NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-353

ANTHONY C. TEIXEIRA'S CASE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The employee appeals from a decision of the reviewing board of the Department of Industrial Accidents (reviewing board), summarily affirming the decision of an administrative judge terminating the employee's G. L. c. 152, § 34, benefits as of September 29, 2018, and crediting the insurer for overpayments made from September 29, 2018, to the date of decision. The employee argues that the administrative judge erroneously applied a heightened standard of causation, erred both in admitting the impartial physician's medical report and ignoring the impartial physician's deposition testimony, and made inadequate subsidiary findings. We affirm.

We reverse or modify a decision of the reviewing board only "where it is based on an error of law, or is arbitrary, capricious, or otherwise not in accordance with law." Wilson's

Case, 89 Mass. App. Ct. 398, 400 (2016).[1] In accordance with G. L. c. 30A, § 14 (7), and G. L. c. 152, § 12 (2), "we do not review whether the board's decision was supported by substantial evidence." Wadsworth's Case, 461 Mass. 675, 679 (2012).

Background. As a maintenance worker, the employee engaged in daily heavy manual labor, including regularly lifting thirty-five to 200 pound objects. On April 9, 2017, the employee suffered an injury to his lower back and hip while attempting to lift tiles at work. On June 13, 2017, after a few unsuccessful attempts to return to work, the employee was advised to go home because he could not complete his assigned tasks. A G. L. c. 152, § 10A, hearing was held on February 13, 2018, and, after the first order was appealed by both sides, a hearing de novo in front of the same administrative judge was held on June 20, 2018. The record closed on October 26, 2018.

The administrative judge adopted portions of the medical opinions of three physicians: Dr. Kinnard (the employee's physician), Dr. Nicoletta (the insurer's physician), and Dr. Geuss (the impartial physician). The administrative judge adopted Dr. Kinnard's finding that there was a direct causal relationship between the work injury and the employee's

[1] Similarly, the board may reverse an administrative judge when he acts beyond the scope of his authority, arbitrarily, capriciously, or contrary to law. Hicks's Case, 62 Mass. App. Ct. 755, 763 (2005).

diagnosis of lumbar strain.[2] The administrative judge adopted Dr. Nicoletta's opinion that the employee's lumbar strain was consistent with a person who had lumbar degenerative disk disease, that the employee had reached a medical end result as of September 29, 2018, that the employee was capable of working at full capacity with no restrictions, and that he had no permanent impairment as a result of the accident. The administrative judge also noted that although Dr. Geuss diagnosed the employee on April 25, 2018, with low back strain, Dr. Geuss recommended that the employee return to work with a thirty pound lifting restriction. The administrative judge awarded the employee § 34 benefits of $780.43, based on his average weekly wage of $1,300.71, from September 1, 2017, to September 29, 2018.[3]

Discussion. The employee argues that the administrative judge erroneously applied a heightened "major cause" standard of causation. G. L. c. 152, § 1 (7A) ("If a compensable injury or disease combines with a pre-existing condition . . . the

[2] The administrative judge noted, but did not adopt, Dr. Kinnard's opinion that the employee remained totally disabled from all gainful employment.

[3] The insurer did not contest its obligation to pay benefits until September 1, 2017. The administrative judge also ordered that the insurer "shall credit itself with any benefits paid to the employee from September 1, 2017 to date," to reflect overpayments based on the first decision.

resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability"). Instead, he argues, the administrative judge should have applied an "as is" standard. See Zerofski's Case, 385 Mass. 590, 593 (1982) ("If a condition or incident of work aggravates a preexisting health problem, the employee has suffered a 'personal injury,' and may recover from the employer for his entire disability, without apportionment").

The record undermines the employee's argument. The administrative judge did not find that the work injury aggravated the employee's degenerative disk disease so as to disable him. Rather, the administrative judge found that the injury itself and the resultant pain left the employee temporarily unable to perform his job. The administrative judge did not credit the employee's claims of continued pain and physical restriction and found that the lumbar strain, the sole cause of his disability, was at a medical end result. We do not read the administrative judge's decision, even with a reference to an underlying condition, as applying a heightened standard of causation.

The employee also argues that the administrative judge should have stricken the entirety of Dr. Geuss's impartial medical report. In the report, Dr. Geuss mentions that the

employee displayed some "positive Waddell signs." The employee requested a Lanigan hearing, at which he presented evidence that the Waddell test is an unreliable method by which to assess whether an employee is malingering. See Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994).[4] Nevertheless, the administrative judge did not err in declining to strike the entire report. Dr. Geuss did not administer -- nor did he claim to -- the entire, eight-part Waddell battery. Instead, he used a subset of tests for Waddell signs with all patients he saw to determine whether their reports of pain or other symptoms might be exaggerated. Moreover, Dr. Geuss expressly disclaimed that he thought the employee was malingering and did not conclude so in his report. It is unclear whether the positive Wadell signs even factored into Dr. Geuss's conclusion, since he ultimately diagnosed the employee with a lumbar strain. In any event, the administrative judge never mentioned, relied upon, or adopted the portions of Dr. Geuss's report mentioning the Waddell signs. See Clarici's Case, 340 Mass. 495, 497 (1960) (administrative judge was "free to accept such portions of [medical] testimony as [he] thought credible").

[4] Although the record is unclear, we accept for our purposes that the materials the employee includes in the record on appeal was submitted to the administrative judge to consider in connection with the Lanigan motion. See Commonwealth v. Camblin, 478 Mass. 469, 476 (2017) (proponent of evidence must show reliability of expert opinion by preponderance of evidence).

The employee also argues that the administrative judge improperly "ignored" portions of Dr. Geuss's deposition testimony that the employee claims undermined Dr. Geuss's report. An impartial physician's report, despite being afforded prima facie status by G. L. c. 152, § 11A (2), is open to a "thoroughgoing challenge" and any "deposition [or] cross-examination will . . . be part of the record" considered by the administrative judge. O'Brien's Case, 424 Mass. 16, 23-24 (1996). That impartial medical reports may be challenged, however, does not prevent an administrative judge from exercising his authority to accept such portions as he finds credible. Clarici's Case, 340 Mass. at 497. Dr. Geuss did not waver in his deposition testimony from his ultimate conclusion that the employee had not suffered permanent loss of function and was able to return to work with a lifting restriction. The specific portions of the testimony that the employee challenges were either consistent with this conclusion or not significant enough to bear mentioning. Thus, the administrative judge did not act arbitrarily or capriciously in choosing not to include portions of Dr. Geuss's deposition testimony in his decision.

The employee's challenge to two subsidiary findings is also unpersuasive. First, the employee argues that the administrative judge erred in relying on the September 29, 2018 date of Dr. Nicoletta's second report to establish the end date

of the employee's disability, when Dr. Nicoletta had earlier, in his report of December 9, 2017, concluded that the employee was capable of returning to work by that date.[5] It was for the judge to reconcile any conflict. See Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). While Dr. Nicoletta originally found the employee capable of returning to work on December 9, 2017, we see no reason why that prevents the judge from adopting the later date.

Second, the employee accuses the administrative judge of acting as a "silent witness" during the proceedings. The employee had testified that a gas canister he was seen carrying in a surveillance video when he claimed to be disabled weighed four pounds. Later, when discussing the video with counsel, the judge commented: "It's not four pounds. I know what four pounds looks like, and I'm certainly -- it's not 50, but it's somewhere there in between." But a "judge [does] not commit error by relying partially on his own knowledge." Commonwealth v. Gilchrest, 364 Mass. 272, 278 (1973). Indeed, the administrative judge, as finder of fact, had wide discretion to determine witness credibility. See Dalbec's Case, 69 Mass. App. Ct. 306, 315 (2007) (judge found claimant's testimony about pain

[5] We also note that, were the defendant's argument to be adopted it would work against his interest by placing his medical endpoint earlier, rather than later.

and limitation "completely credible"). Here, the administrative judge's comment was consistent with a credibility determination. In any event, the administrative judge did not, as the employee claims, use the video in support of the ultimate finding that the employee's disability had resolved: the video depicted the employee in June 2017, and the administrative judge found that he was disabled through September 29, 2018.

The decision of the reviewing board is affirmed.

So ordered.

By the Court (Wolohojian, Blake & Kinder, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: January 22, 2021.

[6] The panelists are listed in order of seniority.