COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011307-09**

Jane Sullivan	Employee
Centrus Premier Home Care	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Koziol)

The case was heard by Administrative Judge Maher.

APPEARANCES
Michael O. Smith, Esq., for the employee
Diane Cole Laine, Esq., for the insurer

HARPIN, J. The insurer appeals the decision filed after our prior decision recommitting the matter for further findings. See Sullivan v. Centrus Premier Home Care, 26 Mass. Workers' Comp. Rep. 301 (2012). We affirm the recommitted decision.

The employee sustained injuries to her back, knee, and hip, in a slip and fall incident while visiting a client in the course of her employment as a visiting nurse. Id. at 302. We recommitted the original decision to allow the insurer the opportunity to take medical depositions in response to the judge's late ruling admitting the employee's medical records. On recommittal, the insurer opted to depose the treating surgeon, Dr. Stephen Johnson, who had performed a spinal fusion. (Dec. 5, 8.)

In his second decision the judge credited the employee's testimony regarding her fall at work and her complaints of pain and physical restrictions. (Dec. 8-9, 12, 13.) The judge adopted the medical opinions of the § 11A examiner, Dr. Peter Anas, (Dec. 10), who opined the employee sustained a traumatic strain to her lumbar spine on August 16, 2005, superimposed on degenerative spondylolisthesis at L5-S1 and degenerative changes at L3-4 and

L4-5. The doctor also felt this combination of conditions led to the need for surgery, and that the underlying pre-existing condition was responsible for fifty percent of her condition, with the fall responsible for the remaining fifty percent. The examiner also opined the treatment to date was reasonable, but that the employee's peripheral joint disease, peripheral arthralgia, neck pain and right knee pain were unrelated to the August 16, 2005 work injury. (Dec. 10; Ex. 1.) The judge also adopted the opinions of Dr. Johnson that the employee has been totally disabled, and continues to be so, since the surgery, and that the surgery itself was necessitated by the work injury. (Dec. 11-12.)

The judge found the employee sustained a work-related injury to her back that ultimately required surgery. Based on the medical evidence and the employee's credited testimony as to pain and physical limitations, the judge further found the employee was temporarily and totally incapacitated from gainful employment. (Dec. 13.) Accordingly, she was again awarded § 34 benefits, as well as §§ 13 and 30 benefits for related medical services. (Dec. 14-15.)

The insurer raises several issues on appeal. First, it asserts its objections to the employee's leading questions during Dr. Johnson's deposition were erroneously overruled. (Insurer br. 1, 5-7.) We see no error in the judge's rulings. "The decision whether to allow leading questions [is] 'left for the most part to the wisdom and discretion of the trial judge.' " Commonwealth v. Flynn, 362 Mass. 455, 467 (1972)(citations omitted); see also Flanagan and Carroll, Trial Practice § 11.9 (2d ed. 2005)(whether counsel will be permitted to put leading questions on direct examination is a matter for the trial judge's discretion and rarely reversed on appeal). Additionally, the judge had the duty to allocate varying degrees of weight to the response to any leading question to minimize, if not completely eliminate, any prejudicial effect. Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007)(determination of the weight to be given evidence is the exclusive function of the administrative judge).

Next, the insurer claims the requirements of §1 (7A)[1] were not met with respect to any disability after September 23, 2009, the date of the § 11A examination. (Insurer br. 1, 7-8.) This argument is without merit. Although Dr. Anas, the impartial physician, stated the employee's disability was fifty percent related to the underlying pre-existing degenerative conditions, he also opined that the remaining fifty percent was related to the fall at work. (Dec. 10; Ex. 1.) A fifty percent causal relationship between a work injury and an ongoing disability satisfies the "a major" requirement of § 1 (7A) as a matter of law. Goodwin's Case, 82 Mass.App.Ct. 642, 647 (2012)("a major" cause need not be more than fifty percent); Durfee v. Baldwin Crane and Equip., 20 Mass. Workers' Comp. Rep. 163, 165 (2006). In fact, a smaller percentage is capable of satisfying the "a major cause" standard. Lesione v. Corcoran Mgt. Co., 22 Mass. Workers' Comp. Rep. 153, 159 (2008)(medical opinion that work injury was forty percent of cause satisfied "a major cause" standard); Abad v. Stacy's PITA Chips Co., 25 Mass. Workers' Comp. Rep. 173, 175 n.3 (2011)(in the proper circumstances a twenty percent contribution of a work injury to the disabling condition could satisfy the "a major" standard).

Finally, the insurer contends the judge erroneously adopted the disability opinion of the treating surgeon, alleging the doctor considered unrelated conditions in finding the employee totally disabled. (Insurer br. 1, 8-10.) The insurer is correct that, in his deposition testimony, Dr. Johnson stated the employee's causally related spondylolisthesis and stenosis, taken in isolation and post-operatively, did not result in present physical restrictions with regard to her back, nor did the fusion, "a priori," prevent her from working as a nurse. (Dep. 61-

[1] G.L. c. 152, § 1(7A), states 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.

62, 97.) The doctor also acknowledged that the employee's peripheral neuropathy, while unrelated to the industrial accident, (Dep. 93), was nevertheless a "large factor" in her present disability. (Dep. 61.) However, the doctor later clarified his medical opinion: "She had the surgery because of the [workplace] accident, the accident caused this, and now it's just a line of progression." (Dep. 96.) He also stated that: "structurally [the employee] was sound enough that she could work . . . but it's not - - okay. It just needs to be clear that I recognize that there's more to it than just that structural issue." (Dep. 97.) He stated the surgery was not a failure: "It accomplished what it was supposed to do. It just didn't accomplish relief of her pain." (Dep. 99.) When asked if the employee could work, taking into consideration her subjective back pain, the doctor responded, "No." (Dep. 99.) Thus, the doctor clearly stated that the back pain, related to the accident, would interfere with her ability to work. Perangelo's Case, 277 Mass. 59, 64 (1931)("[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying").

The judge's conclusion that the employee's current disability was causally related to the accident was supported by his finding that the employee's subjective complaints of pain and physical limitations were credible, and by his adoption of Dr. Johnson's opinion relating that pain to the industrial accident. Caramiello v. BSI Bureau of Spec. Invest., 21 Mass. Workers' Comp. Rep. 321, 326 (2007) (subjective complaints of pain, if supported by some medical opinion, can be a basis to award benefits). Accordingly, the judge did not err by relying upon Dr. Johnson's medical opinion to determine the extent of the employee's disability.

The decision of the administrative judge is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,574.87.

So ordered.

_____
William C. Harpin
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

Filed: **September 8, 2014**