COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023865-08**

Aida Rivera	Employee
George Weston Bakeries, Inc.	Employer
ACE American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Koziol, and Fabricant)

The case was heard by Administrative Judge Preston.

APPEARANCES
Michael A. Torrisi, Esq., for the employee
John J. Davey, Esq., for the insurer
Thomas G. Bradley, Esq., for the insurer at oral argument

LEVINE, J. The insurer appeals from a decision ordering it to pay the employee permanent and total incapacity benefits pursuant to § 34A. We affirm the decision, but address one of the insurer's arguments -- that the judge erred by refusing to exclude from evidence the opinion of the employee's treating physician on the ground that his deposition fee rendered him "unavailable," thereby violating the insurer's due process right to cross-examine him.

On June 26, 2008, the employee sustained medial and lateral meniscal tears of her left knee while working as a route sales driver for the employer. (See Ex. 4, Hearing Decision filed December 17, 2010, 5-6.)[1] She underwent two knee surgeries, on November 21, 2008, and January 5, 2010, but her pain persisted and worsened. Id. The 2010 hearing decision denied the insurer's complaint to modify or discontinue the employee's § 34 benefits. (Dec. I, 9.) Neither party appealed. (Dec. II, 5.)

The employee subsequently filed a claim for § 34A permanent and total incapacity benefits beginning February 15, 2011, which is the subject of this appeal.

[1] The December 17, 2010, decision is referred to as "Dec. I"; the decision on appeal, filed March 28, 2012, is referred to as "Dec. II."

Following a § 10A conference award of § 34A benefits, the insurer appealed to a § 11 hearing. (Dec. II, 3.) Pursuant to § 11A, the employee was examined by Dr. David Lhowe, whose report and deposition testimony were admitted into evidence. (Dec. II, 4.) The judge found the medical issues complex, and allowed the parties to submit additional medical evidence. Id.

On the second day of hearing, the insurer's attorney informed the judge that he was unable to schedule the deposition of the employee's treating orthopedic surgeon, Dr. Samuel Gerber, because the doctor had demanded a $5,000 deposition fee. (January 19, 2012, Tr. 3; hereinafter, "Tr. II"). The judge asked what the insurer wanted to do, and counsel stated:

> Mr. Davey: You know, I just found this out yesterday. My understanding is that, you know, I could move to have a portion of his opinion stricken that were [sic] not rendered with personal knowledge. So, anything dealing with her history and description of her symptoms would not be personal knowledge. But those portions of his opinion dealing with tests or actual observations would be permissible. But honestly, Judge, I haven't talked to the doctor. This is all coming from my secretary and maybe if I speak to him maybe I can persuade him.

(Tr. II, 4.) After employee's counsel responded, the judge asked the insurer's attorney:

> The Judge: Do you have anything in writing from the doctor?
>
> Mr. Davey: Honestly, Judge, this happened yesterday via telephone call.
>
> The Judge: Why don't we do this, why don't you explore that further. Find out if that is the firm price and get something in writing from the physician, if he's going to give it to you. Advise him of what is going to be entailed by giving a deposition, the time and date and all the creature comforts you're going to afford him to provide that deposition, and then get back to me. I'm not going to make any call on it at the moment.
>
> Mr. Davey: Okay, thank you, Judge.

(Tr. II, 4-5.)

The decision is silent on the resolution of the issue of Dr. Gerber's deposition fee. However, the board file[2] reveals that, on January 26, 2012, insurer's counsel sent the judge a letter enclosing the "Fee Schedule pertaining to the costs of taking Dr. Gerber's deposition." The letter did not request the judge to take action, or indicate what efforts insurer's counsel had made to negotiate the deposition fee, as the judge had requested. Instead, the enclosed fee schedule was sent by fax from "Tammy" to "Laura," indicating the fee was $5,000 for up to two hours, and $2,500 for each additional hour.

Also on January 26, 2012, after receipt of these documents, the judge wrote a letter to insurer's counsel, stating: "There is nothing to suggest that Dr. Gerber is unavailable in the January 26, 2012 fax received from the Insurer. Accordingly, I will not exclude Dr. Gerber's medical reports/records if and when they are offered as medical evidence." The employee's additional medical evidence, including reports, office notes, and prescriptions issued by Dr. Gerber, was admitted in evidence. (Dec. II, 2, 8; see Ex. 10.)

In his decision, the judge credited the employee's complaints of pain and its impairment of her mobility, concentration and ability to sleep. (Dec. II, 5-6.) The judge adopted Dr. Robert Pennell's opinions regarding the diagnosis; the course of employee's treatment; the impact of the pain on the employee; his opinion that the employee is permanently and totally disabled and that the June 26, 2008, industrial injury is and remains a major cause of her ongoing disability and need for treatment. The judge also adopted Dr. Gerber's opinion that the employee is disabled and needs continued treatment. (Dec. II, 8-9.) The judge went on to find the employee to be permanently and totally incapacitated from performing any work. (Dec. II, 10.)

It is well-settled that parties have the due process right to cross-examine medical witnesses of an opposing party. Richardson v. Chapin Ctr. Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 236 (2009), citing O'Brien's Case, 424 Mass.

[2] We take judicial notice of documents within the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002). (See also Oral argument Tr., 19-20.)

16, 23 (1996). If a physician who prepared a medical report is "unavailable" to be deposed, her opinion will be inadmissible. Watson v. Rodman Ford Sales, 25 Mass. Workers' Comp. Rep. 339, 343-344 (2011)(judge did not err by sua sponte striking impartial report because doctor was ill and thus unavailable for deposition); Padilla v. North Coast Seafood, 19 Mass. Workers' Comp. Rep. 98, 100 (2005)(impartial physician's death prevented cross-examination and required the physician's report to be excluded from evidence).

Where, as here, a party alleges that a physician has made himself "constructively unavailable" by virtue of the size of his deposition fee, the issue is whether the fee demanded is "so unreasonable as to effectively deprive the [insurer of its] cross-examination right." Richardson, supra at 236. We have declined to adopt, as the "sole gauge of reasonableness," the fee approved by the department for the deposition of the impartial physician[3] or to hold that a $2,500 deposition fee is per se unreasonable. Id. at 236 n. 5. Rather,

> [the reasonableness of the fee] is a factual determination for the judge to make, after consideration of the particular circumstances of the case. The judge should take into account other factors relevant to the reasonableness of the fee. See Linthicum v. Archambault, 379 Mass. 381, 390 (1979)(listing factors to be considered in determining amount of reasonable expert witness fees recoverable in a G.L. c. 93A action). Of particular significance in the judge's analysis is the time element.

Id. In Richardson, the employee filed a motion to strike the report of the insurer's medical expert, but the judge failed to conduct a hearing or make findings on the motion. We therefore recommitted the case for a hearing on the record and appropriate findings of fact. Id. at 237. In the present case, recommittal is unnecessary.

First, the insurer did not preserve the issue of Dr. Gerber's unavailability by filing a motion to strike Dr. Gerber's reports. At hearing, insurer's counsel merely

[3] The fee for deposition of impartial medical examiners was $500 for the first two hours at the time of our decision in Richardson; it is currently $700. See Circular letter 337, issued February 16, 2011.

stated: "I *could* move to have a portion of his opinion stricken . . . ." (Tr. II, 4; emphasis added.) Moreover, the insurer's January 26, 2012, letter to the judge contains no request to strike Dr. Gerber's report, nor did the insurer object to or move to strike the reports after they were offered in evidence. See, e.g., Sanchez v. Industrial Polymers and Chems., Inc., 25 Mass. Workers' Comp. Rep. 61, 65 (2011)(judge may adopt whatever competent medical evidence he finds most persuasive in absence of objection or motion to strike).

And, even if we consider that insurer's counsel did move to strike Dr. Gerber's report by virtue of his statements at hearing, he only objected to those opinions of Dr. Gerber that were "not rendered with personal knowledge." (Tr. II, 4.) The insurer's position was that "those portions of [the doctor's] opinion dealing with tests or actual observations would be permissible," but "anything dealing with [the employee's] history and description of her symptoms would not be personal knowledge." Id.[4] Because Dr. Gerber is the employee's treating orthopedic surgeon, arguably much of his opinion is based on his personal observation, and would be admissible pursuant to the insurer's position. In any event, the judge adopted Dr. Pennell's opinion in detail; the fewer opinions of Dr. Gerber that were adopted are largely cumulative, and do not provide a basis for reversal. Moseley v. New England Fellowship, 13 Mass. Workers' Comp. Rep. 316, 325 (1999)(errors in admitting merely cumulative evidence should not be basis for reversal of decision).

Finally, the judge did not abuse his discretion by effectively finding the insurer had presented no evidence that Dr. Gerber was unavailable to be deposed. Following insurer counsel's own suggestion, the judge directed him to make efforts that would potentially make the deposition less costly, or alternatively, give the judge a basis for determining the reasonableness of the fee. The January 26, 2012, letter and the fax from "Tammy" in "Medical Records" to "Laura," insurer counsel's secretary, (Oral

[4] This position as to the law is dubious: If the doctor is unavailable, his entire report would be inadmissible. Watson, supra; Padilla, supra. But see Liacos, Brodin and Avery, Massachusetts Evidence § 3.8.3, at 86 (7th ed. 1999)("the overruling of an incorrect specific objection is not error even if correct ground for exclusion appears to exist").

argument, Tr. 20), stating the amount of the fee, contain no information from which the judge could make a factual determination regarding whether or not the requested fee of $5,000 for two hours was reasonable. Cf. Linthicum, supra (factors to be considered.) Nor do they indicate that insurer's counsel followed the judge's encouragement to negotiate with Dr. Gerber regarding his deposition fee and determine whether $5,000 was a "firm price." Given the failure of insurer's counsel to do as the judge had asked and as he had agreed and even suggested, the judge did not abuse his discretion in finding no evidence Dr. Gerber was unavailable for deposition, and in admitting his reports. Eastwood v. Willowood of Williamstown, 26 Mass. Workers' Comp. Rep. ___ (2012)(where employee's counsel ignored the path set by the judge that all had agreed to follow, judge's decision to hold parties to that course was not an abuse of her judicial discretion).

The decision is affirmed. Pursuant to § 13A, the insurer is ordered to pay employee's counsel a fee in the amount of $1,563.91.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **February 28, 2013**