COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 01748-03**

Pamela Cooper	Employee
City of Haverhill	Employer
City of Haverhill	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Fabricant)

APPEARANCES
Kevin T. Daly, Esq., for the employee
Robert J. Riccio, Esq., for the self-insurer

McCARTHY, J. Pamela Cooper appeals from the decision of an administrative judge allowing the self-insurer's complaint to discontinue her weekly incapacity benefits. She argues that the judge erred by misstating medical evidence and relying on this mistake in rendering his decision. We disagree.

At the time of the § 11A hearing, Pamela Cooper, the employee, was a sixty-year-old high school graduate who had worked as a legal secretary from 1963 through 1969 and again from 1984 through 1991. (Dec. 3-4.) She then began employment with the City of Haverhill as an administrative assistant and executive secretary to the Haverhill City Council. (Dec. 4.)

The employee injured her right shoulder at work on September 8, 1992 and underwent a surgical repair in March of 1993. She was paid weekly compensation benefits while out of work for this injury. Then, in August 1994, she had left shoulder surgery and again was paid weekly compensation benefits. (Id.) The employee was able to return to work but between 1994 and 2003, she treated regularly with orthopedic physicians, physical therapists, acupuncturists and a chiropractor for complaints of pain in her neck, back, both arms, shoulders and wrists. (Dec. 5.)

On January 9, 2003, while in the course of her employment, the employee felt a pull in her upper back while putting away boxes of manila envelopes on a shelf above

shoulder level. She worked in pain until January 23, 2003. She has not returned to work since that date. (Id.)

The self-insurer accepted the claim and paid § 34 total incapacity benefits from January 24, 2003 and continuing. (Dec. 1.) On December 31, 2003, the self-insurer filed a complaint requesting modification or discontinuance of weekly benefits, which was denied after a § 10A conference. The self-insurer's appeal brought the case to a hearing de novo. (Dec. 1; Tr. 3.) A § 11A exam was done by Dr. Ralph Wolf, and, at hearing, the employee moved for the allowance of additional medical evidence. (Dec. 1; Tr. 4.)

The judge ruled the § 11A examiner's report inadequate on the question of causation. (Dec. 1; Tr. 42.)[1] He allowed the parties to submit additional medical reports. (Dec. 3.) The judge reviewed the opinions of the employee's treating physiatrist, Dr. Moskowitz, and her chiropractor, Dr. O'Brien, and specifically rejected their views. The judge adopted the opinions, submitted by the self-insurer, of a three-doctor panel that had examined the employee on June 30, 2004 in connection with her application for accidental disability retirement benefits, (ADRB). (Dec. 9; Self-ins. Ex. 2.)[2] It was the medical panel's unanimous opinion that as of the date of their examination, the employee's condition was not related to her January 9, 2003 injury. (Self-ins. Ex. 2.)

The judge concluded that the employee was no longer incapacitated from employment as of the date of the ADRB medical panel's examination and authorized the self-insurer to discontinue payment of weekly incapacity benefits and recoup any overpayment. (Dec. 10.) We have the case on appeal by the employee.

Raising but a single issue, the employee argues that the judge committed reversible error by misstating one portion of the medical evidence relevant to the

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1. Without addressing causal relationship between the employee's condition and her industrial accident, the § 11A examiner opined that the employee suffered from degenerative disc disease of the cervical spine and was disabled from performing heavy labor involving her neck and right arm. (Dec. 7; D.I.A. Ex. 1.)

[2] The ADRB medical panel of three physicians included two orthopedic surgeons, Dr. James Hewson and Dr. Anthony Caprio, as well as Dr. Judith Fine-Edelstein, a neurologist. (Dec. 8-9; Self-ins. Ex. 2.)

employee's ability to perform the essential functions of her job. (Employee br. 4.) For the reasons that follow, we disagree.

The standard for harmless (non-prejudicial) error is well established.

> An error is non-prejudicial only when we are sure that the error "did not influence the [judge], or had but very slight effect . . . But if one cannot say, with fair assurance, after pondering [the decision] without stripping the erroneous action from the whole, that the [judge's conclusion] was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

Whelan v. Brigham & Women's Hosp., 17 Mass. Workers' Comp. Rep. 279, 281 (2003), citing Commonwealth v. Frederico, 425 Mass. 844, 852 (1997), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 446 (1983).

Clearly, the judge's error in the present case clears the harmless error hurdle as it did not affect the ultimate decision. We therefore determine "with fair assurance," that the judge's conclusion was "not substantially swayed by the error." *See* Whelan, supra. Essentially the employee is relying on the absence in the decision of a word or prefix preceding the word "able" to support her claim of error. (Dec. 9.) The judge erroneously cites the ADRB medical panel as opining the employee was "able" to perform the essential job functions. In fact, it is the panel's opinion that Ms. Cooper is "unable" to perform the essential job functions. (Dec. 9; Self-ins. Ex. 2.) However, we are satisfied that the error did not affect the final result. LaPlante v. Maguire, 325 Mass. 96, 98 (1949).

After careful consideration, the judge rejected the opinions of the employee's treating physiatrist and chiropractor. Dr. Steven Moskowitz and Dr. Kevin O'Brien respectively, for failure to explain how the January 2003 injury caused the employee's multiple medical problems. (Dec. 7-8.) He then adopted the ADRB medical panel's causal relationship opinion, and found that the employee was no longer incapacitated from employment *as a result of her January 9, 2003 industrial injury*. (Dec. 9.)(Emphasis ours.) The judge also adopted the ADRB panel's opinion that the employee

had a myofascial pain syndrome and advanced osteoarthritis of the cervical spine, which presented a "marked functional overlay." (Dec. 9.)

Furthermore, in response to the self-insurer's § 1 (7A) defense, the judge undertook a second analysis under the heightened causation standard, providing an alternate reason for discontinuing the employee's weekly compensation benefits. *See* G. L. c. 152, § 1(7A). If the analysis were necessary, the judge concluded that, "the employee had several pre-existing non-compensable conditions, including a chronic pain syndrome affecting her upper extremities, and that [*she] failed to establish that her January 9, 2003 work injury remained a major cause of any incapacity after June 30, 2004."* (Dec. 9-10.)[3] (Emphasis ours.)

Finally, we note the judge's credibility findings regarding the employee's testimony. Specifically, relevant to her physical difficulties, the judge found the employee to be overly dramatic and less than fully credible, exaggerating her symptoms and limitations. (Dec. 6.) See Lettich's Case, 403 Mass. 389, 394 (1988); Pinhancos v. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. 412, 419 (2003).

Accordingly, the decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **September 14, 2006**

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

[3] We note that the employee did not respond to or argue the § 1 (7A) issue in its brief. We are left with the self-insurer's assertion and the judge's findings. Therefore, pursuant to the provisions of 452 Code Mass. Regs. § 1.15, we need not decide this question. By limiting her argument in the body of her brief to the issue of misstatement of medical evidence and the judge's reliance thereon, the employee tacitly waived argument on the § 1 (7A) issue. See Ortona v. Burger King, 11 Mass. Workers' Comp. Rep. 526 (1997).