COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024256-16**

William Santos Flores	Employee
Royal Hospitality Services, Inc.	Employer
Charter Oak Fire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Calliotte and Long)

The case was heard by Administrative Judge Spinale

APPEARANCES

Denitsa Valtchanova, Esq., for the employee at hearing
Peter Georgiou, Esq., for the employee on appeal
Scott E. Richardson, Esq. for the insurer

FABRICANT, J. The employee appeals from the administrative judge's order that awarded a closed period of §34 weekly compensation benefits, § 36 benefits, and §§ 13 and 30 reasonable and related medical expenses, and denied and dismissed claims for psychiatric-based benefits. We agree with the appellant that the judge's decision is predicated upon the incorrect causation standard as well as on vague and inconsistent findings regarding the employee's pain. We therefore recommit the case for further findings.

The employee is 43 years old and came to the United States from El Salvador in 2003. He worked for the employer for 12 years as a "team leader" in charge of other employees that cleaned the employer's hotels. On August 16, 2016, the employee informed his supervisor about a co-worker who refused to comply with the employee's directions. The supervisor, in turn, instructed the co-worker to go home. As he was leaving, the co-worker turned and punched the employee in the chest. As a result, the employee fell, striking his back against a wall. The co-worker then punched the employee a second time before finally leaving the premises. (Dec. 3-4.)

The employee initially underwent evaluation and treatment for complaints of chest and back pain. Although the chest pain eventually resolved, pain in his lower back persists and is constant at a level of six or seven on a one to ten pain scale. The pain also affects his level of concentration. (Dec. 4.) In addition to his physical pain, the employee complains of suffering from depression, accompanied by nightmares and fears of being hurt by his co-worker. He also does not feel safe outdoors due to his fear of a chance encounter with his co-worker. (Dec. 4.)

The adopted opinion of the § 11A impartial medical physician, Dr. George P. Whitelaw, a board-certified orthopedist, contained a diagnosis of "a chest and lower back strain that would be related to the incident at work that occurred on or about August 16, 2016," and stated that the employee's "underlying degenerative arthritis is not related to the incident of August 16, 2016."[1] (Dec. 5; Ex. 1.) Further, Dr. Whitelaw opined "the incident at work … is no longer a major cause of his disability, pain and/or dysfunction." (Id.)

The judge also adopted the opinions of Dr. Olarewaju Oladipo, who evaluated the employee on June 28, 2017, and Dr. Robert R. Pennell, who evaluated the employee on April 24, 2018.[2] Noting that the employee's chief complaints were "Low back pain; Left-sided chest pain; Left shoulder/scapular pain; Upper back pain," Dr. Oladipo opined that his review of the November 30, 2016 lumbar spine MRI[3] showed "degenerative joint

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[1] The § 11A impartial examination was conducted on July 16, 2018.

[2] The judge found the § 11A report of the impartial physician adequate, but authorized additional medical evidence due to the complexity of the medical issues involved. (Dec. 3.)

[3] The impression of the November 30, 2016, MRI was:

1. Mild degenerative disc disease including a small disc herniation at L4-5, and early lower lumbar facet arthritis; and
2. Mild L5-S1 spondylolisthesis due to chronic L5 spondylolysis.

(Dec. 6; Ex. 5.)

disease changes." (Dec. 5; Ex. 5.) Dr. Pennell opined the employee has a "9% impairment of his lumbar spine. All of the impairment is the result of the work accident of 8/16/16." (Dec. 6; Ex. 5.)

The insurer's medical expert, Dr. Michael Rater, performed an evaluation on October 24, 2018, and provided a report addressing the employee's psychiatric complaints. The judge adopted Dr. Rater's opinion that the employee's medical records indicate "no functional findings or problems or commentary related to mental health condition." The judge also adopted Dr. Rater's conclusion that the employee "had a full-time work capacity with no restrictions or limitations related to his injury. He had no need for mental health treatment related to the injury. He is at a medical end result." (Dec. 6; Ex. 5.) The judge denied and dismissed the claim for "psychiatric/depression" benefits and referenced the adopted opinion of Dr. Rater that "the [e]mployee does not have a psychiatric problem causally related to a work injury and does not have any functional impairment related to the injury." (Dec. 6, 9.)

In addition to adopting the above-referenced medical opinions, the judge found the extent of the employee's complaints of pain and limitations to be unpersuasive. Citing the July 16, 2018, opinion of Dr. Whitelaw that the work incident is no longer a major cause of the employee's "disability, pain and/or dysfunction," the judge awarded total weekly incapacity benefits pursuant to §34 only from the date of the work incident, August 16, 2016, until July 16, 2018, the date of Dr. Whitelaw's examination.[4] (Dec. 8-9.)

The employee has appealed, raising three issues. First, he contends that the judge's rationale for the award for physical disability was based upon inconsistent

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[4] Based upon the adopted opinion of Dr. Robert R. Pennell, the judge also assigned a 9% loss of function to the employee's lumbar spine, and calculated § 36 benefits accordingly: 9% of the State Average Weekly Wage of $1,256.47 multiplied by 32 weeks yields a § 36 benefit award of $3,618.63. (Dec. 8-9.) Reasonable and related medical expenses pursuant to §§ 13 and 30 were also awarded. (Dec. 9.)

findings; he alleges that, despite the fact that the judge accepted the employee's claims of consistent daily pain, the denial of benefits is bereft of findings as to why that pain is not disabling. (Employee br. 5.) Second, the employee argues that the judge committed error by not reviewing the opinion of the employee's psychiatric expert, Dr. Robert Weiner. (Employee br. 6.) Third, the employee argues that the judge improperly adopted the "a major cause" standard of proof found in § 1(7A) for the claimed orthopedic injury. (Employee br. 9.)

We begin with the employee's third argument that the judge erred by applying Section 1(7A)'s "a major cause" standard. The judge ultimately found that the employee was "totally disabled as a result of the work incident from August 16, 2016 to July 16, 2018." (Dec. 8.) The end date of that finding coincides with the date of the credited opinion of the § 11A impartial examiner, Dr. Whitelaw, that the work incident "is no longer a major cause of his disability, pain and/or dysfunction." (Ex. 1, p. 5; Dec. 8.) While it is not error to adopt a medical opinion with "a major cause" language in the absence of a § 1(7A) defense being raised, that language cannot be relied upon to end the inquiry as to the current level of disability or causation.

There is no dispute that the § 1(7A) defense was not raised in this case,[5] and, in fact, § 1(7A) is not referenced anywhere in the judge's decision. (Dec. 1-9; Insurer br. 4.) Regardless, the insurer would like us to view the impartial examiner's adopted opinion that the work incident is "no longer a major cause" of disability as merely the fulfillment of his mandate to assess "whether or not a disability exists." (Insurer br. 5.) Unfortunately, this language is self-limiting as to the existence of "a major cause" of

[5] M.G.L. c. 152, § 1(7A) states, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

disability and does not fulfill the impartial examiner's mandate as suggested. One can only determine from this opinion that the original incident is no longer a "major cause" of disability. Whether the work incident is merely "a cause" of any continuing "disability, pain and/or dysfunction" is never addressed in a meaningful way. The only finding regarding the employee's orthopedic complaints relies entirely, and improperly, on the "a major cause" standard:

> "I have adopted the July 16, 2018 opinion of Dr. Whitelaw and find that the incident at work on or about August 16, 2016, is no longer a major cause of his disability, pain and/or dysfunction."

(Dec. 8). With this finding, the judge has improperly ended all other inquiry and analysis of disability and causation, despite the adoption of other medical evidence relevant to these issues.

Further, the judge's findings are inconsistent and vague with respect to the employee's pain and limitations. The decision recounts the employee's testimony regarding his daily activities and ongoing pain and limitations,[6] ultimately concluding: "While the Employee does suffer from pain on a daily basis, I do not find this pain rises to the level complained of." (Dec. 7.) However, there is no additional analysis or examination of the level or nature of the pain that the employee does suffer from. (Dec. 7). Finding that the employee's pain does not rise "to the level complained of," is not the same as finding that there is no pain or resultant disability. See Nelson v. Rite Aid Corp., 11 Mass. Workers' Comp. Rep. 431, 433 (1997)(judge's unclear and inconsistent findings regarding employee's level and duration of pain prevent reviewing board from performing its appellate function). The finding that the employee continues to suffer some level of daily pain, as well as the adopted medical evidence suggesting a continuing causally related injury, leave us unable "to determine with reasonable certainty whether

[6] The decision references the employee's testimony that he has trouble sleeping, difficulty concentrating, experiences increased back pain while putting on or taking off his socks and shoes, and has difficulty walking, bending and climbing stairs. (Dec. 7.)

correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1995). We therefore recommit this case for further findings on disability and causation using the simple "as is" causation standard.

Regarding the employee's argument, that the judge failed to review the psychiatric opinion of Dr. Weiner, the employee's brief begins by correctly citing to Clarici's Case, 340 Mass. 495 (1960), for the proposition that the judge has wide discretion as to the adoption of any medical opinion presented. (Employee br. p. 6.) The employee then argues that because the judge did not mention Dr. Weiner's opinion in the narrative of his decision, it necessarily follows that opinion was not considered. (Employee br. p.7.) However, as the insurer correctly argues, there is no requirement that the judge's decision contain a "recitation of all evidence presented." Clark v. Longview Associates, 24 Mass. Workers' Comp. Rep. 253, 257 (2010). (Insurer br. 3.) "An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive." Id. at 258. Had the judge failed to comment on Dr. Weiner's opinion *and* failed to list it as an exhibit, a case could be made that the judge erred in failing to consider it. Kenney v. Pembroke Hospital, 32 Mass. Workers' Comp. Rep. 27, 28 (2018)(recommittal required where submitted evidence neither listed

nor mentioned in decision). However, Dr. Weiner's report is prominently listed as part of Exhibit 5,[7] a "Joint Medical Submission,"[8] and thus we find no error.[9]

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board for review, a duly executed fee agreement between employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is received and approved by this board.

So ordered.

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[7] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(permissible to take judicial notice of board file).

[8] Several times in his brief, the employee emphasizes that Dr. Weiner's report was submitted jointly with a number of other medical reports and records. (Employee br. 6-8.) The insurer suggests that this is an attempt to imply that the insurer was *endorsing* Dr. Weiner's report by their participation in that joint submission. (Insurer br. 2.) Whether or not this was the employee's intention, we are unaware of any precedent or statute supporting this view. The fact that this exhibit was part of a joint submission does not, by itself, affect the credibility or persuasiveness of the evidence contained therein.

[9] We note, however, that once the judge makes appropriate findings on the employee's physical disability and causation using the "as is" causation standard, the employee's psychological claims may require reconsideration as well. As we stated in Pickett v. Boston Software Corp., 32 Mass Workers' Comp. Rep. 133 (2018):

> There are limits to causally relating a mental condition that is the result of a physical injury. In LaFlash v. Mount Wachusett Dairy, 18 Mass. Workers' Comp. Rep. 254 (2004), we noted that "an employee must only prove that the physical injury, even if now resolved, contributed to any extent to his emotional incapacity," Id. at 256, note 2, and Horan, J. concurring, at 264. However, we held that where the emotional condition depended on an ongoing causally related chronic physical condition (neck and right shoulder pain), the judge's finding that such a chronic condition no longer existed was sufficient to preclude a finding of causal relationship of the emotional condition. "[I]n the absence of chronic pain, limitations, or neurological findings, any psychiatric problems experienced by the employee are unrelated to the industrial accident." Id. at 261-262. See Sfravara v. Star Market Company, 15 Mass. Workers' Comp. Rep. 181, 182-185 (2001).

Bernard F. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **August 23, 2021**