COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008290-09**

Robert Amaral	Employee
Department of Youth Services	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
John J. King, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision awarding him a closed period of § 34 benefits and medical benefits for his work-related right shoulder and low back injuries.[1] We affirm.

We recount only those facts necessary to address the arguments raised on appeal.[2] The employee worked as a Group Worker III for the employer. "His duties included administrative tasks, but he was also required . . . to participate in the physical restraint of his young male clients when necessary." (Dec. 5.) At hearing, the employee testified that on April 11, 2009, he injured his right shoulder and low back while breaking up a fight between two clients at work. On February 11, 2010, he had surgery to repair his torn right rotator cuff. On July 25, 2012, he underwent low back surgery. (Dec. 6.)

[1] Pursuant to § 13A, the self-insurer was also ordered to pay the employee's attorney's fee and necessary expenses. (Dec. 15.)

[2] The employee's brief does not contain "[a] statement of the issues presented for review; stated with particularity." 452 Code Mass. Regs. § 1.15(4)(a)(1). Under the brief's heading, "Argument," we discern the employee advances three claims of error on appeal, which we address, infra.

On March 5, 2012, the employee was examined pursuant to § 11A by Dr. George Whitelaw.[3] The doctor issued his report that day and was deposed on September 5, 2012. Dr. Wojciech Bulczynski, who performed the employee's back surgery, was deposed on November 6, 2012. Dr. Alfred Hanmer, who operated on the employee's torn rotator cuff, was deposed on November 12, 2012. At the self-insurer's request, the employee was examined by Dr. Patrick Connolly, whose report of July 30, 2011 was entered into evidence with his curriculum vitae. (Self-ins. Exs. 1-2.)

In her decision, the judge adopted Dr. Whitelaw's opinion that the April 11, 2009 incident at work was "the direct and major cause of the employee's rotator cuff injury and subsequent need for treatment." (Dec. 7.) She also adopted the opinions of doctors Whitelaw and Connolly that, as of the date of their examinations, the employee's right shoulder injury no longer disabled him.[4] (Dec. 7, 9.)

The judge then addressed the employee's claims referable to his low back injury and surgery. She adopted Dr. Whitelaw's opinion that, 1) the employee suffered a low back strain on April 11, 2009; 2) the employee also suffered from pre-existing abnormalities that were aggravated by that strain; 3) his back strain had resolved as of March 5, 2012; and 4) his work injury was not a major cause of any back-related disability or need for treatment. (Dec. 7-8.) She also adopted Dr. Connolly's opinions to the same effect, (Dec. 9-10), and rejected Dr. Bulczynski's opinion that the employee's work injury "was the major cause of [his] two-plus year history of back disability and need for treatment." (Dec. 8.) Based on these findings, the judge conducted a § 1(7A) analysis and concluded the employee was not entitled to incapacity and medical benefits for his back injury as of July 30, 2011, the date of Dr. Connolly's examination. (Dec. 12.)

[3] The judge denied the employee's motion to strike the impartial report but found the medical issues sufficiently complex to authorize the parties to submit additional medical evidence. (Dec. 3.)

[4] The judge also rejected the self-insurer's § 1(7A)(major cause) defense with respect to the employee's shoulder injury. (Dec. 12.)

On appeal, the employee argues the judge erred by adopting the "speculative" medical opinion of Dr. Connolly. Specifically, the employee states Dr. Connolly's opinion, that the employee's back sprain "should have resolved within a 6-8 week period of time," was an insufficient basis to support her finding the employee's back disability was no longer the result of his industrial injury. (Employee br. 8.) We disagree. Dr. Connolly's opinion was not speculative. See Driscoll v. Town of Framingham, 28 Mass. Workers' Comp. Rep. 7, 10-11 (2014)(doctor's opinion limiting duration of disability to sixteen weeks post injury not speculative). When he examined the employee, Dr. Connolly found no present causal relationship between the employee's industrial accident and his back condition. Rather, he opined the employee's "current limitations are in place as a result of the claimant's underlying pre-existing condition of poor general fitness as well as degeneration of the lumbar spine." (Self-ins. Ex. 1, 6.) There was no error.

Next, the employee argues the judge mischaracterized Dr. Whitelaw's opinion as to whether the industrial accident was a major cause of the employee's back condition. The judge found Dr. Whitelaw opined the employee's work-related aggravation of his spinal condition "could cause between 10-30% of the employee's disability and need for treatment. . . ." (Dec. 8.) The employee points out:

> Dr. Whitelaw's testimony was not that [the industrial accident] "could cause" between 10% to 30% of the employee's disability, it was that the industrial accident was between 10% to 30% of the cause of the back injury.

(Employee br. 8.) But Dr. Whitelaw also testified the employee's industrial accident was not a major cause of his disability or his need for treatment. (Whitelaw Dep. 23, 31-32, 35.) In fact, the judge adopted that opinion. (Dec. 8.) "Where the adopted medical opinion, viewed as a whole, effectively rules out the subject industrial injury as 'a major cause' . . . the use of the phrase 'twenty percent' cannot change the result." Abad v. Stacy's Pita Chips Co., 25 Mass. Workers' Comp. Rep. 173, 175 (2011)(footnote omitted). The same holds true here. See also Healey v. Tewksbury

Hosp., 21 Mass. Workers' Comp. Rep. 87, 89 (2007)(opinion that work was a significant but not a major factor insufficient to carry burden under § 1[7A]). The judge did not err in finding the employee failed to satisfy the elements of § 1(7A).

Finally, the employee argues the judge failed to perform a § 1(7A) analysis. (Employee br. 9.) She clearly did. (Dec. 11-12.)

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **January 5, 2015**