COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 088390-88

Scott Botelho	Employee
Department of Correction/Bridgewater	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

Robert J. Deubel, Jr., Esq., for the employee

Patricia G. Noone, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee medical benefits for the work-related condition of gynecomastia. The self-insurer argues that it was prejudiced by the judge's allowance of the employee's proffer of certain medical reports as additional medical evidence under § 11A(2), after the close of the record. Finding no error in the admission of the additional medical reports, we affirm the decision.

In 1988, the employee was injured in a motorcycle accident in the line of duty as a corrections officer. The self-insurer accepted the resultant claim, which included treatment for a condition known as gynecomastia. (Dec. 2.) The employee's treatment for this condition included numerous surgeries from 1989 through 1996. (Dec. 4-5.)

In 2002, the employee suffered a recurrence of his gynecomastia. His treating physician, Dr. Silverman, was guarded in his treatment recommendations, and in his admitted reports, did not expressly state that further surgery is reasonable and necessary. (Dec. 5.)

At issue in the self-insurer's appeal are the causal connection between the 1988 work injury and the employee's 2002 recurrence of the gynocomastia condition, and whether another surgery would be reasonable and necessary. The employee underwent an impartial medical examination by Dr. Elias Dow on June 29, 2004. Dr. Dow causally related the current bout of gynecomastia with the prior incidents of the condition. However, the doctor did not causally relate the gynecomastia to the employee's 1988 work accident. Dr. Dow also opined that further surgery would not be beneficial. (Dec.

6.) The judge allowed additional medical evidence on the basis of medical complexity. (Dec. 3.)

The employee submitted the October 5, 2004 medical report of Dr. Stephen Mackler, who causally related the employee's present and recurrent gynecomastia to his 1988 work injury. [1] The judge adopted Dr. Mackler's opinion, and ordered the self-insurer to pay medical benefits for the condition. However, the judge did not order the self-insurer to pay for further surgery, as no medical evidence supported the proposed surgery as reasonable and necessary. (Dec. 6-7.)

We find no support for the self-insurer's appeal on this record. Citing Mayo v. Save on Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005), the self-insurer argues that the judge's admission into evidence of Dr. Mackler's adopted report of October 5, 2004 prejudiced its ability to defend against the employee's claim. However, the self-insurer's reliance on Mayo is misplaced. In Mayo, the judge allowed a late submission of additional medical evidence from the employee without notifying the insurer of that action. Id. at 3. Unlike Mayo, the self-insurer here does not allege that it was unaware of the judge's allowance of additional medical evidence and her extensions of the close of the record deadlines. Its own brief makes it clear that it was aware of all relevant events. (Self-ins. br., 3-4.) Mayo has no application to the present case, as the self-insurer had every opportunity to oppose Dr. Mackler's opinion in whatever manner it deemed fit. Contrary to the self-insurer's assertions, its due process rights were not violated by the judge's actions. [2]

The decision is affirmed. [3] Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,357.64.

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[1] The self-insurer's argument that no medical expert has causally related the employee's present and recurrent gynecomastia to his 1988 work injury is without merit and thus, summarily dismissed.

[2] The self-insurer's argument that the employee failed to provide Dr. Mackler's qualifications as required by 452 C.M.R. § 1.11(6) is waived, as it did not raise the objection at the hearing. Dunn v. U. S. Art Co, Inc., 18 Mass. Workers' Comp. Rep. 123, 125 (2004).

[3] The self-insurer makes a perfunctory objection to the administrative judge's award of a § 13A(5) attorney's fee, based on its assumption that the reviewing board will reverse the decision; thus no fee will be due because the employee did not prevail by securing

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: February 9, 2006

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benefits. However, contrary to this assumption, our affirmation of the decision awarding disputed § 30 benefits requires affirmation of the award below of an attorney's fee. Cf. Bradford v. Blue Cross/Blue Shield, 10 Mass. Workers' Comp. Rep. 653 (1996)(no fee due in accepted case where weekly benefits terminated and boilerplate medical benefit "award" did not contemplate any contested issue).