COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 016673-12**
Charles M. Berfield	Employee
North Shore Medical Center	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte)

The case was heard by Administrative Judge Preston.

APPEARANCES
Michael Levin, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision denying and dismissing his claim for § 34A benefits, allowing the insurer's complaint to discontinue payment of § 34 temporary total incapacity benefits as of the date of the hearing, November 17, 2014, and ordering the self-insurer to commence payment of § 35 benefits at a rate of $293.13 per week based on a $440.00 earning capacity, beginning November 17, 2014 and continuing.[1] The judge also denied the employee's claim for medical benefits related to his left shoulder, and ordered the self-insurer to cease medical payments for the employee's post-traumatic mental health treatment, as of November 17, 2014. (Dec. 9-11.) For the reasons that follow, we affirm the decision.

At the time of the hearing, the employee was fifty-eight years old. He has an associate's degree in liberal arts, and his work history includes employment as "a trainer, program manager, mental health counselor and mental retardation worker." (Dec. 5.) On July 15, 2012, while working as a mental health counselor, the

[1] The hearing was conducted on two separate days. We refer to the transcript of the November 17, 2014 proceeding as "Tr. I," and the January 15, 2015 proceeding as "Tr. II."

employee was assaulted and beaten by a patient in a locked ward, sustaining multiple injuries. (Dec. 5.)

The self-insurer accepted liability for the claim and paid § 34 temporary total incapacity benefits from the date of injury and continuing. The self-insurer also paid for multiple diagnostic studies and conservative care, except for a left shoulder surgical repair. (Dec. 5.) It filed a complaint seeking to modify or discontinue the employee's weekly benefits and appealed from the judge's January 21, 2014, denial of that complaint at conference. The employee also appealed the conference order's denial of his joined claim for §§ 13 and 30 benefits relating to his left shoulder. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file). Later, on August 27, 2014, the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. Id.

At the hearing, the judge found the report of the § 11A examiner, Dr. Joseph Abate, to be adequate. However, he found the medical issues were complex and allowed the parties to submit additional medical evidence. (Tr. II, 18.) Both parties submitted medical evidence, including the reports of Dr. Stuart Gitlow and Dr. Michael Rater. Dr. Abate was deposed. (Dec. 2, 4.)

Relying on the medical opinion of Dr. Abate, the judge determined the employee has right shoulder limitations as a result of the work injury, and that he is at a medical end result. Furthermore, the judge adopted Dr. Abate's opinion that the employee's left shoulder complaints were not causally related to the industrial accident. (Dec. 6.) Regarding the employee's psychiatric issues, the judge found the employee had a pre-existing psychiatric post-traumatic stress disorder and depression that combined with the work injury to require treatment. However as of May 15, 2014, the employee did not require further treatment for the work-related aggravation of those conditions. (Dec. 5-7.)

The judge denied the employee's claim for medical benefits for his left shoulder as well as his § 34A claim. The judge adopted the opinions of the self-insurer's vocational expert, Rhonda Jellenik, and ordered the self-insurer to cease

payment of § 34 total incapacity benefits and commence payment of the aforementioned § 35 partial incapacity benefits. (Dec. 8-10.)

On appeal, the employee first argues the judge erred by ignoring evidence pertaining to the employee's left shoulder. We disagree. The employee refers to his medical records from treatment with Dr. Todd O'Brien, which he asserts support a finding of causal relationship between his left shoulder complaints and the work injury. However, Dr. O'Brien's records were not introduced as evidence at the hearing. Although the employee acknowledges that Dr. O'Brien's reports were not admitted in evidence, he suggests that since they were submitted at conference and were later reviewed by the impartial doctor, they were part of the hearing record. (Employee's br. 13; Reply br. 2.) The employee's contention is contrary to long-established case law. See Haley's Case, 356 Mass. 678, 682 (1970) ("Nothing can be considered or treated as evidence which is not introduced as such"); 452 Code Mass. Regs. § 1.11(5) ("The decision of the administrative judge shall be based solely on the evidence introduced at the hearing"); see also Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 246 (1998)("Since the hearing is a de novo proceeding and not an extension or continuation of the conference, the conference order is not part of the hearing evidence . . . "). In addition, the employee bears the burden of proof on every element necessary to prove his claim. Martinelli v. Chrysler Corp., 28 Mass. Workers' Comp. Rep. 35, 39 (2014); Sponatski's Case, 220 Mass. 526 (1915).

The employee further argues that Dr. Abate's testimony established the existence of a causal relationship between the work injury and the employee's left shoulder condition. Focusing on certain portions of Dr. Abate's deposition testimony, the employee asserts that, when asked whether the injury to the right arm could have caused the employee to overcompensate with his left, the doctor responded, "It's possible, yes." (Employee br. 8.) Employee's counsel continued his questioning of Dr. Abate:

> Q. If he did [overcompensate], would it have aggravated the underlying condition there?[2]
>
> A. It could have.
>
> Q. Is there anything else that you can think of that might have triggered his left shoulder, triggered it to become symptomatic again?
>
> A. No.
>
> Q. Okay. The point I'm trying to make is – I'm going to phrase this as a question. Dr. O'Brien made a number of comments and I highlighted these for you. These are my Exhibits 9 and 10. And I'll draw your attention to specifically Exhibit 10. This is Dr. O'Brien dated January 16, 2014. I'll give you a moment to review that.
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> A. (Witness complying)
>
> Q. Dr. Abate, my question is simply this, would you agree that the injury to Mr. Berfield's left shoulder is a consequence of his original injury to his right shoulder?
>
> A. It could be yes.
>
> Q. Would you agree with Dr. O'Brien's assessment?
>
> A. Yes, his assessment is appropriate. Yes.

(Ex. 1, 16-18.) The employee's argument lacks merit for several reasons. First, it fails to acknowledge that "medical opinions must be expressed in terms of probability, not possibility." Colon-Torres v. Joseph's Pasta, 27 Mass. Workers' Comp. Rep. 61, 65 (2013); Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). Although Dr. Abate indicated that he could not think of anything else that might have triggered the employee's left shoulder symptoms, the doctor never provided an opinion that there was anything more than a possibility of the existence of a causal relationship between the employee's right shoulder injury and his left

[2] In the 1990's the employee sustained an injury to his left shoulder requiring surgical repair of a rotator cuff tear, performed some years prior to the industrial accident of July 15, 2012. (Dec. 6; Tr. I, 19-20, 22; Dep. 15.)

shoulder symptoms. Consequently, his opinion could not support a finding of causation. Sponatski's Case, supra at 528 ("The [employee] must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right"); Sevigny's Case, 337 Mass. 747, 749-750 (1958)(same). Second, Dr. Abate's opinion that Dr. O'Brien's "assessment is appropriate" does not have any significance, where the "assessment" is not in evidence and where employee's counsel asked no further questions about what the "assessment" entailed. An opinion agreeing to something unknown, and that is not otherwise in the record, is useless to the judge, who must base his decision on the evidence submitted at hearing. Because the judge allowed the parties to submit additional medical evidence, no procedural impediment thwarted the employee's ability to put Dr. O'Brien's records, and thus his opinions, in evidence for the judge's consideration. G. L. c. 152, § 11A(2) (additional medical evidence may be submitted when the impartial examiner's report is inadequate or the case presents complex medical issues). Moreover, nothing prohibited the employee from questioning Dr. Abate about Dr. O'Brien's assessment so as to make clear what Dr. Abate believed was "appropriate." See Higgins's Case, 460 Mass. 50, 60 (2011)(parties have ability "to depose the impartial physician regarding relevant facts and information"). The employee failed to carry his burden of proving there was a causal relationship between his industrial injury and his left shoulder condition.[3]

[3] The employee's further argument, that the judge erred by failing to analyze his disability regarding his left shoulder condition and his right shoulder injury under the combination standard set forth in § 1(7A), lacks merit. By its terms, § 1(7A) is triggered when the injury combines with a "pre-existing" injury or disease, yet the employee's entire argument is based on the theory that "the left shoulder came about as a consequence of the injury to the right shoulder," which concerns events occurring *after* the injury. It also is a theory that embodies the existence of a causal relationship that the employee failed to prove. (Employee br. 7-8.) In addition, because there was no evidence to show there was an aggravation or any causal connection between the left shoulder and the right shoulder injury, the employee's argument that the causal chain had not been broken by his experience of pain in the left shoulder as he pushed himself out of bed, is equally unavailing. Cf. Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343 (2008)(subsequent motor vehicle accident

Lastly, citing Frennier's Case, 318 Mass. 635, 639 (1945), the employee argues the judge erred in assigning him an earning capacity based on the opinions of Ms. Jellenik, because he "is not expected to take a job that is trifling in character." (Employee br. 17-18.) In making this argument, the employee equates the term "trifling" with the testimony of his own vocational expert, Francine Yencho, who opined that the jobs identified by Ms. Jellenik were "outside of [the employee's] range of interest, and would not satisfy [the employee's] goal of helping others," and that "his lack of interest in the jobs would likely affect his performance and that he would not last long in them." (Employee br. 18.) The judge, as fact-finder, was free to adopt the opinions of Ms. Jellenik, over those of Ms. Yencho. Moreover, the employee cites to no case or legislative enactment supporting his interpretation of "trifling" work.

The judge found, based on the medical and the vocational evidence, that the employee could "return to the workplace full-time, but is limited to patient communication work at $11.00 per hour for 40 hours per week full-time." (Dec. 9.) We find no error in the judge's findings regarding the employee's earning capacity, which comport with requirements set forth in G.L. c. 152, § 35D. We affirm the decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **March 31, 2016**

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which aggravated work injuries found not to be an intervening event breaking causal connection).