COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021846-19**

Ronnie Siebenhaar	Employee
MCISMX M.C.I. Shirley-Maximum	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Fabiszewski)

This case was heard by Administrative Judge Sherry.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Patricia G. Noone, Esq., for the self-insurer

KOZIOL, J. This case concerns the self-insurer's appeal from a hearing decision ordering it to pay the employee's claim for post lump sum settlement medical treatment; specifically, cervical spine surgery and physical therapy. The self-insurer argues the judge committed four errors in ordering the treatment claimed. The first three concern the judge's alleged impermissible expansion of the language of the lump sum settlement agreement, initially by finding the self-insurer liable for two additional diagnoses not accepted in the settlement, and then by ordering surgery on an additional body part not mentioned in the lump sum settlement agreement. (Self-ins. br. 5-11.) The self-insurer alleges the judge committed a fourth error in ordering physical therapy for the employee's cervical spine without adopting a medical opinion supporting that order. (Self-ins. br. 11-12.) We find merit in two of the self-insurer's arguments, requiring us to vacate the decision and recommit the matter for further findings of fact and rulings of law regarding both the surgery, and physical therapy for the employee's cervical spine.

The undisputed facts are as follows. The employee, a correction officer, was injured in an altercation on August 27, 2019, while he was restraining and disarming an

inmate. (Dec. 6.) The employee was paid various amounts of weekly benefits under §§ 34 and 35, along with "medical benefits under the provisions of M.G.L. c. 152, §30." Rizzo v. M.B.T.A. 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). However, prior to the lump sum settlement, the board file contained no order, hearing decision or agreement setting forth the precise nature or extent of the employee's accepted injuries.[1] On July 13, 2023, the parties entered into a lump sum settlement agreement wherein the self-insurer accepted liability for the following diagnoses, "left shoulder internal derangement status post 2 surgeries and cervical radiculopathy with C4-5 and C5-6 protrusions." (Dec. 6, Ex. 10[2].)[2]

Three months after the settlement, on October 10, 2023, the employee filed the present claim for "§§ 13 and 30 medical benefits." Rizzo, supra. The matter proceeded to conference and on March 1, 2024, the judge issued a § 10A conference order requiring the self-insurer to pay for "past and ongoing physical therapy for the left shoulder and neck and surgery to address C5-6 herniation and C4-5 spinal cord flattening at DIA rates." Rizzo, supra. Both parties appealed. On May 2, 2024, the employee was examined pursuant to § 11A, by Wojciech Bulczynski, M.D. (Ex. 2.) The judge subsequently determined that the medical issues were complex and allowed the parties to submit

[1] On August 20, 2020, the employee filed a claim for § 34 total incapacity benefits from August 20, 2020, and medical benefits under §§ 13/30. Rizzo, supra. On October 24, 2020, a different administrative judge issued a § 10A conference order requiring the self-insurer to pay the employee § 34 benefits from August 22, 2020, through January 2, 2021, followed by partial incapacity benefits from January 3, 2021, and continuing "plus medical benefits under the provisions of M.G.L. c. 152, § 30." Id. The parties cross-appealed and the matter was continued. Id. The matter was reassigned to the present judge who, on November 17, 2021, rescheduled the matter for hearing. Id. The hearing was rescheduled twice thereafter, and ultimately never took place because the case was lump sum settled. Id.

[2] In his brief, the employee states that the lump sum settlement's "accepted diagnoses were left shoulder internal derangement status post 2 surgeries and cervical radiculopathy with – not limited to – C4-5 and C5-6 protrusions." (Employee br. 6.) The "not limited to" language does not appear anywhere in the settlement document.

additional medical evidence at the hearing, which was held on November 12, 2024. (Dec. 4.)

In his decision the judge framed the issues in controversy as follows:

1. Whether the employee's need for treatment relates to his injury of August 27, 2019.
2. Whether employee's work injury remains a major cause of his need for treatment.
3. Entitlement to §13 and §30 medical benefits, to specifically include C5 corpectomy and C6-7 discectomy and fusion recommended by Dr. Sungarian, as well as physical therapy for the neck and shoulders.
4. Whether employee is precluded from §13 and §30 medical benefits sought due to res judicata, collateral estoppel, and/or claim preclusion.

(Dec. 8.) The judge discussed at length the medical records submitted by the parties, dating from 2019 up to and including, the January 6, 2025, deposition testimony of Arno S. Sungarian, M.D. (Dec. 7-15.) The judge then adopted portions of the medical opinions of Dr. Sungarian, Luis Jenis, M.D., Preshant Kumar, M.D., Henry Drinker, M.D., Dr. Bulczynski, and Marc Linson, M.D. (Dec. 15-18.)

Consistent with the approved lump sum settlement agreement, the judge found that liability was accepted for "left shoulder internal derangement status post two surgeries and cervical radiculopathy with C4-C5 and C5-C6 protrusions" and that the employee's affidavit recited those accepted diagnoses with "ongoing medical treatment limited to the specific accepted injuries for the specific date of loss." (Dec. 18.) Regarding causal relationship, the judge found:

> [T]he surgery recommended by Dr. Sungarian, specifically a C5 corpectomy with C6-7 anterior discectomy and instrumented fusion with allograft bone, is causally related and medically necessary due to the work injury of August 27, 2019. I further specifically find that the C6-7 anterior discectomy and instrumented fusion with allograft bone is medically necessary to prevent failure of the caging and plating related to the C5 corpectomy, which is a significant risk if the lever arm of the C5 corpectomy repair was on an already injured disc.
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> Additionally, I find that physical therapy for the cervical spine and left upper extremity has been reasonable and related from the date of the work injury up to Dr. Sungarian's deposition on January 6, 2025, when he testified that manipulation of the cervical spine and/or spinal cord before surgery may result in

> further injury. Consistent with Dr. Sungarian's testimony, further cervical physical therapy after Mr. Siebenhaar's surgery would be reasonable and related treatment. I find that left shoulder physical therapy was reasonable and necessary up to and including October 1, 2024, when Mr. Siebenhaar reported that his shoulders had been feeling great.

(Dec. 19.) Citing our decisions in Bordeleau v. M.C.I Concord, 35 Mass. Workers' Comp. Rep. 75 (2021) and Lamport v. Draper Place, 35 Mass. Workers' Comp. Rep. 81 (2021), the judge properly went on to observe that a lump sum settlement is treated as a final judgment barring further litigation of the issues contained therein and that parties must "specifically reserve rights for additional injuries or body parts." (Dec. 19.) Noting that the self-insurer timely raised and pled the affirmative defenses of res judicata and collateral estoppel, the judge concluded:

> [The] work injury remains a major contributing cause of both cervical radiculopathy and cervical myelopathy for which surgery is recommended.
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> M.G.L. c. 152, §30 entitles an injured employee to, ". . . adequate and reasonable health care services, and medicines if needed. . ." A C5 corpectomy to address C4-5 and C5-6 radiculopathy is not barred by *res judicata*, collateral estoppel, and/or claim preclusion. Adequate and reasonable health care for [the employee's] C4-5 and C5-6 radiculopathy includes C6-7 anterior discectomy and instrumented fusion with allograft bone to prevent failure of the C5 corpectomy, and is likewise not barred by *res judicata*, collateral estoppel or claim preclusion.

(Dec. 20, emphasis original.) The judge ordered the C5 corpectomy and C6-7 anterior discectomy and instrumented fusion with allograft bone, recommended by Dr. Sungarian with "reasonable and related post-surgical care." (Dec. 21.) As discussed below, we agree with the employee that the judge did not err in adopting Dr. Sungarian's opinion regarding the employee's diagnoses of radiculopathy and myelopathy and the need to include the C6-7 level in the surgery. (Employee's brief at 9-11.) However, the employee fails to mention, but we cannot ignore, that the judge stated, without further explanation, that in making his determinations in this case, he also relied on the adopted portions of the opinions of Dr. Jenis, Dr. Kumar, Dr. Drinker, and Dr. Bulczynski. Their opinions

diagnosing and causally relating cervical spondylosis to the work accident, form one of the bases for the self-insurer's appeal.[3]

The judge expressly adopted Dr. Jenis's October 29, 2021, opinion that the employee's diagnoses were "cervical spondylosis with spinal stenosis and left cervical radiculopathy." (Dec. 16.) He adopted Dr. Kumar's December 20, 2021, opinion diagnosing the employee with "1) cervical spondylosis with components of cervical facet arthropathy and radicular pin [sic]; 2) cervical facet joint arthropathy; and 3) cervical radiculopathy radiating to the left arm." (Dec. 16.) He also adopted Dr. Drinker's May 3, 2022, opinion that the employee's diagnosis was "radiculopathy of the left upper extremity from cervical spondylosis and degenerative disc disease" as well as his opinion that "[t]he cervical spine injury was from a pre-existing condition of cervical spondylosis and radiculopathy which was asymptomatic and became symptomatic within four days of his work incident and was more than likely exacerbated by the work incident which gave rise to his subsequent symptoms." (Dec. 17.) Lastly, the judge adopted Dr. Bulczynski's opinions that the employee's four diagnoses included, "3) cervical radiculopathy; and 4) cervical spondylosis;" that "a causal connection existed between all his diagnoses and the work injury on August 27, 2019;" and, that "the proposed cervical spine surgery was

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[3] The employee submitted Dr. Jenis and Dr. Drinker's opinions. (Dec. 2; Ex. 7[11] and 7[9].) He saw Dr. Jenis on October 29, 2021, "for evaluation of his left arm pain after sustaining significant injury to his neck and shoulder area." (Dec. 8.) Dr. Drinker saw the employee on May 3, 2022, as one of the three physicians who examined him as part of an "Accidental Disability Retirement Medical Panel." (Dec. 12.)

The self-insurer submitted Dr. Kumar's opinion. (Dec. 2, Ex. 8[7].) The employee saw Dr. Kumar on December 20, 2021, "for constant nagging discomfort that started in the left shoulder and radiated down the arm to the fingers." (Dec. 9.) The self-insurer also submitted the opinions of their examiner, Marc Linson, M.D., who evaluated the employee on three occasions, September 22, 2021, April 23, 2023, and November 7, 2023. (Dec. 2, Exs. 8[1-3].) The judge adopted specific opinions Marc Linson, M.D., but Dr. Linson's adopted opinions did not contain any reference to spondylosis. (Dec. 17-18). The judge adopted Dr. Linson's opinion that the employee's "diagnosis remained left shoulder labral tear and cervical disc protrusions and stenosis" that were causally related to the employee's work accident. Id. The judge also adopted Dr. Linson's opinion that the surgery recommended by Dr. Sungarian was "causally related and medically necessary due to the work injury of August 27, 2019." (Dec. 17.)

appropriate, necessary and related to [the employee's] work injury of August 27, 2019 ." (Dec. 16-17.)

Cervical spondylosis was diagnosed years before the approval of the 2023 lump sum settlement and both parties were aware of the diagnosis at the time of the lump sum settlement. Nevertheless, the self-insurer did not accept the spondylosis diagnosis in the lump sum settlement agreement, either as a condition caused by the industrial accident or a diagnosed pre-existing condition that had been exacerbated by the injury. Instead, it was completely excluded from the lump sum settlement and cannot now be included as a condition for which the self-insurer is liable. Lamport's Case, 101 Mass. App. Ct. 26, 30-31 (2002)(lump sum settlement agreement has preclusive effect barring recovery for known, but not accepted conditions).

Before we address the self-insurer's remaining claims of error, we must address a threshold issue. The employee correctly points out that at the commencement of the hearing, his counsel advised the judge of an additional stipulation, which the self-insurer confirmed on the record, yet the judge failed to utilize or mention in his decision. (Employee's br. 3.) We set forth the pertinent part of the transcript:

> Mr. Danahy:
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> > No additional exhibits just clarification, your Honor. On the 13 and 30 claim, was specifically looking for the physical therapy bills. It doesn't look like there's a dispute anymore about the retroactive it's just the ongoing physical therapy.
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> > And then the surgery, the insurer has offered to pay for the C5 corpectomy that their doctor recommended but not the C6-7 discectomy infusion [sic].
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> * * *
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> The Judge:
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> > Attorney Noone, as far as what Attorney Danahy said about the physical therapy bills and the extent of what aspect of the surgery is disputed, is that consistent with your position as well, that we're talking that the previous physical therapy bills are being resolved and that we're really talking ongoing physical therapy, and then for the surgery the issue is the C6-7

component of the surgery as opposed to the C5 portion, or is that all in dispute or something different?

Ms. Noone:
I think you stated it correctly, your Honor. I agree with that, thank you.

(Tr. 8-9.) This stipulation should have served to narrow the issues in dispute, including arguably, a large part of the dispute regarding the surgery. Goncalves Cordeiro v. Carlos Painting, 33 Mass. Workers' Comp. Rep. 211, 217-218 (2019) (judge cannot ignore stipulation and must notify parties if judge intends to vacate it). The employee, however, does not argue that the stipulation bars the self-insurer from raising the argument that the judge erred in finding it liable for the myelopathy diagnosis, so we address it.

On September 21, 2023, over two months after the lump sum settlement agreement was approved, Dr. Sungarian examined the employee determining he, "was in the early stages of cervical myelopathy, with imaging revealing severe spinal stenosis at multiple levels due to disc herniations." (Dec. 15.) The judge expressly adopted the following pertinent parts of the doctor's opinions:

- Dr. Sungarian's opinion to a reasonable degree of medical certainty was that C5 corpectomy and C6-7 discectomy and fusion was the correct procedure for [the employee], as he had no significant cervical or spinal issues prior to his work incident, he developed problems with weakness and pain, he had significant disc herniations and signs of myelopathy, and he developed severe problems with dexterity in his hands and numbness, which supported compression of his cervical spinal cord that can progressively result in significant spinal cord injury leading to irreversible neurological deficits without surgical decompression of the spinal cord.

- Patients will benefit from surgery first, followed by physical therapy, rather than physical therapy before surgery because manipulation of the cervical spine and/or spinal cord before surgery may result in further injury.

- Corpectomy is better to approach the spine from the front to relieve pressure off the spinal cord at really tight levels of the C4-5 and C5-6 discs.

- C6-7 discectomy is necessary to prevent failure of the caging and plating from C4-C7 if the 'lever arm' of the repair was on an already injured disc.

- On January 6, 2025, it remained Dr. Sungarian's opinion that [the employee's] work injury remained a major contributing cause of both cervical radiculopathy and cervical myelopathy for which the recommended surgical procedures were to be performed.

(Dec. 15-16.)

It is significant that none of the physicians who examined the employee prior to the lump sum settlement, diagnosed the employee with myelopathy. The diagnosis of myelopathy did not emerge until after the lump sum settlement, in the face of deterioration in the employee's physical condition as outlined by Dr. Sungarian. Dr. Sungarian directly related that condition to the protruding discs that were accepted injuries. For that reason, myelopathy could not have been listed as a diagnosis on the agreement, and the adopted opinions of Dr. Sungarian support the judge's determination that myelopathy was a consequence of the disc protrusions.

We also agree with the employee that there was no error in including the C6-7 level in the proposed surgery. The proposed surgery at this level was not a stand-alone procedure involving an unaccepted body part, but rather an ancillary requirement to ensure the success of the otherwise medically necessary procedure for the accepted injury. As Dr. Sungarian's adopted opinion points out, failure to include that level would set the employee up for a failed surgery. In addition, there is no conflicting medical evidence suggesting that the exclusion of this level was a reasonable option. The self-insurer's physician, Dr. Linson opined, and the judge adopted his opinion that, "[t]he cervical surgery, if it is directed to the areas of abnormality identified by Dr. Sungarian, would be causally related and medically necessary due to the work injury of August 27, 2019." (Dec. 17; Ex. 8[1].)

Nonetheless, we cannot affirm the order of the surgery, because the judge also relied on the adopted opinions of Dr. Bulcyznski, who related the surgery, at least in part, to the unaccepted spondylosis condition. Kelly v. Boston University, 25 Mass. Workers' Comp. Rep. 143, 146-147 (2011)(where error cannot be found harmless as a matter of law, recommittal required.) Consequently, we must vacate the award of the surgery and

recommit the matter for further findings of fact and rulings of law on the issue of the surgery, excluding the diagnosis of spondylosis.

Lastly, we address the self-insurer's argument that the judge erred in ordering payment for cervical spine physical therapy. (Self-ins. br. 11-12.) The judge ordered physical therapy for C4-5 and C5-6 "radiculopathy up to and including January 6, 2025," with credit for payments already made, noting that post-surgical treatment had been addressed with his order for the spinal surgery. (Dec. 21.) The self-insurer correctly notes that the judge made no specific findings of fact adopting any medical opinion indicating that the therapy was reasonable and adequate medical treatment for the accepted cervical problems. G.L. c. 152, §30. The employee argues the judge's adoption of Dr. Bulczynski's opinion that the employee's "care had been reasonable, necessary and related which would include the physical therapy" satisfies that requirement. (Employee br. 11.) However, we note the judge did not adopt that particular opinion of Dr. Bulczynski, just his opinion regarding the surgery. (Dec. 16-17.) Moreover, for the reasons stated above, to the extent Dr. Bulczynski's opinion was based on an unaccepted condition of cervical spondylosis, an order for therapy based on that condition could not stand in any event. In the absence of the adoption of an opinion regarding the need for therapy, there can be no order for therapy from the date of hearing through January 6, 2025, the date of Dr. Sungarian's deposition. Evans v. Geneva Construction Co., 25 Mass. Workers' Comp. Rep. 371, 375-376 (2011)(medical determinations unsupported by an adopted medical opinion are speculative and cannot stand.) Against this backdrop, we further observe that the judge expressly adopted Dr. Sungarian's opinion that "[p]atients will benefit from surgery first, followed by physical therapy, rather than physical therapy before surgery because manipulation of the cervical spine and/or spinal cord before surgery may result in further injury." (Dec. 15.) Without further analysis by the judge, the adoption of Dr. Sungarian's opinion would appear to militate against any order for payment of physical therapy for the employee's cervical spine. Accordingly, we also vacate so much of the order of physical therapy as requires the self-insurer to pay for

that treatment to the employee's cervical spine. On recommittal, the judge must make findings of fact and rulings of law regarding the surgery and the physical therapy for the employee's cervical spine, without consideration of the excluded diagnosis of cervical spondylosis, and, insofar as the physical therapy is concerned, for the stipulated timeframe from the date of the hearing, forward.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: ***November 20, 2025***