COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034583-06**

Scott Bordeleau	Employee
M.C.I. Concord	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Long)

This case was heard by Administrative Judge Spinale.

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

KOZIOL, J. The self-insurer appeals from a hearing decision allowing the employee's claim for post lump sum settlement medical benefits, and ordering it to pay benefits pursuant to §§ 13 and 30 for "reasonable and related medical expenses to include pain management and [radio frequency ablations, (RFAs)] per Dr. Feliz," (Dec. 8.) The self-insurer asserts on appeal that the judge erred by failing to discuss the terms of the lump sum settlement and address its defense that the lump sum settlement barred the employee's claim. We affirm the judge's decision.

In 1991, when the employee began working for the self-insured employer as a Corrections Officer, he did not have any medical issues with his back and worked without restrictions or limitations. (Dec. 5-6.) During the course of his employment as a Corrections Officer, the employee sustained work-related injuries to his back but returned to work full duty after each incident. (Dec. 6.) Then, on November 7, 2006, while attempting to break up a fight between inmates in their shared cell, the employee struck his low back on a steel toilet/sink and felt a sharp pain in his back. (Dec. 4.) After this injury to his low back, the employee was unable to return to work as a Corrections

Officer. He retired on Accidental Disability Retirement in 2008, and lump sum settled his workers' compensation claim on June 2, 2008. (Dec. 3 n. 3; 4.)

The judge found the employee went to Emerson Hospital on the date of the accident and was treated and released. Thereafter, he underwent physical therapy and diagnostic testing, including a lumbar MRI, and was deemed not to be a surgical candidate. (Dec. 4.) The employee subsequently underwent additional physical therapy and chiropractic treatment which helped him deal with his pain. He also had epidural and facet joint injections which provided "little, if any, relief." Id. "In 2014/2015, the Employee was referred to Dr. Roberto Feliz and Dr. Feliz recommended RFAs since 2016." Id. On June 6, 2019, the judge issued a conference order requiring the self-insurer to pay for the employee's medical benefits consisting of continued pain management per Dr. Feliz's recommendations, including RFAs. The self-insurer timely appealed, and on October 4, 2019, the employee was examined pursuant to § 11A, by Dr. Julien Vaisman, who is board certified in internal medicine, and is an anesthesiology and pain management specialist. (Dec. 3.)

At the hearing, the self-insurer denied causal relationship and entitlement to medical benefits under §§ 13 & 30. (Dec. 3; Ex. 4; Tr. 4.) The judge stated he would take judicial notice of the board files,[1] including the June 2, 2008, lump sum settlement agreement. (Tr. 4, 6-7). The judge found Dr. Vaisman's report to be adequate but allowed the self-insurer's motion to submit additional medical evidence on the ground of medical complexity. (Dec. 3.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice may be taken of board file). The parties submitted additional medical evidence and took Dr. Feliz's deposition on June 29, 2020. (Dec. 2-3.)

The judge's decision shows he took judicial notice "of the prior DIA files, including, but not limited to the approved Lump Sum Agreement dated June 2, 2008."

[1] The files included the present board file as well as those pertaining to the employee's two prior work-related back injuries sustained while working for the self-insurer. (Tr. 6-7.)

(Dec. 3 n.3.) The judge found that, as of the date of the hearing, the employee had undergone five rounds of RFAs. The judge credited the employee's testimony that the RFAs greatly reduce his need to take Vicodin and decrease his level of pain for periods of four to six months at a time. The judge also found that, after the lump sum settlement, the employee returned to work in a lighter, non-physical capacity, and at the time of the hearing he was working two to three days per week as a delivery driver for a local pharmacy.

The judge adopted Dr. Vaisman's opinion that, "based on a reasonable degree of medical certainty the Employee, 'suffers from chronic low back pain secondary to spondylosis and facet joint arthritis triggered by the traumatic event sustained on November 7, 2006' [and] that, ' the radio frequency treatments along with the pharmacological management rendered so far were reasonable and necessary and causally related to the work injury.' " (Dec. 5.) The judge also adopted Dr. Feliz's opinions that since 2015 he has provided medical "treatment to the Employee's lower back, specifically for chronic low back pain and lumbar spondylosis," he is currently prescribing RFA as a treatment the employee should have "two or three" times per year, and that "the work injury of November 7, 2016 is the major cause of the Employee's need for treatment." (Dec. 5.) Accordingly, the judge ordered the self-insurer to "pay for reasonable and related medical expenses to include pain management and RFAs per Dr. Feliz." (Dec. 8.)

On appeal, the self-insurer asserts that the judge erred by failing to discuss the lump sum settlement agreement and by failing to address its defense that the settlement agreement barred the employee from asking the insurer to pay for the medical treatment, because the only injury accepted by the self-insurer was a "soft tissue injury to the low back," not "lumbar spondylosis." (Self-ins. br. at 4-10.) The judge did not err.

We have held that claim preclusion operates to bar further litigation of matters that were or should have been raised and adjudicated in a prior action if there was a valid, final judgment in the action, and that a lump sum settlement is analogous to a final judgment. Lisby v. EDM Construction, Inc., 32 Mass. Workers' Comp. Rep. 183, 190-

191 (2018); Keegan v. August A. Bush and Co., 18 Mass. Workers' Comp. Rep. 37, 30 (2004). Res judicata and collateral estoppel are affirmative defenses that must be pled in order to be raised properly. Boucher v. Edward Buick, Inc., 35 Mass. Workers' Comp. Rep. ___, n.4 (January 19, 2021); Litch v. American Airlines, 32 Mass. Workers' Comp. Rep. 235, 241 n. 5 (2018). Here, the self-insurer provided the following grounds for denying the employee's present claim: "no injury; no injury from employment; insufficient medical documentation to support a disability; not causally related to a work injury; rights reserved under Section 1(7A)." (DIA Form 104 Insurer's Notification of Denial, 3/13/2019); Rizzo, supra. On the § 10A conference memorandum, the self-insurer checked the following boxes: Disability, Extent, Causal Relationship to Work and Other, which was followed by the insertion of the words "1(7A) Reserved." (DIA Form 140 Conference Memorandum, 6/06/2019); Rizzo, supra. While the self-insurer made a passing reference to the lump sum settlement in its motion for additional medical evidence pursuant to § 11A(2), stating only that, "The claimed date of injury was in 2006, and the case was resolved via lump sum for a soft tissue injury only," that statement stood alone without explanation. Lastly, at the hearing the self-insurer affirmed on the record what it presented on its issue sheet, acknowledging that the judge had sufficiently stated its defenses as causal relationship and denial of entitlement to §§ 13 and 30 benefits. (Dec. 3; Ex. 4; Tr. 4.)

As an affirmative defense, the claim that the lump sum acted as a bar to the employee's claim for benefits had to be stated on the record and could not be raised by innuendo. 452 Code Mass. Regs. § 1.11(2)(1/27/17).[2] The first time the self-insurer raised the lump sum as a bar to the employee's claim was in its closing argument. Rizzo, supra. This was "too little too late," to "provide the employee with 'fair notice of the grounds for its defense at hearing.' " Doherty v. Union Hospital, 31 Mass. Workers'

[2] Prior to the amendment of the regulations in 2017, the requirement that claims and defenses be "stated clearly on the record" appeared in 452 Code Mass. Regs. 1.11(3). See Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597 (1995)(stating "import of regulation 1.11(3) is unmistakable: an insurer must give the employee fair notice of the grounds for its defense at hearing").

Comp. Rep. 195, 202, 203 (2017), quoting from Bamihas, supra at 597. Thus, the argument was waived, and the judge properly did not address it in his decision. Ovalle v. City of Everett, 34 Mass. Workers' Comp. Rep. 65, 73-74 (2020); Griffin v. M.B.T.A., 34 Mass. Workers' Comp. Rep. 75, 83 (2020).

Here, the employee sought specific medical treatment for his work-related low back injury. The judge's findings of fact, including the adopted medical opinions, supported the judge's conclusion that the employee had met his burden of proving his entitlement to those medical benefits. We therefore affirm the judge's decision. Pursuant to § 13A(6), the self-insurer shall pay a fee to the employee's attorney in the amount of $1,745.44.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***May 14, 2021***