COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 035789-02

Patrick Breslin	Employee
American Airlines	Employer
Insurance Co. of State of Pennsylvania	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

APPEARANCES

Donald W. Blakesley, Esq., for the employee

John J. Canniff, Esq., for the insurer

COSTIGAN, J. The parties cross-appeal from a decision in which the administrative judge prospectively terminated the employee's weekly benefits thirty days after the filing date of his decision. For different reasons, both parties argue that the termination date chosen by the judge is arbitrary and capricious. We agree. Therefore, we reverse the decision and recommit the case for further findings as to the proper date, if any, for the termination of weekly benefits.

The employee, forty-one years old at the time of hearing, injured his back and left foot on September 7, 2002, while working as an aircraft technician. He has not worked since. The insurer accepted liability, and paid § 34 total incapacity benefits. The insurer then filed a complaint for discontinuance of weekly compensation. Following a § 10A conference, the judge assigned the employee a $400 weekly earning capacity and modified his incapacity benefit to partial under § 35. (Dec. 1-2.)

On September 6, 2005, the employee underwent a § 11A impartial medical examination by Dr. MacEllis K. Glass, an orthopedist. The doctor opined that although the employee no longer had any physical restrictions as a result of his work injury, he suffered from an overwhelming psychogenic musculoskeletal reaction. (Dec. 2-3; Stat. Ex. 1.)[1] [1] Doctor Glass considered

[1] The doctor wrote:

> On the basis of a period of observation of somewhat less than an hour I certainly cannot rule out the possibility that there is an element of voluntary **symptom magnification** but the juxtaposition of rather bazaar [sic] and inappropriate somatic complaints is not typical of such cases. The only thing that I can say with reasonable medical certainty on the basis of my experience over the past 47 years with somewhere between fifteen and twenty thousand orthopedic evaluations is that the presently observed subjective signs and symptoms are not in any way representative of residuals of a Contusion and Sprain arising from the impact sustained three years ago when he was struck by the baggage truck.
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> I have no doubt that this patient did indeed sustain some degree of injury on that occasion nor can I rule out the possibility that some residual after affect [sic] remains, but the **psychogenic overlay** is so overwhelming that it precludes any reliable measurement.
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> Mr. Breslin's current impediments are neither musculoskeletal or neurological per se; his impairment, if any, derives from above the neck not below it. A careful thorough psychiatric evaluation would be definitive and I would heartily recommend it. I am convinced that treating this man's problems from a physical standpoint will be as ineffective in the future as they have been in the past.

(Stat. Ex. 1; emphasis original.)

At deposition, Dr. Glass qualified his opinion as to the diagnosis of musculoskeletal psychogenic overlay, testifying that it was one of two possible diagnoses, the other being voluntary symptom magnification. He thought the latter was "a little less likely" than the former, (Dep. 37), and testified that he was "leaning toward the psychogenic overlay diagnosis as opposed to the symptom magnification," (Dep. 9), but opined that a trained psychiatrist should make the definitive call. (Dep. 37-39.) Dr. Glass had earlier opined in his report that the employee should have "a careful thorough psychiatric evaluation," (Stat. Ex. 1), and he maintained that opinion when deposed. (Dep. 29-31, 33-34, 37-38.) See Kautz v. Sloane & Walsh, 19 Mass. Workers' Comp. Rep. 54, 64 (2005), citing Perangelo's Case, 277 Mass. 59, 64 (1931)(final conclusion of physician at moment of testifying must be taken as his expert opinion). As this was the sole expert medical opinion in evidence, and therefore uncontroverted, the judge could not reject it unless he clearly and sufficiently stated his reasons for doing so in findings with adequate support in the record. Andre v. F. C. Constr. Co., 19 Mass. Workers' Comp. Rep. 124, 128 (2005), citing Galloway's Case, 354 Mass. 427 (1968). There are no such factual findings and

further chiropractic treatments counterproductive to the employee's recovery, (Dec. 3; Dep. 20-21), and recommended a psychiatric evaluation. (Dec. 3; Stat. Ex. 1.) The impartial report and deposition were the only medical evidence in the case. (Dec. 1.)

The administrative judge concluded that although the employee was physically able to perform his former work, the psychogenic overlay prevented him from doing so. (Dec. 3.) The judge ordered that the § 35 benefits being paid pursuant to the conference order be terminated thirty days from the issuance of his decision. (Dec. 4.) The judge explained: "This is to allow Mr. Breslin a certain amount of transition time to seek some support counseling if he should so choose, and to locate or return to a suitable job." (Dec. 4.)[2] The judge also ordered the insurer to pay for any psychological or counseling program necessary to return the employee to the work force, but denied § 30 benefits for any further chiropractic treatments. (Dec. 4.)

There is no basis in the record evidence for the judge's termination of weekly benefits as of a date thirty days after the filing date of his decision. This sort of prospective termination, tracked

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therefore, the judge could not permissibly substitute "supportive counseling" or even a "psychological or counseling program," (Dec. 4.), for the recommended psychiatric evaluation.

[2] Addressing the psychogenic disorder, the judge also wrote:

> This does not appear to be something Mr. Breslin is purposefully doing. But according to the physician, it is something which must be addressed, and halted.
>
> . . . Mr. Breslin's physical basis for disability is clearly gone. But the legitimate psychological basis, rooted in the original physical injury, needs to be addressed. Part of that, in the words of the impartial physician, is to get Mr. Breslin "out of the area of secondary gain." (Dep. 33, lines 2 - 10.) *The order is fashioned to try and navigate this route.*

(Dec. 3; emphasis added.) This explanation renders the prospective termination of weekly incapacity benefits even more draconian, and reflects a misguided approach to the adjudication of disability. Moreover, the judge's selective citation to Dr. Glass's deposition mischaracterizes and misconstrues the overall import of the doctor's testimony regarding secondary gain. (Dep. 31-36.) A judge is not free to mischaracterize expert medical opinion. LaGrasso v. Olympic Deliv. Serv., 18 Mass. Workers' Comp. Rep. 48, 58 (2004).

for a time certain from the filing date of the decision, is akin to the long-disfavored practice of modifying or discontinuing incapacity benefits effective on the filing date of a decision. See, e.g., Betty v. Olsten Health Care, 10 Mass. Workers' Comp. Rep. 623, 624 (1996)(order of discontinuance on filing date of decision, based on impartial opinion that no physical basis for incapacity remained, not grounded in evidence; recommittal required); Sullivan v. Commercial Trailer Repair, 7 Mass. Workers' Comp. Rep. 8 (1993)(decision filing date improper for termination of benefits).[3]

Moreover, the prospective termination is also wholly speculative, as there is nothing in the evidence which would permit the judge to conclude that whatever "supportive counseling," (see footnote 1, supra), the employee might be able to locate, schedule and undergo in a mere thirty days would enable him to return to work. See Marchand v. Waste Mgmt. of Massachusetts, Inc., 14 Mass. Workers' Comp. Rep. 332 (2000)(finding of future closed period of incapacity following recommended, but not yet performed, surgery speculative); O'Neill v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 42 (2003)(same).

The parties are entitled to a decision in which the judge's conclusions regarding incapacity and the nature of medical treatment needed are based on subsidiary facts grounded in the evidence. Here, the impartial physician unequivocally opined there was no physical reason for the employee's complaints to him on the date of the § 11A examination. (Dep. 37.) Thus, the judge's award of § 35 benefits to July 20, 2006, almost one year beyond the date of the § 11A examination, can be based only on the employee's psychogenic overlay, as identified by Dr. Glass. Other than stating there was a "legitimate psychological basis, rooted in the original physical injury," for the employee's inability to work, the judge made no other subsidiary findings of fact in that regard, and there is not a scintilla of evidence the psychogenic condition either had resolved, or would resolve no later than thirty days after the filing date of the decision, so as to allow the employee to return to work.

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[3] As a general rule, the only *procedural* date that has a bearing on when incapacity benefits may be modified or terminated is the date on which the insurer put the employee's benefit entitlement at issue, that is, the date on which it filed its complaint for modification or discontinuance. The insurer is not entitled to relief any earlier. See Cubellis v. Mozzarella House, Inc. 9 Mass. Workers' Comp. Rep. 354, 356 (1995).

Accordingly, we reverse the decision insofar as it authorizes discontinuance of weekly incapacity benefits on a date not grounded in the evidence. We recommit the case for further subsidiary findings of fact on the nature of medical treatment the employee should undergo,[4] [4]and the date, if any, on which his incapacity benefits properly could be terminated. Given the passage of time, the administrative judge, in his discretion, may reopen the record and take additional evidence on these issues.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **September 15, 2008**

[4] Even though the judge disregarded the impartial medical examiner's opinion as to the type of medical treatment the employee needed in the first instance, we do not agree with the insurer that the judge's award of medical benefits for psychological treatment or counseling to facilitate the employee's return to work was outside the scope of his authority. (Dec. 4.) The impartial physician's differential diagnosis of psychogenic overlay is competent medical evidence, and we reject the insurer's argument that Dr. Glass was unqualified to make that diagnosis. "There is no requirement that the impartial medical examiner be a specialist in the particular departments of medicine in whose fields the employee may place his alleged medical disability at the time of the hearing." Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273, 277 (1999), quoting Dupras v. Water Divs. Of Millipore, 10 Mass. Workers' Comp. Rep. 1, 4-5 (1996).