COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029591-04**

Anthony Orlofski	Employee
Town of Wales	Employer
MIIA SIG	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Rose.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Sr., Esq., for the employee at hearing and on appeal
John J. Canniff, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying and dismissing his claim for §§ 13A, 30, 34, and 35 benefits for an accepted back injury. We affirm.

As the judge noted, the employee's case "has been the subject of numerous proceedings before the Department of Industrial Accidents, as well as the Massachusetts Appeals Court." (Dec. 4.) Appropriately, at hearing and in his decision, the judge analyzed and considered the law of the case. (Dec. 4-5.) We recount the pertinent history necessary to address the issues raised on appeal.

In our last decision, we recommitted the case to a different judge for a hearing de novo to resolve the merits of the employee's July 27, 2007 claim for medical benefits for his accepted low back injury. Orlofski v. Town of Wales, 24 Mass. Workers' Comp. Rep. 333 (2010). We also expressly permitted the employee to renew his motion to allow the submission of additional medical evidence to address the issue of § 1(7A) "a major" causation. Id. at 337-338. Six days prior to the February 23, 2011 hearing de novo, the insurer made a written offer to pay the claimed medical benefits.[1] See Memorandum Of Proceedings, hereinafter

[1] See 452 Code Mass. Regs. § 1.19(3), which provides, in pertinent part:

"Memorandum," filed May 10, 2011. Due to a conflict, the case was reassigned to a different judge, and twenty days prior to the April 25, 2011 rescheduled hearing de novo, the insurer renewed its written offer to pay the employee's § 30 claim. Id. The hearing was rescheduled to May 10, 2011, and "the parties reported that the Employee had accepted the Insurer's April 5, 2011 offer to pay." Id. In her Memorandum, the judge noted that:

> the parties agreed that the written offer and acceptance resolves the Employee's claim for medical benefits. I therefore, deny the Insurer's request for the issuance of a hearing decision. Instead, this memorandum is a memorialization of the proceedings before me.

Id. "No attorney's fee was ordered, and the memorandum of proceedings was not appealed." (Dec. 5.)

The employee then filed another claim, seeking benefits under §§ 30, 34, 34A and 35 from May 7, 2009, to date and continuing, and a § 13A attorney's fee. (Dec. 5.) The employee would later argue his § 13A claim encompassed a separate claim for an attorney's fee arising from the insurer's voluntary adjustment of his July 27, 2007 claim[2] for § 30 benefits. (Tr. 13-16.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file). All of the employee's claims were denied at conference, and he appealed. (Dec. 1.)

Prior to the hearing, the employee underwent a § 11A impartial medical examination by Dr. Charles Kenny. (Dec. 1; Ex. 4.) Dr. Kenny's report and deposition were admitted into evidence and the judge, sua sponte, allowed the parties to submit additional medical evidence. (Dec. 2-3.)

> When an insurer . . . at least five days before a hearing, serves on a claimant or person receiving compensation or the representative of such claimant or person a written offer to pay . . . compensation under M.G.L. c. 152, §§ 30 . . . and such offer is not accepted, the insurer shall not be required to pay any fee under M.G.L. c. 152, § 13A, for such . . . hearing, unless the . . . decision rendered directs a payment of said . . . compensation in excess of that offered.

[2] This claim was the subject of the Memorandum referenced supra.

At the hearing, the parties stipulated the employee had suffered a work-related "lumbo-sacral sprain." (Dec. 3.) The insurer raised, inter alia, the defenses of causal relationship and § 1(7A). (Dec. 2.)

In his decision, the judge found:

> I accept and adopt Dr. Kenny's diagnosis of lumbosacral sprain/strain with pre-existing conditions of degenerative lumbar disk disease with stenosis; lumbar facet arthropathy, and fusion of the L5 transverse process to the sacrum. I further accept and adopt Dr. Kenny's opinion that the industrial injury of September 13, 2004 was a temporary aggravation to [the employee's] serious pre-existing pathology, and the lumbosacral sprain/strain was a major cause of his complaints, disability, and need for treatment from September 13, 2004 *through at best December 13, 2004*.
>
> I accept and adopt Dr. Kenny's opinion that beyond that point the employee's condition was the natural progression of his underlying significant pathology (Deposition Dr. Kenny, p. 35). *I also accept and adopt Dr. Kenny's opinion that at the time of his examination, the employee was not experiencing even one percent (1%) aggravation from the industrial injury* (Deposition Dr. Kenny, pp. 53, 55). The employee is not disabled from a work injury.

(Dec. 5-6; emphases added.) The judge denied and dismissed the employee's claims.

The employee raises three issues on appeal. First, the employee argues the insurer's acceptance of the employee's lumbosacral sprain injury, and its prior agreement to pay the medical benefits claimed in treatment of that condition, established that the employee did not suffer a "combination" type injury as defined by § 1(7A). The cases cited by the employee in his brief do not support this proposition. In fact, we have indicated otherwise. In Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep. 315 (2011), we held the insurer's original acceptance of the employee's claim did not preclude it from raising § 1(7A), for the first time, in defense of a later claim for benefits. Contrast Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39, 46-47 (2013)(insurer could not raise issue of § 1(7A) combination injury after issue was litigated, and lost, in prior litigation). We do not appreciate how the insurer's voluntary adjustment of the employee's prior claim for

medical benefits alters this result. The record is void of any evidence that the insurer abandoned its "combination injury" defense. See Orlofski, supra at 337. Accordingly, we reject the employee's argument that the judge was bound to adopt the opinion of his medical expert because it was the only one based on the law of the case. (Employee br. 18-19.)

Next, the employee argues the judge erred when he refused to allow Mr. Noonan, a previous employer of the employee, to testify at the hearing. The employee offered that Mr. Noonan's testimony would help establish that the employee had sustained a prior work-related back injury in the early 1980s, which resulted in surgery. (Tr. 19; Employee br. 20-22.) By proving his pre-existing back condition was work-related, the employee maintains he would be relieved of the burden of proving that his September 13, 2004 injury was a major cause of his subsequent disability or need for treatment. See G. L. c. 152, § 1(7A)(fourth sentence).

The judge's refusal to consider Mr. Noonan's testimony is harmless. The subject of the relationship, if any, between the employee's prior back injury and surgery, and his condition following his September 13, 2004 work-related injury, was covered extensively by Dr. Kenny at his deposition. Following a long discourse, Dr. Kenny opined that any September 13, 2004 aggravation of the employee's prior back condition lasted no more than a few months, was a temporary exacerbation, and was not even one percent causative of the employee's condition after December, 2004. (Dep. 44, 46, 51-55, 66.) Accordingly, the judge's adoption of Dr. Kenny's opinions was sufficient to defeat the employee's ongoing claim for benefits under any prescribed causation standard.

Lastly, the employee argues the judge erred by failing to award an attorney's fee following the voluntary adjustment, in May, 2011, of his prior claim for § 30 benefits. See Memorandum, supra. He argues that because the original hearing on his July 27, 2007 claim for medical benefits was October 20, 2008, and the insurer's

written offer to pay was not made until February 11, 2011, an attorney's fee is due, as the offer was not made more than five days prior to the date set for the 2008 hearing. See footnote 1, supra. On the facts of this case, we disagree.

The date set for the hearing de novo following our order of recommittal in Orlofski, supra, was originally scheduled for February 23, 2011, as noted by the judge then assigned to the matter. Memorandum, supra. The insurer's offer to pay was communicated to the employee on February 11, 2011, more than five days prior to the hearing. Id. The insurer renewed its offer on April 5, 2011, more than five days prior to the rescheduled April 25, 2011 hearing, which was continued to May at the employee's request. Id. On May 9, 2011, the employee accepted the offer, so when the parties finally appeared before the judge on May 10, 2011, the matter was resolved. Id. Following a discussion on the record that day, the judge memorialized the proceedings in writing, noting that "the parties agreed that the written offer and acceptance resolves the Employee's claim for medical benefits." Id. Employee's counsel voiced no objection to this, and offered no argument in support of his claim that he was entitled to an attorney's fee. (May 10, 2011 Tr.) We think the time to address the § 13A issue was at the May 10, 2011 hearing de novo. Employee's counsel's failure to raise the issue, combined with his failure to take any exception to the Memorandum, constituted a waiver of his § 13A claim.[3] We also agree with the judge below that the

> law is quite clear that the administrative judge has discretion to enhance or reduce an attorney's fee, and the employee's failure to resolve this matter [before the prior judge] renders that discretion questionable. Therefore, on jurisdictional and/or equitable grounds, the employee's claim for attorney's fees and costs is denied.

(Dec. 8.) See G. L. c. 152, § 13A(5).

The decision is affirmed.

So ordered.

[3] All of the arguments presently advanced respecting the § 13A issue could have, and should have, been made at the May 10, 2011 hearing.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **March 7, 2014**