COMMONWEALTH OF MASSACHUSETTS

DEAPRTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 082225-86

Maria Nelson	Employee
General Hospital Corp.	Employer
General Hospital Corp.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Koziol, McCarthy and Fabricant)

APPEARANCES

Thomas F. Grady, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer at hearing and on appeal
Richard W. Jensen, Esq., for the self-insurer on brief

KOZIOL, J. The self-insurer appeals from an administrative judge's decision denying its complaint to modify or discontinue the weekly § 34A benefits the employee receives as a result of a work-related back injury she sustained on June 12, 1986. The self-insurer claims the administrative judge committed several errors in his treatment of the medical evidence and erred in adopting the opinion of a vocational expert. We affirm the decision.

At the time of the hearing, the employee, Maria Nelson, was forty-three years old. The employee had some past work experience as a cashier, and after graduating from high school, she worked in the medical records field. (Dec. 3.) As a result of the June 12, 1986 work injury, she has had three back surgeries, the last of which occurred on January 16, 1991. (Dec. 3.) She has not worked since the date of the accident. (Dec. 3.) On the record at the hearing, the administrative judge allowed the employee's motion for a finding of inadequacy regarding the October 29, 2003 report of the § 11A(2) impartial medical examiner, Dr. Stanley Hom. The parties subsequently submitted additional medical evidence in the form of the deposition testimony of the employee's treating physician, Dr. John W. Stakes, III, and two reports of Dr. Robert Pennell.

The self-insurer argues recommital is appropriate because the decision does not indicate that the administrative judge considered Dr. Pennell's reports. We disagree. The

administrative judge specifically referenced the two reports as "Exhibit No. 8 - Reports of Dr. Pennell." (Dec. 2.) Referencing the documents in the plural was sufficient, compare Dilisio v. R. Dilisio, Inc., 21 Mass. Workers' Comp. Rep. 315, 316 (2007)(error in failing to list admitted reports as exhibits or otherwise comment on their contents), and we are satisfied that the judge considered these reports. Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 96-97 (2007)(administrative judge need only comment on the evidence he deems persuasive).

In his October 29, 2003 report, the impartial medical examiner opined that the employee had a permanent partial disability, limiting her with regard to "lifting, pushing, pulling, bending and/or twisting at the waist and prolonged sitting." (Ex. 2, p. 5.) He further opined, "I also believe that she might only be able to tolerate work on a part time basis (at least at the present time). Most appropriate would be a sedentary position and I would place pound limitations in the order of 3 to 5 pounds." (Ex. 2, p. 5.)

Nonetheless, after viewing videotapes of the employee, Dr. Hom changed his opinion regarding the employee's disability. He testified that, "[the employee] demonstrated the capacity that I think would be consistent with full-time employment," and although he continued to recommend avoiding, "excessive lifting, pushing and pulling, excessive bending and twisting of the waist, and again, prolonged sitting," he opined that the employee seemed to be able to tolerate a greater level of activity than he had believed, based on his examination of the employee in October of 2003. (Dep. 26-27.) The following exchange then took place:

> Q: Doctor, in your October 29, 2003 report, you had stated that you felt that, "she would only be able to tolerate work on a part-time basis at least at the present time." Are you saying now that she would be able to work, you believe, on a full-time basis?
>
> A: I believe so.
>
> Q: Okay. And, Doctor, you also state that you believe that, "most appropriate would be a sedentary position, and you [sic] would place pound limitations in the amount of 3 to 5 pounds." With regard to the lifting, do you think she could lift more than 3 to 5 pounds?

> A: Yes. I would probably even amend the sedentary position. I would probably say that she would not be capable of a manual labor position, and I would probably increase her pound limitations to maybe 15 pounds.

(Dep. 27-28.)

When asked what he meant by "a manual labor position," Dr. Hom responded: "[a] position that would require frequent lifting, pushing, pulling, bending at the waist, stooping, and carrying excessive weight," which he clarified as being "over that 15-pound limitation." (Dep. 28.) Despite changing his opinion regarding the employee's physical restrictions, Dr. Hom's diagnosis and causal relationship opinions remained unchanged after viewing the videotape evidence. The administrative judge noted these facts and adopted the doctor's opinions that the employee suffered from a chronic pain syndrome in her low back causally related to her industrial injury and subsequent surgeries. (Dec. 4.) The administrative judge also explicitly noted that Dr. Hom had changed part of his opinion, finding the following:

> Dr. Hom concludes that [the employee] had more work capacity than he had originally believed. He concludes that the employee would be suitable for full time sedentary employment provided that she not engage in excessive pushing, pulling or lifting of over fifteen pounds and not engage in prolonged sitting without the opportunity to change position. I adopt these conclusions.

(Dec. 5.)

The self-insurer challenges this finding, arguing Dr. Hom did not limit the employee to the performance of sedentary employment. Despite the doctor's use of the term "sedentary," no one asked him what he meant by that term. The vocational expert, Edward Calandra, opined that the employee's past work in the medical records field was sedentary work, which he defined as work requiring lifting up to ten pounds. (Tr. 21, 37, 38.) In his decision, the administrative judge also found the employee has "some sedentary work experience and transferable skills appropriate for sedentary work." (Dec. 6.) In addition, at the conclusion of his deposition, Dr. Hom testified it was his opinion the employee could perform her past work. (Tr. 56-57.) Under the circumstances, there was no error in the judge's finding that it was Dr. Hom's opinion the employee "would be suitable for full time sedentary employment." (Dec. 5.) See, Goroch v. Alec H. Jaret, D.M.D., 22 Mass. Workers' Comp. Rep. 119, 120 (2008), citing Perangelo's Case, 277

Mass. 59, 64 (1931). Immediately after using the label "sedentary," the administrative judge accurately described the physical restrictions imposed by Dr. Hom at his deposition. (Dec. 5.) Thus, to the extent the administrative judge may have erred in using the label "sedentary," to describe Dr. Hom's ultimate conclusion regarding the employee's work capacity, the error, if any, is not material and is harmless.

The self-insurer further argues that Dr. Hom's opinion regarding the extent of the employee's disability conflicts, and cannot be reconciled with, the opinion of the employee's treating physician, Dr. Stakes. Consequently, it claims the administrative judge erred by adopting both doctors' opinions. We disagree. Dr. Stakes opined the employee was physically capable of sedentary or even light work. (Dec. 5.) To the extent the actual restrictions set forth by Dr. Hom fall outside the scope of sedentary employment and spill into the range of light work, the physicians' opinions are easily reconciled. There also was no error in the administrative judge's description of Dr. Hom's opinion as providing "strictly delineated physical restrictions," especially where Dr. Hom described those restrictions in detail and more precisely than Dr. Stakes. (Dec. 5.)

The administrative judge conducted his own vocational analysis in this case and adopted only a portion of Mr. Calandra's testimony. After making findings of fact regarding her age, education, past work experience, and transferrable skills, the administrative judge found the employee has the ability to sit or stand for no longer than forty-five minutes and, incorporating Dr. Hom's ultimate opinion, he found she could lift up to fifteen pounds. (Dec. 5-6.) The administrative judge then found: "[the employee] remains on pain medication and displays significant pain behaviors. Based primarily on these factors, Edward Calandra, the only vocational expert to testify, opined that the employee was unable to find and maintain gainful employment. I adopt this opinion." (Dec. 6.)

The self-insurer claims the administrative judge erred in adopting Mr. Calandra's opinion, because his opinion was based in part on Dr. Hom's initial written opinion limiting the employee to lifting three to five pounds, not Dr. Hom's ultimate opinion rendered at deposition. The self-insurer's argument rests upon an overly expansive reading of the administrative judge's findings. The administrative judge did not adopt all of Mr. Calandra's opinions. Instead, he found that Mr. Calandra's opinion regarding the employee's ability to find and maintain work was based primarily on his assessment of the impact her chronic pain syndrome would have on her ability to function in the workplace. Mr. Calandra was not asked what served as the primary basis for his opinion,

nor did he directly testify that his opinion was based primarily on the employee's pain. Nevertheless, "the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999).

Mr. Calandra documented that the employee has on-going symptoms of back and leg pain, needs to take multiple medications, and that sitting for long periods is her most aggravating position. (Ex. 5.) Dr. Hom did not change his opinion regarding the employee's tolerance for sitting or the existence or extent of, her chronic pain syndrome. The administrative judge not only credited the employee's complaints of pain, but found her ability to tolerate both sitting and standing was more restricted than Mr. Calandra assumed.[1] Despite believing that the employee had a greater capacity to tolerate sitting and standing, Mr. Calandra opined that even sedentary work was beyond the employee's capabilities, explaining his opinion was based on a number of factors. (Tr. 40-41.) He further opined that the employee could not sit for an entire day because she described sitting as her most uncomfortable position. (Tr. 44-45.) Most significantly, however, Mr. Calandra opined the employee's ability to work would be affected by her complaints of "[c]onstant low back and left leg pain as well as [sic] radiating into both feet, as well as significant difficulty with standing and especially with long periods of sitting," because these complaints would adversely affect her ability to carry out job duties. (Tr. 22.) He further testified that she is unemployable at this time. (Tr. 22-23.)

Viewed in its entirety, Mr. Calandra's testimony supports the inference drawn by the administrative judge. For these reasons, the decision of the administrative judge is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee in the amount of $1,495.34.

So ordered.

_____

Catherine Watson Koziol
Administrative Law Judge

[1] By finding the employee can sit or stand for only forty-five minutes, the administrative judge found the employee had less capacity to tolerate those positions than the one hour tolerance assumed by the vocational expert. (Tr. 29.)

_____

William A. McCarthy
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: ***November 14, 2008***