**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 002978-93**

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| Linda Mariano | Employee |
| Town of Needham | Employer |
| Town of Needham | Self-Insurer |

**REVIEWING BOARD DECISION**
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

**APPEARANCES**
Judson L. Pierce, Esq., for the employee at hearing
Alan S. Pierce, Esq., for the employee at hearing and on appeal
Susan G. McDonald, Esq., for the employee on appeal
Douglas K. Birkenfeld, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

**KOZIOL, J.** Pursuant to a corrected hearing decision,[1] filed November 10, 1998, the employee was awarded § 34 temporary total incapacity benefits through the exhaustion of those benefits on or about January 17, 1999, followed immediately

[1] In his cover letter accompanying the corrected hearing decision, the judge stated:

> [t]here have been no changes made to any part of the [October 29, 1998] decision except for the orders. I have added an order directing the [self-]insurer to pay ongoing § 34A benefits from the exhaustion of § 34 benefits which I inadvertently left out of the copy previously mailed. I have also increased the attorney's fee by $1000 due to the complex and difficult nature of this case.
>
> These changes are made to reflect my findings made in the subsidiary and general findings which are not changed in this correction.

(Cover letter accompanying Corrected Hearing Decision, November 10, 1998.); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

thereafter, by continuing § 34A permanent and total incapacity benefits.[2] (Dec. I.) The self-insurer did not appeal that decision. The self-insurer appeals the judge's second hearing decision, filed December 29, 2017, denying and dismissing its complaint to discontinue the employee's § 34A benefits. We affirm.

The employee worked for the employer as a seventh and eighth grade Spanish language teacher from 1987 through 1996. Her otherwise "excellent" state of health began to deteriorate during the 1992-1993 school year when prolonged renovations began in areas of the Pollard School that were close to her classroom. (Dec. I, 738.) The judge's prior decision details the extensive renovations at the school, which occurred between the fall of 1992 and the spring of 1995, and describes the employee's workplace exposures to engine exhaust, thick smoke, dust, noxious fumes, chemical adhesives, a strong odor from tile sealant, paint and polyurethane, as well as the symptoms she developed, such as nausea, persistent flu-like symptoms, fatigue, nose and throat irritation involving burning sensations and swelling, chest tightness, heavy cough, sinus pain, headaches and dizziness. (Dec. I, 739-744.) "In the fall of 1993, the entire school was evacuated due to the fumes." (Dec. I, 741.) By the fall of 1994, the employee "suffered asthma and a worsening of her symptoms when exposed to cleaning agents, perfumes or colognes," and she also experienced "numbness in her limbs and a persistent cough." (Dec. I, 742.) The judge found "the school was forced to shut down for three to four days in April, 1995 due to the fumes," and "in the fall of 1995, the entire middle school was moved to the high school building due to the continuing problems with fumes." (Dec. I. 743.) In January of 1996, the middle school moved back to its own building, and weekly health surveys were done. Id.

The employee left work on January 17, 1996, due to "chest pain, sinus pain, extreme fatigue, headaches and a persistent cough" and a continued worsening of her symptoms. (Dec. I, 744.) The judge found the employee developed additional symptoms after leaving work including, "joint pain in her elbows, shoulders, wrists and knuckles,"

[2] We refer to the November 10, 1998, corrected hearing decision as "Dec. I," and the December 29, 2007, decision as "Dec. II."

as well as pain in "the metatarsals of both feet," which prohibited her from wearing shoes or standing in the shower. Id. He found she developed leg and arm tremors after leaving work, but that by 1998, the leg tremors were gone and the employee once again could wear shoes and stand in a shower. (Dec. I, 744.) She also "developed dizziness and throat irritation when exposed to new carpet." Id. "In early 1998 she developed low back and abdominal pain." (Dec. I, 745.) In his first decision, the judge found the employee "continue[d] to suffer from all of the symptoms discussed above, except for the leg tremors." Id. Regarding the mechanism of the employee's injury and her diagnosis, the judge determined,

> that the employee was injured when she was exposed to noxious chemicals over an extended period, while working for the employer at the Pollard School. These exposures caused the large collection of symptoms that she reported to her doctors and testified to in this action. These symptoms totally disable her from all employment. In making these determinations, I rely on the credible testimony of the employee and Elizabeth Ann Mela, and the medical opinions of Dr. Howard Hu. I also rely, in a small part, upon some of the opinions of Dr. Accetta. I accept the employee's representations about her health as I described it in the subsidiary findings. I observed the tremors of her hand and arm, and her frail appearance when she testified before me. I also rely on the undisputed facts concerning the presence of many chemicals at the Pollard School including diesel and paint fumes, and chemical adhesives and sealants.

(Dec. I, 757.) Regarding causation and disability, he further concluded,

> I do not find that the employee suffers from [multiple chemical sensitivity] MCS. MCS is a controversial diagnosis which has gained substantial acceptance in the medical community, but a concensus [sic] on the diagnosis has not yet been reached. Scientific opinion that is based on speculation or conjecture will not support an award of benefits even if it is presented in terms of reasonable probability or medical certainty. Sevigny's Case, 337 Mass. 747, 750-754 (1958). Before expert testimony on a medical issue such as a particular diagnosis can be accepted, the 'scientific validity' and 'reliability' of the issue must be established. Commonwealth v. Lanigan, 491 Mass. 15, 25-26 (1994), quoting Daubert v. Merrel Dow Pharms., 509 U.S. 579, 592 (1993). In Massachusetts, 'general acceptance in the relevant scientific community will continue to be the significant, and often, the only issue.' Lanigan at 26. As there is no concensus [sic] among the medical experts on the diagnosis, I cannot, as a nonexpert, make such a finding. *However, I do make the finding that the symptoms listed above which*

> *collectively make up the collection of ailments diagnosed by Dr. Hu, do afflict the employee. These symptoms, regardless of the name assigned to them, do totally disable the employee, and are causally related to the employee's workplace exposure at the Pollard School.*

(Dec. I, 758-759.)(Emphasis added.)

As a result of the 1998 decision, the employee, age fifty-eight at the time of the most recent hearing in 2017, has been receiving § 34A benefits since the exhaustion of her § 34 temporary total incapacity benefits on or about January 17, 1999. On September 30, 2014, the self-insurer filed a complaint to discontinue those benefits, accompanied by a July 31, 2014, report of Dr. Milo Pulde.[3] Rizzo, supra.

On February 5, 2015, the self-insurer's complaint proceeded to a § 10A conference, where it was denied. (Dec. II, 402.) The self-insurer's appeal resulted in the employee's examination by a § 11A impartial medical examiner, Dr. Robert Swotinsky, on May 9, 2015. At the subsequent hearing, the judge determined that the matter was medically complex and allowed the parties to submit additional medical evidence. (Dec. II, 402.) The judge admitted the employee's submission of reports from Dr. Susan Korrick, over the insurer's objection and motion to strike those reports. The judge then relied on Dr. Korrick's opinions as well as the "credible testimony of the employee" to determine that the employee remains permanently and totally incapacitated "as a result of the toxic exposures she suffered at work at the Pollard School those many years ago." (Dec. II, 409.)

The insurer appeals, arguing the judge erred in handling the medical evidence, specifically Dr. Korrick's reports, and that, as a result of that error, it was denied due process of law. Specifically, it argues that, 1) Dr. Korrick's reports were not timely submitted; 2) the doctor did "not meet with or examine the employee at or near the time of the report"; and, 3) the doctor's reports had to be excluded from the evidence or

[3] The insurer's Form 108 states as the specific ground for its complaint to discontinue the employee's benefits, "[b]ased upon Dr. Milo Pulde's report dated July 31, 2014, causation of present and ongoing medical condition of the employee is contested." (Insurer's Form 108 [9/30/14])

stricken, because she relied on the diagnosis of "multiple chemical sensitivities (MCS)" which, the insurer argues, is a diagnosis not generally accepted in the medical community and fails the tests of Daubert and Lanigan. (Dec. II, 405-406; Ex. 9; Self-ins.br. 6-16.) Regarding the self-insurer's first two claims of error, we note that the judge's rulings were clear and provided adequate support for his decision. (Dec. II, 405-406.) Accordingly, we summarily affirm on those two issues.

We address the self-insurer's third argument that the reports of Dr. Korrick should have been stricken as a matter of law because she provided a diagnosis of MCS, which is not accepted in the medical community, and fails the tests of Daubert, Lanigan and Canavan's Case, 423 Mass. 304 (2000). The judge accepted Dr. Korrick's explanation of her use of the term MCS as "diagnostic code," and he also accepted her explanation that she uses "the more appropriate designation 'Chronic Environmental Illness' as the official diagnosis." (Dec. II, 407.) In doing so, the judge noted that MCS "is a more convenient and less cumbersome diagnosis than 'headache, severe burning sensations of the face and nose, join[t] pain and muscle pain' that I used on page 755 of my October 29, 1998 decision," and that Dr. Korrick used MCS as a "catch phrase or a well understood abbreviation for a constellation of several symptoms caused by an exposure or exposures to construction-related chemicals, dusts and airborne contaminants." (Dec. II, 407.) The self-insurer argues the judge erred because he,

> devised a semantical solution to avoid the edict of Canavan's Case, supra, abetted by the two reports of Dr. Korrick. 'I conclude that Dr. Korrick is likely a proponent of the medical community accepting the diagnosis of MCS. But she understands that MCS is not an AMA endorsed diagnosis. She uses MCS as a "diagnostic code" despite its unaccepted status.' (Dec. 14 Bean 407). Even the judge recognized that Dr. Korrick utilizes the term MCS as the diagnostic code and for billing purposes. 'We have rejected this effort to dodge the MCS conundrum, while still awarding benefits based on its symptomatology. See Canavan v. Brigham & Women's Hospital, 14 Mass. Workers' Comp. Rep. 385, 390 (2000).' Costello v. Faulkner Hospital, 17 Mass. Workers' Comp. Rep. 66, 68 (2003).

(Self-ins. br. 15-16.) The self-insurer thus asserts the judge erred by admitting Dr. Korrick's reports, and as a result, the decision must be reversed and vacated. (Self-ins. br. 19.)

The self-insurer's proposed disposition of this case assumes that it would prevail as a matter of law, without the admission of Dr. Korrick's reports. However by focusing its arguments on the judge's admission of Dr. Korrick's reports, and stating that "once the fray was engaged, the employee had to prove her case," (Self-ins. br. 9), the self-insurer bypasses the threshold issue of whether it met its burden of producing evidence of a change in the employee's condition, so as to create a "fray." The law in this area is settled. The compensability of the employee's condition was established through the first, unappealed hearing decision which determined,

> [a]s there is no concensus [sic] among the medical experts on the diagnosis, I cannot, as a nonexpert, make such a finding. However, I do make the finding that the symptoms listed above which collectively make up the collection of ailments diagnosed by Dr. Hu,[4] do afflict the employee. These symptoms, regardless of the name assigned to them, do totally disable the employee, and are causally related to the employee's workplace exposure at the Pollard School.

(Dec. I, 759.) As a result of this unappealed decision, original causation and liability were established, and the self-insurer now cannot contest either determination. The self-insurer's present argument, that the judge erred by relying on the employee's symptoms as supporting compensability, is a backdoor attempt to alter a finding that its failure to appeal from the original hearing decision rendered unassailable.

The self-insurer's complaint acknowledged it was limited to contesting present causal relationship. Yet, as the judge observed, the report of Dr. Pulde, which the self-insurer used to pursue its complaint, failed to meet the insurer's threshold burden of producing evidence of a change in the employee's accepted condition. Dr. Pulde diagnosed the employee's condition as idiopathic environmental illness (IEI). (Dec. II,

[4] In his first decision, the judge noted Dr. Hu diagnosed the employee as having MCS related to her workplace exposures. (Dec. I, 754-756.) In that decision, the judge expressly rejected the MCS diagnosis. (Dec. I, 758.)

Ex. 6.) As the judge found in his decision, "[b]oth IEI diagnoses are invalid in this case as liability was established in 1998. So from a legal point of view the employee's malady is not 'idiopathic.' " (Dec. II, 410 n. IV.) The IEI diagnosis was discussed by the § 11A examiner, Dr. Swotinsky and by Dr. Rose H. Goldman. (Dec. II, 408.) As the judge noted, Dr. Swotinsky's opinion on the issue of causation concerned the issue of *original* causation existing during the time period prior to the judge's decision in November 1998, as did Dr. Goldman's opinion. (Dec. II, 404-405, 408.) To the extent Dr. Goldman provides an opinion regarding causal relationship of the employee's "current symptoms," her report reveals that opinion is neither new nor altered from her opinion on causal relationship for the time period prior to the judge's 1998 decision.[5] Thus the opinions of these other physicians are akin to the physician's opinion in Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007).

In Adams, the self-insurer accepted liability for the employee's "discogenic back pain with occasional sciatica," failed to appeal a subsequent conference order awarding

[5] Dr. Goldman initially examined the employee on May 26, 1994, "for symptoms of "irritation of the throat, nasal congestion and 'sinus pressure.' " Her January 21, 2015, report states in relevant part,

> In 1994, she developed symptoms of nose and throat irritation and sinus issues which were causally related to exposure to irritants at the Pollard School that were occurring at that time. However, instead of these symptoms resolving once she was either away from the school or when the construction had ceased, she began experiencing not only respiratory irritation symptoms, but also cognitive symptoms which she reported in relationship to a variety of perceived environmental exposures. To characterize this syndrome, Dr. Hu used the label 'multiple chemical sensitivities (MCS)'. . . .

(Ex. 6.) Dr. Goldman went on to discuss MCS, IEI, and toxic induced loss of tolerance (TILT); however, noting these diagnoses are controversial, she did not offer any of them as the employee's diagnosis. (Dec. II, Ex. 6.) Instead, she offered an alternative diagnosis: "it seems to me that some of her symptoms are consistent with a conditioned response type of disorder so that even smelling a small odor or experiencing an initial mild level of nose or throat irritation triggers an anxiety reaction, as manifested by hyperventilation, light headedness and tremor." (Ex. 6; Dec. II, 408.) The judge also noted that Dr. Goldman did not relate the employee's head pain to chemical exposure and thought her chest tightness could be asthma or a reaction to stress or anxiety. (Dec. II, 408; Ex. 6.) Regarding the employee's current symptoms, Dr. Goldman opined, "a large portion of her current symptoms are anxiety-type symptoms that are precipitated by her perceived environmental exposures." Id.

the employee § 34A benefits, and, after paying those benefits for seventeen years, filed a complaint to discontinue them. Adams, supra at 207-208. Although the judge properly limited the self-insurer to challenging the employee's present incapacity and causal relationship from the date of the filing of the insurer's complaint forward, she erred in adopting the opinion of the self-insurer's physician that "there is no causal relationship between any activities as a school teacher and her development of left sciatica," because that opinion was a statement regarding the "*initial* causal relationship between the employee's work activities and the development of left sciatica," not a statement of *present causal relationship*. Adams, supra at 207-209 (emphasis added). What we said then, equally applies to this case:

> [Where there is] 'a final determination of all issues involved in the establishment of the right to compensation[,]. . . . [t]he board has jurisdiction to modify the award of compensation *as changes take place in the condition of the injured employee* [citations omitted], but the basic questions of liability under the law are not open for further consideration of different determination.' Kareske's Case, 250 Mass. 220, 224 (1924). Thus, the only question before the administrative judge was whether the employee's medical or vocational circumstances had changed in such a way as to permit the self-insurer to place her § 34A entitlement at issue. '[W]here the insurer seeks discontinuance of § 34A benefits, the insurer must go forward with evidence of improvement in the employee's condition or a lessening of the degree of incapacity in order to meet its burden' of producing sufficient evidence to create a dispute. Slater v. G. Donaldson Const., 17 Mass. Workers' Comp. Rep. 133, 137 (2003), quoting Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994). [The adopted doctor's] causal relationship opinion did not meet that burden of production, because it did not address any change in the employee's condition.

Adams, supra at 209 (emphasis added). Here, the judge recognized that none of the medical evidence met the insurer's burden of production during the relevant time period in dispute as he expressly found, "no evidence of a substantial change in the employee's symptomatology or the extent of her disability, since the issuance of my 1998 decision, presented in this action [sic]. *Nor has there been any evidence presented that would suggest that the causation that I found in my 1998 decision has dissipated or been superseded in the intervening 19 years*." (Dec. II, 409.)(Emphasis added.)

We further note that the judge also expressly relied on the employee's "credible" testimony and found, "consistent with my 1998 decision, the employee continues to be totally and permanently disabled as a result of the toxic exposures she suffered at work at the Pollard School those many years ago." (Dec. II, 409.) We cannot disturb this finding. Wilson's Case, 89 Mass. App. Ct. 398, 402 (2016)(no abuse of discretion where judge found employee to be credible "as to the nature and cause" of injury).

Because the self-insurer has not met its burden of production, any error the judge may have committed in allowing the admission of Dr. Korrick's records is harmless, as the self-insurer could not prevail in the first place. Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. 261, 267 (2012)(where no evidence meets insurer's burden of production, complaint to modify or discontinue weekly benefits fails as a matter of law and must be denied and dismissed). Accordingly, the decision of the administrative judge is affirmed. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,680.52, plus necessary expenses.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **January 15, 2019**