COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019846-02**

Stephen A. Maraia	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Brian R. Sullivan, Esq., for the employee
Martin J. Long, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits. It argues the judge erred by failing to address whether the employee's condition had worsened after a prior hearing decision found him to be only partially incapacitated. See Foley's Case, 358 Mass. 230, 232 (1970). It also claims there is no evidentiary basis for the date chosen to commence the employee's entitlement to § 34A benefits, and that the judge misconstrued the medical evidence. We affirm the decision.

On June 12, 2002, the employee injured his back at work. (Dec. 5.) An April 6, 2007 hearing decision awarded him a closed period of § 34, and ongoing § 35, benefits. In the present claim the employee sought, and the judge awarded, § 34A benefits from August 26, 2009, to date and continuing. (Dec. 2.) The employee had his second back surgery on that date.[1] (Dec. 6.) The support for this finding derives from the judge's adoption of the causal relationship opinion of self-insurer's physician, Dr. John Chaglassian, who described the employee's surgery, a lumbar spine fusion using pedicle screws and rods, as "failed." (Dec.

[1] The judge found that the employee's first surgery, on July 21, 2004, left him with pain radiating down his leg, and with back pain. (Dec. 6.)

8.) It also rests upon the opinion of Dr. Richard Ozuna, who opined that after the employee's second surgery, he was permanently and totally disabled. (Dec. 7; Ex. 7.) The validity of a finding of total incapacity for a reasonable time following an invasive surgical procedure is so basic and well-established that the *failure* to do so may constitute error requiring recommittal. See, e.g., Wilkins v. City of Lowell, 11 Mass. Workers' Comp. Rep. 669, 673 (1996); Smith v. Theta J. Corp., 6 Mass. Workers' Comp. Rep. 172, 173 (1992). Thus, the self-insurer's argument that the judge's decision to commence § 34A benefits from the date of the employee's second surgery rings hollow.

The judge's use of the employee's second surgical date also disposes of the self-insurer's argument that she failed to conduct a Foley "worsening" analysis.[2] While it is true the employee was on § 35 partial incapacity benefits prior to his August 26, 2009 surgery, that surgery had the unfortunate result of worsening the employee's medical condition, beyond any reasonable expectation of a recuperative period.[3] Accordingly, based on the adopted medical evidence, the employee has demonstrated the requisite worsening.

The self-insurer also posits the judge erred by relying on a medical report dated one year post-surgery to conclude the employee was permanently and totally disabled from the August 26, 2009 surgery forward. Reliance on a medical

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[2] The Foley decision requires the employee to prove that the deterioration in his condition, necessary to qualify for total incapacity benefits following an award of partial incapacity benefits, is "due to the [industrial] accident," and not solely the result of "advancing age." 359 Mass. at 232.

[3] As noted, the judge adopted Dr. Chaglassian's opinion that the second surgery was a failure, and also adopted the opinion of Dr. Ozuna that as of August 17, 2010, a year after the second surgery, the employee remained permanently and totally disabled. (Dec. 7-8, 11.) Dr. Ozuna performed both surgeries, and treated the employee throughout the disputed period of disability. (Dec. 6-7.) Thus, his disability opinion is based on a solid foundation of continuous personal knowledge. See Massachusetts Guide to Evidence, § 703 (2008)(proper basis for expert opinion includes "facts observed by the witness or otherwise in the witness's direct personal knowledge").

opinion to address an employee's incapacity for a period prior to the medical examination upon which the opinion is based is a component of disability adjudication. This case presents a common fact pattern. As discussed, the date of surgery stands as an appropriate commencement date of total incapacity. When a doctor opines, a year after a failed surgery, that the employee is *still* permanently and totally disabled, and his disability *remains causally related to the industrial injury*, an inference that total disability existed throughout that year is reasonable. See Cugini v. USF Red Star, Inc., 20 Mass. Workers' Comp. Rep. 1, 3 (2006)(even in § 11A context, disability opinion could be relied upon to address a thirteen month gap between industrial injury and examination), citing Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before").

Finally, the self-insurer's argument that the judge misconstrued the disability opinion of the impartial physician, Dr. Peter Anas, fails because while the judge adopted his opinion, in part, in her subsidiary findings of fact, she did not rely on it in her general findings and award of benefits. (Dec. 7, 11.) In any event, we consider that Dr. Anas's opinion is susceptible of the judge's interpretation: two to three months post-surgery, the employee remained totally disabled. (Dec. 7.) There was no error.

Accordingly, the decision is affirmed. Under the provisions of G. L. c. 152, § 13A(6), we order the self-insurer to pay the employee's attorney a fee in the amount of $1,517.62.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **November 30, 2011**