

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 004428-06

Rose Boyden
Epoch Senior Living, Inc.
AIM Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Koziol and Fabricant¹)

The case was heard by Administrative Judge Dike.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Michael K. Landman, Esq., for the insurer

McCARTHY, J. This case comes to us on cross-appeals from a decision awarding the employee a closed period of § 34 total incapacity benefits but denying and dismissing her claim for benefits for an alleged psychiatric sequela of her physical injury. For the following reasons, we vacate the order of § 34 benefits and reverse the award of § 13A legal fees and expenses.

On February 12, 2006, Rose Boyden suffered injuries while walking through the employer's parking lot when she was struck by a pick-up truck plowing snow. (Dec. 3.) She alleged injury to her low back and the right side of her ribs. (Dec. 5.) The insurer paid the employee § 34 benefits without prejudice from February 12, 2006 through June 10, 2006, at which point the insurer discontinued benefits. (Ins. br. 1.)

On June 5, 2006, the employee filed a claim for further benefits relative to the February 12, 2006 work incident.² The claim came on for conference and an order

¹ Judge Fabricant recused himself from this case and did not participate in panel discussion.

followed on October 12, 2006 for payment of benefits pursuant to §§ 35, 13 and 30 from June 10, 2006 through December 10, 2006. Neither party appealed the conference order. Id.

In late December 2006, the employee filed a claim for §§ 34, 35, 13 and 30 benefits for additional periods of partial and total incapacity, from December 11, 2006 to date and continuing. (Dec. 2.) That claim came before the same administrative judge for a § 10A conference on March 13, 2007 and an order issued awarding the employee § 35 partial incapacity benefits from December 11, 2006 and continuing. The insurer appealed this order and the matter was scheduled for hearing de novo. Id.

At hearing, the judge allowed medical records to cover the so-called "gap period" leading up to the § 11A impartial report. (Dec. 7.) The judge adopted the medical opinions of Dr. William Balcom and Dr. George McManama, offered by the insurer. On the strength of these reports, the judge concluded that the employee was totally disabled from February 12, 2006 to September 18, 2006. (Dec. 10.) The judge then ordered the insurer to pay the employee § 34 temporary total incapacity benefits for that period, medical benefits pursuant to §§ 13 and 30 and a § 13A(5) attorney's fee in the amount of \$5,103.04 plus expenses. (Dec. 11.)

On appeal we find error with the decision on two fronts. The specific claim before the judge at hearing was for partial incapacity benefits pursuant to § 35 from December 11, 2006 to May 12, 2007 and total incapacity benefits pursuant to § 34 from May 13, 2007 to date and continuing. (Dec. 2.)³ In his hearing decision, however, the judge ordered the insurer to pay benefits for a time other than the period claimed, namely ***February 12, 2006 to September 18, 2006*** . (Dec. 11;

² We take judicial notice of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

³ Finding no credible basis supporting a finding of causal relationship between the accident and her alleged psychiatric condition, the administrative judge denied the psychiatric portion of the claim. (Dec. 9-10.)

emphasis ours) . This order clearly does not confront the period of weekly benefits claimed by the employee at the outset of the hearing. (Dec. 2.)

We have established that a judge is restricted to deciding the claim(s) presented for adjudication, and nothing more. MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31 (2007). "It is not a judge's function to be the trial strategist for any litigant[,]" any more than it is a judge's duty "to interfere with trial counsel's strategy." Id., quoting Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). "Where there is no claim, and therefore, no dispute . . . the judge strayed from the parameters of the case and erred on making findings on [an] issue not properly before him." Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31, 32 (2006), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994).

The original conference order, filed on October 12, 2006, and not appealed by either party, ordered payment of §§ 35, 13 and 30 benefits from June 10, 2006 through December 10, 2006. The period of compensation awarded in the hearing decision encompasses the time frame and benefits addressed in that conference order and an earlier period of benefits paid by the insurer without prejudice.

"By statutory directive, an unappealed conference order binds the parties to all matters covered by it. Section 10A provides: 'Failure to file a timely appeal... shall be deemed to be acceptance of the administrative judge's order. . . .' Aguilar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 110 (1995).⁴

The only issue raised by the insurer in its appeal is the propriety of the award of the legal fee plus reasonable expenses under § 13A(5) of the Act. "In order to receive

⁴ There are exceptions, one of which provides that an unappealed conference order does not bar a claim for further weekly benefits for any period of disability related to the same date of injury which occurs after the date of the order. Russo's Case, 46 Mass. App. Ct. 923 (1999). Sellick v. Trailways of New England, 12 Mass. Workers' Comp. Rep. 384, 387 (1998)(parties free to seek incapacity review after date of conference order); also see Sanchez v. Framingham State Hosp., 21 Mass. Workers' Comp. Rep. 19 (2007).

an attorney's fee under G. L. c. 152, § 13A(5), the employee must prevail on some disputed issue at hearing, either by gaining or not losing some degree of benefits **within the disputed time frame. . . .**" Case of Conroy, 61 Mass. App. Ct. 268 (2004)(emphasis added). Because the judge's decision did not produce an award of benefits of any kind for the period claimed at hearing, the award of an attorney's fee and expenses is not supported. See Gonzalez's Case, 41 Mass. App. Ct. 39 (1996); Flores v. Italian Home For Children, Inc., 22 Mass. Workers' Comp. Rep.____ (October 22, 2008); 452 Code Mass. Regs. § 1.19(4).

As to the employee's appeal, we find no error in the judge's handling of the medical evidence pertaining to her psychiatric claim, and summarily affirm on that issue. (Dec. 5, 6-7, 9-10.) We also find no merit in the employee's argument the judge erred by improperly relying on medical evidence, outside of the gap period to conclude she was not disabled during any time period relevant to this dispute, i.e., December 11, 2006 and continuing. The judge was persuaded by and adopted the opinions of the § 11A examiner, Dr. Renaud, that the employee's physical injury had resolved and she needed no further treatment by the time of his examination on June 4, 2007. (Dec. 5-6.) At the hearing, the employee did not object to the judge's ruling soliciting medical evidence "with regard to the employee's physical condition up to the date of the 11A report." (Tr. 5.) Moreover, the employee submitted multiple medical reports of physicians who examined her and opined as to the extent of her disability prior to December 11, 2006, and she made no objection to the insurer's submissions covering the same time period. In any event, the judge made extensive findings regarding the opinions of the physicians who did discuss the issue of the employee's disability after December 11, 2006, and did not adopt any of them. (Dec. 7-8.) The employee simply failed to persuade the judge she was disabled as a result of the work-related injury at any time from December 11, 2006 and continuing.

Because the judge had no authority to order benefits from February 12, 2006 through September 18, 2006, that award and the award of an attorney's fee and expenses are vacated and the employee's claim is dismissed.

So ordered.

Rose Boyden
Board No. 004428-06

William A. McCarthy
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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