COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 039361-98 026368-96**

Michael L. Lemieux	Employee
FLEXcon Co.	Employer
FLEXcon Co.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Levine, Carroll and McCarthy)

APPEARANCES

Clifford D. Heaton, Esq., for the employee
Howard E. Stempler, Esq. for the self-insurer

LEVINE, J. The parties cross appeal from a decision in which the administrative judge awarded the employee ongoing partial incapacity benefits and medical benefits that included continuing treatment for moderate depression. We summarily affirm the decision with regard to the employee's appeal. We agree with the self-insurer's argument on the single issue it raises on appeal; we reverse the judge's award of medical benefits for psychological or psychiatric treatment as the employee had made no claim for such at hearing.

We recount the facts pertinent to the self-insurer's appeal. The employee suffered from a series of inguinal hernias from 1988 until the most recent injuries of June 9, 1996 and September 19, 1998, which are the subjects of the present proceeding. The employee filed claims for workers' compensation benefits due to the hernias. The self-insurer opposed the claim. (Dec. 2.) An impartial physician examined the employee pursuant to G.L. c. 152, § 11A(2). The doctor opined that the employee was partially disabled due to pain in his groin, and restricted him from lifting more than 10 pounds, from walking more than 30 minutes and from major bending or squatting. The doctor noted some problems with depression. (Dec. 3.) The judge credited the employee's pain, adopted the impartial physician's opinions, and awarded partial incapacity benefits and medical benefits, which included treatment for depression. (Dec. 3-4.)

During direct examination of the employee, the employee's counsel asked about the employee's recent depression. (Tr. 13.) In response to the self-insurer counsel's statement that there was no psychiatric claim before the court, the judge inquired of employee's counsel:

> JUDGE: You're bringing it up for the first time today.
>
> MR. HEATON: It's an issue that comes up more recently and it's also one of the reasons, as well there's been a variety of factors concerning this depression. I want to admit into evidence are these most recent medical reports from Dr. Belesoz and the reasons because first of all Dr. Belesoz indicates his disability is a complex issue because of the number of factors.
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> JUDGE: Is Dr. Belesoz a psychiat[rist] or something?
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> MR. HEATON: No. He's not a psychiatrist. He's the one that's been treating him. His principal physician.
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> JUDGE: Has he treated him for emotional or psychiatric[?]
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> MR. HEATON: No. He hasn't been treating.
>
> JUDGE: Then it's not an issue in front of us today[.] I mean if he starts treating that way or you want to bring in a claim later for medicals on that, then that would be a separate thing. And that's not a part of it today. It's not before us today.

(Tr. 13-14.) The self-insurer contends that the judge's ruling above was correct, and that his order of medical benefits for depression was inconsistent with this ruling and therefore erroneous. We agree.

Where the employee had made no claim for causally related emotional injury, there could be no issue in controversy under § 11B regarding treatment for such an injury. Therefore, the judge went beyond the scope of his authority in ordering medical benefits for such an injury. See Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998)("in order to properly present a dispute over medical benefits, an employee must actually file a claim for them"); Gebeyan v. Cabot's Ice Cream, 8 Mass.

Workers' Comp. Rep. 101, 103 (1994)("Where there is no claim and, therefore, no dispute, . . . the judge strayed from the parameters of the case and erred . . . ").

While we note that the impartial physician did touch on the topic of the employee's reactive depression during his deposition, (Dep. 10-14), he offered no causal relationship opinion. Indeed, the doctor stated that he did not discuss the issue of depression with the employee, as it was not within his neurological field of expertise. (Dep. 11.) We therefore see no basis for considering that the employee's alleged emotional injury was tried by consent. Cf. Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390 (1999); Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 (1998). To the contrary, the self-insurer expressed its unwillingness to have the emotional injury claim brought into the hearing, and the judge agreed. (Tr. 13-14.)

Accordingly, we reverse the judge's award of medical benefits for depression; we affirm the remainder of the decision.[1]

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Filed: **September 20, 2001**

[1] We note that the employee may bring a new claim related to the alleged depression. Cf. G.L. c. 152, § 16; Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997).