

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 030786-05

Veraina Diaz
Gentiva Health Services
Twin City Fire Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Fabricant¹)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Charles R. Casartello, Jr., Esq., for the employee
Lauren M. Bergheimer, Esq., for the insurer

McCARTHY, J. The employee appeals from a decision in which the administrative judge denied and dismissed her claim for § 34 benefits from March 8, 2006 to July 30, 2007 for a work-related motor vehicle injury which occurred on September 12, 2005. Because the adopted medical evidence of the § 11A impartial physician was inadequate to address the disputed period of incapacity, which issue the parties brought to the judge's attention but was left unaddressed, we recommit the case for the introduction of additional medical evidence and further findings.

On September 12, 2005, the employee, a visiting psychiatric nurse, was traveling to a patient's home when her automobile was struck on the side. She injured her back and neck, was taken to the hospital by ambulance and was out of work until December 5, 2005. The insurer paid § 34 benefits on a without-prejudice basis until her return to work. In March 2006, the employee left work with worsening neck and back pain. She again returned on July 30, 2007, this time in a restricted duty position. (Dec. 2.)

¹ Judge Koziol recused herself from this case and did not take part in panel discussions.

Following the denial of her claim for § 34 benefits at conference, the employee sought a full evidentiary hearing. (Dec. 1.) After a § 11A medical examination on July 12, 2007, the impartial physician opined that the employee suffered from chronic, pre-existing mid-cervical degenerative spondylosis, which was aggravated dramatically by the motor vehicle accident. Nevertheless, on the day of the § 11A exam the doctor determined that the employee had recovered from the effects of the September 12, 2005 accident. He could not pinpoint the precise time when the employee's work injury was no longer a component in her medical disability, or identify the extent of her disability prior to his examination. The doctor opined that the motor vehicle injury probably would not be a factor in the employee's medical disability for more than a year post-accident. (Dec. 3.)

The judge read the impartial physician's opinion to support his denial of the employee's claim of work-related incapacity from March 2006 through July 2007. The judge found that, in the months following the employee's December 2005 return to work, her neck and arm [pain] increased until she finally was unable to continue working. She was still unable to continue working due to this pain over a year later, by which time the impartial physician opines the effects of the accident would no longer be accountable for the continued symptoms. It would seem then, in keeping with the opinion of the impartial physician, that the work injury was no longer a major cause of this second disability from work, but rather it was the underlying, pre-existing symptoms (which were already coming to the fore in the days leading up to the work injury) that were now causing the ongoing problems.

(Dec. 4.) The judge therefore concluded that the insurer's payment of § 34 benefits up to December 5, 2005, the date she returned to work, was the extent of the employee's entitlement for her work-related motor vehicle injury. (Dec. 4-5.)

The employee correctly argues that the impartial medical evidence left her claim for weekly benefits largely unaddressed. Although she returned to work in December 2005, the employee then left work again in March 2006. The impartial medical examination took place on July 12, 2007, and the doctor testified at his deposition that he did not know if the work-related motor-vehicle accident played any role in the period of incapacity commencing in March 2006. (Dep. 58.) The doctor also conceded that any assessment as to the extent of the employee's disability from when she left work in March 2006 until he saw her on July 12,

2007, would be speculation on his part. (Dep. 54.) However, the doctor expressed repeated reluctance to consider that the work-related aggravation would still have an effect on the employee's upper spine over a year after the incident, given the pre-existing problems she exhibited. (Dep. 53, 57.) Finally, the impartial physician opined without equivocation that the employee had returned to her pre-injury status as of his examination some sixteen months later. (Stat. Ex. 1.)

Given the parameters of the impartial medical opinion, there was no basis for the judge's findings that the employee did not have a causally related medical disability from March 2006 until (at least) September 2006, a year post-injury. There was simply no medical evidence in the record addressing her disability and its causal relationship during that period. The judge erred by failing to allow additional medical evidence "to present fairly the medical issues."² O'Brien's Case, 424 Mass. 16, 23 (1996). See George v. Chelsea Housing Auth., 10 Mass. Workers' Comp. Rep. 22 (1996)(§ 11A opinion inadequate to assess prior period of disability triggers necessity for additional medical evidence).

We therefore recommit the case for the introduction of additional medical evidence and further findings of fact.

So ordered.

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **March 24, 2009**

² Although not mentioned in the decision, we take judicial notice of the fact that after the doctor's deposition, *both* parties moved for the introduction of additional medical evidence for the pre-exam gap period See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of board file appropriate).