COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009012-00**

Karen Monterosso Dow	Employee
Berkshire Medical Center	Employer
Berkshire Health Systems, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Harpin)

This case was heard by Administrative Judge Poulter.

APPEARANCES
John A. Smillie, Esq., for the employee
Frederica H. McCarthy, Esq., for the insurer

CALLIOTTE, J. The employee appeals from a decision denying her claim for $24,519.22 in §§ 13 and 30 medical expenses for a Duragesic patch, which she alleges is prescribed for work-related neck pain.[1] We affirm the decision.

The employee, a cleaner and transporter, injured her neck in an accepted industrial injury in February 2000. On March 23, 2003, Dr. Christopher Comey performed a cervical discectomy and spinal fusion at C5-C6 and C6-C7. Due to a non-union following the first surgery, Dr. Comey performed another cervical fusion with plating at the same levels on October 6, 2009. (Dec. 3; Statutory Ex. 1, at 2.) On October 17, 2011, the employee settled her case regarding her accepted neck injury by way of a lump sum agreement. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of board file). On September 8,

[1] In this failure of proof case, it is unclear from the hearing record whether the $24,519.22 was an unpaid amount owed to a medical provider, payment owed to a health insurer, reimbursement for out-of-pocket payments made by the employee, or some combination of the above.

2012, Dr. Comey performed a non-work-related surgery on her low back.[2] (Dec. 3; Dep. Dr. Kirby, 12.)

On or about February 26, 2014, the employee filed a claim for medical expenses for payment of a Duragesic patch[3] for treatment of neck pain.[4] Prior to the June 17, 2014, conference, the insurer was paying for 50% of the cost of the patch. (Dec. 6, Tr. 7). Following the conference,[5] the judge denied the employee's claim for outstanding medical bills, but ordered the insurer to continue paying half the cost of the patch. (Tr. 9.) Both parties appealed.[6] At hearing, the employee claimed entitlement to $24,519.22 in outstanding medical bills for the Duragesic patch, as well as future payment of medication for the accepted neck injury. (Dec. 2, Tr. 4.) The insurer denied entitlement to §§ 13 and 30 benefits for the Duragesic patch. It maintained there was no causal relationship between the employee's accepted neck injury and the need for the patch, and raised § 1(7A)'s "a major cause" provision, alleging that the need for the patch was due primarily to a pre-existing low back condition. (Dec. 2; Tr. 7-8.)

The employee was examined by Dr. Demosthenes Dasco, pursuant to § 11A, on October 23, 2014. Finding the medical issues complex, the judge allowed the parties to submit additional medical evidence. On April 23, 2015, the parties deposed the employee's primary care physician, Dr. Craig Kirby, who had treated her for eighteen

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[2] The employee no longer treats with Dr. Comey. (Dec. 3.) However, she plans to have a non-work-related lumbar fusion in the future, as previously recommended by Dr. Comey. (Dec. 4, Tr. 49, 63.)

[3] "Duragesic" is the brand name for a transdermal fentanyl analgesic. (Ex. 6, Dr. Kirby Dep. 7-8.)

[4] Attached to the claim form was a "reimbursement worksheet" listing dates of service from March 6, 2013 through February 6, 2014, for the Duragesic patch, indicating there was an outstanding balance of $9,966.06. Rizzo, supra.

[5] At conference, the employee submitted a "Reimbursement Worksheet" showing an outstanding balance for the Duragesic patch of $15,176.49. See Rizzo, supra.

[6] The judge's statement that only the insurer appealed, (Dec. 2), is incorrect. Rizzo, supra.

years. The insurer submitted an additional packet of medical records. (Dec. 2, 3; Ex. 5.) The employee did not submit any bills, receipts or requests for reimbursement, or any additional medical records.[7] (Dec. 2.)

The judge found the employee has worn the Duragesic patch for approximately 12 years, since before her first neck surgery. (Dec. 3.) She has also used Vicodin for about the same period of time. Id. Her neck pain has been continuous since 2000, and "she considers her neck pain and back pain to be one." (Dec. 4; Tr. 76.) The employee testified extensively as to her neck and right shoulder pain. The judge did not find the employee a "credible historian," and credited her testimony only "to the extent that she recalls her surgery and some of her treatment." (Dec. 4.) She did not credit the employee's testimony regarding "her current pain levels or the origin/source of that pain," her "recitation of her visits with either Dr. Kirby or Dr. Comey," id., or her "testimony with regard to her treatment for neck pain." (Dec. 6.)

The judge found that, according to the medical records, the employee has not seen Dr. Kirby for her neck pain since February 10, 2011, and that she primarily sees him about her chronic back pain. (Dec. 5.) In April 2013, Dr. Kirby prescribed the Duragesic patch. However, "[d]uring her visits in April, May and June of 2013 she reported low back pain only." (Dec. 4.) The judge adopted Dr. Kirby's April 13, 2015, deposition testimony that he has been treating the employee for both neck and back pain, (Dec. 5; Dep. 9), but that her pain emanates from "principally the lower back and sometimes the neck but mostly the lower back." (Dec. 5; Dep. 7.) When asked what pain the Duragesic patch was for, he replied, simply, "it's one way of treating chronic pain." (Dep. 10; Dec. 5.)

The judge also adopted the § 11A opinion of Dr. Dasco that the employee's use of the Duragesic patch could be gradually reduced from every two days to every three days.

[7] After the hearing, the self-insurer submitted a written closing argument, maintaining that the employee had failed to meet her burden of proof by failing to introduce evidence that the medical treatment was adequate, reasonable and/or causally related to her work injury, and by failing to introduce documentation in the form of medical bills. Rizzo, supra. The employee did not submit a written closing argument.

(Dec. 5, 6.) The judge found that Dr. Dasco opined that "some of the medications were given for her neck pain in 2013, and 2014, but most of the medications were given for her low back pain."[8] (Statutory Ex. 1; Dec. 5.)

The judge concluded that, although the medical records made "extremely limited mention of neck pain," (Dec. 6), "Ms. [Dow] was prescribed medication for her work-related neck injury on at least one occasion in both 2013 and 2014. She is ready to reduce her use of the Duragesic patch at this time." Id.[9] The judge further found that, while 452 Code Mass. Regs. § 1.07,[10] was not necessarily applicable to claims at hearing, the employee nonetheless,

> must show what type of treatment she has received for her neck and what the cost has been and continues to be. Pharmacy invoices, medical office invoices, co-payment records and records like those types outlined in 452 C.M.R. § 1.07 must

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[8] Dr. Dasco wrote in his impartial report:

> I noted in the records that in most of the visits to her family physician Dr. Kirby the pain medications, including Duragesic, were given for her back pain.
>
> There is only one visit dated January 6, 2014, when Dr. Kirby stated in his record that she had neck pain, chronic and overall noted stability in regard to her chronic back pain.

(Statutory Ex. 1, at 3.)

[9] The judge's findings on § 1(7A), though somewhat confusing, appear to be that it does not apply because the back condition for which the employee is currently treating did not precede the neck injury in 2000. (Dec. 6.) Thus the simple causation standard would apply.

[10] 452 Code Mass. Regs. § 1.07, provides, in relevant part:

> (c) 1. Claims for payment for adequate and reasonable health care services shall, where applicable, be accompanied by the following:
> a. the dates of service;
> b. the type of treatment or service and the itemized costs;
> c. office notes, hospital records, or a statement from the attending physician or medical vendor that such visit, testing, prescription drug, therapy, or ancillary medical service device or aid was reasonable, necessary, and causally related to the injury for which the employee is eligible for benefits.

> be submitted in evidence to support the type of treatment claimed and the ongoing cost thereof.

(Dec. 5.) The judge continued as follows:

> *Unfortunately, there is no credible evidence before me to suggest what the nature of the treatment or cost of the treatment for the neck was in 2013 and 2014*. The Insurer has paid 50% of the cost of the Duragesic Patch to date. I do not find that to be a correct division of the cost. There is no indication that the neck is 50% responsible for Ms. [Dow's] need for treatment. *There is no indication that she has received treatment on more than two occasions for her neck. There is no supporting documentation or credible evidence as to the cost or nature of her treatment with the Duragesic Patch to support her claim of $24,519.22*.

(Dec. 6-7; emphases added.) Accordingly, she denied the employee's claim. (Dec. 7.)

On appeal, the employee argues that the judge impermissibly apportioned the cost of the Duragesic patch between the accepted neck injury and the non-work-related back injury.[11] The employee maintains that if the patch was prescribed to ameliorate the employee's neck pain at all, even though it was also prescribed for back pain, the insurer should be responsible for the entire cost of the patch. In making this argument, the employee focuses on the following statements made by the judge: "The insurer has paid 50% of the cost of the Duragesic Patch to date. I do not find that to be a correct division of the cost. There is no indication that the neck is 50% responsible for Ms. [Dow's] need for treatment." (Dec. 7.) Although the judge's findings are, admittedly, inartfully drawn, we do not read these statements as necessarily relating to or condoning an apportionment of medical treatment costs between work-related and non-work-related injuries. When read in context, the judge's statements, on which the employee focuses, appear to be an observation that the insurer has paid more than the employee has shown it was

[11] She further maintains that the insurer stipulated that it was responsible for paying 50% of the cost of the patch, and, thus, the judge erred by finding there is no indication the neck is 50% responsible for the employee's need for treatment. (Employee br. 2-3.) However, there was no stipulation, as the insurer later stated that its position was that it "shouldn't pay for it at all . . . because I'm arguing major cause." (Tr. 8.) There was no explanation as to why the insurer was paying 50% of the cost of the patch and no evidence introduced as to what period it had paid that amount. Moreover, there was no agreement in the Board file regarding such payment. Rizzo, supra.

responsible to pay *for treatment of her neck with the patch.* The judge correctly found the insurer had been paying half the cost of the patch, id., both prior to and after the conference order. In the same paragraph, the judge also found there was no evidence the employee had received "treatment on more than two occasions for her neck," and that the employee submitted *no evidence* as to the nature or "cost of treatment for the neck" in 2013 and 2014. Id. Thus, the employee failed to meet her burden of proof to show the insurer owed any more than it had already paid, which was 50% of the amount claimed.

Pursuant to G. L. c. 152, § 30, an insurer has an affirmative obligation to provide the employee with adequate and reasonable health care services. Tenerowicz v. Francis Harvey & Sons, 10 Mass. Workers' Comp. Rep. 76, 77-78 (1996). However, the employee has the burden of proof on all elements of her claim. Sponatski's Case, 220 Mass. 526, 527-528 (1915). She "must go further than simply to show a state of facts which is equally consistent with no right to compensation as it is with such a right." Id. at 528; Berfield v. North Shore Medical Center, 30 Mass. Workers' Comp. Rep. 87, 91 (2016). An employee claiming payment for specific outstanding medical bills has the burden to prove that the treatment for which she is seeking payment is causally related to her work injury and reasonable. Goodwin v. The Emporium, 28 Mass. Workers' Comp. Rep. 157, 160 (2014) (where doctor's testimony does not support causal relationship between all the claimed treatment and the injury, judge erred in finding employee's multiple hospitalizations for pneumonia were causally related to pain medications prescribed for treatment of work injury). Generally, findings of causal relationship and reasonableness of medical disability and treatment must be based on expert medical testimony. Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56, 59 (1999)(reasonableness); see Josi's Case, 324 Mass. 415 (1949)(causal relationship).

Here, the employee introduced no expert medical testimony regarding causal relationship and reasonableness sufficient to support her claim, and no medical bills at all from which the cost or even the parameters of her claim could be determined. When Dr. Kirby was asked what pain he was prescribing the patch for, he replied merely, "it's one

way of treating chronic pain." (Dep. 10.) The judge found that Dr. Kirby was treating the employee for primarily non-work-related back pain. However, the employee did not ask Dr. Kirby whether he prescribed the Duragesic patch for neck pain, and, if so, how many times and on what occasions. While Dr. Dasco stated, in his report, that the use of the patch could be reduced, he never opined that the patch was reasonable for treating pain resulting from her neck injury, and the employee posed no hypothetical questions seeking such an opinion. Dr. Dasco could find only one note, from January 6, 2014, in which the employee reported neck pain, but nonetheless concluded that "some of the medications were given for her neck pain in 2013, and 2014, but most of the medications were given for her low back pain." (Statutory Ex. 1, at 5.) By "medications," Dr. Dasco was referring to both Vicodin and the Duragesic patch. (Id. at 3-4.) Thus, it is unclear whether Dr. Dasco's statement that "some of the medications were given for her neck pain," id. at 5, refers to the patch, or Vicodin, or both. "[It] [is] the responsibility of employee's counsel to submit sufficient hypothetical questions to the doctor, or to question him directly at deposition, concerning whether the employee's [medical treatment] was reasonable and causally related" to her industrial accident. Lupa v. United Parcel Service, 30 Mass. Workers' Comp. Rep. 27, 30 (1016), citing Eastwood v. Willowood of Williamstown, 26 Mass. Workers' Comp. Rep. 291, 297 (2012). See also Goodwin, supra. The employee failed to do this.

As the employee claimed payment for a specific amount of medical bills in the past which had been denied by the insurer, the judge was correct that the employee must submit into evidence "[p]harmacy invoices, medical office invoices, co-payment records and records like those [ ] outlined in 452 C.M.R. § 1.07" to support her claim." (Dec. 5.) See Celko v. P.J. Overhead Door, Inc., 27 Mass. Workers' Comp. Rep. 131, 135, n. 6, 7 (2013)(regulation concerns contested claims for payment of medical treatment received; where no medical bills outstanding, it is irrelevant no bills submitted). She failed to do so. (Dec. 5.) Accordingly, the judge properly found "[t]here is *no supporting documentation or credible evidence* as to the cost or nature of her treatment with the

Duragesic Patch to support her claim of $24,519.22." [12] (Dec. 7; emphasis added.) Without such documentation, the employee's claim must fail.

The judge permissibly found the employee simply failed in her burden of proof. The decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***October 13, 2017***

William C. Harpin
Administrative Law Judge

[12] We acknowledge that where an employee has paid out-of-pocket for medical treatment, her testimony may be credited by the judge as the basis for the amount of medical costs the insurer owes. See King v. APA Transport Inc., 29 Mass. Workers' Comp. Rep. 81, 86-87 (2015). Here, there was no such testimony. Certainly records submitted with the employee's claim, at conciliation, or at conference, cannot be treated as evidence at a hearing, which is a de novo proceeding. Berfield, supra, at 89-90, citing 452 Code Mass. Regs. § 1.11(5)("The decision of the administrative judge shall be based solely on the evidence introduced at the hearing").