COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS.:** 035635-99, 026364-03

Ewa Klama	Employee
National Envelope Corp.	Employer
Hartford Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
Allen Rubin, Esq., for the employee
Andrew S.A. Levine, Esq., for the insurer

McCARTHY, J. Born in Poland, Ewa Klama is a forty-one year old married woman who lives in Worcester with her husband and two minor children. Ms. Klama completed high school and two years of college in her native country. She then worked in a laboratory in Poland analyzing blood and urine samples. She came to the United States in 1994 and found work pressing neckties, a job she held for four years. (Dec. 7.) In 1998, Ms. Klama started work with National Envelope Corp. operating an envelope manufacturing machine. Her duties included loading paper into the machine, removing processed envelopes, squeezing them together and packing them in boxes. (Dec. 7.)

On August 26, 1999, Ms. Klama developed right wrist pain and noticed a lump on her hand. She treated at the Fallon Clinic and stayed out from work for several days. When she returned, working primarily with her left hand, she developed pain and swelling in the left wrist and hand. She stopped work again on September 2, 1999 and has not worked since. On January 26, 2000, Ms. Klama underwent left wrist surgery. The insurer accepted the August 26, 1999 and September 2, 1999 claims of injury and paid weekly temporary total incapacity benefits under § 34 of the Act until the maximum three-year entitlement was reached. At that point, the insurer voluntarily placed the employee on weekly partial incapacity benefits at the statutory maximum under the formula set out in § 35.

The employee then filed a claim for permanent and total incapacity benefits under § 34A. The insurer resisted the claim and following a § 10A conference, an administrative judge issued an order directing payment of § 34A benefits. The insurer's appeal of that order brought the case back to the same administrative judge for an evidentiary hearing. A § 11A impartial medical exam was performed by Dr. Kenneth Gorson. Finding the medical issues complex, the judge sua sponte opened the record for additional medical evidence.

At the outset of the hearing, the parties entered into an agreed statement of the issues in controversy:

> 1. What level of incapacity, if any, does the employee have as of and after August 26, 2002 that is causally related to her accepted industrial accidents of August 26, 1999 and/or September 2, 1999?
>
> 2. Has the employee needed psychiatric treatment for personal injury and has this treatment that she has received been reasonable, necessary, and related to the accepted industrial accident?
>
> 3. Is the employee totally and permanently disabled as defined by Section 34A as a causal result of her accepted industrial accident?

(Dec. 6.) The judge determined that Ms. Klama was a credible witness and found that:

> . . . she experiences severe pain primarily in the left arm and the left side of her body; that this pain prevents her from performing all but the most minimal tasks of daily living; that she does not sleep well nor can she concentrate; that she requires strong pain medication that makes her woozy; that light and noise cause her severe discomfort; that she is anxious about her condition and that she is extremely distressed about her condition and way of life.

(Dec. 9.)

Turning to the medical issues, the judge adopted in part the opinion of the § 11A examiner, Dr. Gorson, and found that the employee suffers from probable left carpal tunnel syndrome; probable complex regional pain syndrome; and probable superimposed psychogenic pain disorder associated with depression. The judge also found that the left carpal tunnel syndrome and resulting surgery were causally related to the work effort, but the weakness or sensory loss in the employee's upper left extremity was not severe

enough to preclude her from using the left upper limb, "and that the limiting factor is pain." (Dec. 9, 10.)

The judge then turned to the critical question of the causal relationship of the employee's pain and depression to her work injuries. Concluding that the employee failed to carry her burden of proof, the judge wrote:

> Insurer raises a defense of Section 1 (7A). I find that insurer has failed to prove that the employee suffered from a pre-existing non-work-related condition that combined with the work related injury. I find that the applicable standard of causation is simple causation. *Assuming the insurer has not accepted the pain syndrome and the depression, I find that employee has not met her burden of proof at this hearing that these conditions are causally related to her left carpal tunnel which I do find to be causally related to her September 2, 1999 injury based on the evidence at hearing.*

(Dec. 11; emphasis added.) But these findings did not signal the demise of the psychiatric claim. The judge then identified an issue not contemplated or agreed to by the parties:

> The next issue is whether insurer by it's [sic] actions has accepted the pain syndrome and depression and whether the employee in fact had the burden to proof [sic] causal relationship of these conditions.

(Dec. 11.) The judge then reviewed the "actions" of the insurer. He noted that the insurer paid § 34 benefits for three years until the maximum was reached; that during this three year period the insurer assigned a nurse case manager who coordinated the employee's medical treatment, including the treatment for the pain syndrome and depression; and that the insurer paid for this treatment. Id. The judge noted that not until the filing of the § 34A claim did the insurer contest the causal relationship of the pain syndrome and depression to the accepted physical injuries. The judge then concluded that the insurer was estopped from raising the defense of causal relationship, and ordered payment of § 34A benefits from August 26, 2002 and continuing. We have the case on appeal by the insurer.

It is axiomatic that it is the employee's burden to prove that she is permanently and totally incapacitated from gainful employment, and that such incapacity is causally related to an industrial injury. Based on the record evidence, the judge found that the employee did not

meet her burden of proof. Id. The judge grounded the award of § 34A benefits on the doctrine of equitable estoppel. The insurer argues that as the issue of estoppel was never raised, it was not properly before the administrative judge. We agree. There is no reference to estoppel in the hearing record and it cannot be said to have been tried by consent. It is not listed as one of the issues. Estoppel must be affirmatively pleaded and the failure to do so precludes its consideration by the administrative judge. Methuen Ret. Bd. v. Contrib. Ret. App. Bd., 384 Mass. 797 (1981). By raising the issue sua sponte, without advising the parties, the judge deprived the insurer of an opportunity to rebut the application of the estoppel doctrine. The judge's decision here went beyond the parameters of the dispute as identified by the parties, supra; see Whitaker v. Agar Supply Co., 14 Mass. Workers' Comp. Rep. 417 (2000).

One of the facts found by the judge to support his application of the estoppel doctrine is that the insurer paid for the employee's psychiatric treatment. (Dec. 11.) We find no record evidence on which to base this finding. There was testimony that a nurse case manager arranged for the employee to receive psychiatric treatment, but this is not equivalent to payment. And even if the insurer did pay for psychiatric medical services, there is no authority for the proposition that this amounts to acceptance of the psychiatric portion of the claim.[1]

The hearing judge found that the employee did not meet her burden of proving by a fair preponderance of the evidence that her pain syndrome and depression were causally related to the August 26 and September 2, 1999 physical injuries. He reached a finding favorable to the employee on the claim for permanent and total incapacity benefits solely by application of the doctrine of equitable estoppel by conduct. That was error.

We vacate the award of § 34A benefits and direct the insurer to resume payment of maximum weekly partial incapacity benefits under § 35.[2] The insurer may take credit for

[1] "The court has never passed on the question whether an insurer assumes liability for payment of compensation by furnishing medical care without entering into an agreement for compensation . . . To say [that an enforceable obligation under the Act is created by payment ofmedical bills] might discourage insurers from providing prompt and adequate treatment." (L. Locke, Workmen's Compensation 2nd ed., (1981), § 417 n.28.)

[2] The disposition urged by the insurer. (Ins. br. 17.)

the § 35 benefits it paid voluntarily and for all § 34A benefits paid pursuant to the conference order and hearing decision. Should there exist an overpayment, the insurer may recoup same in accordance with G. L. c. 152, § 11D(3).

So ordered.

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: November 16, 2005