COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 41519-06**

Daniel Wilson	Employee
Southworth Milton, Inc.	Employer
Sentry Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Sean M. Beagan, Esq., for the employee
Joseph J. Durant, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HARPIN, J. The insurer appeals from a decision ordering payment of medical benefits for treatment of an injury that was not identified on a lump sum settlement agreement. We reverse the decision and dismiss the claim.

The thirty-eight year old employee worked as a heavy equipment and truck mechanic for the employer. He sustained an industrial injury on August 15, 2006, while fixing a hydraulic problem. The case settled, and a lump sum agreement for $2,500 was approved on October 17, 2008.[1] (Dec. 258.) In the agreement the diagnosis and narrative stated that the settlement covered injuries to the employee's *right* shoulder, neck and upper back.[2]

Three years later, in late 2011, the employee filed a new claim for payment of medical treatment for a *left* shoulder injury stemming from the August 15, 2006 date of

[1] A Form 113, Agreement for Compensation, was also approved at the same time, in which the insurer agreed to pay the employee's attorney a $5,000 "hearing" fee. The Form 113 stated the employee "injured [his] right shoulder, neck and upper back." We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] Rizzo, supra.

injury. The employee claimed his left shoulder pain was present since the industrial accident, although the right shoulder pain was worse. (Dec. 259; Employee br. 7.) He had surgery on the right shoulder on April 12, 2007, and was released to modified duty five and a half weeks later. (Dec. 259.) The employee alleged his left shoulder pain increased after he returned to modified work, as he favored the right shoulder, forcing him to use the left shoulder more. (Id.) However, except for a physical therapy note in September, 2007, the first mention of any left shoulder complaints in the other medical records was not until June, 2008. (Id.)

A May 3, 2012, conference order required the insurer to pay for the left shoulder treatment. The insurer filed a timely appeal.[3] (Dec. 258.) On June 14, 2012, the employee was examined by the § 11A examiner, Dr. Ralph Wolf. At the November 6, 2012 hearing, the judge allowed a joint motion for the submission of additional medical evidence. Consequently, in addition to the report and deposition transcript of Dr. Wolf, the report and deposition transcript of Dr. Peter Noordsij, the treating doctor, were admitted into evidence. (Dec. 260.)

On March 13, 2013, the judge issued a decision adopting what he termed the opinion of Dr. Wolf that the employee's left shoulder condition was causally related to the August 15, 2006 industrial accident. The decision ordered the insurer to pay for all reasonable and necessary medical treatment related to the work injury, including

[3] Although the employee was aware of his left shoulder complaints since the alleged date of injury, (Dec. 259), he would have failed to preserve his right to pursue a claim for benefits pertaining to that body part when he settled his claim stemming from the industrial injury of August 15, 2006. Mueller's Case, 48 Mass.App.Ct. 910 (1999); Duarte v. Trelleborg Sealing Solutions, 28 Mass. Workers' Comp. Rep. ___ (2014)(failure to reserve rights in lump sum settlement agreement bars claim). But see, LaFleur v. C.C. Pierce Co., Inc., 398 Mass. 254, 259 (1986)(doctrine of mutual mistake will allow parties to seek rescission of lump sum agreement in Superior Court where "unknown injury" exists). However, the insurer, by not raising in its denial of the claim, or anytime thereafter, the bar of the October 17, 2008 lump sum settlement agreement, has waived that issue, although it could have been a full defense to the employee's new claim. Hansen's Case, 350 Mass. 178, 180 (1966)(once lump sum settlement is approved, further inquiry into merits of the original controversy is precluded unless the agreement is set aside by the Superior Court); Horner v. Boston Edison Co., 45 Mass.App.Ct. 139, 141 n. 2 (1998)(failure to raise claim preclusion below prevents its being raised on appeal).

treatment for the left shoulder. (Dec. 6.) The insurer appeals, asserting the judge mischaracterized Dr. Wolf's opinions.

In adopting the opinion of Dr. Wolf, the judge referred to a specific line in the report addressing the left shoulder: "Patient's pain and subsequent treatment are therefore secondary to his 2006 work injury." (Ex. 3: Report, June 14, 2012; Dep. 11, 1-4.) However, the doctor's opinion in its entirety differed from the result found by the judge. When asked at his deposition what he meant by his written statement, the doctor replied:

> The patient, if I understood correctly, felt he had no other explanation for his shoulder pain on either side, except the 2006 work injury. The reason I ended that paragraph the way I did was that it's unusual for [someone] not to report, or for someone not to have noticed that there was pain in the opposite shoulder within a few days of the 2006 injury. In fact, that it was 2007 before he mentioned to me about this, it makes you think that maybe the left shoulder had evolved from some other source.

(Ex. 3, Dep. 11.)

This equivocal statement from Dr. Wolf is far from the resounding opinion on causation cited by the judge to support his award of benefits. Instead, the deposition testimony was an explanation why the doctor had earlier written that the employee's pain and treatment were "secondary to his 2006 work injury." (Ex. 3: report, June 14, 2012.) Perangelo's Case, 277 Mass. 59, 64 (1931); Sullivan v. Centrus Premium Home Care, 28 Mass. Workers' Comp. Rep. ___ (September 8, 2014)(doctor's clarification of his opinion in his deposition is his final opinion, as long as it is not self-contradictory); . Dr. Wolf's actual opinion, taken as a whole, was inadequate support for the judge's finding of causation. "A judge may adopt an expert medical opinion in part, but he may not take that part out of context and mischaracterize the opinion as a whole." Hovey v. Shaw Indus. Inc., 12 Mass. Workers' Comp. Rep. 442, 443 (1998); Mays v. Alpha Indus., 24 Mass. Workers'

Comp. Rep. 175, 176 (2010)(judge's adoption of mischaracterization of impartial physician's opinion was error).

The employee also argues that Dr. Wolf stated he would defer to the treating physician's opinion, which was that it was "certainly possible" the employee's left shoulder injury was related to the industrial accident. (Employee br. 6.)

Dr. Wolf did indeed note he would defer to the treating doctor's opinion, up to a point:

> Q. If it was Dr. Noordsij's opinion that this left shoulder tear was causally related to the August 2006 industrial accident, would you defer to his opinion on that issue?
>
> A. Generally I would defer to the treating physician's opinion, except that it's just – and the reason I made that note on the second paragraph of the second page is it's really unusual to have somebody complain of pain a year after an injury and have it be related to that injury. You know, perhaps Dr. Noordsij can kind of elucidate for us the reason he thinks its connected. Certainly I will respect his opinion.

(Ex. 3, Dep. 12-13.)

However, Dr. Noordsij's opinion was not one that could support a finding of causation. Toward the end of his deposition that doctor testified as follows:

> Q. Seeing that he was complaining of left shoulder pain in September of 2007, in your mind does that make it more likely that the left shoulder pain may have been either related to the incident itself or, as you have noted, possible based on an overuse or overcompensation on the left following the right shoulder surgery?
>
> A. I don't know that it changes my thought process. I mean, that certainly the closer it is to his, you know, surgery problem, the more likely it would be. But I think there's still some uncertainly on my part as to whether it's related or not, but being a year earlier, in terms of his presentation, *it's certainly possible*.

(Dep. Noordsij, 21; italics added).

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); Hachadourian's Case, 340 Mass. 81, 86 (1959). Given that Dr. Noordsij found only a possibility of causation, Dr. Wolf's adoption of that opinion could not serve as the basis for a finding of causation by the judge.

In any event. Dr. Noordsij had a more definite opinion on causation.

> Q. Would it be fair to state, Doctor, that you could not state to a reasonable degree of medical certainty that the problems that Mr. Wilson is having in his left shoulder are directly causally related to his industrial accident to August of 2006?
>
> A. I think that would be a pretty fair statement, yes.

(Dec. 261; Ex. 10, Dep. 17.)

As Dr. Noordsij was of the opinion, to the requisite statutory degree of probability, G. L. c.152, §11A, that the employee's left shoulder condition *was not* related to his industrial accident, his expression of a possible relationship was entitled to no weight, and the judge properly gave it none.

"The injured employee carries the burden of proof on every element necessary to entitle him to an award of compensation." Martinelli v. Chrysler Corp., 28 Mass. Workers' Comp. Rep. __ (2014); Sponatski's Case, 220 Mass. 526, 527-28 (1915). Here the judge based his order for payment of left shoulder medical treatment on the employee's testimony and "the persuasive medical opinions of Dr. Ralph Wolf." (Dec. 261.) However, the judge mischaracterized Dr. Wolf's opinion, and there were no other medical opinions to support the employee's claim. Without other expert medical testimony on causation, the employee failed to carry his burden of proof that the left shoulder medical expenses were related to his August 15, 2006 industrial injury. The decision is therefore reversed and the claim is denied and dismissed.

So ordered.

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William C. Harpin
Administrative Law Judge

_____
Bernard F. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: October 23, 2014