COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046697-01**

Henry A. Quarles	Employee
USF Red Star, Inc.	Employer
Insurance Company State of PA	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Fabricant)

APPEARANCES
Salvatore J. Perra, Esq., for the employee
Mark J. Kelly, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee § 34 temporary total incapacity benefits followed by § 34A permanent and total incapacity benefits. The insurer argues, among other things, that there was no medical evidence to support the award during the so-called "gap" period between the commencement of the claim (the date of a compensable causally related surgery) and the impartial medical examination. Because we conclude that the case falls within our treatment of the "gap" issue first set out in Hernandez v. Crest Hood Foam Co., Inc., 13 Mass. Workers' Comp. Rep. 445 (1999), and followed by numerous cases, we disagree and affirm the decision.

The employee injured his lower back lifting while working as a diesel truck mechanic on March 30, 2001.[1] He treated conservatively, and continued to work. However, after consulting with a neurosurgeon, David A. Roth, M.D., he underwent a microdecompressive lumbar laminectomy on November 30, 2001, which aided in relieving his acute radiating leg symptoms. (Dec. 4.)

[1] There is a scrivener's error on page 4 of the decision - i.e., the date of injury listed as March 20, 2001. Throughout the remainder of decision, the administrative judge correctly identifies March 30, 2001, as the date of injury.

The insurer paid temporary total incapacity benefits without prejudice until unilaterally terminating same on August 8, 2002.[2] The employee then filed the present claim, and § 34 benefits were ordered following a § 10A conference. Both parties appealed to an evidentiary hearing. (Dec. 4-5.) The employee was permitted to join a claim for permanent and total incapacity benefits. The insurer raised, as issues in dispute, liability, extent of disability, causal relationship, and § 1(7A) pre-existing condition, and denied entitlement to benefits under §§ 13, 30 and 36. (Dec. 2.)

The employee underwent a § 11A impartial medical examination by Dr. Thomas Sciascia on April 3, 2003. Dr. Sciascia diagnosed spinal stenosis and Grade I spondylolythesis, made symptomatic by the March 30, 2001 work injury. The doctor also diagnosed left-sided radiculopathy causally connected to the work injury. Dr. Sciascia opined that the work injury constituted a major cause of the employee's disability and need for treatment, and that the employee was at a medical end result with a partial and permanent disability. The doctor limited the employee to sedentary or light duty work, but also opined that as a practical matter, he probably had no ability to work due to his pain. The judge adopted Dr. Sciascia's medical opinion. (Dec. 5-6.)

Based on that medical opinion, the employee's credible testimony, and the testimony of the employee's vocational expert, Carol Falcone, the judge found the employee totally incapacitated. The judge awarded § 34 benefits from November 29, 2001 until the April 3, 2003 impartial examination, and § 34A benefits thereafter. (Dec. 9-10.)

The insurer contends that the judge erred by awarding § 34 benefits for the period of disability in dispute prior to the impartial medical examination. We disagree.

[2] There is another scrivener's error on page 5 of the decision - i.e., the termination date is listed as August 8, 2003. The administrative judge identifies the correct termination date in the procedural history on page 2 of his decision.

Having adopted an impartial medical opinion, which supports the conclusion that an employee was totally incapacitated as of the date of the doctor's examination of the employee, a judge may reasonably draw the inference that the employee has been totally incapacitated from the commencement of his claim (the day before his lumbar surgery) until that examination. In the present case, the employee's testimony was that his leg and buttock pain dissipated somewhat after his surgery, but that the lower back pain became worse. (Tr. 55.) The employee then developed right leg numbness when he stood for more than fifteen minutes. (Dec. 6; Tr. 56.) The employee testified that these symptoms continued without improvement from the time of the surgery until the hearing, even though he underwent several courses of physical therapy. (Tr. 56-62.) The employee further testified that, while his pain changed post-surgery, it did not improve. (Tr. 105.) Such testimony, in combination with the impartial medical opinion that amply supported the judge's finding of total incapacity, gives rise to an inference of total incapacity for the pre-examination period.

In Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363 (2003), we reasoned:

> [W]e 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 . . . 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).
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> Furthermore, the employee testified that he had not worked since [the commencement of his claim] 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 [sic] to find the employee totally incapacitated. . . . There is no error in the award of benefits for the claimed period prior to the impartial examination.

Cugini, supra at 366. See also Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 98-99 (2004)(applying Cugini in harmless error context); Hernandez, supra at 449 (first exploration of appropriate use of impartial medical evidence to address pre-examination gap).

The present case is indistinguishable from Cugini. As such, we are unpersuaded by the insurer's argument that the award of benefits for the employee's pre-examination period of disability was unsupported by medical evidence.

We summarily affirm the decision with respect to all other issues argued by the insurer on appeal. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel fee of $1, 357.64.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **January 26, 2006**

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Bernard W. Fabricant
Administrative Law Judge