COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038512-08**

Deborah Nykorchuk	Employee
Blue Q Corp.	Employer
Wholesale Retail Suppliers Compensation Corp.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Rose.

APPEARANCES
J. Peri Campoli, Esq., for the employee
William C. Harpin, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits from March 22, 2011, and continuing, and § 30 medical benefits for all treatment with Dr. Marc Linson, including back surgery performed on July 19, 2010.[1] (Dec. 7.) The insurer argues the judge erred in finding that the employee's surgery was adequate and reasonable medical treatment, and in finding the employee permanently and totally incapacitated. We affirm.

The employee, an assistant production manager at Blue Q Corporation, injured her lower back at work on December 22, 2008, while bending over and moving a crate of soap weighing approximately twenty pounds. The insurer accepted the case, paying the employee § 35 benefits from December 30, 2008 through January 26, 2009, and § 34 benefits from January 27, 2009 and continuing. (Form 140 Conference Memorandum, 10/06/10); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

[1] The impartial medical examiner, Dr. Charles Kenny, described the surgical procedure as a "L4-5 anterior disk excision" and fusion. (Ex. 4, at 7, 8.)

The employee's present claim for medical benefits was the subject of an October 6, 2010, § 10A conference order requiring the insurer to pay for the employee's office visits with Dr. Linson, but denying her claim for payment of the July 19, 2010 surgery. Both parties appealed and pursuant to § 11A, the employee was examined by impartial medical examiner, Dr. Charles Kenny, whose report and testimony were the sole medical evidence at the hearing. (Dec. 2, 5.) At the March 22, 2011 hearing, the judge allowed both the insurer's motion to join a complaint to modify or discontinue the employee's weekly benefits, and the employee's motion to join a claim for § 34A benefits. On appeal, the insurer argues the judge mischaracterized Dr. Kenny's opinion regarding whether the surgery was adequate and reasonable, and erred in performing the vocational analysis pertaining to the § 34A award.

In regard to the surgery, the judge made the following pertinent findings:

> Although Dr. Kenny would not have done the extensive surgery performed by Dr. Linson, it was a viable option based on the patient's decision as to the risks involved. See Deposition, Dr. Kenny, pgs. 38, 39, 41. Consequently, I adopt Dr. Kenny's opinion that the surgery of July 19, 2010, was reasonable and causally related. Exhibit 4, pg. 9.
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> . . .
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> I find the surgical procedure performed by Dr. Linson on July 19, 2010 an adequate and reasonable medical service under Chapter 152, Section 30.

(Dec. 5-6.) The insurer argues that Dr. Kenny did not opine that the surgery was adequate and reasonable medical treatment but, instead, impermissibly deferred to the employee's decision as to whether the surgery was reasonable. See LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 56 (2004). We disagree.

Dr. Kenny did not opine that it was better medical practice to require the employee to receive further conservative treatment prior to undergoing surgery, or that surgery was not warranted in this case. LaGrasso, supra. That Dr. Kenny would not have recommended the particular surgical procedure used by Dr. Linson, (Dep.

41), does not determine the outcome. Dr. Kenny opined that the particular surgical procedure used by Dr. Linson was one of two medically accepted surgical procedures available to address the employee's condition, leaving the option, or ultimate decision, of which procedure to use to the doctor and his patient, after considering all the risks and benefits involved. (Ex. 4, 9; Dep. 36-39.) Thus, Dr. Kenny's opinion merely illustrates that "[m]edicine is not an exact science and in many disciplines there are a variety of different but valid schools of thought." O'Brien v. Blue Cross/Blue Shield, 9 Mass. Workers' Comp. Rep. 16, 26 (1995). The adopted opinion of Dr. Kenny, "which, when looked at as a whole, considered the surgery to be reasonable or not unreasonable," Donegan v. Eastern Tool and Stamping, 17 Mass. Workers' Comp. Rep. 495, 497 (2003), was sufficient to support the judge's conclusion awarding payment for the June 19, 2010 surgery. See Walker's Case, 243 Mass. 224, 225 (1922)("cautious declaration of an opinion which is based upon disputed and disputable facts and conclusions of fact").

The insurer also challenges the award of § 34A benefits, arguing the judge made various errors in conducting the vocational analysis. We discuss only one of those claimed errors, and otherwise summarily affirm the decision. The insurer asserts that because there was no direct evidence regarding the "attitudes of personnel managers," the judge's finding that the employee would be subjected to the "negative attitudes of personnel managers," (Dec. 6), ran afoul of the principles discussed in Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007)("precedents do not approve of the exercise of . . . judgment and knowledge with no explanation whatsoever"). We disagree. The judge made the following findings regarding the issue of incapacity:

> I adopt Dr. Kenny's objective physical restrictions of no stooping, bending, twisting, kneeling, crawling, squatting, climbing; and no sitting, standing, or walking greater than 15 minutes. Id. pg. 8, Deposition pg. 44. Lifting is limited to no more than occasionally 10 lbs. She is permanently and totally disabled from her previous occupation due to the extensive bending, twisting, and lifting required. Deposition pg. 43.
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> . . .

> I note that the employee indicates the surgery improved her symptomology [sic]. Despite that improvement, I find credible that the [sic] suffers from debilitating and significant pain. She was visibly in pain during her testimony at hearing and shifted periodically in a credible fashion. Her answers at hearing were affected by her pain and she became confused at times. I find credible her subjective complaints of pain and physical limitations including that she finds it necessary to lay down on a frequent basis.
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> . . .
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> In consideration of the Scheffler factors, her age, training, background and experience;[2] including the objective permanent restrictions given by Dr. Kenny and her credible subjective pain, I find the employee permanently and totally disabled from any employment in the open labor market. Despite the opinion of Rhonda Jellineck [sic] to the contrary, I find the employee would be subjected to the negative attitudes of personnel managers, and her restrictions of no bending or twisting, along with the need to lay down, precludes any and all employment including that of a part-time sedentary nature.[3]

(Dec. 5-6.) First, we note that, viewed in context, the subject statement was made after the judge made his findings of fact and conducted his analysis showing how he arrived at his conclusion that the employee was "permanently and totally disabled from any employment in the open labor market." (Dec. 6.) The statement then merely was offered as one reason why the judge did not rely on the testimony of insurer's witness, Rhonda Jellenik, regarding her opinion about the employee's ability to secure and maintain employment in the open labor market.[4] The judge was under

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[2] The judge found the employee was forty-five years old at the time of hearing, last attended school when she graduated from high school in 1983, had certificates as a Home Health Aide and Certified Nursing Assistant, and had training in the use of an EKG machine and operation of a forklift. (Dec. 3.) The judge also made detailed findings about the employee's work experience and job duties associated with the various jobs she held prior to working for the employer as well as findings pertaining to her job duties and work experience at the employer's. (Dec. 3-4.)

[3] Rhonda Jellenik is a vocational expert who, at the insurer's request, performed a labor market survey and testified at the hearing. (Dec. 1.)

[4] The judge's comment appears to reference Ms. Jellenik's testimony:

> A: . . . You know, one alternative would be a part-time employment maybe twenty to thirty hours a week and she could rest in the afternoon. Clearly, she wouldn't be able

no obligation to make any specific findings about the substance of Ms. Jellenik's testimony, where he did not adopt or rely upon her opinions. Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999). To the extent he provided a reason for rejecting her testimony, there was no error. Dalbec does not require the judge to refrain from drawing reasonable inferences from the evidence. Here the judge found the employee "suffers from debilitating and significant pain;" she was "visibly in pain" and shifted periodically; her pain caused her to become confused at times; and, she lies down "on a frequent basis." (Dec. 6.) From those findings, the judge reasonably could infer that the employee would not be viewed in a positive light by personnel managers, either as a candidate for a job or as an actual employee. Even Ms. Jellenik conceded the employee "wouldn't be able to lay down at work, so that would have to be factored in," implying such activity would not be tolerated by potential employers. (Tr. 71.) The judge's role in determining earning capacity is well established:

> The determination of loss of earning capacity involves more than a medical evaluation of the employee's physical impairment. Physical handicaps have a different impact on earning capacity in different individuals. Education, training, age, and experience affect the ability to cope with the physical effect of injury. The nature of the job, seniority status, the attitudes of personnel managers and insurance companies, the business prospects of the employer, and the strength or weakness of the economy also influence an injured employee's ability to hold a job or obtain a new position. The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors. . . .

> to lay down at work, and so that would have to be factored in. But I have clients who go to work and rest after work in the afternoon.
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> Q: And you found at least two jobs where that is a possibility?
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> A: Yes.

(Tr. 71.) We note that this legally insufficient opinion, stated only as a mere "possibility," renders the claimed error, if any, harmless under the circumstances.

Scheffler's Case, 419 Mass. 251, 256 (1994), citing Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981). Based on the facts found, the judge's further finding that the employee "would be subjected to the negative attitudes of personnel managers," (Dec. 6), reflects a "realistic appraisal of the medical effect of [the] physical injury on the [employee]," Scheffler, supra, and is not erroneous. See LaFlam's Case, 355 Mass. 409, 411 (1969)(employee not required to show she tried to obtain employment "that common sense would indicate she is incapable of performing").

Accordingly, we affirm the judge's decision. The insurer shall pay counsel for the employee a § 13A(6) attorney's fee in the amount of $1,517.62.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: ***April 17, 2012***