COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019331-03**

Joseph F. Driscoll	Employee
Town of Framingham	Employer
Town of Framingham	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Taub.

APPEARANCES
Judith S. Driscoll,[1] for the employee at hearing
Joseph F. Driscoll, pro se, on appeal
John F. Keefe, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

HORAN, J. The employee appeals from a decision awarding § 30 medical benefits and § 34 total incapacity benefits "from July 22, 2003 through April 1, 2004." (Dec. 14.) Although the judge misconstrued a medical opinion he adopted to terminate the employee's entitlement to benefits as of April 2, 2004, we nevertheless affirm the decision in light of the judge's additional findings of fact.

The employee alleged he suffered a work-related back injury on July 21, 2003. The self-insurer paid the employee weekly incapacity benefits on a without prejudice basis from July 22, 2003, through September 26, 2003. The employee filed a claim seeking ongoing benefits, which the self-insurer denied. The judge denied the claim at conference and the employee appealed. (Dec. 3.)

Prior to the hearing, on September 26, 2007, the employee was examined by Dr. Nabil Basta, the § 11A impartial medical examiner. In his detailed report of that examination, Dr. Basta opined the employee suffered a back strain as a result of his

[1] Judith S. Driscoll is not a member of the Massachusetts bar. See 452 Code Mass. Regs. § 1.18(2)(permitting authorized representation by non-attorneys).

industrial accident. Dr. Basta also opined the employee's injury would have disabled him for eight to twelve weeks, but that because "his treatment has been excessive and he has not worked for the last four years," the employee would initially be restricted to sedentary work due to his absence from the workforce. (Stat. Ex. 1, 4.) The doctor reviewed the employee's medical records and reports and opined that, with the exception of evidence of pre-existing degenerative disc disease, "the medical examinations were unremarkable with no objective findings and the radiological studies were all indicative of negative findings." Id.

At the hearing, the self-insurer raised, inter alia, the defenses of liability, disability, and § 1(7A)(alleging a "combination" injury).[2] (Dec. 4.) The judge allowed the parties to submit additional medical evidence to address the "gap" period prior to Dr. Basta's examination, and the parties submitted numerous medical records and reports. (Dec. 1-4.)

At his deposition, upon being asked to assume that the employee *had* returned to work in the years prior to the impartial medical examination, Dr. Basta altered his opinion, (Dep. 10-12), and testified that, at most, the employee would have been disabled by his work-related back strain for up to sixteen weeks after the industrial injury. (Dep. 12, 14.) The doctor iterated that his opinions were based on his examination of the employee and his review of the medical records and reports submitted for consideration. (Dep. 6, 13-14, 24-26, 30; Stat. Ex. 1.)

Although he credited the employee's account of what transpired on the date of injury, the judge relied upon multiple evidentiary sources, including the employee's federal tax documents, to conclude he "was not able to credit [the employee's] testimony describing his symptoms and his activities . . . as to what happened or what he experienced in the years after the injury." (Dec. 12.) Rather, the judge found the

[2] The judge did not address whether the employee's injury was a "combination" injury under § 1(7A), and the self-insurer has not appealed. See Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39, 46 (2013)("as is" burden of proof applies when insurer fails to appeal judge's decision not to apply "heightened" causation standard where issue was raised by the insurer at hearing).

employee "had engaged in any number of employments" in the years following his back injury "and had clearly worked . . . for contractors and construction companies during times he reported to physicians that he was not able to and had not worked." (Dec. 12-13.) Accordingly, the judge found the employee's misrepresentations "to all these physicians cause me to be unable to rely upon their medical opinions that found him disabled based, at least in part, upon those employee misrepresentations. . . ." (Dec. 13.)

The judge, having concluded the employee had returned to the workforce prior to being examined by Dr. Basta, adopted the doctor's revised opinion and concluded the "period of [the employee's] causally related disability and need for treatment was finite. . . ." (Dec. 14.) He also adopted Dr. Lawrence Shields's opinion that the employee was totally incapacitated as of September 3, 2003. (Dec. 11-12.) Finally, because he felt Dr. Basta's opinion ─ that the employee's work-related incapacity lasted a maximum of sixteen weeks post injury ─ "could possibly be seen as speculative (even though he had the opportunity to view considerable records from that period of time)," the judge adopted the opinion of Dr. Frank Pedlow, and concluded that:

> [t]he finite period of causally-related symptoms and disability, if it had not ended sooner, would have ended at least as of April 2, 2004 when Dr. Pedlow saw reason to believe that the degenerative disc disease was the sole cause of the employee's symptoms.

(Dec. 12.) Accordingly, the judge ordered the self-insurer to pay the employee § 30 medical benefits, and § 34 incapacity benefits, from July 22, 2003 through April 1, 2004. (Dec. 14.)

On appeal, the employee raises several issues. We address one, and otherwise summarily affirm the decision.

The employee argues that, by terminating his § 34 benefits on April 2, 2004, the judge misconstrued the opinion of Dr. Pedlow. The judge wrote that Dr. Pedlow opined the employee's physical examination "results were not entirely *inconsistent*

with degenerative disc disease as the sole cause of the employee's symptoms. . . ." (Dec. 10; emphasis added.) In fact, as the self-insurer concedes, (Self-ins. br. 11), Dr. Pedlow actually opined the examination results were "not entirely *consistent* with degenerative disc disease as the sole cause of [the employee's] symptoms. . . ." (Employee Ex. 9; Emphasis added.) Thus, the employee contends, his entitlement to compensation benefits was improperly discontinued on April 2, 2004. We disagree.

Because the judge found, based on Dr. Basta's assessment, that the employee suffered nothing more than a back strain on July 22, 2003, the viability of the employee's claim for ongoing incapacity benefits depends largely upon whether his complaints of pain, and the limitations associated with his injury, are credited by the judge. Here, it is abundantly clear the judge 1) discredited the employee's testimony respecting his ongoing pain and physical limitations, and 2) found the employee had consistently misrepresented his activity level post injury. (Dec. 11-14.) Accordingly, the judge was free to reject any medical opinion premised on the employee's subjective complaints. Brommage's Case, 75 Mass.App.Ct. 825 (2009).

Moreover, while Dr. Pedlow described the employee's low back pain as "possibly secondary to degenerative changes at the L4-5 disc with some mild stenosis causing intermittent L5 radicular symptoms," (Self-ins. Ex. 9), the doctor did not opine there was a causal relationship between the employee's industrial accident and his degenerative changes and/or stenosis. Id. His opinion that the employee's examination was "not entirely consistent with degenerative disc disease as the sole cause of his symptoms," (Id.), fails to carry the employee's burden of proof that he continued to be incapacitated as a result of his industrial accident.[3] Sponatski's Case, 220 Mass. 526 (1915).

Finally, we do not view Dr. Basta's opinion respecting the duration of the employee's disability as speculative. (Dec. 12.) As a qualified medical expert, Dr.

[3] Because the self-insurer did not appeal the decision, the employee suffered no harm as a consequence of the judge's erroneous reliance on Dr. Pedlow's opinion to award compensation benefits beyond the period found by doctors Shields or Basta.

Basta could reasonably rely on his review of the employee's medical records, his examination of the employee, the employee's work activities post injury, and the reports of other qualified physicians to conclude the employee's disability from a work-related back strain lasted, at most, sixteen weeks from the date of injury.[4] Contrast LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 306 (2010)(medical opinion predicting future cessation of disability is speculative); Gallo v. Angel Enterprises, 9 Mass. Workers' Comp. Rep. 453, 455 (1995)(same).

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **February 25, 2014**

[4] At his deposition, Dr. Basta explained the bases of his opinions, (Dep. 6, 13-14), and noted his opinions were shared by all but one of the doctors who had previously examined or treated the employee. (Dep. 25-26, 30.) On this record, we cannot say Dr. Basta's opinions lacked sufficient foundation.