COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 042816-06**

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| Richard Famiglietti | Employee |
| City of Lynn School Department | Employer |
| City of Lynn | Self-Insurer |

**REVIEWING BOARD DECISION**
(Judges Costigan, Horan and Koziol)

**APPEARANCES**
Alan S. Pierce, Esq., for the employee
Kathleen G. McNeill, Esq., for the self-insurer

The case was heard by Administrative Judge Preston.

**COSTIGAN, J.** The self-insurer appeals from the administrative judge's denial of its complaint to discontinue payment of benefits. The self-insurer argues the judge erred in his adoption of the § 11A impartial medical examiner's opinion and improperly adopted conflicting medical evidence. Although the judge's subsidiary findings could have been more carefully crafted, any error is harmless. Therefore, we affirm the decision.

The employee, a teacher, injured his back at work on March 21, 2006, when a stool on which he was sitting collapsed. The self-insurer voluntarily paid weekly incapacity and medical benefits, and then filed a complaint to modify or discontinue compensation effective June 22, 2007. Following a § 10A conference on October 2, 2007, the judge denied the complaint and the self-insurer appealed. (Dec. 2.)

Pursuant to the provisions of § 11A(2), the employee was examined by Dr. James Hewson on December 18, 2007. (Dec. 2; Ex. 1.) Doctor Hewson diagnosed degenerative disc disease, lumbar disc protrusion and osteomyelitis of the cervical and lumbar spine, and degenerative changes in the lumbar facet joints from the L4 to S1

levels. He noted the employee's low back pain had persisted since 2003[1] and, on the date of his examination, the employee exhibited multiple symptoms and restrictions related to his lumbar spine. The impartial physician further opined the employee had reached a medical end result and was totally disabled from returning to his work as a teacher. The judge adopted the impartial physician's opinions. (Dec. 6.)

Although he deemed Dr. Hewson's report adequate, the judge authorized additional medical evidence on the ground of medical complexity, "by virtue of the ongoing painful sequlae [sic] from the industrial injuries, and the Insurer's issue that § 1(7A) is operative."[2] (Dec 2.) The employee's treating physician, Dr. Sara J. Lee, opined the March 21, 2006 work injury was superimposed over a pre-existing back problem, but the work injury was a major cause of the employee's ongoing disability and need for treatment. She also opined that the multiple spinal and sacroiliac joint injections the employee had undergone for his low back pain had caused a secondary condition of cervical diskitis and osteomyelitis requiring hospitalization and several months of intravenous antibiotics. The judge adopted Dr. Lee's opinions. (Dec. 5.)

The judge also adopted the opinions of the self-insurer's examining physician, Dr. Robert Levine, who concluded the employee exhibited physical findings consistent with bi-lateral S1 joint dysfunction, which diagnosis was causally related to the work injury of March 21, 2006, which in turn was an exacerbation of the employee's pre-existing low back condition. Dr. Levine also opined the employee remained disabled and in need of medication. (Dec. 6-7.)

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[1] The employee had sustained another back injury at work on December 17, 2003, which did not result in payment of workers' compensation benefits, even though he was out from work for over twenty days.[1] (Dec. 3-4.)

[2] General Laws c. 152, § 1(7A), provides, in pertinent 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.

Addressing the self-insurer's defense under § 1(7A), the judge found:

> [T]he employee sustained a workplace low back personal injury arising out of and in the course of his employment with the City of Lynn on December 17, 2003. I accept his credible testimony regarding this previous workplace accident that happened prior to this accepted March 21, 2006 incident. I am satisfied that the Employer had timely notice of the 2003 event.
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> . . .
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> This accepted injury was on top of a previous work-related injury. Accordingly, the Employee does not have to prove more than "as is" causal relationship. The Insurer's defense of § 1(7A), regarding a pre-existing condition, does not contain the factual predicates and does not have the legs to stand on. Nonetheless, the Employee's incapacity since the Insurer's request remains complete from that date forward through the hearing.

(Dec. 7-8.)

The self-insurer argues, and the employee acknowledges, the judge erred when he stated he adopted the impartial physician's opinion on causal relationship.[3] (Self-ins. br. 5; Employee br. 2.) Dr. Hewson expressed no causal relationship opinion. We agree with the employee, however, that the error is harmless, given the judge's adoption of Dr. Lee's causal relationship opinion. (Dec. 5.) It matters not that Dr. Lee opined the employee's 2006 work injury was "a major" cause of his disability, as required by § 1(7A), because the judge found that statute inapplicable to the employee's claim. It stands to reason simple "as is" causation is necessarily met by an opinion satisfying the higher "a major" causation standard under § 1(7A).

Lastly, the self-insurer argues the judge's decision is arbitrary and capricious because he adopted conflicting medical opinions on disability, and his finding of total disability is inconsistent with the medical evidence he adopted. We disagree. Even accepting the premise proffered by the self-insurer that Dr. Hewson, the impartial physician, considered the employee unable to return to his former employment, but

[3] "I adopt the above opinion of Dr. Hewson in finding that the Employee's incapacity since June 22, 2007 rests solely with the industrial accident he sustained in 2006." (Dec. 8.)

not totally disabled from all gainful employment,[4] the judge's finding of total incapacity, against the backdrop of only partial medical disability opinions, was amply supported by his own his belief of the employee's testimony concerning his pain and physical restrictions. Mahoney v. City of Boston Police Dept., 18 Mass. Workers' Comp. Rep. 127 (2004); Cugini v. Town of Braintree School Dept., 17 Mass. Workers' Comp. Rep. 262 (2003); Reynolds v. Kay Bee Toys, 16 Mass. Workers' Comp. Rep. 433 (2002); Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65 (1990). See also Scheffler's Case, 419 Mass. 251 (1994), and Brown v. Northeast Underpinnings, Inc., 22 Mass. Workers' Comp. Rep. 329, 331 (208), *aff'd sub nom.* Brown's Case, 2009-P-119, Memorandum and Order pursuant to Rule 1:28 (December 31, 2009).[5]

Accordingly, we affirm the judge's decision. Pursuant to § 13A(6), the self-insurer shall pay employee's counsel a fee in the amount of $1,497.28.

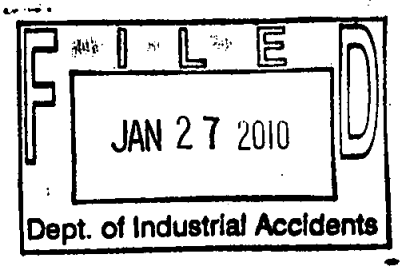
So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed:




[4] As the employee notes, Dr. Hewson never so opined. (Employee br. 3.)

[5] The same reasoning applies to the judge's adoption of Dr. Levine's partial disability opinion. (Dec. 6-7.)