COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024205-13**

Edmund Kochling	Employee
City of Worcester	Employer
City of Worcester	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Calliotte)

The case was heard by Administrative Judge Maher.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Theresa Reichert, Esq., for the self-insurer

FABRICANT, J. This environmental exposure case is before us on the employee's appeal of the judge's decision as to the adopted medical diagnosis and the reasonableness of treatment. We affirm in part and recommit in part.

The employee, Edmund Kochling, was initially employed by the City of Worcester in the engineering office.[1] Part of his job was to act as a conservation agent, reviewing conservation plans and inspecting sites. He was transferred to the water department, but continued to oversee the recapping of landfills. (Dec. 5-6.) In 2007, he was tasked with overseeing the city's composting operations. The compost facility was an open-air site of about fifteen acres that processed yard materials, consisting primarily of leaves, grass, and brush. It was in poor condition and there were odor complaints from immediate neighbors. (Dec. 6.)

Initially, the employee was onsite six hours out of his eight-hour workday. Noticing strong odors and disorganization, he made numerous changes to the operation process that greatly enhanced efficiency. (Dec. 6-7.) He checked pile temperatures with

[1] Mr. Kochling commenced employment with the City of Worcester in 1998. (Dec. 5.)

a four-foot stick that he inserted into the various piles and frequently grabbed portions of the debris in his hands to check the breakdown process. He also "walked" the compost facility to address odor concerns. After six months of this intense daily schedule, the amount of time spent onsite was reduced to approximately an hour every morning and then periodically during the day. (Dec. 7.)

In January 2008, the employee began to experience fatigue and cramping. Eventually he coughed up blood and was treated at a hospital emergency room, where he was diagnosed with a pulmonary embolism and admitted overnight. Six days after discharge, the employee experienced another episode. In 2013, he experienced flu-like symptoms and was admitted to St. Vincent's hospital for several days. Again, he was diagnosed with a pulmonary embolism. (Dec. 7.)

Following his release from the hospital, the employee saw a number of physicians, including pulmonologists, infectious disease specialists, an allergist, a cardiologist, a neurologist, and a hematologist. (See Dec. 3, Ex. 10, Employee additional medical evidence; Dec. 8; Self-ins. br. 3-4.) He also traveled to Florida for evaluation at the Mayo Clinic. (Dec. 7-8.) The employee testified that he had "self-referred to most of his evaluating and treating physicians indicating that he suspected his pulmonary embolisms were related to his exposure to aspergillum mold." (Dec. 8.)

Due to the employee's concerns regarding possible mold exposure, the employer allowed him to manage the compost facility offsite.[2] (Dec. 9.) Payment for the employee's medical treatment was resisted by the self-insurer. An administrative judge denied his claim at conference, and the matter proceeded to a hearing. (Dec. 3-4.)

On July 10, 2014, the employee was examined by Dr. Robert Swotinsky, the § 11A medical physician. (Dec. 9.) Although the judge found the medical report adequate, the parties were allowed to submit additional medical evidence due to the medical complexity of the employee's claims. (Dec. 4.) Medical records and reports were submitted by both parties. (Dec. 2-3, Exs. 9, 10.) In addition, both parties

[2] There is no incapacity claim raised by the employee, as he remained actively employed with the City throughout the time period in question. (Dec. 12.)

submitted deposition testimony of their respective environmental experts. Thomas Hamilton was deposed on behalf of the employee, and Geoffrey Sylvester was deposed on behalf of the self-insurer. (Dec. 1.)

The judge adopted the following testimony from Mr. Hamilton:

> [C]omposting is a breakdown of organic material through biologic activity… [where] molds and bacterias [ ] are eating the materials that are brought in. . . . [T]he majority of air contaminates found in composting facilities are detritus from organic material being digested and mold, the major mold being aspergillus fumigates. . . .

(Dec. 9.)

The judge adopted parts of the medical opinions of three pulmonologists: Dr. Kevin B. Martin, Dr. Eric S. Silverman, and Dr. Andres Borja Alvarez, as well as a portion of the opinion of Dr. Sarah Page Hammond, an infectious disease specialist. (Dec. 10-12.)

The adopted portion of Dr. Martin's medical opinion is as follows:

> • That Mr. Kochling was seen to help sort out in his mind whether or not he had certain diagnoses and what they were caused by.
>
> • That he was diagnosed with a pulmonary embolism in 2008, another in 2010 and another in 2013.
>
> • That he had at least two pulmonary function tests that showed moderate obstruction in air flow.
>
> • That the most common cause of obstructive pulmonary testing abnormally and then return to normal would be a form of asthma.
>
> • That his workplace exposure resulted in a diagnosis of occupational asthma that was temporary in a sense that having been removed from the workplace, he no longer had the syndrome. That doesn't mean I think it would be safe for him to be exposed again.
>
> • That pulmonary embolism is not known to cause an obstructive deficit on pulmonary function testing so I do not think that can be passed off as secondary to the pulmonary embolism with confidence.
>
> • That the testing that was done here (after I got involved) was done

> specifically with the concern of allergy and asthma and therefore causally related to the workplace exposure.
>
> • That over time he did have some testing that was related to his history of a recurrence of pulmonary embolism and I cannot say with any certainty that it was causally related to his workplace exposure.
>
> • That I do not believe that Mr. Kochling has invasive pulmonary aspergillus.

(Dec. 10-11.)

The administrative judge adopted the medical opinion of Dr. Silverman "[t]hat attributing pulmonary embolisms to aspergillus exposure is erroneous and not supported by the facts of the case or the medical literature." (Dec. 11.)

The portion of Dr. Alvarez's adopted medical opinion is as follows:

> • That in this case with a history of exposure to molds, high IgE levels, allergic skin testing positive for mold, pulmonary function testing showing mild restrictive pattern which has improved and mild tree in bud on CT chest which have resolved.
>
> • That the patient took the most important step in treatment which is avoidance of exposure.
>
> • That it was discussed in length with patient the result of a high IgE for aspergillus he does not meet criteria for ABPA, invasive aspergillosis, chronic necrotizing aspergillus or aspergillioma.

(Dec. 11.)

Finally, the judge adopted the medical opinion of Dr. Hammond "[t]hat if he [the employee] has any current medical disease related to aspergillus exposure it is most likely of the allergic variety as opposed to the invasive kind." (Dec. 12.)

Based on the adopted medical evidence, expert testimony and the employee's credible testimony, the judge determined that the employee sustained "an allergic, asthmatic exposure," (Dec. 14), causally related to his employment, that had resolved. (Dec. 12-14.) The judge specifically adopted the opinion of Dr. Martin " 'that his workplace exposure resulted in a diagnosis of occupational asthma that was temporary in

a sense that having been removed from the workplace, he no longer had the syndrome.' " (Dec. 13.) Based on the opinions of Dr. Silverman and Dr. Martin, the judge found that the employee's pulmonary embolisms could not be attributed to workplace exposure to aspergillus. (Dec. 13-14.)

With respect to the payment of medical bills, the judge determined that much of the employee's medical treatment stemmed from his own pursuit of a diagnosis that was not borne out by the medical evidence. (Dec. 14.) Relying on Dr. Martin's opinion, he found that the medical treatment and testing at St. Vincent's Hospital concerning allergy and asthma, and the testing done at UMass and Reliant Medical were causally related to the workplace exposure, (Dep. Dr. Martin 28-30), and, thus, reasonable and necessary.[3] (Dec. 14.) The evaluations by infectious disease and allergy specialists were found to be questionable, as they stemmed from the employee's self-referrals, rather than treatment. Further, the judge held that there was insufficient information to determine whether visits to the employee's primary care physician, pulmonologists, hematologists and cardiologists were related to specific pulmonary embolism treatment or to the workplace exposure. The judge specifically held that the visit to the Mayo Clinic in Florida was not reasonable, necessary or related. (Dec. 14-15.) Accordingly, the self-insurer was ordered

[3] As we have previously pointed out, the standard for medical treatment is "adequate and reasonable:"

> "Although commonly used, the statutory support for the 'reasonable and necessary' standard is nonexistent." Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337, 337 n.1 (2008); Lewin v. Danvers Butchery, Inc., 13 Mass. Workers' Comp. Rep. 18, 19-20 n. 1 (1999) (" '[a]dequate and reasonable' relates to the nature of the hospital or medical services," whereas " '[n]ecessary' relates to the length of time an employee may be entitled to such health care services. It was added to the statute in 1948 when the duration of medical benefits was expanded to an indefinite period from what had earlier been limited to a few weeks").

Zavalu v. Standard Thompson Corp., 28 Mass. Workers' Comp. Rep. 235, 241 n.8 (2014).

to pay the reasonable and related medical expenses, including diagnostics, as outlined in the administrative judge's rulings.[4] (Dec. 16.)

On appeal, the employee asserts that the administrative judge erred when adopting the truncated medical diagnosis of "occupational asthma." The employee proffers that the adopted medical opinion of Dr. Martin detailed a more complete diagnosis of "allergic asthma with fungal hypersensitization." As a result, the employee maintains that the matter must be remanded to the judge for clarification as to exactly what diagnosis was adopted. (Employee br. 1, 28-30.) Additionally, the employee argues that the judge erred in his determination that much of the medical treatment received was not reasonable or necessary.[5] (Employee br. 1, 30-37.) We address each issue in turn.

The employee's first issue on appeal has some merit. As the employee pointed out at oral argument, the accepted diagnosis is relevant to the determination of what medical treatment the self-insurer is responsible for. (OA Tr. 24-26.) A review of Dr. Martin's deposition testimony reveals that he refers to a diagnosis of "allergic asthma with fungal hypersensitivity." (Dep. Dr. Martin, 31, 36.) He also opined that the employee's "exposure to compost in the workplace, including the aspergillus mold, was likely to be related to his development of an obstructive lung disease, which is to say asthma." Id. at 19. Simultaneously, Dr. Martin refers to the diagnosis as simply "occupational asthma." (Depo. 32, 45.) In Dr. Martin's medical reports, dated April 4, 2014, and April 8, 2014, he gives a diagnosis of "occupational asthma with fungal hypersensitivity." Here, the judge adopted the expert medical opinion of "occupational asthma." (Dec. 10, 13.) Although it is possible the judge viewed these diagnoses as essentially one and the same and not inconsistent, we cannot be sure without further

[4] Due to the complexity of this matter, the judge also awarded an enhanced fee to the employee's counsel. (Dec. 16.)

[5] In his brief, the employee mentions that the parties agreed to bifurcate the employee's claim at hearing, so that the judge would initially decide only liability and causal relationship. (Employee br. 30.) However, the parties agreed at oral argument that the reviewing board need not address whether the judge erred by prematurely addressing the reasonableness of the medical treatment. (OA Tr. 32, 36.)

explanation. The employee strenuously argues that this ambiguity requires recommital for clarification. See Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(judge must address issues in such a manner to enable proper appellate review "to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found.") Thus, the judge needs to clarify which diagnosis or diagnoses he adopts and, if he adopts one form of the diagnosis over the other, explain why he has done so.

The employee's second argument lacks substance. In support of his position that all his medical treatment and evaluations were reasonable, the employee argues that the judge's findings are contradictory: although he "understands" the employee's health concerns and "will not second guess his decisions in that regard," (Dec. 14), the employee maintains that the judge appears to have done just that in denying the claims for self-referred medical evaluations, as well as "visits to his primary care physicians and referrals to the pulmonologists, hematologists and cardiologists." Id. at 15. Further, the employee argues the judge appears to "frown" on the employee's attempt to discover his true medical diagnosis and that the "clouded" medical evidence, as stated by the judge, causes the decision to be ambiguous as to what treatment is to be reimbursed. (Employee br. 1, 30-37.) We disagree.

We do not take the judge's comment about "second guessing" the employee's actions to be anything other than an expression of empathy and compassion. That sentiment cannot be transformed, as the employee suggests, into a certification that the medical treatment sought was "reasonable," as defined by the applicable statutes. The employee has the burden of proving every element of his claim. Thus, he alone is responsible for providing the evidence that his medical treatment is related to a work injury. Sponatski's Case, 220 Mass. 526, 527-528 (1915). The insufficiency of medical evidence as to the causal relationship between treatment and a workplace injury is a direct result of the employee's failure to sustain his burden in this case, rather than judicial error. As correctly noted by the judge, the medical treatment sought by the

employee exceeds that which is permitted by § 30,[6] and appears to be the result of self-referral rather than referral by qualified medical professionals. (Dec. 6-7.) Thus, the judge's findings relative to compensable medical treatment are affirmed.

We recommit the case to the administrative judge for further findings consistent with this opinion. The balance of the judge's decision is affirmed. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7) to defray the reasonable costs of counsel. If such a fee is sought, the employee's counsel is directed to submit to this board for review, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal, within thirty days of the date of this decision. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: <u>December 19, 2018</u>

[6] Barring emergency, agreement by the insurer, or judicial approval, G.L. c. 152, § 30 authorizes an employee to seek medical treatment with a qualified professional other than one agreed to or provided by the insurer, and the employee may switch from such professional one time by right. When referred by a treating health professional to another provider in a particular specialty, the statute also permits the employee to unilaterally change to a different provider within that specialty one time.