COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030720-06**

John Erickson	Employee
Worcester Manufacturing	Employer
State National Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Theresa Brooks Benoit, Esq., for the employee at hearing
Charles E. Berg, Esq., and James N. Ellis, Esq., for the employee on appeal
Joseph J. Durant, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing his claim for further incapacity benefits. We affirm.

The facts and procedural history pertinent to the issues raised on appeal are as follow. On October 3, 2006, the employee fell six feet onto cement and steel beams at work, injuring his back. (Dec. I, 5.)[1] The insurer paid the employee weekly incapacity benefits on a without prejudice basis until March, 2007. The employee then filed claims for additional benefits and penalties.[2] On September 18, 2007, a conference on the employee's claim was held, and an order issued requiring the

[1] The first hearing decision, hereinafter "Dec. I," was filed on August 24, 2009; the second hearing decision, the subject of this appeal, is hereinafter referenced as "Dec. II." References to the January 28, 2011 first day of the second hearing are designated, "Tr. I," and to the March 10, 2011 second day, "Tr. II."

[2] On March 15, 2007, the employee filed a claim for "Section[] 8 – (Illegal discontinuance)." On May 17, 2007, he filed a second claim for §§ 34 and 35 benefits from October 3, 2006 to date and continuing, and for "Sections 7 & 8." We take judicial notice of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

insurer to pay § 35 benefits from March 7, 2007, to date and continuing.[3] Both parties appealed the conference order, which resulted in the first hearing decision filed on August 24, 2009.

In the first hearing decision, the judge found the employee "was preparing to go back to work" in March, 2007, but instead chose to be laid off "and collect[] six months of unemployment benefits." (Dec. I, 6.) She also found that,

> the employee suffered from no lasting disability as a result of the October 3, 2006 . . . [industrial] accident and, therefore . . . the employee was fit to return to full duty work as of December 1, 2006.

(Dec. I, 7.) As the employee failed to advance his §§ 7 and 8 claims at hearing, (Id. at 3; see footnote 2, supra), the judge did not address them. The employee appealed the first hearing decision, which was affirmed by this board and the Appeals Court. See Erickson's Case, 80 Mass. App. Ct. 1116 (2011)(Memorandum and Order Pursuant to Rule 1:28).

On September 9, 2009, the employee filed a claim seeking § 34 benefits, once again from October 3, 2006, to date and continuing, based on two theories. First, the employee alleged he suffered an emotional injury owing to his physical injury.[4] (Dec. II, 4, 13 n.6; Tr. I, 23-26.) Second, he alleged entitlement to benefits based upon the presumption contained in G. L. c. 152, § 8(2).[5] The insurer denied these claims raising, inter alia, the defense of res judicata.

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[3] Our review of the board file indicates that the conference order authorized the insurer to credit itself for unemployment benefits paid to the employee during the time period awarded. See General Laws c. 152, § 36B.

[4] At the second hearing, the employee also argued that the stress associated with his psychiatric injury, which symptoms were first manifest in March, 2007, aggravated his pre-existing psoriasis. (Tr. I, 8, 22.) The insurer objected, arguing it had no prior notice of such a claim. (Tr. I, 32.) In view of our decision, we need not determine if it was proper to allow the employee to advance this aspect of his claim.

[5] General Laws c. 152, § 8(2), provides, in pertinent part:

> For purposes of clause (d) of this section, any termination of an employee within one year of resumption of work with his prior employer will be presumed to be for the

In her decision, the judge found that the employee's psychiatric injury claim "is built upon a factual foundation that I do not find to be true." (Dec. II, 13.) The judge also adopted the opinion of Dr. Michael Rater that the employee did not have a psychiatric condition related to his work. (Dec. II, 11.) Although these findings, standing alone, defeated the employee's claim for the treatment of his psoriasis,[6] the judge also found that "the employee failed to present persuasive evidence that his psoriasis was causally connected to his work accident. . . ." (Dec. II, 15.)

The judge also rejected the employee's § 8(2) claim by finding that, contrary to the employee's assertion, he was not terminated in March, 2007, but had asked to be laid off rather than work for the individual who would have been his supervisor. (Dec. II, 16; Tr. II, 28, 30.) Consequently, the judge denied and dismissed the employee's claims. (Dec. II, 17.)

> reason that the employee was physically or mentally incapable of performing the duties required by the job or that the job was unsuitable for the employee, unless the insurer demonstrates the contrary by a preponderance of evidence at a subsequent proceeding.

General Laws c. 152, § 8(2)(d), provides, in pertinent part:

> An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
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> . . .
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> [T]he insurer has possession of (i) a medical report from the treating physician . . . and . . . such report[] indicates that the employee is capable of return to the job held at the time of injury . . . and (ii) a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open and has been made available, and remains open to the employee; provided, however, . . . that if such employee accepts said employment subsequent to a modification or termination pursuant to this paragraph, compensation shall be reinstated at the prior rate if the employee . . . should be terminated by the employer because of the employee's physical or mental incapacity to perform the duties required by the job. . . .

[6] This is because the psoriasis was claimed to be a product of the underlying alleged psychiatric injury. See discussion in footnote 4, supra.

The employee raises two arguments on appeal. First, he alleges that the impartial psychiatric examiner, Dr. Zamir Nestelbaum, might have advanced a positive causal relationship opinion regarding the psoriasis condition, had he been provided with a copy of the medical report of Dr. Richard Brown, the insurer's expert dermatologist, whose opinion was favorable to the employee.[7] Therefore, the employee argues, the "denial of [his] motion for leave to re-depose Dr. Nestelbaum was an abuse of discretion." (Employee br. 35.)

For several reasons, we disagree. First, Dr. Brown's opinion, at the employee's urging, was admitted into evidence but was not adopted by the judge.[8] (Dec. II, 2.) Second, the fact that the judge had both Dr. Brown's and Dr. Nestelbaum's opinions to consider was sufficient to afford the employee due process. See O'Brien's Case, 424 Mass. 16, 22-23 (1996). Third, although the judge could have reasonably concluded, given his prior deposition testimony, that Dr. Nestelbaum would have agreed with Dr. Brown and endorsed a causal relationship opinion favorable to the employee, she was under no obligation to adopt such an opinion. In fact, she adopted the contrary opinion of Dr. Rater. See Fitzgibbons's Case, 374 Mass. 633, 636 (1978)(judge is free to accept medical testimony of one physician over another). Fourth, Dr. Nestelbaum was already on record as having considered medical reports showing a connection between the injury, the psoriasis and the anxiety and depression. (Impartial Dep. 31.) Finally, the judge's rejection of the employee's testimony, offered as the foundation of his psychiatric claim, ultimately

[7] Dr. Nestelbaum was deposed on March 3, 2011. (Dec. II, 5.) Dr. Brown's report is dated April 11, 2011. (Dec. II, 2; Ex. 5[k].)

[8] While the judge did not discuss the report, she listed it as an exhibit. Nothing more was required. See Clark v. Longview Assocs., 24 Mass. Workers' Comp. Rep. 253, 257-258 (2010).

renders this issue moot. Brommage's Case, 75 Mass. App. Ct. 825 (2009). There was no abuse of discretion.[9]

The employee also avers the judge erred when she failed to apply the presumption contained in § 8(2). See footnote 5, supra. We disagree. The judge discredited the employee's assertion that he returned to work and was then terminated. (Dec. II, 16.) Moreover, beyond the employee's failure to prove the elements of the statute necessary to trigger the application of its "presumption," his failure to raise this issue at the first hearing precludes him from raising it at the second. Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. ___ (2011), aff'd Boyden's Case, 81 Mass. App. Ct. 1117 (2012)(Memorandum and Order Pursuant to Rule 1:28), rev. denied May 3, 2012; see also footnote 2, supra.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine

[9] Because the employee's initial claim for psychiatric benefits was rejected by the department between the time of the first conference and the first hearing, and because we affirm the denial and dismissal of that claim on numerous grounds, we express no opinion respecting whether the employee was precluded from bringing the claim. See 452 Code Mass. Regs. § 1.23(1), which provides, in pertinent part:

> (1) A party *may* amend his claim or complaint as to the time, place, cause, or nature of the injury, as a matter of right, at any time prior to a conference on a form provided by the Department. At the time of a conference or thereafter, a party *may* amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.

(Emphases added.) Cf. Boyden's Case, supra.

Administrative Law Judge

Filed: **June 12, 2012**