COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040132-05**

Marilyn Bland	Employee
MCI Framingham	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Robert Noa, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Vincent F. Massey, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision denying her claim for § 35 partial incapacity benefits.[1] (Dec. III.) After review, we affirm the decision of the administrative judge.

Because this case has been before the board previously, we summarize the history and only those facts salient to the current claim. There was an accepted December 5, 2005, workplace injury to the employee's right ankle. Initially, a closed period of § 35 partial incapacity benefits was awarded. (Dec. I.) The employee returned to full duty work, but on May 29, 2009, she left her job and later succeeded on a claim for § 36 benefits, subject to recoupment of an overpayment of benefits. (Dec.

[1] This is the third time this case has been to a hearing, resulting each time in an appeal to the reviewing board. The first decision was issued by a different administrative judge on December 28, 2007, hereinafter referred to as Dec. I. See Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 283 (2009). The second decision filed on April 20, 2010, was issued by the same administrative judge who presided over the present hearing, hereinafter referred to as Dec. II. Bland v. MCI Framingham, 25 Mass. Workers' Comp. Rep. 429 (2011), *appeal docketed*, No. 11-P-665 (Mass. App. Ct. Apr. 15, 2011). The judge issued the present decision on August 8, 2011, hereinafter referred to as Dec. III.

II.) Subsequently, the employee filed the present claim seeking further partial incapacity benefits under § 35 benefits for alleged injuries to her left ankle, left hip, left knee and low back caused by the "additional pressure on the left leg due to right ankle injury." (Dec. III, 3, 6.)

The self-insurer opposed the employee's claim, which was denied at conference; and the employee appealed to a hearing de novo. (Dec. III, 3.) The employee then was examined by the § 11A impartial physician, Dr. David W. Lhowe.[2] (Dec. III, 7.) Dr. Lhowe opined the employee did not have any medical disability as a result of the 2005 injury to her right ankle. He further opined the employee was at an end medical result, but "took no history from the employee of the left leg claims and offered no opinion in this regard." (Dec. III, 7.)

Although the administrative judge ultimately adopted Dr. Lhowe's opinion regarding the employee's right ankle disability, he allowed the parties to submit medical evidence to address the claim as it applied to the employee's left leg. (Dec. III, 7.) The employee submitted, among other items, the deposition of Dr. Errol Mortimer. Likewise, the self-insurer submitted medical evidence, including the deposition of Dr. John F. McConville. (Dec. III, 2.) The judge adopted portions of Dr. McConville's medical opinion and determined that there was no causal relationship between the employee's alleged "left-sided" injuries and the accepted 2005 right ankle work injury. (Dec. III, 7.) The judge also noted that in his prior decision, (Dec. II), "I found that the low back condition is not causally related to the ankle fracture," and that the low back issue "had been adjudicated." (Dec. III, 6.) Accordingly, the judge denied and dismissed the employee's claim. (Dec. III, 8.)

On appeal, the employee contends the administrative judge erred in ruling that his prior decision dismissing the employee's claim for loss of function of the low back precludes the employee from seeking compensation based in part on disability related to her low back. Additionally, the employee maintains the administrative judge erred in

[2] Dr. Lhowe also served as the § 11A impartial physician in the two prior proceedings. (Dec. III, 7.)

crediting Dr. Lhowe's opinion regarding the disability of the right ankle because his opinion regarding permanent loss of function of the right ankle is contrary to the law of the case, which awarded the employee § 36 benefits for permanent loss of function of the right ankle. (Employee br., 1.) Both issues lack merit.

As to the first issue, the judge duly noted that in his prior decision, (Dec. II, 7-8), he found no causal relationship between the right ankle fracture and the low back condition.[3] (Dec. III, 6.) In appealing that decision, the employee did not challenge the judge's findings and conclusions pertaining to the low back condition; rather, she claimed the judge erred regarding the terms of the recoupment order and the payment of attorney's fees. (Employee br. filed 12/06/10); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). As the self-insurer argues in its brief, "[t]he Employee's claim regarding her low back injury was previously determined to be unrelated to this [December 5, 2005,] date of injury. Nothing new was offered." (Self-ins. br., 6; emphasis added).[4] The judge did not err in denying the claim regarding the low back condition. Angelo's Case, 81 Mass. App. Ct.

[3] The employee had returned to full duty at some point following a July 2006 surgery, but opted for early retirement after May 29, 2009, allegedly due to her physical inability to perform the duties required by her prison guard position. (Dec. III, 6; Tr. 9-10, 13, 14, 21, 28, 56-57.)

[4] We note the employee's brief is sparse, if not silent, as to what new medical evidence was provided to the judge to support her claim. The only medical evidence that appears to bear dates after the judge issued his decision finding no causal relationship between the back condition and the accepted right ankle fracture, (Dec. II), were a report of Dr. Moo K. Kim dated December 17, 2010, and a medical report and the deposition testimony of Dr. Errol Mortimer. (Dec. III, 2-3.) Dr. Kim's 2010 report references an evaluation of the employee, but fails to specify a date on which that evaluation occurred. He mentions that he treated the employee for several months in 2006 and 2007, and his records from those dates document the employee suffered from low back pain then. (Dec. III, Ex. 10.) Dr. Mortimer's report, dated November 5, 2009, was also entered in evidence. (Dec. III, Ex. 10; Dr. Mortimer Dep. Ex. 2.) In that report, Dr. Mortimer stated that "[h]er back pain is intermittent . . . [i]t has not changed significantly since her last evaluation [in March 2008]." (Ex. 10, Rep. of Dr. Mortimer, dated 11/5/09, 1.) Later in that same report, Dr. Mortimer states: "[s]he [the employee] has not noticed significant change in her symptoms for greater than 2 years." Id. at 2. During his deposition, the doctor acknowledged to self-insurer's counsel that the history provided to him by the employee may have been different from what was provided by the employee at hearing. (Dr. Mortimer Dep., 19, 20, 23-25, 27, 28.)

1142 (2012)(Memorandum and Order Pursuant to Rule 1:28); Hough v. Athol Table LLC, 25 Mass. Workers' Comp. Rep. 301, 305 (2011); Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. 153, 156 (2011).

The employee also contends the judge erred in crediting the impartial examiner's opinion regarding her right ankle disability, because the doctor's loss of function opinion was contrary to the law of the case. Loss of function and incapacity are two separate and distinct matters. See Blanchette v. Town of Marblehead, 25 Mass. Workers' Comp. Rep. 347, 348-349 (2011)(findings on the issue of incapacity do not address the issue of loss of function). As such, the fact that there was a prior § 36 award does not necessarily mandate a finding of incapacity. In his prior decision, the judge credited the medical opinion of Dr. John F. McConville that the employee had "a 9% permanent loss of function of her right ankle. . . ." (Dec. II, 7.) In regard to Dr. Lhowe's opinion, the judge then stated:

> I find that this opinion does not reflect whether the doctor has considered the degree [sic] permanent loss of function as defined by the AMA Guides to the Evaluation of Permanent Impairment. So I do not adopt it for that purpose. I do adopt his findings on examination and find that the ankle was normally aligned and ligamentously stable, without soft tissue swelling, that range of motion showed a minimal loss of active dorsiflexion; that palpitation revealed no bony tenderness with some rather diffuse tenderness over the anterolateral distal leg; that the foot was warm and well perfused; that neurologic examination showed intact sensation to light touch with minimal incisional hypesthisia; that motor strength showed no deficits and that the employee has reached an end result.

(Dec. II, 7.) Thus, even in the prior decision, the judge adopted Dr. Lhowe's medical opinion regarding his findings on his physical examination of the employee.

In the judge's present decision, he stated that the impartial examiner's opinion did not change with regard to the right ankle. "Dr. Lhowe was of the opinion, similar to his prior examinations, that there was no longer any disability as a result of the diagnosed right lateral malleolus fracture and that an end result had been reached. I continue to adopt this opinion." (Dec. III, 7.) Additional medical evidence was allowed to address the portion of the employee's claim that was not addressed by the

impartial examiner, and the judge adopted the medical opinion of Dr. McConville "that there is no difficulty with the left leg," in that regard. (Dec. III, 7.) There was ample evidentiary support for the judge's findings. See Howze v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 159, 161 (2011)(findings, including rational inferences, supported by evidence will be upheld unless different finding required by law).

The employee, relying on Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997), argues that Dr. Lhowe's most recent opinion on her right ankle disability must be disregarded in its entirety because the doctor impermissibly expanded the scope of the dispute by providing an opinion on loss of function. (Employee br. 18-19.) In light of the fact Dr. Lhowe's report did not address loss of function, and because it was the employee's counsel who actively sought the doctor's opinion on the very topic she now takes issue with, her argument advanced on that ground is, at best, disingenuous and bordering on frivolous.[5] The decision is affirmed.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

[5] The relevant questioning by employee's counsel was as follows:

> Q. I realize you didn't note this in your report, but do you have an opinion as to whether, as a result of that right lateral malleolus fracture of December 5, 2005, the employee sustained any permanent loss of function with regard to her right ankle?
>
> A. I didn't find any objective basis for permanent impairment.
>
> Q. Do you have an opinion as to whether she suffered a permanent impairment of the right ankle?
>
> A. I don't believe she suffered a permanent impairment of the right ankle.

(Dr. Lhowe Dep., 7.)

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***September 14, 2012***