

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF  
INDUSTRIAL ACCIDENTS

BOARD NOS. 030694-90  
027984-01  
016047-07

Donald Conners	Employee
Zampell Refractories	Employer
Liberty Mutual Insurance Company	Insurer
Thermal Insulation	Employer
Massachusetts Insurer's Insolvency Fund <sup>1</sup>	Insurer
Bay State Insulation	Employer
Liberty Mutual Insurance Company	Insurer

**REVIEWING BOARD DECISION**

(Judges Horan, Fabricant and Harpin)

The case was heard by Administrative Judge Vendetti.

**APPEARANCES**

Padraic P. Lydon, Esq., for the employee at hearing  
William J. Branca, Esq., for the employee on appeal  
Michael J. Sherry, Esq., for Liberty Mutual Ins. Co. (Zampell)  
William H. Murphy, Esq., for the Massachusetts Insurer's Insolvency Fund (MIIF)  
Jean M. Shea-Budrow, Esq., for Liberty Mutual Ins. Co. (Bay State) at hearing  
Margo A. Sutton, Esq., for Liberty Mutual Ins. Co. (Bay State) on appeal

**HORAN, J.** The employee appeals from a decision denying his § 34A claim, but ordering Liberty Mutual Insurance Company, the insurer of Bay State Insulation, (Liberty/Bay State), to pay him three years of § 34 benefits, followed by ongoing § 35 benefits, owing to his June 7, 2007, work-related right shoulder injury.<sup>2</sup>

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<sup>1</sup> On July 23, 2001, the employee's claimed date of injury against Thermal Insulation, it was insured by Eastern Casualty Insurance Company, which is now insolvent.

<sup>2</sup> Liberty/Bay State was also ordered to pay medical benefits for treatment of the employee's right shoulder, and an enhanced attorney's fee. (Dec. 21-22.)

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We reverse the decision in part, and recommit the case for the judge to address anew the employee's claim for retroactive permanent and total incapacity benefits.

Liberty/Bay State accepted the employee's right shoulder injury and paid § 34 benefits until their statutory exhaustion. (Dec. 4.) Prior to that exhaustion, the employee filed his § 34A claim. In response, Liberty/Baystate filed a discontinuance complaint, and was permitted to join Liberty Mutual Insurance Company, the insurer of Zampell Insulation, (Liberty/Zampell), and the Massachusetts Insurer's Insolvency Fund, (MIIF), which provided coverage for Thermal Insulation (Thermal).<sup>3</sup> (Dec. 5.)

Following a conference before Judge Frederick Levine on September 13, 2010, Liberty/Baystate was ordered to pay the employee partial incapacity compensation and medical benefits from June 4, 2010, to date and continuing.<sup>4</sup> The judge also denied Liberty/Baystate's discontinuance complaint. Both the employee and Liberty/Baystate appealed. (Dec. 4.)

On May 5, 2011, the employee moved to join his claim for a psychiatric injury allegedly resulting from his accepted 2007 industrial accident; the judge allowed the motion. *Id.* In addition to injuring his right shoulder in 2007, the employee also continued to claim he injured both knees.<sup>5</sup>

In her decision, the judge credited the employee's testimony that he experienced limited relief from his shoulder surgeries, had constant pain and limited

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<sup>3</sup> Liberty/Bay State claimed the employee was injured on May 18, 1990, while working for Zampell Refractories, and on July 23, 2001, while working for Thermal Insulation. (Dec. 5.)

<sup>4</sup> Judge Levine, now a member of this board, took no part in this decision.

<sup>5</sup> The 1990 injury to the employee's left knee is described as "a medial meniscal tear and chondromalacia patella, stage IV degenerative changes, and frayed tears of the medial and later meniscus and degenerative joint disease. . . ." (Dec. 10-11.) The judge found "the employee received benefits under the Act and did not return to work until June 7, 2004." (Dec. 11.) The employee also suffered a "work-related right quadriceps tendon rupture of his [right] knee in 2001." (Dec. 12.) He eventually underwent bilateral knee replacement surgery but, in her decision, the judge did not find any of the insurers liable for treatment of the employee's knees. (Dec. 10-12, 21.) On appeal, the employee does not contest this aspect of the decision.

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use of his right arm and shoulder, and could not “raise his right arm above elbow height.” (Dec. 10.) The judge adopted the medical opinion of the impartial medical examiner, Dr. Richard Alemian, that as a result of his work-related right shoulder injury, the employee suffered from, 1) a dislocation of his right shoulder with a corresponding rotator cuff tear; 2) two failed surgeries; 3) a five pound right arm lifting restriction and; 4) an inability to perform overhead work. (Dec. 10, 12-13.) The judge found the employee’s knee injuries were not causally related to his June 7, 2007 industrial accident. (Dec. 20-21.)

The judge then addressed the employee’s claim that he suffered a psychiatric injury as a consequence of his physical industrial injury. She adopted the opinion of Dr. Albert M. Drukteinis “that the industrial accident of June 7, 2007 is ‘a major, even if not predominant, cause for the employee’s Major Depressive Disorder and Anxiety Disorder.’ ” (Dec. 14.) She also adopted Dr. Drukteinis’s opinion that, prior to June 7, 2007, the employee suffered from a “non-work related psychiatric disorder of Alcohol Dependence which combined with his work-related depression and anxiety to render him essentially nonfunctional.” (Dec. 15.) Finding that the predominant cause of the employee’s psychiatric condition post injury was his prior psychiatric condition, the judge denied the employee’s claim for a psychiatric injury and § 34A benefits. (Dec. 15, 17, 20-21.)

Accordingly, on the basis of the employee’s shoulder injury alone, the judge ordered Liberty/Baystate to pay the employee the aforementioned weekly incapacity benefits, along with medical benefits and an enhanced attorney’s fee. (Dec. 21.) The judge denied and dismissed, with prejudice, the claims against MIIF and Liberty Mutual/Zampell. (Dec. 22.)

The employee appeals, arguing the judge applied the wrong standard to deny his claim for a psychiatric injury as a sequela of his work-related physical injury. We agree. This case is analogous to Cornetta’s Case, 68 Mass.App.Ct. 107 (2007). Cornetta stands for the proposition that the “predominant cause” standard found in

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§ 1(7A) applies only to “pure” mental injuries, and does not apply to mental or emotional injuries which result from a work-related physical injury. Cornetta also involved, as here, an employee with a prior psychiatric condition which combined with a physical work-related injury to cause a “resultant condition.” Id.; G. L. c. 152, § 1(7A)(fourth sentence). In such a case, the “major cause” standard applies. Because the judge adopted a medical opinion which satisfied the major cause standard, the employee’s “Major Depressive Disorder and Anxiety Disorder” should have been found to be compensable under the act. (Dec. 14); Cornetta, supra at 118-119. Therefore, we reverse the judge’s finding to the contrary, and recommit the case for her to address anew the employee’s § 34A claim.

Lastly, the employee argues the judge should not have dismissed his claims against MIIF and Liberty/Zampell “with prejudice.” We view the judge’s use of the phrase “with prejudice” to apply only to the claims advanced at hearing against those insurers, and thus we affirm her ruling.

Because the employee has prevailed, in part, an attorney’s fee may be due under § 13A(7). Accordingly, employee’s counsel may submit his fee petition to this board, accompanied by a fee agreement between him and the employee. No fee shall be due or collected from the employee without our approval.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

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William C. Harpin  
Administrative Law Judge

Filed: **December 22, 2014**