COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004867-04**

Wendy Costa	Employee
TGI Fridays	Employer
Insurance Co. of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and McCarthy)

This case was heard by Administrative Judge Brendemuehl.

APPEARANCES
Samuel Lovett, Esq., for the employee
Joseph M. Spinale, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee §§ 34A and 36 benefits. We affirm the decision.

The employee has an eleventh grade education. She worked as a waitress, and occasionally prepared salads and nacho dishes, for the employer. In a prior hearing decision[1] she was awarded § 34 benefits, for an injury to her left upper extremity, from February 20, 2004, to date and continuing, based on a stipulated average weekly wage of $380. (Dec. 3, 6.)

As the date of statutory exhaustion of her § 34 benefits neared, the employee filed a claim for § 35 partial incapacity benefits, and for § 36 benefits for permanent functional loss of her left arm. Following a § 10A conference, the judge awarded the employee ongoing § 35 benefits only. Both parties appealed and, prior to hearing, the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 3-4.)

At hearing, the employee testified she experienced constant pain, and a lack of strength, in her left arm, which prevented her from performing many household activities. She also testified her arm remained extremely sensitive to touch and

[1] Neither party appealed that decision, which was filed on April 13, 2006. (Dec. 3.)

temperature, and that she wore a wrist splint to carry objects. (Dec. 7-9.) The judge credited the employee's testimony regarding her pain and limitations. (Dec. 7, 11.)

Doctor Vincent Birbiglia examined the employee pursuant to § 11A, and issued reports dated June 22, 2007 and August 7, 2007. His reports, and his deposition testimony of June 13, 2008, were admitted into evidence. (Dec. 1, 3.) The judge found Dr. Birbiglia's reports were adequate, but allowed the parties to submit additional medical evidence on complexity grounds.[2] (Dec. 5.)

In her decision, the judge adopted Dr. Birbiglia's opinion that, as a direct result of her February 20, 2004 industrial injury, the employee suffered from regional pain syndrome in her left forearm, arm and hand, and from left elbow contractures, causing a 100% functional loss of her left upper extremity. The judge also found the employee suffered from disfigurement due to her elbow contractures. (Dec. 8.) Consequently, the judge awarded the employee $34,493.94 for benefits under § 36(1)(e)[3] for the 100% permanent loss of function of her left minor upper extremity, and $15,000 in disfigurement benefits.[4]

Addressing the employee's claimed incapacity, the judge again adopted the opinion of Dr. Birbiglia, who testified at deposition that it "would be reasonable to consider [the employee] permanently and totally disabled if there are not other therapeutic options that could be offered to her." (Dep. 43; Dec. 9.) Doctor Birbiglia was unable to suggest any such options. (Dec. 9.) The judge then considered the opinions of two vocational experts. Specifically rejecting the opinion of the insurer's expert, and adopting the opinion of the employee's

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[2] See General Laws c. 152, § 11A(2).

[3] General Laws c. 152, § 36(1)(e), provides, in relevant part, that in addition to all other compensation, the employee shall be paid, "for the amputation or permanent total loss of use of the minor arm, a sum equal to the average weekly wage in the commonwealth at the date of the injury multiplied by thirty-nine. . . . "

[4] On appeal, the insurer does not challenge the judge's § 36(1)(k) disfigurement award.

vocational expert, Edmond J. Calandra, the judge concluded the employee "is unable to perform job tasks, duties and physical requirements on a consistent, regular, and ongoing basis. . . ." (Dec. 11.) Accordingly, the judge ordered the insurer to pay the employee § 34A benefits based on the stipulated average weekly wage of $380. (Dec. 4, 12.)

The insurer's first argument on appeal is that the judge erred by relying on Dr. Birbiglia's § 36 evaluation because his opinion was not based on the American Medical Association (AMA) guidelines. The insurer also posits that, because Dr. Birbiglia opined "she can do some things," such as hold a soda or open a car door, and "does not have 100 percent loss of function, 100 per cent of the time," his opinion cannot be read to support a finding of 100 percent functional loss. (Dep. 25, 44; Ins. br. 9-12.) We disagree with both contentions.

General Laws c. 152, § 36(2) provides, in relevant part: "*Where applicable*, losses under this section shall be determined in accordance with standards set forth in the American Medical Association Guides to the Evaluation of Permanent Impairments." (Emphasis added.) Here, Dr. Birbiglia testified repeatedly that the employee had a 100%, or total, loss of function of her left arm. (Dep. 16-17, 18-19, 40, 42.) However, he admitted, "I couldn't really follow *all* the AMA guidelines because I really couldn't even examine her properly because of all the discomfort and contractures." (Dep. 18.) (Emphasis added.) On further questioning, he stated: "The AMA would include motor function, which was not able to be tested because of severe pain." (Dep. 25.) He explained the employee had no functional use of her arm because any contactual stimulus (someone touching her arm or something brushing against it) caused severe pain. (Dec. 8; Dep. 18.) Dr. Birbiglia continued: "I think in this situation the factor becomes the *pain and the marked sensitivity to any touch and the contractures and the difficulties with movement.* So, I think that's what puts us into the 100 percent disability." (Dep. 19; emphasis added.) With respect to her ability to do "some limited things" with her left arm, the doctor opined the employee could not do

anything on a repetitive basis, or use the arm in a sustained, purposeful way. (Dec. 17, 20-22.)

We see no error in the manner in which Dr. Birbiglia performed his permanent loss of function evaluation. As noted, the AMA guidelines are to be utilized "where applicable." G. L. c. 152, § 36(2). In this instance, Dr. Birbiglia applied them to the extent possible, and adequately explained the foundation for his opinion that the employee has a 100% total loss of function of her left arm. This was entirely appropriate, particularly since, "the AMA Guides provide for consideration of pain factors in determining the extent of impairment. (See, generally, § 16.5e entitled 'Complex Regional Pain Syndromes (CRPS), Reflex Sympathetic Dystrophy (CRPS I), and Causalgia (CRPS II). AMA Guides, [ ] 495-496, [5th Ed. (2001)].' " MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 34 (2007). In the circumstances presented here,[5] we do not interpret the statute to require a purely mechanical application of the AMA guidelines. Thus, the judge did not err when she adopted Dr. Birbiglia's opinion on the functional loss issue.

The insurer next challenges the judge's award of § 34A permanent and total incapacity benefits, because it was based, in part, on a faulty § 36 analysis. (Ins. br. 13.) As discussed above, we find no error in the judge's § 36 analysis. Moreover, the judge's § 34A award is otherwise on *terra firma*.

The determination of incapacity involves consideration of both medical and vocational factors. Scheffler's Case, 419 Mass. 251, 256 (1994). Here, the judge

[5] In MacEachern, supra, the insurer challenged the judge's finding that the employee suffered a 100% loss of function of her right major *arm*, where the impartial physician had merely opined her right *hand* was useless, which, under the AMA guides, converted to 90 percent of the upper extremity. We held that, "based on . . . pain factors and the 90% functional loss [of the arm], the judge rationally read the doctor's opinion as determining a 100 percent permanent impairment of the employee's right major arm." Id. at 35. The instant case is more clear-cut than the situation in MacEachern, as the impartial physician opined explicitly that the employee had a 100% loss of function of her left arm.

credited the employee's testimony that her constant, severe pain and sensitivity had not improved in the four years since her injury. (Dec. 7.) She also credited Dr. Birbiglia's opinion that, assuming no improvement since the injury, and given that there were no other therapeutic options available to her, the employee was permanently and totally disabled.[6] (Dec. 9; Dep. 43.) By considering the employee's limited education (tenth grade), work experience (waitressing and food preparation), and by adopting Mr. Calandra's opinion that the employee remains unemployable, the judge performed a thorough vocational analysis. (Dec. 11.) There was no error.

Finally, the insurer alleges error in the judge's refusal to vacate the stipulation, made at the *prior* hearing, that the employee's average weekly wage on her date of injury was $380.00. (Dec. 4, n.3.) Although the insurer initially appealed the prior hearing decision, it ultimately withdrew that appeal; the employee did not appeal from the prior hearing decision. (See Form 109, Insurer's Notice of Withdrawal of Appeal to reviewing board, filed November 28, 2006.)[7] The insurer now contends it should be permitted to raise the issue anew because it was the employee who initially moved to litigate the issue of average weekly wage at the second hearing. (Ins. br. 15.) We disagree.

While it is true that a trial or appellate court may vacate a stipulation if it is found "improvident or not conducive to justice," Hill v. Dunhill Staffing Systems, Inc., 14 Mass. Workers' Comp. Rep. 350, 351 (2000), quoting Loring v. Mercier, 318 Mass. 599, 601 (1945), the request to vacate a stipulation needs to be made "in the course of a single action." Rhodes v. Mass. Turnpike Auth., 18 Mass.

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[6] Dr. Birbiglia noted initially that a ganglion block might possibly provide the employee with some relief, but then opined her contractures were not likely to improve because of fibrosis of the underlying connective tissue. (Dec. 8.) He later opined the employee was permanently and totally incapacitated due to her failure to improve after four years, and the unavailability of any therapeutic options. (Dep. 43.)

[7] 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).

Workers' Comp. Rep. 33, 36 (2004); Hill, supra; Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 252 (1999).

Our decision in Grant, supra, is particularly on point. There, the insurer appealed an initial hearing decision utilizing a stipulated average weekly wage, but later withdrew its appeal. The insurer then filed a claim for modification or discontinuance of benefits and, at the second hearing, sought to litigate the issue of average weekly wage. We held that principles of res judicata, more specifically claim preclusion, barred the "reconsideration of the issue of average weekly wage after a hearing decision was issued containing a stipulation as to average weekly wage." Grant, supra at 250-251. The doctrine of res judicata " 'makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action.' " Id. at 251, quoting Heacock v. Heacock, 402 Mass. 21, 23 (1988). Claim preclusion does not require actual litigation of an issue; it requires "only that the parties had the opportunity and incentive to litigate an issue." Grant, supra at 251. Here, as in Grant, the parties stipulated to the employee's average weekly wage at the first hearing, and neither party pursued an appeal of that hearing decision.[8] "Again, it is irrelevant that the issue of average weekly wage was not actually litigated at the first hearing because the parties had the opportunity to litigate it then and chose not to do so." Id. at 252. The judge did not err by declining to address the issue of average weekly wage.

Accordingly, we affirm the judge's decision. Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $1,497.28.

So ordered.

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[8] Because a determination of the employee's average weekly wage at the first hearing was necessary to determine the compensation rate for the employee's claimed incapacity, the parties had the opportunity and the incentive to litigate, if they so chose, the issue of average weekly wage at that time.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: