COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036747-08**

Debra A. Lastih	Employee
Erickson Retirement Community	Employer
Zurich American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan, and Fabricant)

The case was heard by Administrative Judge Preston.

APPEARANCES
Daniel P. Napolitano, Esq., for the employee
David M. Bae, Esq., for the insurer at hearing and on appeal
Teri A. McHugh, for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision ordering it to pay the employee § 34A benefits from September 6, 2011, and continuing. The insurer argues the judge erred by refusing to address its § 1(7A) defense, by mischaracterizing the opinion of a § 11A impartial medical examiner, Dr. Peter Anas, and by finding the matter to be medically complex. It seeks reversal of the decision or, in the alternative, an order vacating the award and recommitting the case for further findings of fact. We affirm.

On August 8, 2008, the employee, a bus driver for a retirement community, injured her low back while lifting a resident's walker. The insurer denied the employee's initial claim for benefits, which became the subject of a prior hearing. At that hearing, the insurer contested liability, causal relationship, disability and

the extent thereof, and raised the defense of § 1(7A).[1] (Dec. I, 2.)[2] The judge determined, among other things, that "the factual predicates do not exist to breathe life into the Insurer's § 1(7A) defense" and, as a result, the employee "did not have to prove more than 'as is' causal relationship." (Dec. I, 7.) The judge adopted both the opinion of the § 11A impartial medical examiner, Dr. James Hewson, that the employee sustained a "lumbar and sacroiliac strain which aggravated [her] pre-existing degenerative joint [and] disk [sic] disease in the lumbar spine," and the opinion of the employee's treating physician, Dr. Joseph Orida, that the August 8, 2008 accident "resulted in overstretching, bruising and tearing of facet and sacroiliac ligaments." (Dec. I, 5, 6.) The judge found the employee to be totally incapacitated as a result of these injuries and ordered the insurer to pay § 34 benefits from April 17, 2009, and continuing. Neither party appealed.

Subsequently, the insurer filed a complaint to discontinue the employee's benefits, which was denied at conference on May 11, 2011. The insurer appealed and on June 16, 2011, the employee was examined by a second § 11A impartial medical examiner, Dr. Peter Anas. (Dec. II, 10.) On September 27, 2011, after receipt of Dr. Anas's report, but prior to the scheduled hearing, the insurer withdrew its appeal. See n.2, supra.

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[1] The relevant portion of G. L. c. 152, § 1 (7A), states:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] Hereinafter, we refer to the judge's March 22, 2010 decision as Dec. I, and his September 30, 2013 decision as Dec. II. We note that the judge's September 30, 2013 decision is a "Corrected Decision," which addressed a scrivener's error in the "Order" portion of the decision initially issued on September 25, 2013. 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).

The employee then filed the present claim for § 34A permanent and total incapacity benefits. The employee's claim was the subject of a conference on January 18, 2012, that resulted in an order of payment of § 34A benefits. The insurer appealed. (Dec. II, 3.) The employee was examined by a third impartial medical examiner, Dr. Emad Younan, on March 1, 2012. (Dec. II, 2; Ex. 1.) Arguing Dr. Younan's report was inadequate, the employee filed a motion to submit additional medical evidence pursuant to § 11(A)(2). (Dec. II, 2.) The judge found the report to be adequate but, sua sponte, he found the medical issues complex and opened the record for additional medical evidence. (Dec. II, 4; Tr. II, 94.) The parties submitted such evidence but did not depose any doctor. (Dec. II, 2, 4.) The judge adopted opinions from Dr. Anas's June 2011 report, and from the reports of the employee's treating physician, Dr. Joseph Ordia, from April 2011, October 2011, and February 2013. (Dec. II, 8-10.) Relying on those opinions, the judge made findings addressing the issue of causal relationship, concluding that the employee's disability is causally related to her August 8, 2008 injuries. (Dec. II, 13.)

The judge then discussed the insurer's § 1(7A) defense:

> I find that the Insurer did not appeal the earlier decision after raising the affirmative Section 1(7A) defense. The affirmative defense again raised here under 1(7A) is not relevant nor need be addressed in this second decision. See: Michelle Grant v. Fashion Bug [sic] DIA# 45514-04, March 1, 2012. I accept the Employee's credible testimony and the dispositive medical opinions of Dr. Ordia and Dr. Anas that I adopted in concluding that "as is" causal relationship is all that is required here.

(Dec. II, 13.) Based on the adopted medical opinions, the adopted opinions of the employee's vocational expert, Rhonda Jellenik, and the credible testimony of the employee, the judge concluded the employee's "incapacity is total and complete and permanent through hearing and for the foreseeable future." (Dec. II, 12.)

The insurer argues the judge's ruling regarding its § 1(7A) defense was erroneous because the employee never claimed entitlement to § 34A benefits in

the past; therefore, the issue of pre-existing injuries/illnesses as a defense to her claim was never litigated. (Ins. br. 13.) The judge's determination made in his first hearing decision, that "as is" causation applied to the employee's injury, was adverse to the insurer's interests at the outset. The fact the employee had not previously claimed entitlement to § 34A benefits does not excuse the insurer's failure to preserve its § 1(7A) defense by challenging that adverse ruling on appeal. Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39 (2013).

The insurer attempts to distinguish this case from Grant stating, "here the insurer does not challenge the *initial* cause of the employee's alleged disabilities, but rather challenges the employee's claim that her alleged injures *continue* to be related to the alleged work accident." (Ins. br. 14; emphasis in original). On its face, the insurer appears to be arguing that by failing to address its § 1(7A) defense, the judge somehow prohibited it from challenging the causal relationship between the employee's present disability and the injuries sustained in the industrial accident. This simply is not the case. The judge adopted specific medical opinions that addressed the issue of ongoing causal relationship between the employee's current disability and the injuries sustained in the industrial accident, and he made his rulings based thereon. (Dec. II, 8-10, 12-13.)

To the extent the argument attempts to resurrect the lost § 1(7A) defense by intimating that the employee's injuries have now combined with another pre-existing condition, the insurer's reliance on Dr. Younan's and Dr. Anas's opinions to support that claim is misplaced. Dr. Younan opined the employee was not disabled at all, from any condition. (Ex. 1, 2.) Aside from the fact the judge was not required to adopt Dr. Younan's opinion, such an opinion does not implicate any § 1(7A) analysis. Dr. Younan also opined "that the lumbosacral strain is the only thing that is directly related to her injury," and if the employee had any restrictions on her activities they are no longer related to her industrial accident. (Ex. 1, 2.) Dr. Younan's opinion regarding the nature of the work-related injury is a statement of original causal relationship which is contrary to the opinions

adopted by the judge in the first hearing decision that established the nature of the employee's work-related medical conditions. (Dec. I, 5-6.) As such, the judge could not rely on Dr. Younan's opinion which was based on "the issue of original causal relationship [that] had long been settled in the employee's favor." Grant, supra., at 48; Kareske's Case, 250 Mass. 220 (1924); Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(parties may not relitigate issue of initial causal relationship based on medical opinion rejecting that finding). (Dec. I, 5-7.)

The insurer is also not assisted by Dr. Anas's opinions. While Dr. Anas's opinion regarding the nature of the initial injury was consistent with the previously adopted opinion of Dr. Hewson, (Dec. I, 5), Dr. Anas continued to causally relate the employee's disability to her injury. (Dec. II, 10). Moreover, Dr. Anas did not opine "that a medical condition which pre-existed [August 8, 2008] combined with the employee's compensable injury *after* the close of the evidence at the [first] hearing, 'to cause or prolong' the employee's disability or need for treatment." Grant supra., at 49. Thus, Dr. Anas's opinion apportioning causation in this case lends no aid to the insurer because the only standard in play is the "as is" causation standard established in the first hearing decision.

The insurer also argues the judge relied "upon an erroneous interpretation of the impartial physician's, Dr. Peter Anas's, findings in making his final conclusion that the employee is permanently and totally disabled." (Ins. br., 11.) This argument ignores the judge's determination that the extent of the employee's disability was based on the opinions of Dr. Anas and Dr. Ordia,[3] as well as the

[3] The judge adopted the following opinions of Dr. Anas:

- That the employee has chronic multiple level degenerative spine disorder.
- That the employee has an acute superimposed lumbar strain causing aggravation of underlying degenerative disease.
- That the employee has underlying degenerative disc disease that was asymptomatic until the August 8, 2008 injury which caused an aggravation of her underlying problems resulting in her chronic pain.

employee's credible testimony. Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, (2013)("The judge was well within his authority to credit the employee's complaints of pain"); Killam's Case, 83 Mass. App. Ct. 1102 (2012)(Memorandum and Order Pursuant to Rule 1:28). The judge also found the employee's condition had worsened and become chronic since the prior decision. (Dec. II, 10.); Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge").

Lastly, the insurer argues the judge committed reversible error by finding the medical issues were complex, despite finding that the impartial report was adequate. We disagree. Complexity involves a subjective component, Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818 (1996), and we have declined to set a "bright line objective standard" to determine whether a case is medically complex. Murphy v. American Steel & Aluminum Corp., 25 Mass.

- That her condition is attributable to the aggravating injury of August 8, 2008.
- That the employee has a permanent loss of function of her total person resulting from the industrial accident.
- That the employee may benefit from yearly periodic steroid injections.

He also adopted, in pertinent part, the April 16, 2011 opinions of Dr. Ordia:

- That the Employee's work injury resulted in overstretching, bruising and tearing of the ligaments of the facet and sacroiliac joint, and displacement of the L1-2 disc and she remains totally disabled from gainful employment.
- That the low back injury is [sic] predominant cause of her ongoing disability and the prognosis for her return to previous work capacity is poor.

and Dr. Ordia's opinions of Februray 21, 2013:

- That the Employee continues with worsening low back pain that is exacerbated by being in the same position for 30 minutes; sitting, bending, walking, standing.
- That the Employee is permanently and totally disabled from gainful employment, and the disability is related to her work injury of August 8, 2008.

(Dec. II, 8-10; Ex. 10.)

Workers' Comp. Rep. 71, 76 (2011), aff'd, Murphy's Case, 81 Mass.App.Ct. 1117 (2012)(Memorandum and Order Pursuant to Rule 1:28).

Although the insurer contends "that nowhere in the employee's medical records or Dr. Younan's report is there any indication that her medical issues are too complex for the physicians who are treating her alleged symptoms," (Ins. br. 17), that is not the benchmark. "The legislature has expressly permitted judges, on their 'own initiative,' to allow the submission of additional medical evidence upon a finding of complexity. Nothing in the statute requires the judge to base a finding of medical complexity on a medical opinion to that effect." Adams v. Coca-Cola Enters., 23 Mass. Workers' Comp. Rep. 13, 16 (2009). The judge's decision to admit additional medical evidence due to complexity was not arbitrary or capricious.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel an attorney's fee in the amount of $ 1,596.24.

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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Bernard W. Fabricant
Administrative Law Judge

Filed: **November 4, 2014**