COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 038877-04

Wendy Patrinos	Employee
Kindred Nursing Center	Employer
Insurance Company State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Rose.

APPEARANCES
Alan S. Pierce Esq., for the employee
Darren I. Goldberg, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

KOZIOL, J. The parties cross-appeal from a decision ordering the insurer to pay the employee § 34A permanent and total incapacity benefits, denying the employee's § 30 claim for medical treatment for her psychiatric and low back conditions, and ordering the insurer to pay employee's counsel a fee in the amount of $5,103.04 pursuant to § 13A(5). The insurer challenges the judge's adoption of certain medical evidence supporting the § 34A award. As to the insurer's appeal, we summarily affirm that portion of the decision. However, the employee raises an issue requiring reversal of the judge's denial of her § 30 claim for psychiatric treatment, and recommittal for further findings pertaining to the § 13A(5) attorney's fee issue.

On December 7, 2004, the employee was working as the director of social services at the employer's Oakwood Nursing Home when she slipped and fell at the nurses' station, injuring her right knee. (Dec. 4.) The insurer paid the employee weekly § 34 total incapacity benefits as a result of her knee injury. After undergoing arthroscopic surgery to her right knee on April 24, 2005, the employee felt increased pain and was unable to straighten her right leg. (Dec. 5.) Her condition did not improve after a second surgery. (Dec. 5.)

The board file indicates the department received the insurer's complaint to modify or discontinue the employee's weekly benefits on September 25, 2006. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The complaint was denied at conference and the insurer appealed. (Dec. 1.) On April 18, 2007, the employee was examined by a § 11A impartial medical examiner, neurologist, Dr. Michele Masi. (Dec. 1.) By the time the matter came before the administrative judge for hearing, the employee's § 34 benefits were about to exhaust. The judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits from December 5, 2007, and continuing. (Dec. 3.) Although the insurer had accepted liability for the right knee injury, it contended the employee's right leg dystonia was either psychogenic in origin or drug induced, but not causally related to the injury of December 7, 2004. It also disputed the existence of any causal relationship between the industrial injury and the employee's psychiatric illness or back condition, disputed disability and the extent thereof, denied entitlement to medical benefits, and raised a § 1(7A) defense. (Dec. 2.)

The judge found the medical issues complex and the parties submitted numerous additional medical records and reports. (Dec. 3.) They also submitted the deposition testimony of the employee's treating neurologist, Dr. Nuntan Sharma, the insurer's neurologist, Dr. Paula Ravin, the employee's treating psychiatrist, Dr. Jane Erb, and the insurer's psychologist, Mary Gilbride O'Connor, Ph.D. (Dec. 3)

The judge expressly credited the employee's testimony that she suffers from severe pain in her right leg, has difficulty sleeping at night, sleeps for periods during the daytime, has extreme fatigue, and cannot sit for extended periods of time. (Dec. 5, 7.) He also found the employee's right leg is contracted and does not straighten, she uses a wheelchair when she is outside of her home, and her walking is limited to extremely short distances. (Dec. 5) Adopting the medical opinions of Dr. Masi and Dr. Sharma, the judge concluded the employee suffers from post-traumatic dystonia of the right leg causally related to her industrial injury of December 7, 2004, which

results in "credible severe pain and severe loss of motion" and renders her permanently and totally disabled. (Dec. 6, 7.)

Addressing the employee's claim that the industrial injury caused a compensable psychiatric sequela, the judge found the employee suffered mental stress prior to the accident and had taken medications for that condition.[1] (Dec. 5.) He also found that one month prior to the accident, the employee's primary care physician had increased her dosage of Paxil and diagnosed her as suffering from anxiety and depression. (Dec. 5.) The judge then found the insurer met its burden of production under § 1(7A), showing the employee had a pre-existing psychological condition that combined with her industrial injury. (Dec. 6.)

In evaluating the medical evidence regarding the employee's psychiatric claim, the judge made the following findings:

> As to the employee's claim for a psychiatric illness directly caused or aggravated by her industrial injury, I find that the employee has given evasive, conflicting, and incomplete histories as to her prior mental status. Although her treating psychiatrist Dr. Erb, rendered an opinion that would satisfy the [§] 1(7)(a) [sic] causation standard, the doctor qualified her opinion indicating that she would need to talk to the employee again in order to obtain an accurate history. Deposition pages 17 and 53. In the context of my finding of evasiveness on the part of the employee, and an inaccurate history given to several physicians, I cannot find persuasive the doctor's speculative opinion that whatever the employee might report as to the accurate history would not change her opinion. Deposition page 41. No follow-up medical evidence was provided post-deposition of Dr. Erb. There is no credible or persuasive

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[1] The judge made the following specific observations and findings regarding the employee:

> At hearing the employee testified that she had stress prior to her industrial injury related to her mother's terminal illness. She recalled brief periods of medications, but did not treat with a psychiatrist. Her testimony regarding her prior psychiatric difficulties was evasive and not persuasive.

(Dec. 5.)

> opinion as to causation for an alleged lower back condition.[2] I adopt the opinion of Dr. Margaret Gilbride O'Connor that the employee suffers from no cognitive disability. Deposition Dr. Gilbride O'Connor, page 42.
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> . . .
>
> The employee has suffered a physical injury to her right knee and leg which arose out of and in the course of her employment. I have adopted the opinions set forth above. I find the employee has failed her burden of proof as to a credible psychiatric illness causally related to the industrial injury on December 7, 2004.

(Dec. 6-7.)

The employee argues the judge erred in concluding she failed to meet her burden of proving her psychiatric illness is causally related to her industrial injury, for two related reasons. First, the judge erred in characterizing Dr. Erb's opinion. Second, the judge erred by failing to adopt, without sufficient explanation, the uncontradicted psychiatric medical evidence which supported the employee's claim for medical benefits for the treatment of her depression. We agree.

Addressing the first prong of the employee's argument, we note Dr. Erb opined the employee "probably has a unipolar major depressive disorder," and "it was quite clear that she was functioning at a high level, working, mother of three, exercising at Curves, sustained this accident following which her functioning became dramatically different and she was in continued pain and not sleeping and became in that context extremely depressed." (Erb Dep. 15-16.) The doctor then opined that "the neurologic and pain effects of the accident" are, and have been, a major cause of her need for psychiatric treatment. (Id. at 17.)

Dr. Erb had not reviewed any of the treatment notes from the employee's primary care physician, Dr. Gulla, concerning the employee's psychiatric complaints and medications she received prior to the industrial injury. (Id. at 34.) When she was informed that prior to the accident, Dr. Gulla prescribed Effexor and Paxil more

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[2] Doctor Erb did not express any opinion regarding the employee's low back condition and the employee doesn't contest the judge's conclusions pertaining to that condition.

frequent than the employee had reported, Dr. Erb agreed Dr. Gulla's records would be relevant and indicated she would like more information about what transpired. (Id. at 34, 36.) The doctor was provided with a copy of Dr. Gulla's notes, which she immediately reviewed. (Id. at 38.) Thereafter, the following exchange took place:

> Q: So does that give you any concern knowing that a patient that you have been seeing now since March of '07, going on over a year, year and a half, she never revealed to you the full extent of any prior history that she had when treating with someone for depression on medications?
>
> Mr. Pierce: I am going to object. The question assumes that she didn't divulge the fullest extent. I don't think there is any showing of what Ms. Patrinos divulged to Dr. Erb is not the full extent. You have reviewed the records. I think the question is misleading as it is phrased.
>
> A: I will want to follow-up further with her on it. Is it a major concern to me? No. People never give you the absolute accurate history because when we are not feeling well, and even when we are feeling well, details can be lost. And what I just read doesn't sound drastically different from the history she gave me.
>
> Q: But now knowing that you have indicated that you now need to talk to her about it; is that correct?
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> A: Just to find out a lit [sic] bit more. From reading the notes, and what I know in the primary care community, had she been in their offices looking like she did when I first met her and continued to meet with her, they wouldn't have treated her. They would have said you need to see a specialist, you need to see a psychiatrist.
>
> So for all I know and what I could tell, she was coming in complaining of minor ailments, needing to quit smoking, for which she was started on Wellbutrin, and also suffering some depression and anxiety which she references as being related to her mother's terminal illness. I saw that it looked like she said at one point the Paxil was helping. That was a contradiction from what she told me. I would want to follow-up on that.
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> It is not clear to me that she took the Effexor for very long. Maybe that is what made her feel worse.[3] She could have mixed that up. I see this all the time where somebody comes in and at some point along the way you learn and

[3] Earlier in the deposition, Dr. Erb testified the employee reported that prior to her injury she stopped taking Paxil after a few days because "she began having suicidal thoughts following the initiation of it." (Erb Dep. 11.)

> [sic] few more details. It is a [sic] not a major change in my impressions of her and certainly doesn't change how I would proceed with treatment.
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> Q: With regards to treatment. But you have testified you made a medical opinion as to a reasonably degree of medical certainty as to the causal relationship with her condition - -
>
> A: Correct.
>
> Q: - - and now you have kind of just shown that perhaps you didn't have a complete or accurate history and you now need to talk to Ms. Patrinos about it further, correct?
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> A: One can never have a complete enough history. There is not enough information in there for me to make any changes in the statement I have already made.

(Id. at 39-40.) Dr. Erb was further questioned about the relative significance of three other stressful incidents that occurred in the employee's personal life after her injury but prior to Dr. Erb's initial March, 2007 evaluation of the employee.[4]

> Q: And, you know, certainly one of those would certainly be a major psychological event, but the combination of all three happening within a two-year period, that is something that would be significant?
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> A: It is significant. But pales by comparison to the physical and emotional changes that have occurred as part of her injury and the surgery, et cetera.

(Id. at 43-44.) The doctor's testimony was unwavering:

> Q: My last question. Having read Dr. Gulla's office notes, the PCP, does that change any of the opinions you have expressed today regarding disability or causation to the industrial accident?"
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> A: No.
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> RE-CROSS EXAMINATION BY MR. GOLDBERG:

[4] In her initial treatment note of March 1, 2007, Dr. Erb documented each of these events as "stressors." (Employee Ex. 3; Erb Dep. 9-12.)

> Q: Again, doctor, last question. Now knowing about Dr. Gulla's records, is it fair to say you have to talk to Ms. Patrinos and find out a little more information; is that fair to say?
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> A: Of course.

(Id. at 52-53.)

The judge's reasons for rejecting Dr. Erb's opinion lack legal support in the record. First, the judge's characterization of Dr. Erb's opinion as "qualified," is not borne out by the record. Doctor Erb never conditioned her causal relationship opinion on obtaining more information from the employee. Second, while a doctor's reliance upon an inaccurate or less than complete history can be grounds to reject the doctor's opinion, once the opinion has been rehabilitated through questions probing whether the doctor's "opinion would change or be affected after consideration of different facts," the uncontradicted opinion cannot be rejected for that reason. Daly v. City of Boston School Dept., 10 Mass. Workers' Comp. Rep. 252, 257-258 (1996). Doctor Erb's testimony was clear: Dr. Gulla's records of the employee's psychiatric complaints, including the type and amount of psychiatric medications he prescribed for those complaints, were not sufficient to effect a change in her opinion that the effects of the employee's industrial injury remain a major cause of the employee's depression and need for psychiatric treatment.

Findings on issues of medical causation typically require the support of an expert medical opinion. Josi's Case, 324 Mass. 415, 418 (1949); Ladue v. C&S Wholesale Foods, 20 Mass. Workers' Comp. Rep. 233, 239 (2007). Whether Dr. Gulla's notes contained medically significant information pertaining to the issue of causation was a question requiring a medical determination the doctor was qualified to make. Although the judge found the employee to be evasive about her history,[5] he expressly found the complaints upon which Dr. Erb's causation opinion was based, to

[5] The judge also did not credit the employee's complaints of cognitive difficulties. However, Dr. Erb had not tested the employee for those alleged difficulties nor did she render any medical opinion about them. (Erb Dep. 46-47.)

be credible. By further characterizing Dr. Erb's causation opinion as "speculative," the judge made "a determination of causation, which [he] is not qualified to make." Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 307 (2007). Moreover, the insurer's psychiatric expert agreed with Dr. Erb regarding the causal relationship between the employee's depression and her industrial injury. Unlike Dr. Erb, Dr. Gilbride O'Connor reviewed Dr. Gulla's medical records, read a transcript of the employee's testimony, and reviewed Dr. Erb's and other doctors' reports, prior to performing a neuropsychological evaluation of the employee over the course of two days, April 18 and May 8, 2008. (Gilbride O'Connor Dep. 40-50.) Armed with all the available psychiatric information, Dr. Gilbride O'Connor opined the employee's pain, inactivity, and effects of the work related injury were an ongoing, continuing daily stressor representing a "major cause" of her depression and need for treatment. (Ins. Ex. 1, 27-28; Gilbride O'Connor Dep. 51-52, 60-62.) Because the judge credited the employee's complaints that formed the foundation for the uncontradicted medical opinions of the psychiatric experts, the record supports only the conclusion that the employee's industrial injury is a major cause of her depression and need for treatment. Accordingly, we reverse so much of the judge's denial of the employee's claim for § 30 medical benefits as relates to her claim for treatment of her depression, and order the insurer to pay § 30 medical benefits for that condition.

Lastly, the employee argues the judge's denial of her motion for an enhanced attorney's fee pursuant to § 13A(5) is arbitrary and capricious because the judge denied that motion without comment.[6] (Dec. 3.) "The judge was in the best position to assess the time and effort expended by employee's counsel in advancing the employee's claim" and "[w]e will not second-guess his determination in that regard." Guzman v. ACT Abatement Corp. and Emanuel Corp., 23 Mass. Workers' Comp.

[6] General Laws, c. 152, § 13A(5), states, in pertinent part:

> Whenever an insurer files a complaint or contests a claim for benefits and then . . . (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney. . . . An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

Rep. 291, 299 (2009). However, because we cannot determine whether the judge's denial of the psychiatric portion of the employee's claim weighed in his decision to deny the motion for an enhanced attorney's fee, we recommit the case for the judge to make findings pertaining to that motion. See Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(recommittal appropriate where reviewing board cannot "determine with reasonable certainty whether correct rules of law have been applied to the facts that could be properly found."). Because the employee has prevailed against the insurer's appeal, the insurer is ordered to pay employee's counsel a fee of $1,497.28 pursuant to § 13A(6).

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: