**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NO. 009912-99** |
| Susan E. Caramiello | Employee |
| BSI Bureau of Special Investigations | Employer |
| Commonwealth of Massachusetts | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Horan, Costigan and McCarthy)

**APPEARANCES**
Joseph F. Agnelli, Jr., Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

**HORAN, J.** The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits. We affirm.

The employee suffered a low back injuries at work in January 1997 and in March 1999. (Dec. 3.) After being placed on § 35 partial incapacity benefits by a hearing decision, she applied for § 34A permanent and total benefits. (Dec. 2.) There is no disputing that under these circumstances, the employee is required to show a worsening of her condition, related to her industrial injuries, to qualify for § 34A benefits. Foley's Case, 358 Mass. 230 (1970).

The self-insurer raises four issues on appeal. We address one, and otherwise summarily affirm the decision.

Essentially, the self-insurer argues the judge could find no worsening in this case because the adopted medical opinion of Dr. Anthony R. Caprio, the § 11A impartial medical examiner, was based solely on the employee's subjective complaints of pain, and her report that she was feeling worse. While Dr. Caprio, at his deposition, used the terms "objective" and "subjective" interchangeably to describe the employee's complaints, we accept, for the purpose of this appeal, the self-insurer's view that the medical opinion of Dr. Caprio on this key issue amounts to no more than an opinion based on the subjective complaints of the

employee.[1] Nevertheless, we find no error, given the doctor's role, the overall import of his testimony, and the judge's crediting of the employee's testimony concerning her level of pain. Cf. Larti v. Kennedy Die Castings, Inc., 19 Mass.

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[1] Dr. Caprio testified at his deposition as follows:

> Q: But your opinion as a doctor . . . based on your exam, based upon your review of Dr. Tanenbaum's records, is there any objective evidence of a worsening?
> A: No, there is no objective evidence.
> Q: And so if we ask you, Doctor, is your opinion that Mrs. Caramiello has gotten worse since 2000, what's your opinion?
> A: She is getting worse from a subjective - - I cannot separate one from the other. . . .

(Dep. 37.)

. . .

> Q: Just referring to Ms. Caramiello, based on objective evidence you didn't see any worsening?
> A: No, I didn't.

(Dep. 44.)

. . .

> Q: And the occasion of the most recent visit, the subjective complaints, you agree that she has demonstrated a worsening of her condition, correct?
> A: Objectively as shown at that time it was worsened.
>
> Q: But her subjective complaints in May of 2005 which you took to be credible demonstrated a worsening of her condition, correct?
> A: Combination of both, yes.

(Dep. 49-50.)

At the conclusion of his deposition, the doctor testified that "[o]ver the years subjectively . . . [the employee's condition has] gotten worse. Objectively she has had these good days and bad days. It depends on when the doctor sees her. You would probably come up with a straight line with very little change if you plot this on a graph. That's objectively. Her complaints have been subjective, objective." (Dep. 54.)

Worker's Comp. Rep. 367 (2005)(judge must determine credibility of employee's complaints of pain independent of physician's assumption that employee's complaints of pain were truthful even in the absence of an organic or anatomic basis for many of his complaints); Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342 (2003)(error for judge to simply defer to the impartial medical examiner's decision not to credit the employee's history).

The judge found the employee's complaints of lower back pain, which wax and wane without predictability, to be credible. The employee testified her increase in symptoms could last up to six weeks, during which time the judge found that the employee was severely limited in her activities. The judge also credited the employee's testimony and found that her pain was "stronger and worse" since September 1, 2004. (Dec. 5.)

Dr. Caprio's opinion is the only medical opinion in the record. He opined the employee suffered a work-related exacerbation of an underlying degenerative spinal condition, with chronic postural and mechanical low back dysfunction, secondary to degenerative discs. The doctor also opined the employee's work related injuries were a major cause of her worsening medical condition and resultant disability:

> Q: So it's your opinion that her condition since 2000 has gotten worse since the last time you saw her?
> A: Yes, degenerative, yes.
> Q: Is it fair to say, Doctor, that one of the major contributors . . . to setting the wheels in motion, Doctor, were those two incidents at work?
> A: It's a major cause, yes, but not necessarily the predominant cause.
> Q: So those two work-related episodes of 1997, in January, and in March of 1999, both of those, if you take them together with the history that she gave you, both of those injuries continue to be a major contributor to this worsening process, correct, Doctor?
> A: Yes.
> Q: Correct?
> A: Yes.

(Dep. 14-15.) The doctor never abandoned this opinion.[2] The doctor assessed the employee's disability as ranging from some ability to perform sedentary work to total disability from even sedentary work, depending on her unpredictable bouts of severe back spasms. The doctor further opined the employee's condition is permanent, and that it will continue to worsen. (Dep. 16-20.) The judge adopted Dr. Caprio's opinions. (Dec. 6.)

Based on the employee's vocational profile, her credible testimony regarding her unpredictable pain and its disabling effects, as well as Dr. Caprio's opinions, the judge found the employee's work-related medical condition had worsened, and therefore awarded § 34A permanent and total incapacity benefits from September 1, 2004 to date and continuing. (Dec. 6-7.) Cf. Foley's Case, supra, at 232 (employee testified his medical condition unchanged, and doctors opined that any worsening was due only to advancing age; claim for § 34A benefits rightly denied.)

The self-insurer does not cite to any statute or case, and we cannot find one, in support of its argument that a doctor may not base his medical opinion solely by crediting a patient's subjective complaints. In fact, under Massachusetts law, it is at least clear that a doctor may testify as to a patient's past complaints of pain, symptoms and conditions, which were made to the doctor for the purposes of diagnosis and/or treatment. Commonwealth v. Comtois, 399 Mass. 668 (1987); see also M.S. Brodin, M. Avery, Handbook of Massachusetts Evidence, 512 (7th ed. 2007). We acknowledge, based on our collective experiences as judges, lawyers, and especially as patients, that doctors routinely ask patients to report and describe symptoms, and that some symptoms are not objectively verifiable. See White v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 490 (2000)(in the absence of objective medical evidence, impartial physician based his opinion of the

[2] The dissent points out Dr. Caprio's testified the "predominant" cause of the worsening was the pre-existing degenerative process. The doctor testified: ". . .the predominant

employee's medical restrictions on her subjective complaints). As Dr. Caprio stated at his deposition:

> A: Why a person comes to me is for subjective complaints. I say, Does it bother you? Why do you want to have it treated? You don't treat X-rays. You treat [a] patient's symptoms.

(Dep. 37.) We also note that many psychiatric diagnoses are made based on an assessment of a patient's history, and subjective complaints. See generally, Diagnostic And Statistical Manual Of Mental Disorders ("DSM-IV-TR") of the American Psychiatric Association (4th ed. 2000).

In the tort arena, the physical harm requirement in an action for the negligent infliction of emotional distress must be proven by "objective symptom-atology". Payton v. Abbott Labs, 386 Mass. 540 (1982). Since Payton, our appellate courts have taken a more expansive view of the types of complaints or symptoms that may properly qualify as "objective". In Sullivan v. Boston Gas Company, the plaintiff complained "he had suffered from sleeplessness, gastro-intestinal distress, upset stomach, nightmares, depression, feelings of despair, difficulty in driving and working, and an over-all "lousy" feeling. . . ." 414 Mass. 129, 131 (1992). In reversing summary judgment for the defendant on the plaintiff's negligent infliction of emotional distress claim, the court held that medical experts "may consider, in the exercise of their professional judgment, the plaintiffs' description of the symptoms they experience" to provide objective corroboration of a patient's emotional distress. Id. at 138. In such cases, the court felt it best to leave the ultimate question to the fact-finder, especially where the plaintiff had produced sufficient evidence to causally link the alleged symptoms to the accident in question. Id. at 138-140.

In this case, there is no causation dispute, and there is medical testimony to support the employee's testimony that her medical condition has worsened. We

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cause now is the degenerative process, on top of which is the injury, which I call a major process." (Dep. 30.) See G. L. c. 152, § 1(7A).

think it is best for the administrative judge, as fact-finder, to accept or reject the lay and expert testimony in these circumstances. We therefore conclude that a doctor may, based solely on subjective complaints of pain, form an opinion that an employee's work-related medical condition has worsened.[3] We also conclude that a judge may award weekly incapacity benefits by crediting the employee's subjective complaints, and by adopting corroborative medical testimony. Cf. Cipoletta v. Metropolitan District Comm'n., 12 Mass. Workers' Comp. Rep. 206, 208 (1998)(judge's adoption of medical opinion based solely on subjective complaints of pain internally inconsistent with judge's discrediting of those very complaints; recommittal appropriate).

Accordingly, we affirm the decision. The self-insurer shall pay the employee's attorney a § 13A(6) fee in the amount of $1,458.01.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **December 31, 2007**

**COSTIGAN, J., dissenting.** Because the employee, by an earlier hearing decision,[4] had been adjudicated only partially incapacitated, she was

[3] Of course, a judge may reject such a medical opinion by discrediting the employee's testimony regarding the nature and extent of her pain. See e.g., Corbitt v. Modern Continental Constr. Co., 17 Mass. Workers' Comp. Rep. 557 (2003); Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312 (2003).

[4] Although the administrative judge was asked to take judicial notice of that prior decision, filed by a different judge in 2001, (Tr. 8), nothing in his decision reflects that he did so. Certainly he made no findings with respect to that prior adjudication of partial incapacity, and for that reason alone, his finding of a worsening -- from an unidentified level of medical disability in 2001 -- is suspect. Manzi v. Beverly Housing Auth., 19 Mass. Workers' Comp. Rep. 180, 183 (2005).

"required to demonstrate a *worsening of [her] work-related medical condition* or a deterioration in [her] vocational status," to prevail in her claim for § 34A permanent and total incapacity benefits. Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203 (2004), citing Foley's Case, supra. (Emphasis added.) Though subjective complaints are part of a person's medical condition, they are not the only component. Thus, the employee's burden was far greater than to simply persuade the impartial medical examiner, and/or the administrative judge, that her subjective complaints, i.e., her symptoms, had worsened since the prior adjudication. That, however, is all the employee accomplished here, and therefore, in my opinion, the judge's decision cannot stand.

The majority says it accepts the self-insurer's view that Dr. Caprio's opinion on the key issue of "worsening" amounts to no more than an opinion based on the subjective complaints of the employee. In my view, the doctor's so-called "opinion" is not an expert opinion based on a reasonable degree of medical certainty at all, but rather a mere recital or recounting of the employee's subjective complaints and *her* view that her physical condition has worsened. "As a general rule, proof of worsening or deterioration must be supported, at least in part, with medical evidence. See, e.g., Foley, supra; McEwen's Case, 369 Mass. 851,854 (1976); Desrosiers v. Lakeville Hosp., 17 Mass. Workers' Comp. Rep. 248, 249-250 (2003)." Manzi, supra at 183-184.

The majority identifies Dr. Caprio's "opinions" as such supporting medical evidence, but I think the majority misconstrues the doctor's actual opinion on worsening. Dr. Caprio testified the employee's pre-existing degenerative process of her spine had gotten worse between his two examinations, in 2000 and in 2005. (Dep. 14.) He also acknowledged that the employee's two work injuries continued to be a major contributor to her current level of disability which, he opined, was chronic and permanent, (Dep. 50-51), although partial. (Dep. 13, 23-27, 46.) Dr. Caprio, however, testified that the predominant cause of the employee's worsening complaints was the pre-existing degenerative process. (Dep. 30.) The doctor

acknowleged his findings on physical examination of the employee were basically the same in 2005 as in 2000. (Dep. 28-29.)[5] "You would probably come up with a straight line with very little change if you plot this on a graph. That's objectively." (Dep. 54.)

While I agree with the majority that a physician may consider a patient's subjective complaints as part of an overall medical assessment, I do not agree that a medical opinion based solely on the physician's *belief* of such complaints (assuming *arguendo* that is what Dr. Caprio's adopted opinion is) carries the employee's burden of proof.[6] No physician, not even a § 11A impartial medical examiner, is the arbiter of the employee's credibility. That is exclusively the function of the trier of fact. See Moynihan, supra; Larti, supra. However, we have said:

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[5] Q. Two questions for you. Just based purely on your exam in 2000 versus 2005, was her *condition* any worse in 2005?
A. From a physical point of view, no.
Q. And you mentioned her complaints you thought were worse --
A. *She told me they were worse.*

. . .

Q. Do you see any indication of a worsening in her medical records from 2002 tho [sic] 2004?
A. No. It's consistent, status quo.
Q. So I am not sure where you are coming up with your worsening.
A. She told me subjectively. I put down subjectively she has gotten progressively worse.
Q. So there is [sic] no objective signs of worsening?
A. No.
Q. And --
A. Her complaints are subjective with very little objective findings, other than some mild restricted motion in all planes of the back, mild.

(Dep. 29, 35; emphases added.)

[6] I doubt the majority would consider an employee's testimony that he has suffered occasional, non-work related back pain over the years as satisfying the insurer's burden of production as to a pre-existing lumbar condition for the purpose of applying § 1(7A) to the employee's claim, even if a physician recounted that same history in a report or at deposition. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000).

> The decision reflects that the judge credited the employee's testimony regarding [her] pain. . . . Such credibility determinations are the sole province of the hearing judge and, generally, will not be disturbed. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000), citing Lettich's Case, 403 Mass. 389, 394 (1988). Here, however, the judge could not properly rely on the employee's testimony alone to find that [she] had physical restrictions which prevented her from working . . . because the impartial physician was asked at deposition to assume that very testimony -- that the employee's levels of pain were as [she] testified -- and the doctor reiterated his opinion that the employee could [perform sedentary work].

Taylor v. USF Logistics, 17 Mass. Workers' Comp. Rep. 182, 185 (2003). See also, Rezendes v. City of New Bedford Water Dep't, 21 Mass. Workers' Comp. Rep. 47, 50-51 n.2 (2007). Just as some measure of medical disability is a *sine qua non* of loss of earning capacity, Taylor, supra at 186, some measure of objective medical worsening is a *sine qua non* of the permanent and total incapacity of an employee previously adjudicated to be only partially incapacitated. Because Dr. Caprio offered no such opinion, the judge could not simply substitute his belief of the employee's testimony to find her medical condition had worsened.

In my view, the employee failed to carry her burden of proving a worsening of her medical condition, as contemplated in Foley's Case, supra, and the judge erred as a matter of law in finding her permanently and totally incapacitated. Accordingly, I would reverse the judge's decision and vacate the award of § 34A benefits.

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Patricia A. Costigan
Administrative Law Judge

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