COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCICDENTS **BOARD NO. 026813-02**

Paul Smith	Employee
Northeastern University	Employer
Northeastern University	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Preston.

APPEARANCES
Joseph M. Burke, Esq., for the employee
Joseph B. Bertrand, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision ordering it to pay §§ 13 and 30 medical benefits for the employee's chiropractic treatment. We affirm the decision.

On August 9, 2002, the employee injured his back working as a campus police officer for the self-insurer. He had surgery, and returned to work a few months later. The self-insurer accepted liability and paid § 34 total incapacity benefits, along with §§ 13 and 30 medical benefits, for various periods of time. (Tr. 4-5.) The employee left his job with the self-insurer in 2005, but continued to work as a police officer for the Town of Carlisle. (Ex. 2; Tr. 6-7.)

Since his industrial injury, the employee has suffered from chronic low back and right leg pain. Between 2002 and 2005, epidural steroid injections and pain management failed to provide him with lasting relief. The employee declined a second surgery, and instead commenced a regular course of chiropractic treatment with Dr. Steven C. Saro. (Dec. 3.) When the self-insurer stopped paying for his treatment with Dr. Saro, the employee filed a §§ 13 and 30 claim. Following a conference on the employee's claim, the judge issued an order of payment, and the self-insurer appealed. (Dec. 2.)

On October 20, 2008, the employee underwent a § 11A impartial medical examination by Dr. David M. Swenson. Dr. Swenson's report and deposition testimony were admitted into evidence at the hearing. Although he found the employee's chiropractic treatment to be reasonable, Dr. Swenson opined the employee's "current condition is related to [the employee's] pre-existing spinal degeneration." (Ex. 1.)

The judge authorized the submission of additional medical testimony "due to the complexity of the medical issues."[1] Both parties submitted additional medical evidence. (Dec. 1.) The employee's medical evidence was a report from Dr. Saro dated January 28, 2009. (Ex. 4.) Although Dr. Saro's report was unsigned, and unaccompanied by a statement of the doctor's qualifications,[2] the self-insurer voiced no objection to its admission into evidence. Dr. Saro diagnosed the employee as suffering from "sciatic neuralgia and lumbar radiculopathy, status post laminectomy syndrome." Id. Dr. Saro opined the employee's "current clinical picture and ongoing symptomatology and objective findings, are a direct result of the injury that occurred on 08/09/02." Id. He further opined the employee's current level of chiropractic management was necessary to enable him to continue working as a police officer. Id.

The judge adopted Dr. Saro's opinion on causal relationship, adopted Dr. Swensen's opinion respecting the propriety of the employee's chiropractic care, and credited the employee's testimony that his chiropractic care enabled him to continue to working as a police officer. Accordingly, the judge found the employee's ongoing chiropractic treatment was "reasonable, necessary and related" to his work injury, and ordered the self-insurer to pay for "all chiropractic

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[1] In so ruling, the judge cited the employee's long-standing symptoms, his prior surgery, "prospect for further surgery," and his stated need for ongoing treatment to enable him to continue working "full time as a police officer." (Dec. 2.) The self-insurer did not object to the judge's decision to allow additional medical evidence.

[2] See 452 Code Mass. Regs. § 1.11(6).

medical treatment pursuant to §[§] 13 and 30 as directed by Dr. Steven C. Saro after August 9, 2002, for the Employee's diagnosed low back condition." (Dec. 3, 5; Tr. 14.)

On appeal, the self-insurer argues the judge could not adopt the opinions contained in Dr. Saro's report because they lacked a proper medical foundation, and because the doctor did not sign the report. We disagree.

The fundamental flaw in the self-insurer's arguments is that it failed to object to the introduction of Dr. Saro's report at the hearing.[3] " 'Objections, issues, or claims - however meritorious - that have not been raised' below, are waived on appeal." Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000); see also Echeverria v. Costa Fruit & Produce, 24 Mass. Workers' Comp. Rep. ___ (January 11, 2010); Conrad v. McLean Hosp., 19 Mass. Workers' Comp. Rep. 292 (2005).[4]

The self-insurer's argument that Dr. Saro's opinions lack an adequate medical foundation is without merit. Beyond the self-insurer's failure to object or move to strike the report, we note the doctor's report is replete with details of the employee's symptoms and treatment. Any perceived inadequacy respecting the bases for the doctor's opinions could have been explored via deposition, which the

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[3] In its brief, the self-insurer maintained it did not have an opportunity to object to the report because it was mailed to the judge on February 2, 2009, subsequent to the hearing. (Self-ins. reply br.1.) However, at oral argument, counsel for the self-insurer conceded he received Dr. Saro's report before the record closed on February 15, 2009. Given this concession, we fail to see how the self-insurer was precluded from filing a timely objection. Cf. Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep 83 (2008)(judge erred by admitting additional medical evidence after the record closed, without ruling on insurer's objection, or giving it an opportunity to respond to the employee's evidence).

[4] We note that had the self-insurer objected to Dr. Saro's report prior to the close of the evidence, the employee, or the judge, could have sought to obtain the doctor's signature. See Conrad, supra at 293, citing Commonwealth v. Roth, 437 Mass. 777, 795-796 (2002)("technical defects raised in objection at trial 'are readily cured' ").

self-insurer chose to forego. Here, as was his prerogative, the judge found Dr. Saro's opinions, particularly on the key issue of causation, persuasive. E.g., Echeverria, supra (judge may adopt all or part of any medical opinion admitted), and cases cited. In the end, self-insurer's arguments amount to a request that we second guess the judge's decision to adopt Dr. Saro's opinion on causation over that of Dr. Swensen. This we are not authorized to do. See G. L. c. 152, § 11C.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,497.28.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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