COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 053401-97 024996-15[1]**
Valerie Morris	Employee
Elder Services of Merrimack Valley, Inc.	Employer
Arbella Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Harpin and Long)

This case was heard by Administrative Judge Bean.

APPEARANCES
Vincent A. Murray, Jr., Esq., for the employee
Kerry G. Nero, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from a decision ordering it to pay for reasonable and necessary medical treatment pursuant to §§ 13 and 30, including prescriptions for Fentanyl, Vicodin, and Lyrica. We agree with the insurer that the judge erred by refusing to allow its motion for additional medical evidence, because the impartial opinion was inadequate as a matter of law. We recommit the case to the judge for the allowance of additional medical evidence, and further findings of fact and rulings of law based on the evidence.

The employee suffered a repetitive motion injury to her left major elbow on November 14, 1997. Two unsuccessful surgeries in 1997 and 1998 resulted in nerve damage, after which the employee developed complex regional pain syndrome (CRPS) in her left arm, also known as reflex sympathetic dystrophy (RSD). (Dec. 260-261.) In 1999, she entered into a lump sum agreement for her elbow injury, which required that the insurer pay for "reasonable, necessary[2] and related medical expenses." (Dec. 259;

[1] This board number belongs to the claim against a subsequent insurer, Phoenix Insurance which was dismissed from the case prior to hearing. (Dec. 259.)

[2] Although throughout the decision, the judge refers to whether the medications at issue are "reasonable and necessary," there is no statutory support for that standard. Rather, § 30 provides

Lump Sum Agreement, approved October 15, 1999.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of board file). In 2000, she began to take Fentanyl for pain and Vicodin for breakthrough pain. "These medications reduce, but do not eliminate her pain." (Dec. 260.)

Several years later, despite her injury, the employee earned a master's degree in human resources and mediation, and returned to work for a different employer. (Dec. 260.) In March 2009, she broke two toes and sprained her ankle in a non-work-related injury, and subsequently developed RSD in her right leg. (Dec. 260-261; Ex. 3, Impartial report.) In May 2009, she "was prescribed Lyrica to address her neuropathic pain." (Dec. 260.) Since that time, she has been prescribed Lyrica, Fentanyl and Vicodin.[3] From 2010-2015, her health insurance paid for those drugs. Id.

The employee filed a claim against the insurer for §§ 13 and 30 medical benefits, to which she joined a claim against Phoenix Insurance, which insured her subsequent employer, Korde. Following a conference, the judge denied both claims. The employee appealed, but withdrew her claim against Phoenix before the December 23, 2016, hearing. (Dec. 259.) The issues at hearing were the reasonableness, "necessity," and causal relationship of the prescription medications, Vicodin, Fentanyl and Lyrica, to the elbow injury, from June 2010 to the present and continuing.[4] (Dec. 258.)

Pursuant to § 11A, on September 7, 2016, the employee was examined by Dr. Mark Berenson, a Board certified orthopedist. On February 6, 2017, Dr. Berenson was deposed. On February 23, 2017, the insurer filed a motion to submit additional medical

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that "the insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services . . . ." See Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337 n. 1 (2008). Nonetheless, we leave in the references to medical "necessity" and medically "necessary" where the judge used those terms.

[3] The judge found that, "[t]hrough the years, she has taken twenty prescription medications for her symptoms." (Dec. 260.) She currently takes Cymbalta, Trazodone, Topamax, Tizanidine, Atorvastatin, Imitrex and Fioricet, none of which are at issue in this case. (Dec. 261.)

[4] Although the judge did not list causal relationship as an issue, the insurer clearly raised it at hearing, (Tr. 4), and the judge addressed it in his decision. (Dec. 262.)

evidence "because the medical issues are complex and the 11A Report and testimony are inadequate." Rizzo, supra. On March 23, 2017, the judge "ruled that the impartial medical examiner's report was adequate," and denied the motion. (Dec. 259.) The insurer filed a closing argument, in which it objected to the denial of its motion for additional medical evidence. (Insurer's Closing Argument, dated March 28, 2017; see Dec. 259.)

In his decision, the judge found that the employee was prescribed Lyrica, Fentanyl and Vicodin for the pain associated with the RSD in her elbow, which she injured at work in 1997, and in her foot, which she injured in 2009 outside of work. (Dec. 262.) The judge found that, although Dr. Berenson conceded he was not a pain specialist, "he provided persuasive testimony that the three medications are reasonable and necessary treatment for her 1997 industrial injury to her elbow." Id. Accordingly, he ordered the insurer to pay "for all reasonable and necessary medical treatment including prescriptions for Lyrica, Fentanyl and Vicodin, related to the industrial injury of November 14, 1997 pursuant to §§ 13 and 30." (Dec. 263.)

The insurer argues that the judge erred in failing to find that the impartial opinion is inadequate as a matter of law. We agree. In O'Brien's Case, 424 Mass. 16 (1996), the Supreme Judicial Court acknowledged that "a decision by the administrative judge to foreclose further medical testimony where such testimony is necessary to present fairly the medical issues would represent grounds either for reversal or recommittal." Id. at 22-23. Furthermore, where the procedural safeguards in § 11A—including the right to present additional medical evidence to the impartial medical examiner and the right of cross-examination—"still failed to offer a party an opportunity to present testimony necessary to present fairly the medical issues, there then might well be failure of due process as applied in that case." Id. Here, due to the inconsistencies in the impartial opinion, and the impartial physician's own admission that he lacks the expertise to address key elements of the issue in controversy, Dr. Berenson's opinion fails to address the medical issue in controversy. Thus, it cannot attain the status of prima facie evidence, and additional medical evidence is required.

We have long held that self-contradictory medical opinions cannot be prima facie evidence. Roscoe v. Brigham and Women's Hosp., 28 Mass. Workers' Comp. Rep. 77, 80-81 (2014); La v. Pre-Owned Elecs. Co., 24 Mass. Workers' Comp. Rep. 199, 201 (2010); Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 180 (2009), aff'd sub nom Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(Memorandum and Order Pursuant to Rule 1:28); Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 282-283 (2005); Brooks v. Labor Mgt. Srvcs., 11 Mass. Workers' Comp. Rep. 575, 580 (1997).

> "The unexplained, internally inconsistent opinion of the § 11A physician in the present case cannot be accorded prima facie force under the Cook [v. Farm Service Stores, Inc., 301 Mass. 564 (1938)] reasoning. It should therefore 'retain only its inherent persuasive weight as a piece of evidence *to be considered with other evidence* . . . . ' Cook, [supra,] at 566 (emphasis added). It logically follows that additional medical evidence is mandated under the circumstances presented by this case. The impartial physician's opinion evidence is inadequate because it is too self-contradictory to '[compel] the conclusion that the evidence is true. . . . ' Id. As a practical matter, if the evidence cannot stand alone as prima facie, it cannot be exclusive. § 11A. The doctor's opinion retains status only as ordinary evidence to be weighed with any other medical evidence within the parameters set by Perangelo's Case, [277 Mass. 59 (1931)]."

Orlofski, supra, at 180, quoting Nunes, supra at 282-283 (2005), quoting Brooks, supra. Similarly, an ambiguous and confusing impartial opinion may not stand alone as the only medical evidence. Roscoe, supra at 80-81; Libby v. National Restaurants Corp., 20 Mass. Workers' Comp. Rep. 37, 40 (2006). Moreover, where an impartial physician's testimony is self-contradictory, a judge "cannot . . . select which of the contradictory testimony to credit." Orlofski's Case, supra.

Here, Dr. Berenson offered irreconcilable and equivocal opinions. In his report, Dr. Berenson stated: "She was taking some of these medications [including Fentanyl] up to the time that she broke her toe and following this she has continued them *because of the toe fracture and her subsequent reflex sympathetic dystrophy*." (Ex. 3, Impartial report; emphasis added.) He continued, "[The employee's] *medications* and disability as a result of her toes *are all related to basically her new injury in 2009, and not related to*

the elbow injury which took place back in 1998."[5] Id. (emphases added.) By contrast, in his deposition, Dr. Berenson appeared to change his mind, opining at times that Fentanyl, Vicodin and Lyrica, were prescribed for *both* the elbow and foot condition, and were still appropriate and reasonable for her to be taking for her elbow pain. (Dep. 19, 23, 26, 27, 37.) However, he did not maintain this opinion throughout his deposition. For example, when discussing the addition of Lyrica, which was prescribed about two months after her 2009 foot injury, Dr. Berenson initially opined that it and the other two medications were "reasonable and necessary protocol medications for the RSD of her left elbow." (Dep. 23.) However, two pages later, when asked if Lyrica "would be a reasonable medication to add for the RSD of her left elbow[,]" (Dep. 25), his response was,

> A: To be honest, it's so far away I would say not.
>
> . . .
>
> A: I mean, to add that, she's had this thing for all this time. You know, *I'm not a pain doctor giving the medicine out*. I'm not . . .

(Dep. 25; emphasis added.) Then, when pressed, Dr. Berenson changed his opinion again, apparently deferring to the expertise of Dr. Roberto Feliz, a pain specialist whose report of May 19, 2009, had been submitted to him by both parties prior to the impartial examination. Rizzo, supra. (Dep. 7. 30-31.)

> A: I wouldn't say it wasn't reasonable. I mean, *I'm not a pain specialist doctor. This gentleman [Dr. Feliz] is.* But she had not been on—the impression I got, that her bigger problem was her foot problem.
>
> . . . .
>
> But I think that sitting back and looking at her now to me it was the foot

[5] Dr. Berenson incorrectly states throughout his report that the elbow injury occurred in 1998 rather than 1997. He also incorrectly diagnosed the employee's elbow injury as a fracture rather than a repetitive motion injury. In addition, his report is focused more on disability than on the reasonableness, adequacy and causal relatedness of the three medications. It was the responsibility of the parties, specifically the employee, to present hypothetical questions to the impartial examiner to focus his opinion, but they chose to depose him instead. See Lupa's Case, 91 Mass. App. Ct. 1103 (2017)(Memorandum and Order Pursuant to Rule 1:28). We note that the employee was prepared at hearing to present a motion for additional medical evidence, but, after an off-the-record discussion with the judge, a deposition was agreed upon. (Tr. 3, 37.) Following the deposition, the insurer filed its motion for additional medical evidence.

injury which was giving her the bigger problem even though she was on the medication before for the elbow. *Be that right or wrong, I don't know*. That was my impression when I saw her.

Q: Okay.

A: *I don't know*. And I think that's why I said medications as a result of the toe, basically to the new injury; not related to the elbow. Not that she didn't have an elbow problem, but the bulk of her problems were from the toe.

(Dep. 28-29; emphases added.)

In addition, thereafter, Dr. Berenson continued to express an inability to opine regarding whether it was reasonable for the employee to continue with the medications over an extended period of time, as well as a lack of expertise with regard to treatment with these pain medications, and pain medications in general. When asked if he would keep a patient on medications for nineteen years after an injury, as was the case here, Dr. Berenson could not give an opinion:

A: *I can't give you an answer for that*. I mean, if it's working. Sometimes you put them on it and you don't have a phenomenal result, but it's like you're afraid to take them off because they may do worse. *So I can't say that*.

(Dep. 29-30.) When asked if a patient could build up a resistance over time to the three drugs in question, Dr. Berenson responded:

A: *I can't tell you that*.

Q: You can't tell us that.

A: *I don't know*.

(Dep. 30.) Later, insurance counsel asked if Dr. Berenson knew anything about alternative treatments to the drugs the employee was being prescribed:

Q: And Dr. Feliz talked about – is it here? – a concern that Ms. Morris was developing a central sensitization/wind-up pain. She went from foot and ankle to now systemic generalized pain. As a result he talked about an option being Ketamine.

A: Ketamine. Yes.

Q: K-E-T-A-M-I-N-E. [versus] Magnesium [versus] IV Lidocaine [versus]

medical marijuana. Do you know whether any of those treatments are alternative treatments for RSD.

A: *I have no experience with that. I can't tell you that*.

Q: Okay.

A: *I don't know*.

(Dec. 36; emphases added.)

Although Dr. Berenson's testimony is not quite the "verbal tennis match" of the § 11A physician's testimony in Nunes, supra, it is nonetheless equivocal, inconsistent and lacking in foundation. It is not governed by Perangelo's Case, 277 Mass. 59, 64 (1931) ("[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying") in which the medical expert changed his opinion based on new evidence. Here, Dr. Berenson was not presented with any new medical evidence, nor was he presented with a different history. He testified that he had read the medical records submitted by the parties, (Dep. 7-8, 31), and was specifically questioned about the May 19, 2009, report of Dr. Roberto Feliz, including the fact that Dr. Feliz did not mention the foot injury when he prescribed the Lyrica. (Dep. 25.) Nonetheless, Dr. Berenson's opinion went from "reasonable" to "not reasonable" and back to "reasonable." (Dep. 23-27.) He attempted to explain the change from his original opinion that none of the medicals were prescribed for the elbow, to his sometimes opinion that all the medicals were reasonable and appropriate for treating the employee's elbow pain, by stating that he thought the foot was her main problem. (Dep. 27, 29.) However, this explanation is insufficient to explain his vacillating opinions. See Brooks, supra at 9-10 (due to insufficient explanation of change in assessment of causal relation, judge must allow additional medical evidence).

Moreover, Dr. Berenson's opinion is inadequate because he prefaced his opinions, or lack thereof, with the caveat that he was not a pain specialist, and admitted that he could not answer relevant questions regarding treatment with pain medications, including whether he would prescribe the pain medications at issue over a long period of time, whether the employee could build up a resistance to such medications, and whether some

medications mentioned by the employee's treating pain specialist were alternative treatments for RSD. Thus, there is no sound basis or foundation for his opinion that treatment with these medications continues to be reasonable, adequate and related to the elbow injury. The employee is correct that the fact the impartial physician was an orthopedic specialist rather than a pain management specialist does not, in and of itself, render his report inadequate. Howe v. Ken Weld Co., 25 Mass. Workers' Comp. Rep. 201, 204 (2011). However, an impartial physician must be able to address fairly the issues in controversy. O'Brien's Case, supra at 22-23. Here, Dr. Berenson, by his own admission, could not do that. See Mays's Case, 72 Mass. App. Ct. 1116 (2008) (Memorandum and Order Pursuant to Rule 1:28)(where impartial physician could not reach conclusion whether employee remained disabled as a result of chemical exposure at her workplace, that opinion is inadequate and additional medical evidence should have been allowed). Moreover, by stating, "I'm not a pain specialist doctor. This gentleman is," (Dep 29), and then changing his opinion on the reasonableness of treating the employee's elbow pain with Lyrica, Dr. Berenson appeared to impermissibly defer to Dr. Feliz's opinion. See Lagrasso v. Olympic Delivery Service, Inc., 18 Mass. Workers' Comp. Rep. 48, 56 (2004)("Section 11A does not permit an impartial medical examiner to delegate his medical determinations, or defer the opinions he is supposed to render to another physician"). Accordingly, we hold that the combination of the inconsistency in the § 11A deposition and report, and within the deposition itself, as well as Dr. Berenson's professed lack of expertise and inability to answer relevant questions regarding the medical issue in controversy, and his deference to Dr. Feliz, renders his opinion inadequate, and requires the admission of additional medical evidence.

The insurer also argues that the judge erred by failing to rule on whether the medical issues were complex, although this issue was clearly presented in its motion for additional medical evidence. ("Insurer's Motion for Additional Medical Evidence Due to Inadequacy and Complexity," dated February 23, 2017.) We agree with the insurer that medical complexity was a part of its motion, and that the judge ruled only on the question of adequacy of the impartial opinion. (Dec. 259.) Normally, we would recommit the

case for the judge to consider whether the case is medically complex. See Driscoll v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 428 (1997)(where employee filed motion for additional medical evidence on grounds of both inadequacy and medical complexity, and judge denied additional medical evidence on grounds that impartial opinion was adequate, case recommitted for ruling on complexity). However, in light of our holding that the impartial opinion is inadequate as a matter of law, there is no need for a ruling on complexity.

Finally, there is no merit to the insurer's argument that the case should be recommitted for the judge to address whether the employee's elbow condition was aggravated by her subsequent work at Korde. (Insurer br. 16-18.) The employee withdrew her appeal against the alleged successive insurer, Phoenix, prior to hearing. Thus, the issue of whether a successive insurer was liable for any aggravation was not before the judge, and could not properly be addressed. Kendrick, Jr. v. Grus Constr. Personnel, 30 Mass. Workers' Comp. Rep. 55, 63 (2016), citing Remillard v. TJX Cos., 27 Mass. Workers' Comp. Rep. 97, 103 (2013) ("Because there is no successive insurer to whom liability may be shifted, the employee remains entitled to benefits to the extent his incapacity is causally related to his [1997] industrial injury"). [6] See also Lombardo v. Titan Roofing Co., 31 Mass. Workers' Comp. Rep. 25, 33-34 (2017).

Accordingly, because the impartial opinion is inadequate as a matter of law, we reverse and recommit the case to the judge to allow the parties to submit additional medical evidence. Thereafter, he shall make additional findings of fact and rulings of law based on the record evidence.

So ordered.

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[6] In Remillard, supra, at 103, we held:

> Causal relationship to the original injury is not severed simply because the employee may have suffered a later injury. In fact, the successive insurer rule contemplates that an employee may suffer 'two or more compensable injuries that are causally related to a resulting incapacity.' Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). However, . . . where there is no successive injurer and no issue of another date of injury, the successive insurer rule does not come into play to shift liability.

Carol Calliotte
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***December 28, 2017***

Martin J. Long
Administrative Law Judge