COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 019435-08

Edward Sanchez	Employee
Industrial Polymers and Chemicals, Inc.	Employer
Massachusetts Manufacturing SIG	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

COSTIGAN, J. Both parties appeal from the administrative judge's award of a closed period of § 34 total incapacity benefits. The employee argues that, 1) the medical evidence on which the judge relied to terminate weekly benefits was insufficient to overcome the prima facie opinion of the § 11A examiner; 2) the judge erred in excluding a medical report he deemed fell outside the periods for which he had allowed additional medical evidence; and 3) the judge's handling of the evidence and certain comments in his decision reflect bias, or the appearance of bias. The insurer contends the judge misconstrued the impartial opinion on causation and therefore erred in finding the employee met his burden of proving his work injury was "a major" cause of his disability pursuant to G. L. c. 152, § 1(7A). We see no merit in any of these arguments, and affirm the decision.

Edward Sanchez, forty years old at the time of the hearing, has a tenth grade education and prior work experience as a security guard. He began working for the employer in 1994 and, within a couple of years, had moved up to the position of machine operator, a heavy job involving lifting materials weighing hundreds of pounds. Over the years, the employee occasionally suffered injuries at work, as well

as in the gym while lifting weights, but those injuries never caused him to miss work. In 1999, he injured his low back and right hip in a non-work related motor vehicle accident, and missed approximately a month of work. In 2004, he missed one day of work due to another non-work related motor vehicle accident. (Dec. 5-6.)

For almost three years before his alleged work injuries in May and July of 2008, the employee treated with Dr. Demosthenes Agiomavritis for back problems.[1] (Dec. 6.) A MRI study performed on May 15, 2008, revealed a disc protrusion at the L5-S1 level, mildly compressing the right S1 nerve root. (Dec. 7-9.) Two weeks later, on May 29, 2008,[2] the employee reported an injury to his back at work. He continued to work through worsening pain until July 16, 2008, when he claimed to have suffered another back injury at work while lifting. He treated at the St. Vincent Hospital emergency room that same day, and has not returned to work since then. (Dec. 9.)

On August 2, 2008, the employee underwent another MRI of his lumbar spine, with results similar to those of the May 15, 2008 study. (Dec. 10.) Doctor Arno Sungarian diagnosed a right paracentral disc herniation at L5-S1, with compression of the exiting S1 nerve root and lumbar radiculopathy. (Dec. 10.) On November 19, 2008, Dr. Sungarian performed a right L5-S1 discectomy. A February 2009 MRI showed the disc herniation had been significantly reduced in size. Doctor Sungarian released the employee to return to work as of April 24, 2009. (Dec. 11; Exs. 13 and 14.)

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[1] A January 6, 2006, MRI of the lumbar spine revealed minor disc bulges in the lower lumbar spine with no disc herniations or significant degenerative disease. In January 2008, the employee had surgery on his right foot for plantar fasciitis, which caused him to walk with an awkward gait when he returned to work in March 2008. In early May 2008, just weeks before his first alleged back injury at work, the employee was prescribed Vicodin and Percocet for back pain. (Dec. 7-9.)

[2] The judge found the injury occurred on May 28, 2008, (Dec. 9), and on May 29, 2008. (Dec. 14, 16.) The incident report and an amended incident report both reflect the injury occurred on May 29, 2008. (Exs. 8 and 9.)

In late August 2008, the employee, through counsel, filed a claim citing a July 16, 2008, date of injury and describing how the injury occurred as, "specific lifting incident superimposed upon cumulative back trauma caused by years of heavy lifting at work." See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of contents of board file proper). The claim sought § 34 benefits from July 16, 2008 prospectively for three years to July 15, 2011, that is, the entire 156-week statutory maximum entitlement under § 34. Following a § 10A conference on October 27, 2008, the administrative judge awarded the employee a closed period of § 34 benefits from July 17, 2008 prospectively through March 21, 2009, and § 35 partial incapacity benefits from and after March 22, 2009, based on an assigned earning capacity of $170.88. Id. Both parties appealed.

Pursuant to § 11A, the employee was examined by Dr. Mark A. Linson, whose March 18, 2009 report, (Ex. 1), and October 27, 2009 deposition testimony were admitted as evidence at hearing. The judge deemed Dr. Linson's report inadequate, "partly because his examination of the Employee took place a mere sixteen weeks following the Employee's back surgery." (Dec. 4.) He allowed additional medical evidence for the so-called gap period prior to the impartial examination, and for the period subsequent to Dr. Linson's examination "through August 31, 2009." Id. Following two days of hearing,[3] both parties submitted extensive medical records. (Dec. 3-4; Exs. 32-39.)

The judge found the employee sustained industrial injuries to his back on May 29, 2008 and July 16, 2008.[4] (Dec. 14.) He adopted Dr. Linson's opinion that

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[3] References herein to the August 31, 2009 hearing transcript are designated, "Tr. I," and to the September 25, 2009 hearing transcript, "Tr. II."

[4] The judge wrote:

> I find that the Employee did sustain an industrial injury on May 29, 2008 and an exacerbation of it through a lifting incident on July 16, 2008. I can best serve the beneficent purposes of the statute by considering the May 29 and July 16 incidents together as a work-related injury to the Employee's back, which was already in poor condition due to weight-lifting injuries and an antalgic gait following unsuccessful

although the employee had "other major causal factors" including "significant preexisting disease," (Dep. 44), and a "preexisting ruptured disk," (Dep. 46), the work injuries "just barely reached the threshold for a major causal factor," (Dep. 44), of the employee's disability and need for treatment. (Dec. 11-13, 14-15.) Addressing the employee's testimony as to his pain and physical limitations, the judge did "not find [him] to be a completely credible witness." (Dec. 15.) The judge adopted Dr. Sungarian's opinion that the employee could return to work *as of* April 24, 2009, (Dec. 15), but awarded the employee § 34 benefits from July 17, 2008 *through* April 24, 2009. (Dec. 16.) We address the arguments on appeal.

The Termination of Weekly Incapacity Benefits

The employee contends the evidence the judge relied on to terminate his weekly benefits as of April 25, 2009 -- a "Work Capabilities Form" purportedly completed and signed by Dr. Sungarian on May 6, 2009, (Ex. 14), -- was insufficient to overcome the prima facie effect of the impartial examiner's opinion, rendered less than two months earlier, that the employee was partially disabled. See Anderson's Case, 373 Mass 813, 817 (1977)(prima facie evidence may be met and overcome by evidence sufficient to warrant contrary conclusion). This is particularly true, the employee maintains, given that the judge admitted additional medical evidence, in part, because the impartial examiner had seen the employee soon after surgery, and where all the other medical evidence was that the employee had some ongoing disability. (Employee br. 7-10; employee reply br. 1-2.)

The employee also challenges the authenticity of the "Work Capabilities

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> plantar fasciitis surgery in January 2008. As experienced practitioners in medicine and personal injury litigation are well aware, diagnostic tests are valuable tools that still cannot explain the whys and wherefores of all sensory phenomena, or lack thereof. From my analysis and careful review of all of the evidence, I conclude, as did Dr. Linson, that the industrial injury was a major cause of the Employee's disability and need for treatment.

(Dec. 14.)

Form."[5] (Employee br. 11-13; employee reply br. 2.) The appropriate time to mount that challenge was at hearing. Not only did the employee fail to object to the document's admission, (Tr. I, 134), but he also failed to depose Dr. Sungarian to explore the issues he now raises. He has therefore waived his right to challenge the authenticity and admission of the form. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 674 (2000); Smith v. Northeastern Univ., 24 Mass. Workers' Comp. Rep. ___ (2010)(failure to object to introduction of unsigned medical report at hearing is waiver).

As Dr. Sungarian's opinion was properly admitted without objection, it was for the judge to determine its probative value. Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988); Robinson v. Contributory Ret. App. Bd., 20 Mass. App. Ct. 634, 639 (1985). The judge may "adopt whatever competent medical evidence he or she finds most persuasive, in the absence of any objection or motion to strike." Thompson v. Berkshire County Assoc. for Retarded Citizens, 20 Mass. Workers' Comp. Rep. 247, 251 (2006); see Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). Thus, the judge was free to adopt Dr. Sungarian's opinion over any other or, for that matter, all other expert medical opinions. Fitzgibbons's Case, 374 Mass. 636 (1978); Smith, supra. Moreover, the judge permissibly supported his conclusion on incapacity with his disbelief of the employee's testimony regarding his pain and limitations. Tran v. Constitution Seafoods, 17 Mass. Workers' Comp. Rep. 312, 319 (2003). We find no error in the judge's adoption of Dr. Sungarian's opinion to terminate the employee's weekly benefits on April 25, 2009.[6]

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[5] The employee argues that it is not clear Dr. Sungarian actually filled out and signed the Work Capabilities Form, which indicated the employee was released to return to work without limitations as of April 24, 2009. He speculates that the form was completed by someone else and Dr. Sungarian's signature stamp was simply affixed. (Employee br. 11; employee reply br., 2-3.)

[6] Furthermore, contrary to the employee's contention, the judge did not mischaracterize the evidence by finding that "Dr. Sungarian saw the employee in follow-up on April 24, 2009

The Deadline for Submission of Additional Medical Evidence

The employee next argues the judge erred by "deleting" the September 2, 2009 report of Dr. Julie Pilitsis, submitted after the hearing, for the stated reason that it fell outside the dates for which he had opened the record. (Dec. 4, n.1.) The employee maintains the judge arbitrarily set August 31, 2009, the first hearing date, as the date by which additional medical evidence must have been generated, and then failed to notify the parties of this limitation until he issued his decision. (Employee br. 13-14.)

It is within a judge's discretion to invite the parties to submit additional medical evidence, and to set a reasonable date by which they must do so. Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83, 87 (2008); Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 96 (2007)(judge has broad discretion in conduct of hearing, including granting of continuances and enforcement of reasonable deadlines). Here, the judge set an initial deadline for the *submission* of additional medical evidence, and then revised that deadline. On the first day of hearing, August 31, 2009, he gave the parties until September 30, 2009, to submit additional medical evidence. (Tr. I, 12.) When the hearing continued to a second day, the judge extended the due date for such evidence to October 26, 2009. (Tr. II, 3.) However, as best as we can tell from the record, the first notice to the parties that the submitted medical evidence must have been *generated* prior to August 31, 2009, and that Dr. Pilitsis's report was therefore excluded, was in the hearing decision. (Dec. 4, n.1.)

It is well-established that:

> A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently – if not necessarily – result.

[and] released the Employee to return to work as of that day." (Dec. 11.) Dr. Sungarian did not address the employee's ability to return to work in his April 24th note, but when later asked to do so via the "Work Capabilities Form," he clearly indicated the employee could work without limitation as of April 24th, the last date he saw him.

Babbitt v. Youville Hosp., 23 Mass. Workers' Comp. Rep. 215, 219 (2009), quoting Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005); see also, Godinez, supra. The employee, however, does not assert his due process rights were violated. He merely argues Dr. Pilitsis's report of September 2, 2009 was wrongly excluded, requiring reversal or recommittal. (Employee br. 19.)[7] We disagree.

The employee has not provided any information by which we could determine whether the evidence was relevant or whether he was prejudiced by its exclusion. See DeJesus v. Yogel, 404 Mass. 44, 48-49 (1989)("appropriate test is whether the proponent of erroneously excluded, relevant evidence has made a plausible showing that the trier of fact might have reached a different result if the evidence had been before it"). "It was incumbent on the [employee] to put enough into the record to show that he was harmed, and this he has failed to do."[8] Baker v. Rosen, 331 Mass. 763 (1954). See also, Massachusetts Guide to Evidence, § 103 (2008-2009 edition) and G. L. c. 231, § 119. Thus, while we do not condone the judge's late notice on the exclusion of medical evidence, the employee has, in effect, failed to preserve this issue for appeal. See Commonwealth v. O'Brien, 419 Mass. 470, 477 (1995)(because document in question is not part of record on appeal, defendant failed to preserve issue for appellate review).

The Allegation of Bias

The employee's final argument is that the judge's handling of the evidence and certain comments in his decision reflect bias or at least the appearance of bias against

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[7] The employee contends that because he continued to treat beyond August 31, 2009 and, indeed, testified before the judge on September 25, 2009, the administrative judge acted arbitrarily and capriciously by limiting additional medical evidence to services provided only through August 31, 2009. (Employee br. 13-15.)

[8] We realize the employee could not have made an offer of proof at the time of the exclusion of the evidence because the report was submitted after the hearing, (Dec. 3-4), and he did not know it had been excluded until the decision was filed. However, he has not provided us with a copy of Dr. Pilitsis's report, which was submitted as part of the UMass Memorial Medical Center records, (Ex. 33), but deleted by the judge therefrom, or even a synopsis of the contents of that two-page report.

him. He again cites the judge's rejection of the impartial medical opinion on disability in favor of Dr. Sungarian's opinion as evidence of judicial bias. The argument acquires no merit on iteration.

The employee further alleges the judge improperly made the employee's "ill will" toward the employer the foundation of his decision on present disability. (Employee br. 15-16; employee reply br. 2.) The statement about which the employee complains[9] was made in the context of, and as partial explanation for, the judge's finding the employee was not entirely credible, a determination which is the judge's prerogative as the sole arbiter of credibility. See Lettich's Case, 403 Mass. 389, 394 (1988). Moreover, the judge permissibly relied on a medical opinion the employee could return to work, an opinion unaffected by the employee's attitude toward his employer. Finally, we note: "The case law is clear that a negative impression of a party formed by a judge *as an adjudicator* [is] 'not a ground for the assertion of a disqualifying bias.' " Robinson v. General Motors Corp., 13 Mass. Workers' Comp. Rep. 207, 215 (1999)(emphasis original), quoting Civil Service Comm'n v. Boston Mun. Court Dept., 27 Mass. App. Ct. 343, 348 (1989), quoting Perez v. Boston Housing Auth., 379 Mass. 703, 740 (1980). The employee's claim of judicial bias, or the appearance of bias, is wholly lacking in merit.

"A Major" Cause under § 1(7A)

We turn to the insurer's argument that Dr. Linson's § 11A opinion did not

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[9] The judge stated:

> With regard to the extent of his pain and limitations, I do not find the Employee to be a completely credible witness. I find that he has attempted to ignore, minimize or deny the existence of his long history of back problems and his multi-year use of narcotic medications, to which he became addicted. I find that the Employee bore ill will to the Employer, and that this ill will has been a significant motivational force in his pursuit of a worker's compensation claim long after proper medical treatment has been rendered.

(Dec. 15.)

satisfy the heightened "a major" cause standard under § 1(7A),[10] and that the judge erred by relying on it to award the employee any incapacity benefits. The insurer maintains that in his deposition testimony, Dr. Linson equated "a major" cause with "but for" causation. The insurer relies on Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006), in which the court rejected a "but-for" test in combination injury cases under § 1(7A), noting, "a new disabling injury is always the cause of one's absence from work, notwithstanding a pre-existing injury." Id. at 221.

It is true that, when questioned by the insurer, Dr. Linson agreed that "but for" the work incidents, the employee's "disability and surgery wouldn't have happened when it [sic] did."[11] However, Dr. Linson also offered a clear and measured opinion, informed by his knowledge of the employee's pre-existing back problems, that the work injury was nevertheless a major causal factor in the employee's ongoing disability:

> I was well aware, despite this man's poor recollection, of his trouble for years leading up to his alleged work injury, and felt that, while this was probably a very close call between major and not major because of all the other factors that he had, that he just barely crossed the threshold for me being able to say to a reasonable degree of medical certainty that *what happened at work was a major causal event* in the context of a man with many other things going on,

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[10] General Laws c. 152, § 1(7A), provides, in relevant 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.

[11] Q.: And so what you're saying is that, quote, but for, end quote, his work incident, whether it's you have it recorded in May or whether it's as it's been alleged in July that this -- that but for this incident, the surgery wouldn't have happened -- well, strike that -- this disability and surgery wouldn't have happened when it did, is that what you're saying?
A.: I also agree with that.

(Dep. 50.)

> significant preexisting disease, a long history of medical care for similar problems who had, in addition, other major causal factors and the predominant causal factor probably had nothing to do with work, but yet in that context, the work injury that he described and that was documented by others at some point, *just barely reached the threshold for a major causal factor.*

(Dep. 44; emphases added.) See Walker's Case, 243 Mass. 224, 225 (1922)(cautious declaration of an opinion based on disputed and disputable facts). Despite his opinion that there was "no change of consequence" between the May 15, 2008 MRI and the post-injury August 2, 2008 MRI, (Dep. 45),[12] Dr. Linson still held to his opinion that, "there was enough of a connection to reach, just barely, a major causal factor." (Dep. 48.) Thus, unlike the impartial physician in Stewart's Case, 74 Mass. App. Ct. 919 (2009), Dr. Linson offered a medical opinion addressing, "in meaningful terms . . . the relative degree to which compensable and non-compensable causes have brought about the employee's disability." Id. at 920. Simply put, if the "a major" cause standard is satisfied, "but for" causation, which requires only a simple causal connection, is necessarily satisfied. There is no merit to the insurer's argument that the impartial physician equated the two standards. Cf. Castillo, supra at 220-221(impartial physician opined only to simple causation, was never asked whether employee's injury was a major cause of his disability and need for treatment).

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[12] Dr. Linson explained:

> [W]hat had led to this man's period of disability was enough leg pain to have a surgeon do an operation on him shortly after this work injury occurred and this is not always reflected in a change in an [sic] MRI scan. It's reflected in a change of symptoms and a reasonable scenario for this man would be that he had [a] preexisting ruptured disc and that the work injury in question in May caused his tight nerve to chafe over that disk to a point where symptoms worsened to a point where he then became a surgical candidate . . . , which led to his impairment and disability changing in its nature.
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> So the MRI doesn't have to change as a result of a suspected work injury. It's based more on symptoms that [had] changed. . . .

(Dep. 45-46.)

The decision is affirmed. Pursuant to § 13(A)(6), the insurer is to pay employee's counsel a fee of $1,488.30.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: