COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 018358-03**

Christopher Boucher | Employee
Edward Buick, Inc. | Employer
Associated Employers Insurance Company | Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul L. Durkee, Esq., for the employee
Peter P. Harney, Esq., for the insurer at hearing
Dawn M. Colozzo, Esq., for the insurer on appeal

LONG, J. The insurer appeals the hearing decision, which denied its discontinuance request and ordered §§ 13 and 30 benefits for psychiatric treatment. The insurer alleges the judge committed error when he declined to consider the § 11A impartial opinion and adopted opinions found in the additional medical evidence allowed by motion. Finding no error in the judge's reasoning or findings, we affirm the hearing decision.

This claim has a lengthy procedural history, and, for purposes of our review, we note there are two prior hearing decisions issued by different administrative judges.[1] Each decision established liability for a June 11, 2003, industrial injury involving, among other conditions, a spinal cord syrinx.[2] The current litigation involves the insurer's latest

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[1] The first decision, hereinafter referred to as "Dec. I," was issued by Administrative Judge William Constantino on April 5, 2007. The second decision, hereinafter referred to as "Dec. II," was issued by Administrative Judge Steven Rose on November 9, 2011. The present decision, issued on December 11, 2019, is hereinafter referred to as "Dec. III."

[2] Administrative Judge Constantino adopted "the medical opinion of Dr. Malloy that the industrial injury of June 10, 2003 is the major cause of Mr. Boucher's syrinx and headache and back problem conditions and that Mr. Boucher is totally disabled." (Dec. I, 15.) Judge

discontinuance request and § 1(7A) defense relative to a claim for psychiatric treatment.[3] The insurer appealed the conference denial of its discontinuance request, and a § 11A impartial examination was conducted by Dr. Stephen Saris on January 16, 2018. At the hearing on April 19, 2019, the judge allowed the employee's motion to allow additional medical testimony, and each party submitted additional medical exhibits. In his December 11, 2019, hearing decision, the current administrative judge denied the insurer's discontinuance request and ordered the payment of psychiatric medical treatment. In doing so, the judge adopted the medical opinions of the employee's physicians (Drs. Nairus, Izzo, Pease, Polizoti and Vinton) and specifically rejected Dr. Saris' opinion, which disagreed with the very existence of the heretofore mentioned thoracic syrinx. The judge found:

> The § 11A examiner in the instant case is supportive of the insurer's positions but has stated conclusions that are contrary to the established law of the case. More particularly, Dr. Saris states that the Employee does not have "putative syringomyelia," but rather has "an enlarged central canal, which is a normal variant. It is a congenital condition that will not cause any clinical problem in his

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Constantino's decision was appealed by the insurer and affirmed by both the Reviewing Board and the Appeals Court. Boucher's Case, 76 Mass. App. Ct. 1101 (2009)(Memorandum and Order Pursuant to Rule 1:28). Regarding the insurer's subsequent discontinuance request, Administrative Judge Steven Rose found,

> [a]fter careful consideration of the voluminous medical evidence submitted, I accept and adopt the opinions of Dr. James Nairus. I adopt the opinion that the diagnosis for the neck, lower back, and left lower extremity pains involved in the June 10, 2003 accident are: post-traumatic thoracic spine syrninx; a T7-8 disk herniation; chronic neck pain with bilateral upper extremity radicular symptoms from a disk herniation at the C6-7 level; and chronic lower back pain with bilateral lower extremity radicular symptoms from disk extrusions at the L4-5 and L5-S1 levels. I further accept and adopt the doctor's opinion that the work injury of June 10, 2003 acted as the major contributing cause of the employee's permanent and total disability.

(Dec. II, 5.) No appeal of Judge Rose's hearing decision was filed.

[3] The relevant portion of § 1(7A) raised by the insurer was the third sentence that provides, "Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment."

> lifetime. It is not the cause of his pain or any of his myriad of problems. It pre-existed the subject accident, was not made worse by it, and was not made clinically manifest by it."…. Because Dr. Saris's findings and opinions are in stark contrast to the established law of the case, I must, and do, consider it to be not probative of the issues before me.

(Dec. III, 9-10.)

The insurer's primary argument on appeal alleges the "judge exceeded his authority and erred when he found the § 11A examiner's findings and opinions to be not probative of the issues before him due to issues of collateral estoppel and res judicata."[4] (Insurer br. 5.) For the following reasons, we reject the insurer's arguments and affirm the hearing decision.

Dr. Saris' rejection of the existence of a spinal cord syrinx and his challenge to the initial causal relationship of this condition are contrary to our holding in Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007), where we held that, in an accepted case, it was error to permit an insurer's challenge of the causal relationship of the employee's present disability based on a medical opinion rejecting liability for the initial causal relationship between the industrial injury and the employee's disability. See also Kareske's Case, 250 Mass. 220, 224 (1924); Gravallese v. General Electric Aviation Co., 34 Mass. Workers' Comp. Rep. 41 (2020); Mariano v. Town of Needham, 33 Mass. Workers' Comp. Rep. 1 (2019); and Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39 (2013). The insurer's assertion that Dr. Saris' "opinions as to initial causation are immaterial and not prohibitive of his assessment of present disability status," (Insurer. br. 12), is a misstatement of the law as outlined in the cases cited above. To imply that the objectionable portion of Dr. Saris' opinion can be parsed out and ignored or

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[4] The insurer's allegation that the concepts of collateral estoppel and res judicata were improperly applied is without support. Collateral estoppel and res judicata are affirmative defenses which must be raised by a party, and that was not done in this case. Litch v. American Airlines, 32 Mass. Workers' Comp. Rep. 235, 241 n. 5 (2018). While the judge did state that "The doctrine of issue preclusion looms large in this case[,]" (Dec. 8), he did so in the context of asserting the "established law of the case" relative to the spinal syrinx and the initial causal relationship for same. The insurer was not deprived of any opportunity to present its modification/discontinuance request due to res judicata or collateral estoppel.

disregarded misses the mark. An expert opinion based upon a foundation contrary to that found by the judge, or an "erroneous medical history," is inherently unreliable, and an administrative judge presented with such an opinion, be it from a § 11A physician or any other medical expert, must reject it. See Reddy v. Charles P. Blouin, 14 Mass. Workers' Comp. Rep. 341, 345 (2000). The judge's rejection of Dr. Saris' opinion was the precise action to be taken in this instance, since to do as the insurer requests would be to commit reversible error.

Addressing the psychiatric component of the claim, the judge analyzed it in the context of a psychiatric/emotional injury arising in the aftermath of a physical injury. He found:

> Leo Polizoti, Ph.D. is a licensed psychologist whose report dated October 18, 2017 contains the following statements of fact and/or opinion:
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> - I have been seeing Mr. Boucher in individual psychotherapy for his psychological symptoms related to his physical injury since 2009.
> - Adjusting to "disability lifestyle" has been difficult for him and his family.
> - His depressive symptoms, which are usually caused by his pain level, have been problematic for the family.
> - I have tried supportive counseling, cognitive-behavioral therapy and relaxation training to try to manage his pain level.
> - I am continuing to treat him as well as I can since his symptoms are not going to decrease to a reasonable level until his pain level is decreased significantly.
> - The most that can be accomplished at this time is to assist him in dealing with his symptoms of depression and anxiety regarding his future and minimizing the negative effect on his family.
>
> I accept and adopt these statements of fact and/or opinion of Dr. Polizoti.

(Dec. III, 7.)

The judge further found, "[t]he Employee's treatment for emotional problems is a direct result of his physical pain. . . . The Employee has proven that it is more likely than not that his industrial injury is the major cause of his psychological condition and need for mental health/psychological treatment. (Dec. 10, 11.)

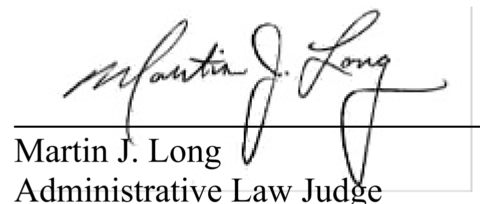
The insurer claims error in the judge's findings and argues that the

> judge based his decision regarding mental/psychological treatment on a legal standard of review that had not been met. The Administrative Judge's finding that, 'The employee has proven that it is more likely than not that his industrial injury is the major cause of his psychological condition and need for mental health/psychological treatment' is an error.

(Insurer br. 16.) The insurer is correct that there is no "major cause" opinion. However, no such opinion was necessary in this case. "A mental disability that is but a sequela of a physical work injury is a link in an uninterrupted chain of causation, and must be evaluated under causal chain standards." Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17, 23 (1997). Despite the use of the word "major" in the quoted causation statement, a plain reading of the judge's statement reveals that the judge invoked the proper "but for" causation standard when analyzing this psychiatric claim that results from a physical injury. We further note that the insurer's objection to the "major cause" language rings especially hollow since it did not even raise the fourth sentence of § 1(7A), where the "major but not necessarily predominant cause" language is found, See footnote 3, supra. See also Cornetta's Case, 68 Mass. App. Ct. 107, 118 (2017)(third sentence of § 1(7A) applies only to those mental or emotional disabilities that are not consequential to work-related physical injury). Thus, the insurer's claim of error is unfounded, as is its suggestion that the physical injury no longer exists.

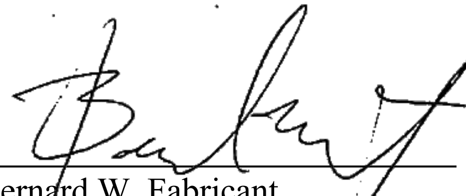
Accordingly, the decision of the administrative judge is affirmed.

So ordered.



Martin J. Long
Administrative Law Judge

Christopher Boucher
Board No. 018358-03



Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **December 15, 2020**