COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 080087-89**

John Stawiecki	Employee
DPW Mass. Highway Dept.	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant and Koziol)

The case was heard by Administrative Judge Hernández.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
Charles E. Berg, Esq., and James N. Ellis, Esq., for the employee on appeal
Arthur Jackson, Esq., for the self-insurer

LEVINE, J. The employee appeals the decision denying his claim for § 36(1)(k) disfigurement benefits[1] for his confinement in a wheelchair. The employee raises two specific issues on appeal: 1) the adopted medical opinion compels the award of benefits; and, 2) his claim is not barred by res judicata. (Employee br. 22-27.)[2] Because the judge adopted a medical opinion that there was no causal connection between the employee's 1989 work injury and his present physical impairment, there is no error. We affirm the decision.

The employee suffered a work-related back injury on June 5, 1989. In February of 2000, the employee and the self-insurer entered into a § 19 agreement to pay the employee $3,553.60 in § 36(1)(k) disfigurement benefits related to a limp. (Dec. 13.) On October 12, 2002, the employee was hospitalized after fracturing his

[1] General Laws c. 152, § 36(1)(k), provides, in pertinent part, payment "[f]or bodily disfigurement [in] an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section."

[2] The employee acknowledges that the judge never reached the res judicata issue. (Employee br. 26.) We also note that issues not raised by the appellant on appeal need not be reached. 452 Code Mass. Regs. § 1.15 (4)(3).

pelvis in a fall at home. The employee became a resident of the Webster Manor nursing home in January 2003, and he started using a wheelchair approximately six months later. By May of 2005, the employee's overall level of confusion had increased and on June 2, 2005, the employee fell in his nursing home apartment, fracturing his hip. (Dec. 10.) The employee's mental status deteriorated; he failed to recover from his hip fracture; and his lower back also was impaired by progressive degenerative changes. (Dec. 5, 7, 9-10.)

The employee claimed that his confinement to a wheelchair was related to his 1989 work injury, and he sought specific injury benefits under § 36(1)(k) for disfigurement related to that medical status.[3] (Dec. 5.) The parties opted out of the § 11A medical examination, and introduced their own medical evidence. (Dec. 1-4.) The judge concluded, based on the October 7, 2009 medical opinion of the self-insurer's physician, Dr. James Leffers, that the employee's wheelchair confinement was not causally related to his 1989 work injury. (Dec. 12.) The judge therefore denied the employee's claim. (Dec. 14-15.)

The employee argues that Dr. Leffers' medical opinion supports his claim that the work injury is causally connected to his wheelchair confinement, as a matter of law. We disagree. Dr. Leffers attributed the employee's medical status to his dementia, his inability to recover from the hip fracture, and progressive degeneration of his lumbar spine. (Dec. 10; Ex. 5.1, 8.) That degenerative condition, according to Dr. Leffers, was "not specifically added to in any magnitude by the [industrial] injuries of 1987 and 1989." (Ex. 5.1, 4.) Dr. Leffers also opined that "there [was] absolutely no evidence that because of the [employee's] back problems that [sic] he fell" and broke his hip. (Id. at 7.) The judge specifically adopted this opinion. (Dec. 10.) These statements of medical opinion do not support the employee's contention that the requisite causal connection was established because, in a different portion of his report, Dr. Leffers stated that the work injury was a "negligible" contributor to the

[3] The employee's nephew and permanent guardian, Robert Stawiecki, testified at the hearing, as the employee suffers from dementia and is confined to a nursing home. (Dec. 4.)

disability. (Ex. 5.1, 8.) See Rock's Case, 323 Mass. 428, 429 (1948)(evidence of work injury contribution, "even to the slightest extent," satisfies employee's burden of proving entitlement to c. 152 benefits).

"The testimony of a medical expert should be considered as a whole to determine whether he is expressing his professional opinion or conclusion that it is more likely than not that there is a causal relationship between" the injury and the disfigurement. Nason, Koziol and Wall, Workers' Compensation, §17.24 (3d ed. 2003). Aside from stray references to contribution of the 1989 injury to the wheelchair confinement, Dr. Leffers consistently opined throughout his report that there was no such contribution. Thus, he opined that "[t]here is no evidence that the [work] injury added any damage to this severely degenerated lumbar spine." (Ex. 5.1, 3.) "[T]he gradual progression of this disease process of the lumbar spine . . . accounted for the claimant's deterioration over time, not specifically added to in any magnitude by the injuries of 1987 and 1989." (Id. at 4.) Dr. Leffers described the opinion of another doctor as corroborative of his opinion: "This [other] physician is stating that the claimant had injuries at those times in 1987 and 1989 and returned to his pre-injury state, and the claimant, then, was left with a chronic condition simply relative to the pre-existing degenerative arthritis of the lumbar spine." (Id. at 5.) Dr. Leffers continued: "the disfigurement was related to the pre-existing scoliosis and had nothing to do with any injury of June 2, 1989." (Id. at 6.) There is "no evidence that because of the claimant's back problems that he fell [in 2005]. . . . Again, the opinion of this examiner would be any work-related injuries 20 years prior were related in an extremely minor fashion, if any, at this point in time in the claimant's life." (Id. at 7.) "The injury of June 2, 1989, . . . contributed a strain pattern. The claimant had continued deterioration after June 2, 1989 that did not allow return to work. That was much more likely a condition of the pre-existing degenerative change than any added strain pattern from the June 2, 1989 injury." (Id. at 7.) "The disfigurement was from the scoliosis and had nothing to do with any of the injuries." (Id.) Dr. Leffers concluded:

> The confinement to the wheelchair was due to: 1) a gradual demented condition of the claimant; 2) the inability to recover from the hip fracture, and 3) the progressive degenerative changes of the lumbar spine. The injuries of June 2, 1989 contributed negligibly to the progression of deterioration . . . .
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> [T]he injury of June 2, 1989, was added to a significantly degenerated spine and added no significant damage whatsoever to that spine. The major contributor to the claimant's condition at the time of this examination, September 15, 1994 [sic], was due far more to the pre-existing degenerative changes than any contribution made by the injury of June 2, 1989. Had the claimant not had the pre-existing spinal condition, it is highly unlikely that he would have gone on to develop this disability . . . . It is also highly likely that had the claimant not had the injury of June 2, 1989, that this condition would have deteriorated to this type of status simply because of the pattern that was in place prior to June 2, 1989.

(Id. at 8.)

Although Dr. Leffers occasionally and weakly connected the 1989 industrial injury to the resulting disfigurement, the overwhelming weight of his opinion is that there is no such connection. Compare Duggan's Case, 315 Mass. 355, 358 (1940)(do not read a portion of an expert's statement in isolation from the rest of the sentence). Taken as a whole, the judge fairly read and adopted Dr. Leffers' opinion that there was not the requisite causal connection, even under the "as is" standard which applies to this 1989 injury. Cf. Wax's Case, 357 Mass. 599(1970)(even though there are inconsistencies, testimony was competent that there was a causal relationship between the work and emphysema).

Because the judge found, based on competent medical evidence, that the industrial injury had no causal connection to the employee's confinement to a wheelchair, the disfigurement claim fails. As a result, we do not reach the question of whether the prior § 19 agreement for § 36(1)(k) disfigurement benefits based on the employee's limp barred a subsequent claim under that section for further disfigurement benefits related to the injury.

Accordingly, the decision is affirmed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **February 13, 2012**