COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001277-08**

Boguslaw Mielewski	Employee
Department of Youth Services	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Paul L. Durkee, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision discontinuing his § 34 total incapacity benefits, based on the judge's finding that the employee's accepted lower back injury no longer remained a major cause of his disability. We affirm the decision.

The employee injured his lower back at work on January 20, 2008. The self-insurer accepted the claim and began paying the employee § 34 benefits. On July 2, 2008, the self-insurer filed a complaint to discontinue payment of those benefits. (Dec. 3.) The complaint was denied at conference and the self-insurer appealed. On February 5, 2009, the employee was examined by a § 11A impartial medical examiner, Dr. Steven A. Silver, and thereafter, the matter proceeded to hearing. (Dec. 3.)

In his report, Dr. Silver listed the employee's diagnoses as 1) lumbar strain, 2) mechanical low back pain secondary to obesity, 3) spinal stenosis, and 4) degenerative disc disease. (Ex. 1.) Dr. Silver opined that only the lumbar strain diagnosis was causally related to the work injury. Id.

In direct response to a set of written questions posed by the judge and submitted to Dr. Silver for completion in conjunction with his § 11A report, Dr.

Silver opined that the employee's work injury ceased being a major cause of his disability or need for treatment by approximately April 1, 2008.[1] Dr. Silver testified this opinion was based on a commonly held view in the medical field that sprains and strains typically resolve within a period of three to four months. (Dec. 3, 7; Dep. 56-59.) Because he found this opinion at odds with our decision in Nolan v. Bank of Boston, 12 Mass. Workers' Comp. Rep. 16 (1998), the judge allowed the employee's subsequent motion to admit additional medical evidence.[2] The parties submitted additional medical evidence and the record closed.

In his decision, the judge determined that the "combination injury" provisions of § 1(7A),[3] applied to the employee's claim. (Dec. 1, 8.) Ultimately, the judge adopted Dr. Silver's opinion that the January 20, 2008 injury was no

---

[1] On the Form 461 "Conflict Disclosure Form To Be Completed by Physician," which is sent to the impartial medical examiner by the department, the following handwritten instructions from the judge appear: "PLEASE COMPLETE THE ATTACHED QUESTIONNAIRE." (Ex. 1.) Attached to the doctor's report is a separate sheet of paper entitled "Section 1(7A) Combination inquiry questions" instructing the impartial medical examiner to answer a set of questions "to a reasonable degree of medical certainty" by checking either "yes" or "no" boxes, or by providing specific dates. In response to a question asking when the injury "first became a major but not necessarily predominant cause of disability or need for treatment" Dr. Silver wrote: "1/20/08." The doctor was then instructed to answer the following question: "does the alleged industrial injury or disease remain a major but not necessarily predominant cause of disability or need for treatment?" to which Dr. Silver checked the "no" box. (Emphasis original.) The questionnaire then instructed the doctor to "state the date on which the alleged industrial injury or disease ceased to be a major but not necessarily predominant cause of disability or need for treatment," to which Dr. Silver responded, "≈ 4/1/08." (Emphasis original.)

[2] As discussed in detail, infra, Nolan does not apply to this case. The self-insurer has not appealed and the issue has not been preserved. In any event, we observe that other circumstances, also discussed infra, render any perceived error to be harmless.

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

longer a major cause of the employee's disability or need for treatment. (Dec. 7-8.) The judge terminated the employee's weekly § 34 benefits as of the date of Dr. Silver's examination, February 5, 2009. (Dec. 8-9.)

On appeal, the employee makes four claims of error. First, relying on our decision in Nolan, supra, the employee argues the judge erred by adopting Dr. Silver's opinion that the work injury no longer remained a major cause of his disability or need for treatment. Nolan, however, stands for the proposition that a judge may not modify an employee's benefits based on the judge's lay understanding of a typical period of disability for the injury involved. Id. at 18. In the present case, it is the impartial physician who opines that the recovery period for this lumbar strain should have been three or four months, and thereafter, the employee's symptoms were due to his pre-existing conditions of stenosis and degenerative disc disease exacerbated by obesity.[4] (Dep. 47-48, 56-59.) Dr. Silver's medical opinion was evidence of the extent of causally related disability and as such, the judge did not err in adopting it.

Second, relying on our decision in Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997), the employee argues the same opinion of Dr. Silver impermissibly expanded the scope of the medical dispute framed by the parties at conference. Indeed, the July 2, 2008 filing date of the self-insurer's complaint is the earliest date discontinuance may be sought. Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354 (1995). Although the self-insurer's conference submissions contained a July 14, 2008 medical report from Dr. Robert Pennell, opining the employee's work related injury no longer remained a major, or even a minor, cause of his disability or need for medical treatment, no report was submitted at conference providing such an opinion for the time period between July 2, 2008 and July 14, 2008. Rizzo v. M.B.T.A., 16 Mass.

[4] On the date of his examination of the employee, Dr. Silver opined to a reasonable degree of medical certainty that the injury no longer remained a major cause of the employee's disability or need for treatment. See footnote 1, supra; Ex. 1.

Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file). Moreover, pursuant to § 10A(2), at conference, the self-insurer submitted a last best offer seeking discontinuance of the employee's weekly benefits because "IME says can work with restrictions. Job offer has been made,"[5] lending support to the employee's assertion that Dr. Silver's opinion widened the medical dispute framed by the parties by opining the employee had a lesser duration of causally related disability than the opinions of the parties' doctors.[6] Nonetheless, to the extent Dr. Silver's opinion may be seen as creating a Ruiz type error, the error is harmless under the circumstances.

Where such an error does occur, the remedy is to open the medical evidence, as the judge did in this case. Ruiz, supra at 403. Despite Dr. Silver's opinion that the work injury ceased being a major cause of the employee's disability or need for treatment nearly ten months before his examination of the employee, the judge awarded the employee ongoing weekly incapacity benefits until the date of that examination. Accordingly, the employee has failed to show how he was prejudiced by the alleged error.

Third, the employee argues that meaningful judicial review cannot be performed because the judge erred by failing to make findings regarding the

---

[5] The self-insurer's July 2, 2008 complaint for discontinuance, was accompanied by a March 27, 2008, medical report from the self-insurer's § 45 examiner, Dr. John H. Chaglassian. 452 Code Mass. Regs. § 1.07(2)(j)(2)(complaint for modification may be filed, where applicable, with a physician's report opining work capacity). Without reference to the "a major cause" standard of §1(7A), Dr. Chaglassian, opined, "the employee's signs and symptoms were causally related" to the work injury, the employee had "not reached maximum medical improvement or a medical end result," and although he could not perform "his usual job" the employee could perform a job which adhered to specific restrictions on his physical activities. Rizzo, supra.

[6] The judge's questions failed to apprise Dr. Silver of the parameters of the dispute. See Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)("If there is to be any stability and predictability at hearing, the § 11A examiner should be told exactly what is in dispute and his opinion, if it is found adequate, should fall somewhere within the extremes of the conflicting opinions.") Moreover, both parties stated at oral

specific mechanism of the January 20, 2008 injury. We disagree. The self-insurer accepted liability for this injury and the nature of its occurrence was not an issue in dispute. Accordingly, the judge was under no obligation to make findings with respect to that matter.

Lastly, the employee argues Dr. Silver's opinion failed to address the issue of causal relationship within a reasonable degree of medical certainty. The employee's argument against the § 11A opinion is based on his reading of the impartial physician's deposition testimony as "clearly impl[ying] that the 11A examiner is not able to state . . . whether the employee's current symptoms are related to the industrial injury of January 20, 2008 as opposed to a degenerative process, his obesity etc." (Employee's br. 14.) The implication is neither necessary nor probable. The passage of deposition testimony cited by the employee merely establishes the work-related injury was a major cause "for a period of time." (Dep. 47.) The doctor's testimony elaborates that the "period of time" referenced was around three months post-injury, not the timeframe pertaining to the employee's present and ongoing disability at the time of Dr. Silver's examination of the employee some ten months post-injury. (Dep. 47-48.) We think Dr. Silver clearly opined that by the time he examined the employee the work-related lumbar strain did not remain a major cause of the employee's medical impairment. As such, the judge's adoption of the impartial physician's causal relationship opinion was not arbitrary, capricious or contrary to law. Accordingly, we affirm the decision.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

argument that the judge did not notify them that he was sending these questions to Dr. Silver, thereby depriving them of a meaningful opportunity to object to the questions.

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: