COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO(s): 015282-87 047433-01 031269-03 036937-06 002594-08**

James Caslin	Employee
NStar Electric and Gas Company	Employer
Liberty Mutual	Insurer
NStar Electric and Gas Company	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

The case was heard by Administrative Judge Bean.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Kevin Santos, Esq., for Liberty Mutual Insurance Company
John C. White, for the self-insurer at hearing
Richard L. Neumeier, for the self-insurer on appeal

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay the employee § 34A permanent and total incapacity benefits beginning on April 17, 2015, as well as §§ 13 and 30 benefits, including diagnostic tests, surgeries and psychiatric treatment for injuries of October 29, 2001, September 29, 2003, November 28, 2006, and February 1, 2008. The insurer (Liberty Mutual) also appeals the decision ordering it to pay for any outstanding weekly compensation, and reasonable and necessary[1] medical treatment related to a March 9, 1987, industrial injury, as well as an attorney's fee. We

[1] We note that there is no statutory support for the "reasonable and necessary" standard for medical treatment. Rather G.L. c. 152, § 30, provides that "the insurer shall furnish to an injured employee adequate and reasonable health care services and medicines, if needed, together with the expenses necessarily incidental to such services . . . ." See Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337 n. 1 (2008). Nonetheless, the "reasonable and necessary" language is widely used, and we leave those references in the decision where used by the parties or the judge.

affirm the decision with respect to the self-insurer's arguments. However, we vacate the decision against Liberty, except with respect to the establishment of liability.

The employee, who was sixty years old at the time of hearing, worked for the employer in various positions from 1983 to 2015. Between 1987 and 2008, he suffered five industrial injuries which are the subject of this dispute, the first four to his back, and the last to his right leg and ankle.[2] (Dec. 331.) At the time of the 1987 back injury, after which the employee was diagnosed with an L4-5 disc herniation, the employer was insured by Liberty Mutual. That insurer paid workers' compensation benefits for about twelve months, but did not accept liability for the injury. (Dec. 332.) The judge stated that his decision "will resolve that dispute." (Dec. 331.)

The employer was self-insured for the employee's four more recent injuries, and it accepted liability for all of them. Between 2001 and 2008, the employee was working as a gas distribution technician, which was heavy work requiring the use of jack hammers, picks and shovels. Following his 2001 injury, he was diagnosed with a herniated disc at L5-S1. After the 2001, 2003, and 2006 injuries to his back, the employee was out of work for periods of time, but eventually returned to his regular job, while still suffering from residual low back pain. Id. 333-334. His last injury occurred on February 1, 2008, when he caught his foot in a groove in a cobblestone roadway, causing him to fall and fracture his tibia. Following surgery, the employee remained in the hospital for almost two weeks, after which he was sent to rehabilitation for several weeks, and then to physical therapy. "Throughout this time he dealt with excruciating pain in his right leg and ankle," as well as low back pain. Id. at 334.

The employee returned to work in May or June 2008, in an administrative, part-time position, working in a lot of pain, until he had surgery in November 2008 to remove the internal fixation in his leg/ankle. After treatment, which included sympathetic nerve blocks, epidural steroid injections, a course in a pain clinic, and narcotic pain

[2] The employee also suffered a low back injury in 1986, for which he collected workers' compensation benefits. That injury is not at issue in this action. (Dec. 330.)

medications, he returned to the same part-time administrative job sometime in 2009, and continued to work until October 2010, at which time, he left work due to the pain. (Dec. 334-335.) In April 2011, he returned to a different sedentary job to avoid being fired. In addition to administrative tasks such as payroll record keeping, data entry and ordering stock and supplies, the employee was required to do a substantial amount of walking. Between 2009 and 2015, the employee received significant treatment for his foot and ankle problems, as well as for his low back pain which radiated down both legs. In addition, he received psychotherapy and tried psychiatric medications, which he discontinued because of the side effects. (Dec. 335.) The self-insurer paid § 34 or § 35 benefits from the date of the employee's 2008 injury until October 14, 2014, when it discontinued weekly benefits due to their alleged exhaustion. Rizzo, supra. By April 10, 2015, the employee's last day of work, he had used up all his sick time and his Family Medical Leave Act time. "He was depressed and in constant pain. He would cry at his desk as he tried to make it through another day." (Dec. 335.) On April 13, 2015, he was hospitalized for a suspected suicide attempt. (Dec. 335-336.)

The procedural history recounted by the judge in the decision indicates that all five claims against both the self-insurer and Liberty were before a different judge at conference. (Dec. 331.) However, the Board file reveals this was not the case; thus, we recite the history as reflected therein. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002) (judicial notice taken of Board file). In October 2015, the employee filed a claim for §§ 34A, 13 and 30 benefits against the self-insurer for the February 1, 2008, leg/ankle injury, requesting weekly benefits beginning on April 17, 2015. On February 3, 2016, following a § 10A conference on this single claim, a different administrative judge ordered the self-insurer to pay a closed period of § 34 benefits from October 11, 2015, to June 3, 2016, and ongoing § 35 benefits thereafter. The employee and the self-insurer appealed. The employee then moved to join claims for the four other dates of injury discussed above, which brought Liberty, the insurer on the 1987 claim,

into the litigation. All five claims then proceeded to hearing before the present administrative judge.

At hearing, the employee sought § 34A permanent and total incapacity benefits beginning on April 17, 2015, for a physical disability due to his lumbar and ankle/foot injuries, as well as for a psychological disability resulting from those injuries. The self-insurer denied liability for a psychological injury; raised disability and extent thereof; denied entitlement to permanent and total incapacity benefits; raised causal relationship, including § 1(7A); and, denied entitlement to payment of medical bills for a psychiatric injury. Liberty Mutual denied liability, disability, causal relationship, and entitlement to §§ 13, 30 and 36 benefits. Rizzo, supra. The hearing was held over three days in May and June 2017. (Dec. 331.)

Dr. David Morley, Jr., examined the employee pursuant to § 11A. The judge allowed additional medical evidence due to the complexity of the medical issues, and ultimately adopted the opinions of Dr. Justin Dorfman, (the employee's examining physician); Dr. Steven P. Abreu (the employee's primary care physician); and psychiatrist Dr. Mark O. Cutler. (Dec. 337-340, 342.) Based on the opinions of these three doctors, and the employee's credible testimony, the judge found the employee was totally and permanently incapacitated due to his industrial injuries of 1986,[3] 1987, 2001, 2003, 2006 and 2008, which have left the employee with the following diagnoses:

> a right ankle fracture, a complex intraarticular distal tibia and fibula fracture (Pilon fracture) s/p ORIF, avascular necrosis of the right ankle, complex regional pain syndrome in his right leg, a lumbar disc protrusion with radiculopathy, degenerative disc disease of the lumbar and thoracic spine, upper back pain, thoracic disc disease, right hip pain, right hip osteoarthritis/labral tears, chronic pain and chronic persistent somatic pain disorder, generalized anxiety disorder and severe major depressive disorder.

(Dec. 341-342.) The judge found "the employee suffers from constant, significant pain in his ankle, leg, hip and low back." (Dec. 336.) He has even asked that his right lower leg be amputated, in hopes that would reduce or eliminate his leg and foot pain. He

[3] Again, we point out that the 1986 industrial injury is not at issue in this case.

continues to suffer from depression and anxiety, has trouble sleeping, and has nightmares and invasive thoughts about suffering more injuries. He cannot concentrate and is in too much pain to work. Id.

The judge adopted Dr. Dorfman's opinion, in his reports of September 23, 2015, and March 16, 2016, that the industrial accident of February 1, 2008, "individually or in combination with his previous industrial accidents," was "a major cause" of the employee's disability and need for treatment of his "right leg complaints, right hip complaints, lower back and thoracic back complaints." (Dec. 338.) The judge also found that Dr. Dorfman causally related the employee's depression to the industrial injuries, opined that the employee had been totally disabled since April 12, 2015, and believed it was unforeseeable he would improve to the point he could work in any capacity. Id.

Dr. Abreu, in a report of November 23, 2015, which he supplemented with addenda of April 28, 2016, April 11, 2017, and June 28, 2017, (Ex. 18), causally related the employee's diagnoses "to the employee's several industrial injuries." (Dec. 338), and opined that the employee was totally incapacitated due to his chronic pain, depression and anxiety.

Finally, the judge adopted the psychiatric opinion of Dr. Cutler, who noted that the employee had a history of anxiety dating back to his childhood. He further noted the employee had been committed on April 13, 2015, the morning his wife came home from the hospital, (Dec. 340), and shortly after his last day at work, April 10, 2015.[4] (Dec. 335.) Dr. Cutler diagnosed chronic, persistent somatic pain disorder, generalized anxiety disorder and major depressive disorder, and believed the employee was totally and permanently disabled. (Dec. 340.)

[4] The judge recounted a series of events beginning on April 13, 2015, in which the employee's wife was hospitalized with severe asthma. After caring for her in the hospital for a couple of nights, the employee returned home and took medication to help him sleep. When his wife came home that night, she called 911, and he was taken to the hospital where a suicide attempt was suspected. He was hospitalized for three days, and did not return to work after that. There was some evidence suggesting that a non-work related personal event occurred at that time, but the judge credited the testimony of the employee and his wife that no such event occurred. (Dec. 335-336, 342.)

The judge ordered the self-insurer to pay § 34A benefits from April 17, 2015, and continuing, as well as reasonable and necessary medical treatment related to the 2001, 2003, 2006 and 2008 industrial injuries, including diagnostic tests, surgeries and psychiatric treatment. The judge also ordered Liberty Mutual to pay for "any outstanding weekly compensation benefits and reasonable and necessary medical treatment related to the March 9, 1987 industrial injury." (Dec. 342.)

Both the self-insurer and Liberty Mutual appeal.

The self-insurer first argues that the adopted medical evidence fails to satisfy the predominant contributing cause standard applicable in mental and emotional disability cases. The self-insurer misstates the applicable causation standard. In a case where a physical injury results in a mental or emotional disability, as here, the standard is one of simple causation. Cornetta's Case, 68 Mass. App. Ct. 107, 117-118 (2007)(predominant contributing cause standard of third sentence of § 1(7A) "applies only to emotional or mental disabilities directly triggered by work-related incidents that involve no physical trauma"). Here, the adopted medical evidence clearly supports a finding that the employee's depression and anxiety are causally related, to some extent, to his work injuries. (Dec. 338, 340.) Dr. Dorfman opined that the "employee has been unable to sleep and developed depression as a result of his chronic pain," which resulted from his work injuries. (Ex. 13.) Similarly, Dr. Abreu stated that the employee's "chronic pain as a result of these [work] injuries have [sic] lead him to experiencing serious depression and anxiety." (Ex. 18.) Dr. Cutler actually opined that "the episode of 2008" is "the predominant cause" of the employee's "current psychiatric disability,"[5] (Ex. 14), a higher

[5] The judge adopted Dr. Cutler's opinion, without limitation, but did not specifically mention his causal relationship opinion. See Lisby v. EDM Construction, Inc., 32 Mass. Workers' Comp. Rep. ___, n. 4 (October 12, 2018), citing Schwartz v. Partners Healthcare, 116 Mass. Workers' Comp. Rep. 310, 313 (2002)(where adopted medical opinion evidence satisfies causation criterion, judge's failure to specifically cite to it is harmless).

standard than is necessary in this physical/mental claim. Accordingly, the adopted medical evidence clearly supports the applicable simple, "but for" causation standard. [6]

The self-insurer also argues that the adopted medical evidence is insufficient to support a finding that the industrial accidents between 1986 and 2008 caused the employee to become totally disabled in April 2015, seven years after the last date of injury, particularly where he was able to work light duty after 2011, and where he was hospitalized for an overdose, at his wife's instigation, immediately before going out of work in 2015. However, the adopted medical evidence clearly supports the conclusion that the employee's physical and mental conditions deteriorated in the period between February 1, 2008, and April 17, 2015, as a result of his work injuries. Dr. Dorfman catalogued the employee's worsening right leg, hip, thoracic and lumbar pain, as well as his increasing depression, following the February 1, 2008, accident, and opined that, "[a]s a result of [his] work injuries, he has been totally disabled since April 12, 2015." (Ex. 13, March 16, 2016 report of Dr. Dorfman.) Dr. Abreu also totally disabled the employee from performing the duties of his administrative job "since April 12, 2015**,"** opining, "his work injures are the major cause of his continuing pain and disability related to his back, hip and ankle," and "that his chronic pain as a result of these injuries have lead to him experiencing serious depression and anxiety." (Ex. 18, November 23, 2015, report of Dr. Abreu.) On May 15, 2017, Dr. Cutler opined that the employee has not improved since he saw him in January 2016, and that, although he was not at that time receiving psychiatric treatment, he was "totally and permanently disabled from any work for which he is reasonably trained," due to his "ongoing psychiatric symptoms and continuing somatic pain disorder," "secondary to the 2/1/08 accident." (Ex. 14, May 5, 2017 report of Dr. Cutler.) With respect to the employee's hospitalization soon after he left work, Dr.

[6] We note that, although the self-insurer listed § 1(7A) on its hearing memorandum, it does not argue on appeal that the employee had a pre-existing physical or psychological condition which combined with his work injury to cause or prolong his disability, thus bringing the "a major cause" standard of the fourth sentence of § 1(7A) into play.

Cutler opined that "[t]he event of 2015 was resolved during his hospitalization and has not contributed to his current psychiatric disability." Id. (See Dec. 340).

The self-insurer's position that there must have been a work event between April 2011 and April 2015 to cause the employee to become unable to work in 2015, (Self-insurer br. 11), has no merit. As long as the employee has suffered a personal injury, the fact that incapacity is delayed does not affect his right to compensation. See, e.g., Cornetta's Case, supra (employee who suffered physical injury on May 22, 1997, and worked off and on for a period of time while receiving § 35 benefits by hearing decision, was awarded § 34A benefits for consequential emotional and mental disability, beginning in February 2000, with no new incident or aggravation after 1997 injury). See also Nason, Koziol & Wall, Workers' Compensation, § 9.11 (3d ed. 2003)(the date of a specific "injury is the time of the occurrence, even if incapacity or death is significantly delayed"). Cf. G.L. c. 152, § 35C (addressing applicable benefits where there is a difference of five years or more between the date of injury and the date of eligibility for benefits).

Finally, the self-insurer contends that the judge made insufficient findings to determine which of the claimed dates of injury caused the employee to become totally disabled on April 15, 2015. The judge found the employee permanently and totally disabled due to his "industrial injuries of 1986, 1987, 2001, 2003, 2006 and 2008." (Dec. 341.)

This case is essentially a successive insurer case involving Liberty Mutual, which the judge found liable for the 1987 injury, and the self-insurer, which was liable for the 2001, 2003, 2006 and 2008 injuries. The judge found that all of the employee's work injuries, beginning in 1986, contributed to his physical and mental disability. As the court held in Sliski's Case, 424 Mass. 126 (1997),

> The Massachusetts policy of nonapportionment is long and well established. Known as the "successive insurer rule," this policy dictates that
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> > "Where incapacity results from the combined effect of several distinct personal injuries, received during the successive periods of coverage of

> different insurers, the result is not an apportionment of responsibility . . . . Where [this occurs], the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity."
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> Evans's Case, 299 Mass. 435, 436-437 (1938). Subsequent cases have not deviated from this position and it is now "settled that on a series of injuries contributing to an existing condition of disability the insurer covering the risk at the time of the last injury is responsible for all disability payments." Carrier v. Shelby Mut. Ins. Co., 370 Mass. 674, 675 (1976).

Id. at 131. Thus, the insurer on the risk at the time of the last injury causally related to the employee's incapacity—here, the self-insurer-- is liable to pay the claimed disability benefits, even though the employee's disability is causally related to all his injuries. There was no error in the judge's order against the self-insurer.

Liberty Mutual also appeals, arguing that the judge exceeded his authority by ordering it to pay "any outstanding weekly compensation benefits and reasonable and necessary medical treatment related to the March 9, 1987 industrial injury," as well as an attorney's fee.[7] (Dec. 342.)

The judge noted early in his decision that he would resolve the liability dispute with Liberty, (Dec. 330-331), and ultimately found Liberty "liable for any outstanding obligations, if any, relating to" the 1987 injury. (Dec. 342.) Liberty does not challenge the finding of liability. However, as Liberty points out, the only claim for weekly benefits against both the self-insurer and Liberty was for the period beginning April 17, 2015, for which the judge found the self-insurer liable. Because there were no other weekly indemnity benefits at issue, the judge expanded the parameters of the dispute by ordering that Liberty pay "any outstanding weekly compensation benefits." See MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007)(where judge awarded benefits for six-month period prior to date claim began, judge erred in making findings on issue not before him). We therefore vacate the order that Liberty pay any outstanding weekly compensation benefits.

[7] The judge also ordered the self-insurer to pay an attorney's fee. (Dec. 343.)

Liberty also challenges the order that it pay "reasonable and necessary medical treatment related to the March 9, 1987 industrial injury." (Dec. 342.) Liberty points out that the employee did not claim medical benefits or expenses against Liberty at hearing, and that there was no evidence submitted of any medical expenses or bills related to the 1987 industrial accident. We have found nothing in the Board file or in the evidence to contradict Liberty's contention. While a finding of liability, as was made here, may certainly trigger an order of payment for §§ 13 and 30 medical benefits, such benefits must be properly claimed. Merely checking off the box for "medical expenses" on the Employee's Claim Form 110, Rizzo, supra, without claiming any generic or specific medical benefits at hearing, is insufficient to put §§ 13 and 30 benefits at issue at hearing. Accordingly, we vacate the order of §§ 13 and 30 benefits against Liberty.

Because we vacate the order for weekly and medical benefits against Liberty, the employee has not "prevailed" within the meaning of G.L. c. 152, § 13A(5).[8] Therefore, as Liberty requests, we must also vacate the attorney's fee award against it. Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996)(establishment of liability without award of compensation means employee did not prevail and is not entitled to an attorney's fee). Even if the judge had properly issued a generic award for §§ 13 and 30 medical benefits, it would not support an attorney's fee award where, as here, it is unaccompanied by an order of weekly compensation benefits or an order to pay *specific* medical bills in dispute. Murphy v. American Steel & Aluminum Corp., 23 Mass. Workers' Comp. Rep. 225, 228 (2009), citing Paygai v. Wrentham State School, 10 Mass. Workers' comp. Rep. 685, 686 (1996).

Accordingly, we affirm the judge's award against the self-insurer. We also affirm the determination of liability against Liberty Mutual, but vacate the award of weekly and medical benefits, as well as the attorney's fee award, against it.

[8] General Laws c. 152, § 13A(5), provides, in relevant part: "Whenever an insurer . . . contests a claim for benefits and . . . (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . . ."

Pursuant to § 13A(6), the self-insurer shall pay a fee to the employee's attorney in the amount of $1,680.52. So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

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