COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031707-11**

Lisa DeGrandis	Employee
Massachusetts General Hospital	Employer
Partners HealthCare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
William H. Troupe, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee §§ 13, 30 and 34 benefits for a December 4, 2011 work injury. We affirm.

On December 4, 2011, the employee, a registered nurse, injured her back at work while helping to transfer a patient.[1] (Dec. 4-5.) The self-insurer accepted liability for the employee's injury and paid § 34 benefits until May, 2012, when it commenced payment of maximum § 35 benefits. The employee filed a claim seeking § 34 benefits from May 19, 2012, to date and continuing, but at a conference before a different administrative judge, she was awarded § 34 benefits only from May 19, 2012, to June 1, 2013. Both parties appealed the conference order. (Dec. 2.)

Pursuant to § 11A, the employee was examined by Dr. William D. Shea, who issued his report on February 4, 2013. (Ex. 4.) His deposition testimony was later admitted into evidence. (Dec. 1.)

[1] Previously, the employee suffered a back injury at work on May 15, 2011, was paid workers' compensation benefits, and returned to full duty work in September, 2011. The record is unclear whether the self-insurer accepted liability for the condition caused by the May, 2011 injury, and the decision is silent on this issue. Because the self-insurer has not pursued its § 1(7A) defense on appeal, we need not recommit the case for a determination of whether the May, 2011 injury was compensable. See footnote 2, infra.

At the hearing the employee claimed, inter alia, § 34 benefits from May 19, 2012, to date and continuing. (Dec. 2.) In defense, the self-insurer raised disability, the extent thereof, and causal relationship, including § 1(7A).[2] (Dec. 2-3.)

The self-insurer moved to strike Dr. Shea's § 11A report as inadequate, and moved for permission to submit additional medical evidence. The judge "denied the motion to strike the impartial report as inadequate, but . . . allowed the [self-]insurer to submit additional medical reports." (Tr. 5.) The judge acknowledged the employee's additional medical evidence, and stated, "[t]he [self-]insurer is to submit any additional medicals for that time period after the impartial by October 1, 2013." (Tr. 6.) Importantly, the judge had also previously confirmed that, in addition to Dr. Shea's report, "by agreement, [the parties are] also going to submit all medicals from the conference package . . . submitted to Judge Jacques who initially heard this matter at conference." (Tr. 4.)

In her decision, the judge adopted the opinion of Dr. Shea, who restricted the employee "to work which requires her to be able to change positions frequently and not require sitting of more than 30 minutes at a time, no lifting more than 10 pounds and no more than 4 hours a day." (Dec. 7.) The judge also was "persuaded by the employee's testimony that she is desirous to return to work but is prevented from doing so by her daily pain." Id. Adopting Dr. Shea's opinion that the employee's disability was causally related to the December 4, 2011, industrial accident, the judge awarded her § 34 benefits "from December 5, 2011 to date and continuing." (Dec. 8.)

The self-insurer argues three issues on appeal: 1) the expert medical evidence fails to support a causal relationship between the employee's work injury and her disability; 2) the judge's "finding that the employee is totally disabled is not adequately supported by the evidence or [the] reasonable inferences" therefrom; and, 3) the judge failed to consider all of its evidence. (Self-ins. br. 3-6.)

[2] On appeal, the self-insurer raises no issue with the judge's failure to address the elements of § 1(7A), nor does it argue that the "major cause" standard applies to the employee's claim.

We disagree that the adopted medical opinion of Dr. Shea fails to carry the employee's burden of proof on the causation issue. The totality of Dr. Shea's deposition testimony, as reasonably interpreted by the judge, supports the conclusion the employee's work injury caused her L4-5 disc rupture, and her sacral pain. (Dep. 2-5.) It was the judge's prerogative to credit the employee's complaints of pain, and afford them "decisive weight" in her incapacity analysis. Dalbec's Case, 69 Mass. App. Ct. 306, 314 (2007), and cases cited. Accordingly, we also reject the self-insurer's argument that the judge's finding of total incapacity is unsupported by the evidence.

Finally, the self-insurer argues the judge erred by failing to list or consider the medical evidence it submitted at conference which, by agreement, was entered into evidence at hearing. Tunis v. Hillcrest Educ. Ctrs., 26 Mass. Workers' Comp. Rep. 299 (2012), and cases cited. Ordinarily, this failure engenders a recommittal for consideration of that evidence. Id. In this case, however, examination of that evidence leads us to conclude that this error is harmless. See Driscoll v. Town of Framingham, 28 Mass. Workers' Comp. Rep. ___ (February 25, 2014) (misinterpretation of medical opinion rendered harmless when viewed in context of other findings). The medical evidence[3] submitted by the self-insurer at conference supported a causal relationship between the employee's work injury, and her resulting pain and disability. Therefore, we fail to appreciate how this evidence could permit the judge to conclude that a causal relationship between the employee's injury, her complaints of pain, and her incapacity, was lacking.

[3] The self-insurer's conference submission consisted of two documents. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file). First, the November 14, 2012 office note of Dr. Eric P. Carkner, which does not contain an opinion on causation or disability. Second, the May 2, 2012 medical report of Dr. Kenneth Polivy, which states the employee "developed a lumbar disc protrusion causally related to her work injury of December 4, 2011. At the present time [the employee] is 7 weeks post surgery. She continues to report central low back pain although she does report that her right leg complaints have improved." Dr. Polivy did not opine the employee was capable of

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is ordered to pay the employee an attorney's fee in the amount of $1,574.83.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **June 30, 2014**

returning to her former work activity. Dr. Polivy and Dr. Shea agreed the employee had a work-related partial medical disability.