COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003454-07**

Scott Hibbard	Employee
Henley Enterprises, Inc.	Employer
Valley Forge Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Harpin)

The case was heard by Administrative Judge Bean.

APPEARANCES
Daniel C. Finbury, Esq., for the employee
Michael A. Fager, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision ordering payment of ongoing benefits to the employee pursuant to § 34A. We recommit the decision for further analysis and review of the causation and worsening issues raised by the insurer, consistent with Foley's Case, 358 Mass. 230 (1970).

The employee injured his back lifting a garage door at work on February 12, 2007. (Dec. 92). After being out of work for six months, he returned to a light duty job with the employer for nine hours a week. Several months later, he was terminated by the employer and collected unemployment compensation. (Dec. 92.) He has not worked since 2008. (Dec. 93.)

The employee's initial claim for compensation resulted in a hearing decision filed on September 24, 2009, which ordered § 34 temporary total incapacity compensation from February 13, 2007, to August 20, 2007, and § 35 partial incapacity compensation from August 21, 2007, to date and continuing. (Dec. 92; September 24, 2009 Dec. 916.) The employee's current claim for § 34A permanent and total incapacity compensation was filed on April 1, 2011. (Dec. 92.) Following a conference on that claim on July 13, 2011, the judge ordered the payment of § 34 benefits from that date and continuing. (Dec. 92.)

The § 11A impartial medical examiner, Dr. David C. Morley, Jr., first examined the employee in 2008 to evaluate his initial claim. (Dec. 94; Ex. 4.) Dr. Morley again examined the employee on August 11, 2011 for the present claim. (Dec. 94; Ex. 3.) In his August 25, 2011, written report[1] Dr. Morley opines that the employee sustained a causally related "lumbar strain superimposed on preexisting multiple level disk degenerative changes/lower lumbar facet degenerative changes," and that "he is incapable of performing any work based on his functional level and complaints of severe pain." (Ex. 3; Dec. 94.)

At his subsequent deposition on April 3, 2012, Dr. Morley confirmed his written opinion on the diagnosis, (Dec. 94; Dep. 17 – 20, 29, 31, 44), indicated that the employee was totally disabled, (Dec. 94; Dep. 37), and stated that this condition could be permanent. (Dec. 94; Dep. 38.)

On appeal, the insurer first argues that the judge's analysis of § 1(7A)[2] was not grounded in the evidence. However, because the applicability of § 1(7A) was definitively rejected in the prior September 24, 2009 decision in this case, the judge's analysis in the later decision is superfluous and unnecessary. The prior decision was summarily affirmed by the reviewing board, and there was no further appeal. Therefore, the law of the case is that the employee did not suffer a combination injury and § 1(7A) is inapplicable. Grant v. Fashion Bug, 27 Mass. Worker's Comp. Rep. 39, 46 (2013)(insurer's failure to appeal from final decision that the employee's condition was related to industrial accident and was not the result of a combination injury establishes finding as law of the case).

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

[2] The relevant portion of G. L. c. 152, § 1 (7A), states:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The insurer next argues there is a lack of evidence that the claimed disability is permanent and total. It specifically cites Ladue v. C&S Wholesale Foods, 21 Mass Workers' Comp. Rep. 233, 239 (2007), for the premise that medical findings must be supported by expert medical opinion. The insurer's analysis of Ladue incorrectly supplants *supporting* expert medical opinion with a requirement of *definitive* expert opinion. The judge acknowledged Dr. Morley's opinion that the employee's total disability "could be recognized as permanent" was insufficient on its own. (Dep. 38; Dec. 5). However, the judge's crediting of the employee's testimony as to the extent of his pain, and his finding that five years passed without improvement, buttressed the expert opinion on permanency. Comeau v. Beck, 319 Mass. 17, 20 (1946); Josi's Case, 324 Mass. 415, 417-418 (1949)(finding can be made even if opinion expresses only a possibility of a relationship, if there is sufficient other evidence bolstering the causal chain). The finding fails only if the equivocal expert opinion is the only evidence on a particular issue. Hachadourian's Case, 340 Mass. 81, 86 (1959). Thus, the judge correctly evaluated the totality of the evidence to make a determination of permanency.

The insurer next argues the employee failed to demonstrate a causally related worsening of his condition since the finding of partial incapacity in the September 24, 2009 hearing decision. (Ins. br. 17.) Specifically, the insurer asserts the only evidence of a change in the employee's condition "appears to be caused by medical conditions related not to his injury, but rather his advancing age." (Ins. br. 17.) It then argues there was "no testimony by the impartial examiner of a worsening of the employee's condition related to the original injury." (Ins. br. 18).

The insurer is correct that an employee seeking § 34A benefits carries the burden of proof, following a hearing decision finding him partially disabled, to demonstrate that his work-related condition worsened, "not due to advancing age," but owing to his industrial accident. Foley's Case, 358 Mass. 230, 232 (1970).

Without medical evidence of an increase in causally related impairment, the employee fails to carry that burden. Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203, 205 (2004). The judge credited the employee's statements concerning his pain, and relied on the "persuasive medical opinions" of the impartial examiner, to find him permanently and totally incapacitated. (Dec. 95.) The employee testified that his condition had gotten "dramatically worse" in the two years prior to the hearing, with his pain "steady and intense." (Tr. 19.) He stated "the pain level in my back muscles has increased," a worsening he related to the muscle strain of 2008. (Tr. 34-25.) Dr. Morley, in his deposition, noted there had been "significant changes" between his 2008 examination and that of 2011. (Dep. 25-26). Although the employee's clinical condition had not changed between the two dates, (Dep. 26, 32, 42, 45), the doctor was of the opinion the employee's pain behaviors had gotten worse, given that he presented bent over and shaking at the examination. (Dep. 26.) The doctor also noted the treatment of the employee's pain had "escalated dramatically," with significantly higher doses of stronger pain medications. (Dep. 27.) While the doctor acknowledged the employee's pain was subjective, (Dep. 29), and out of proportion to his physical findings, (Dep. 36, 43), he accepted that the employee's work prospects were worse and that the original lumbar strain remained a major cause of his need for treatment. (Dep. 48-49.)

We have held that an employee's credited increase in complaints of subjective pain may properly form the basis of an expert medical opinion of worsening of the employee's condition, even where an objective basis for the increase in pain is lacking. [3] Caramiello v. BSI Bureau of Spec. Invest., 21 Mass.

[3] Crediting of the employee's testimony of worsening pain alone, without corroborating expert medical opinion, is not sufficient support for an award of benefits. Docos v. T. J. McCartney, 25 Mass. Workers' Comp. Rep. 39, 42 (2011).

Workers' Comp. Rep. 321. 326 (2007). However, the judge made no specific findings that the employee's underlying industrial condition had worsened from the time of his earlier decision, as is required. Docos, supra., at 42. Although he credited the employee's complaints of pain, the judge did not adopt a medical opinion sufficient to support a finding that the employee experienced a non-age related worsening of his work related condition. Thus, we agree with the insurer that on recommital the judge must perform a proper analysis on whether the employee has sustained a work related, and not merely an age related, worsening, utilizing only the existing medical and lay evidence of record.

Finally, the insurer challenges the validity of the assignment of April 1, 2011, as the commencement date for the § 34A benefits, as there is no support for this date in the evidence. We agree. Although April 1, 2011, is the date the employee's complaint was filed, it bears no evidentiary significance. On this record, it would appear that the earliest start date supported by the medical evidence would be August 25, 2011, the date of the § 11A impartial medical examination. It is axiomatic that factual findings as to when an employee's incapacity, whether total, partial, temporary or permanent, begins or ends must be grounded in the evidence found credible by the judge. Bowie v. Matrix Power Servs. Inc., 23 Mass. Workers' Comp. Rep. 251, 253 (2009). See also MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36-37 (2007), and cases cited.

Therefore, we vacate the award of § 34A benefits, reinstate the conference order, and recommit the case for findings consistent with this decision. The insurer shall take credit for benefits it has previously paid.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **January 31, 2014**