COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 0978595**

Judith K. Burnette	Employee
Command Marketing Corp.	Employer
Continental Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and Fischel[1])

APPEARANCES
John Trefethen, Jr., Esq., for the employee at hearing
Sandra Jenkins-Bryant, for the employee on brief
Charles Dixon, Esq., for the insurer at hearing
Karen A. Loughlin, Esq., for the insurer on brief

WILSON, J. The employee appeals from a decision of an administrative judge who awarded permanent and total incapacity benefits pursuant to § 34A, but denied payment of the deposition costs of her expert and psychotherapy treatment after a certain date, and reduced the fee payable to her attorney. Finding no error in the judge's rulings, we affirm his decision.

The employee, who was fifty-seven years old at the time of the hearing, had worked for approximately two years as a shipper and receiver lifting boxes that weighed up to fifty pounds when, on January 26, 1990, she injured her back and neck in an attempt to open a heavy, metal, sliding door at work. She continued to work for the employer in a sedentary position until February 8, 1991, and then she left work due to severe pain. (Dec. 5.) The employee received treatment from a neurologist and a neurosurgeon for her physical problems and, beginning in 1992, from a psychotherapist, Dr. Harvey Kraslin. (Dec. 6.) The insurer accepted her

[1] Judge Fischel participated in early panel discussions, but is no longer serving as a member of the reviewing board.

claim and paid temporary, total incapacity benefits pursuant to § 34, as well as medical benefits pursuant to §§ 13 and 30 for both the physical and psychological treatment. Following the insurer's complaint for discontinuance, a November 29, 1995 conference order assigned the employee a $105.00 per week earning capacity. (Dec. 2.) The conference order also allowed the employee's motion to join a claim for § 34A weekly benefits and for §§ 13 and 30 benefits relative to the payment of her psychotherapy bills. The employee appealed and a hearing de novo was held on September 18, 1996.

At hearing, the insurer challenged the employee's entitlement to weekly benefits; the causal relationship of any ongoing physical or emotional incapacity; and the reasonableness and necessity of the employee's psychotherapy treatment beginning in January of 1995. The § 11A impartial physician, Dr. Caprio, testified that the employee's neck and back strain had resolved, but that she had chronic pain due to ongoing degenerative disc disease, (Dec. 7, 8), which had become symptomatic as a result of her industrial injury. (Dec. 11; Dr. Caprio Dep. 30.) He determined that she was capable of only lighter, sedentary work. (Dec. 9.) The judge found the § 11A examiner's report to be adequate with respect to the employee's physical condition, but inadequate with respect to her emotional or psychiatric condition and, accordingly, authorized the submission of additional medical testimony to address the issues relating to her psychiatric disability. The insurer's psychiatric examiner, Dr. Greenberg, whose deposition testimony and reports were admitted, opined that the employee was totally disabled as a result of her psychiatric problems, which were directly related to her industrial injury of 1990. (Dec. 13.)

Ms. Burnette sought to depose Dr. Harvey Kraslin, her treating psychologist, who was not an M.D., but a licensed social worker, (Dec. 4), with a

doctorate in education.[2] (Dec. 14; Tr. 6; Dr. Kraslin Dep. 3.) Dr. Kraslin had treated her since 1992 for depression, generalized anxiety and post-traumatic stress disorder.[3] (Dec. 14.) Dr. Kraslin testified that though the employee had experienced anxiety and depression before the industrial accident, he believed that the injury at work exacerbated her symptoms to the point where she became overloaded and overwhelmed. (Dec. 15.)

The judge found that the industrial injury aggravated the employee's degenerative spinal condition to the point of physical disability and that her anxiety and depression were sequelae of her physical injury. (Dec. 17-18.) He wrote:

> I find that based on medical evidence and Mrs. Burnett's testimony that the employee's present psychiatric disability is causally related to the February 1990 back injury as there was an unbroken chain of causation between the February 1990 industrial injury and the aggravation and acceleration and exacerbation of Mrs. Burnett's anxiety and depression which had not impeded her ability to function prior to the industrial injury. . . . [T]he employee through the totality of the evidence has persuaded me to find a causal relationship between the accepted physical injury and the current mental disability.

(Dec. 17-18.)

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[2] The administrative judge twice states in his decision that Dr. Kraslin has a Ph.D., (Dec. 3, 4), but the record reveals that his later statement that he has an Ed.D. is correct. (Dec. 14; Tr. 6; Dr. Kraslin Dep. 3.)

[3] At the hearing in September 1996, the insurer's attorney stated that someone such as Dr. Kraslin, who is not a physician, is not normally deposed. (Tr. 50.) The judge then gave the employee's counsel the "opportunity" to have lay testimony re-opened and to bring Dr. Kraslin in to testify before him rather than by deposition. (Tr. 55-56.) The employee's attorney agreed to consult with Dr. Kraslin regarding his availability, but reserved his right to request to take his deposition testimony if he was unavailable. (Tr. 58.) By letter to the parties dated November 25, 1996, the judge indicated that he had set a second day of hearing for the morning of November 20, 1996 to hear the testimony of Dr. Kraslin but, because employee's counsel had to cover another hearing, he was unavailable until after noon. The judge wrote in his letter to the parties that this exhibited a "lack of consideration and respect for the parties and others involved in the dispute resolution process." Then, with the agreement of the parties, he stated that he would allow the employee to submit the deposition testimony of Dr. Kraslin.

Adopting the opinions of Dr. Caprio, the impartial examiner, and Dr. Greenberg, the insurer's psychiatric examiner, the administrative judge found that the employee was totally and permanently incapacitated from work as a result of her work-related injury. (Dec. 18, 19.) However, citing Dr. Kraslin's testimony that the employee suffered a significant emotional regression caused by the financial details of her daughter's wedding and by her daughter's emotional abuse, the judge found her psychotherapy treatments with Dr. Kraslin reasonable, necessary and causally related only until March 9, 1995. (Dec. 17, 19.) He reduced the attorney's fee to $2,500.00 because the "employee's attorney was not prepared for the Hearing on November 20, 1996." (Dec. 20.) Finally, he denied payment to the employee for the expenses associated with deposing Dr. Kraslin. (Dec. 20.)

The employee contends that denial of the costs related to Dr. Kraslin's deposition is arbitrary and capricious and contrary to law, since such costs were a legitimate and reasonable expense of litigation. Ordinarily we would agree. G.L. c. 152, § 13A(5); 452 CMR § 1.02. But in this case, the employee stipulated during Dr. Kraslin's deposition that he would not seek reimbursement for the doctor's reports or deposition. (Dep. 32.) There is no error.

The employee next argues that the finding that Dr. Kraslin's treatments after March 9, 1995 were not causally related, reasonable or necessary has no basis in the evidence and is, therefore, arbitrary and capricious.[4]

An insurer is obligated to provide the employee with adequate and reasonable medical services pursuant to G.L. c. 152, § 30. See Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 77 (1996). Where the employee claims entitlement to medical services, the judge must render a decision on the issue, providing a brief statement of the grounds for his decision. G.L. c.

[4] The employee does not challenge the evidentiary basis for the date of termination.

152, § 11B; see Kourouvacilis v. F.L. Roberts & Co., 10 Mass. Workers' Comp. Rep. 295, 296 (1996). In most cases, "[f]indings regarding the reasonableness of medical treatment must be based on expert medical testimony." Tenerowicz, supra at 77-78, citing Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 165 (1994). Here, the judge found that the employee's treatment with Dr. Kraslin was causally related, reasonable and necessary only through March 9, 1995, the date of a letter Dr. Kraslin sent to the insurer's utilization review provider. (Dec. 15, 17; Dr. Kraslin Dep. 35.) The judge referred to Dr. Kraslin's deposition testimony in which he affirmed his statements in the letter that the employee experienced a significant regression that began during the Christmas holidays and was caused by the financial details of her daughter's wedding and her daughter's emotional abuse. (Dec. 15, 17; Dr. Kraslin Dep. 41, 46.) The judge also found that the utilization review provider, Comprehensive Rehabilitation Associates, approved treatment visits in January and February 1995, but denied approval of proposed subsequent treatment as the "characterological change" was not caused by the work injury. (Dec. 16.)

At first blush, the judge's general finding of unbroken causal relationship seems contradictory to his termination of Dr. Kraslin's treatment. On closer examination, however, we conclude that the administrative judge viewed Dr. Kraslin's treatment of the post-Christmas regression as distinct from the causally related treatment for which he ordered benefits. The judge specifically found that he was "not persuaded based on the deposition of Dr. Kraslin and based upon the testimony of the employee that Dr. Kraslin's psychotherapy treatments after March 9, 1995 are reasonable, necessary and related to the industrial injury of January 1990[,]" and then concluded: "I do find the employee's treatment to be reasonable [and] necessary as related to the diagnosed condition except for the Psychotherapy treatment with Dr. Kraslin, Ph.D., and I do not find Psychotherapy treatment with Dr. Kraslin is reasonable, necessary and related to the industrial injury beyond the date of March 9, 1995." (Dec. 17, 19, emphasis supplied.)

Thus, even though the judge found generally that the employee's ongoing emotional problems were causally related to her work injury, he clearly carved out a specific exception to that general finding grounded in Dr. Kraslin's testimony that his treatment at that time was for an emotional regression caused by events other than the work injury.[5]

As a final matter, the employee challenges the judge's reduction of his attorney's fee as arbitrary and capricious. General Laws c. 152, § 13A(5), sets out a formula for a fee award to an employee attorney who prevails at hearing, but also allows the judge discretion to increase or decrease fees based on the complexity of the dispute or the effort expended by the employee's attorney. See Carter v. Shaughnessy Kaplan Rehab Hosp. 9 Mass. Workers' Comp. Rep. 437, 446 (1995). "Discretion" implies the "absence of arbitrary determination, capricious disposition, or whimsical thinking." Davis v. Boston Elevated Railway, 235 Mass. 482, 496 (1920). "It imports discriminating judgment within the bounds of reason." Id. "A decision is not arbitrary and capricious unless there is no ground which 'reasonable men might deem proper' to support it." T.D.J. Development Corp. v. Conservation Commission of North Andover, 36 Mass. App. Ct. 124, 128 (1994), quoting Cotter v. Chelsea, 329 Mass. 314, 318 (1952). The amount of an award of attorney's fees generally rests in the judge's sound discretion and ordinarily ought not to be disturbed. Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1024 (1982) (rescript op.).

The judge in the instant case stated, "I have reduced the legal fee to be ordered as the employee's attorney was not prepared for the hearing on November

[5] We note that in his deposition, Dr. Greenberg expressed some doubt as to the efficacy of Dr. Kraslin's treatment. He agreed that the employee would be better off in the hands of a psychiatrist and stated that "perhaps with more aggressive management carried out by a psychiatrist there could be some further improvement." (Dr. Greenberg Dep. 47.)

Of course, where the judge has found ongoing causal relationship for both physical and psychological disabilities, the employee is entitled to reasonable psychological treatment that is causally related to the work injury, and may file a claim if payment for such

20, 1996." (Dec. 20.) There is nothing arbitary or capricious in the judge's rationale for reducing the legal fee, which relates broadly to the effort expended by the employee's attorney, even though the attorney's lack of readiness for trial had to do with a conflict in scheduling. Abuse of discretion is rarely found and, where the judge provided a plausible reason allowed by the statute for reducing the fee, we decline to find an abuse of discretion.

The decision of the administrative judge is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: March 3, 1999

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treatment is denied by the insurer. See Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 78 (1996).