COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032069-95**

John O. McDermott	Employee
John G. Maclellan Oil Co., Inc.	Employer
Lamorak Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Rosado.

APPEARANCES
Michael F. Walsh, Esq., for the employee
Mark J. Kelly, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision denying and dismissing its complaint to discontinue or modify the employee's prescription pain/opiate medications, and ordering the insurer to continue to pay for treatment of the employee's constant low back pain, including all medications prescribed by his treating physician, as well as for the surgical implantation of a spinal cord stimulator. We reverse the order requiring the insurer to pay for a spinal cord stimulator, but otherwise affirm the decision.

The employee, age sixty-three at the time of hearing, suffered a low back injury on July 19, 1995, while lifting and moving a boiler. He underwent an L5-S1 laminectomy and fusion at L4-S1, followed by physical therapy, which did not alleviate his pain. Subsequent to a hearing decision of July 13, 1998, denying the insurer's discontinuance request and ordering reinstatement of § 34 benefits, (Ex. 5), the employee settled his case by way of a lump sum agreement approved on July 14, 2000. (Ex. 4.) In 2014, he moved to Texas and began treating with Dr. Choudhri of the Greater Houston Interventional Pain Associates. (Dec. 5; Tr. 15.) His treatment for many years has included some form of opioid pain medication. (Dec. 6.)

On March 2, 2017, the insurer filed a complaint seeking to modify or discontinue the employee's prescribed opioid medications, and challenging the causal relationship between his need for ongoing pain care and the work injury. Rizzo v. M.B.TA., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). The insurer's complaint was denied at a § 10A conference, and the insurer appealed. Prior to the hearing, the employee was examined pursuant to § 11A by Dr. Roberto Feliz, a pain management specialist. The judge found Dr. Feliz's report of March 26, 2018, adequate, and admitted it, along with his deposition testimony, as prima facie medical evidence. (Dec. 3.) In the decision, the insurer's issues were listed as follows: "1. Deny entitlement to Sections 13 & 30 benefits; 2. Discontinuance/Modification & Reduction/Weaning of Opioids after 3/2/17." (Dec. 3.) The Employee's "claims" were listed as, "Deny Insurer's Request to Discontinue pain medication without adequate alternatives." The judge defined the issues in controversy as, "Is the Employee's treatment regimen/prescribed opioid medication appropriate after March 2, 2017?" (Dec. 4.)

The employee, who testified remotely because his condition prevented him from traveling to Massachusetts, was the only witness. The judge found,

> He continues to be prescribed multiple pain medications to manage his daily low back pain: Oxycodone and Nucynta. Oxycontin was discontinued several months prior to the hearing. His painful condition nonetheless persists and further or alternative treatment options, including a spinal cord stimulator is on the horizon. I accept from his credible testimony that he is undergoing psychiatric treatment and psychological counseling to obtain clearance for implementation of a spinal cord stimulator: the goal of which is to reduce or discontinue the need for ongoing opioid use for pain management.

(Dec. 5.) She further found that "the Employee together with his treating provider is making every effort to facilitate qualification for a spinal cord stimulator that will result in reduction or discontinuance of opioids; this being the ultimate goal by all parties, Employee, Medical Provider, and Insurer." (Dec. 5-6.)

The judge adopted the opinion of Dr. Feliz that the employee has a diagnosis of post-laminectomy/failed back pain syndrome, with ongoing radiating lower back pain consistent with L-5 nerve root involvement. He has been prescribed some form of opioid pain medication for eighteen to twenty years. Changes have been made to his treatment regimen to determine the most effective treatment. "[U]ltimately, the treating physician decides what the most effective treatment is for the Employee, and that can include treatment outside of the DIA guidelines." (Dec. 6.) ["A]ny decision to voluntarily opt for participation in a proposed plan to reduce opiate medication rests solely with the Employee and his physician." (Dec. 7.)

Accordingly, the judge found,

> [T]he ongoing and proposed treatment by the Employee's physician is reasonable, necessary and causally related to the Employee's July 19, 1995 industrial injury. I further conclude that the Employee's persistent painful condition post spinal fusion is a sequelae of that treatment's failure to produce relief. I rely on the credibility of the Employee and the medical opinion of Dr. Feliz in concluding that reduction of opioids is equally the goal of the Employee and Insurer. Thus, I accept that the Employee seeks to lessen, reduce and eliminate his painful ordeal with the implantation of a spinal cord stimulator. To that end, psychiatric/psychological treatment and other modalities prescribed by his treating physician to facilitate non-opioid management of symptoms should be approved by the Insurer.

(Dec. 7-8.) The judge denied the insurer's request to "modify, discontinue, or alter the employee's ongoing medication regime," and ordered the insurer to "continue to pay §§ 13 and 30 medical benefits for treatment of [the employee's] constant daily low back painful and disabling condition, including all medications prescribed by his treating physician." In addition, the judge ordered the insurer to "pay for the surgical implantation of a spinal cord stimulator as prescribed." (Dec. 8.)

On appeal, the insurer first argues that the judge strayed from the parameters of the dispute by ordering a specific medical treatment that had not been claimed, a spinal cord stimulator. See Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000)(judge erred by expanding the parameters of the dispute beyond the

boundaries framed by the parties in the specific claims and defenses raised). The insurer points out that the employee did not seek to join any claims in response to the insurer's complaint to modify or discontinue opioid pain medications, but merely denied the complaint, and sought the status quo. The employee does not address this issue in his appellate brief.

We agree that the issue of whether the implantation of a spinal cord stimulator was reasonable and adequate treatment was not before the judge. The dispute in this case is over the continuing appropriateness of the employee's prescription pain medications, as set forth above. At hearing, the judge framed the issue as, "the employee's entitlement to continue medication and [the insurer's] request for weaning off the opioids that the employee is currently on. Employee is seeking maintenance of whatever he is on, status quo." (Tr. 3-4.) The insurer's and employee's issues, as they defined them, were consistent with this statement. (See Dec. 3, 4; Exs. 2 and 3.) Moreover, the employee does not argue, either in his closing argument or in his appellate brief, that he was entitled to a stimulator. The only mention in his appellate brief of the stimulator is a reference to the employee's testimony that "he has undergone evaluation for a spinal cord stimulator on three separate occasions but that he continues failing the psychiatric evaluation." (Employee br. 2, citing Tr. 22-23.) [1]

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[1] The only reference in the transcript to the stimulator was as follows:

> Q. Now, you've been talking about the spinal cord stimulator since 2014 also with Dr. Choudhri; isn't that correct?
> A. Yes.
> Q. But it just hasn't panned out because you are not able to pass a psychiatrist test apparently?
> A: Well, I passed the first one but I canceled the appointment for the stimulator because I read some stuff, my mistake, I read some stuff on the Internet and I didn't like it so. But when I wanted to do it again I went for the psych eval and that's the first one I failed.

(Tr. 22-23.) The employee testified at greater length about wanting to wean off oral opioids through a morphine pump, which also required the psychological evaluation he was unable to pass. (Tr. 16, 17, 21, 23-25.)

Not only did the employee fail to join a claim for a spinal cord stimulator or argue entitlement to a stimulator, but there is no medical support for the judge's order that the insurer pay for the implantation of the stimulator. Dr. Feliz did not offer an opinion as to whether the stimulator was reasonable or adequate treatment in either his report or deposition testimony. In his report, he simply mentioned that the employee had discussed with Dr. Choudhri the possibility of either an intrathecal infusion pump or a trial of a spinal cord stimulator, but told him nothing came of it. (Ex. 1, § 11A report.) In his deposition, Dr. Feliz was not questioned about, nor did he even mention, a spinal cord stimulator. While the judge appeared to view the implantation of a spinal cord stimulator as a means of assisting the employee in his goal of weaning from opioids, which all parties agree is desirable, the judge's order is speculative, and thus arbitrary and capricious, in the absence of a medical opinion that such treatment is reasonable and adequate. See Weilandt v. American Lighting Fixture Corp., 34 Mass. Workers' Comp. Rep. ___ (October 15, 2020), citing Evans v. Geneva Constructing Co., 25 Mass. Workers' Comp. Rep. 371, 376 (2011)(judge's findings which are " 'unsupported by any medical opinion . . . are clearly speculative' "). Accordingly, we vacate the order that the insurer pay for a spinal cord stimulator.

The insurer next argues that the judge ignored the § 11A opinion of Dr. Feliz that the employee's current level of pain relief can most likely be achieved without his current opioid medications. The insurer urges that the judge was required to follow Dr. Feliz's recommendation of a trial of gradual weaning over four to six months, in conjunction with a "program of therapeutic exercises for spine stabilization and functional restoration." (Ex. 1, § 11A report.) See Chapin v. Gil Montague Regional School District, 34 Mass. Workers' Comp. Rep. 1 (2020)(reviewing board affirmed judge's order establishing a schedule for weaning from opioids as a goal, to which the employee did not object). The employee maintains that, while Dr. Feliz stated that he would treat the patient differently than Dr. Choudhri was treating him, Dr. Feliz opined that it was

essentially up to Dr. Choudhri to decide what works best for the employee. We agree with the employee.

Medical treatment to reduce pain has long been found to be "reasonable and necessary." See Levenson's Case, 346 Mass. 508 (1963). The employee's burden, even where the insurer is seeking to discontinue medical benefits, is to show that the medical treatment the employee is receiving is "adequate and reasonable . . . so long as such services are necessary." G. L. c. 152, § 30. See Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337 n.1 (2008)(§ 30 arguably sets out a broader standard than "reasonable and necessary"). The judge found "[t]hat ultimately the treating physician decides what the most effective treatment is for the Employee, and that can include treatment outside of the DIA guidelines."[2] (Dec. 6.) Dr. Feliz's testimony supports these findings. Dr. Feliz acknowledged that the medications the employee is taking were "reasonable and within [the] acceptable standard of care to be prescribed to a patient like Mr. McDermott . . ." His concern was that, in the employee's case, they did not seem to be providing any significant level of relief, while exposing him to potentially major side effects. (Exh. 1, 11A report.) Although Dr. Feliz stated that he would recommend gradually weaning the employee from his opioid medications, he emphasized that, "Ultimately the doctor and the patient have to decide whether what he is doing right now is the most effective way to manage his pain. In my opinion, it's not. . . . [But] [u]ltimately Dr. Choudhri is the one that has to make that decision." (Dep. 43.)

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[2] 452 Code Mass. Regs. § 6.06, "Treatment Guidelines," reads, in relevant part:

> (1) In promulgating these Utilization Review regulations, the Commissioner hereby utilizes the treatment guidelines developed and endorsed by the Health Care Services Board, recognizing that medical treatment cannot be reduced to regulation and that health care providers must be free to exercise their best judgements about the treatment of their patients.
> (2) . . . The guidelines should not be construed as including all proper methods of care reasonably directed to obtaining the same results. The ultimate judgement regarding any specific procedure or treatment must be made by the provider in light of all circumstances presented by the injured employee and the needs and resources particular to the locality or facility. . . .

Consistent with the judge's findings, (see Dec. 6.), Dr. Feliz also testified that the most effective treatment for an employee may be treatment outside the guidelines, and that, in fact, Dr. Choudhri has changed the employee's treatment in an attempt to determine what worked best for him. At the time of Dr. Feliz's exam, the employee was on both Oxycodone and Oxycontin, but by the time of the hearing and deposition, the employee had been weaned from Oxycontin, and was taking Nucynta, which, Dr. Feliz explained, is a very different type of opioid. (Dep. 20.) Dr. Feliz testified that, "Nucynta is a great medicine for patients that are in pain and depressed," because it also acts as an antidepressant. (Dep. 49.) Dr. Feliz acknowledged that the employee's dosage of Oxycodone and Nucynta put him over the recommended dosage under the "pain treatment guidelines," (Dep. 25), but repeatedly stated, "Those are guidelines. Ultimately the doctor who prescribes has to justify his treatment." (Dep. 26.) "Again, those are guidelines. I want to re-emphasize that with anyone. If a doctor cannot adhere to all of them or he can say these are just guidelines because that's what Dr. Feliz or a whole bunch of doctors in Boston put together I don't agree with that." (Dep. 36.) "[I]t's a guideline. It's not written in stone. A doctor can say I want him higher because of that. Then you need to justify your prescription." (Dep. 32; see 452 CMR § 6.06, supra note 4.) He further opined, "[T]his is not precision-based medicine. . . . Oxycodone may be his best drug. I don't know that now." (Dep. 48.) Dr. Feliz further noted that the employee was "not . . . on an excessive amount of narcotic," (Dep. 11), and had shown no signs of abuse of the Oxycodone, (Dep. 58), but was nonetheless motivated to get off the opiates. (Dep. 37, 58.)

Based on Dr. Feliz's testimony that the ultimate decision as to how to manage the employee's pain was appropriately made by his treating physician, who, in fact, had made changes in his treatment plan to determine what was most effective for him, the judge did not err in denying the insurer's complaint for discontinuance or modification of the employee's prescribed opiate/pain medications. "As long as the judge's findings are grounded in the evidence and reasonable inferences . . . drawn therefrom, as they are

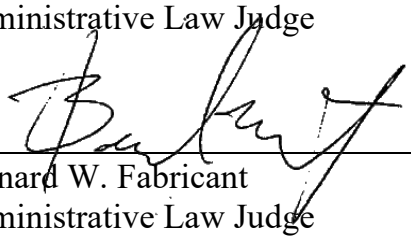
here, we will not disturb them." Chapin, supra at 6, citing Blais v. Gallo Constr., 25 Mass. Workers' Comp. Rep. 351 (2011).

Accordingly, we affirm the decision, except with respect to the order that the insurer pay for the implantation of a spinal cord stimulator. We vacate that order, with the caveat that the employee may file a new claim for such device if, and when, he has appropriate medical documentation.

Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee in the amount of $1,765.38

So ordered.

Carol Calliotte
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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