COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041907-91**

Robert Richardson	Employee
Department of Employment and Training	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
John J. Maloney, Esq., for the employee
Nicole M. Allen, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee § 34A benefits from and after July 28, 2004. It maintains the employee failed to carry his burden of demonstrating that his condition had worsened since the time of a prior hearing decision awarding him § 35 benefits. See generally Foley's Case, 358 Mass. 230 (1970). We affirm the decision.

The employee sustained a compensable injury to his back on July 5, 1991. On April 8, 1994, a hearing decision, filed in response to the self-insurer's complaint, assigned him an earning capacity of $210.00 per week from July 28, 1993 to date and continuing. In that decision, the judge relied upon a physician's opinion clearing the employee to perform work involving sitting and standing, so long as the employee could tolerate it, and requiring him to lift no more than forty pounds. (Dec. 5-6.)

Thereafter, the employee filed a claim for permanent and total incapacity benefits. Following a § 10A conference on October 25, 2005, the self-insurer was ordered to pay § 34A benefits; it appealed, and a hearing before a different judge was held on January 18, 2006.

Dr. William D. Shea conducted the § 11A exam in response to the employee's claim for § 34A benefits. He was not involved in the previous hearing

that resulted in a decision modifying the employee's incapacity benefits from § 34 to § 35. At the hearing on the § 34A claim, Dr. Shea's opinion was the only medical evidence *sub judice*. He opined the employee was totally disabled, and that the industrial accident had limited his ability to ambulate, stand, sit, and lift over ten pounds. (Dep. 7-8.) When counsel for the self-insurer asked Dr. Shea what the major cause of Mr. Richardson's back problem was, he replied: "His injury." (Dep. 16.)

The judge credited the employee's testimony concerning the increase in his symptomatology, noted the current restrictions imposed by Dr. Shea, considered the employee's age, education, and lack of sedentary work skills, and awarded permanent and total incapacity benefits. The judge's "worsening" finding, based on a comparison between Dr. Shea's opinion and the adopted medical opinion from the prior hearing decision, is logical and reasonable.[1] Cash v. Metropolitan Dist. Comm'n., 21 Mass. Workers' Comp. Rep. ___ (2007). Moreover, it cannot be said the decrease in the employee's physical ability was due solely to his advancing age. Foley, supra at 232. Rather, it is clear the employee's disability remained causally related to his industrial injury.

The judge's decision is not arbitrary, capricious or contrary to law. G. L. c. 152, § 11C. Accordingly, we affirm. 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.

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Mark D. Horan
Administrative Law Judge

[1] The self-insurer's reliance on Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203 (2004), is misplaced. There, we reversed a judge's finding of worsening because the doctor opined, in fact, there had been no increase in the employee's medical impairment, and that his work capacity had remained the same since the time of a prior hearing decision awarding § 35 benefits. Also, regarding the self-insurer's argument that because Dr. Shea testified on direct examination that the employee's "condition" had not changed, it appears the judge felt the doctor was referring to the employee's diagnosis, and not the extent of the employee's present medical disability. The totality of the doctor's testimony bears this out.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **July 31, 2007**