COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019236-10**

Daniel H. Smith	Employee
DMHNS 1 North Shore Area Danvers	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Preston

APPEARANCES
Alan S. Pierce, Esq., for the employee
Michael E. McMahon, Esq., for the self-insurer at hearing
Arthur Jackson, Esq., for the self-insurer on appeal

HARPIN, J. The self-insurer appeals from a decision awarding the employee § 34A benefits. We affirm the decision.

The employee, while working in the psychiatric section of Tewksbury State Hospital on August 7, 2010, was physically attacked by a patient. (Dec. II, 4.)[1] He was punched in the head and then knocked to the floor, where he was repeatedly kicked in the chest and abdomen until he lost consciousness. Id. He received and continues to receive medical treatment for his multiple injuries, which consist of a fractured right lower leg, right leg deep vein thrombosis (DVT), chronic right lower leg pain and instability, and chronic lumbosacral pain. (Dec. II, 4, 5.) He has not returned to work since his injury. (Dec. II, 4.)

The employee filed a claim for §§ 34, 13, and 30 benefits after the insurer's payment of without-prejudice benefits ceased on February 4, 2011. In a decision dated March 22, 2013, the judge awarded the employee § 34 benefits from the date of the injury and continuing, based on what the judge found was causally related

[1] The first hearing decision in this case will be cited as "Dec. I." The second decision, currently under appeal, will be cited as "Dec. II."

neck pain, a right knee injury, a right leg fibula fracture, a right calf DVT, and right ankle pain. (Dec. I, 10, 12.) The judge found the employee's prior, and long-standing, seizure disorder was unchanged by the 2010 injury, and that it did not cause any of his incapacity. (Dec. I, 10.) He also found the employee's pre-existing degenerative arthritis of the spine did not combine with the industrial injury to prolong the employee's incapacity or need for treatment, nor had the degenerative condition "ever resulted in any incapacity from performing any work." Id. The insurer filed a timely appeal of that decision, which the reviewing board summarily affirmed on April 1, 2014. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file). No further appeal was taken. Id. The employee then filed a claim for § 34A benefits.

At the time of the second hearing the employee had constant low back, right knee, leg and ankle pain that limited standing to five to ten minutes, sitting to ten to fifteen minutes, and walking to ten to fifteen minutes. (Dec. II, 5.) His right knee and leg give out periodically, causing him to fall, even though he uses a cane to aid in his balance and mobility. Id. His persistent back, knee and leg pain interrupt his sleep. Id. The judge found the employee "can barely take care of himself or get around his residence." Id.

Relying on the opinion of Dr. Frank A. Graf, the § 11A impartial examiner, the judge found the employee was totally incapacitated from "the permanent and chronic residuals of the August 7, 2010 event." (Dec. II, 6.) He noted, "I do not disturb my findings made in the previous March 22, 2013 hearing decision[,]" and reiterated that the employee's pre-existing seizure disorder and degenerative arthritis "did not combine with the back, neck, right knee, right ankle, right leg fracture, DVT and closed head injuries to prolong the Employee's disability/incapacity and need for medical treatment." (Dec. II, 7.) He then awarded the employee § 34A benefits from August 4, 2013, and continuing. (Dec. II, 8.) The self-insurer filed this timely appeal.

The self-insurer raises three issues. It first argues that the judge improperly relied upon Dr. Graf's impartial opinion to find the employee permanently and totally disabled, because in that opinion the doctor considered the employee's back and seizure conditions in reaching his conclusion of permanent and total disability. The self-insurer argues this was error because, in his first decision, the judge had specifically found the employee's back and seizure conditions not related to his industrial accident, and thus those findings should have been given "res judicata effect." (Self-insurer's br. 5.)

The self-insurer is correct that the judge, in his first decision, found the employee's pre-existing degenerative arthritis of the lumbar spine and his history of seizures did not combine with his causally related right leg, ankle, knee and neck injuries to prolong his disability or need for treatment. (Dec. I, 10.) He also found that the pre-existing seizures and lumbar disc disease were not the cause of any work incapacity. Id. These findings, which are the law of the case, Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39, 46 (2013)(failure to appeal from a decision establishes findings as the law of the case), are therefore not subject to revision in the second decision.

However, the self-insurer is not correct in arguing that the judge, by adopting the impartial physician's opinion on permanent and total disability, ran afoul of this rule. The judge adopted Dr. Graf's opinions that the employee had "persistent residuals" from the August 7, 2010, accident, consisting of a fractured fibula complicated by DVT, chronic right lower leg pain and instability, and chronic lumbosacral pain since that date. (Dec. II, 5.) He also adopted the doctor's opinion that the right leg, low back symptoms, fractured fibula, DVT, and chronic gait changes had a "causal nexus" with the employee's low back pain and the August 7, 2010 accident. Id. The judge further reiterated that the pre-existing seizure disorder and degenerative arthritis did not combine with the conditions from the accident, and that the direct cause of the employee's permanent and total

incapacity was his right leg, knee, ankle, neck and DVT injuries, as well as their sequelae. Id.

A judge is not bound to adopt all of a doctor's opinion, as he may adopt only part of it. Kent v. Town of Scituate, 27 Mass. Workers' Comp. Rep. 195, 199 (2013). Here, the judge did not adopt that part of Dr. Graf's opinion in which the doctor related an alleged increase in the employee's seizures to the work incident. (Dec. II, 5; Ex. 1, 4.) Instead, the judge specifically noted that he did not disturb his prior findings in his first decision, (Dec. II, 7), in which he did "not find that there was any change post accident of the long standing pre-existing seizure disorder nor that it caused any incapacity." (Dec. I, 10.)

As for the employee's low back pain, the self-insurer argues the judge could not "rely upon the [employee's] back issues to support his 2015 decision," as he had found in his first decision that they "were not work related." (Self ins. br. 6.) However, this argument expands the second decision beyond the judge's actual findings. After noting that the employee's seizure disorder and degenerative arthritis did not combine with his causally related conditions, the judge explicitly found that: "[t] he Employee's right leg, knee, ankle, neck and DVT industrial injuries and resulting limitations *and sequelae are the direct cause* of the Employee's now permanent and total incapacity . . . ." (Dec. II, 7, emphasis added.) The judge adopted Dr. Graf's opinion regarding a "causal nexus" between the industrial accident and the employee's *present* right leg and low back symptoms, fractured fibula, DVT and his chronic gait change. (Dec. II, 5-6.) However, Dr. Graf went to some effort to relate the employee's low back pain to his chronic changes in gait "over the last four years." The doctor noted:

> The reason for seeing this causal relationship is that prolonged gait pattern change in itself has a risk of increasing low back symptoms either through a primary effect or through aggravation of previously documented spinal degenerative changes multilevel.

(Ex. 1, 5.) Since the gait changes were the result of the industrial accident, (Dec. II, 5; Ex. 1, 4), the judge's adoption of Dr. Graf's opinion on this point does not run counter to the law of the case that was established in the first decision. The judge thus did not "rely" on the employee's prior back condition as part of his finding of permanent and total incapacity.

The self-insurer next argues that, by rejecting its vocational witness' opinion as "not helpful and unrealistic given the facts I have found at hearing," (Dec. II, 6), the judge violated the precepts of Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007), that any vocational analysis must provide a source and application of an earning capacity. Dalbec, it must be remembered, concerned the amount of an earning capacity when the employee was found to be partially disabled. It has no bearing on a case when the judge finds an employee to be totally disabled and "there is no reasonable likelihood in the foreseeable future that the Employee will be able to earn a wage. . . ." (Dec. II, 6.) As we said in Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73(2005), " '[t]otal is total.' " By that we meant that when an employee is found to be totally disabled in a prior decision or agreement to compensation, he need not prove that he has become *more disabled*, if there is a proven continuity of physical condition from the prior awarded period of incapacity to the present hearing. When a judge finds that the employee's "multiple injuries exclude him from employment," (Dec. II, 5), based on the employee's credible testimony and adopted medical opinion, the inquiry must end there. Galdemez v. Channel Fish Co. 28 Mass. Workers' Comp. Rep. 259, 262 (2014)(when finding of total incapacity is supported by the evidence, explicit vocational analysis is unnecessary).

Finally, the self-insurer asserts that the judge evidenced bias in his "cross-examination" of its vocational witness.[2] However, the self-insurer did not object to any of the questions asked by the judge. We have stated before that any claim

[2] The judge asked four questions of the witness concerning whether an employer would tolerate an employee who had episodes of falling. (Tr. 38-39.)

of bias must be raised below, especially when the claimed bias occurs during a hearing, in order for the judge to address the claim and make findings on whether or not he has demonstrated bias towards a party. Morales v. Not Your Average Joe's, Inc., 31 Mass. Workers' Comp. Rep. 1, 6 (2017). That did not occur here; thus we consider the issue waived.

Because the employee has prevailed in this appeal brought by the self-insurer, pursuant to G. L. c. 152, § 13A(6), the self-insurer is directed to pay the employee's counsel a fee of $1,654.15.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed **December 15, 2017**