COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Employee: Edward Cugini
Employer: Town of Braintree School Department
Insurer: Town of Braintree
Board No.: 00246999

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
William T. Salisbury, Esq., for the employee at hearing
Mary B. Klegman, Esq., for the employee on appeal
Brenda L. Bowen, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee ongoing § 34 temporary and total incapacity benefits for a January 21, 1999 industrial ankle injury. For the reasons that follow, we reverse the decision in part, and affirm in part.

The employee suffered a cut and trauma to his left ankle when a piece of steel fell on him in the course of his employment as a custodian in an elementary school. (Dec. 4.) After paying benefits without prejudice for almost a year, the self-insurer terminated payments, and the employee filed a claim for continuing § 34 incapacity benefits. The self-insurer then accepted liability for the employee's ankle injury; but it disputed the employee's claim for incapacity benefits commencing on January 17, 2000.[1]

The employee underwent a § 11A medical examination by Dr. Edward Fink on February 7, 2001. Dr. Fink opined that the employee's work injury contused his sural nerve, with the subsequent development of a sural neuroma, and that the employee's pain was related to his injury. Dr. Fink opined that the employee was

[1] The employee also added a claim for a back injury stemming from the same work event. The judge denied the claim. (Dec. 2, 7.) That denial is not an issue on appeal.

disabled from returning to his job as a custodian, but that he was capable of light duty work, with limited carrying of less than thirty pounds, and no climbing stairs. (Dec. 5, 6.) The judge adopted Dr. Fink's opinions, except for his opinion that the employee has light duty work capability. (Dec. 6.)

Declaring the impartial report inadequate for the nine months between the impartial examination and the hearing, the judge allowed additional medical evidence to be introduced as to alleged disability after the § 11A examination. (Dec. 3.) In a November 12, 2001 report, Dr. John F. Mahoney, the employee's treating physician, diagnosed a probable tear of the left flexor hallucis longus tendon probably associated with a post-traumatic neuroma of the left lateral calcaneal nerve, which is a branch of the left sural nerve. Dr. Mahoney opined that the injury caused chronic, intractable pain provoked by any degree of standing, walking or squatting, and that the injury rendered the employee totally disabled from work. (Exhibit 6; Dec. 6.) The judge adopted Dr. Mahoney's opinion that the employee was disabled from work. (Dec. 6.) The judge also found that, except for brief periods of relief provided by nerve blocks, the employee experiences constant left ankle pain on a level of seven (on a scale of ten), even on a good day. "Three or four days a week the pain in his work-injured ankle is so great when he rises in the morning that he avoids being on his feet, and sits with his legs elevated. The pain affects his ability to concentrate, so that he cannot think straight." (Dec. 6.) The judge concluded that the pain precluded the employee from being able to reliably perform any gainful employment; she awarded the continuing § 34 benefits the employee sought. (Dec. 6, 7, 8.) The judge also ordered the self-insurer to pay § 50 interest. (Dec. 8.)

The self-insurer, a municipality, challenges the judge's award of § 50 interest. We agree with the self-insurer that the award of interest was contrary to law. In Russo's Case, 46 Mass. App. Ct. 923 (1999), the Appeals Court held that an award of § 50 interest against the Commonwealth was barred under the doctrine of sovereign immunity, as nothing in c. 152, expressly or by necessary

implication, waived the application of the doctrine. Because sovereign immunity also applies to municipalities, see Bain v. City of Springfield, 424 Mass. 758, 762 (1997), Russo's Case governs the present case. We therefore reverse the award of § 50 interest.

The self-insurer next argues that the award of benefits from the commencement of the claim, January 17, 2000, until the impartial examination on February 7, 2001, was unsupported by medical evidence and therefore must be reversed. The self-insurer's argument is based on the proposition that the impartial medical examination is inadequate to address the period of disability prior to the examination, during which time the doctor did not examine the employee. See George v. Chelsea Housing Auth., 10 Mass. Workers' Comp. Rep. 22 (1996). In effect, it argues that, to warrant an award of weekly benefits during that period, the judge must rule, sua sponte or in response to a motion, that the impartial medical evidence is inadequate. See § 11A(2). The judge here did not so rule, having determined that Dr. Fink's report was adequate for all purposes except the *post*-examination period of disability and the employee's back claim. (Dec. 3.)[2] Therefore, the self-insurer contends that the award of benefits during the disputed period is reversible error.

However, because the self-insurer failed to assert this contention at the hearing, we need not address it on appeal. When the judge inquired as to the parties' positions on the adequacy of the § 11A medical report, the self-insurer raised the inadequacy of the medical evidence for the post-examination period, but stipulated to its adequacy for all other issues, (Tr. 7), which would include, of course, the pre-examination period. It therefore, has no cause now to complain. Compare Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. ___ (May 15, 2003)(insurer at hearing did not object to ruling that the report of the impartial

[2] The self-insurer does not challenge those rulings.

physician was inadequate for the period prior to his examination).

Moreover, we have not adopted a per se rule regarding the adequacy or inadequacy of the § 11A medical report regarding the pre-examination period. In the present case the impartial evidence is not inadequate for the pre-examination period. The judge specifically adopted the opinion of the impartial physician, Dr. Fink, that the employee was disabled as a result of the industrial ankle injury. The doctor's opinion could support the inference that the employee's medical status, from the commencement of his claim in January 2000 until the impartial examination in February 2001, was essentially unchanged. See Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before"); Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187, 191 (2001)(citing Conroy, supra, and reading later medical report to support prior period of disability). Furthermore, the employee testified that he had not worked since the industrial accident because he was in pain and could not perform. (Tr. 55.) See Miller v. M.D.C., 11 Mass. Workers' Comp. Rep. 355, 357 n. 3 (1997) (lay testimony of uninterrupted symptomatology can support award of benefits for prior period of disability lacking contemporaneous medical opinion). The judge credited the employee's reports of pain, and used it to find the employee totally incapacitated. (Dec. 6, 7.) There is no error in the award of benefits for the claimed period prior to the impartial examination.

The self-insurer argues that the judge's treatment of the impartial medical evidence was arbitrary and capricious, in that she rejected Dr. Fink's opinion on the extent of the employee's work capacity, based on her crediting the employee's pain and its effect on him. It is true that the judge determined that the employee was totally incapacitated based on his pain, while Dr. Fink opined that he had a light duty work capability. (Dec. 6.) But contrary to the self-insurer's contention, such analysis is entirely proper. Capozzi v. Brockton Auto Repair, 17 Mass. Workers' Comp. Rep. ___ (March 31, 2003); Cordi v. American Saw & Mfg. Co.,

16 Mass. Workers' Comp. Rep. 39, 45-46 (2002); Delaney v. Laidlaw Waste Sys., 13 Mass. Workers' Comp. Rep. 72, 74 (1999); Anderson v. Anderson Motor Lines, Inc. 4 Mass. Workers' Comp. Rep. 65 (1990). As pointed out earlier, the judge found that the employee's symptoms preclude him from reliable gainful employment. (Dec. 6, 7.) There was no error.

Finally, the self-insurer correctly argues that the judge's award of § 34 benefits exceeds the maximum of 156 weeks authorized by the statute. The pay-without-prejudice period from January 22, 1999 through January 16, 2000, and the hearing decision award from January 17, 2000 to June 6, 2002 and continuing, (Dec. 2, 8), are more than 156 weeks. Vlachos v. Domenico Ins., 11 Mass. Workers' Comp. Rep. 278 (1997). However, reversal of the decision is not the appropriate remedy. Given our disposition of the self-insurer's other issues on appeal, we simply reverse so much of the § 34 award as exceeds the statutory maximum, and award § 35 partial incapacity benefits at the maximum rate of 75% of the employee's § 34 rate of compensation. See Lavoie v. Zayre Corp., 13 Mass. Workers' Comp. Rep. 76, 79 (1999)(approving "stop gap" award of § 35 benefits due to inordinate amount of time having passed while case in litigation). The employee and the self-insurer may respectively file claims for § 34A benefits and modification or discontinuance. Given our administrative award of § 35 benefits, the employee need not show a worsening pursuant to Foley's Case, 358 Mass. 230 (1970). Compare Goden v. Phalo Corp., 9 Mass. Workers' Comp. Rep. 720, 721 (1995)(no requirement to prove worsening in § 34A claim following exhaustion of § 34 benefits).

Accordingly, we reverse the award of § 50 interest and so much of the § 34 award as exceeds the statutory maximum of 156 weeks. We award § 35 benefits at the maximum rate for all indemnity benefits payable after the 156th week. We otherwise affirm the decision. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,273.54.

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: **July 17, 2003**