COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006767-19**

Douglas Rose	Employee
Department of Correction	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Fabiszewski)

This case was heard by Administrative Judge Williams.

APPEARANCES
Paul Danahy, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

LONG, J. The self-insurer appeals from a hearing decision dated February 4, 2022, ordering § 34 temporary total incapacity benefits from September 13, 2019, to date and continuing, as well as §§ 13 and 30 medical benefits for treatment and surgery of the employee's right hip condition. We affirm the decision in all respects but address several of the self-insurer's arguments that warrant discussion.

The employee's claim was the subject of a § 10A conference on December 4, 2019, and the December 9, 2019, order required the self-insurer to pay § 34 benefits from September 13, 2019, to date and continuing. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The self-insurer appealed the conference order and, on March 24, 2021, a § 11 hearing was held. There, the self-insurer stipulated to the occurrence of the work injury of March 19, 2019, and accepted liability for the employee's right shoulder condition while contesting liability for the employee's right hip condition. (Dec. 5.) The employee claimed § 34 benefits from September 13, 2019, to date and continuing and §§ 13 and 30 benefits for medical treatment related to his right hip and right shoulder. The self-insurer raised the defenses of disability and extent of disability; causal relationship between the industrial injury and

disability; causal relationship of the claimed hip injury and treatment; entitlement to §§ 13 and 30 medical benefits for the claimed hip injury; § 1(7A),[1] a pre-existing condition relative to the right hip; and failure to report a right hip injury on March 19, 2019. (Dec. 3-4; Tr. 3-4.).

The employee and a supervisor from the employer's industrial accident unit were the only witnesses to testify at the hearing. The judge found the January 14, 2020, impartial report of Dr. Scott Harris adequate, but determined the medical issues were complex and allowed each party to submit additional medical evidence. Among the additional medical records submitted on behalf of the employee were a report dated March 15, 2021, from Dr. George Whitelaw and medical records from Dr. Richard Wilk dated March 30, 2020, and March 10, 2021. The self-insurer's additional medical evidence included Middleboro Chiropractic records, documenting eight visits between October 19, 2010, through January 2, 2018, and an IME report of Dr. Steven Sewall dated October 23, 2019. No depositions of any physicians were taken. The self-insurer also submitted a vocational expert report dated March 15, 2021, authored by Zachary Fosberg, CRC.

In his February 4, 2022, hearing decision the judge found:

> I find that the employee suffered a work-related injury in the scope and course of his employment to both his right shoulder and his hip. [sic] As a result of the work-related incident of March 19, 2019. In making these findings I have adopted the opinions of Dr. Whitelaw and Dr. Wilk. Moreover, I credit the testimony of the employee that the injury to the hip was reported on March 20, 2019 to his primary care physician.
>
> I find that the employee is temporarily totally disabled from his prior employment and gainful employment. Taking into account the employee's credible testimony regarding his restrictions and ongoing need for treatment including but not limited

[1] M.G.L. c.152, § 1(7A), provides in pertinent part:

> 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.

> to surgical intervention. [sic] I find that the employee would not be able to sustain any employment at this time. In making that decision I adopt the opinions of Dr. Whitelaw and Wilk and find that the employee is temporarily totally disabled from work.

(Dec. 12-13.)

The self-insurer first argues that the absence of any badge of personal analysis by the judge requires the case be remanded for further findings of fact. (Self-ins. br. 9, 12.) Specifically, it claims, "The administrative judge in this case gives no sign at all that he rendered any personal analysis or judgment in making his subsidiary findings of fact." (Self-ins. br. 11.) The self-insurer relies on the case of Cormier v. Carty, 381 Mass. 234 (1980) in support of its position that, because the judge incorporated portions of each party's closing arguments in his subsidiary findings of fact, the decision is flawed. However, the self-insurer concedes that the administrative judge in this case made two pages of general findings and rulings of law, (Self-ins. br. 11), and, most importantly, does not argue that any of the judge's findings are unsupported by the evidence. In Cormier, despite chiding the trial judge, the Supreme Judicial Court held that reversal was *not* required where the judge adopted verbatim findings of fact submitted by defendant's counsel at the judge's request, plaintiff's counsel received a copy of the judge's letter to defense counsel requesting suggested findings of fact, and the evidence supported the findings. Cormier, supra at 235-238. As in Cormier, the findings here are well supported by the evidence. Additionally, the court confirmed that "[n]othing we say in this opinion should be construed as criticism of the practice of soliciting proposed findings of fact and conclusions of law from all parties at the close of evidence before a decision has been reached." Id. at 237 n.5. While the self-insurer is correct in its proposition that an administrative judge must render a decision that is the product of his independent judgment, it is also true that a judge is entitled to solicit and incorporate draft findings of fact into his final decision. Rutanen v. Ballard, 424 Mass. 723, 727 (1997)("fact that some findings are taken verbatim from counsel's proposed findings [is] insufficient to override the presumption that the judge made an independent judgment as

to the facts"); Karsaliakos v. K & L Concrete Service Co., 14 Mass. Workers' Comp. Rep., 285, 287 (2000). Upon careful review of the hearing transcript, evidence introduced at the hearing and the hearing decision, "we are not persuaded that the decision before us is so lacking an independent analysis such that the decision should be set aside." Karsaliakos, supra at 287.

The self-insurer next argues that the hearing decision must be vacated ("cannot stand") due to "[t]he absence of required findings of fact related to G.L. c. 152, § 1(7A)." (Self-ins. Br. 12.) "[T]he administrative judge noted that the self-insurer raised G.L. c.152, § 1(7A) but nowhere in the remainder of the decision did the administrative judge acknowledge that defense, make specific findings relative to the issue, or in any way dispose of it in the remainder of the hearing decision." (Self-ins. br. 12.) The self-insurer is correct in its observation that the judge did not specifically address its § 1(7A) defense in the hearing decision, which typically would require remand to address the issue. However, while the self-insurer raised § 1(7A) as a defense, it took no further steps to avail itself of the defense, namely making the required offer of proof. "As the court in MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009), explained, an insurer wishing to rely on § 1(7A)'s heightened 'a major cause' standard, must first meet a burden of production, which includes producing evidence of a noncompensable pre-existing condition that combines with the industrial injury." Bell v. Electronic Data Systems 33 Mass. Workers' Comp. Rep. 221, 225 (2019). The self-insurer introduced chiropractic records from Middleboro Chiropractic, where the employee sought sporadic treatment for low back pain between October 2010 and January 2018 and argues that these records demonstrate the existence of a pre-existing right hip condition. Assuming, arguendo, that the records demonstrate what the self-insurer alleges, its argument still fails because "simply injuring the same body part close in time prior to the work injury is not sufficient to meet its § 1(7A) burden of production." Tavares v. MBTA, 34 Mass. Workers' Comp. Rep. 59, 64 (2020). The self-insurer's IME from Dr. Sewall, dated October 23, 2019, references the chiropractic records (as does the adopted opinion of Dr. Whitelaw) but does not provide an opinion that there was any combination with the

accepted industrial injury. While specifically addressing the § 1(7A) defense in the hearing decision would have been preferred, no error resulted from this oversight. Furthermore, any error as alleged by the self-insurer in this instance would be harmless, since the opinion of Dr. Whitelaw, adopted by the judge, satisfies both the "as is" causation standard, as well as the "a major" causation standard imposed by § 1(7A).

The self-insurer also argues that the employee did not meet his burden to establish even simple "as is" causation for the right hip and shoulder conditions. It essentially argues that the expert opinions of Dr. Whitelaw and Dr. Wilk, used by the judge to support the decision, are deficient. The deficiencies arise, according to the self-insurer, because the doctors were allegedly not privy to the employee's prior "treatment to his sacroiliac, hip and thigh regions from 2010 to 2018, prior to the 2019 date of injury," (Self-ins. br. 13-14), at Middleboro Chiropractic. However, Dr. Whitelaw specifically referenced the treatment received prior to the injury in his report dated March 15, 2021, and described the treatment as being for low back issues and the ilium, not for hip pain as alleged by the self-insurer. In fact, the only allegation that the Middleboro Chiropractic records establish a pre-existing, non-compensable right hip condition, comes from the self-insurer, without any supporting medical opinion. (Self-ins. br. 13-19.) The self-insurer's mischaracterization of the Middleboro Chiropractic records undermines the entirety of its arguments relative to this issue. The argument also fails because it assumes the employee chose to withhold the history of his chiropractic treatment from Dr. Wilk. The only evidence regarding this issue is the employee's testimony that he could not recall if he told Dr. Wilk about his chiropractic treatment. (Tr. 66) Regardless, the opinions of Dr. Whitelaw and Dr. Wilk adequately sustain the employee's burden of proof for both his shoulder and hip injuries. Likewise, the opinions more than adequately support the judge's order for the payment of the employee's hip surgery, despite the self-insurer's claim of error because "no surgical interventions have ever been requested by the treating physicians." (Self-ins. br. 28.) The self-insurer's cry of foul for the judge ordering surgery when allegedly none was requested is not supported by the adopted

medical evidence, the employee's testimony, or the self-insurer's proclaimed denial of any treatment for the right hip throughout the entire claim.

Lastly, the self-insurer argues that "the administrative judge made findings of fact that are internally contradictory and unsupported by the evidence," and that "the administrative judge offered no evidence or explanation to overcome the expert opinion of the vocational rehabilitation expert …[a]nd yet, with nothing but his lay opinion to fall back on, the Administrative judge dismissed the expert evidence without any explanation and no foundation in the evidence before him." (Self-ins. br. 19, 23.) Again, we disagree. The judge outlined the employee's education and physically demanding work history, including the position he held with the employer. (Dec. 6, 11.) The judge found the employee's testimony credible, specifically regarding his ongoing pain, physical restrictions, medical treatment and proposed surgical procedures. (Dec. 12.) The judge also adopted the medical opinions of Drs. Whitelaw and Wilk which adequately support, at the expert level, the employee's total disability and need for surgical intervention, and whose opinions the vocational rehabilitation expert did not rely upon. The self-insurer's position that there was insufficient evidence to overcome the opinion of its vocational expert suggests that an expert opinion must be adopted if introduced into evidence. However, a judge is under no such obligation. See Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep. 518, 521-22 (1998)(testimony by a vocational expert does not stand in the same position as testimony by a medical expert); see also Amon's Case, 315 Mass. 210, 215 (1943)(a fact finder may reject some or all of the testimony of an expert). While the judge addressed the vocational report in his subsidiary findings, he was not required to do so and was well within his authority to reject the vocational expert's report. Sylva's Case, 46 Mass. App. Ct. 676, 681 (1999).

Accordingly, the decision of the administrative judge is affirmed. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,765.38, plus necessary expenses.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: **September 16, 2022**