COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018902-03**

Gary L. Bolles	Employee
Suffolk County Sheriff's Department	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Michael C. Akashian, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits. See G. L. c. 152, § 34A. We affirm.

The facts pertinent to the issues on appeal are as follow. On February 2, 2000, while working as a corrections officer, the employee suffered a compensable back injury. (Dec. 5.) He was paid compensation and returned to work. Id. Over time, his work aggravated his back condition; thereafter, he "resumed medical treatment and went out of work on May 8, 2003."[1] (Dec. 6.)

On May 11, 2005, the judge filed a hearing decision awarding the employee partial incapacity benefits from December 17, 2003, to date and continuing, based on a $500 weekly earning capacity. (Dec. 4.) On March 23, 2009, the judge approved an Agreement to Pay Compensation (Agreement) which placed the employee on total incapacity benefits from December 10, 2008, to date and continuing.[2]

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[1] At the hearing on his § 34A claim, the parties stipulated the employee suffered a second industrial injury on May 8, 2003. (Dec. 4.)

[2] The agreement was not done on a "without prejudice" basis. See Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73 n.2 (2005). As the judge did, we also take judicial notice of the board file. (Dec. 4-5.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

On January 20, 2011, the employee filed a claim for § 34A benefits from January 17, 2011, to date and continuing. The judge issued a conference order awarding those benefits, and the self-insurer appealed.

Prior to the hearing, the employee was examined by Dr. Michael V. DiTullio pursuant to G. L. c. 152, § 11A(2). (Ex. 2.) He issued a medical report and was deposed. (Dec. 1; Ex. 2.) At his deposition, the doctor acknowledged he did not teach or have an active clinical practice.[3] (Dep. 31; Dec. 8.) Subsequently, the employee moved to strike Dr. DiTullio's report and deposition testimony on the ground that he did not qualify to serve as an impartial medical examiner.[4] (Dec. 8, n.3.) On March 13, 2012, the judge heard arguments on the motion, and denied it.[5] (March 13, 2012, Tr. 18.) In so doing, the judge informed the parties,

> that in view of the objection that is being raised . . . I am going to allow the parties to . . . submit [their] own medical reports to be considered in conjunction with that of Doctor DiTullio. . . .

[3] Pursuant to General Laws c. 152, § 13(3), on March 15, 2003, the Health Care Services Board (HSB) of the Department of Industrial Accidents established eligibility criteria for § 11A(2) impartial medical examiners. The HSB required, inter alia, that said examiners have an active clinical practice, defined as "the treatment of patients a minimum of 8 hours per week or, a combination of 4 hours of patient treatment plus 4 hours of clinical teaching or research per week." See also General Laws c. 152, § 11A(1). On April 9, 2008, the HSB added the following criterion: "If a provider [impartial medical examiner] retires or fails to meet the minimum requirements for active clinical practice after appointment to the impartial roster, he/she may continue serving for the term of the contract and one renewal, but not more than 4 years, at the discretion of the senior judge."

[4] The employee did not request a ruling from the judge concerning the adequacy of Dr. DiTullio's report. Nor did the employee move to submit additional medical evidence on the grounds of medical complexity. See General Laws c. 152, § 11A(2).

[5] The judge also referred the "issue of the eligibility of Dr. DiTullio to the Senior Judge and to the impartial unit whose domain it is to determine eligibility to be on the roster of impartial physicians." (Dec. 9.)

(Id.; Dec. 8-9.) Neither party objected to the judge's decision, sua sponte, to permit them to submit additional medical evidence.[6]

In his decision the judge credited the employee's testimony that, 1) his "symptoms have worsened since 2003"; 2) "twisting, bending, turning, squatting, kneeling all cause back pain"; and 3) that "his pain is present every day." (Dec. 6-7.) The judge adopted Dr. DiTullio's opinions that the employee's L4-5 disc injury was work-related and that he could not lift more than ten pounds. (Dec. 8.) The judge also adopted the opinions of Dr. Panis and Dr. Nicoletta that the employee's back condition was work-related, and that he could lift no more than twenty pounds. Finally, the judge adopted the opinion of Dr. Richard S. Fraser, who "considered the employee to be disabled from any gainful employment given his lumbar radiculopathy." (Dec. 10.) The judge found that

> Dr. DiTullio, Dr. Nicoletta, Dr. Fraser, and Dr. Panis all concur that the employee's restrictions include lifting no more than ten to twenty pounds, and that he should avoid prolong[ed] posturing, as well as avoid bending, lifting, twisting. The medical consensus is that the employee's condition is permanent and his prognosis is poor. I adopt these positions and so find.

(Dec. 11.) The judge also credited the employee's "pain and its impact on his activities of daily living," (Dec. 14), and found "that he is not capable of sustaining regular attendance in even a sedentary or light occupation if one were available to him." (Dec. 13.) The judge awarded the employee permanent and total incapacity benefits from January 17, 2011, to date and continuing. (Dec. 16.)

The self-insurer raises two issues on appeal. First, it argues the judge erred by allowing the parties to submit additional medical evidence without a finding that the medical issues were complex, or that the impartial report was inadequate. See G. L.

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[6] At one point during the motion session, self-insurer's counsel did ask the judge if he was finding Dr. DiTullio's report inadequate or the medical issues complex. (March 13, 2012 Tr. 19-20.) The judge replied, "I'm going to reserve on that right now." Id. at 20. In a March 27, 2012 letter to the judge, the self-insurer offered, and the judge admitted into evidence, the reports of Dr. Walter Panis and Dr. Robert Nicoletta. (Exs. 20 and 21.)

c. 152, § 11A(2). We do not reach the merits of this issue, as the self-insurer waived it by failing to object below to the judge's decision to allow additional medical evidence.[7] See, e.g., Echeverria v. Costa Fruit & Produce, 24 Mass. Workers' Comp. Rep. 1, 4 (2010) and cases cited.

Next, the self-insurer argues the decision was arbitrary and capricious because the judge found "that the employee was only partially disabled in a prior hearing decision and the testimony of the employee and the impartial physician from the prior decision is basically the same." (Self-ins. br. 10-11.) To the extent the self-insurer's argument is intended to challenge the judge's award of benefits on the grounds that the employee failed to demonstrate a worsening of his condition following his receipt of partial incapacity benefits pursuant to the prior hearing decision,[8] we note the Agreement[9] between the parties, which placed the employee back on total incapacity benefits as of December 10, 2008, relieved him of the burden of demonstrating a worsening. Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69 (2005). In Sicaras, we held,

> when the self-insurer agreed to pay § 34 benefits prior to the employee's § 34A claim, such agreement established that the employee *was*, indeed, totally incapacitated for the time period covered by that agreement. See Kareske's Case, 250 Mass. 220, 224 (1924). The prior status of partial incapacity ordered in the judge's prior 1998 decision ceased to exist as of the execution and departmental approval of the § 19 agreement. Accordingly, the employee did not need to prove a "worsening" under Foley. . . .

Id. at 73 (footnote omitted). This case is not materially different.

Accordingly, we affirm the decision and order the self-insurer to pay employee's counsel an attorney's fee of $1,563.91. G. L. c. 152, § 13A(6).

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[7] We also note that any perceived error would be harmless, as the judge found the medical opinions of Dr. DiTullio were consonant with the adopted medical opinions of doctors Nicoletta, Fraser and Panis. (Dec. 11.)

[8] See Foley's Case, 358 Mass. 230 (1970). The self-insurer's brief does not cite to Foley, or to any other case, in support of such an argument.

[9] The self-insurer's brief fails to mention this Agreement.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **April 10, 2013**