COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021976-94**

Frank Hovey	Employee
Shaw Industries	Employer
Insurance Company State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Wilson)

APPEARANCES
Louis P. Massaro, Esq., and Salvatore J. Perra, Esq., for the employee at hearing
Salvatore J. Perra, Esq., for the employee on brief
David G. Shay, Esq., and Paul T. Fisher, Esq., for the insurer at hearing
Ellen Harrington Sullivan, Esq., and David G. Shay, Esq., for the insurer on brief

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits for an accepted June 10, 1994 industrial injury to the employee's neck and head. We discern one issue of merit in the insurer's brief. The judge's conclusion that the employee suffers from depression caused by his 1994 injury is not supported by the medical evidence. We therefore reverse the judge's order for § 30 medical benefits for the treatment of that diagnosed condition. We otherwise affirm the decision.

As this claim has already been the subject of a recommittal, Hovey v. Shaw Industries, Inc., 12 Mass. Workers' Comp. Rep. 442 (1998), we recount only the facts necessary to update the proceedings. The employee injured his neck and head when he lost his footing and was struck by a 75-pound roll of carpet padding that he was carrying. (Dec. 5-6.) The employee suffered from severe neck pain, headaches and numbness in his upper extremities. (Dec. 6.) The employee underwent an anterior vertebral corpectomy at C4 and C5, along with the removal of disc material at C3-4, C4-5 and C5-6. A right iliac crest graft was harvested and affixed to the C3-6 area with a cervical

plate and screw fixation. (Dec. 6-7.) The first decision, by a different administrative judge, awarded § 34 benefits based on an impartial physician's insufficient causal relationship opinion as to the etiology of the employee's headaches. We reversed that decision, and recommitted the case for a hearing de novo, because the judge had retired. (Hovey, supra at 445-446; Dec. 4.) In the present hearing, the employee joined a claim for permanent and total incapacity benefits. The employee underwent a new § 11A medical examination, this time by a neurosurgeon, Dr. Vernon Mark.[1] In addition, the employee introduced the vocational expert testimony of Paul Blatchford. (Dec. 2-3.)

The § 11A neurosurgeon opined that the employee suffered from a work-related exacerbation of cervical spondylosis and cervical stenosis, along with a concussion at the time of his accident. (Rep. of Dr. Mark, 3.) The doctor causally related the employee's headaches to the industrial accident. (Dep. of Dr. Mark, 31.) The doctor also diagnosed the employee as suffering from depression, but could not causally relate it to the industrial injury. (Dep. of Dr. Mark, 14-15, 22-23.) The doctor partially disabled the employee, based largely on the employee's pain. (Dep. of Dr. Mark, 37-38.) The judge credited the employee's pain and adopted Dr. Mark's opinions and that of Dr. Genovese as it supported Dr. Mark's opinion. (Dec. 7, 13-14.)

The employee's vocational expert, Mr. Blatchford, opined that the employee did not possess residual functional or physical capacity either to return to his former employment, or to hold an entry-level job involving even light exertion. Mr. Blatchford based his opinion on the employee's physical limitations, his pain and headaches and his use of multiple medications. (Dec. 14-15; Dep. of Mr. Blatchford, 11-12.) While Mr. Blatchford did take into account the employee's depression, (Dep. of Mr. Blatchford, 10), his opinion did not rely on that diagnosis:

> The medical and functional limitations are so severe, the psychological would be more on top of the -- icing on the top of the cake. It may in and of itself be

[1] The § 11A medical examiner in the original proceeding was an orthopedic surgeon, Dr. Vincent P. Genovese, whose report and deposition were also introduced in the recommittal hearing de novo. (Dec. 2.)

> disabling, but physical and functional limitations are so significantly severe for excluding this person from work, it doesn't matter.

(Dep. of Mr. Blatchford, 11.) The judge adopted Mr. Blatchford's opinion that the employee was unemployable and awarded benefits under §§ 34 and 34A accordingly. (Dec. 15-17.) The judge also awarded § 30 medical benefits for the treatment of the employee's physical problems, as well as his depression. (Dec. 17.)

The insurer contends, as an initial matter, that the judge erred by awarding total incapacity benefits commencing on an arbitrary date, April 30, 1996. We disagree. April 30, 1996 was the date on which the parties' "Agreement to Pay Compensation" for the payment of § 35 partial incapacity benefits terminated.[2] The Agreement determined with finality all matters addressed within its four corners. See West's Case, 313 Mass. 146. 153 (1943)("When an agreement for compensation has been made and approved . . . , then all further inquiry into the merits of the original claim both as to liability and the amount of compensation for the period covered are, in the absence of fraud, accident or mistake, conclusively settled"). As of April 30, 1996, however, the employee was free to file a claim for further compensation. The medical evidence adopted by the judge – based on examinations of Dr. Mark on May 22, 1998 and Dr. Genovese on August 30, 1996 – reasonably could be read to establish total disability commencing with the June 10, 1994 industrial injury and continuing on through April 30, 1996. See Hernandez v. Crest Hood Foam Co., 13 Mass. Workers' Comp. Rep. 445, 449 (1999)(impartial report "could be rationally read to cover the entire period of claimed incapacity [as i]t provided a detailed report of the medical records that had been forwarded for review [which] were consistent with the conclusions about diagnosis and work limitations that the impartial doctor reached"). There was no error in the judge's award beginning where the Agreement ended.

[2] We take judicial notice of the agreement, approved by the department on November 6, 1995, included in the board file.

Furthermore, the employee's proof of total incapacity as of April 30, 1996 did not need the "worsening" that the insurer contends was required for the employee to prevail, due to the change from partial to total incapacity benefits. The Agreement for payment of a closed period of partial incapacity benefits stands in a position analogous to an unappealed conference order, as it is similarly unsupported by findings of fact and a judicial decision on the merits. It is settled that "there is no requirement of showing a worsening after an unappealed conference order." Scholl v. Fixture Perfect, 14 Mass. Workers' Comp. Rep. 484, 489, n. 7 (2000), citing Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660, 662-663 (1996). Since the Agreement did not have any future effect as res judicata, the employee did not need to prove a "worsening."[3]

The insurer asserts that the judge's award of incapacity benefits must be reversed, as it was based in part on the employee's depression, which diagnosis was not causally related to the industrial injury. (Insurer's brief, 10-12.) Although the decision is not a model of clarity, we are satisfied that the judge did not rely on the depression in his assessment of the employee's incapacity status. The judge concluded:

> Dr. Mark is of the opinion that the post-surgical headaches are causally related and that in reading both the medical report and the deposition of Dr. Mark, I find that a compensable injury combined with a noncompensable pre-existing condition, which resulted from an injury that caused or prolonged the disability and treatment and the resulting condition shall be compensable because the compensable injury was a major, but not necessarily the predominant cause of the disability and need for treatment and that the post surgical headaches are causally related to the injury of June 10, 1994 and that the employee is totally and permanently disabled under § 34A because I find that the report and deposition of Paul Blatchford, the vocational expert, was based on a review of the records and the results of his standardized testing of Mr. Hovey, who he saw in person, and he felt the Mr. Hovey did not possess residual functional capacity that would allow him to do his

[3] Likewise, the insurer's secondary contention of error regarding "arbitrary" dates of benefit modification, namely, the judge's order of § 34A benefits as of September 1, 1996, is also baseless. The date apparently represents the exhaustion of § 34 benefits and, as such, is entirely appropriate for the commencement of § 34A benefits. See Slater v. G. Donaldson Construction, 14 Mass. Workers' Comp. Rep. 117, 123 (2000). We are not privy to the payment ledgers; we accept the representation of the employee as to the exhaustion of § 34. If this is not the case, the parties can once again go before an administrative judge, if that is necessary.

> past level of relevant heavy, unskilled work. He was further of the opinion that Mr. Hovey was unable to do a new job at entry level even if it were light exertion because of the difficulty he has with sitting, standing, lifting, and repetitive use of his hands and arms and the pain he incurs in his legs, neck, upper shoulders, and back, not to mention his headaches. Mr. Blatchford states that this is one of the worse cases he has seen in his 22 years of examining people for vocational rehabilitational purposes. . . . Mr. Blatchford goes on further to say that the physical and functional limitations are so significantly severe for the excluding of this person from work. (Dep. pg. 11, lines 14-19) He further is of the opinion that his clinical depression would further restrict his ability for financial gainful activity. Mr. Blatchford finds the employee unemployable and I adopt that finding.

(Dec. 13-15.) As the above-quoted testimony of Mr. Blatchford makes clear, (Dep. of Mr. Blatchford, 11), the depression is not a necessary component of his incapacity opinion. We see no merit to the insurer's assertion of error regarding the award of § 34A benefits.

We do, however, acknowledge that the judge's order of medical treatment for the employee's depression cannot stand, due to the lack of a causal relationship opinion tying the diagnosis to the work injury. We therefore reverse that order. We summarily affirm the decision as to the insurer's other arguments.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **April 2, 2002**
MC/jdm

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Sara Holmes Wilson
Administrative Law Judge