COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009483-00**

Patricia Arslanian	Employee
Department of Mental Retardation	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan & McCarthy)

APPEARANCES
William J. Doherty, Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee § 34 benefits from and after June 10, 2003, due to a work injury sustained on March 14, 2000. We affirm the decision.

The employee, sixty years old at the time of hearing, injured her neck in a fall at work on March 14, 2000. The self-insurer accepted the employee's claim and commenced payment of § 34 benefits. A neurologist recommended surgery, but the employee first chose to treat conservatively. She returned to light duty work in October 2001, but continued to experience neck pain. In January 2002, because constant pain limited her ability to work, the employee elected to accept an early retirement package. (Dec. 3-5.)

Post retirement, the employee's pain worsened, and she opted to have surgery. On June 4, 2003, the employee filed a claim for further § 34 benefits, and medical benefits for her cervical surgery originally scheduled for June 10, 2003. However, the self-insurer denied the claim, and the surgery was cancelled. Following a § 10A conference, the self-insurer was ordered to pay for the surgery, but the § 34 claim was denied. Both parties appealed the conference order. On March 30, 2004, the employee had a diskectomy with fusion involving bone graft

and the insertion of a titanium plate from C3-C7. She has continued to experience neck pain since the surgery. (Dec. 2, 5.)

On January 28, 2004, the employee underwent a § 11A impartial medical examination by Dr. Marc Linson. He opined the employee sustained multi-level disc herniations, and aggravated a pre-existing degenerative cervical arthritis, with spondylosis and spinal stenosis, caused by the March 14, 2000 work injury. He agreed surgery was a reasonable and necessary treatment option. The employee's symptoms, as noted by the doctor, included neck and arm pain, poor balance, and walking difficulties. In light of the employee's pre-existing cervical problems, Dr. Linson opined the work injury was the major and predominant cause of her present symptomatology. He also opined the employee had been totally disabled since June 10, 2003, the date her surgery was originally scheduled. (Dec. 5-6.)

Based on the employee's March 30, 2004 surgery, which took place two months after Dr. Linson's examination, in September 2004 the self-insurer moved to open the record to introduce additional medical evidence. Instead, on June 22, 2005, the judge allowed additional medical evidence to be submitted on the basis of medical complexity; she specifically rejected the self-insurer's contention that Dr. Linson's report was inadequate. The judge gave the parties ten days to submit medical evidence addressing the employee's post-surgery condition. Neither party submitted additional medical evidence. (Dec. 2-3.) The judge credited the employee's testimony, adopted Dr. Linson's medical opinions, and awarded the claimed benefits. (Dec. 7-8.)

The self-insurer raises three issues on appeal. The first issue presented is "[w]hether the insurer's [sic] due process rights were observed on the motion for inadequacy." In its brief, the self-insurer advances the following two sentences in support of its "argument":

> As a consequence of the Administrative Judge's handling of the insurer's [sic] motion, she found the impartial medical report inadequate and then proceeded to find disability, continuing disability, causal relationship and continuing causal relationship based on the inadequate impartial medical

> report. The insurer [sic] would submit that this finding of the judge is completely illogical and requires reversal.

(Self-ins. br. 2.) "The bare assertion[] in the [self-insurer's] brief do[es] not rise to the level of appellate argument." Commonwealth v. McCants, 25 Mass. App. Ct. 735, 744 (1988). See Greater Media, Inc. v. Department of Pub. Utils., 415 Mass. 409 (1993)(four-sentence discussion does not rise to level of proper appellate argument). Accordingly, we do not reach the "due process" issue.[1]

The self-insurer, citing McDonough's Case, 440 Mass. 603 (2004), also argues the employee's claim is barred because she retired. We disagree. McDonough is inapposite for several reasons. First, the bar to compensation imposed by the McDonough court was in the context of a latency claim governed by the rate-shifting provisions of § 35C.

Second, a discordance arises in the proposed application of McDonough, a § 31 death case, to a living employee's retirement or withdrawal from the labor market. For workers at least 65 years of age receiving §§ 34 or 35 benefits, § 35E sets out a *rebuttable presumption* of voluntary withdrawal from the labor force, and resulting bar to benefits, when certain enumerated circumstances are met. See Tobin's Case, 424 Mass. 250 (1997); Harmon v. Harmon's Paint & Wallpaper, 8 Mass. Workers' Comp. 432 (1994). We do not think the employee, who was fifty-seven years old when she retired, should face a retirement-based bar to compensation that is more easily established than that of § 35E. Third, McDonough addressed *voluntary* retirement, which the judge found was *not* the case here, as the employee retired for reasons related to her injury. (Dec. 6-7.)

Finally, the court's reasoning in McDonough included the nature of the pension payment: "When [the employee] retired, he took his pension as a lump sum, and was not in receipt of any stream of earnings-related income at the time of his death." 440 Mass. at 606. The present employee receives ongoing pension

[1] Moreover, we note the faulty premise for the self-insurer's argument. The judge did not find the report inadequate. She ruled the medical issues were complex. (Dec. 2-3.)

payments, which represent a "stream of earnings-related income" under the McDonough rationale. We therefore decline the self-insurer's request to extend the holding of McDonough to bar the employee's claim for benefits.

Finally, the self-insurer argues the judge erred by denying its motion to introduce an investigative videotape and report regarding the employee's activities *prior* to her return to work in October 2001. Because the employee's claim for benefits commenced as of June 10, 2003, we fail to see what relevance the proposed evidence would have, especially in light of Dr. Linson's causation opinion.

Accordingly, we affirm the decision. Pursuant to the provisions of § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: March 15, 2007