COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031069-09**

Aaron Tracy	Employee
City of Pittsfield	Employer
City of Pittsfield	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Harpin)

The case was heard by Administrative Judge Rose.

APPEARANCES
J. Norman O'Connor, Jr., Esq., for the employee
Frederica H. McCarthy, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits and §§ 13 & 30 medical benefits. For the reasons that follow, we affirm the decision.

The employee, fifty-two years old at the time of the hearing, worked for the City of Pittsfield highway department as a heavy equipment operator and laborer. (Dec. 4.) He was initially injured in June or July of 2008, when he felt back pain after using a "jumping jack" compactor. (Tr. 14-15.)[1] Then, on July 24, 2009, the employee hit a pothole while operating a road paver and bounced out of his seat. (Tr. 16.) Following a § 10A conference on August 12, 2012, the judge ordered the self-insurer to pay § 34A benefits from July 25, 2012, to date and continuing. The self-insurer appealed to an evidentiary hearing. (Dec. 2.)

On September 4, 2012, Dr. Marc Linson performed surgery on the employee involving an anterior lumbar fusion at L5-S1. Pursuant to § 11A, on October 5, 2012,

[1] At oral argument, the self-insurer conceded it accepted the employee's 2008 low back strain industrial injury. (Oral Argument [O.A.] Tr. 5, 6, 7, 12, 13.) The employer's report of injury states that the 2008 injury occurred on July 16, 2008. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of contents of board file).

Dr. Pier Boutin examined the employee. Sua sponte, the judge found Dr. Boutin's report inadequate and the medical issues complex. Id.

The parties stipulated to liability for a July 24, 2009 work injury occurring at the L5-S1 level. Id. But the self-insurer did not accept liability for fusion surgery at L5-S1 and denied liability for protrusions at L2-3, L3-4 and L4-5, allegedly related to the fusion surgery. (Dec. 2; Tr. 3-4, 9-10). The self-insurer also raised §1(7A).

The judge adopted Dr. Linson's opinion that the post-surgery disc protrusions at L2-3, L3-4, and L4-5 were "causally related as a major causal factor to the original work injury." (Dec. 4.) He also adopted Dr. Linson's opinion that the employee's fusion surgery "was causally related to the industrial injury." (Dec. 5.) After considering the employee's testimony regarding his pain and limitations, the objective restrictions, and his age, training, background and experience, the judge found the employee to be permanently and totally disabled from July 25, 2012, and continuing. Id.

The self-insurer first contends the decision should be reversed because the judge did not review and consider all the medical evidence submitted. We disagree. Because the judge listed the medical evidence as exhibits at hearing, (Dec. 1, 3), we presume that he considered them. Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, 11 (2013). Moreover, the judge specifically stated, "After careful consideration to all the medical evidence, I accept and adopt the opinions of Dr. Marc Linson." (Dec. 4.) The judge is free to adopt the opinion of one medical expert over another without explanation. Thompson v. Berkshire County Assoc. for Retarded Citizens, 20 Mass. Workers' Comp. Rep. 247, 251 (2006).

The self-insurer next argues that the judge's decision is silent on the issue of § 1(7A) (major cause); or that the findings thereon are inadequate. (Self-ins. unpaginated br., 5.)

In fact, the judge made the following finding:

> "There is no issue as to causation for the damage done at the L5-S1 level.[2] I accept and adopt Dr. Linson's opinion that the three levels above the L5-S1 fusion are causally related as a major causal factor to the original work injury."

(Dec. 4.) The self-insurer contends that the finding is inadequate because Dr. Linson's history of the work injury upon which he based his major cause opinion was faulty and therefore the judge committed error in adopting it. (O.A. Tr. 11-13.) We disagree.

The opinions of Dr. Linson, which the judge adopted, appear in Dr. Linson's March 22, 2013 report, admitted in evidence as employee exhibit 1. (Dec. 3.) In that report, Dr. Linson stated the employee "reported that he was injured March 2008 driving a road paver when it hit a pothole." Dr. Linson later in that report found that the "pathology at three levels above the L5-S1 fusion . . . to be causally related as a major causal factor to the original work injury." Id. The self-insurer argues that because Dr. Linson referred to a "March 2008" injury in his report, his subsequent opinion relating major cause to the original work injury is flawed. While there was no industrial injury in March 2008, see supra note 1 and accompanying text, Dr. Linson's description of the industrial injury - - "driving a road paver when it hit a pothole" - - is consistent with the description of the accepted July 24, 2009 industrial injury. (See Tr. 16: the road paver "caught a pothole which made the whole machine slow down and I bounced out of the seat.") And self-insurer counsel conceded that if Dr. Linson had said July 2009, instead of March 2008, in his report, that would be sufficient to satisfy the "a major cause" standard applicable to the 2009 industrial injury. (O.A. Tr. 13.) Cf. Petition of Dept. of Pub. Welfare to Dispense with Consent, 8 Mass App. Ct. 872 (1979)(concession of factual point at oral argument relied upon).

Given that the date, March 2008, had no relevance in this case, and given that Dr. Linson's description of the work injury was consistent with the description of the

[2] At the hearing the self-insurer stated there was a question whether the injury at L5-S1 was a herniation or destabilization. (Tr. 9.)

subject July 2009 accepted industrial injury, the judge was warranted to infer that Dr. Linson was referring to the July 2009 industrial injury when he accurately described the mechanism of that injury. Cf. Wax's Case, 357 Mass. 599, 601 (1970)("We cannot say that the board, as a matter of law, had no competent evidence before it for its conclusion merely because their testimony contained inconsistencies . . .").

The decision is affirmed. Pursuant to G.L. c. 152, § 13A(6), the self-insurer is ordered to pay the employee's counsel a fee of $1,596.24.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **January 15, 2015**