COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025541-04**

Anthony Pimental	Employee
MCI Cedar Junction	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge McManus.

APPEARANCES
Robert J. Deubel, Jr., Esq., for the employee
Vincent F. Massey, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee ongoing § 35 partial incapacity benefits, §§ 13 & 30 medical benefits, and a § 8(5) penalty.[1] We reverse the § 8(5) penalty award, and recommit the case for further findings of fact.

We relate only those facts pertinent to the issues raised on appeal. The employee worked as a correction officer for MCI-Norfolk. "On or about August 12, 2004, the Employee was in the course of his employment, when he missed a step and fell down some 20-30 stairs." (Dec. 5.) The employee claimed injuries to his right knee and left shoulder. Subsequent MRI examinations revealed a torn meniscus in his right knee, and a tear in his left shoulder. He underwent surgery for these conditions. The self-insurer later accepted the employee's right knee and left shoulder injuries as work related.[2] (Dec. 4-6.)

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[1] The self-insurer also appealed the judge's award of § 50 interest. (Self-ins. br. 1, 5.) At oral argument, the parties stipulated no interest was due. See Russo's Case, 46 Mass. App. Ct. 923 (1999)(absent waiver of sovereign immunity, Commonwealth not liable for payment of interest.)

[2] The employee was paid weekly incapacity and medical benefits on a without prejudice basis in accordance with § 8(1), and thereafter under the terms of a § 19 agreement. His

On May 14, 2008 the self-insurer, citing the provisions of § 8(2)(d),[3] notified the employee, via Form 107 sent certified mail, that it would terminate his weekly incapacity benefits on May 24, 2008. The mailing included a letter from the self-insurer notifying the employee that his "position as a Correction Officer I [was] open and available to [him]." (Dec. 1; Ex. 4.) It also included a physician's report signed by Dr. Alfred W. Hanmer, the employee's treating doctor, dated May 13, 2008.[4] Id. The report indicated the employee was able to perform his regular work duties as of that date. Id.

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initial claim for § 34 benefits, owing to his left shoulder and right knee injuries, was received by the department on April 6, 2007 and identified Dr. Alfred W. Hanmer as the employee's treating physician. On June 5, 2007, four days after the employee underwent surgery on his left shoulder, the parties resolved that claim by entering into another § 19 agreement. Under that agreement, the self-insurer paid the employee a closed period of § 34 benefits, and ongoing § 35 benefits, at the maximum statutory rate commencing on September 9, 2007. (Self-ins. br. 2-3). We also take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[3] General Laws c. 152, § 8(2)(d), provides, in pertinent part:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
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> . . .
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> (d) the insurer has possession of (i) a medical report from the treating physician . . . [and the] report[] indicates that the employee is capable of return to the job held at the time of injury, or other suitable job . . . consistent with the employee's physical and mental condition as reported by said physician and (ii) a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open and has been made available, and remains open to the employee. . . .

[4] Following oral argument, the parties stipulated that the date of Dr. Hanmer's report was May 13, 2008, as referenced by the judge on page fifteen of her decision, and not June 13, 2008, as indicated in footnote 1 on page 2 of her decision. The parties also stipulated that: 1) the self-insurer did submit, in addition to other medical records, a May 18, 2009 note from Dr. Hanmer; 2) the reference to a June 16, 2009 "medical note identified in footnote 1 on page 2 of the decision as being from Dr. Tejaswini, is from Dr. Tejaswini Shah"; and 3) Dr. Hanmer did not issue a May 16, 2009 report. (See September 29, 2011 e-mail submission to the board on behalf of both parties.)

On May 19, 2008 the employee filed a claim seeking reinstatement of his weekly § 35 benefits from May 24, 2008, the anticipated date of their termination. He also sought penalties under §§ 8(1) and (5),[5] and § 14.[6] Unlike his prior claim, which sought compensation for his left shoulder and right knee injuries, the employee's May 19, 2008 claim described injuries to his "neck, left shoulder, low back, [and] right knee." (Employee's Form 110, dated 5/19/08.)

Following an October 9, 2008, § 10A conference, the judge ordered the self-insurer to pay the employee § 35 benefits at the rate of $473.90 from October 9, 2008 to date and continuing, based on his average weekly wage of $1,139.84, and a $350 earning capacity. Medical benefits were also ordered, but § 8 penalties were not. Both parties appealed the conference order. (Dec. 2.)

On March 18, 2009 the employee was examined by Dr. Olarewaju Oladipo, the § 11A(2) impartial medical examiner. (Dec. 3.) His report, a subsequent addendum, and his deposition were entered into evidence. (Stat. Exs. A-C; Dec. 2.) The judge later found the medical issues complex, and allowed the parties to submit additional medical evidence. (Dec. 3-4.) Both parties did so. (Ex. 8-9; Dec. 2.)

At hearing, the employee renewed his claim for § 8 penalties and, *inter alia*, §§ 34 and 35 benefits from May 24, 2008, to date and continuing. (Dec. 2-3.) The self-insurer denied the employee's § 8 claims and his entitlement to any benefits for a low back injury; it did not specifically deny that his neck injury was work-related. It also raised, *inter alia*, § 1(7A) in defense of the claim.[7] (Dec. 3.)

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[5] General Laws c. 152, § 8(5), provides, in pertinent part:

> [I]f the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty payment equal to twenty per cent of the additional compensation due on the date of such finding.

[6] The judge denied the employee's § 8(1) and § 14 claims. (Dec. 16-17.)

[7] General Laws c. 152, § 1(7A), provides, in pertinent part:

In her decision, the judge credited the employee's testimony that "[o]verall, his knee and shoulder symptoms have improved somewhat, but his neck and back have not." (Dec. 7.) She also adopted the medical opinions of Dr. Oladipo, and concluded the employee suffered from an ongoing partial incapacity "due to his ongoing pain and disability in his left shoulder and neck and back."[8] (Dec. 10.) The judge also found that the adopted opinion of Dr. Oladipo carried the employee's "a major" burden of proof under § 1(7A) with respect to those injuries. (Dec. 12.) She rejected Dr. Oladipo's opinion that the employee could return to his former job as an electrician.[9] Following a comprehensive vocational assessment, the judge assigned the employee a weekly earning capacity of $320 and awarded him § 35 benefits at the rate of $491.90 per week from May 24, 2008 forward. (Dec. 12-13, 18.)

The judge addressed the employee's § 8(5) penalty claim as follows:

> The note that it . . . used for this termination and that was attached to the Form 107, is a form of/from the Commonwealth of Massachusetts, entitled *Physician's Report*, dated 5/1/[]08. (footnote omitted.) This note, purportedly signed by Dr. Hamner [sic], speaks for itself.[10] However, certain portions of this are left blank, which include #7 the description of

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> 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.

[8] The judge addressed the self-insurer's § 1(7A) defense with respect to the employee's right knee injury: "I find that there was a compensable injury along with some evidence of a pre-existing degenerative condition, assumably non-work related. There is, however, no compelling evidence that there was a combining of these two conditions that resulted in a prolonging of the disability or need for treatment." (Dec. 12.) The employee conceded at oral argument that his right knee injury was not disabling at the time of hearing, and Dr. Oladipo opined that as of March 18, 2009, the employee's knee injury was no longer disabling. (Dec. 9; Dep. 15.)

[9] From 1981 to 2004, the employee "performed intermittent electrical work." (Dec. 5.)

[10] The employee did not contend that someone other than Dr. Hanmer signed it.

> the injury, #8 history of pre-existing injury or disease, # 11 neurological findings, # 12 diagnosis and # 13 treatment. The sections referring to subjective and objective findings, does [sic] reflect something, but it is unclear what is being indicated.

(Dec. 15-16.) The judge stated that Dr. Hanmer had treated the employee for his left shoulder injury, and not for his accepted right knee injury. Reasoning that it would be improper for the self-insurer to terminate the employee's weekly benefits without information concerning the status of his work-related knee injury, the judge concluded "the termination of the Employee's benefits was improper, under statutory provisions." (Dec. 16.) Accordingly, she ordered the self-insurer to pay a penalty to the employee equal to twenty percent "of the back compensation awarded as claimed, from May 24, 2008 to October 9, 2008." (Dec. 18.)

On appeal, the self-insurer argues the judge erred in awarding the § 8(5) penalty. (Self-ins. br. 1, 5-8.) We agree. First, as the self-insurer correctly points out, the employee *was* treating with Dr. Hanmer for both his right knee and left shoulder injuries. The employee so testified,[11] and the judge so acknowledged.[12] Second, we note the employee's April, 2007 claim listed Dr. Hanmer as his treating physician.[13] See footnote 2, supra. These facts do not support the judge's main rationale for concluding that the self-insurer illegally discontinued the employee's benefits on the date in question. Moreover, § 8(2)(d) does not require the treating physician's report to identify or describe any of the elements the judge

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[11] See September 9, 2009 transcript at p. 43, and September 28, 2009 transcript at pp. 24, 26 and 39.

[12] "The Employee alleges that he remained in active treatment for his shoulder and knee with Dr. Hamner [sic] at and throughout that time." (Dec. 7.)

[13] The employee's May, 2008 claim did not identify a treating physician. Furthermore, there is nothing in the record to suggest that once the employee received the Form 107, that he timely informed the self-insurer of the identity of another treating physician supportive of his entitlement to receive ongoing incapacity benefits.

relied upon to conclude that the statutory requirements were unmet. See Collatos v. Boston Retirement Bd., 396 Mass. 684, 686 (1986)(penalty provisions are to be strictly construed). Lastly, the employee, in his brief and at oral argument, failed to identify any other treating physician for the time period in question. On these facts, the self-insurer's offer of employment, coupled with Dr. Hanmer's report clearing the employee to return to his regular work, complied with the letter and spirit of § 8(2)(d).[14] Accordingly, we reverse the judge's illegal discontinuance finding and vacate the § 8(5) penalty award.

The self-insurer also posits the judge erred by concluding the employee carried his burden of proof under § 1(7A) respecting his right knee, neck, low back, and left shoulder injuries. As the judge did, we address the statutory elements for each body part separately. See Dorsey v. Boston Globe, 20 Mass. Workers' Comp. Rep. 391 (2006)(where employee suffered injuries to multiple body parts, proper for judge to consider application of § 1[7A] for each distinct diagnosis).

With respect to the employee's right knee injury, the judge did not err when she found the evidence lacking on the "combination" element of § 1(7A). See footnote 8, supra. In any event, she adopted Dr. Oladipo's opinion that, as of March 18, 2009, the employee had no ongoing disability referable to his knee injury. (Dec. 9.)

The issue of the continuing causal relationship between the employee's work-related neck injury,[15] and his present disability, is more problematic. The

[14] We do not mean to suggest that our ruling would necessarily countenance the discontinuance of an employee's benefits based on the opinion of one of two treating physicians releasing the employee to return to work, where both are treating the employee for two distinct work-related injuries, and the insurer knows that the employee has recovered from one injury only. The statute speaks of "the treating physician," and not "a treating physician," or "any treating physician." G. L. c. 152, § 8(2)(d). See also G. L. c. 152, § 30.

[15] Dr. Oladipo described the employee's neck injury as "cervical sprain with an underlying degenerative disc disease of the cervical spine." (Dep. 12.)

judge purported to adopt Dr. Oladipo's opinion that the industrial injury remained a major cause of the employee's neck symptomatology.[16] At first, the doctor seemed to express that opinion. (Dep. 15-16, 30-31.) However, later in his deposition, Dr. Oladipo testified as follows:

> Q. The diagnosis of cervical strain/sprain at your time of examining Mr. Pimental in March of '09, was your opinion that the strain as related to the work injury was an important or significant factor with regard to the causation and [dis]ability he was suffering?
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> . . .
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> A. I will not describe it as a major contributory factor since most of the strain/sprain component of an injury tends to settle down over time, and the injury was in 2004.

(Dep. 56-57.)[17] The doctor's last stated opinion,[18] therefore, was insufficient to carry the employee's burden of proving that his work-related neck injury remained a major cause of his disability and need for treatment. MacDonald's Case, 73 Mass. App. Ct. 657 (2009).

The causation of the employee's low back injury was also disputed. (Dec. 3.) The judge found that Dr. Oladipo opined that the employee's "industrial injury was a major cause" of his thoracolumbar injury, as well as his "ongoing disability and need for treatment." (Dec. 12.) It is true Dr. Oladipo testified that, as a result of the employee's fall at work, he suffered a thoracolumbar sprain. (Dep. 13-14.) However, when asked which of his several diagnoses were

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[16] Dr. Oladipo's opinion established, as a matter of law, the "combination" element of § 1(7A) respecting the employee's neck injury: "the cervical degenerative disc disease is a preexisting condition and the diagnosis of a cervical sprain/strain would have been [superimposed] on that preexisting abnormality." (Dep. 30.)

[17] Dr. Oladipo also testified earlier that: "The cervical spine, it did improve. It's not as major when you compare [it] to the left shoulder, but it still has contributory fact [sic], *but I won't call it major*." (Dep. 32; emphasis added.)

[18] See Perangelo's Case, 277 Mass. 59, 64 (1931)("[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying").

causative of the employee's disability at the time he was last examined, the doctor replied:

> The ones that are active. Particularly the residual symptoms suffered in the left shoulder and ongoing symptoms in the neck . . . affect[] his ability to function.

(Dep. 15.) Dr. Oladipo never modified his opinion concerning the employee's back injury. Therefore, regardless of whether § 1(7A) would operate to elevate the causation standard respecting the employee's back injury, the judge erred by considering it a compensable component of the employee's ongoing incapacity.

On appeal, the self-insurer does not contest that the employee's left shoulder injury[19] is related to the employee's fall at work. It does, however, raise issues relative to the treatment of the medical evidence respecting the employee's shoulder injury. The self-insurer submitted a medical report from Dr. Hanmer dated May 18, 2009 − approximately one year after the employee was last seen by Dr. Oladipo − stating that the employee had fully recovered from his shoulder injury, and could "return to work without restrictions." (Ex. 8.) It also submitted a report from Dr. Tejaswini Shah, dated June 16, 2009, releasing the employee to return to work without restrictions "anytime." (Ex. 8.) Although the judge mentioned these reports in her decision, it is unclear whether she considered them as evidence. She sustained multiple objections to their use at Dr. Oladipo's deposition, and one of the bases for the objections was that the reports were not in evidence.[20] (Dec. 19; Dep. 38-40.) Because these reports were evidential, we recommit the case to allow for their express consideration.

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[19] Dr. Oladipo diagnosed the injury as "supraspinatus tendinosis, biceps tendinosis, and impingement syndrome. . . ." (Dep. 12.)

[20] Even if the reports had not been introduced into evidence, they could be used for cross-examination purposes. Higgins's Case, 460 Mass. 50 (2011). We note the filing date of the judge's decision was May 25, 2010.

Accordingly, we reverse the decision and vacate the § 8(5) penalty, and the § 35 benefits, awarded.[21] We also recommit the case for the judge to address anew the extent of the employee's incapacity, based solely on his left shoulder injury, and to consider the May 18, 2009 report of Dr. Hanmer, and the June 16, 2009 report of Dr. Shah.

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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Catherine Watson Koziol
Administrative Law Judge

Filed: **October 18, 2011**

[21] In the interim, we reinstate the conference order.