COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046140-05**

Philip E. Kelly	Employee
Boston University	Employer
Boston University	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Jacques.

APPEARANCES
William J. Branca, Esq., for the employee
Diane J. Bonafede, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from a decision ordering it to pay the employee's § 30 claim for spinal surgery for cervical stenosis and myelopathy, which the judge found reasonable, necessary, and causally related to his October 24, 2005, work injury.[1] The self-insurer argues the judge erred by: 1) mischaracterizing and then adopting alleged opinions of the § 11A examiner; 2) adopting a medical opinion that did not address the components of G. L. c. 152, § 1(7A); and, 3) relying on lay testimony to conclude the employee suffered from myelopathy. We recommit the case for further findings of fact.

At all relevant times, the employee, age fifty-four at hearing, worked as a pipe fitter, steamfitter and HVAC technician for the employer. On October 24, 2005, while attempting to disassemble an overhead steam pipe, he injured his

[1] "Although commonly used, the statutory support for the 'reasonable and necessary' standard is nonexistent." Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337, 337 n.1 (2008); Lewin v. Danvers Butchery, Inc., 13 Mass. Workers' Comp. Rep. 18, 19-20 n.1 (1999)(" '[a]dequate and reasonable' relates to the nature of the hospital or medical services" whereas " '[n]ecessary' relates to the length of time an employee may be entitled to such health care services. It was added to the statute in 1948 when the duration of medical benefits was expanded to an indefinite period from what had earlier been limited to a few weeks").

shoulder and neck. (Dec. 5, 6.) He reported the injury, but continued to work in a modified capacity. (Dec. 6; Tr. 12.) Following MRIs of the employee's shoulder and neck, Dr. Timothy Foster diagnosed a torn labrum in the left shoulder and a cervical disc protrusion. Dr. Foster recommended shoulder surgery but first referred the employee to Dr. Christopher Bono for a second opinion. Dr. Bono agreed with the recommended shoulder surgery, but also instructed the employee to return in six months so he could check for signs of cervical myelopathy.[2] (Dec. 6-7.)

The self-insurer accepted liability for a torn labrum of the left shoulder and a sprain of the cervical spine. On June 5, 2006, the employee underwent shoulder surgery, and by October 24, 2006, he had returned to work part-time. By December 2, 2006, he was working full-time with self-imposed modifications due to radiating pain from his neck down to his shoulder, forearm, and the back of his hand. (Dec. 5-7.)

Because Dr. Bono retired, the employee saw Dr. Tony Tannoury on January 26, 2007. (Dec. 8.) Dr. Tannoury determined the employee had cervical disc herniations with signs of myelopathy and recommended surgery to decompress the spine. (Ex. 7.) Following a second MRI on July 25, 2007, Dr. Tannoury found more established myelopathy and again recommended surgery. (Dec. 8.) On October 1, 2008, he concluded the employee's symptoms were getting worse. In January 2009, Dr. Tannoury causally related the employee's neck and back symptoms to the October 24, 2005 injury and, again, strongly recommended the employee have surgery for cervical myelopathy.[3]

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[2] Doctor Bono stated in his report of February 14, 2006: "I will see him back in 6 months, in the least, for a second visit to make sure that he has not developed any type of myelopathic symptoms." (Ex. 6.)

[3] The judge quoted and adopted Dr. Tannoury's explanation:

> Myelopathy is a condition where the spinal stenosis is affecting the main spinal cord, not just the nerve root and when that pressure . . . is quite significant. . . . the

On or about April 23, 2007, the employee filed a claim for medical benefits pursuant to §§ 13 and 30 for a cervical spine injury.[4] Following a § 10A conference, a different administrative judge allowed the employee's claim, without specifying the medical treatment authorized. The self-insurer appealed. (Dec. 2.)

At the hearing before the administrative judge, the issues were whether the employee's diagnosis of spinal stenosis was causally related to the industrial accident; whether the employee, in fact, had been diagnosed with myelopathy, and, if so, whether it was causally related to the industrial accident; and, whether surgery for the spinal stenosis was reasonable and necessary. (Dec. 6.) With respect to causation, the self-insurer raised the affirmative defense of § 1(7A).[5]

> natural history of such a disease is best shaped by surgery by taking the pressure off the spinal cord and allowing the spinal cord to recover. . . patients with myelopathy who do not choose to go for cervical decompression face an unacceptable risk of further deterioration, gradual, most of the time leading to significant muscle waste, difficulty with balance and significant loss of dexterity and also eventually they might become wheelchair bound. Also, these patients are at high risk of spinal cord injury even with minor injuries that otherwise would be well tolerated by a normal spine.

(Dec. 8, quoting Ex. 7, January 15, 2009 report.)

[4] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] General Laws c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Prior to hearing, the employee was examined by Dr. Olarewaju Oladipo pursuant to § 11A. His report of November 1, 2007,[6] and his deposition testimony were admitted in evidence. The judge found Dr. Oladipo's report adequate, but allowed the parties to submit additional medical evidence due to the complexity of the medical issues. (Dec. 3.) The employee submitted records from three treating physicians: Dr. Tannoury, Dr. Bono and Dr. Alan Berrick. The self-insurer submitted two reports and the deposition testimony of its examining physician, Dr. Richard C. Anderson. (Dec. 2, 4.)

The judge adopted Dr. Tannoury's opinion that the employee suffered from myelopathy caused by the industrial injury on October 24, 2005, and needed surgery to decompress the cervical spine. (Dec. 8.) The judge also adopted portions of Dr. Oladipo's opinion, including his "diagnosis of myelopathy, his conclusion that the employee's work injury is a major contributing cause of the employee's current condition and his opinion that spine surgery for cervical stenosis is a reasonable recommendation." (Dec. 9.) Relying on the adopted opinions of Dr. Tannoury and Dr. Oladipo, the judge found the requested cervical surgery to be reasonable, necessary and causally related to the industrial accident.[7] (Dec. 10-11.)

The self-insurer contends the judge erred by misstating Dr. Oladipo's opinion, and relying on the misstated opinion to conclude that the employee's request for spinal surgery was reasonable and causally related to the industrial accident. We agree.

Contrary to the judge's findings, Dr. Oladipo did not: 1) diagnose the employee with myelopathy; 2) conclude the work injury was a major cause of the

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[6] The judge's statement that Dr. Oladipo examined the employee on December 27, 2007, (Dec. 3), is incorrect. (See Ex. 1.) The judge correctly references the November 1, 2007 examination date elsewhere in her decision. (Dec. 1, 9.)

[7] At oral argument, employee's counsel confirmed the employee subsequently underwent the spinal surgery and had returned to work. (See also Employee br. 5.)

employee's current condition; or, 3) opine that surgery to decompress the spine was reasonable, as the judge found.[8] Rather, he conditioned the reasonableness of surgery on the worsening of any myelopathy, (Dep. at 64, 68-69), which had not been documented by further studies, (Dep. 69), or even definitively diagnosed. (Dep. 21.) The only medical condition Dr. Oladipo could clearly relate to the employee's injury was the cervical sprain. (Dep. 64.)

Dr. Oladipo's opinions were not consistent with those of Dr. Tannoury. Because we cannot say that the error in adopting inconsistent medical opinions was harmless as a matter of law, we must recommit the matter for the judge to reconsider the medical evidence and make further fingings of fact. Sourdiffe v. University of Mass./Amherst, 22 Mass. Workers' Comp. Rep 319, 324-325 (2008) (adoption of inconsistent medical opinions requires recommittal for further findings).

However, we find the self-insurer's remaining claims of error lack merit. First, the self-insurer argues that Dr. Tannoury failed to comment on the impact of any pre-existing condition on the employee's cervical problems. Consequently, it maintains that Dr. Tannoury's opinion does not adequately address § 1(7A), and the judge erred in adopting it. (Self-insurer br. 6-8.)

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[8] In his report, Dr. Oladipo diagnosed the employee with cervical sprain/strain and cervical degenerative disc disease with C6-7 disc protrusion and canal stenosis. He found signs of myelopathy and hyperreflexia, and opined the moderate narrowing (or stenosis) of the spinal canal at C6-7 was a significant finding. He opined, "[w]hile surgical treatment of such a condition is reasonable in the light [of] deteriorating symptoms, a more recent MRI evaluation of the cervical spine is recommended." He also thought myelogram studies may be helpful to determine whether there had been any deterioration in the canal stenosis and to assess stenosis of the foramina in the lower cervical region. (Ex. 1.) During his deposition, Dr. Oladipo opined, 1) the employee's stenosis was more related to degenerative changes in his cervical spine than to trauma (Oladipo Dep. 11-12); 2) the two MRIs did not show a deterioration in the employee's condition (id. at 28); 3) the concern was *whether* the employee was *developing* some myelopathy, (id. at 31-32); and, 4) *if* further studies showed a deterioration, surgery *might* be reasonable, (id. at 68-69), but, it was not reasonable at the time of his examination (id. at 31-32). (Emphasis supplied.)

As a threshold matter, we observe the judge simply was not persuaded by either Dr. Oladipo's or Dr. Anderson's opinions that the employee's cervical stenosis was a pre-existing condition. Id. at 9, 10. Instead, the judge found that Dr. Berrick, the employee's primary care physician, made no mention of cervical problems in his comprehensive report chronicling the employee's medical history from 2001 to 2005, and she credited the employee's testimony that he had no prior history of back or neck problems. (Dec. 7, 9.) In addition, in rejecting Dr. Anderson's opinion to the contrary, the judge reasoned that he had relied heavily on a mistaken belief the employee had a significant history of cervical problems.[9] (Dec. 9.) In any event, Dr. Tannoury's adopted opinion, expressed in his report of January 15, 2009, shows that he contemplated the issue:

> Whether his injury caused or significantly contributed to his problem, I have to go by my records and Dr. Bono's records. It seems to me that the patient had no complaints prior to his work-related injury and now his symptoms are getting worse. It is my opinion that this work-related injury is *the cause* of Mr. Kelly's medical problem to a reasonable degree of medical certainty.

(Ex. 7.)(Emphasis supplied.)

The self-insurer did not object to the admission of Dr. Tannoury's reports or seek to depose Dr. Tannoury to explore the issues it now raises. Thus, it has no basis for challenging the judge's adoption of Dr. Tannoury's opinion that the October 24, 2005 work injury was "the cause," (Ex. 7), of the employee's cervical myelopathy, (Dec. 9), or her rejection of the opinions of Dr. Anderson and Dr. Oladipo that the employee suffered from pre-existing spinal stenosis. See Smith v. Northeastern Univ., 24 Mass. Workers' Comp. Rep. ___ (2010)(no merit to self-insurer's argument that adopted medical opinion lacked adequate medical

[9] The employee posits that the erroneous history of a cervical disc herniation predating the October 24, 2005 accident originated with his shoulder surgeon, Dr. Foster, and was relied on by Dr. Anderson and Dr. Oladipo. (Employee br. 15-16.)

foundation where self-insurer failed to object to admission of report, move to strike it, or explore bases for opinion via deposition).

Lastly, the self-insurer contends the judge erred by adopting, as medical evidence, the employee's lay testimony that Dr. Bono told him "he needed neck surgery and warned him that if he had a bad fall or car accident involving whiplash it could end up paralyzing him." (Dec. 7.) Although Dr. Bono did not state that opinion in his report, (Ex. 6.), the self insurer's claim of error lacks merit. Not only was the employee's testimony cumulative of the adopted opinion of Dr. Tannoury, (Dec. 8), but as the employee points out, the self-insurer elicited the testimony from the employee. (Tr. 36-37.) The self-insurer neither objected to the testimony, nor sought to limit its use in any way. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Comm'n. Against Discrimination, 431 Mass. 655, 674 (2000)(objections not raised below are waived on appeal).

Because the judge's conclusions were based in part on her adoption of inconsistent medical opinions, we recommit the case for further findings consistent with this decision.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: