COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 060574-93**

Robert J. Listaite	Employee
Worcester Telegram & Gazette	Employer
Chronicle Publishing	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Costigan and Maze-Rothstein)

APPEARANCES
Malcolm L. Burdine, Esq. for the employee at hearing and on brief
John F. Trefethen Jr., Esq., for the employee at hearing
Joanne T. Gray, Esq., for the self-insurer

WILSON, J. The self-insurer appeals the decision of an administrative judge in which the employee was awarded G. L. c. 152, § 34A, benefits for permanent and total incapacity; payment of all reasonable and necessary medical treatment for the diagnosed condition pursuant to §§ 13 and 30; and attorney's fees and costs. After a review of the record, we affirm the decision.

Robert J. Listaite was sixty-four years old at the time of the hearing. Following graduation from high school, the employee served four years in the U.S. Air Force and earned an associate's degree in industrial management from Northeastern University. Prior to his injury, the employee was a district circulation manager for the *Worcester Telegram and Gazette*. Among his responsibilities was the supervision of forty adult newspaper carriers. In addition to his supervisory duties, the employee delivered newspapers himself. (Dec. 5.)

On September 22, 1993, while delivering newspapers, the employee lost his footing on the way down a stairway. As his right heel came down on the next step, he felt a shock from the right heel up through the right leg. The sensation continued through his groin and back regions and up to the back of his neck.

(Dec. 5-6.) Although the employee did not fall, he twisted his back. He continued to work, despite pain, for several days thereafter. (Dec. 6.)

The self-insurer accepted the claim. Our review of the board file[1] indicates that the employee initially received § 34 weekly benefits followed by § 35 benefits for partial incapacity pursuant to an agreement to pay compensation, dated May 30, 1996. On April 27, 1999, the self-insurer filed a complaint for modification or discontinuance of compensation benefits. The matter was conferenced before an administrative judge, who, on February 14, 2000, assigned an increased earning capacity and ordered the self-insurer to pay reduced § 35 partial incapacity benefits. Both parties appealed for a hearing de novo. (Dec. 3.) The employee was allowed to join his claim for § 34A benefits for permanent and total incapacity.[2] On August 22, 2000, the employee was examined by Dr. Deborah DeMarco pursuant to G. L. c. 152, § 11A. (Dec. 7.) The impartial physician, a rheumatologist, previously had examined the employee on January 3, 1996, prior to the agreement to pay compensation. Both medical reports were admitted into evidence. (Dec. 1, 8.)

In her first medical report, the § 11A physician noted that the employee had terrible sleep patterns and intermittent numbness of his right lower extremity. She also noted multiple trigger points consistent with fibromyalgia. (Dec. 8.) Following the August 2000 examination, the doctor opined that the employee suffered from diffuse joint pain, without swelling, warmth or redness, and burning skin as well as intermittent shooting pains. These pains are experienced throughout the length of the employee's spine causing terrible sleep, poor balance and migraines. The doctor also noted memory difficulty and depression. (Dec. 7.) Additionally, she opined that the employee suffered from chronic pain syndrome

[1] We take judicial notice of these documents. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] The employee's § 34A claim was for weekly benefits from February 1, 2000 to date and continuing. (Dec. 3.)

and was likely unable to work as a result. The impartial examiner stated that there was "probably a causal relationship" to the industrial accident as the employee did not suffer these symptoms prior to the 1993 work incident. She also stated, however, that her findings on the second examination were not consistent with fibromyalgia. (Dec. 8.) Finding the § 11A report inadequate and the medical issues complex, the administrative judge authorized the submission of additional medical testimony. (Dec. 4.)

Medical reports from Dr. Mark Weiner and Dr. Shankar L. Garg were submitted on behalf of the self-insurer. On February 8, 2000, Dr. Weiner examined the employee and opined that the employee's lumbar spine was normal and that there was no need for any physical restrictions. (Dec. 6.) Dr. Garg examined the employee on August 9, 1999; his diagnoses were: 1) non-specific musculoskeletal aches and pains with subjective complaints of burning skin, headaches and sleep disturbances; 2) no definite diagnosis of fibromyalgia; and 3) psychogenic rheumatism secondary to underlying, previously underrecognized psychological problems. Dr. Garg opined that the employee's pre-existing condition is the major cause of his prolonged symptoms and disability. He, like Dr. Weiner, did not see a need to impose any physical restrictions. (Dec. 7.)

The employee submitted the medical reports of Dr. Don L. Goldenberg, Dr. Cannon[3] and Dr. Vincent R. Giustolisi. Dr. Goldenberg, a rheumatologist, had treated the employee since 1995. He opined that the employee's symptoms are consistent with a diagnosis of fibromyalgia, but that the employee has had much more dramatic and persistent pain and multiple unexplained somatic symptoms. The doctor also opined that the employee had a longstanding history of severe headaches, some of which are migraine in nature. (Dec. 8.) The doctor stated that the cause of fibromyalgia is unknown and is sometimes attributed by patients to stressful events or physical/emotional trauma. He added that it is not possible to

[3] Although the judge makes reference to the medical report of Dr. Cannon, he did not mention the medical opinion elsewhere in his decision. (Dec. 4.)

document such associations here other than the patient's account of a temporal relationship. The doctor was unable to make any specific statements regarding fibromyalgia and chronic fatigue due to lack of objective indications and lack of qualification with regard to assessing the impact of symptoms in relation to the patient's activities. He stated that such a determination was better left to a work evaluation specialist. (Dec. 9.)

Dr. Giustolisi examined the employee on February 1, 2000. He diagnosed chronic cervical neck and lumbar strain and fibromyalgia by history. (Dec. 9.) The doctor opined that there was a causal relationship between the work injury and the disability claimed. He further opined that the employee had reached a maximum medical result and was totally and permanently disabled. (Dec. 10.)

A vocational expert, Paul Blatchford, testified on behalf of the employee. Mr. Blatchford concluded that the employee was not physically capable of performing his past relevant work or even entry level work due to his constellation of physical symptoms. The judge adopted this opinion. (Dec. 1, 11.)

Despite finding transferable skills, the judge concluded, on the basis of the impartial medical examiner's opinions, that the employee's significant pain and discomfort were disabling to the point that he could not function on a sustained basis in the workplace. He found the employee permanently and totally incapacitated from remunerative employment. Relying on the § 11A medical opinion, the administrative judge determined that the employee's disability was causally related to his 1993 work injury, and he awarded § 34A permanent and total incapacity benefits from February 1, 2000 and continuing. (Dec. 12-13.)

The self-insurer contends that the administrative judge erred in awarding § 34A permanent and total incapacity benefits where the employee failed to show a worsening in the medical condition for which he had been receiving § 35 benefits. See Foley's Case, 358 Mass. 230, 232 (1970). The case law is otherwise in the circumstances before us. When, as in this case, an employee is receiving

§ 35 benefits for partial incapacity pursuant to an agreement to pay compensation, the employee need not prove a "worsening" of his medical condition in order to make out a claim for permanent and total incapacity benefits. An agreement to pay compensation "stands in a position analogous to an unappealed conference order, as it is similarly unsupported by findings of fact and a judicial decision on the merits." Hovey v. Shaw Indus., 16 Mass. Workers' Comp. Rep. 136, 139 (2002).[4] Such findings on the merits of a claim are necessary for the invocation of res judicata principles upon which the Foley "worsening" prerequisite in based. See Hendricks v. Federal Express, 10 Mass. Workers' Comp. Rep. 660, 662-663 (1996). Thus, although the employee clearly had the burden to prove his entitlement to permanent and total incapacity benefits, "worsening" was not part of that burden.[5]

The decision is summarily affirmed as to the self-insurer's argument that the causal relationship opinion was stated with an insufficient degree of certainty.

Accordingly, we affirm the decision. The insurer shall pay an attorney's fee of $1,273.54.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

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[4] Although the agreement to pay in Hovey was for a closed period of partial incapacity benefits, we see that difference as having no bearing on our application of the legal principles stated there to the facts of this case.

[5] The fact that the judge ordered partial incapacity benefits at conference, from which the parties appealed, and to which the employee joined his claim for § 34A benefits, has no bearing on the analysis. The hearing was de novo.

So too, the argument that the employee testified that, over time, his symptoms didn't change is of no import when the agreement to pay compensation represents no more than the parties' written compromise of their respective positions on incapacity.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge