COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 35599-88**

Justyn Glowinkowski Employee
KLP Genlyte Employer
National Union Fire Insurance Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy & Carroll[1])

APPEARANCES

Richard H. Schwartz, Esq., for the employee
Susan Kendall, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision awarding the employee weekly benefits under §§ 34 and 34A on his claim for further compensation, following exhaustion of partial incapacity benefits. The employee had received § 35 benefits pursuant to a prior hearing decision, as opposed to a conference order or agreement.

Therefore, he was required to demonstrate a worsening of his work-related medical condition,[2] or a deterioration in his vocational status,[3] to perfect his claim for §§ 34 and 34A benefits.[4]

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[1] Judge Carroll recused herself from deciding this case.

[2] See Foley's Case, 358 Mass. 230 (1970).

[3]See Buonnano v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91 (2003); Dawson v. New England Patriots, 9 Mass. Workers' Comp. Rep. 675 (1995).

The insurer contends the evidence does not support the judge's finding that the employee's condition worsened following the payment of § 35 benefits. Because the employee failed to offer evidence proving that his medical and/or vocational condition had worsened, we conclude the award of total incapacity benefits was contrary to law. We therefore reverse the decision, with a reservation of rights for the employee to claim further compensation under G. L. c. 152, § 16.[5]

The employee sustained work-related back injuries in September 1987, and on June 1, 1988, at which time he began receiving workers' compensation benefits. (Dec. 5-6.) Pursuant to a December 8, 1992 hearing decision, the employee received § 35 partial incapacity benefits, which were paid to exhaustion as of December 16, 2001. Thereafter, the employee claimed further compensation under § 34; the claim was denied at conference. The employee appealed to a full evidentiary hearing, where his claim for permanent and total incapacity benefits was joined. (Dec. 3.)

The employee underwent a § 11A medical examination by Dr. James Hewson on April 23, 2002. The judge *sua sponte* allowed additional medical evidence for the disputed period of incapacity prior to the § 11A examination. (Dec. 4.) Dr. Hewson opined the employee had lumbar disc protrusions at L4-5 and L5-S1 with pre-existing osteoarthritic changes, which had been exacerbated by the work injuries.

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[4] Cf. Hovey v. Shaw Indus., 16 Mass. Workers' Comp. Rep. 136 (2002)(*no "worsening" required where employee was receiving § 35 benefits under an Agreement to Pay Compensation*); Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660 (1996)(no "worsening" required following payment of § 35 benefits from an unappealed conference order).

[5] General Laws c. 152, § 16 provides, in pertinent part:

> When in any case before the department it appears that compensation has been paid or when in any case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by a member or the reviewing board discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res adjudicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injury for which he received compensation . . . .

The judge credited the employee's pain complaints, and adopted the opinion of Dr. Hewson that the employee's osteoarthritis, initially aggravated by his work injuries, was a progressive condition. On this basis, the judge concluded the employee had met his burden of proving that his medical condition had worsened between the prior hearing decision award of § 35 benefits and Dr. Hewson's § 11A examination. The judge therefore ordered the insurer to pay the employee the remainder of his available § 34 benefits, and ongoing permanent and total incapacity benefits thereafter. (Dec. 10.)

In actuality, Dr. Hewson opined there had been no increase in the employee's medical impairment. (Dec. 6; Dep. 21.) Dr. Hewson did state that osteoarthritis "usually" was a progressive condition that most likely would result in increasingly more severe symptoms "over the foreseeable future." (Dep. 25-26.) The judge based his finding of a worsening upon this testimony.[6] In fact, Dr. Hewson testified there had not been any such worsening:

> Q: Would it be fair to state that the symptoms that he related to you have been fairly consistent since 1994-1995, based on your review of the medical records?
>
> A: Yes. I believe that - I don't record that there was any increased impairment. But, there seems to be impairment certainly all that time that you -
>
> Q: But, no increase in impairment to any significant degree that you can see, is that correct?
>
> A: I'd say that it is rather consistent all that time.
>
> ....
>
> Q:[A]s of the time that you saw him, you felt his condition had been fairly static with respect to his complaints and his work capacity since 1994, is that correct?
>
> A: From what I can get from the records, it had been relatively the same.

(Dep. 21, 26-27).

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[6] "From this I infer that, even though Dr. Hewson could not be specific as to the degree of worsening since 1994, there has been a worsening." (Dec. 7.)

In accordance with the rule of law set out in Foley's Case, supra, we reverse the decision, and vacate the award of § 34 and § 34A benefits. The employee may file a claim for further weekly compensation benefits from the date of the close of the evidence, December 14, 2002. (Tr. 1, 104.) See Dunphy v. Shaw's Supermarkets, 9 Mass. Workers' Comp. Rep. 473, 475-476 (1995); G. L. c. 152, § 16.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: August 17, 2004