COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014942-12**

John C. Barry	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Koziol)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Alan H. King, Esq., for the employee
John T. Walsh, Esq., for the self-insurer

CALLIOTTE J. The self-insurer appeals from a decision awarding the employee ongoing § 34 benefits, arguing that the employee has failed to prove his disability is causally related to the injury he suffered at work. For the following reasons, we affirm the decision.

The employee, a sixty-seven year-old senior shuttle driver, was injured on June 25, 2012, when the van he was driving in the course of his employment was struck by another vehicle and hit a tree. (Dec. 3.) He was taken to Boston Medical Center, complaining of pain in his neck, back and left thigh. A day later, he saw his primary care physician, Dr. Jan Dohlman. (Tr. 14.) The day after that, he followed up with the Boston Medical Center Occupational Medicine Department, where physical therapy was recommended. Because he experienced difficulty breathing during physical therapy, he was twice admitted to Boston Medical Center, first for drainage of fluid around his lungs, and later for treatment of pneumonia. Dr. Roger Kinnard, a neurologist with whom he consulted before and after his hospitalizations, diagnosed cervical and lumbar sprains, and recommended the employee continue physical therapy. (Dec. 4, 6-7; Stat. Ex. 1.) The employee has not returned to work. (See Tr. 25-26, 28, 30-31.)

The self-insurer paid § 34 benefits without prejudice from June 26, 2012, through September 29, 2012,[1] after which the employee filed a claim for further weekly and medical benefits. Following a conference, a judge awarded ongoing § 34 benefits. (Dec. 2.) The self-insurer appealed to a hearing, at which it stipulated that the employee sustained a work-related injury, (Dec. 3), but contested liability for a hip injury. (Tr. 34.) The self-insurer also raised the issues of disability and extent thereof, and causal relationship, including § 1(7A).[2] (Dec. 2.) The sole medical evidence at hearing was the May 15, 2013 § 11A report of Dr. Daniel Bienkowski. (Dec. 4, 6.)

Dr. Bienkowski diagnosed the employee with cervical and lumbar sprains/strains, pre-existing lumbar disc disease, and a history of post-traumatic pleural effusion.[3] He causally related the cervical and lumbar sprains to the work incident, but opined that only the cervical sprain had resolved. (Stat. Ex. 1.) He continued:

> 8.4 Strains of the spine generally take 6-12 weeks to recover. The reason for the prolonged disability is not clear. The pre-existing lumbar diagnosis is not known. . . .
>
> 8.5 The patient is disabled. *The disability at present is total*. The duration is not known.
>
> 8.6 The patient is not at an endpoint

(Stat. Ex. 1; emphasis added.)

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[1] We take judicial notice of documents in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] 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.

[3] Dr. Bienkowski did not indicate what the trauma was that caused the pleural effusion.

Crediting the employee's testimony, the judge found that he continues to experience back pain, for which he takes Advil and uses a Lidoderm patch, and that he has difficulty getting in and out of a car and navigating stairs. (Dec. 6-7.) The judge adopted Dr. Bienkowski's opinion that the employee is temporarily totally disabled, (Dec. 7), and that his symptoms are causally related to his June 25, 2012 injury.[4] (Dec. 8.) Finding the employee incapacitated from meaningful work, he ordered the self-insurer to pay ongoing § 34 benefits. (Dec. 9.)

On appeal, the self-insurer argues that Dr. Bienkowski's report does not satisfy the employee's burden of proving his total disability is causally related to the work injury. It acknowledges that Dr. Bienkowski causally related the lumbar sprain to the industrial accident, but claims the impartial physician did not indicate the cause of the employee's ongoing disability. In support of its position, the self-insurer points to Dr. Bienkowski's statement that spine strains generally take six to twelve weeks to resolve, and that the reason for the employee's prolonged disability is unclear. (Self-insurer br. 6-7.)

"The essential facts [of an employee's claim] need not necessarily be proved by direct evidence but may be established by reasonable inferences from the facts shown to exist." Sawyer's Case, 315 Mass. 75, 76 (1943); Montes v. Liberty Constr. Servs., 27 Mass. Workers' Comp. Rep. 83, 85 (2013). Thus, "[w]e will not disturb the judge's findings which are 'reasonably deduced from the evidence and the rational inferences of which it was susceptible.' " Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007), quoting from Chapman's Case, 321 Mass. 705, 707 (1947).

Here, because no contradictory medical evidence was admitted, Dr. Bienkowski's report was "prima facie evidence of the matters contained therein." G. L. c. 152,

[4] Dr. Bienkowski noted the employee was discharged from the service with a partial disability for a back problem in the 1970's, but did not offer an opinion as to whether it played a role in the employee's current disability. (Stat. Ex. 1.) See G. L. c. 152, § 37A. The judge found the employee currently has a forty per cent disability rating from the Veterans Administration for a compression fracture injury to his low back which occurred while he was in the Air Force, but made no findings regarding the significance, if any, of this finding. (Dec. 6.)

§ 11A(2). Dr. Bienkowski clearly opined the employee was totally disabled, (Stat. Ex. 1), and the judge so found, based on the § 11A report, as well as the employee's credible testimony. (Dec. 6.) Dr. Bienkowski causally related the employee's lumbar and cervical sprains to the work injury, opining that only the cervical sprain had resolved. The judge reasonably inferred that the employee's lumbar sprain had not resolved and continued to cause his symptoms. (Dec. 8.) Under the applicable simple causation standard, this is sufficient to support a finding of causal relationship.[5]

Dr. Bienkowski's statements that strains of the spine generally take six to twelve weeks to resolve, and that the reason for the employee's prolonged disability is not clear, do not affect this conclusion. There is no requirement that the judge draw the inference espoused by the self-insurer that the lumbar sprain bore no relation to the employee's current disability. The judge could reasonably conclude that Dr. Bienkowski was simply unclear on why the employee had not improved in the expected time frame, and that the unresolved lumbar sprain continued to contribute to his disability. Cf. Studzinski v. FM Kuzmeskus, Inc., 14 Mass. Workers' Comp. Rep. 421, 424-425 (2000)(statement by impartial physician that work strain would have resolved within six to eight weeks if the employee did not have pre-existing condition was too inconclusive to support finding employee's condition returned to baseline eight weeks after injury). Accordingly, because the judge's inferences were reasonable, we affirm the decision.[6]

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[5] The simple "but for" causation standard requires only that the employee prove the work injury to his lumbar spine was one of the contributing factors in causing his disability. See Nason, Koziol and Wall, Workers' Compensation §§ 9.3, 9.7 (3rd ed. 2003); Colon-Torres v. Joseph's Pasta, 27 Mass. Workers' Comp. Rep. 61, 64-65 (2013). Although the self-insurer raised the affirmative defense of § 1(7A) at hearing, it does not argue on appeal that the heightened "a major cause standard" was applicable, or that the judge erred by failing to address § 1(7A). See 452 Code Mass. Regs. § 1.15(4)(a)(3)("The Reviewing Board need not decide questions or issues not argued in the brief"); see also Castillo v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 351, 355 n.8 (2010). In any case, Dr. Bienkowski did not offer an opinion which would have satisfied the self-insurer's burden of production on the issue of "combination" under § 1(7A). See MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009).

[6] Given our disposition of this case, we need not address the employee's argument that an agreement executed pursuant to G. L. c. 152, § 15, between the employee, the self-insurer and

Pursuant to § 13A(6), we order the self-insurer to pay employee's counsel a fee in the amount of $1,596.24.

So ordered.

Carol Calliotte
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***October 22, 2014***

the third party motorist's insurer, estops the self-insurer from denying that the employee's ongoing disability and need for treatment are causally related to his work injury.