COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026102-11**

Gerald Downing	Employee
Davenport Realty Trust	Employer
Zurich American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Harpin and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Juliane Soprano, Esq., for the employee
Donald E. Hamill, Jr., Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee §§ 13, 30, 34 and 34A benefits. We affirm.

On August 31, 2011, the employee sustained a work-related L4-5 disc herniation. (Dec. 5-8, 10.) Sixty-three years old at the time of the hearing, the employee had worked at "unskilled to semi-skilled employment in physically demanding occupations. . . ." (Dec. 9.)

At hearing, the insurer sought modification or discontinuance of the employee's § 34 benefits, and he claimed entitlement to § 34A benefits from November 1, 2012, forward. (Dec. 3.) The insurer raised, inter alia, the defenses of causation and extent of disability.

Pursuant to § 11A, the employee was examined by Dr. Scott Harris. His report was entered into evidence as Exhibit 1. (Dec. 2.) On complexity grounds, the judge allowed the parties to submit additional medical evidence; both parties did so.[1] (Dec. 2, 4.)

[1] The employee submitted the medical records and reports of Dr. William Fenney; the insurer submitted the medical reports of Dr. Michael Murphy. (Dec. 2.)

The judge credited the employee's testimony that "he could do heavy work, including lifting up to 200 pounds, prior to his injury but now he would avoid lifting even as much as ten pounds." (Dec. 5.) She also found the employee's pain disturbed his sleep. Id. The judge adopted much, but not all, of Dr. Harris's opinion as contained in Exhibit 1. Specifically, the judge found, inter alia, a direct causal relationship between the employee's work injury and his lumbar disc herniation, and that the employee's injury was the cause of his complaints, disability and need for treatment. (Dec. 6.) The judge did not adopt Dr. Harris's opinion respecting the extent of the employee's disability. Rather, she adopted Dr. Fenney's opinion that the employee was totally disabled from work. (Dec. 7.) The judge also credited the testimony of Diane Durr, a vocational rehabilitation expert, who opined the employee lacked the capacity to earn wages as a result of his work-related injury. (Dec. 9.) Accordingly, the judge awarded the employee § 34 benefits from September 1, 2011 to October 31, 2012, and § 34A benefits thereafter. (Dec. 11.)

The insurer raises two issues on appeal. First, it argues the judge erred by adopting Dr. Fenney's disability opinion because it was based on "an ambiguous opinion on causal relationship." (Ins. br. 1.) We disagree. As the insurer concedes, Dr. Fenney opined the employee's August 31, 2011 injury was the major cause of his back condition. (Ins. br. 3-4.) Thus, the foundation for Dr. Fenney's disability opinion is consistent with Dr. Harris's. It is a judge's prerogative to adopt one physician's opinion on causation and another physician's opinion on disability. Clarici's Case, 340 Mass. 495, 497 (1960)(judges are "free to accept such portions of [medical] testimony" as they deem credible); compare Sourdiffe v. Univ. of Massachusetts/Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(adoption of irreconcilable medical opinions requires recommittal). There was no error.

Lastly, the insurer argues the judge erred by rejecting, without a stated rationale, the "impartial medical examiner's opinion on the extent of disability

when she adopted all the other opinions of the impartial medical examiner." (Ins. br. 4.) We disagree. Again, the judge was free to adopt none, some, or all, of Dr. Harris's opinions. Clarici, supra. Where, as here, additional medical evidence is admitted, the judge is free to adopt the medical opinions of physicians other than those of the impartial medical examiner. Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997)(and cases cited); Page v. O.P. Viau & Sons, 14 Mass. Workers' Comp. Rep. 143, 147 (2000)(and cases cited). Furthermore, nothing in the statute, regulations, or case law, obligates a judge, as factfinder, to articulate a reason for adopting one doctor's opinion over another. See Clarici, supra; Coggin, supra.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's attorney a fee of $1,596.24, plus necessary expenses.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **September 30, 2015**