**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 026669-05**

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| Jean Celko | Employee |
| P. J. Overhead Door, Inc. | Employer |
| AIM Mutual Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Maher.

**APPEARANCES**
Rickie T. Weiner, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Robert J. Riccio, Esq., for the insurer at hearing
Holly B. Anderson, Esq., and Peter P. Harney, Esq., for the insurer on appeal

**HORAN, J.** The insurer appeals from a decision denying the employee's claim for §§ 34 and 34A benefits, but awarding him §§ 13 and 30 benefits for medical treatment and, consequently, an attorney's fee pursuant to § 13A. We affirm.

On August 15, 2005, the employee injured his back at work. Two prior hearing decisions awarded the employee § 35 benefits,[1] following his receipt of § 34 benefits for a closed period. The employee, having exhausted the statutory maximum number of weeks typically payable under § 35, claimed incapacity benefits under

[1] The first hearing decision, filed by a different administrative judge on May 25, 2007, awarded the employee ongoing § 35 benefits from October 5, 2005. The insurer appealed that decision, and we recommitted the case for the judge to make a finding whether the employee suffered a "combination" injury. See Celko v. P.J. Overhead Door, Inc., 23 Mass. Workers' Comp. Rep. 7 (2009). The insurer's appeal of our decision was dismissed by the Appeals Court as interlocutory. See Celko's Case, Docket No. 09-P-514 (Memorandum and Order Pursuant to Rule 1:28)(March 4, 2010). In his second hearing decision, filed on June 7, 2010, the prior judge found the employee did *not* suffer a "combination" injury. The insurer appealed the second hearing decision and we summarily affirmed it on March 16, 2011. The insurer appealed our decision, which was affirmed. Celko's Case, 81 Mass. App. Ct. 1111 (2012)(Memorandum and Order Pursuant to Rule 1:28).

§§ 34 and 34A, and §§ 13 and 30 medical benefits. The employee's claims were denied at conference, and he appealed.

Pursuant to § 11A, the employee was examined by Dr. Marshall Katzen. In his September 13, 2011 report of that examination, Dr. Katzen opined that "although [the employee] had degenerative changes prior to his work injury . . . this [industrial injury] was the precipitating cause of his current condition and the most proximate cause." (Stat. Ex. 1.)

At the hearing, the insurer raised § 1(7A) in defense of the employee's claims. (Dec. 3, Tr. 4, 7-8.) Although in his decision the judge noted that the insurer also denied the employee's "entitlement to § 13 & § 30 benefits," (Dec. 3), our review of the board file indicates that it did not.[2] However, when asked to give an offer of proof in support of its § 1(7A) defense, the insurer, relying on Dr. Katzen's opinion, argued that

> [t]he employee did have an acknowledged preexisting, non-work-related degenerative condition which did combine with the alleged work injury . . . to prolong disability *and/or need for treatment*.

(Tr. 7; emphasis added.) Thus, the insurer sought to impose upon the employee the burden of demonstrating that his compensable injury remained "a major . . . cause of [his] disability or need for treatment." G. L. c. 152, § 1(7A).

The employee testified, without objection, that prior to late December, 2011, or early January, 2012, he received treatment for his back condition at a pain clinic, where his doctor had prescribed methadone. (Tr. 17-18, 40-41.) His methadone treatment ceased when the insurer "stopped paying my pain clinic doctor, and he wouldn't see me anymore because he wasn't getting paid." (Tr. 41.) Medicare informed him it would no longer cover his treatment, including his medication, "because it was a workers' comp[ensation] issue." (Tr. 42.) Thereafter, he resorted to

[2] The insurer's hearing sheet did not list this defense, nor was it raised at the hearing. We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

"over-the-counter medications, heat pads, [and] basic hot/cold packs," which were unhelpful. (Tr. 18-19.)

In his decision, the judge "took notice of and adopt[ed]" the prior judge's finding that the employee had not suffered a § 1(7A) "combination injury." (Dec. 5.) While he denied the employee's claim for incapacity benefits, the judge adopted parts of Dr. Katzen's medical opinions, and credited the employee's testimony to conclude that his "medical treatment, including the medication, methadone, for pain [was] reasonable and appropriate." (Dec. 9.) Accordingly, he ordered the insurer to pay "all reasonable and related medical expenses . . . including methadone for pain." Id. He then ordered the insurer to "pay Employee's Counsel a legal fee in the amount of $5,311.62, plus his necessary expenses pursuant to Section 13A(5)." Id.

Upon receipt of the hearing decision, in an e-mail to the judge, insurer's counsel requested an amended decision, objecting to the attorney's fee award on the basis that the employee had not prevailed[3] on his claim for medical benefits:

> At no point in the current litigation did the Insurer ever raise a defense against the payment of medical benefits pursuant to Section 13 and 30. . . .
> On page 3 of the Decision, under Insurer/Defenses/Issues, deny entitlement to Section 13 & Section 30 benefits is listed erroneously. . . .
> Since the Employee's claim for [incapacity benefits] was denied and dismissed, and no other claims were at issue, the Employee did not prevail. As such, no Hearing fee should have been awarded.

(Ins. August 14, 2012 e-mail.) The judge replied, "the employee prevailed on the Section 1(7A) defense which arguably affects any/most potential other benefits . . . including . . . medical treatment. Therefore his attorney is eligible for a fee." (Judge's August 14, 2012 e-mail.) The judge did not amend the hearing decision.

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[3] General Laws c. 152, § 13(A)(5), provides, in pertinent part:

> Whenever an insurer . . . contests a claim for benefits and then . . . the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney. . . .

On appeal, the insurer raises three issues. First, it argues the judge erred by dismissing its § 1(7A) defense. We disagree. The judge concluded correctly that the issue of whether the employee had suffered a combination injury had been fully litigated, and finally decided, previously. (Dec. 5; footnote 1, supra.) That the employee's industrial injury was not a combination injury was the law of the case. Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. ___ (March 1, 2013), and cases cited;[4] compare Spencer-Cotter v. North Shore Medical Center, 25 Mass. Workers' Comp. Rep. 315 (2011)(insurer permitted to raise issue of combination injury in defense of claim for further incapacity benefits where no prior § 1[7A] adjudication). There was no error.

Next, the insurer argues the judge expanded the controversy presented by the parties, without notice, by addressing the employee's claim for the payment of his methadone treatment. (Ins. br. 19.) The insurer posits that because it did not deny the employee's claim for §§13 and 30 benefits, the judge erred when he ordered the insurer to pay for the methadone treatment, and awarded attorney's fees. The insurer is correct that it did not specifically deny the employee's claim for medical benefits.[5] But it *did* raise § 1(7A) in defense of *both* the employee's incapacity *and* medical claims. It made that clear in its § 1(7A) offer of proof at the hearing. (See

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[4] Whether the insurer would have chosen a different trial tactic with the benefit of Grant is irrelevant. By raising § 1(7A), and causation in general, the insurer actively pursued issues with the potential to defeat the employee's entitlement to ongoing medical benefits.

[5] General Laws c. 152, § 13, requires insurers to pay for medical services for compensable injuries at the rates set by the division of health care finance and policy under G. L. c. 118G. A General Laws c. 152, § 30, defense presents a challenge to the employee's entitlement to "adequate and reasonable health care services, and medicines if needed" for the treatment of an industrial injury. Causal relationship is a distinct defense. Therefore, the insurer was free to defend the claim for the payment of the proposed medical treatment on causal relationship grounds without questioning whether that treatment was "adequate and reasonable" under § 30. Once the judge realized the insurer did not specifically raise § 30 in defense of the claim, *and* awarded benefits, he determined the employee had "prevailed" on causal relationship grounds; consequently, he awarded an attorney's fee under § 13A(5). (Judge's August 14, 2012 e-mail.)

discussion, supra; Tr. 7.) Nor can the insurer credibly assert it was surprised by the employee's claim[6] for payment of his methadone treatment.[7] As the insurer notes in its brief to this board:

> Questions to Dr. Katzen regarding the reason for the Employee's methadone treatment and the source of the pain it treated were relevant to the Insurer's § 1(7A) defense, supporting the argument

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[6] On the facts of this case, we reject the insurer's argument that the employee's failure to comply with 452 Code Mass. Regs. § 1.07(2)(c)(1), prohibited the judge from ordering the insurer to pay for the employee's methadone treatment, and an attorney's fee. The pertinent part of that regulation states:

> Claims for payment for adequate and reasonable health care services shall, *where applicable*, be accompanied by the following:
>
> a. the *dates of service*;
> b. the type of treatment or service *and the itemized costs*
> c. office notes, hospital records, or a statement from the attending physician or medical vendor that such visit, testing, prescription drug, therapy, or ancillary medical service device or aid *was* reasonable, necessary, and causally related to the injury for which the employee is eligible for benefits.

(emphases added.) The regulation was not intended to apply to a situation, where, as here, the employee has been denied medical treatment outright. Rather, it concerns contested claims for the payment of medical treatment received. In any event, we note the insurer did not move to dismiss, or otherwise object to, the employee's claim on the basis of any regulatory non-compliance.

[7] While it is true the insurer did not specifically deny the employee's claim for medical treatment, it is equally true that the insurer was not paying for it. The insurer cannot have it both ways. Where "payment for medical services . . . [is] specifically disputed by the insurer and the matter [is] resolved in favor of the employee, the employee has 'prevailed' and is thus entitled to an award of attorney's fees." Spurr v. Crosby's Markets, Inc., 12 Mass. Workers' Comp. Rep. 347, 349 (1998). In this case, as in Spurr, there was a "real medical dispute" at the hearing. Id. The fact that the employee did not introduce an unpaid medical bill into evidence is irrelevant; there was none. Had the insurer denied the employee's §§ 13 and 30 claim, the employee would have been obligated to introduce evidence that his proposed medical treatment was "adequate and reasonable." See n.4, supra; Sponatski's Case, 220 Mass. 526, 527-528 (1915)(burden of proof rests on claimant to prove facts sufficient to warrant payment of compensation). However, the insurer opted to defend the claim only on causal relationship/§ 1(7A) grounds, thereby conceding the adequacy and reasonableness of the medical treatment proposed. Ginley's Case, 244 Mass. 346, 348 (1923)(if not conceded by the insurer, employee has burden of proof on all elements required to warrant an award of compensation).

> that the Employee's work injury did not *remain* [emphasis in original] a major but not necessarily predominant cause for his disability *and/or need for treatment.* [emphasis added.]

(Ins. br. 20.) In fact, Dr. Katzen attributed the need for the employee's methadone treatment to his work-related back injury and pain. (Dep. 34-35.) He did not, as the insurer maintains, "never opine" on the issue. (Ins. br. 22.) The judge found Dr. Katzen's opinion, as a § 11A examiner, to be adequate. (Dec. 3.) The judge also adopted his opinions, and credited the employee's testimony, to conclude that his methadone treatment was "reasonable and appropriate." (Dec. 9.) Because the judge found Dr. Katzen's opinion adequate, he was not compelled to adopt other medical evidence respecting the causal link between the employee's industrial injury, his resulting pain, and his need for methadone treatment.[8] As the record supports the judge's findings, we do not disturb them.

Finally, the insurer maintains that, "[e]ven if, arguendo, the Employee . . . defeated the Insurer's § 1(7A) defense . . . the fee award would fail scrutiny." (Ins. br. 24.) The insurer is correct that, 1) only the employee appealed the conference order and, 2) in this circumstance attorney's fees are awarded only when the employee "prevails" at the hearing. See footnote 3, supra; 452 Code Mass. Regs. § 1.19(4).[9] But, contrary to what the insurer argues, under the statutory and

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[8] The only other medical evidence introduced was submitted for the so-called "gap" period prior to the date of the impartial medical examination. The judge listed this evidence, but chose not to adopt it. (Dec. 2.)

[9] This regulation provides, in pertinent part:

> In any proceeding before the Division of Dispute Resolution, the claimant shall be deemed to have prevailed, for the purposes of M.G.L. c. 152, § 13A, when compensation is ordered or is not discontinued at such proceeding, except where the claimant has appealed a conference order for which there is no pending appeal from the insurer and the decision of the administrative judge does *not* direct *a payment of weekly or other compensation benefits exceeding that being paid by the insurer prior to such decision.* . . .

(Emphases added.)

regulatory scheme as pertains here, the employee *did* prevail at the hearing. His appeal of the conference order resulted in an award of "other compensation"[10] which exceeded what was "being paid by the insurer prior to [the hearing] decision." 452 Code Mass. Regs. § 1.19(4); compare Cavanaugh v. Massad Movers, 8 Mass. Workers' Comp. Rep. 169 (1994)("employee did not prevail at hearing because the award of continuing benefits under §§ 13 and 30 did not exceed benefits being paid by the insurer prior to the decision").

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is ordered to pay the employee an attorney's fee in the amount of $ 1,563.91.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **July 30, 2013**

[10] Medical benefits clearly qualify as "other compensation" payable to, or on behalf of, the employee. Boardman's Case, 365 Mass. 185, 193 (1974).