COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 39016-96**

Enid S. Liberman	Employee
McLean Hospital	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
J. Channing Migner, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer at hearing and on appeal
Richard W. Jensen, Esq., for the self-insurer on appeal

FABRICANT, J. The employee and the self-insurer cross-appeal from a decision in which an administrative judge awarded the employee § 34A permanent and total incapacity benefits for a 1996 neck injury. The employee contends that these benefits should commence on January 10, 2003, when her doctor opined she was permanently and totally disabled, and not on August 28, 2003, the date of the § 11A impartial examination and used by the judge. The self-insurer disagrees and further argues that the employee did not prove any benefit entitlement at all. We affirm the decision.

The claim for § 34A benefits came before the judge for a § 10A conference on July 7, 2003, resulting in an order denying the claim. The employee appealed to a hearing de novo, (Dec. 131), and submitted to a § 11A medical examination by Dr. Lawrence F. Geuss on August 28, 2003. Dr. Geuss offered a diagnosis of chronic pain syndrome resulting from an unsuccessful work-related cervical surgery. He also diagnosed significant pre-existing degenerative disc disease of the cervical spine.[1] Dr.

[1] The § 1(7A) heightened causation standard is inapplicable here as the employee's pre-existing degenerative disc disease was caused, in part, by a 1991 work injury. See Liberman v. McLean Hospital, 17 Mass. Workers' Comp. Rep. 1, 5-6 (2003).

Geuss found the employee to be totally and permanently disabled due to her 1996 work injury, based on the unpredictable nature of her pain and the seven year span of her chronic pain condition. He noted no improvement in the employee's medical condition from his examination of her three years earlier. (Dec. 134-135.) However, Dr. Geuss did consider that the employee might be able to perform part-time light duty work, were it not for the various pain medications she was taking, which, in his opinion, prevented her from being able to drive. (Dec. 136.)

The judge concluded that the employee was permanently and totally incapacitated, based on the employee's credible testimony, the vocational opinion of the employee's expert, Peter Skirinka, and the opinions of Dr. Geuss. Although a surveillance videotape offered into evidence by the self-insurer showed the employee moving without guarding on the four occasions she was observed, out of fourteen surveillances, the judge credited the employee's testimony that, on the other ten occasions, she did not feel well enough to venture out of the house. The judge concluded that this evidence corroborated Dr. Geuss' opinion that the employee's pain was unpredictable, making her chances of sustaining employment poor. (Dec. 137-138.)

The employee argues on appeal that the judge erred by commencing the payment of § 34A benefits on August 28, 2003, the date of the impartial medial examination. Instead, the employee points to an earlier date, January 10, 2003, when her treating physician opined that she was permanently and totally disabled. That medical report, however, is not in evidence, and the impartial physician merely noted the opinion of the treating physician during his deposition without adopting it. (March 3, 2005 Dep. 11-12.) We therefore agree with the self-insurer that the record evidence does not establish the employee's entitlement to § 34A benefits as of the earlier date. See Makris v. Jolly Jorge's, Inc., 4 Mass. Workers' Comp. Rep. 360, 362 (1990). There was no error.

As to the self-insurer's arguments on appeal, we do not agree that Dr. Geuss' opinion of medical worsening was improperly based solely on advancing age, in contravention of Foley's Case, 358 Mass.230, 232 (1970). Dr. Geuss' opinions were grounded in other factors, such as the employee's regimen of pain medication, her

inability to drive, more limited motion in her neck upon examination, and the unpredictability of her pain. There was sufficient evidence of medical worsening to support the employee's claim of worsening from partial to permanent and total incapacity.

We also disagree with the self-insurer's argument that the judge erred by inferring the employee's inability to leave her house on the ten occasions when she was not observed by the self-insurer's investigator. The judge's finding was based on the employee's credible testimony to that effect. As an issue of credibility, it is not subject to our review.

The decision is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,407.15

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **February 15, 2007**