COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021016-05**

Douglas Wentworth	Employee
Country Hen	Employer
Farm Family Casualty Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan and Levine)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee on appeal
M. Therese Roche, Esq., for the insurer

HARPIN, J. The employee appeals the decision of the administrative judge, which denied his claim for § 34A benefits on the basis of res judicata/issue preclusion. We affirm the decision in part, and recommit for further findings.

The employee sustained injuries to his right arm and neck on June 16, 2005, while working as a route deliveryman and salesman of eggs. He was injured when he caught a box of eggs that had slipped from his grasp. He finished his route with the aid of a helper, and has not returned to work. (Dec. I, 6.)[1]

On July 14, 2005, the employee filed a claim for § 34 benefits beginning on June 16, 2005, and continuing, as well as for medical expenses.[2] The claims were heard

[1] On June 3, 2010, the judge filed the first hearing decision, (Dec. I), denying and dismissing the employee's claim for incapacity benefits under §§ 34A and 35. The judge's second decision, (Dec. II), filed on March 23, 2013, is the subject of this appeal.

[2] As some of the procedural history is not contained in either Dec. I or Dec. II, we take judicial notice of documents in the board file that fill in the missing history. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

before a different administrative judge on November 29, 2005, at which time the issues in dispute were listed as liability, average weekly wage, disability and its extent, and causal relationship to work. The judge issued a conference order on that same date, awarding § 34 benefits from July 5, 2005, to August 9, 2005, and § 35 benefits from August 10, 2005, to date and continuing. (Dec. I. 4.) Neither party appealed the order.

On March 30, 2006, the employee filed another claim for ongoing § 34 benefits from the date of injury, along with a claim for "psychiatric treatment and disability," beginning on June 16, 2005, and continuing. (Dec. 1, 4.) The insurer denied the claim raising, inter alia, the defenses of liability,[3] despite its not having appealed the earlier order awarding ongoing weekly benefits, see G. L. c. 152, § 10A(3), disability, and causal relationship; it also denied entitlement to §§ 13 and 30 benefits for psychiatric treatment.

On August 23, 2006, the same administrative judge held a conference on the new claims, and denied them the next day. (Dec, I, 4.) The employee appealed.

Prior to the hearing the parties entered into an Agreement to Pay Compensation, which was approved by the judge. (Dec. I, 4.) The agreement provided for: 1) payment of § 34 benefits from April 18, 2007 and continuing; 2) agreement to monies previously paid; 3) an attorney's fee of $4,000.00 plus costs; and 4) psychiatric evaluation of the employee by the treating psychiatrist within thirty days, with a report to be provided to the insurer within seven days after the examination.

On March 17, 2008, the employee filed a third claim, this time for § 34A or, alternatively, § 35 benefits, both from June 17, 2008, and continuing. The insurer again denied the claim. A conference was held on September 30, 2008, at which the insurer reiterated liability as an issue, along with causation and disability. A second administrative judge denied the claim in an order dated October 3, 2008, which the employee appealed. At the first day of hearing, held before the present judge, a claim for

[3] We presume the liability defense was raised in response to the employee's psychiatric injury claim, as liability for the employee's physical injury had been established. See General Laws c. 152,§ 10A(3).

medical expenses for psychiatric treatment by Dr. Montville was joined. (Dec. I, 5). This second claim was never litigated, as the parties reached an agreement before the scheduled second day of hearing on November 4, 2009. In a written Agreement to Pay Compensation the insurer agreed to pay an attorney's fee of $750.00 "from 13/30, 13A & 14(1) claim (sic) for treatment bills of Dr. Montville." The agreement was approved by the judge on January 4, 2010. (Dec. I, 5.)

In his June 3, 2010 decision, the judge denied and dismissed the employee's claim for §§ 34A and 35 benefits. The judge rejected the causation opinion of the § 11A impartial examiner, Dr. Mark Cutler, as the doctor found the employee's psychiatric condition had only a "temporal" relationship to the work injury, and noted that the employee had failed to have the recommended MRI, which had "hindered physicians' abilities to make meaningful recommendations for improving his lot." (Dec. I, 12.)

The employee appealed to the reviewing board, raising three issues: 1) whether the judge mischaracterized the impartial physician's testimony; 2) whether the judge's dismissal of the impartial's opinion on causation as temporal only was "irrational" and displayed "a profound misunderstanding of the cases he cites in support;" and 3) whether the judge's reliance on the employee's failure to undergo an MRI was unsupported by relevant case law. (Employee's br., October 15, 2010.) At no time did the employee raise the existence of the January 4, 2010 Agreement to Pay Compensation as conclusive on the issue of liability for a psychiatric condition.[4] We summarily affirmed the hearing decision. The employee then appealed to the Appeals Court.[5]

[4] Even if it were to be considered that by the January 4, 2010 Agreement to Pay Compensation the insurer accepted liability for a non-specified psychiatric condition, the employee did not raise this argument in his appeal of the 2010 decision. Consequently, the employee waived it at that time and for all litigation thereafter. Zavalu v. Standard Thompson, Corp., 28 Mass. Workers' Comp. Rep. ___ (December 11, 2014).

[5] The Appeals Court affirmed our decision. "While the AJ acknowledged Dr. Cutler's belief that the employee's psychiatric symptoms initially were related to his workplace injury, the AJ astutely chose to focus on Dr. Cutler's belief that the employee's current subjective symptoms stem from his inability to work and the unresolved status of his legal case. Therefore, the AJ

While the appeal was pending, on September 22, 2010 the employee filed yet another claim, seeking indemnity benefits from the date of closure of the record of the prior hearing, January 11, 2010, and continuing. At the conference the insurer raised liability for any psychiatric injuries, and asserted that res judicata required the dismissal of the claim. In his conference order the judge denied the claim and ordered the bifurcation of the hearing, in order to first address the issue of the defense of res judicata. (Dec. II, 3.) At the hearing the employee asserted that his claim for further disability was based on a psychiatric condition that was a sequela of the accepted 2005 physical injury. His attorney did not specify the nature of the psychiatric condition on which his new claim was based, stating only that "it is a combination of the physical, which was the original neck injury, and the psychiatric in that the psychiatric was the sequel to the underlying neck." (Dec. II, 3; Tr. 4.) The insurer noted only that it accepted the 2005 industrial physical injury. (Tr. 9.)

In his decision, the judge found "[t]he Employee does not allege any basis for psychiatric incapacity other than sequelae of physical injury. The Employee does not present any indication of a change in his physical condition since the close of the record in January 2010." The judge held "[t]he instant claim involves relitigation of the same issues, based on a different claim, between the same parties, as in the 2010 decision." (Dec. II. 3.) The judge denied and dismissed the employee's claim for § 34A benefits on the basis of res judicata, (Dec. II, 4), citing Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. 153 (2011), aff.'d Boyden's Case, 81 Mass. App. Ct. 1117 (2012) (Memorandum and Order Pursuant to Rule 1:28), rev. den. 462 Mass. 1102 (2012).

The employee appeals, asserting error and claiming that initial liability for the psychiatric injury had been established. We disagree.

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appropriately reasoned that to continue awarding the employee workers' compensation benefits would only perpetuate the employee's subjective symptoms." Wentworth's Case, 81 Mass. App. Ct. 1126 (2012)(Memorandum and Order Pursuant to Rule 1:28).

The 2010 decision established that the employee had failed to prove he suffered from causally related anxiety, panic disorder or depressive disorder, the diagnoses found by the impartial physician and asserted by the employee in his testimony. (Dec. I, 7.) The judge's rejection of that claim was based on his finding that the impartial physician's causation opinion related the diagnoses to the industrial accident solely on a "temporal relationship," which the judge correctly noted was an insufficient basis for finding causal relationship. Ciano v. Peterson Party Ctr., 23 Mass. Workers' Comp. Rep. 101, 103 (2009); Koonce v. Bay State Bus Corp., 14 Mass. Workers' Comp. Rep. 238, 240 (2000). The subsequent affirmance of the decision by the Appeals Court has made this finding binding on the parties under the doctrine of issue preclusion. McCarthy v. Peabody Prop., 29 Mass. Workers' Comp. Rep. ___ (March 20, 2015).

However, the insurer's present res judicata defense operates only to prevent re-litigation of a psychiatric claim for causally related anxiety, panic disorder or depressive disorder, or of any other psychiatric claim which the employee *could* have raised in 2010. McCarthy, supra (discussing the doctrine of claim preclusion). The problem with the decision under review is that, without any findings of fact specifically addressing the nature of the claims advanced, the judge held that they "involve[d] relitigation of the same issues, based on a different claim, between the same parties as in the 2010 decision." (Dec. II, 4.) Cf. Angelo's Case, 81 Mass.App.Ct. 1142(2012)(Memorandum and Order Pursuant to Rule 1:28)(res judicata applied when the employee's claim was clearly identical to prior rejected claim: "Angelo's own submissions to the administrative judge in her second action make it clear that the psychological injury claimed is the same.").

On this record, owing to the lack of factual findings, we cannot determine whether the psychiatric condition or conditions for which the employee seeks weekly and medical benefits is the same as those found not causally related in the 2010 decision, or whether he is asserting a different causally related psychiatric condition that could not have been raised at that time. For that reason a recommittal is required for further findings, as the judge did not make such a determination in the present decision. Praetz v. Factory Mut.

Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). If the new claim is for a condition previously found not related, or which could have been brought in 2010, then the employee's claim is barred by issue and/or claim preclusion, and he is vulnerable to possible penalties under G. L. c. 152, § 14(1). Thus, the judge must hear testimony on the new claim and render a new decision based on the evidence presented at the hearing.

We therefore recommit the case for further proceedings consistent with this decision.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **May 29, 2015**