COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 06619588**

Thomas Izbicki	Employee
John J. Nissen Baking Co.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Carroll)

APPEARANCES
Paul L. Durkee, Esq., for the employee
Thomas E. Fleischer, Esq. for the insurer at hearing and on appeal
Nicole M. Edmonds, Esq., for the insurer on appeal

LEVINE, J. The insurer appeals from a decision in which an administrative judge awarded § 34A permanent and total incapacity benefits to an employee for orthopedic impairment resulting from his 1988 low back injury. The insurer argues that the judge erred by failing to find a worsening of the employee's orthopedic condition, when a different judge awarded § 34 benefits based on both orthopedic and psychiatric conditions, but specifically found that the orthopedic condition only partially incapacitated the employee. The insurer also argues that the judge erred with respect to her finding as to the employee's age; finally, it argues that the judge violated the insurer's right to due process by denying its request for a post-hearing § 45 medical examination. Finding merit in the first two issues the insurer raises, we recommit the case for further findings.

The employee injured his back at work on October 11, 1988. (Dec. 4.) The insurer accepted the claim for compensation benefits and paid § 34 temporary total incapacity benefits. In an August 11, 1992, conference order, an administrative judge discontinued the payment of § 34 benefits and ordered the payment of § 35

partial incapacity benefits. (Statutory Ex. #2, 1-2 [hereinafter, "1995 Dec."].[1]) The parties accepted the order. In 1994, both the employee and the insurer sought modifications in the benefits being paid under § 35; the insurer sought a discontinuance of benefits; the employee sought a restoration of § 34 benefits or continuation of § 35 benefits. (1995 Dec. 2.) On the basis of the employee's alleged psychiatric condition, the judge allowed the parties to introduce medical evidence in addition to the report of the § 11A orthopedic surgeon, Dr. Anthony R.M. Caprio. (1995 Dec. 3.) The employee submitted a report of Dr. Robert J. Mulvey, a psychiatrist who examined the employee on April 1, 1995. (1995 Dec. 3, 5.)

The 1995 hearing decision contains the following additional relevant information. With regard to the employee's orthopedic injury, the impartial physician diagnosed a chronic pain syndrome based on the October 11, 1988 work related aggravation of underlying degenerative disc disease of the lower back. The doctor causally related at least some of the employee's ongoing symptoms to the work injury. The doctor opined that the employee was physically capable of doing some sedentary work with no repetitive bending, twisting and lifting over 25 pounds for over one half hour. The doctor also recommended physical therapy and work hardening to slowly reintroduce the employee to the workplace. (1995 Dec. 4-5.) The judge adopted the impartial physician's opinion that the employee was partially disabled as a result of his physical condition; he also specifically found that the employee would be employable, were it only a matter of his physical condition. (1995 Dec. 7.)

Dr. Mulvey's opinion as to the employee's psychiatric condition was that the employee suffered both from a dysthymic disorder, because of a chronic depression of greater than two years, and from a pain disorder due to the

[1] Because one of the issues in this case involves a comparison of the employee's condition between 1995 and 1999, it is necessary to present a summary of the 1995 decision.

employee's complaints of pain that exceeded that which were supported by objective findings. Dr. Mulvey was of the opinion that the employee was totally disabled from gainful employment due to these disorders. (1995 Dec. 5.) The judge adopted Dr. Mulvey's opinion, and concluded that the employee was totally incapacitated by his causally related psychiatric condition, as of the date of Dr. Mulvey's examination, April 1, 1995. (1995 Dec. 7.) Accordingly, the judge ordered ongoing § 34 benefits in his decision filed October 13, 1995. (1995 Dec. 8.)

With that background, we now address the insurer's appeal of the present decision. The employee filed his claim for § 34A benefits in 1998; in her conference order, the judge denied the claim but did award § 35 benefits. Both parties appealed to a full evidentiary hearing, which was held on November 22, 1999. (Dec. 2.) The employee underwent an impartial psychiatric examination on May 10, 1999. The doctor did not find evidence of a psychiatric illness, but did find that the employee suffered from a somatoform disorder consisting of real or imagined pain in different parts of his body. The doctor concluded that the employee was not psychiatrically disabled. (Dec. 5.) The judge adopted the opinion of the impartial psychiatrist, but allowed additional medical evidence as to the employee's orthopedic condition. (Dec. 3, 5-6.)

The employee submitted clinical records and the deposition testimony of Dr. Philip Lahey, Jr. (Dec. 1, 6.) According to Dr. Lahey, the employee had suffered from chronic low back strain and an L5-S1 disc herniation since November 25, 1996, which diagnosis the doctor causally related to the October 11, 1988 work injury. Dr. Lahey opined that the employee had been permanently and totally disabled since June 13, 1997. The judge adopted the opinions of Dr. Lahey, and did not adopt those of the insurer's expert, Dr. Benjamin Gilson. (Dec. 6.) The judge concluded that the employee was permanently and totally incapacitated as a result of chronic low back strain and an L5-S1 herniated disc.

The judge concluded that the employee's psychiatric condition was not disabling. (Dec. 7.)

Two issues raised by the insurer require recommittal. First, the judge found the employee to be sixty years old. (Dec. 4.) The finding is erroneous, as it is not disputed that the employee was thirty-nine years old at the time of the hearing. (Tr. 24, 60; employee brief 2, 6). This mistake is too crucial to the judge's vocational assessment to be considered harmless. The judge must revisit her analysis under Frennier's Case, 318 Mass. 635 (1945), having in mind the employee's correct age.

Second, the insurer argues that the judge failed to make the finding of a worsening condition, which is necessary to warrant an increase of weekly incapacity benefits from partial to permanent and total. See Foley's Case, 358 Mass. 230 (1970). We agree. Because the employee was no longer psychiatrically disabled, his orthopedic condition is now crucial. Applying and paraphrasing Foley: "Since the employee had been found in [1995] to be only partially incapacitated [by his orthopedic condition,] the burden in the [1999] proceedings was upon him to prove he was now totally incapacitated as a result [of that condition]." Id. at 232 (citations omitted). However, the judge here did not explicitly find a worsening in the employee's orthopedic condition from 1995 to 1999. Cf. McEwen's Case, 369 Mass. 851, 854 (1976)(court affirmed board award of § 34A benefits two years after denial of same, based on lay and medical evidence of worsening medical condition). But see also Lally v. K.L.H. Research & Development, 9 Mass. Workers' Comp. Rep. 427, 429 (1995)("worsening is not limited to the employee's medical condition but might also be induced by vocational factors").

As "[i]t is the exclusive function of the [administrative judge] to consider and weigh the evidence and to ascertain and settle the facts," McEwen's Case, supra at 853, we recommit the case for further findings on whether the employee's orthopedic condition worsened between 1995 and 1999, and for a reassessment of

the employee's vocational profile using his correct age. Absent a change in the employee's condition, the judge's award of permanent and total incapacity benefits cannot stand.[2]

The case is recommitted. Pending reconsideration, the hearing order shall remain in effect.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

FEL/kai
Filed: July 12, 2001

[2] We affirm the decision with regard to the insurer's last argument, that the judge denied it due process when she did not permit a § 45 medical examination in the thirty days allowed for depositions to be taken, after the conduct of the lay hearing. Suffice it to say that judges have wide discretion to administer their own hearings. Furthermore, the insurer had omitted – for over a year – to have the employee reexamined orthopedically, even though the assignment of a psychiatric impartial examination made it likely that additional evidence was going to be required to address the orthopedic condition.