COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019020-15**

Albert Sadiku	Employee
Aquila the Eagle Express, LLC	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Harpin and Long)

This case was heard by Administrative Judge Maher.

APPEARANCES
Charles E. Berg, Esq., for the employee
Janice M. Toole, Esq., for the Workers' Compensation Trust Fund
Michael F. Walsh, Esq., for the Employer

CALLIOTTE, J. The employee and the employer[1] appeal from a decision ordering the Workers' Compensation Trust Fund (Trust Fund) to pay a closed period of § 34 temporary total incapacity benefits, from May 27, 2015, to March 9, 2016.[2] Both argue that the judge's § 1(7A)[3] analysis was inadequate, but in different ways. We agree and recommit the case for completion of the required § 1(7A) analysis, and reconsideration of extent and duration of incapacity. The employer also argues the judge

[1] Although not mentioned in the decision, the employer was joined as a party at conference on December 2, 2015, following the Trust Fund's motion to join. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of board file).

[2] The Trust Fund did not appeal, but submitted a brief in support of the judge's decision.

[3] General Laws c. 152, § 1(7A), states, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

erred in finding the employee was not guilty of serious and wilful misconduct pursuant to § 27. We disagree and affirm the decision on that issue.

The employee, forty-eight years old at the time of hearing, emigrated from Albania in 1996. He can neither read nor write English, and testified via an interpreter. Since 2006, he has worked as a commercial truck driver. In 2012, the employee was involved in a rollover accident while driving a truck for a different employer. Following this accident, surgery was performed for a herniated L5-S1 disc. His workers' compensation claim for the 2012 injury was settled in 2014, but the lump sum agreement specifically excluded the disc herniation, (Dec. 6, 11), and established liability only for lumbar soft tissue injuries. (Employee br. 1; see Tr. 6-7.)

In early 2015, the employee began working for the employer. On May 26, 2015, while driving a tractor trailer truck for the employer in New York, the employee was involved in an accident, in which he claims he injured his low back. (Dec. 5.) At the time of the accident, he was operating with a suspended license. (Dec. 6.) Following a conference, a different administrative judge denied the employee's claim. The employee appealed to hearing, claiming § 34 benefits from the date of injury forward, along with medical benefits. The Trust Fund defended on all issues, including liability, disability and extent thereof, causal relationship, including § 1(7A), and employer/employee relationship. The Trust Fund also raised § 27,[4] alleging the employee's claim was barred by his serious and wilful misconduct. (Dec. 4.)

On March 2, 2016, the employee was examined pursuant to § 11A by Dr. R. Scott Cowan, whose opinion the judge adopted, in part. Based on Dr. Cowan's opinion, the judge found the employee "sustained a myofascial strain injury of the lumbar spine as well as an exacerbation of underlying degenerative disc condition status post L5-S1 microdiskectomy a year prior"; that the employee's symptoms had significantly increased from his "previous evaluations indicating either symptom magnification or another new injury following the motor vehicle accident," (Dec. 7; Ex. 1); and that the employee

[4] General Laws c. 152, § 27, provides, in relevant part, "If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation . . . ."

"would be partially disabled as a result of the injury sustained in the motor vehicle accident for three to six months' time," after which Dr. Cowan anticipated that he would then be able to return to work. (Dec. 7-8; Ex. 1, § 11A report.) The judge further adopted Dr. Cowan's qualifying opinion that it would be reasonable for the employee to have an MRI "to evaluate for a more significant structural issue in the lumbar spine," prior to returning to work. Id. The employee underwent a lumbar MRI a week later, on March 9, 2016; however, Dr. Cowan never reviewed the MRI results.

Due to the complexity of the medical issues, the judge allowed the parties to submit additional medical evidence. (Dec. 4.) The employee submitted numerous medical records, including the report of the MRI performed on March 9, 2016, and the January 10, 2017, report and February 16, 2017, deposition testimony of Dr. Errol Mortimer. Id. at 1. Dr. Mortimer reviewed the MRI, and the judge adopted that portion of his opinion that the MRI showed scar tissue around the base of the L5-S1 nerve root that was likely to have been the result of the non-work-related surgery of May 6, 2014. (Dec. 8; Exh. 10, Dr. Mortimer report dated 1/10/17, and Dr. Mortimer dep. dated 2/16/17, p. 12).

The judge concluded that there was an employer/employee relationship, and that the employee sustained a personal injury in the course of his employment on May 26, 2015. (Dec. 9.) Crediting the employee's testimony that he was unaware his license had been suspended, and finding no evidence the suspended license had any impact on the accident, the judge denied the Trust Fund's § 27 defense. (Dec. 12.)

With respect to causal relationship, the judge adopted portions of the medical opinions of Dr. Cowan and Dr. Mortimer, "and the credible testimony of the employee,"to find the industrial accident of May 26, 2015, "is the cause of the Employee's incapacity for work on and after that date." (Dec. 10.) However, he also acknowledged that § 1(7A) was in play "because the pre-existing back injury (L5-S1) was exacerbated by the work injury of May 26, 2015 and . . . the prior lump sum

agreement specifically excluded the disc herniation."[5] (Dec. 11.) The judge concluded as follows:

> Dr. Cowan opined that as a result of the May 26, 2015 accident Mr. Sadiku sustained a myofascial strain injury of the lumbar spine as well as an exacerbation of underlying degenerative disc condition status post L5-S1 micro-discectomy a year prior. It is my finding that the *myofascial strain and exacerbation were separate and distinguishable conditions related to the May 26, 2015 motor vehicle accident. I further find based on Dr. Cowan's adopted opinion that those two conditions resolved within three to six months from the injury. The incapacity was related to the injury up to the time Dr. Cowan felt a diagnostic should have been taken. The MRI showed scar tissue attributed to the prior non-work related disc surgery. There is no causal relationship subsequent to that date.*

(Dec. 11; emphases added.)

In separate disability/incapacity rulings, the judge stated he was "frustrated in trying to determine the employee's incapacity related to the May 26, 2015 injury." (Dec. 10.) However, he adopted "Dr. Cowan's opinion that the employee had a strain and exacerbation of his underlying condition that he opined *should have resolved* within three to six months of the accident . . . ." Id. (Emphasis added.) Based on Dr. Cowan's opinion that it would be prudent to have an MRI before he returned to work, and based on the employee's vocational profile, the judge concluded the employee was not ready to return to any remunerative work until March 9, 2016, when he had the MRI. (Dec. 10.) Accordingly, the judge ordered the insurer to pay § 34 benefits from the date of the injury, May 27, 2015, to the date of the MRI, March 9, 2016, as well as reasonable and related medical expenses until that date. (Dec. 13.)

The employee's appeal alleges that the judge erred by finding no causal relationship as of the March 9, 2016, MRI, and cutting off disability on that date. (Employee br. 10.) These findings were based on the judge's adoption of the part of Dr.

[5] Neither appealing party mentions the potential inconsistency in the judge's finding the work injury is "the cause" of the employee's disability, while also finding § 1(7A) applies, although both assume § 1(7A) is applicable. As discussed, infra, § 1(7A) was clearly raised and applies with respect to the employee's pre-existing L5-S1 back condition, status post surgery. On recommittal, the judge should resolve any inconsistency in his findings on causal relationship.

Mortimer's opinion that the scar tissue at L5-S1 seen on the MRI was likely the result of the non-work-related surgery. (Employee br. 10.) The employee maintains this finding does not address § 1(7A)'s "a major cause" component. We agree. The Trust Fund properly raised the affirmative defense of § 1(7A), by producing evidence of a pre-existing non-compensable condition (degenerative disc condition status post L5-S1 micro-discectomy, not causally related to a prior work injury) which was exacerbated by, or combined with, the 2015 motor vehicle accident arising out of the employee's employment. See Lazzari v. DCR Conservation and Recreation, 25 Mass. Workers' Comp. Rep. 133, 135 (2011) (opinion that employee's industrial injury exacerbated his pre-existing medical condition established the "combination" element of § 1[7A] as a matter of law). Dr. Mortimer's opinion that the scar tissue seen on the MRI was a result of the prior non-work-related surgery does not address the role the 2015 motor vehicle accident played in causing the employee's disability**.** See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009)("determination of causation in a combination injury case . . . must be grounded in competent expert medical evidence . . . that addresses the relative degree to which compensable and noncompensable causes have brought about the employee's disability"). Accordingly, we recommit the case for the judge to perform the remainder of the analysis outlined in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005), making findings, based on competent medical evidence, regarding whether the work-related exacerbation of the L5-S1 disc condition remains "a major cause" of the employee's disability or need for treatment.

In so doing, the judge must consider Dr. Mortimer's opinion in its entirety. The employee contends that Dr. Mortimer actually gave a "major cause" opinion in his deposition testimony**,** which the judge ignored. This appears to be true.[6,7] It is axiomatic

---

[6] The following colloquy occurred between employee counsel and Dr. Mortimer at deposition:

> Q. Do you have an opinion, Doctor, based upon a reasonable degree of medical certainty, as to whether or not the motor vehicle accident of May 2015 remains a major, if not necessarily predominant, cause of Mr. [Sadiku's] present complaints and need for treatment referable to his lumbar spine.

that a judge may adopt all, part or none of a medical opinion, but he cannot mischaracterize it, Gurey v. Tables of Content, 27 Mass. Workers' Comp. Rep. 173, 175 (2013), or fail to consider it as a whole, Wilson's Case, 89 Mass. App. Ct. 398 ,401 (2016), as he has done here. Moreover, he may not substitute his own opinion on medical issues for those of a medical expert. See Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 307-308 (2007), and cases cited. Here, the judge has made both errors. Although he may have had legitimate reasons for failing to adopt Dr. Mortimer's "a major cause" opinion, without more, we cannot tell what they are. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(judge must address issues in case in a manner enabling this board to determine with reasonable

---

. . . .

A. My opinion is that the motor vehicle accident exacerbated his pain leading to his ongoing disability and his requirement for additional treatment.

Q. So it was a significant cause of his present complaints and need for treatment?

. . . .

A. Yes.

Q. What's your basis for your opinion that the motor vehicle accident is a major cause of Mr. [Sadiku's] need for treatment and current disability?

. . . .

A. In my history Mr. [Sadiku] expressed that his pain was less severe and much more manageable. After the motor vehicle accident, he developed worsening low back pain with radiation of his pain into the left leg that was less consistent and less severe prior to the accident and was manageable prior to the accident, whereas after the accident, it became unbearable and interfered with his ability to continue to work.

. . . .

Q. [I]n your opinion, then, does the motor vehicle accident of May 2015 remain a major cause of Mr. [Sadiku's] disability at the present time and need for treatment?

. . . .

A. Yes.

(Dep. 13-15.)

[7] Although the employee does not specifically argue this point, we are also troubled by the fact that that the judge ignored the second half of Dr. Mortimer's statement regarding the MRI results, which was that the MRI showed "progression of his disc protrusion at L3-4." (Ex. 10, Dr. Mortimer report dated 1/10/17, and Dr. Mortimer dep.12, 37-38.) The judge made no findings regarding whether that condition was subject to a § 1(7A) or an "as is" causation analysis.

certainty whether correct rules of law have been applied to facts that could be properly found). Accordingly, on recommittal, the judge should re-examine the medical evidence, performing a complete § 1(7A) analysis. Cf. Stewart's Case, supra (where there is medical evidence which would support a judge's conclusion the work injury was a major cause of her ultimate disability, case must be remanded for judge to decide whether to accept or reject such evidence); see also Cvinar v. 128 World of Transportation, 26 Mass. Workers' Comp. Rep. 141, 147 (2012)(same). If he adopts Dr. Mortimer's opinion, he must consider it as a whole, making such findings as will enable us to conduct an effective appellate review. [8]

While the employee argues that the judge cut off his disability benefits too soon due to the judge's failure to complete the § 1(7A) analysis, the employer, in its appeal, contends "the employee failed to meet his burden under 1(7A) to be awarded any benefits beyond, at best, a limited closed period." (Employer br. 1.) It is unclear whether the employer means the closed period awarded by the judge up to the MRI, or a closed period of three to six months from the date of the accident. (Employer br. 1, 4-5.) However, it is clear that the judge failed to conduct the "a major cause" portion of the § 1(7A) analysis for any period, although he found the pre-existing degenerative disc condition, status post L5-S1 surgery, was aggravated by the work injury. Thus, because both parties challenge the judge's § 1(7A) analysis, and the judge failed to address

[8] We note that the judge found that only the pre-existing non-work-related "degenerative disc condition status post L5-S1 micro-discectomy" was aggravated by the work injury. (Dec. 11.) He found the myofascial strain injury was a "separate and distinguishable" condition. Id. Neither party challenges this finding. Thus, the § 1(7A) analysis needs to be performed only for the degenerative disc condition status post L5-S1 discectomy with which the work injury combined. Because there was no finding of combination of the myofascial strain injury with a non-compensable pre-existing injury" with respect to the myofascial strain injury, the simple "as is" causation standard would apply to it. See MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009)(§ 1[7A] applies only where there is a "combination of the industrial injury with the pre-existing condition"). See also Remillard v. TJX Cos., Inc., 27 Mass. Workers' Comp. Rep. 97, 105-106 (2013)(judge required to perform § 1(7A) analysis only for employee's right median neuropathy, for which combination alleged; judge need not perform § 1(7A) analysis regarding fibromyalgia, where insurer failed to make offer of proof as to combination).

whether the medical evidence supports a finding the work-related exacerbation of the degenerative disc condition is "a major cause" of the employee's disability for *any* period, the judge must perform a § 1(7A) analysis for all periods at issue from the date of injury.

The judge's incomplete and erroneous § 1(7A) analysis, concluding that causal relationship ceased as of the date of the MRI, appears to have been the basis for his determination that the employee's incapacity ceased as of the same date. [9] Neither Dr. Mortimer's opinion nor the MRI itself supports terminating incapacity on that date. Moreover, to the extent Dr. Cowan's incapacity opinion is contingent on the MRI's findings explaining the employee's continued symptoms, it also fails to support termination of benefits on the date of the MRI. The judge will thus need to reconsider his findings on extent and duration of the employee's causally related incapacity once he completes an appropriate § 1(7A) analysis.

The error in the judge's causation analysis has also created an inconsistency which is reflected in his finding that, although the employee's incapacity resolved within 3-6 months of the accident, he was entitled to weekly benefits for several more months, until the date of the MRI. See Sourdiffe v. U. of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(internally inconsistent decision is arbitrary and capricious). Again, there may be a valid reason for the judge's continuation of benefits beyond the

[9] We observe that early on in his decision, the judge stated that the employee "asserted that his pain was seven on a ten pain scale after taking ibuprofen and an eight level before. I do not find his ongoing complaints of pain credible." (Dec. 6.) However, the judge made no further findings regarding how these pain findings, based on the employee's testimony on December 13, 2016, impacted his termination of the employee's benefits on March 9, 2016. Nor did he find what level of pain, if any, he believed the employee was experiencing. Without such findings, we cannot tell whether the judge correctly applied the law to facts that could properly be found. Praetz, supra. Similarly, the judge never linked his adoption of Dr. Cowan's opinion that the employee's increased symptoms may have indicated a new injury or symptom magnification to his termination of causal relationship and disability. As discussed, infra, Dr. Cowan never saw the MRI, and the judge misinterpreted Dr. Mortimer's opinion regarding its significance as to causation and disability. Thus, these findings, without more, cannot be used to support termination of benefits on the date of the MRI. Praetz, supra.

date he found the employee disabled, but, without additional findings, we cannot make that determination. See Brouillette v. Safelite Auto Glass, 32 Mass. Workers' Comp. Rep. ___ (September 12, 2018)(there may be legally sound reason for the judge's termination of benefits several months after an adopted medical opinion stated he had returned to his pre-accident level of function, but, without further findings of fact, we cannot determine whether correct rules of law have been applied). [10,11]

Finally, the employer argues that the fact the employee was driving with a suspended license in violation of the law, after he had been notified his license had been or was about to be suspended, is sufficient to establish "serious and wilful" misconduct pursuant to § 27. (Employer br. 3-4.) We disagree with the employer's statement of the law and with his characterization of the facts as found by the judge. Serious and wilful misconduct under § 27 is analyzed with reference to the same language in § 28 regarding

---

[10] Moreover, it is not clear that Dr. Cowan actually opined the employee's work-related injuries resolved within 3-6 months after the accident, as the judge found, or whether Dr. Cowan only anticipated that they would resolve, but had not. (See Dec. 8; Ex. 1, § 11A report.) In his March 2, 2016, report, Dr. Cowan wrote:

> Maximal Medical Improvement: Based on the injury sustained in the motor vehicle accident, as described above, I *would anticipate* that Mr. Sadiku would be at maximal medical improvement within 3-6 months time following the motor vehicle accident of 5/26/15. *His presentation today would indicate that he is not*, unless of course he is exhibiting symptom magnification.
>
> Disability: In my opinion, Mr. Sadiku *would be* partially disabled as a result of the injuries sustained in the motor vehicle accident of 5/26/15 *for 3-6 months time.* I *anticipate* being able to return to work subsequent to that. Once again, I think it would be reasonable to obtain an MRI at this point to evaluate for a more significant structural issue in the lumbar spine prior to returning to the workplace."

(Ex. 1; emphases added.) Dr. Cowan's opinions on both disability and causation are further confused by the fact that, elsewhere in his report, he opines, "Mr. Sadiku remains disabled from the injury sustained in a motor vehicle accident on 5/26/15 . . . ." (Ex. 1.) We leave these inconsistencies for the judge to resolve with additional findings of fact. Praetz, supra.

[11] In reconsidering incapacity, the judge should be mindful that, because he found the work injury resulted in "two separate and distinguishable conditions"—the myofascial strain injury and an exacerbation of a pre-existing, non-work-related disc condition (Dec. 11)--each condition alone may disable the employee for different periods of time.

serious and wilful misconduct by an employer. McDonald v. Brand Energy Services, Inc., 29 Mass. Workers' Comp. Rep. 5, 7 (2015). A violation of § 27 thus requires a finding the employee engaged in "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of the probable consequences." Silver's Case, 260 Mass. 222, 224 (1927). In order for § 27 to bar the employee from compensation, his conduct must be both serious and wilful. "[S]erious refers to the conduct itself and not to its consequences. Wilful implies intent or such recklessness as is the equivalent of intent." Dillon's Case, 324 Mass. 102, 110 (1949). Moreover, § 27 bars compensation only if the alleged misconduct - here driving without a license - is the cause of the injury. McDonald, supra, citing DiGloria v. Chief of Police of Methuen, 8 Mass. App. Ct. 506 (1979). Cf. Dupuis v. Phillip Beaulieu Home Improvement, 19 Mass. Workers' Comp. Rep. 33, 35 (2005)(finding of § 27 bar to compensation upheld, as judge permissibly found employee's fall from roof was caused by intoxication).

Here, the only evidence on this issue was the employee's testimony, (Tr. 19-24), and what purported to be a receipt from a New York court indicating that two fines and surcharges were paid for a total of $300.00, and another charge was dismissed. (Ex. 6.) The judge credited the employee's testimony on this "narrow issue," and found he had hired an attorney to pay his outstanding fines, but only one had been resolved. Furthermore, the judge credited the employee's testimony that he was unaware his license was suspended at the time of the accident. Finally, he found there was no evidence the suspended license had any impact on the accident. (Dec. 12.) We may not disturb a judge's factual and credibility findings as long as they are based on the record evidence. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). Even if, arguendo, the employee's action in driving without a license, could be considered "serious," it cannot be considered "wilful." Not only did the judge believe the employee's testimony he was unaware his license was suspended, but he found no evidence indicating driving with the suspension was the cause of the accident. See McDonald, supra. Accordingly, we affirm the judge's finding that § 27 did not bar the employee from receiving compensation.

We vacate the judge's decision as to causation and disability/incapacity, and recommit the case to the judge for further findings as discussed herein. We affirm the decision on § 27, and summarily affirm the decision as to other arguments raised by the parties.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7) to defray the reasonable costs of counsel. If such fee is sought, the employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.[12]

So ordered.

Carol Calliotte
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***October 11, 2018***

Martin J. Long
Administrative Law Judge

[12] Because the Trust Fund did not appeal, an attorney's fee pursuant to § 13A(6) is unavailable.