COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057726-92**

Linda M. Doucette	Employee
TAD Technical Institute	Employer
ACE Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

APPEARANCES

Kevin T. Daly, Esq., for the employee
G. Brian Shontz, Esq., for the insurer at hearing
Alicia M. DelSignore, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits. The insurer argues the judge erred on three counts: failing to address its defense under § 1(7A); finding the employee's condition had worsened since a prior adjudication of only partial incapacity; and choosing a date for the onset of permanent and total incapacity which is unsupported by the evidence. Finding no reversible error, we affirm the decision.

Linda Doucette, a financial aid administrator, injured her neck at work on October 27, 1992, while reaching overhead to file a document. The insurer paid her a closed period of § 34 total incapacity benefits, and then § 35 partial incapacity benefits until statutory exhaustion on April 1, 1998. [1] She filed a claim for § 34A benefits based on her physical disability, but at the § 10A conference, she was permitted to join a claim based on alleged psychiatric disability. The judge denied both claims, and the employee appealed. (Dec. 3-4.)

[1] Two prior hearing decisions addressed the employee's entitlement to compensation benefits. The first decision, by a different administrative judge, denied the insurer's complaint to discontinue § 35 benefits; the second decision, filed on November 13, 1997, denied the employee's claim for resumption of § 34 benefits, and ordered the insurer to continue paying § 35 benefits. (Dec. 5-6.) Neither party appealed that second decision. (Dec. 5.)

Prior to the hearing on her § 34A claim, the employee was examined by Dr. Leonard Popowitz pursuant to § 11A. The examination took place on August 12, 2002, almost ten years after the employee's work injury. Dr. Popowitz reported the employee complained of all-day shoulder pain and spasm in the right shoulder and low back. She also complained of discomfort when lying down or sitting, and claimed she required two canes to walk. She was on a number of medications, including Oxycontin, Oxycodone and Oxy-IR for "breakthrough" pain. In addition, she reported taking Prozac, Valium, Flexeril and Pamelor. Dr. Popowitz noted that the employee's x-rays showed some cervical and lumbar disc disease. (Dec. 7-8; Stat. Ex. 1.) "The lumbar disc disease has progressed over the years, with more recent MRI showing some spondylolisthesis." (Stat. Ex. 1.) Dr. Popowitz "opined 'to a certain degree of medical certainty' that he did not feel that the Employee's neck and back pathology are related to her 1992 work injury." (Dec. 8.) Though he opined the employee was totally disabled due to her pain pattern and "physiological [sic] status, which is apparently being treated by a psychiatrist," (Dec. 8; Stat. Ex. 1), the impartial physician made no objective orthopedic findings which would explain the employee's absence from work for the prior eleven [sic] years. (Dec. 7-9.)

Citing medical complexity, the employee filed a motion to submit additional medical evidence, which the judge allowed. The employee submitted reports and records from three of her treating physicians, Drs. David J. Nagel, Walter G. England and David Krueger-Andes. The insurer submitted a report from its psychiatric expert, Dr. Robert M. Weiner, who opined the employee's 1992 work injury was not the cause of her current psychiatric condition. (Dec. 16.) The insurer also submitted a note from Dr. Nagel dated May 27, 1996 indicating the employee was permanently and totally disabled at that time. (Dec. 16.) Because the judge adopted, in part, the opinions of the employee's three treating physicians, and not those of the impartial medical examiner or the insurer's psychiatric expert, we set forth in some detail the pertinent opinions of the employee's medical experts.

Dr. Nagel, a specialist in physical medicine, had treated the employee since 1995 for chronic neck and low back pain secondary to the 1992 work injury. He opined that as a result of the injury, she developed multi-regional myofascial pain syndrome, also known as fibromyalgia, as well as radicular nerve root pain. He specifically disagreed with Dr. Popowitz's opinion that the employee's symptoms were not causally related to her work injury. In his report of September 28, 1998, Dr. Nagel wrote:

> I follow Mrs. Doucette for chronic cervical and lumbar pain syndrome. She is totally and permanently disabled because of these entities. She has already been through extensive rehabilitation including vocational rehabilitation to address these issues, and she *remains* totally and permanently disabled.

(Dec. 12; Employee Ex. 6; emphasis added.) In September 2001, Dr. Nagel opined that the employee had been totally disabled for many years, that her symptoms had deteriorated since 1998, and that she was permanently and totally disabled. (Dec. 12-13; Employee Ex. 6.) [2]

Dr. England, a pain management specialist who treats the employee, opined on June 1, 2004, "with a high degree of medical certainty," that the employee is permanently and totally disabled as a result of her work injury. He further opined that she suffers from both soft tissue (neuromuscular) and articular (joint) progressive disorders. He felt she would benefit from an inpatient pain management admission, but would require continued outpatient pain management to maintain any gains she makes. (Dec. 10-11; Employee Ex. 2).

Dr. Krueger-Andes, the employee's treating psychologist, diagnosed the employee with a depressive disorder. He opined that she had been "a very active and independent woman who is quite frustrated and depressed by her physical limitations and her chronic pain. . . . He further opined that the Employee's suffering is increased by her depression and her sleep problems." (Dec. 14-15.)

The judge credited the employee's testimony that she experiences severe and constant headaches, feelings of depression and thoughts of suicide, and constant neck and shoulder pain that worsened sometime in 1997. (Dec. 16.) He adopted, in part, the medical opinions of all three of the employee's treating physicians, and found the employee's disabilities, both physical and psychiatric, causally related to her 1992 industrial injury. He also found that her condition began to worsen in 1997 and that she has been

[2] In an earlier report dated June 3, 1997, Dr. Nagel noted that he was treating the employee for chronic cervicogenic pain; that her neck injury results in muscle spasm also referred to as myofascial pain; that she had radicular nerve root pain caused by that problem; and that her problem was "permanent." (Employee Ex. 6.) In an even earlier disability note dated May 27, 1996, offered into evidence by the insurer, (Dec. 2, 10), Dr. Nagel opined the employee was then "totally and permanently disabled." (Ins. Ex. 2.)

permanently and totally incapacitated since April 1, 1998. (Dec. 16-18.) We turn to the insurer's appeal.

The Insurer's § 1(7A) Defense

We first address the insurer's argument that the case must be recommitted for the judge to address § 1(7A). [3] Plainly the judge listed the affirmative defense of § 1(7A) as an issue raised by the insurer, (Dec. 3), and there is no question that his decision is devoid of any analysis and findings pertinent to that issue. However, it is well-established that an insurer must not only raise § 1(7A) but also produce medical evidence that the employee had a non-compensable , *pre-existing* condition , in order to trigger the application of the heightened causation standard to the employee's claim. Johnson v. Center for Human Development, 20 Mass. Workers' Comp. Rep. 351, 353 (2006), citing Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000)(as threshold matter, insurer must produce evidence of pre-existing medical condition). This the insurer has failed to do.

The insurer points to Dr. Popowitz's August 12, 2002 impartial medical report to support its contention that there was "overwhelming evidence of degenerative lumbar and cervical problems, as well as spondylolisthesis." (Ins. br. 5.) The flaw in that argument is twofold. First, although Dr. Popowitz noted the employee has cervical and lumbar disease which he opined was unrelated to her 1992 work injury, the judge did not adopt his opinion. Second, Dr. Popowitz never stated those conditions *pre-existed* the employee's 1992 accident, though he did acknowledge that evidence of lumbar

[3] General Laws c. 152, § 1(7A), provides, in pertinent part:

If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

spondylolisthesis appeared for the first time on a recent (2002) MRI. [4] (Stat. Ex. 1.) Thus, the insurer did not meet its threshold burden of producing evidence the employee had a pre-existing condition to trigger further analysis under § 1(7A). See Mastrogiacomo v. Eastware, Inc., 20 Mass. Workers' Comp. Rep. 290, 292 (2006)(§ 1(7A) not applicable where insurer adduced no evidence employee's irritable bowel syndrome pre-existed the development of work-related carbon monoxide poisoning). As the judge found, both Dr. Nagel and Dr. England causally related the employee's disability to her work injury. (Dec. 11-14.) Therefore, the employee met her burden of proving simple causation. [5]

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[4] The insurer has directed us to no other medical opinion which supports its contention that the employee's cervical and lumbar degenerative disc disease and spondylolisthesis pre-existed her 1992 work injury. To the contrary, Dr. England's June 1, 2004 report states that "prior to the injury," the employee "possessed no predisposition or risk factors contributing to her disability." (Employee Ex. 2.) In a May 17, 2001 report, (Employee Ex. 6), almost nine years after the employee's industrial injury, and again in a May 27, 2004 report, (Employee Ex. 8), Dr. Nagel acknowledged that "an MRI scan showed significant progression of the Employee's cervical disc disease." However, in neither instance did Dr. Nagel give any indication the employee's disc disease pre-dated her 1992 work injury. On August 8, 2001, the doctor wrote:

I follow Linda Doucette for chronic cervical and lumbar discogenic pain syndromes initiated with a work injury several years ago. She has had progressive change in her lumbar disc and *now* has a degenerative spondylolisthesis, which is certainly rare, but certainly one of the parts of the degenerative cascade that occur after disc injury. Because of this problem she does have persistent back and leg pain.

(Employee Ex. 6; emphasis added.)

[5] To the extent Dr. Popowitz's opinion posits that the employee's cervical and lumbar degenerative disc disease developed subsequent to, and independent of, her 1992 work injury, the analysis required is clear: "In cases where a work injury is *followed* by a noncompensable disease process, the incapacity determination must be conducted by considering the effects of the work related injury *only*, and not the effect of the combination of the conditions," unless "the employee's inability to work is caused by two conditions which cannot be separated [in which case] compensation may be awarded for

While it is the responsibility of the administrative judge, in the face of a § 1(7A) defense, to conduct the necessary analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), the judge's failure to do so here is not, as the insurer contends, reversible error, given the insurer's utter failure to carry its burden of demonstrating the employee suffered from a noncompensable degenerative condition which pre-existed her industrial injury. Therefore, on this record, the employee was properly taken "as is," and she was not required to prove her work injury remained "a major cause" of her permanent and total disa

The Requirement of Worsening

The insurer next argues the judge erred by awarding § 34A benefits because the employee failed to show a worsening of her condition after the 1997 hearing decision in which the judge found her to be only partially incapacitated. See Foley's Case, 358 Mass. 230 (1970)(where there had been no deterioration in employee's condition not due to advancing age since prior hearing decision awarding § 35 benefits, board erred in awarding § 34A benefits). The insurer asserts that because Dr. Nagel had opined on August 21, 1996 that the employee was permanently and totally disabled, (Ins. Ex. 2), and the judge rejected that opinion in his 1997 decision, he acted arbitrarily and capriciously in relying on Dr. Nagel's later opinion of permanent and total disability to presently find the employee eligible for § 34A benefits. We disagree.

The reports of Dr. Nagel in evidence at the prior hearing spanned the period from May 1996 through January 27, 1997. (Ins. br. 2.) The doctor's multiple reports in evidence at the § 34A hearing covered the period from January 27, 1997 through May 27, 2004. (Employee Exs. 6, 7 and 8.) Even if Doctor Nagel's disability opinion was the same in

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the combined result . . . ." Nason, Koziol and Wall, Workers' Compensation, § 9.7 (3rd ed. 2003)(emphasis in original). Here, because the doctors whose opinions the judge adopted causally relate the development of the employee's degenerative condition to her injury, and because we cannot separate this condition from the initial injury itself, this is not a case which must be analyzed as above. Compare Gallant's Case, 329 Mass. 607 (1953)(where medical testimony was that employee was prevented from doing heavy work both by work-related hernia and by unrelated heart condition, employee was awarded benefits for combined effects of two conditions)

1996 as it was in later years, it is clear from his reports that the employee's physical condition did worsen. On May 2, 2000, Dr. Nagel noted the employee had developed fibromyalgia and her functional level was gradually declining to the point she was basically housebound. (Dec. 12, citing Employee Ex. 6.) On September 10, 2001, Dr. Nagel reported the employee's symptoms had increased over time, and have "deteriorated since 1998." (Dec. 13, citing Employee Ex. 6.) On May 27, 2004, the doctor reported the employee "has been on a progessively escalating dosage of pain medications for pain control." (Dec. 13-14, citing Employee Ex. 8.) Finally, the employee, whom the judge found credible, testified that since 1997, her constant neck and shoulder pain as well as her depression had gotten worse. (Dec. 16-17; Tr. I, 15-17.)

This evidence provided ample support for the judge's finding the employee was entitled to § 34A benefits due to a worsening of her condition. See Richardson v. Department of Employment and Training, 21 Mass. Workers' Comp. Rep. 185 (2007)(reviewing board affirmed judge's finding employee's condition had worsened since prior hearing decision awarding § 35 benefits where judge credited employee's testimony regarding increase in symptomatology as well as doctor's increased restrictions); Cash v. Metropolitan District Comm'n, 21 Mass. Workers' Comp. Rep. 157 (2007)(reviewing board affirmed judge's finding employee's condition had worsened since previous hearing award of § 35 benefits, even though doctor testified employee's condition about the same, where doctor also increased the employee's lifting restrictions). We therefore affirm the judge's award of § 34A benefits.

The Effective Date of the § 34A Award

Lastly, the insurer challenges the judge's award of permanent and total incapacity benefits as of April 1, 1998. It contends that date's only significance is it coincides with the exhaustion of the employee's § 35 statutory entitlement. [6] It is true that "as a general principle, factual findings as to when incapacity, be it total or partial, temporary or permanent, begins or ends must be grounded in the evidence found credible by the judge." MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 36-37, citing Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 196

[6] In Svonkin v. Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 138-139 (2006), we held that the judge erred by using the date of § 34 benefit exhaustion, which was several weeks after the hearing decision was filed, to modify the employee's incapacity benefits to partial, based on the impartial physician's opinion offered over a year earlier.

(2005). It is likewise true that the date chosen by the judge to modify benefits should be based on some change in the employee's medical or vocational condition. Id. However, it is not always possible to determine with absolute precision when incapacity begins or ends or changes. Here, the medical evidence did not pinpoint an exact date on which the employee became permanently and totally incapacitated, but Dr. Nagel's report of September 8, 1997 is noteworthy:

> Linda returns in follow-up. She feels like everything is getting worse. Her low back pain is still problematic and radiates into both hips. Her right neck, shoulder and cervicogenic headache pain continues to be quite problematic. . . . I am not sure how to stem the tide of her increasing pain. Some of it is the inevitable spread of her fibromylagia. . . . From my perspective she is totally and permanently disabled.

(Employee Ex. 7.) Inasmuch as the judge credited the employee's testimony that her pain and symptomatology "had gotten worse since sometime in 1997," (Dec. 16), and given that an employee need not exhaust § 34 or § 35 benefits prior to proving entitlement to § 34A benefits, Slater's Case, 55 Mass. App. Ct. 326 (2002), we think

the judge could have used September 8, 1997 as the effective date of the § 34A award, but for one fact. The employee did not claim entitlement to permanent and total incapacity benefits prior to April 1, 1998, and it would have been error for the judge to award benefits not claimed. See Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31 (2006).

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,458.01.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 20, 2008**