COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028369-15**

Nancy A. Peterson	Employee
Mass. State Lottery	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Harpin)

The case was heard by Administrative Judge Bergheimer.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Joseph Clark, Esq., for the self-insurer at hearing
Arthur Jackson, Esq., for the self-insurer at hearing and on appeal

KOZIOL, J. The self-insurer appeals from a hearing decision ordering it to pay the employee § 34 benefits from October 23, 2015, and continuing, along with § 30 medical treatment of low back and right-sided radiculopathy, including any diagnostic studies and/or work-up needed to determine if surgery remains appropriate. (Dec. 18.) Although we must vacate the decision and recommit the case for further findings of fact, we first address two of the self-insurer's arguments that are ripe for resolution.

We recite only those facts necessary to place the dispute in context. The employee was age fifty-seven at the time of the hearing. The judge found she had a history of back pain beginning in 1998 that "increased in 2004 and continuing after that," and "between 2004 and 2015 she managed her pain with periodic medical treatment including injections, physical therapy, chiropractic care and anti-inflammatory medications." (Dec. 7-8.) The judge also found that the employee suffered from an unrelated medical condition which caused her pain and for which she also treated prior to the work accident. (Dec. 7.) The employee worked for the Massachusetts State Lottery from October of 2007 through October 22, 2015, when she fell while entering the building at work. The

employee "landed on her right side, right knee and right hip" and "felt immediate pain in her back and had bruising on the right side of her body." (Dec. 8.) She worked that day, but throughout the day she felt increased pain in her knee, hip and back. The next day she returned to work, but as a result of her pain she left after working only a few hours and has not returned.

The employee filed a claim seeking payment of § 34 benefits from October 23, 2015, and continuing, and § 30 medical benefits for her low back. On October 27, 2016, a different administrative judge issued an order awarding the employee § 34 benefits from October 23, 2015, through May 4, 2016, followed immediately thereafter by ongoing § 35 benefits at the maximum rate of $585.00 per week. (Dec. 4.) Both parties appealed. On April 17, 2017, the employee was examined by impartial medical examiner, Dr. Scott Harris, pursuant to § 11A(2).

Thereafter, the self-insurer filed two motions challenging Dr. Harris's report on the ground of bias, both of which were denied. Although the judge found Dr. Harris's report to be adequate, she found the medical issues complex, and allowed the parties to submit additional medical evidence. The judge found the employee has not returned to work, as her back pain "has gotten much worse" since the work-related accident. (Dec. 8.) The judge found the employee credible and adopted her testimony, "specifically with regard to her ongoing complaints of pain and her physical limitations." (Dec. 9.) She adopted portions of the opinions of Drs. Harris, George P. Whitelaw and Sergery Wortman and found, based on their opinions, that the employee's medical conditions regarding "her low back and right-sided lumbar radiculopathy are causally related to the injury of October 22, 2015"; that the employee is "temporarily and totally incapacitated from any and all gainful employment" since the date of injury and continuing; and that the treatment she had for the lower back and right-sided lumbar radiculopathy "has been reasonable and appropriate pursuant to §§ 13 and 30." (Dec. 13-14.) The judge also found the employee "was recommended for lumbar fusion surgery; however a significant amount of time has passed since then. As such, I further adopt Dr. Harris's opinion that

given that it's been two years, she would require another MRI and consultation with her doctor prior to proceeding with surgery." (Dec. 14.) Regarding the self-insurer's § (7A) defense, the judge made the following pertinent findings:

> The Employee sustained a compensable injury under the Statute on October 22, 2015 for which the [sic]Insurer has accepted liability and paid benefits since the date of injury. There is certainly evidence that the Employee suffered from several pre-existing, non-work related conditions which are not compensable under this statute. In looking at the adopted medical opinions, there is also credible evidence that there was a combination of these. However, the adopted expert medical opinions of Dr. Harris, Dr. Whitelaw and Dr. Wortman provide that the industrial injury of October 22, 2015 was a major though not necessarily predominant cause of his [sic] disability and need for treatment, thereby satisfying the statutory requirement. Dr. Harris clearly reiterated this at his deposition and opined that the work injury of October 22, 2015 was a major though not necessarily predominant cause of his [sic] disability and need for treatment. As a result, I find that the defense of § 1(7A) is not a bar to the Employee's claims as she has successful [sic] met the heightened burden.

(Dec. 15.) The judge went on to find, "[t]he adopted medical experts have all provided an opinion that the October 22, 2015 work injury significantly aggravated and/or exacerbated the Employee's pre-existing low back condition and represented 'a major' contributing cause of the ongoing low back condition, disability and need for treatment." Id.

The self-insurer takes issue with the judge's § 1(7A) analysis, arguing she committed a variety of errors in making her findings of fact and rulings of law. (Self-ins. br. 12-19.) First, the self-insurer argues the judge erred by adopting medical opinions that found the work accident was a major cause merely because the accident "triggered" or "woke up" a period of disability or increased pain, thereby rendering meaningless § 1(7A)'s requirement that the work-injury *remain* "a major cause" of disability or need for treatment. In particular, the self-insurer attacks the opinion of the § 11A impartial medical examiner, Dr. Scott Harris. The self-insurer asserts that Dr. Harris's opinions are not sufficient to meet the employee's burden of proving that her injury remains a major cause of her disability and need for treatment, because the doctor described the

employee's injury as "the straw that broke the camel's back," which it claims is insufficient to satisfy § 1(7A). Also, it argues that particular opinion is inconsistent with Dr. Harris's other opinion that the work-related accident is 20% responsible for her current condition. It concludes that the judge's adoption of Dr. Harris's opinions on § 1(7A) is arbitrary and capricious. We disagree.

The self-insurer misapplies our decision in Larkin v. Feeney Fence, 19 Mass. Workers' Comp. Rep. 78 (2005), to support its claim that Dr. Harris's opinions are legally insufficient to carry the employee's burden under § 1(7A). Id. ("straw that broke the camel's back" medical opinion insufficient to carry employee's burden that accepted industrial injury remained a major cause of his disability). The self-insurer fails to acknowledge that, in Larkin, the doctor provided no opinion sufficient to satisfy the employee's burden of proving that the work-related accident "remains a major cause" of the employee's disability and need for treatment. Instead, it was the judge who determined that "the back has remained broken." Id. at 81. Here, Dr. Harris testified consistently that after the employee's fall, her level of functioning deteriorated and never returned to her preinjury status. (Dep. 11-12, 24,25.) He also consistently testified that the work injury aggravated and worsened her pre-existing condition and was a major cause of her low back condition and need for treatment since the work injury in October of 2015. (Dep. 20, 40)

> Where a physician is asked whether the injury remains a major cause of the employee's disability or need for treatment, and answers affirmatively, sufficient evidence exists for the judge to rule in the employee's favor. Castillo [v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218,] 221 n.8 (2006); See Gleason v. Toxikon Corp., 23 Mass. Workers' Comp. Rep. 313, 315-316 (2009)(physician's opinion satisfied § 1[7A] where doctor affirmatively answered insurer's compound question that the work injury was a "straw that broke the camel's back" and was "enough to make it symptomatic and that was it," and testified as well that the employee's combination injury is a chronic condition of which the work-related injury remained a major cause).

Wiinikainen v. Epoch Senior Living, Inc., 32 Mass. Workers' Comp. Rep. 15, 22 (2018).

Nothing in Dr. Harris's report or his deposition testimony indicates he misunderstood the concept of "a major cause" or that his opinions used a lesser burden than required by the statutory language of § 1(7A). Moreover, contrary to the self-insurer's bald assertion, there is nothing inconsistent between Dr. Harris's opinions on the issue of § 1(7A) and his further opinion that the work-related accident remains 20% responsible for the employee's current symptoms. Abad v. Stacy's Pita Chips, 25 Mass. Workers' Comp. Rep. 173, 175 n. 3 (2011)(acknowledging that "in appropriate circumstances an opinion that a work related injury contributed twenty percent to the resultant condition" can satisfy the "a major cause" standard of § 1[7A]).

Next, the self-insurer argues the judge erred in denying its motion to strike Dr. Harris's § 11A report from evidence on the ground of bias. The self-insurer filed two motions on this topic. The first, filed January 26, 2018, argued that because Dr. Harris and the employee's treating physician, Dr. Nakata, are both "affiliated with Falmouth Hospital and Cape Cod Hospital" and they are both "associated with Medical Affiliates of Cape Cod and Cape Cod Preferred Physician's Network," Dr. Harris's appearance of impartiality was compromised, requiring the judge to find his report to be inadequate. ("Self-Insurer's Motion to Find the Impartial Medical Opinion Inadequate and Motion to Submit Additional Evidence," pgs. 1-2 [1/26/18]); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The parties argued this motion on the record at the hearing, February 1, 2018. (Tr. 8-12.) After hearing their arguments, the judge denied the motion. (Tr. 12.) However, she allowed the self-insurer's additional motion for a finding of medical complexity, and opened the medical evidence. Id.

Following Dr. Harris's deposition, the self-insurer renewed its motion alleging Dr. Harris's appearance of impartiality had been compromised, arguing that the appropriate remedy was to strike Dr. Harris's report and deposition from the record. ("Self-Insurer's Motion to Strike the Impartial Physician's Report and Deposition Based Upon the Appearance of Bias," pgs. 1-3 [4/26/18]); Rizzo, supra. The employee opposed this

motion, and the judge denied it. She noted that the self-insurer raised the issue a third time in its closing argument.[1] (Dec. 5.) The judge made the following findings of fact about this issue:

> I do not find that due to the fact that Dr. Harris and the employee's treating physician belong to the same Cape Cod Healthcare group that there is an appearance of bias. I further do not find the appearance of bias based on the fact that he may have met Dr. Nakata on one occasion. Furthermore, the fact that Dr. Harris shared an opinion or came to the same conclusion as Dr. Nakata does not persuade me that there is an appearance of bias. Dr. Harris testified clearly in his deposition that he does not give less weight to a medical report if he doesn't know the doctor. He also testified that he gives everybody a fair shake in terms of their opinions, unless he sees discrepancies in their report or they are recommending things he doesn't think are appropriate. Based upon the evidence regarding this issue, I do not find that the impartial physician is tainted by any appearance of bias or partiality and therefore the report and deposition are not stricken.

(Dec. 16.)

The self-insurer asserts that the case is governed by our decision in Amoroso v. U. Mass. Med. School, 19 Mass. Workers' Comp. Rep. 233, 236 (2005)(where injured employee and § 11A physician are employed by the same employer, the appearance of impartiality has been compromised requiring finding of inadequacy of § 11A report.) We disagree. Here, Dr. Harris testified that he does not work with Dr. Nakata, nor does the employee have any shared employment with Dr. Harris. (Dep. 33.) "[T]he issue of whether impartiality has been compromised is left to the discretion of the judge, who must make findings and a ruling." Amoroso, supra at 237. The judge did precisely that, and she did not abuse her discretion in denying the self-insurer's motion. Lastly, we note that even if the judge had found that the appearance of impartiality had been

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[1] In its closing argument, the self-insurer argued:

> Here the employee's treating doctor and the impartial are part of the same medical group, they refer patients to each other and based upon Dr. Harris' [sic] testimony at the hearing, he respects Dr. Nakata's opinion over that of the doctors he does not know.

("Self-Insurer's Closing Argument" at 36); Rizzo, supra.

compromised, the proper remedy would have been to declare the impartial report inadequate and to open the medical evidence, not to strike the doctor's report as advocated by the self-insurer. Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670, 673 (1995). Given that the medical record was opened due to the complexity of the medical issues, the remedy was exercised in any event.

However, the self-insurer's last argument has merit.[2] It argues that Dr. Wortman's opinions on causal relationship conflict with those of Drs. Harris and Whitelaw, and, as a result, the judge erred in adopting all three doctors' opinions and mischaracterizing them as being consistent with each other, when the opinions cannot be reconciled. We agree that the judge erred by doing so, and, as a result, we must vacate the decision and recommit for further findings of fact.

The judge is free to adopt none, part or all of an expert's opinion so long as her findings of fact reveal what opinion she is relying on, and she does not mischaracterize that opinion. Kent v. Town of Scituate School Dep't, 27 Mass. Workers' Comp. Rep. 195, 199 (2013). Here, the judge adopted portions of Dr. Wortman's opinion as stated in his first report of June 15, 2016. In that report Dr. Wortman expressly states:

> It is difficult to make any recommendations considering that I do not have any medical records, specifically her MRI report. . . . Since the patient did not have any physical therapy and considering that the patient has a prior history of chronic lower back pain I would recommend first to start with a trial of aquatic therapy with progress to land therapy. I do not know what kind of spinal injections were done and there is a possibility of different spinal injections. She may have had epidural injections but she may benefit from intraforaminal injections or facet blocks. Once again, without medical records it is impossible to make any specific recommendations. I will dictate an addendum when I have available medical records.
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> Disability: It is my medical opinion within a reasonable degree of medical certainty that presently, the patient is temporarily totally disabled due to a work related lower back injury and aggravation of a pre-existing condition. It is my medical opinion to within a reasonable degree of medical certainty that the work accident of October 22, 2015 is the major contributing factor to her present

[2] The self-insurer advanced additional arguments in its brief, which we summarily dismiss.

> temporary total disability as well as the major contributing factor to her ongoing need for medical care (chronic pain management, trial aquatic therapy and land therapy, and additional spinal injections). Without reviewing neurosurgical notes I cannot make any comments regarding recommendation for lumbar spine surgery. It is my medical opinion to within a reasonable degree of medical certainty that injury sustained and disability demonstrated by this patient are causally related to the described accident which occurred at work on or about October 22, 2015.

From this opinion, the judge adopted the following:

- That the Employee is temporarily totally disabled due to a work-related low back injury and aggravation of a pre-existing condition.
- That the work injury of October 22, 2015 is the major contributing factor to her present temporary total disability as well as the major contributing factor to her ongoing need for medical care.

(Dec. 12.) The judge failed to acknowledge that the following day, after reviewing the employee's MRI reports from September 4, 2013, November 18, 2015, and medical records from Neurosurgeons of Cape Cod, Dr. Wortman wrote an "Addendum" to his report wherein he altered his opinions expressed in his report opining, in pertinent part:

> MRI of the lumbar spine after her work injury on November 18, 2015 was compared to her previous MRI from September 4, 2013. I would like to quote from this report: 'When compared with previous examination the degenerative changes at L-4/L-5 have progressed and there is also more stenosis at L-4/L-5. Otherwise no major changes.' *Reading the description of the MRI I found that there is a description of a right sided disc herniation, but not protrusion at T-12/L-1. There is slight displacement of the nerve roots. This was not a finding on her previous MRI and it is my medical opinion to within a reasonable degree of medical certainty that these particular findings are causally related to the work accident of October 22, 2015. This particular finding can explain not only worsening of back pain but also possible radiation of pain into the right buttock area. Neural impingement at this level would not cause pain to the entire right leg. Progression of degenerative changes described are also related to evidence of microfractures of the endplates at L-5/S-1 level. This is not evidence of trauma but rather significant progression of degenerative changes at this particular level. These MRI findings warrant surgical approach but surgery in this particular case is not due to Nancy Peterson's work injury but rather because of progression of degenerative disc disease of the lumbar spine*. . . . Apparently Dr. Nakata is recommending caged fusion. I would like to quote from his office note: 'She has failed multiple epidural steroid injections and is now on oral Morphine. I do not

> feel that more conservative measures are the way to go. If she cannot live with pain L-4/L-5 and L-5/S-1 decompression and fusions would be the most definitive.' . . . I would like to quote again: 'She will on occasion have some right buttock pain, right sided leg pain in to her right thigh and occasionally into the L-5/S-1 distribution.' *Pain in the buttock would be explained by new disc herniation at T-12/L-1 level. L-5/S-1 distribution is possible radicular symptoms related to spinal stenosis and foraminal stenosis but not due to specific trauma*. The patient did not have an EMG/nerve conduction study of the lower extremities to determine if she does in fact have radiculopathy. This type of study is very important because it can show if she has only chronic radiculopathy, which is a pre-existing condition, or a combination of chronic and acute radiculopathy. In this case, acute radiculopathy may be related to her work accident.

(Dec. 3;Ex. 19[5]; [emphasis supplied].) Against this backdrop, the judge adopted the following pertinent opinions of Dr. Harris:

- That the Employee has severe lumbar degenerative disk disease with spinal stenosis and foraminal stenosis and right-sided lumbar radiculopathy.
- That the Employee had these findings prior to the injury of October 22, 2015 however, that injury caused an exacerbation of her preexisting injury. The exacerbation has not calmed down and she is continuing to be symptomatic to a greater degree than she was before the injury.
- That the work injury of October 22, 2015 is a major but not predominant cause of her need for medical treatment.
- That the work injury aggravated and worsened a preexisting condition and represents a major cause of the Employee's condition, disability and need for treatment, which is likely surgery.

(Dec. 11.) She also adopted the following opinions of Dr. Whitelaw:

- The Employee's restrictions and limitations were significantly exacerbated by the fall she had at work on October 22, 2015.
- The injury of October 22, 2015 represents a major if not necessarily predominant cause of her ongoing disability and need for treatment.
- That the surgery recommended by the treating physician is reasonable and necessary and causally related to the October 22, 2015 incident.
- That there is no question that prior to this incident the Employee had significant problems with her back, but the work injury of October 22, 2015 represents a major contributing cause of her low back condition, disability and need for treatment since that date.

(Dec. 12.)

Dr. Wortman's causal relationship opinions are not consistent with the opinions of Drs. Harris and Whitelaw, particularly with regard to lumbar spine degenerative disc disease and recommendation for surgery. See Perangelo's Case, 277 Mass. 59, 64 (1931)("opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying"). Nonetheless, the judge found, "I adopt the expert medical opinions of Dr. Harris, Dr. Whitelaw and Dr. Wortman, that the employee's medical conditions with regard to her lower back and right-sided lumbar radiculopathy are causally related to the injury of October 22, 2015." (Dec. 14.) By ignoring and/or rejecting Dr. Wortman's contradictory opinion concerning causation as it pertains to the employee's degenerative changes to her lumbar spine and her need for surgery, which he rendered after he reviewed the employee's medical records, and "by couching her findings in a manner that implies that all three physicians agree on the issue of causation, the judge mischaracterized the medical evidence." Denham v. Kiewit Corp., 32 Mass. Workers' Comp. Rep. ___ (11/26/18). Because the judge's mischaracterization of the medical evidence on the issue of causation clearly factored into her decision, we cannot say that the error was harmless. Noel v. Faulkner Hosp., 31 Mass. Workers' Comp. Rep. 139 (2017).

Accordingly, we vacate the judge's decision and recommit the case so that she may resolve the conflicts in the evidence by making further findings of fact and rulings of law. "We reinstate the conference order, pending receipt of the judge's decision on recommittal." Carmody v. North Shore Medical Center, 33 Mass. Workers' Comp. Rep. ___ (4/17/19), citing Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

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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William C. Harpin
Administrative Law Judge

Filed: **May 21, 2019**