COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018783-09**

John Clement	Employee
Berkshire Health Care Systems, Inc.	Employer
Berkshire Health Systems, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
J. Norman O'Connor, Jr., Esq., for the employee
Frederica H. McCarthy, Esq., for the self-insurer

HARPIN, J. The self-insurer appeals from a decision awarding the employee §34A permanent and total incapacity benefits. We affirm.

The employee was sixty-five years old at the time of hearing, with a high school education. He had worked as a mail clerk, store manager, and, for the last twenty-five years, as a maintenance employee performing mostly carpentry work. He injured his right major shoulder on July 21, 2009, while helping a technician install an air conditioning unit. (Dec. 3.)

The only issues in dispute at the hearing were disability and extent of incapacity. (Dec. 2.) The report of the § 11A impartial medical examiner, Dr. Charles Kenny, was admitted into evidence and found to be adequate. (Dec. 2; Ex. 4.) The judge adopted Dr. Kenny's opinion that the employee had a permanent partial disability, with restrictions of occasional lifting up to thirty-five pounds, frequent lifting of fifteen pounds, and constant lifting of up to seven pounds, with no work over shoulder level and no repetitive work above waist level. (Dec. 4.) The judge also credited the employee's subjective complaints of pain in his right arm upon reaching for anything, of increased pain with further activity, and difficulty getting dressed. (Dec. 3, 4.) Taking into account the

employee's medical restrictions, his credited complaints of pain, his advanced age (sixty-six at the time of the decision), and an "obvious visible handicap," the judge found the employee to be permanently and totally incapacitated. (Dec. 4.)

The self-insurer argues the judge's award of permanent and total incapacity benefits was arbitrary and capricious, because the judge based his decision upon his observation of the employee's failure to use his right arm at the hearing. (Self-Ins. br. 4.) The judge found, "[h]e can subjectively lift up to 30 lbs. to waist level, however as noted by the finder of fact, the employee could not lift his right arm when being sworn in. His right arm is nearly useless." (Dec. 3) The self-insurer asserts that as the judge did not make this observation part of the record, he violated the self-insurer's due process rights. (Self-Ins. br. 6.)

While the more prudent course would have been for the judge to note on the record his observations about matters witnessed by him in the courtroom, there was no error where he did not rely solely on those observations. Mastrangelo v. Ametek Aerospace, 7 Mass. Workers' Comp. Rep. 184, 188 (1993). The judge specifically credited the employee's testimony that if he reached for anything he experienced a jolt of pain, and thus avoided using his right arm at all. (Dec. 3.) This was well within the judge's fact-finding authority. Killam's Case, 83 Mass. App. Ct. 1102 (2012)(Memorandum and Order pursuant to Rule 1:28); Lastih v. Erickson Retirement Community, 28 Mass. Workers' Comp. Rep. ___ (November 4, 2014); Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, 13 (2013)(a judge may credit an employee's subjective complaints of pain).

The self-insurer also argues that the judge's adoption of the impartial physician's opinion of a partial disability demonstrated a lack of evidentiary support for the finding of permanent and total disability. (Self-Ins. br. 4-5.) This argument is contrary to the well-known rule that a judge may credit an employee's complaints of pain to award total incapacity benefits, even if the medical evidence supports only a partial disability. Corazzini v. Diamond Chevrolet, 28 Mass. Workers' Comp. Rep. 49, 52 (2014); Brown v. Northeast Underpinnings, Inc., 22

Mass. Workers' Comp. Rep. 329, 331(2009), aff'd sub nom. Brown's Case, 76 Mass. App. Ct. 1105 (2009)(Memorandum and Order pursuant to Rule 1:28); Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 67 (1990) (employee's credited complaint of lower leg pain proscribed sedentary work, even though the medical opinion found a loss of function that would have allowed such work).

As a judge may give an employee's credited complaints of pain decisive weight in an incapacity analysis, we cannot say that the decision was arbitrary or capricious. Dalbec's Case, 69 Mass. App. Ct. 306, 314 (2007); Degrandis v. Mass. Gen. Hosp., 28 Mass. Workers' Comp. Rep. 111, 113 (2014).

We therefore affirm the judge's decision. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,596.24.

So ordered.

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William C. Harpin
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **November 20, 2014**