COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001858-85**

Michael Medley	Employee
E.F. Hauserman Co.	Employer
Commercial Union	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Michael Medley, pro se
John J. Canniff, Esq. and Susan F. Kendall, Esq., for the insurer

WILSON, J. This case, involving the employee's claim for weekly incapacity benefits for a January 10, 1985 back injury, is before us for the fourth time on cross appeals by the employee and the insurer. We summarily affirm the judge's decision awarding the employee § 34 benefits for temporary and total incapacity for a closed period and § 35 benefits for partial incapacity to exhaustion. We vacate the decision insofar as it denied the employee weekly benefits under § 34A. The employee is free to file a claim for § 34A benefits if he has reasonable grounds therefor. The employee is entitled to interest on unpaid compensation pursuant to § 50.

The procedural history and pertinent facts of this case are set forth in the third reviewing board decision, Medley v. E.F. Hauserman Co., 10 Mass. Workers' Comp. Rep. 108 (1996). In that opinion, the reviewing board charged the administrative judge with holding a "hearing *de novo* limited to inquiry of and decision on the extent of the

[1] Judge Smith is no longer a member of the reviewing board.

employee's incapacity on and after June 4, 1985." [2] Id. at 111. On recommittal, the administrative judge in the decision here on appeal (hereinafter, Decision IV) awarded § 34 benefits from June 4, 1985 to December 10, 1985, and § 35 benefits for partial incapacity from December 11, 1985 to the date of exhaustion. (Dec. IV, 18; Corrected Dec. IV, 1.) The judge also rejected the employee's claim that his migraine headaches were aggravated by the stress of litigating his compensation claim and by the financial hardship of being unemployed. (Dec. IV, 16.) The judge further concluded that, to the extent the employee's claim regarding his migraines was before her, the employee had not met his burden of proving that the headaches were causally related to his back injury and, though there was credible evidence the employee experienced stress litigating his appeal, this was "not a compensable sequel of his bodily injury." (Dec. IV, 16.) Finally, the judge denied the employee's claim for § 34A permanent and total incapacity benefits.[3] (Dec. IV, 18.)

On appeal, the employee asserts many errors in the judge's decision. The insurer also appeals, arguing that the judge's award of benefits after June 4, 1985 was arbitrary and capricious. Taking all arguments into consideration, we summarily affirm the judge's decision, except as to two issues.[4] First, we agree with the employee that the

[2] The administrative judge in Decision III, issued April 20, 1994, had awarded § 34 benefits from January 11, 1985 to June 3, 1985, and § 35 benefits from June 4, 1985 to December 10, 1985. (Decision III, 9.)

[3] The employee had also filed motions for sanctions against officials of the Department of Industrial Accidents, and for costs and attorneys' fees to be paid by the board; a motion for an award of attorney and physician fees plus costs and expenses pursuant to "§ 12(I)" (sic); as well as a claim for double compensation pursuant to § 28. The judge denied these motions and claims. (Dec. IV, 6, 7.) We see no reason to disturb these rulings.

[4] We note that the employee filed several motions with the reviewing board that were not before the judge below. We briefly address those. One requests that the board sanction the insurer's attorney for conduct under § 14(2). We have no authority to rule on that claim, as it was not brought below. Marticio v. Fishery Prods., Int'l, 11 Mass. Workers' Comp. Rep. 648, 650 (1997). A second motion requests that we disallow the insurer's brief because the employee did not receive page fourteen of the brief. As we did not receive that page either, we find no prejudice in its omission. The employee's motion for added compensation for dependents is

judge overlooked an award of § 50 interest. Interest under § 50 is self-operative, and the employee is entitled to it as a matter of law from the date of receipt of notice of the claim by the department to the date of payment. Long Van Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75, 78 (2000); Charles v. Boston Family Shelter, 11 Mass. Workers' Comp. Rep. 203, 205 (1997). Interest is payable at the twelve percent (12%) rate in effect when the board received notice of the claim. Goden v. Phalo Corporation, 9 Mass. Workers' Comp. Rep. 720, 722 (1995), citing Thomas's Case, 25 Mass. App. Ct. 964, 965 (1988) (rescript op.), rev. denied 402 Mass. 1103 (1988) and G.L. c. 152, § 50, as appearing in St. 1982, c. 183, § 1.[5]

Second, we vacate the administrative judge's order denying the employee's claim for § 34A benefits because it is not clear that the issue was actually before the judge at hearing. "[T]he scope of the administrative judge's authority at a § 11 hearing is limited to deciding those issues in controversy." Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998), citing G.L. c. 152, § 11B. None of the prior hearings or reviewing board decisions addressed whether the employee was entitled to § 34A benefits. The employee did not file a claim for § 34A benefits, nor did he move to amend his claim to include § 34A benefits. The transcript reveals that, at the hearing itself, the administrative judge listed the employee's claim as "Section 34 benefits from []

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inappropriate since § 35A, as amended by St. 1976, c. 474, § 11, provided that such compensation would be available only where the total payments under §§ 34, 35 or 34A and § 35A were not in excess of $150. The employee's compensation was always in excess of that amount. (Dec. IV, 18; Corrected Dec. IV, 1.)

[5] General Laws c. 152, § 50, as amended by St. 1982, c. 183, § 1, made applicable to injuries for which notice of claim is filed on or after the effective date of the act, provided:

> Whenever compensation is not paid within sixty days notice to the insurer that compensation is claimed to be due an injured employee or his dependents, and there are one or more hearings on any question involving the said compensation, including appeals, and the decision is in favor of the employee or his dependents, interest at the rate of twelve percent per annum from the date of the receipt of the notice of the claim by the board to the date of payment shall be paid by the insurer on all sums due as compensation to such employee or his dependents. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly amount.

January 10, 1985 to August 22, 1996, which is today's date. And Section 13 and 30 benefits from January 10, 1985 to August 22, 1996." (August 22, 1996 Tr. 5.) The employee ratified this statement of his claim.[6] Id. Five months later, in the deposition of Dr. Morehead, a neurologist who testified regarding Mr. Medley's migraines, the employee never asked the doctor to opine as to the extent of medical disability or its permanence. "Given these unique factual circumstances, we have no assurance that the denial of the § 34A claim . . . was 'reasoned decision making within the particular requirements governing a workers' compensation dispute.' " McGhee v. TPS Constr., 12 Mass. Workers' Comp. Rep. 46, 49 (1998), quoting Scheffler's Case, 419 Mass. 251, 258 (1994). It is worth repeating that "[w]here there is no claim and, therefore, no dispute, . . . the judge strayed from the parameters of the case and erred in making findings on issues not properly before her." Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994) (judge erred in awarding § 34A benefits where only § 34 benefits were claimed). As it does not appear that a § 34A claim was properly brought or litigated at the hearing, that issue was beyond the scope of the judge's authority and her denial of that claim is vacated. Compare Richard v. Walbaum's Food Mart, 10 Mass. Workers' Comp. Rep. 328, 330 (1996) (board held insurer was prejudiced by decision on § 51 claim where hearing transcript did not list § 51 claim and there were no earlier claims or proceedings on that issue).

The employee is free to bring a new claim under § 34A. We note that, should he choose to bring a claim for permanent and total incapacity, he will not be barred from making a claim that his migraine headaches were exacerbated by his back injury. See

[6] The transcript also indicates that the judge stated that she had "gone over filling out the Employee's Biographical Data Sheet, particularly the Claims Form, and I have explained to Mr. Medley what the various sections of the law represent to help him fill that out." (Tr. 4-5.) However, it does not appear that the employee had filled out this form at the time of hearing, as he sent a letter to the judge several days after the hearing enclosing the form. (Letter to Judge Capeless from Michael Medley dated August 26, 1996.) On the claims section of the Employee Biographical Data Sheet, which was submitted post-hearing, the employee did list a claim for § 34A benefits, but the fact that he had agreed with the judge at hearing when she recited his claim as one for § 34 benefits, along with the other factors mentioned above, lead us to conclude that a § 34A claim was not before her at hearing.

G.L. c. 152, § 16; see also Burrill v. Litton Industries, 11 Mass. Workers' Comp. Rep. 77, 78-79 (1997) (where § 34A was awarded for psychiatric disability related to physical injuries, employee was not barred from alleging that he was physically disabled in a new claim for present incapacity). "[A] new claim or complaint on present incapacity or causal relationship between the original work injury and the present incapacity presents a new and different issue from that of original liability, and as such is not barred from adjudication by the prior judgment." Id. at 79, citing Vetrano v. P.A. Milan Co., 2 Mass. Workers' Comp. Rep., 232, 234-235 (1988) and Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 407 (1994).[7]

Accordingly, we affirm the judge's decision, except that we vacate her denial of § 34A, leaving the employee free to file a new claim for permanent and total incapacity, should he have reasonable grounds on which to base such a claim. See G.L. c. 152, § 14(1). See also G.L. c. 152, § 16. In addition, we order the insurer to pay the employee interest from the date of receipt of notice of his claim by the department to the date of payment at the rate of twelve percent (12%).

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: November 16, 2000

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William A. McCarthy
Administrative Law Judge

[7] Although the administrative judge apparently deemed the issue of the migraines as exceeding the scope of the remand, we see no reason why the employee's new claim that his migraines were causally related to his back injury should not have been allowed at the hearing below. However, that point is moot because the employee was paid a closed period of § 34 benefits, and § 35 benefits "to exhaustion." Under the relevant statutory provisions, the employee would have been paid an aggregate maximum, which included both § 34 and § 35 payments, and is thus unable to obtain any more benefits under those sections. G.L. c. 152, §§ 34 and 35, as amended by St. 1981, c. 572, §§ 1 and 2. See also L. Locke, Workmen's Compensation, § 342 (2d ed. 1981).