COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006164-02**

Francis Williams	Employee
Molloy's Garage	Employer
Massachusetts Insurers' Insolvency Fund[1]	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

This case was heard by Administrative Judge Taub.

APPEARANCES
James F. White, Esq., for the employee
Joseph B. Bertrand, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from a decision denying and dismissing its request to modify or discontinue the employee's weekly § 34A permanent and total incapacity benefits. The insurer's primary argument is that the judge erred by relying on a medical opinion which failed to take into account the employee's non-work-related knee problems. We affirm.

The employee was fifty-eight years old at the time of the hearing. He left school in the ninth grade, and later obtained his GED, as well as certification in automotive technology from the Rhode Island Trade Shop School. For all but three years of his career, he worked as an automotive mechanic. His job consisted of heavy work, involving lifting up to 100 pounds alone, and up to 250 pounds with assistance. (Dec. I, 3.)[2] On February 22, 2002, while bending and lifting at work, the employee suffered a herniated disc at L5-S1 on the right. The insurer accepted the case and paid

[1] On February 22, 2002, the employee's claimed date of injury, his employer, Molloy's Garage, was insured by Casualty Reciprocal Exchange, which is now insolvent. All references to the insurer are to Massachusetts Insurer's Insolvency Fund. We note that the most recent hearing decision, as well as several other documents in the board file since 2014, refer to the employer as *Malloy*'s Garage, which appears to be a scrivener's error.

the employee § 34 temporary total incapacity benefits, beginning on February 23, 2002. The employee underwent surgery in April of 2002, and, after some initial improvement, the symptoms in his back and right leg worsened. (Dec. I, 3; Dec. III, 4.) The employee underwent physical therapy and work hardening in addition to receiving facet blocks, without improvement. He also took a number of medications, including Vioxx, Celebrex, Vicodin, Neurontin, and Oxycodone. (Dec. I, 4.)

The insurer filed its first of four complaints for modification or discontinuance on October 7, 2004, to which the employee joined a claim for § 34A permanent and total incapacity benefits. Dr. Daniel J. Quinn, the §11A examiner, opined the employee was precluded from lifting over ten pounds, climbing, crawling, stooping, and repetitive bending and lifting. Dr. Quinn stated there was no expectation of improvement and, in fact, a real possibility the employee's symptoms would worsen over time. In his November 7, 2007 decision, the judge found the employee's back condition and resulting incapacity were causally related to the industrial injury, and that, given his narrow experience and limited education, the employee was permanently and totally disabled from gainful employment. (Dec. I, 6.) The insurer did not appeal. (Dec. III, 2.)

The insurer filed its second request to modify or discontinue benefits on August 11, 2008. Dr. Quinn, who was again the § 11A impartial examiner, opined that the employee suffered from "failed back syndrome." Although Dr. Quinn did not believe the employee would necessarily be medically disabled from sedentary jobs, (Dec. II, 5), he opined the employee continued to be disabled from any labor intensive work, due to his need to avoid twisting, lifting, squatting, bending, climbing, prolonged sitting or standing, and being on cement floors. (Dec. III, 2.) In his May 26, 2010 decision, the judge found there had been no change in the employee's condition, and, taking into account the employee's limited work experience and education and his current symptoms, he remained permanently and totally disabled. Again, the insurer did not

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2 The first hearing decision of November 7, 2007 is hereinafter referred to as "Dec. I"; the second hearing decision of May 26, 2010, as "Dec. II"; and the third hearing decision of June 16, 2015, which is the subject of this appeal, as "Dec. III".

appeal. (Dec. III, 2.) The insurer's third request to modify or discontinue benefits, filed on October 27, 2010, was withdrawn prior to hearing. Id.

On June 3, 2013, the insurer filed a fourth complaint seeking to modify or discontinue the employee's benefits. A new § 11A impartial physician, Dr. George Whitelaw, examined the employee on January 28, 2014. He suggested the employee undergo a functional capacity exam (FCE), which was performed on March 21, 2014. The judge allowed the submission of additional medical evidence due to medical complexity. The employee submitted the September 9, 2014, report of Dr. Alan Solomon, whom the insurer deposed, as well as the records of Dr. Carl Sousa and Franklin Pain Associates. The insurer submitted the April 18, 2013, report of Dr. Richard Alemian. (Dec. III, 1.)

The employee testified that his condition was essentially the same as at the second hearing, except for some worsening due to age. He experiences constant, nagging, everyday pain from the center to the right side of his low back, occasionally into his buttocks. Walking, particularly on stairs or inclines, increases his back pain. Two or three times a week, he experiences "a shooting, stabbing pain through his right buttocks and into his right leg," usually triggered by some activity. (Dec. III, 5; Tr. 31.) He can walk at most 100 yards at a time, but avoids uneven, cement, and snowy surfaces. He can sit for about one-half hour, preferably in a hard wooden chair, and can stand for about the same amount of time. His pain affects his sleep, waking him three to four times per night, causing him to wake exhausted in the morning, and requiring that he nap during the day. He cannot bend to tie his shoes, and needs help dressing. (Dec. 5.) The judge found the employee "credibly described symptoms and effects upon his life from the symptoms that are essentially the same as when he previously testified." (Dec. III, 9.)

The judge adopted the opinion of Dr. Solomon, the employee's examining orthopedist:

> *[B]ecause of the back condition* the employee is totally disabled from and cannot perform in any way his former work as an auto mechanic. I adopt the opinion of Dr. Solomon and find that the employee has a physical capacity for significantly

> limited sedentary [work] and that, if the employee were offered a sedentary position, it would have to be part-time and truly sedentary—allowing the employee to avoid lifting, climbing, bending, pushing and pulling, and allowing at will alternation between sitting and standing. I adopt the further elaboration of his opinion in which he indicated that he agreed with Dr. Alemian regarding restrictions that would be needed and that the employee could do sedentary work provided he be able to sit, stand and change positions at will; not do any lifting over 10 pounds and that not repetitively; and not do any repetitive bending, pushing, lifting, climbing ladders, squatting, kneeling, or crawling; and only walk briefly on inclines or stairs with secure railings. I adopt the opinion of Dr. Solomon that the employee is at a medical end result.
>
> These restrictions are *much the same as those suggested by Dr. Quinn* in the opinion that I adopted in making my findings at the earlier hearings. I conclude and find once again that these restrictions and limitations; Mr. William[s'] narrow range of employment experience and limited education; and what I find to have been an *honest and credible description of the symptoms attributable to his back condition and their effects* combine to render Mr. Williams *incapable of performing the duties* and activities that would be required for him to obtain and maintain *employment of any kind*.

(Dec. 9; emphasis added.)

The judge specifically rejected Dr. Whitelaw's opinion deferring to the recommendations of the physical therapist who performed the functional capacity evaluation, and adopted Dr. Solomon's opinion, "that it would be inappropriate to extrapolate that Mr. William could sit or stand for extended periods of time because he managed to sit for five minutes and stand for five minutes during the functional capacity evaluation." (Dec. 9.) The judge credited the employee's testimony that he "gave it his all" id., during the FCE, and that many of the testing activities significantly increased his pain to the level of a 9 or 10, on a ten-point scale, making it difficult for him to sleep the following night. (Dec. III, 6, 10.) Finding the employee's back condition and resulting disability were causally related to the 2002 work accident, the judge denied the insurer's complaint to modify or discontinue the employee's § 34A benefits. (Dec. III, 10.)

The insurer's primary argument on appeal is that the judge erred in adopting Dr. Solomon's causation opinion because Dr. Solomon did not consider the effects of the

employee's knee condition on his disability.[3] The insurer argues that it is unclear the extent to which the employee's longstanding bilateral knee problems, for which he sought treatment shortly before and after the lay testimony, contributed to his disability. (Insurer br. 6-7.)

It is a well-established principle that "only work-related diagnoses may be the basis of the judge's disability assessment and order of benefits." Akinmurele v. Target Corp., 25 Mass. Workers' Comp. Rep. 387, 391 (2011), citing Hummer's Case, 317 Mass. 617, 623 (1945); Gray v. Sunshine Haven, Inc., 22 Mass. Workers' Comp. Rep. 175, 177 (2008); Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490, 493 (2003); Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995)(judge must look with something akin to "tunnel vision" to determine extent of disability caused solely by work injury). Thus, where, as here, § 1(7A) is not in play, the judge is required consider the effects of the work-related back injury alone in determining the employee's disability and incapacity for work. The insurer takes the position, however, that it was error for the judge to rely on Dr. Solomon's opinion, because the doctor was unaware the employee was undergoing treatment for his knees during the months prior to the doctor's September 3, 2014, examination of the employee. Therefore, Dr. Solomon's opinion was "not based upon 'complete facts' and lacked a 'competent evidentiary foundation.' " (Insurer br. 10, quoting Scheffler's Case, 419 Mass. 251, 257-259 [1994].) We disagree.

The insurer is correct that, in his report of September 9, 2014, Dr. Solomon did not mention the employee's history of knee problems or any recent consultation regarding

[3] Regarding the employee's knee problems, the judge found:

> The employee had a history of numerous right knee operations prior to 2002. He had a left knee arthroscopy about 4-5 years prior to his testifying in 2014. He felt he had a good result from the surgery and has not had any continuing follow-up treatment with the surgeon.

(Dec. 5-6.) We note that the insurer did not raise the affirmative defense of § 1(7A). (See Tr. 9.) Therefore, the simple "as is" causation standard applies.

knee pain. However, at deposition, Dr. Solomon was questioned about the effect of past and present treatment for the employee's knee problems on the employee's incapacity,[4] and maintained his opinion that the limitations he observed and the restrictions he imposed were based on the employee's back injury:

> Q: Your observations on Page 5 of your report only dealt with back issues, you thought, or his limitations you saw? You didn't take into account his knees?
>
> A: I could only say that what I found and what I asked him to do and what I examined and found objectively seemed to pertain predominantly to his back, and to the sciatica that he had failed to recover from.

(Dr. Solomon Dep. 11.) He was later asked:

> Q: When you examined him in September 2014, last month, did you ask him about any surgeries to his knee or to any other part of his body?
>
> A: He may have mentioned that to me, and I have a vague recollection that he mentioned something about his knee, but I didn't go into that because it wasn't my focus of concern at that point

[4] The additional medical evidence the employee submitted shows the employee had at least consulted with a physician, Dr. Susan Barrett, about his bilateral knee problems approximately a month before hearing and had undergone an MRI of his right knee, which revealed a full ACL tear. (Employee Ex. 3.) Consistent with these records the employee testified he had not had any follow-up *with his surgeon, Dr. Chabot*, since the arthroscopic examination of his left knee four or five years earlier, (Tr. 46-47), and the judge so found. (Dec. 5-6.) However, on cross-examination, the employee denied that he had undergone any treatment for his knees since the arthroscopic examination of his left knee several years earlier, (Tr. 64), despite his consultation with Dr. Barrett, and a right knee MRI within the past month. The medical records are unclear as to what treatment he had for his knees between the hearing on July 18, 2014, and Dr. Solomon's examination on September 3, 2014. His primary care physician, Dr. Sousa, noted, in an August 13, 2014, visit the employee made for help in stopping smoking, that "he recently had surgery on his left knee he is scheduled to have total knee replacement. . . ." (Employee Ex. 3.) However, there is no medical record from any physician describing what that surgery was, or recommending total knee replacement, either before or after the employee testified.

Although the employee's testimony of no treatment for his knees in the last four or five years is troubling, we do not find it requires recommittal. Dr. Solomon, when presented with information regarding the employee's recent consultation for knee pain and potential knee replacement surgery, maintained the employee's disability was causally related to his work-related back problems. (Dep. 10-11, 34.)

> And it didn't seem to make a substantial difference in what I was finding or how the history played out.

(Dep. 16.) Moreover, there is no indication the additional restrictions imposed by Dr. Alemian, and adopted by Dr. Solomon were necessitated by the employee's knee problems.[5] When questioned whether specific restrictions, such as climbing, kneeling, and squatting, were related to the employee's knee, rather than back, problems, Dr. Solomon explained that the employee's back condition was his main concern in imposing those restrictions. (Dep. 17, 18, 20.) The insurer maintains Dr. Solomon's opinion that "very little of knee functioning is involved in bending" (Dep. 16), is not credible. However, "[f]indings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007). Finally, Dr. Solomon confirmed that nothing he learned at deposition changed the opinions expressed in his report. (Dep. 34.) Accordingly, the judge did not err in adopting Dr. Solomon's opinion causally relating the employee's disability to his back injury.

The insurer also argues that the judge erred by finding the employee's condition was substantially the same as at the prior hearings, because the employee's radiculopathy down his right leg had completely resolved, resulting in the employee ceasing all pain medication in 2009. (Ins. br. 3.) We find no error. The employee was receiving permanent and total incapacity benefits pursuant to two prior hearing decisions.

> "We have consistently held that modification or discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence." Bennett v. Modern Continental Constr., 21 Mass. Workers' Comp. Rep. 229, 231 (2008). The insurer had the initial burden of producing evidence of either an improvement in the extent of the employee's disability, her vocational status, or both.

Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. 261, 263 (2012).

[5] The judge did not adopt Dr. Alemian's opinion, but rather adopted Dr. Solomon's opinion agreeing with Dr. Alemian's restrictions. The only problem Dr. Alemian specifically attributed to the employee's knee condition was his right thigh atrophy. (Insurer Ex. 1.)

With respect to the insurer's claim that the employee's cessation of narcotic use signaled an improvement in his pain level, the insurer ignores the fact that the employee had stopped taking narcotics prior to 2009, and the judge had made findings on that issue in his second decision:

> I credit Mr. Williams' testimony that he stopped taking narcotic pain medication because of his and his primary care physician's fears of his becoming addicted and his not enjoying other effects the medication had upon him. I credit Mr. Williams' testimony that his pain has become more noticeable . . . and do not give credence to the suggestion that the stoppage was because the pain experienced had lessened to any significant degree.

(Dec. II, 6.) This decision was not appealed, and these findings may not be relitigated. See Okraska v. Universal Plastics, 23 Mass. Workers' Comp. Rep. 193, 197 n.7 (2009)(collateral estoppel precludes relitigation of same issues between same parties).

With respect to the insurer's position that the employee's right leg radiculopathy had resolved, we note that, although Dr. Solomon opined his "examination demonstrates recovery from *much of his radiculopathy and pain down his leg* with restoration of his reflex and motor power in his right lower extremity," (Employee Ex. 2), Dr. Solomon did not indicate the employee had totally recovered from that pain.[6] Moreover, the judge credited the employee's testimony regarding his symptoms, including that he sometimes experiences a shooting, stabbing pain through his right buttocks and into his right leg, usually triggered by some activity, such as walking, especially on inclines or stairs. (Dec. 5; Tr. 31.) And, most importantly, to the extent Dr. Solomon believed the employee had recovered from the radiculopathy, it did not change his opinion regarding the employee's limitations or disability. See Conley, supra, at 265 (2012)(fact that some symptoms have lessened will not support finding the employee's disability has improved, without a medical opinion so indicating), citing Greene v. Ethyl Prods., 23 Mass. Workers' Comp. Rep. 95, 99 (2009)("expert medical opinion addressing effects of change required"). Finally, as noted above, the restrictions imposed by Dr. Solomon and adopted by the

[6] In his deposition, Dr. Solomon mentioned the "sciatica that [the employee] had failed to recover from." (Dep. 11.)

judge are essentially the same as those recommended by Dr. Quinn and adopted by the judge in prior hearing decisions. Accordingly, the insurer has failed to meet its threshold burden of showing an improvement in the employee's medical condition. Conley, supra, at 263.

The insurer's argument that the judge erred by failing to adopt Dr. Solomon's opinion that the employee could return to his former profession "totally in a supervisory capacity, without the demands of leaning under a hood to inspect an engine or crawling under car to see the undercarriage," (Employee Ex. 2, p. 5), is similarly unavailing. First, there was no evidence that such a supervisory job existed. See Scheffler's Case, supra, at 257 (judge required to give prima facie weight to impartial opinion only where facts are complete and accurate regarding requirements of employee's job or other available work); see also Montes v. Liberty Constr. Servs., LLC, 27 Mass. Workers' Comp. Rep. 83, 87 (2013)(employee's inability to obtain work with employer as non-working foreman, combined with lack of evidence such a position existed in open labor market, supported judge's conclusion employee could not re-enter workforce as non-working foreman). Second, there was no evidence to suggest the employee ever worked in a supervisory capacity, or had obtained new vocational skills that would make him qualified to be a supervisor. (Dec. III, 4.) The disability opinions adopted at hearing over the years have remained consistent that the employee is capable of sedentary work with significant limitations. The insurer has failed to produce evidence of a change in the employee's vocational status which would allow him to perform such sedentary work. Conley, supra, at 263.

The insurer's suggestion that the judge erred by adopting Dr. Solomon's opinion, to the extent it was based on the employee's subjective complaints of pain, is also without merit. See Sullivan v. Centrus Premier Home Care, 28 Mass. Workers' Comp. Rep. 143, 146 (2014), citing Caramiello v. BSI Bureau of Special Investigations, 21 Mass. Workers' Comp. Rep. 321 (2007)(subjective complaints of pain, supported by some medical opinion, can be basis for award of benefits).

Finally, the judge did not err by failing to adopt the § 11A opinion of Dr. Whitelaw. Once the judge allowed additional medical evidence sufficient to support a contrary conclusion, the impartial opinion lost its prima facie effect, and the judge was free to adopt the opinion of another medical expert. See Scheffler's Case, supra, at 258-259. And, contrary to the insurer's suggestion, the functional capacity examination performed by a physical therapist, even though recommended by the impartial examiner, would have no prima facie effect.

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee in the amount of $1,613.55.[7]

So ordered.

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Carol Calliotte
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: ***December 29, 2016***

[7] We deny the employee's request for an enhanced attorney's fee, filed on March 15, 2016, after the filing of the briefs, and opposed by the insurer in writing on March 31, 2016. We do not think either the complexity of the issues, or the effort expended by counsel, warrant an enhanced fee. See G. L. c. 152, § 13A(6).