham	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and McCarthy)

APPEARANCES
John L. Collins, Esq., for the employee
Theresa M. Dowdy, Esq., for the self-insurer at hearing
Elizabeth R. Corbo, Esq., for the self-insurer on appeal

FABRICANT, J. The employee appeals from a decision in which the administrative judge allowed the self-insurer's complaint to discontinue payment of § 34A permanent and total incapacity benefits. We reverse the decision and recommit the case for further findings.

The self-insurer initially accepted the employee's claim for workers' compensation benefits, based on a cumulative work injury – severe back pain – that caused the employee to leave her employment as a school teacher on February 26, 1981. (Dec. 6.) The self-insurer did not appeal a May 6, 1982 conference order to pay the employee § 34 benefits at the rate of $240 per week. (Dec. 6-7.) On July 16, 1982, the parties executed an agreement to pay § 34 benefits at the same rate. The agreement identified the employee's injury as "discogenic back pain with occasional sciatica." As of April 6, 1985, the employee's § 34 benefits were exhausted, and she filed a claim for § 34A benefits. That claim went to conference on June 10, 1986, and resulted in an order to pay § 34A permanent and total incapacity benefits; the self-insurer did not appeal that order. (Dec. 7.)

On July 7, 2003, the self-insurer filed the complaint to discontinue or modify payment, and for recoupment of benefits, that is the subject of this appeal. The self-

insurer's complaint was not based on any allegation of a change in the employee's medical status. Rather, it asserted – over twenty years after the employee left her teaching job – that the employee had not suffered a personal injury under c. 152. (Dec. 7-8.)

The administrative judge appropriately gave little consideration to the self-insurer's argument, which was based on the Supreme Judicial Court's opinion denying the employee accidental disability retirement benefits for the same injury. See Adams v. Contributory Ret. App. Bd., 414 Mass. 360 (1993). The judge noted that the employee's workers' compensation claim, unlike her C.R.A.B claim, had been established as compensable by virtue of the self-insurer's earlier acceptance of liability. Thus, the judge determined that there could be no further inquiry into the question of compensability under the act, vis-à-vis original causal relationship and liability. (Dec. 8-10.) The judge noted, nonetheless, that the self-insurer was entitled to challenge *present* incapacity and causal relationship, from the date of the complaint for discontinuance/modification, July 7, 2003, and the case went forward on that basis. (Dec. 11.)

Without explanation, see 452 C.M.R. § 1.02 ("Disputes over Medical Issues") and 452 C.M.R. § 1.10(5)-(7) ("Conferences"), the case proceeded from conference to hearing without an impartial medical examination.[1] At hearing, the self-insurer introduced medical reports of Dr. Donald Marks and Dr. Robert Levine. The employee introduced a medical report of Dr. Gregory Johnson, and a number of reports and records for the period 1981 to 1984. (Dec. 2-3.) The judge adopted the opinion of Dr. Levine, who found no causal relationship between the development of the employee's diagnosed condition, left sciatica with failed back syndrome, and the work injury of 1981. Payment of § 34A benefits was ordered discontinued as of February 28, 2006, the date of Dr. Levine's examination of the employee. (Dec. 11-12.) The judge denied the self-insurer's request for recoupment of benefits paid prior to that date. (Dec. 12.)

[1] No issue regarding this procedural irregularity is pressed on appeal.

The employee's appeal challenges the judge's adoption of Dr. Levine's opinion as a basis for discontinuing benefits on the basis of present causal relationship. We agree with the employee that the judge erred in so doing. Dr. Levine's opinion did not address the state of the employee's present medical condition; it addressed the initial causal relationship between the employee's work and the *development* of her back injury: "[I]n my opinion, there is no causal relationship between any activities as a school teacher and her development of left sciatica." (Self-ins. Ex. 2.) However, as noted above, that issue was settled by the self-insurer's agreement to pay on the claim in 1982. An agreement to pay compensation, filed with and approved by the department, "is a final determination of all issues involved in the establishment of the right to compensation. . . . [T]he board has jurisdiction to modify the award of compensation as changes take place in the condition of the injured employee [citations omitted], but the basic questions of liability under the law are not open for further consideration of different determination." Kareske's Case, 250 Mass. 220, 224 (1924). Thus, the only question before the administrative judge was whether the employee's medical or vocational circumstances had changed in such a way as to permit the self-insurer to place her § 34A entitlement at issue. "[W]here the insurer seeks discontinuance of § 34A benefits, the insurer must go forward with evidence of improvement in the employee's condition or a lessening of the degree of incapacity in order to meet its burden" of producing sufficient evidence to create a dispute. Slater v. G. Donaldson Const., 17 Mass. Workers' Comp. Rep. 133, 137(2003), quoting Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994). Dr. Levine's causal relationship opinion did not meet that burden of production, because it did not address any change in the employee's condition.

We recommit the case for the judge to reexamine the extent of disability. Although the judge found that the employee can perform sedentary work, she did so without a consideration of the vocational factors enunciated in Frennier's Case, 318 Mass. 635 (1945), and Scheffler's Case, 419 Mass. 251 (1994). Given the passage of time, the judge may take further medical evidence as she deems appropriate.

We therefore reverse the decision and recommit the case for further proceedings consistent with this opinion. We reinstate the employee's § 34A benefits, retroactive to February 28, 2006, the date of discontinuance. (Dec. 12.)

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

Filed: **October 3, 2007**