COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040756-02**

Melissa Thompson	Employee
Berkshire County Assoc. for Retarded Citizens	Employer
St. Paul Fire and Marine Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Fabricant[1])

APPEARANCES
Michelle K. Manners, Esq., for the employee at hearing
J. Norman O'Connor, Jr., Esq., for the employee on appeal
Justin A. Coussoule, Esq., for the employee on brief
Robert A. Riordan, Jr., Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which an administrative judge awarded the employee § 34 total incapacity benefits for a 2002 work-related injury. The insurer contends the judge erred in finding causal relationship between the employee's work injury and her lumbar-related diagnoses and disability, because the adopted medical evidence does not support such a finding. We disagree and affirm the decision.

The employee injured herself while trying to turn a patient on a bed in the course of her employment as a direct care attendant on October 5, 2002. She felt immediate pain in her right abdominal area. (Dec. 2.) In a previous job, the employee had suffered a prior work-related hernia at that general area, but she had been largely asymptomatic in her current position. (Dec. 3.)

The employee sought immediate medical care for her abdominal pain, but within weeks of the incident, the pain radiated into her right hip and back. (Dec. 3.) Following a § 10A conference, the administrative judge awarded the employee benefits, and the insurer appealed. (Dec. 2.)

[1] Judge Fabricant recused himself and did not participate in panel deliberations.

On August 19, 2003, the employee underwent a § 11A impartial medical examination by Dr. Eugene W. Leibowitz. (Dec. 3.) The impartial physician opined it was difficult to attribute the employee's hip and leg pain to a spinal problem, primarily because the employee's first complaints of back pain came three weeks after the work incident. According to the doctor, the hip and leg pain was more likely due to a derangement of the hips rather than a back problem. The doctor could not render an opinion on the effects of any aggravation of the employee's pre-existing hernia to her complaints when examined. The doctor found no ongoing disability related to the work incident. (Dec. 4; Dep. 9, 11-13, 18-19, 21-22, 28-29.)

Following the deposition of the impartial physician, on motion of the employee, the judge declared the medical issues complex and allowed the parties to introduce additional medical evidence. (Dec. 2.) The employee offered medical records of her treating physician, Dr. Gabriella Kovi, which reflected that the initial treatment was focused on the employee's right groin area. As of June 2003, however, Dr. Kovi proposed investigating the employee's back as a possible contributor to her overall right-sided pain. The doctor ordered a lumbar MRI study, which showed a slight bulge flattening the thecal sac at L4-5, and a disc bulge at L5-S1 with evidence of a fissure or annular tear. Dr. Kovi considered the employee had most likely injured her back in the October 2002 work incident, and that her back was the source of the generalized pain in her right hip, groin and down her right leg. Dr. Kovi recommended discography to more fully diagnose the employee's medical condition. (Dec. 4-5; Employee Ex. 2.)

The judge adopted the medical opinions of Dr. Kovi, and concluded that the employee suffered from work-related total incapacity stemming from a probable back injury while turning the patient on October 5, 2002. The judge ordered § 34 and medical benefits accordingly. (Dec. 5-6.)

On appeal, the insurer contends that the medical evidence does not support the judge's award. We disagree.

The adopted medical evidence of the employee's treating physician, Dr. Kovi, consists of twelve office progress notes. While sometimes stated in terms of medical impression, the import of the doctor's assessment of the employee's condition over the course of almost two years is that her diagnoses of right lower quadrant abdominal pain, hip pain and discogenic back pain were causally related to her October 5, 2002 work injury. In her progress note of June 24, 2003, Dr. Kovi states:

> [The employee] was working at the Berkshire ARC as a residential staff member, when she was helping a patient and, as she was repositioning the patient's head, she pulled her abdomen and *most likely her back.*
>
> A CT scan was obtained at the time of the accident, and was consistent with hematoma of the right groin. However, the back has never been investigated. I believe that, the way the patient was lifting and repositioning, the patient actually could have hurt her low back and, therefore, an MRI evaluation of the lower lumbar spine is crucial to further diagnose and treat this patient.

(Employee Ex. 2; emphasis added.) On August 22, 2003, Dr. Kovi noted that the MRI did show generalized disc bulging at L4-5, which she connected to the groin and hip pain the employee was experiencing:

> Typically, L4-5 disk bulges are internal disk derangements resulting in significant pain radiating to the groin and hip. That is exactly the patient's complaint. It has been in our differential diagnosis to evaluate the patient with an MRI first, due to persistent complaints of groin pain different from the previous inguinal hernia-related pain. With the most recent work-related accident on October 5, 2002, the patient has been experiencing a different type of symptomatology with some back pain, groin pain and now, hip pain.

(Employee Ex. 2.)

On October 8, 2003, Dr. Kovi recommended the employee for discography, stating, "[t]he evaluation of the lumbar spine is prudent with persistent symptoms of pain radiating to the hip and groin." On July 6, 2004, Dr. Kovi reported that, "by analyzing the [work] accident, there was a suspicion that the patient has

primary back pain as a result of that injury, and referred pain to the groin is secondary only." At her August 20, 2004 visit with the employee, Dr. Kovi "recommended to the patient that the next possible treatment would be epidural steroid injection, which I plan to perform at the L4-5 level. According to the patient's MRI report, this is the most likely lumbar segment that got damaged at the time of the injury." (Id.) In her September 7, 2004 progress note, the most recent admitted into evidence,[2] Dr. Kovi essentially repeated the differential diagnosis set out above, and opined that the employee should "not return to her previous employment." (Id.)

The insurer makes much of the judge's use of words such as "appear," "probably," and "suspects": "It would appear that, as a result of her work incident, Melissa Thompson probably injured her back. . . ." "By July of 2004, Dr. Kovi suspects that the actual injury to Ms. Thompson was indeed a back injury, and that back injury referred pain to the groin area (the sight [sic] of her previous hernia) secondarily." (Dec. 5.) Whether the judge's use of such terms is, as the employee suggests, "merely . . . an idiolect within his written communication," (Employee br. 14, n.2.), is not the issue. Rather, the question is whether Dr. Kovi's opinions satisfy the employee's burden of proof. We answer in the affirmative.

The adopted medical evidence of Dr. Kovi is more than sufficient to support the judge's conclusion that the employee's total incapacity was causally related to the October 5, 2002 work injury. See Young's Case, 64 Mass. App. Ct. 903, 904 n.3 (2005), citing Hick's Case, 62 Mass. App. Ct. 755, 761-762 (2005)("A reliable differential diagnosis is a valid methodology for proving medical causation.") We do not consider Dr. Kovi's causation opinion

[2] Although he acknowledges that additional progress notes from Dr. Kovi covering the period from December 10, 2004 to March 25, 2005 were "not in the hearing record," employee's counsel nevertheless quotes and discusses the contents of those notes in some detail. (Employee br. 10, n.1.) Such reference to medical reports not in evidence is improper, see Hunt v. Ceco Corp., 3 Mass. Workers' Comp. Rep. 130, 133 (1989), and we have confined our analysis of the issues raised on appeal to the record evidence.

ambiguous, but even an ambiguous expert opinion on causation may be strengthened by credited lay testimony.[3] Josi's Case, 324 Mass. 415, 418 (1949). See also Gajda v. Specialty Minerals, Inc., 18 Mass. Workers' Comp. Rep. 68, 74 (2004).

The insurer also argues that the judge erred in failing to make specific findings as to his reasons for rejecting the § 11A medical examiner's opinions in favor of those of the treating physician. Again, we disagree. Once additional medical evidence is allowed, an administrative judge is entitled to adopt whatever competent medical evidence he or she finds most persuasive, in the absence of any objection or motion to strike.

> Nothing in § 11A . . . requires the administrative judge to adopt the conclusions of the [impartial physician's] report or precludes him from considering additional medical evidence once it becomes part of the record. Indeed, "prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion." Anderson's Case, [373 Mass. 813, 817 (1977).] Once properly admitted, the probative value of medical testimony is to be weighed by the fact finder, in this case, the administrative judge. Robinson v. Contributory Retirement Appeal Bd,, 20 Mass. App. Ct. 634, 639 (1985). [citation omitted]. Thus it is "within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another." Fitzgibbons's Case, 374 Mass. 633, 636 (1978).

Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187, 191 (2003), quoting Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). Dr. Kovi's opinions constituted medical evidence contrary to that of the § 11A examiner, and thus were sufficient to overcome its prima facie status. The judge performed reasoned fact-finding in the case. See Scheffler's Case, 419 Mass. 251, 259 (1994). We discern no error in his subsidiary findings and ultimate

[3] The employee testified that several weeks after her work injury, she perceived the pain in her right abdomen was radiating into her hip and back. She explained, "I was concentrating on the pain in my side, because it would just hurt so bad, that I didn't really . . . notice my back right away. The pain in my side just kind of took over." (Tr. 12-13.)

conclusion. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993).

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is to pay employee's counsel a legal fee in the amount of $1,357.64.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **June 29, 2006**