COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 027222-90**

Rodolfo Tayag	Employee
Baird Corp.	Employer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
G. Gregory Howard, Esq., for the employee
Joseph J. Durant, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals that portion of a decision that dismissed his claim for payment of further chiropractic services and his claim that the insurer improperly withheld weekly benefits pursuant to G.L. c. 152, § 13A(10).[1] After a review of the evidentiary record, we reverse in part and recommit in part.

Rodolfo Tayag, the employee, was fifty-five years old at the time of the hearing. (Dec. 6.) The original date of injury was April 12, 1990.[2] (Dec. 1.) His work injury has

[1] General Laws c. 152, § 13A(10), states in pertinent part:

> In any instance in which an attorney's fee under subsection (1) to (6), inclusive, is due as a result of a cash award being made to the employee either voluntarily, or pursuant to an order or decision, the insurer may reduce the amount payable to the employee within the first month from the date of the voluntary payment[,] order or decision, by the amount owed the claimant's attorney; provided, however, that the amount paid to the employee shall not be reduced to a sum less than seventy-eight percent of what the employee would have received within that month if no attorney's fee were payable.

Amended by St. 1991, c. 398, § 35.

[2] The original work-related injury was to the employee's cervical disc/spine. (Employee's brief, 1; Insurer's brief, 1.) In 1992, the employee was awarded benefits for a psychiatric injury stemming from the April 1990 work injury. (Dec. 2.)

been the subject of numerous conferences and hearings.[3] (Dec. 1-2.) While litigation was ongoing, the statutory period of entitlement to § 34 temporary total incapacity benefits was exhausted.[4] (Dec. 2.) Notwithstanding, the employee continued to treat with his chiropractor. (Dec. 6.) The employee filed a claim for permanent and total incapacity benefits under § 34A. Following a § 10A conference, the administrative judge issued an order granting the § 34A claim from February 2, 1998 and continuing. (Dec. 2.) However, the § 30 claim for payment of chiropractic treatment was denied. (Dec. 3.) The employee appealed to a hearing de novo.

On August 19, 1998, pursuant to G.L. c. 152, § 11A[5], a neurologist examined the employee.[6] (Dec. 4, 5.) The parties agreed to a second § 11A examination by a chiropractor.[7] (Dec. 3.) On November 19, 1998, the employee was examined by a § 11A chiropractor whose medical report and depositional testimony were also admitted into evidence. (Dec. 4, 5.) The case also involved a psychiatric injury.[8]

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[3] Initially, the insurer paid § 34 temporary total incapacity benefits. In February 1992, a conference order was issued modifying the employee's weekly benefits. The employee appealed, but later withdrew his appeal. (Dec. 1.) In November 1992, a different administrative judge issued a conference order requiring the insurer to pay for the employee's psychiatric treatment. That order was appealed and later dismissed due to the failure to file the requisite fee. In September 1993, a third administrative judge issued a conference order that reinstated the employee's § 34 benefits. A conference order was issued in May 1995, by yet another administrative judge in which the insurer's request to modify or discontinue payment of benefits was denied. The insurer appealed. A hearing decision was issued in July 1997 in which the insurer's complaint was dismissed. Additionally, the insurer was ordered to pay medical bills, inclusive of psychiatric treatment. (Dec. 2.)

[4] The employee's § 34 benefits exhausted on October 31, 1996. (Dec. 2.)

[5] General Laws c. 152, § 11A(2), requires that a medical examiner be appointed when the appeal of a conference order involves a dispute over medical issues.

[6] The neurologist physician had also examined the employee in 1995. (Dec. 8.)

[7] While there is no right to more than one § 11A examination under the statute, Oliveira v. Scrub-A-Dub Ctr., 10 Mass. Workers' Comp. Rep. 61, 64 (1996), the parties may do so by agreement. See Pina V. Lachance, 10 Mass. Workers' Comp. Rep. 81, 87 (1996).

[8] As neither § 11A doctor was qualified to render an opinion with regard to the employee's alleged need for psychiatric treatment, the parties were allowed to submit additional medical

The § 11A examiner (neurologist) opined that, although the employee was exaggerating his physical complaints, he experienced pain that was permanent in nature. (Dec. 8.) In addition, the doctor noted that the employee suffered from depression. (Dec. 9.) The examiner opined that the combination of the physical injuries and secondary depression rendered the employee unable to work. These medical opinions were adopted by the judge. (Dec. 9.)

The § 11A chiropractor opined that the employee was permanently and totally disabled as a result of his neck, shoulder and left arm pain. Additionally, he opined that further chiropractic treatments were neither reasonable nor medically necessary. (Dec. 9.) The judge adopted this medical opinion as well. (Dec. 10.) The judge also adopted psychiatric medical opinions that causally related the employee's depression as a permanent sequela of the work injury. (Dec. 10-11.)

Although the judge found the employee exaggerated the extent of his physical restrictions and that he lacked credibility regarding the extent of his complained of pain and his level of activity, he did find a continuing partial physical disability and he credited the psychiatric sequela of the physical condition. (Dec. 6-8.) Based on the medical evidence, the judge determined that the employee had remained totally disabled "[a]t all material times." (Dec. 11.) Additionally, the judge determined that the insurer properly withheld weekly benefits pursuant to § 13A(10). Accordingly, the judge ordered the insurer to pay permanent and total incapacity benefits pursuant to § 34A from November 1, 1996 onward; medical and hospital expenses pursuant to §§ 13, 30 for psychiatric treatment but denied the chiropractic claim; and a § 13A (5) fee to the

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evidence on that issue. (Dec. 3.) The medical reports of the employee's treating and an insurer's examining psychiatrist were submitted. (Dec. 4-5, 10.)

General Laws c. 152, § 11A(2), amended by St. 1991, c. 398, § 30, provides that "the administrative judge may, on his own initiative or upon motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner."

employee's counsel. (Dec. 12-13.) The employee's claim for improper withholding of benefits under § 13A(10) was denied. (Dec. 12.) The employee appeals.

The employee raises two issues: 1) the judge misapplied the provisions of § 13A(10); and 2) the determination that the employee was no longer entitled to chiropractic care is inconsistent with the findings and contrary to law. (Employee's brief, 1.) As to the first issue, the employee contends it was error to find that the insurer had properly deducted amounts from the weekly benefits due the employee for payment of his attorney's fee. More specifically, the employee maintains that his injuries predate the 1991 amendments and therefore G.L. c. 152, § 2A,[9] bars the application of §13A(10) to his case (Employee's brief, 3) because a § 13A(10) payment would reduce the employee's weekly award. (Employee's brief, 4.) The insurer responds only that "The Administrative Judge properly applied Section 13A(10) of Chapter 152." (Insurer's brief, 2.) We disagree with both the employee's rationale and the insurer's view.

Section 13A(10), when enacted, was expressly deemed substantive by the Massachusetts legislature. See St.1991, c. 398, § 106("For purposes of section two A of chapter one hundred and fifty-two of the General Laws . . . subsection (10) of section thirteen A of chapter one hundred and fifty-two of the General Laws shall be deemed to be substantive in character"). Hence, it is not necessary to scrutinize the language of § 2A to determine the applicability of § 13A(10) in this case. Here § 13A(10) did not apply to the employee's date of injury, which clearly preceded its enactment date. Thus, we reverse the decision as to this issue.

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[9] General Laws c. 152, § 2A, reads in pertinent part as follows:

> Every act, in amendment of this chapter, in effect on the effective date of this section or thereafter becoming effective which increases or decreases the amount or amounts of compensation payable to an injured employee or his dependents including amounts deducted for legal fees shall, for the purposes of this chapter, be deemed to be substantive in character and shall apply only to personal injuries occurring on and after the effective date of such act, unless otherwise expressly provided.

Amended by St. 1991, c. 398, § 16.

Second, the employee contends that the finding that his " 'neck and left arm conditions limit his activities, and create his need for treatment,' " (Employee's brief, 4, quoting Dec. 8) conflicts with the adoption of the § 11A chiropractor's opinion to deny further chiropractic benefits. (Employee' s brief, 4.) Next, the employee proffers that he sought palliative chiropractic care for "temporary relief" from his pain and so testified at hearing.[10] (Employee's brief, 4, citing to May 14, 1999 Tr., 31, 37.) See Lewin v. Danvers Butchery, 13 Mass. Workers' Comp. Rep. 18 (1999)(palliative medical care is covered under the Act). The employee's argument on this point has merit.

Palliative care may be compensable. Lewin, supra (and cases cited therein). Despite the fact that the judge questioned the degree of the employee's pain and the credibility of other of his assertions, the judge nonetheless determined that the employee "probably still does suffer from neck and left arm pain, to some extent." (Dec. 8.) Germane to this point, the judge adopted the § 11A neurologist's medical opinion that the employee was experiencing permanent pain, which was unlikely to be alleviated. (Dec. 8-9.) Additionally, although the § 11A chiropractor opined that continued chiropractic treatment was unlikely to result in "any further clinical improvement" and that he would "have a hard time justifying further . . . treatments as being reasonable or medically necessary[,]"[11] he also opined that: "[t]here is no doubt . . . that chiropractic care offers [the employee] temporary symptomatic relief." (DIA Ex. 2, 5.) Nevertheless, the administrative judge denied the claim for further chiropractic treatment. (Dec. 10, 12.)

The decision in Lewin involved the same § 11A chiropractor as testified here. His opinion about symptomatic chiropractic care was consistent in both matters. Lewin,

[10] The employee also raises G.L. c. 152, § 30, to assert an entitlement to adequate and reasonable health care services for as long as they are necessary. He also argues that the reviewing board via Lewin, supra, has defined the terms "adequate and reasonable" and "necessary." (Employee's brief, 4.) As the underlying issue is recommitted for further findings, we need not address this particular concern at this time.

[11] As support for his opinion that the treatments were not improving the employee's condition, in his deposition, the § 11A chiropractor testified that the employee's range of motion has actually decreased over time despite chiropractic treatment. (Dep. of Dr. Sullivan, 13.)

supra at 19. Both here and in Lewin, at no time during his depositional testimony did the § 11A chiropractor recant his prior medical opinion that the employee received some "temporary symptomatic relief" from chiropractic care. Instead he enlarged on this opinion. (Dep. of Dr. Sullivan, 20-23, 25-27.)[12] Moreover, the employee actually testified to several days of palliative relief from each chiropractic visit. (Tr. 31, 37, dated May 14, 1999.) It is unclear from the decision whether the judge considered the palliative aspects of the treatment. Without such a finding, we are unable to determine whether proper principles of law have been applied in this case. See Cicerone v. Quincy Adams Restaurant & Pub, 14 Mass. Workers' Comp. Rep. 62, 66 (2000)("It is the duty of an administrative judge to make such specific and definite findings, based on evidence, as will enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied"). (Citations omitted.) Accordingly, we recommit the case to the judge for further findings on the issue of the chiropractic care.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: February 14, 2001

[12] The § 11A chiropractor opined that the only type of treatment that appeared to provide the employee with any type of pain relief was chiropractic care. In his own practice, he services patients with similar medical histories to that of the employee. (Dep. of Dr. Sullivan, 20-23.) He did stress, however, that such treatment was symptomatic not curative. (Dep. of Dr. Sullivan, 25.)