COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042340-01**

Leanne Manzanero	Employee
Beth Israel Deaconess Medical Center	Employer
Caregroup, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
J. Channing Migner, Esq., for the employee
Peter P. Harney, Esq., for the self-insurer

HORAN, J. Both parties appeal from a decision awarding the employee a closed period of § 34 benefits, and ongoing § 35 benefits, for an October 15, 2001 work-related injury. The self-insurer raises several issues on appeal.[1] The employee takes exception only to the judge's earning capacity finding. We affirm the decision.

The parties presented their own medical evidence in this liability contest. See 452 Code Mass. Regs. § 1.10(7). The alleged industrial accident occurred while the employee was moving a patient. She suffered an injury to the left side of her neck, shoulder, and shoulder blades, and felt pain radiating down her left arm into her fingers. In 1998, the employee had undergone a cervical fusion at C5-6 for right-sided neck and arm pain. The employee had also received workers'

[1] The self-insurer raises issues on appeal regarding the application of G. L. c. 152, § 1(7A). That statute provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

compensation benefits for a back and neck strain in 2000, but was working full time as of January, 2001.[2] (Dec. 6-7.)

In his decision, the judge found the employee's work injury caused temporary total incapacity until September 1, 2003, and partial incapacity thereafter. (Dec. 8-9, 11.) The self-insurer's first two issues concern the causation standard applied by the judge. It maintains his causation findings are arbitrary and capricious. We disagree.

Among others, the judge adopted portions of the medical opinions of Drs. Marc E. Eichler and Anthony R. M. Caprio. (Dec. 8-9.) Dr. Eichler opined the employee suffered from a traumatic right-sided C6-7 disc herniation, with left C7 root compression, and from a disruption (or non-fusion) of her pre-existing C5-6 fusion. He attributed these diagnoses to the October 15, 2001 work injury. Dr. Eichler further opined the work injury was a major cause of the C5-6 impairment. The judge also adopted the opinion shared by Drs. Eichler and Caprio that the employee suffered from a work-related traumatic herniation of the C6-7 disc. Although, by Dr. Caprio's account, there was some degenerative disease present at that level, the judge did not find this prior condition combined with the work-related C6-7 disc herniation to cause the employee's disability. The judge addressed the § 1(7A) combination element with respect to the employee's cervical spine as follows:

> Self-insurer raises issues of pre-existing condition. The findings are that of a new injury at C6-7 and only marginally an aggravation of the prior C5-6 condition. I do not find that

[2] The employee testified she was injured at work in Pennsylvania in 1998, and received $42,000.00 in response to her claim. (October 7, 2004, Tr. 23, 50-51.) She also testified she received workers' compensation payments in Massachusetts following her injury here in 2000. (Id. at 47-50.) The judge did not utilize either of these prior work-related accidents to nullify the application of the higher "a major" causation standard in G. L. c. 152, § 1(7A). See Lefebvre v. Sandelswood, Inc., 21 Mass. Workers' Comp. Rep. ___ (May 15, 2007) and cases cited (in addressing the elements of § 1(7A), judge is not obligated to credit employee's testimony concerning prior industrial accidents, nor is judge obligated to investigate other board files *sua sponte*).

> the primary injury is subject to the [§]1(7A) standard. To the extent it is subject to this standard I have found that the work injury is a major cause of the disability and need for treatment.

(Dec. 9.) We interpret this to mean the primary October 15, 2001 work injury, a C6-7 disc herniation, overwhelmed, and did not combine with, the prior degenerative and post-surgical conditions to cause the employee's disability.[3] See Dorsey v. Boston Globe, 20 Mass. Workers' Comp. Rep. 391 (2006) and § 1(7A) cases cited. Regarding the employee's C5-6 injury, the judge's finding that the work injury "is a major cause" of her disability is supported by his adoption of Dr. Eichler's opinion. Accordingly, we cannot say the judge's comprehensive interpretation of the numerous medical opinions is arbitrary, capricious, or contrary to law. G. L. c. 152, § 11C.

The self-insurer also argues its due process rights were violated when the judge, following a January 14, 2005 status conference, authorized the employee to complete her testimony via live videoconference near her new Hawaiian home. There was no error.

The status conference was held after the employee had testified in person before the judge on October 7, 2004. On that day, she completed her direct testimony, but the self-insurer's attorney had yet to complete his cross-examination. The employee subsequently moved to Hawaii. Employee's counsel argued that a return trip to Worcester would be too costly for her, and suggested a live videoconference be used to complete her cross-examination. In support of his request, counsel explained the mechanics of live videoconferencing to the judge. Self-insurer's counsel objected, and insisted upon the right to complete his cross-examination of the employee live, and before the judge, in Massachusetts. He

[3] We note the self-insurer does not challenge the sufficiency of the evidence on the nexus between the employee's neck strain, C6-7 disc herniation with radiculopathy, chronic neck pain, and her disability. (Dec. 9.)

urged the judge to require the employee to return to the Commonwealth. After a lengthy colloquy, the judge concluded:

> As far as the video conference itself, it's my ruling that the video conference is every bit as equivalent as live testimony and that I see no reason why I cannot make complete determinations on credibility of the employee based upon viewing her on – live on video as opposed to her sitting in front of me. . . .
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> I don't see why this technology can't work. I think that it's not really the issue whether at this point – if you have someone in Hawaii who needs to testify, I don't see the need to compel them to come to Massachusetts if appropriate technology and arrangements are made, and the arrangements that you've outlined seem appropriate to me to meet the criteria of fairness. . . .
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> I also will point out that to some degree it is helpful to actually see the employee live, and I did see the employee live for an entire day during the first day of testimony.

(Jan. 14, 2005 status conf. Tr., 17-18.) On the final day of hearing, via live videoconference from Hawaii, the employee and the self-insurer's investigator testified.

On appeal, the self-insurer alleges no fault with the technical aspects of the videoconference. Instead, it argues its due process rights were violated when the judge refused to require the employee to complete her testimony live, and in person, before the judge. The self-insurer also argues the judge should have, in any event, not authorized the use of a videoconference absent a specific finding of the employee's unavailability. We reject both contentions.

In support of its due process argument, the self-insurer cites to numerous cases decided by this board and our appellate courts. Not one of these cases supports the self-insurer's insistence that, in a civil context, it has an absolute right to confront and cross-examine an opposing party as it sees fit. Indeed, our review

of the caselaw reveals no such authority. It is noteworthy the employee's testimony was taken via live video, and not by deposition. In this respect, the self-insurer's due process argument is particularly weak. Since 1915, our legislature implicitly, if not explicitly, has permitted judges to assess the credibility of out of state "persons or witnesses" based upon their answers to written questions.[4] The language of the 1915 statute is substantially similar to the language of the second paragraph of G. L. c. 152, § 11B. Both statutes allow extraterritorial deposition testimony; neither requires a showing of unavailability. G. L. c. 152, § 11B provides, in pertinent part:

> A member may upon the filing of a written request of any party appearing before him, together with interrogatories and cross-interrogatories, if any, request officers in other jurisdictions, having power and duties similar to those of a member of the board, to take depositions or testimony of persons or witnesses residing in such jurisdiction. On the return of any such deposition to the division it shall be forwarded to the appropriate member. A reasonable fee for services in connection with the taking of such deposition and the expenses thereof shall be assessed upon the requesting party.

The original statute has been interpreted to apply to claimants. Derinza's Case, 229 Mass. 435, 437 (1918), cited in Huff v. TLC Cos., Inc., 19 Mass. Workers' Comp. Rep. 316, 319 (2005). As § 11B permits a more restrictive testimonial mode, we ascertain no error with the judge's use of an appropriately administered

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[4] St. 1915, c. 275, § 1, provided, in pertinent part:

> Upon the written request of the board or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the Superior Court for any county of this Commonwealth, commissions to take depositions of persons or witnesses residing without the Commonwealth, or in foreign countries, or letters rogatory to any court in any other of the United States or to any court in any foreign country, shall forthwith issue from the said Superior Court, as in cases pending in said Superior Court, ...

cited in Derinza's Case, 229 Mass. 435, 437 (1918).

live videoconference.[5] We note the self-insurer also utilized the videoconference to present the testimony of its Hawaiian investigator.[6] Moreover, the judge *did* observe the employee testify on direct and cross-examination, live *and* in person, for much of her testimony. Accordingly, on this record, the self-insurer's due process arguments are particularly fallacious.

The judge found the employee had an earning capacity as of September 1, 2003. Both parties challenge this finding as unsupported by the evidence. Finding no fault with the judge's analysis, we summarily affirm the decision on this issue.

The decision is affirmed. Pursuant to the provisions of § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

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Mark D. Horan
Administrative Law Judge

[5] We recognize the use of videoconferencing in litigation is a growing trend, and has withstood challenges similar to those posited by the self-insurer. In Kroupa v. Mercy Medical Center, 2002 CO 225 (COCA 2002), the Colorado Court of Appeals concluded a workers' compensation claimant did not have a due process objection to the use of video conferencing:

> Use of videoconferencing afforded claimant a reasonable opportunity to present evidence and argument in support of her position, while at the same time furthering the state's interest in speedy and efficient resolution of workers' compensation claims.

Id.; see also Thornton v. Snyder, 428 F.3d 690, 697-698 (7th Cir. 2005)(no abuse of discretion for judge to conduct inmate's civil rights trial against corrections dept. using videoconferencing). Our agency has recently recognized the efficacy of videoconferencing. The Workers' Compensation Forum, Vol. I, No. 2, p. 3; (www.mass.gov/dia/) (Spring 2007); see also G. L. c. 152, § 11B ("Procedures within the division of dispute resolution shall be as simple and summary as possible.")

[6] We hasten to add the judge, after viewing the videoconference testimony of the employee, and the videos produced by the investigator, did not credit "the employee's testimony regarding the severity of her pain when conducting normal light daily activities." (Dec. 9.)

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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