COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 064396-91**

William Cash	Employee
Metropolitan District Commission	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant and Horan[1])

APPEARANCES
David E. Guthro, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits for a November 29, 1991 work-related back injury. The self-insurer correctly identifies one error in the decision, which we find to be harmless. We otherwise affirm the decision.

Prior to his injury, the employee worked as a laborer, farm hand and heavy equipment mechanic. At the hearing in 2005, he was seventy-three years old with a fifth grade education and a limited ability to read and write. (Dec. 3.)

At the time he filed his § 34A claim, the employee was receiving partial incapacity benefits from an unappealed 1995 hearing decision. As part of that earlier proceeding, the employee was examined pursuant to G. L. c. 152, § 11A(2), by Dr. Victor A. Conforti. Dr. Conforti then opined the employee was disabled from returning to unrestricted work, but capable of full time work at a light duty job with restrictions against continuous lifting or bending, and lifting in excess of twenty pounds. The administrative judge in that proceeding concluded the employee was capable of working only twenty hours per week at minimum wage. (Dec. 4.)

[1] Judge Carroll, originally assigned to this panel, did not take part in the deliberations involved in this decision due to her elevation to the position of Senior Judge.

On September 15, 2004, prior to the employee's § 34A hearing, Dr. Conforti conducted a second impartial medical examination of the employee. He opined the employee was incapable of any type of bending, lifting, climbing, stooping or kneeling; that he could only carry up to ten pounds at waist level; and that any lifting was restricted to no more than ten to fifteen pounds. Finally, Dr. Conforti opined the employee had sustained a permanent functional loss of seven to eight percent of the whole body. (Dec. 4-5.)

The judge interpreted the 2004 opinions of Dr. Conforti to indicate the employee's medical condition had worsened from his 1995 status. The judge rejected Dr. Conforti's deposition testimony to the extent it may have indicated the employee's medical condition was essentially the same as it had been in 1995. The judge reasoned that the doctor's opinion changing the employee's restrictions (down from lifting twenty pounds to no more than fifteen pounds) evinced the employee's condition had worsened since the prior hearing decision finding the employee only partially disabled. (Dec. 6-7.) The judge also adopted Dr. Conforti's opinion to find that the employee's "disability, functional loss and restrictions are directly related to the November 29, 1991 industrial injuries." (Dec. 5.) Based on an assessment of the employee's work-related physical restrictions, age, work history and limited education, the judge concluded the employee was entitled to § 34A benefits. (Dec. 7.)

We note the judge allowed the introduction of additional medical evidence for the "gap" period prior to Dr. Conforti's September 15, 2004 examination of the employee. (Tr. 42-43.) Unfortunately, the judge's decision makes no reference to that action taken on the record, and instead states that he allowed additional medical evidence "due to the complexity of the medical issues involved by virtue of the ongoing pain symptomology of the employee's low back injury since November 29, 1991." (Dec. 2.) The judge then adopted the opinion of the employee's treating physician, Dr. Joseph Abate, as to the employee's *present* permanent medical disability. (Dec. 7.)

The self-insurer correctly argues the judge erred when he utilized Dr. Abate's opinion beyond the "gap" period to support the award of ongoing § 34A benefits.

However, the error is harmless, because the judge also adopted Dr. Conforti's opinion (of a permanent loss of function directly related to the industrial injury) as a basis for the § 34A award. Dr. Abate's opinion, therefore, was merely cumulative.

The self-insurer next argues the judge's finding that the employee's condition had "worsened" since the prior hearing award of § 35 benefits lacks evidentiary support. See generally, Foley's Case, 358 Mass. 230 (1970). Specifically, the self-insurer maintains the judge misconstrued Dr. Conforti's opinion on this subject. At his deposition, Dr. Conforti addressed the "worsening" issue on three occasions. He responded by saying the employee was "about the same," "pretty much the same," and "probably about the same." (Dep. 16-17, 21.) But he also altered the employee's lifting restriction in 2005 to no more than fifteen pounds – down from his 1995 assessment of twenty pounds. (Dep. 10, 16.) We believe the judge's interpretation of the totality of Dr. Conforti's opinion on the subject of "worsening" was reasonable, especially where there is no medical evidence that the deterioration in the employee's lifting capacity was due solely to the employee's "advancing age", and not the industrial accident. Foley, supra at 232.

The self-insurer's other arguments challenge the judge's vocational analysis and credibility findings. We will not review the judge's conclusion that the employee was a credible witness as to the extent of his pain and its worsening over the ten years since the earlier hearing decision. (Dec. 7.) See Lettich's Case, 403 Mass. 389 (1988). We also find nothing arbitrary or capricious in the judge's conclusion that the employee is incapacitated, due to his medical and vocational profile, from performing any sort of sustained gainful employment. (Dec. 7.)

The decision is affirmed. Pursuant to the provisions of § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

Bernard W. Fabricant	Mark D. Horan
Administrative Law Judge	Administrative Law Judge

Filed: **June 12, 2007**