COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021709-14**

Denise M. Wiinikainen	Employee
Epoch Senior Living, Inc.	Employer
A.I.M. Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Harpin)

The case was heard by Administrative Judge Vieira.

APPEARANCES
Peter M. Goldberg, Esq., for the employee
Linda D. Oliveira, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision denying "the employee's claim for § 34 benefits,"[1] and ordering the insurer to pay for "reasonable and related medical expenses pursuant to Section [sic] 13 and 30 for treatment, including surgery and aftercare as requested by her treating physician." (Dec. 12-13.) The insurer alleges the judge erred by ruling that the employee met her burden of proof under § 1(7A), by making inconsistent findings and an arbitrary finding regarding the medical evidence, by ordering the surgery, and by failing to address the insurer's underlying complaint to discontinue weekly benefits. The insurer seeks reversal of the order for surgery and recommittal for further findings of fact addressing its complaint.

[1] The judge initially acknowledged that the employee sought "[s]ection 34, temporary total incapacity benefits from August 29, 2014 to date and continuing," (Dec. 2), yet in her conclusion regarding the extent of the employee's incapacity, the judge stated, "[t]he Employee's claim for Permanent and Total disability [sic] is denied." (Dec. 11.) She further ordered, "the Employee's claim for Section 34, permanent and total disability [sic] is denied." (Dec. 12.) The insurer argues that its underlying complaint for discontinuance was the issue at hearing, and that, in response, the employee sought temporary total incapacity benefits under § 34, not § 34A permanent and total incapacity benefits. (Ins. br. 9.) We agree that the decision and order require correction on recommittal because the employee did not seek § 34A, permanent and total incapacity benefits.

The judge did not make inconsistent findings regarding the medical evidence, and did not err by ruling the employee met her burden of proof under § 1(7A) or by ordering the surgery. However, we agree the judge made one arbitrary finding regarding the medical evidence, and that she mischaracterized the nature of the dispute that was before her; in doing so, she failed to address the insurer's complaint to discontinue the employee's weekly incapacity benefits in violation of G. L. c. 152, § 11B ("Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for such decision"). Accordingly, recommittal is required.

The employee is a fifty-nine year old woman who received her GED in 1978 and an associate's degree from Cape Cod Community College in 2008. Her prior work history consists of factory work, filing insurance claims in a doctor's office, shipping and receiving and retail sales. She also helped her ex-husband start a trophy business where she worked in sales, taking and delivering orders and engraving plaques. (Dec. 4-5.)

The judge found the employee "initially injured her low back in '93 or '95 while employed with Kmart when she slipped and fell on stairs at work." (Dec. 5.) The judge found that after receiving treatment for that injury, she and her ex-husband started the trophy business which they ran for two years. (Dec. 5.) Thereafter, the employee received "periodic" chiropractic "adjustments to her back but never lost time from work." (Dec. 5.) In 2005, the employee injured her shoulder, neck, head and low back in a motor vehicle accident. She had an MRI of her low back in 2006. In 2010, the employee had a second MRI. Later, she " 'tweaked' her middle back" at home when she "sat back." (Dec. 5) She underwent about three weeks of physical therapy "just about the same time that she began to work for the Employer, Epoch."[2] (Dec. 5.)

In May of 2014, the employee began working as a cook for the employer. The job required her to make and serve lunch and dinner to 120 people, which involved lifting heavy pots and pans, and washing the dishes and pans after each meal. (Dec. 5.) She

[2] The judge's findings appear to indicate the employee had another MRI in 2014 before her injury. (Dec. 5.) The evidence shows her MRI occurred in November of 2014, after her date of injury. (Exs. 1, 10.)

worked from "twelve to eight" for "three to four days a week" and experienced "no issues with her low back while working for [the employer] until August 29, 2014." (Dec. 5-6.) On that day, the employee slipped while transferring food to a station and was able to catch herself before falling, but in doing so, "immediately felt pain and a big pull." (Dec. 6.) She worked alone, and there was no one to take her place, so she continued to work, but later that same day, while "dropping some plates in the dishwasher . . . she slipped and went flying into some water on the floor." (Dec. 6.) She reported the incidents to her supervisor and received treatment at Cape Cod Hospital, where she was instructed to stay out of work for two days. (Dec. 6.) The board file indicates the insurer commenced payment of temporary total incapacity benefits from August 30, 2014, and continuing. Form 140 "Conference Memorandum" (8/24/15); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). In addition, following the August 29, 2014, injury, the employee received chiropractic care, acupuncture and injections, but experienced only short-term relief from these treatments. In January 2015, the employee began taking courses in medical coding and billing. At the time of the hearing, she had only one more class to take in order to complete the medical coding program. (Dec. 7.)

The judge's decision misstates the procedural history of this case and foreshadows her failure to address the insurer's underlying complaint for discontinuance. The decision is written as though the hearing concerned the employee's claim for § 34 benefits. Indeed, the judge states that she ordered the insurer to pay the employee § 34 benefits at the § 10A conference on August 24, 2015, and that the employee's claim for surgery was joined at the time of the conference. (Dec. 2.) Both statements are incorrect. We summarize the procedural history.

On June 12, 2015, the insurer, which was paying the employee weekly § 34 temporary total incapacity benefits, filed a Form 108, "Complaint for Modification or Discontinuance." Rizzo, supra. The complaint sought a complete discontinuance of the employee's weekly compensation benefits. Id. The insurer's complaint was the subject

of a § 10A conference on August 24, 2015, at which time the insurer made a last best offer of zero dollars in weekly compensation, and the employee made a last best offer of the continuance of payment of § 34 benefits. Form 141; Rizzo, supra. Pursuant to the conference order filed August 26, 2015, the judge allowed the insurer to discontinue the employee's weekly § 34 benefits, and ordered the insurer to commence payment of maximum partial incapacity benefits "as of the filing of this order." Rizzo, supra. Both parties appealed. The employee was examined by an impartial medical examiner, Dr. Scott M. Harris on December 16, 2015. (Dec. 7, Ex. 1.) On June 1, 2016, the employee filed a claim for § 30 medical benefits, specifically seeking an order for lumbar surgery. Rizzo, supra. The employee's claim for surgery was joined for hearing with both parties' appeals from the conference order. (Ins. br. 1.)

Ultimately, the judge denied the employee's claim for § 34 benefits, left unaddressed the insurer's complaint to discontinue benefits, and ordered the insurer to pay for the proposed lumbar surgery. (Dec. 10-13.) Only the insurer appealed from the hearing decision.

The primary error requiring recommittal of this case is the judge's failure to make findings of fact and rulings of law addressing the insurer's complaint to discontinue the employee's weekly benefits. The insurer's complaint, filed June 12, 2015, sought a complete discontinuance of the employee's benefits. The insurer appealed from the conference order requiring it to pay the employee maximum partial incapacity benefits from August 26, 2015, and continuing. As the case stands now, the judge denied only the employee's claim for § 34 benefits from August 29, 2014, to date and continuing, but "[t]his leaves the insurer paying the partial disability [sic] benefits ordered at the conference." (Ins. br. 8.) The decision contains no findings pertinent to the insurer's complaint: the decision does not assign an earning capacity, and despite the judge's finding that the employee was not entitled to § 34 benefits because she had attained the capacity to "earn[] her pre-injury average weekly wage," it provides no date upon which the employee attained that capacity. Rocha v. L.M. Heavy Civil Construction, LLC, 30

Mass. Workers' Comp. Rep. 325, 327 (2016)(date benefits are modified must be grounded in the evidence at hearing). On recommittal, the judge must make findings of fact and rulings of law regarding the insurer's complaint to discontinue the employee's weekly benefits.

The insurer also takes issue with the judge's finding: "[t]he Employee has a spondylolisthesis due to a lytic fracture bilaterally at the L5 pars causing foraminal narrowing as well as some at the L4-5 level due to disc space laminectomy due to her spondylolysis and a lumbar fusion from L4 to S1 with interbody fusions at these levels." (Dec. 9-10.) The insurer argues the employee has not had the surgery and the judge's "finding confuses [Dr. Stephen J. Parazin's] opinion with his treatment recommendation. As such the opinion cannot stand and does not support the hearing decision." (Ins. br. 6.) We agree that the finding is arbitrary because it states the surgery was already performed, which it was not. Chadwick v. Chadwick Greenhouses, Inc., 9 Mass. Workers' Comp. Rep. 12, 14 (1995)(where judge's finding is not supported by evidence, finding is arbitrary). We vacate that finding and on recommittal the judge should make new findings based on the evidence, regarding Dr. Parazin's opinion and treatment recommendations.

We address the insurer's remaining arguments. The insurer takes issue with the judge's ruling that the employee met her burden of proof under § 1(7A). Although the judge did not state she was performing the analysis required by Vieira v. D'Agostino Associates, 19 Mass. Workers' Comp. Rep. 50, 53 (2005), she made findings of fact addressing each step of that analysis. She adopted Dr. Harris's opinion that the employee "suffered exacerbation of preexisting lumbar degenerative disk disease." (Dec. 8.) She found "the Employee does suffer from a pre-existing non-work related degenerative back condition which did combine with the August 29, 2014 work injury to cause or prolong her disability and need for treatment." (Dec. 7.) The judge then adopted the opinions of both Dr. Harris and Dr. Parazin, that the work injury of August 29, 2014, remained a major cause of the employee's disability and need for treatment. (Dec. 9, 10.)

Accordingly, her findings indicate she concluded § 1(7A) was properly raised and satisfied by the adopted medical opinions.[3] The insurer argues, however, that the adopted opinions of Dr. Harris and Dr. Parazin failed to satisfy the "a major" cause language set forth in § 1(7A).

The insurer maintains that the language used by Dr. Harris during his deposition, in particular that "but for" the industrial accident, the employee would not have the degree of symptoms she has now, and his agreement that the incident was "the straw that broke the camel's back," shows that his opinion is insufficient to fulfill the employee's burden of proof under § 1(7A)'s "a major" cause standard. We disagree.

First, it was the insurer, not the doctor, who used these terms to describe the effect of the industrial injury. Dr. Harris merely answered the insurer's questions. (Ex. 10, 13.) Moreover, the conclusion that the insurer would have us draw from the doctor's affirmative responses to both of these questions, i.e., that the injury is not a major cause of the employee's incapacity or need for treatment, requires us to draw an inference that is not compelled under the circumstances.

Dr. Harris clearly opined that the industrial injury was, and *remained*, a major cause of the employee's incapacity and need for treatment:

> Q: You go on to state in your report that she suffers from a preexisting condition combined with an industrial injury to cause or prolong her disability.
> And then you go on to say that you felt that the industrial injury was a major but not necessarily predominant cause of her disability and need for treatment.
> Could you explain what you mean by that?
>
> A: Well, this is language, as you know, that is asked of us in hypotheticals and so when I was asked this hypothetical question, I felt that, just as stated, that her

[3] The employee did not appeal and concedes that § 1(7A) applies, stating,

> The industrial accident combined with a pre-existing condition, although the weight of the credible evidence is that the industrial accident was a major although not necessarily the predominant cause of the employee's disability and need for treatment. The Judge's decision is clear on this portion of the Hearing.

(Employee br. 8.)

> preexisting degenerative disk disease was her major issue and that this was exacerbated by the work injury and that this exacerbation was a major but not necessarily predominant cause of her ongoing disability and need for treatment.

(Ex. 10 at 9-10.) To the extent the insurer now complains that the doctor's testimony was in response to "some unknown hypothetical question" that was "not in evidence," (Ins. br. 5),[4] we note the insurer did not object or move to strike the doctor's testimony at the deposition. Moreover, because the employee has not appealed from the judge's underlying conclusion that § 1(7A) applies in this case, the only issue on appeal regarding § 1(7A) is whether the work-related injury *remains* a major cause of the employee's disability and need for treatment. The doctor's testimony clearly addressed that issue.

The legislature's use of the word "remains . . . obviously contemplates a comparison of the employee's present condition to an earlier time." Larkin v. Feeney's Fence, Inc., 19 Mass. Workers' Comp. Rep. 78, 81 (2005). Unlike the physician opinions in Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006), and Larkin, both Dr. Harris and Dr. Parazin opined that the work injury *remained* a major cause of the employee's disability and need for treatment. Castillo, supra at 220-221 (medical evidence provided only simple "but-for" causation opinions but there was no medical evidence as to whether industrial injury remained a major cause of disability or need for treatment); Larkin, supra at 82-83 & n.11 (insurer's initial acceptance of case does not deprive it of the ability to raise § 1(7A) thereafter, and doctor's opinion that injury " 'was simply the straw that broke the camel's back' " says nothing about whether the injury remained a major cause of ongoing disability and need for treatment during relevant time period in dispute). As we stated in Larkin, "[a] doctor's opinion that 'A' is a contributory cause of 'B' does not mean that 'A' is also a major cause of 'B'." Larkin, supra at 83. However, if "A" *is* a major cause of "B," then "A" certainly qualifies as a contributory cause of "B." Thus, Dr. Harris's answers to the insurer's questions did little,

[4] The board file shows that it was the judge who submitted the hypothetical question. Rizzo, supra.

if anything, to undermine his opinion that the work-related injury "is a major, but not necessarily a predominant cause of the employee's ongoing disability and need for treatment." (Dec. 9, Exs. 1, 10 at 9-10.) Indeed, in his final testimony Dr. Harris opined:

> It's impossible to say that [the employee's degenerative disk disease] would not have progressed to this stage. Most of the degenerative disk disease that we see does progress but at different rates in different patients.
> So in this case, there was a significant change in her symptom level and findings on exam after the industrial accident. And so that is why the exacerbation is taking front and center stage at this point because we don't know where she would have been with her degenerative disk disease.
> But she had a specific incident that upped her level of symptoms.

(Ex. 10 at 13-14.) Where a physician is asked whether the injury remains a major cause of the employee's disability or need for treatment, and answers affirmatively, sufficient evidence exists for the judge to rule in the employee's favor. Castillo, supra at 221 n.8 (2006); See Gleason v. Toxikon Corp., 23 Mass. Workers' Comp. Rep. 313, 315-316 (2009)(physician's opinion satisfied § 1[7A] where doctor affirmatively answered insurer's compound question that the work injury was a "straw that broke the camel's back" and was "enough to make it symptomatic and that was it," and testified as well that the employee's combination injury is a chronic condition of which the work-related injury remained a major cause). Moreover, Dr. Parazin's adopted opinion exceeded the employee's burden of proof, as he opined that the August 29, 2014, injury "is *the* major and *likely predominant* cause of her ongoing disability and need for treatment." (Dec. 10, Ex. 9; emphasis supplied.) The judge did not err in finding the employee met her burden of proof under § 1(7A).

The insurer further argues the judge erred by ordering surgery. Taking a scattershot approach, the insurer first argues the judge made inconsistent findings concerning the medical evidence, and her failure to resolve the resultant factual dispute requires reversal of her opinion. The insurer argues Dr. Parazin,

> stated he believes the work injury is a major cause of the need for treatment because he feels that the others [sic] physicians 'failed to mention that she has a spondylolysis and spondylolisthesis at L5-S1 . . .' However, the very MRI he

> points to support his opinion that spondylolisthesis is work related indicates there is no spondylolisthesis.

(Ins. br. 6.) The insurer then states that when the judge adopted both Dr. Harris's opinion that the MRI showed spondylolysis without spondylolisthesis,[5] and Dr. Parazin's opinion, she failed to resolve the conflict in the medical evidence. Id. The insurer's argument mischaracterizes the evidence and the judge's findings.

Dr. Parazin clearly states his opinion regarding the spondylolisthesis was based on the employee's upright x-rays, not her MRI, as stated by the insurer. (Ex. 9.) Dr. Parazin stated:

> She was first seen in my office by my physician assistant, Rob Kenney, PA-C on March 8, 2016, about a year and a half after her accident. She noted these complaints at this point in time. She brought her MRI and x-rays to that appointment. At that point in time Mr. Kenney found that *she had on her x-rays a spondylolysis in the L5 pars bilaterally as well as a trace spondylolisthesis to grade 1 spondylolisthesis with upright imaging.* On her MRI she had some foraminal narrowing at the L5-S1 level as well as the L4-5 level due to disc space collapse. At the L3-4 level she has some spondylosis but no significant spinal stenosis at that level. As she had exhausted conservative treatment, he recommended she follow up with me for surgical intervention.
>
> I saw her on March 29, 2016. Once again, I went over her imaging and confirmed her pain complaints she noted to Robert Kenney. I was in agreement with Mr. Kenney's assessment. I do believe she has a spondylolisthesis due to a lytic fracture bilaterally at the L5 pars causing foraminal narrowing as well as some foraminal narrowing at the L4-5 level due to disc space collapse.

(Ex. 9; emphasis added.) We see no conflict because Dr. Parazin never opined that the MRI showed the employee had a spondylolisthesis. (Ex. 9.) To the extent the insurer

[5] The judge found and adopted so much of Dr. Harris's opinion as described what the 2014 MRI showed in comparison to the employee's 2010 MRI, specifically:

> The Employee had under gone [sic] a MRI in 2010 and in 2014. When compared to the 2010, showed some L4-5 moderately advanced chronic degenerative disk disease with disk space narrowing and disk bulging more prominent than her previous MRI scan of 2010, there was also bilateral L5 spondylolysis without spondylolisthesis.

(Dec. 8.)

maintains there is a conflict in the adopted medical evidence, the judge resolved it when, in ordering payment of the medical benefits and surgery, she expressly stated, " I rely on Dr. Parazin's opinion that the August 29, 2014 industrial accident is a major cause of the Employee's need for surgery and medical treatment." (Dec. 12).

Second, the insurer argues, without further elaboration, that although the judge found, "that Dr. Harris opines 'that the Employee's industrial injury is a major but not necessarily predominant cause of her ongoing disability and need for treatment,' " Dr. Harris, "further opined that the surgery is to treat a preexisting condition of degenerative disc disease." (Ins. br. 6-7.) The insurer's description of Dr. Harris's testimony regarding the proposed surgery is not accurate. Dr. Harris testified:

> Q: Doctor, based upon the description of what they're doing as far as the surgery is concerned, is that *primarily* to treat the degenerative disk disease?
>
> A: Well, yes. The degenerative disk disease is the cause of her continued irritability. It relates to some instability at the disk level and the facet level and what the fusion does is to solidify that area so there's no motion and hopes with no motion, that there'll be no further pain.
>
> Q: And, Doctor, how does all of that relate to the industrial injury she described to you?
>
> A: Well, it relates that her increased symptoms are causing her incapacity at work and incapacity of doing her normal activities without improvement with nonoperative means.
>
> So it's an attempt by the surgeon to suggest a way of improving her life and possibly getting her back to the workforce.

(Ex. 10, 11-12; emphasis added.) In the combination injury scenario presented by this § 1(7A) case, Dr. Harris's agreement that the proposed surgery was "primarily" to treat degenerative disc disease does not mean that the employee failed to meet her burden of proof. Viewed in context, Dr. Harris's testimony does not conflict with his adopted opinion that the work related injury is a major but not necessarily predominant cause of the employee's ongoing disability or need for treatment. (Dec. 9.) We see no error, especially where the judge's decision clearly shows that her ultimate conclusion

concerning the requisite level of causal relationship between the work-related injury and surgery, was based solely on Dr. Parazin's opinion, "that the August 29, 2014 industrial accident is a major cause of the Employee's need for surgery and medical treatment." (Dec. 12.)

The insurer's third argument in support of its claim that the judge erred in ordering the surgery is that the "credible medical evidence" does not support the conclusion that surgery is related to the injury. (Ins. br. 6-7.) The insurer begins by arguing that Dr. Parazin's medical opinions are insufficient to support the order for surgery. We disagree.

The judge adopted Dr. Parazin's description of the employee's work-related injury as consisting of two falls on the same day: "[t]he first was a hyperextension injury and the second was a fall landing onto her buttocks." (Dec. 9; Ex. 9.) She also adopted his opinions that "[a] spondylolysis is very common after hyperextension injuries" and that her August 29, 2014, "industrial injury is the major and likely predominant cause of her ongoing disability and need for treatment." (Ex. 9.)

The insurer alleges that, "[a]s Dr. Parazin had an incomplete history from the employee," there is no "credible evidence" that the spondylolysis was caused by the work injury. (Ins. br. 7.) The insurer's conclusion that Dr. Parazin had an incomplete history from the employee, is not required by the record. The record contains only the November 1, 2016, report of Dr. Parazin. (Dec. 2, Ex. 9.) Insofar as the employee's past medical history is concerned, Dr. Parazin's report discusses the reports of the insurer's two independent medical examiners whom he states, "noted she had had previous low back pain a number of years ago and noted that she had some degenerative disc disease at L4-5 and to a lesser extent at L3-4," which Dr. Parazin further states "is true." (Ex. 9.) The judge was free to credit his opinion and give it the weight she felt it was worth. Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161, 163 (1997). The insurer further argues the opinion that Dr. Parazin's opinion, "a spondylolysis is very common after hyperextension injuries," fails to "meet the more probable than not standard of causation required of the employee to prove causal relationship of the need for surgery."

(Ins. br. 7.) The insurer fails to acknowledge that Dr. Parazin's report was clear and unequivocal:

> Based upon a reasonable degree of medical certainty, I feel the patient's treatment has been reasonable, necessary and appropriate, as is the recommendation for surgical intervention for the reasons stated above. I also believe within a reasonable degree of medical certainty that the patient's industrial injury is the major and likely predominant cause of her ongoing disability and need for treatment.

(Ex. 9.) This was enough.

Accordingly, the matter must be recommitted for the judge to address all of the issues in controversy by making further findings of fact and rulings of law addressing the insurer's complaint to discontinue the employee's weekly benefits. The judge must also eliminate her references to any claim for § 34A permanent and total incapacity benefits, as those benefits were not at issue in the hearing. Dr. Parazin's opinions expressed in his report, are clear and unequivocal and the insurer advances no dispute concerning the nature or extent of the surgical procedure proposed by him. Nonetheless, we are concerned that by vacating the judge's finding of fact that confused Dr. Parazin's opinions and his treatment recommendation, supra, we have left the decision with no subsidiary findings spelling out the nature of the recommended surgery. Accordingly, in light of the vacated finding, on recommittal the judge should make further findings of fact regarding Dr. Parazin's opinion and treatment recommendation. Otherwise, the judge's orders denying the employee's claim for § 34 benefits and ordering the insurer to pay for the employee's medical treatment, including the proposed surgery, are affirmed.

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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William C. Harpin
Administrative Law Judge

Filed: **February 14, 2018**