COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004514-10**

Albert Mancini	Employee
Suffolk County Sheriff's Dept.	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte)

The case was heard by Administrative Judge Taub.

APPEARANCES
Michael K. Landman, Esq., for the employee
Arthur Jackson, Esq., for the Self-insurer

KOZIOL, J. The parties cross-appeal from an April 17, 2015, decision finding the employee, a lieutenant at the South Bay House of Correction, sustained a compensable injury to his lower back, right knee and left elbow in an altercation with an inmate on February 24, 2010. The judge awarded the employee a closed period of § 34 benefits from February 24, 2010 through May 10, 2011, immediately followed by § 35 benefits from May 11, 2011 and continuing, at a rate of $506.34 per week based on an average weekly wage of $1,643.90 and an $800.00 per week earning capacity. (Dec. 17-18.) The judge denied the employee's claim for a psychiatric injury, as well as the self-insurer's § 27 defense that alleged the employee was injured as a result of his own serious and willful misconduct. (Dec. 17-18.)

The self-insurer hotly contested liability, among other things, and denied the employee's claim. A July 2, 2010 conference order required the self-insurer to pay the employee § 34 benefits from February 24, 2010, and continuing. (Dec. 2.) The self-insurer appealed and on September 17, 2010, pursuant to § 11A(2), the employee was examined by Dr. John F. McConville. (Dec. 3.) Later, the

judge allowed the employee's motion to join a claim for a psychiatric condition, which he alleged was causally related to the February 24, 2010 incident. (Dec. 3.)

The hearing was conducted on March 14, 2011. At the hearing the judge, sua sponte, found the medical issues to be complex and the impartial medical examiner's report to be inadequate, thereby allowing the parties to submit additional medical evidence. (Tr. 9-10; Dec. 3.) The insurer disputed liability, incapacity and the extent thereof, causal relationship "with specific reference to § 1(7A)," entitlement to medical benefits, and asserted, pursuant to § 27, that the employee was injured by his own serious and willful misconduct. (Dec. 3.) The parties submitted their respective medical evidence including the deposition of the self-insurer's independent medical examiner, Dr. Giles C. Floyd. (Dec. 1-4.) The parties agree that the evidence closed on September 10, 2011. (Oral Argument Tr. 41.)

On April 17, 2015, over three and one-half years after the close of the evidence, the judge issued his hearing decision. (Dec. 18.) The judge determined that a videotape of the altercation on February 24, 2010, "substantially corroborated the employee's description of the event" and that the employee "sustained injuries to his left elbow, low back and knees as a result of this altercation." (Dec. 7, 14.) Because the parties only take issue with the judge's findings and rulings pertaining to the employee's low back and right knee conditions, we discuss those aspects of the decision and the parties' arguments that they were prejudiced by the judge's failure to file a timely decision. We summarily affirm the judge's denial of the employee's claim for a psychiatric injury and the self-insurer's § 27 defense.

In regard to the employee's physical injury, the self-insurer disputed the issues of causation and specifically § 1(7A). The judge reviewed the evidence concerning the employee's pre- and post-accident medical treatment, along with the opinions of the various treating and examining physicians. (Dec. 5-6, 9-14.) He found that as early as 2006, the employee had been receiving treatment for

complaints of severe low back pain, and that, although he had been prescribed MS Contin, Oxycodone, and Vicodin for those complaints and had undergone a series of epidural steroid injections at a pain clinic, he continued to report severe back pain. (Dec. 5.) In 2007, the employee's primary care physician, Dr. Walter J. Lee, continued to provide treatment for severe chronic back pain prescribing "what has been described as high doses of Oxycontin." (Dec. 5-6.) On February 22, 2010, two days before the industrial accident, the employee saw Dr. Lee for increased back and shoulder pain "following a sledding accident earlier in 2010, for which the doctor prescribed the same prescription medications." (Dec. 6.) The judge also found that at that same visit, back surgery was discussed, "with Dr. Lee mentioning the employee expressing his fear of having back surgery." (Dec. 6.)

Regarding the employee's post-injury treatment, the judge recited the August 29, 2011 opinions of the employee's treating orthopedist, Dr. Andrew P. White, noting Dr. White read the employee's "imaging studies to demonstrate complete obliteration of the disc height at the L5-S1 interspace as well as traumatic L5 pars fracture causing segmental instability and anterolisthesis. He described that deformity as causing severe bilateral neural foraminal narrowing with neurological compression." (Dec. 11.) The judge noted, "Dr. White had proposed surgery to restore spinal stability in the setting of the bilateral L5 fractures and decompressing the nerves." (Dec. 11.) The judge also discussed the opinions of the self-insurer's examining physician, orthopedist Dr. Giles C. Floyd:

> Dr. Floyd diagnosed Mr. Mancini as having sustained a lumbar strain that he felt had pretty much cleared by the time of his exam in November 2010, but also with, as he read the imaging studies, multi-level lumbar degenerative changes and degenerative disc disease as well as a pre-existing Grade 1 spondylolisthesis, a slippage of the L5 vertebrae over the S1 vertebral body below that. He noted this to have been shown on an earlier July 2006 MRI, but then it was only Grade 2. He described this as related to a congenital incomplete formation of his pars and articularis defects, where bridges between the vertebrae normally fuse in the course of development and after birth, Mr. Mancini's having not done so.

(Dec. 12.) The judge resolved the conflicts in the evidence as follows:

> I adopt the opinion of Dr. Lebovit[s][1] and find that the events of February 24, 2010 only caused a moderate and self-limiting exacerbation of the employee's underlying cervical and lumbar pain. In support of this conclusion, I found it important that the employee had a long history of experiencing significant, sometimes severe pain in the low back and radiating into his extremities from long before the injury. Due to his pre-existing back condition, he was taking significant doses of multiple opiate pain medications, had received spinal injections, and, only two days before this incident, was discussing and addressing his fears regarding low back surgery that had apparently been already recommended to him. I found the explanation of Dr. Floyd very convincing as to just how significant those pre-existing problems were. I adopt the opinion of Dr. Floyd that the work-related lumbar strain that had aggravated the employee's back symptoms had pretty much cleared up by the time of his November 15, 2010 examination and, based upon that, find that the work injury was no longer a major cause of the employee's back symptoms as of that time. Consequently, I reject the opinion of Dr. White that Mr. Mancini had sustained a significant, disabling spinal injury on February 24, 2010 and also reject his opinion that the work injury was a major cause of the need for the surgery he was proposing.

(Dec. 14.)

Regarding the employee's right knee injury, the judge found that on November 18, 2010, the employee's treating surgeon, Dr. Robert G. Davis, performed surgery on the employee's right knee consisting of: "1) a major synovectomy involving multiple compartments; 2) a medical menisectomy; and 3) an ACL reconstruction." (Dec. 11.) The judge acknowledged that Dr. Floyd, whose reports had causally related the right knee injury to the industrial accident, changed his mind at deposition after reviewing records of earlier knee treatment and viewing the videotape, and testified that the employee "did not sustain a knee injury on February 24, 2010 and that the incident was not a major cause of the need for the right knee surgery." (Dec. 12.) The judge then made the following findings of fact:

[1] Dr. Mark Lebovits performed a record review for the self-insurer. His September 7, 2011, report was in evidence as Self-insurer Ex. 16. (Dec. 2.)

> I find the employee to have sustained a more substantial injury to his right knee, adopting the opinion of Dr. Davis that the meniscal tear and the ACL tear were due to the work-related injury and find that the November 18, 2010 knee surgery was causally related to the injury at work.
>
> Regarding incapacity from employment related to the physical injuries sustained on February 24, 2010, I find Mr. Mancini to have been totally incapacitated from gainful employment from the date of injury up to May 11, 2011. I find that Mr. Mancini had, as of May 11, 2011, recovered sufficiently from this right knee surgery such that the knee condition did not prevent his engaging in activities consistent with gainful employment.
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> * * *
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> I find the employee to have been partially incapacitated from gainful employment and the earning of his pre-injury average weekly wage effective May 11, 2011.

(Dec. 14.)

On appeal, the employee concedes that the judge did not mischaracterize Dr. Floyd's opinion that the back injury was no longer a major cause of the employee's incapacity as of November 15, 2010. (Oral Argument Tr. 18.) Nonetheless, he takes issue with the judge's adoption of Dr. Floyd's opinions regarding his low back injury and the doctor's comment that prior to the accident, the employee was able to work with this condition without losing time for a back or knee injury because "he's a very stoic individual." (Dec. 12.) The employee further argues that Dr. Floyd's opinions could not be adopted because the doctor had no knowledge that the employee "would undergo major spinal surgery within three months of [Dr. Floyd's] testimony." (Employee br. 10.)

The judge, as fact finder, was free to adopt Dr. Floyd's opinion, rather than Dr. White's, regarding the nature of the injury sustained and whether that injury remained a major cause of the employee's back condition. Kent v. Town of Scituate, 27 Mass. Workers' Comp. Rep. 19, 17 (2013)("judge is free to adopt all, part or none of an expert's medical opinions, as long as she makes sufficient findings to allow the Reviewing Board to determine on what medical evidence she relies"). Dr. Floyd's deposition was taken on August 10, 2011, exactly one month before the date the evidence closed. At that time, employee's counsel extensively

questioned Dr. Floyd about his opinions regarding the employee's need for spinal surgery. Dr. Floyd testified he agreed with Dr. White that surgical intervention was warranted, but that it was Dr. Floyd's opinion that it was "due to an entirely pre-existing condition." (Dr. Floyd Dep. 33-40.) Thus, we find no error in the judge's findings regarding the employee's low back injury, as they were grounded in the evidence.

In regard to the knee injury, the employee asserts that the judge erred by assigning him an $800.00 per week earning capacity, asserting there was no rational basis for assignment of such an earning capacity because that figure lacks a factual source in the evidence. (Employee br. 9.) The self-insurer on the other hand, argues that the judge acted arbitrarily and capriciously by awarding the employee any § 35 benefits for the knee condition, asserting that Dr. Davis's report of May 11, 2011 does not relate the employee's ongoing disability to the knee at all, but rather to the employee's unrelated back problems. (Self-ins. br. 5.) Accordingly, the self-insurer asserts that there was no medical evidence in the record to support a finding of any causally related disability after May 10, 2011 and that the judge's finding of ongoing incapacity after that date must be reversed. (Self-ins. br. 6.)

We address the judge's award of § 35 benefits for incapacity relating to the right knee. First, in regard to Dr. Davis's opinions about the contribution of the unrelated back problems to the employee's disability, the judge expressly "[d]iscount[ed] whatever disability might have been attributable to this by-then not work-related back condition," (Dec. 15), when he found the employee was partially incapacitated. The judge thus resolved whatever ambiguity was created by his statement that "it was not until a May 11, 2011 appointment that Dr. Davis was able to rule out the right knee as the source of the employee's continuing symptoms and conclude that were [sic] likely due to his back condition." (Dec. 15.) Second, the judge did not err in basing his § 35 award on Dr. Davis's opinions which, when read as a whole, adequately support a finding of partial

incapacity. See Stawiecki v. DPW Highway Dep't., 26 Mass. Workers' Comp. Rep. 31, 33 (2012)(testimony of medical expert should be considered as a whole). Although dating the employee's § 35 benefits from Dr. Davis's May 11, 2011 examination of the employee, the judge referred back to Dr. Davis's March 2, 2011 report, finding, "[t]hough he disabled Mr. Mancini from his regular job, he did not specifically disable the employee from all work." (Dec. 15.) Indeed, Dr. Davis's March 2, 2011 report discusses only the employee's right knee injury, and in doing so, the doctor opined the employee "is in no shape, in no way able to return to his previous occupation, working in the Sheriffs [sic] department." (Employee Ex. 6.) On May 11, 2011, Dr. Davis further stated that, "[o]n 11/18/2010, [the employee] underwent arthroscopic ACL reconstruction, *which he is recovering from.*" (Employee Ex. 6, [emphasis supplied].) The judge could rely on the doctor's March 2, 2011 and May 11, 2011, statements to find that the employee was still in the process of his recovery from that surgery and that he had not reached an end result. In light of his findings and analysis of the evidence in the record, the judge did not err in awarding § 35 benefits from May 11, 2011 and continuing. See Boucher v. Edward Buick, Inc., 22 Mass. Workers' Comp. Rep. 301, 303 (2008) (judge may resolve ambiguity in doctor's opinion). "Absent further credited evidence that the employee's condition changed and improved after [May 11, 2011], there is no basis for terminating benefits on that date." Gurey v. Tables of Content, Inc., 27 Mass. Workers' Comp. Rep. 174, 176 (2013).

In regard to the earning capacity however, we agree that the assignment of an $800.00 per week earning capacity is arbitrary and cannot stand because "[t]he administrative record contains no factual source or reasoned explanation for [that] figure." Dalbec's Case, 69 Mass. App. Ct. 306, 316 (2007). Accordingly, the amount of the partial disability award must be vacated and the matter must be remanded "for a reasoned computation of that amount," which must be accompanied by "a reference to the factual source(s) for the monetary figure." Eady's Case, 72 Mass. App. Ct. 724, 728 (2008). "On remand, the 'information

already present in the case file, or reliable publications of labor statistics, or additional evidence' may be consulted." Eady, at 728, quoting from Dalbec, at 318 n. 14.

We now address the issue raised by both parties on appeal: that they were prejudiced by the judge's failure to issue a decision for three and one-half years. The employee argues that the judge should not have adopted Dr. Floyd's opinion regarding his back injury because the employee "had a completely new and changed medical condition" after the close of the record in September 2011. (Employee br. 8.) He asserts he was prejudiced by the delay because, "the record of the changed medical condition could not be entered into the Board file as the record had closed, and the employee's claim was prejudiced due to his inability to submit these documents or file a new claim for benefits as the initial liability claim was blocking the system from allowing a new claim to be entered." (Employee br. 3.) In support of his argument, the employee points to the fact that his entitlement to § 34 benefits exhausted while he waited for the decision, resulting in him being without any workers' compensation benefits for two years. (Employee br. 2.)

The self-insurer also asserts that it was prejudiced by the judge's failure to issue a timely decision. Specifically, the self-insurer argues it was arbitrary and capricious for the judge to award benefits on April 17, 2015, for the entire time period from May 11, 2011 to April 17, 2015 and continuing, because there was no evidentiary support for an ongoing award during the three and one-half year period after the close of the evidence in September 2011. (Self-ins. br. 7-8.)

Neither party suggests that due to the passage of time the judge lost jurisdiction to issue the decision or that the decision is void. Monico's Case, 350 Mass. 183 (1966); Rapo v. American Optical Corp., 2 Mass. Workers' Comp. Rep. 245 (1988). At the very least, both parties take issue with being bound by the judge's findings for the period from September 10, 2011, when the evidence closed, through April 17, 2015 when the decision issued. The employee however, also seeks recommittal to a new judge for "his entire medical record to be

respected [sic] by a new administrative judge who shall receive the case on a remand from the Reviewing Board in an attempt to cure the lack of due process shown to the employee the first time around." (Employee br. 10.) Essentially, the employee's proposed remedy would result in relitigation of the issues of the nature of the employee's back injury, the causal relationship between his February 24, 2010 back injury and his need for surgery, as well as the issue of his disability and extent thereof relating to the combined back and knee injuries. The self-insurer on the other hand, seeks the right to contest ongoing incapacity from the day after the close of the evidence on September 10, 2011, i.e., from September 11, 2011, and continuing.

We begin by acknowledging that because judges must make written findings of fact and rulings of law addressing every issue in dispute in any given case, there almost always will be a time-lag between the date of the close of the evidence and the issuance of the decision. While the statute states this timeframe should be "no more than twenty-eight days following the close of the testimony,"[2] G. L. c. 152, § 11B, we have said that "the administration of multitudinous cases often makes this ideal unattainable." Dunphy v. Shaws Supermarkets, 9 Mass. Workers' Comp. Rep. 473, 474 n.2 (1995).

All decisions provide a view of the case that is but a snapshot in time, as the judge is limited to dealing with the evidence available during the period from when the record opens through the date it closes. Ordinarily, an award that spans a period of months between the close of the evidence and issuance of the decision does not unduly prejudice the rights of the parties, either because the passage of time is not excessively long, or the medical condition of the employee and other

[2] Determinations as to whether to open the medical evidence pursuant to § 11A(2), are often made at the hearing, as occurred in this case; consequently, the parties are given additional time after the lay testimony has been taken to produce reports and records from their physicians for admission in evidence. See 452 Code Mass. Regs. § 1.11(6)(providing for admission of such reports "as if the physician so testified"). In light of this practice, we construe the words "close of the testimony," appearing in G.L. c. 152, § 11B, to mean "the close of the evidence."

issues in the case remained relatively static. However, because decisions concerning issues of incapacity are "not final as a matter of fact or res adjudicata as a matter of law," G. L. c. 152, § 16, it cannot be gainsaid that the issuance of timely decisions, especially those concerning issues of incapacity, is of paramount importance to protecting the rights of the litigants.

Because the factual possibilities are endless, and because there may be legitimate reasons for a delay of a matter of months between the close of the evidence and the issuance of a decision, we make no bright-line rule as to whether a particular time period is prejudicial per se. In this case, however, we have no explanation why the decision was issued so late, nor can we excuse a delay of three and one-half years. It is plainly wrong and has clearly prejudiced both parties. We understand counsels' reluctance to ask the judge's office about the status of their pending case, as neither party wants to risk the chance of being viewed in an adverse light by the judge who eventually, will issue the decision in that case. We also understand the parties' reluctance to "go over the judge's head" by asking the senior judge why it is taking so long for the decision to be issued. (Oral Argument, 11-12.) The parties should not be placed in the position of being in such a dilemma. However, we do not agree with the employee that, when significant events occur in a case while the parties are waiting for a decision, such as the acquisition of newly discovered evidence, a material change in medical condition, or the development of a significant new problem affecting the case, that it is somehow "cheating" or "against the rules" to attempt to preserve their rights by seeking to reopen the hearing record. (Employee br. 3-4). Indeed, zealous advocacy may require such action. See Dunphy v. Shaws Supermarkets, 9 Mass. Workers' Comp. Rep. 473, 474 (1995).

In Dunphy, one year elapsed between the date of the close of the record and the issuance of the decision. Four days after receiving the decision, the employee filed a request to reopen the record, claiming a change in his medical condition occurred while the decision was pending. Id. Despite upholding the judge's

decision to deny the motion, we concluded that the equities of the case required us to allow the employee to file her new claim "from the date of the close of the evidence as opposed to the filing date of the decision or some other factual marking point." Id., 475-476. [3]

The remedy fashioned in Dunphy, while inadequate in this case, appears to be the only fair remedy for both parties. While both parties are free to file claims seeking modification of the award from the day after the close of the evidence onward,[4] we note that our ruling does not relieve them of their burden of producing evidence in support of their respective positions. Thus, the employee seeking increased benefits, or the self-insurer seeking a reduction in benefits, is free to file such a request for the period beginning after the close of the evidence, but that party must still meet its ordinary evidentiary burdens. The employee requests that we order the matter to be recommitted to a different administrative judge because he questions whether a timely decision will issue and has raised the possibility that the judge may retire before completing the task. In light of the unusual circumstances of this case, we agree that it is best to recommit the matter to a new judge; accordingly, we transfer the matter to the senior judge for assignment to a different judge on recommittal.

[3] The board file indicates that after the judge issued his decision in this case, the self-insurer filed a motion for reconsideration, raising the issue it voiced on appeal regarding the award of § 35 benefits during the period after the close of the evidence. Rizzo v. M.B.T.A., 16 Mass Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). Having already filed his notice of appeal, the employee opposed that motion. The judge denied the motion, noting that there was no "offer of proof to suggest a material change in the employee's condition and/or capacity to engage in gainful employment." (Correspondence by Judge, 5/06/15.)

[4] As a general rule, an insurer is not permitted to seek modification or discontinuance any earlier than the date that it files its complaint seeking such relief. Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995). We conclude that the equities in this case require suspension of that rule where adherence to the rule would not remedy the prejudice to the self-insurer caused by the three and one-half year delay.

Having addressed the issues raised by the parties, we recommit the matter to a different judge for further findings of fact and a determination of the amount of an earning capacity to be assigned to the employee from May 11, 2011 and continuing. The new judge must join any claims or complaints regarding the extent of incapacity from September 11, 2010 and continuing. Pursuant to G. L. c. 152, § 13A(6), the self-insurer shall pay employee's counsel an attorney fee in the amount of $1,618.19.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

HORAN, J., (concurring). I agree with the majority's statement "that the issuance of timely decisions . . . is of paramount importance to protecting the rights of the litigants." The fact that *both* parties raise the issue of the consequences of the judge's failure to file a decision for over three and one-half years makes it *the* paramount issue in this case, as the harm they have suffered has been caused, or exacerbated, by the judge's failure to honor the letter, and spirit, of the law. See G. L. c. 152, § 11.[5] Employee's counsel is correct: "something went horribly wrong in this case which has deprived Mr. Mancini of his due process rights . . . and served to create unreasonable hardship in his life." (Employee br.

[5] General Laws c. 152, § 11, provides, in pertinent part:

> At the hearing the member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him. Such decision shall issue within twenty-eight days of the conclusion of the hearing. Failure of a party to appear at a hearing shall not delay the issuance of a decision.

1-2.) And the inexcusable delay has also deprived this board of the opportunity to craft a meaningful and just remedy.

I write separately because the majority opinion fails to acknowledge that, (1) this case provides further evidence that the Legislature's repeated attempts to streamline our dispute resolution process − for the benefit of injured workers, employers, and insurers alike – have been routinely undermined by judges who fail to file timely decisions; (2) the judge's failure to do so here has caused both parties irreparable harm, and; (3) effective oversight by this department would have prevented, or at least mitigated, that harm. I address these points in turn.

In 1963, the Industrial Accident Board was comprised of commissioners charged with the responsibility of hearing workers' compensation claims, and issuing decisions, "within forty-five days of the close of the hearing, unless further extension [was] authorized by the chairman." St. 1961, c. 611, § 8. In Monico, supra, the commissioner assigned to the case filed a hearing decision one year after the close of the hearing. 350 Mass. at 184. The claimant, the employee's widow, appealed to this board, which held, "the oversight or failure was one of procedure and did not affect or prejudice the substantive rights of the claimant." Id. The Supreme Judicial Court agreed that a timely filing of the decision was "not a condition precedent to [its] validity. . . ." Id. at 185, quoting Cheney v. Coughlin, 201 Mass. 204, 211 (1909). However, the court did acknowledge the forty-five day rule "may have been enacted to deal with what the Legislature felt was *an intolerable situation of delay* in the rendition of decisions in cases affecting employees and their dependents." Monico, supra at 186 (emphasis added).

In 1985, confronted with a growing backlog of cases, and an influx of claims, the Legislature not only shortened the time for the filing of hearing decisions from forty-five to twenty-eight days, it also *deleted* the authorization to permit extensions of time for the filing of decisions, and further provided that the "[f]ailure of a party to appear at a hearing shall not delay the issuance of a

[decision]." G. L. c. 152, § 11. Enacting these provisions, the Legislature clearly intended to expedite the decision making process.

In 1991, the Legislature overhauled our dispute resolution procedures. See St. 1991, c. 398.[6] In an attempt to reduce litigation, the Legislature provided for impartial medical examinations of employees in cases involving medical issues, and mandated that "[n]o hearing shall be commenced sooner than one week after such [medical] report has been received by the parties." G. L. c. 152, § 11A(2). Importantly, the Legislature retained the twenty-eight day rule for the filing of decisions. See footnote 5, supra.

Experience shows that some administrative judges at this department issue hearing decisions by the statutory deadline, while others take closer to a year, or more, to do so.[7] See, e.g., Pasquale v. Benchmark Assisted Living, LLC, 29 Mass. Workers' Comp. Rep. 25, 27 (2015)(timely decision filed after no decision by *prior* judge for three years); Cole v. Roger Kent & Co., Inc., 28 Mass. Workers' Comp. Rep. 33, 34 (2014)(Cole II)(three years following recommittal, judge "largely repeat[ed] his original decision"); Cole v. Roger Kent & Co., Inc., 24 Mass. Workers' Comp. Rep. 7 (2010)(Cole I)(board file reveals three years from close of record to filing of original decision). Without excusing the delay in this

[6] For a more in depth description of the 1991 amendments, see Murphy v. Commissioner of the Department of Industrial Accidents, 415 Mass. 218, 223-225 (1993).

[7] We have access to the board file in every case on review, and are aware that some judges take an inordinate amount of time – well in excess of the statutory mandate – to decide cases. To ignore this systemic problem serves to sanction the habitual disregard of a law designed to prevent the harm suffered by the parties in this, and many other, cases. Of course, there are instances where a judge's unavailability due to illness, or a vacation, may cause a decision to issue late. Such scenarios are justifiable exceptions to the rule. Otherwise, our roles are clear: lawyers try cases, judges decide them. And the Legislature mandates that decisions issue within twenty-eight days of the close of the record – as indicated by their use of the word "shall" in § 11. See footnote 5, supra. I agree wholeheartedly with the majority that the prospect of an attorney approaching a judge, or the senior judge, regarding the status of a case is a daunting task fraught with risk, particularly where, as here, the issue of liability hangs in the balance. No attorney, or client, should *ever* have to contemplate contacting a judge, or a local politician, to cause a decision to issue.

case, the majority cites to Dunphy, supra, for the proposition that, "the administration of multitudinous cases often makes this ideal [the 28 day rule for the filing of decisions] unattainable." 9 Mass. Workers' Comp. Rep. 473, 474 n.2 (1995). What may have been true twenty years ago is no longer.[8] The workers' compensation advisory council's annual report reveals the number of hearing decisions[9] filed in fiscal year 1994 was 1,731.[10] In fiscal year 2014, it was only 323.[11] That several judges file their hearing decisions on time proves the Legislature's "ideal" is presently attainable.[12]

Unlike the widow in Monico, the substantive rights of both parties have been irreparably harmed by the filing of a decision more than three and one-half years after the hearing record closed. Because this case was defended on multiple grounds including, most importantly, liability, Mr. Mancini could not file a claim for further compensation, or a claim for contested medical treatment, until he

[8] I say "may," because I practiced extensively before the board in the 1990s. Even then, some judges routinely issued their decisions within twenty-eight days of the close of the hearing record.

[9] The number of decisions filed annually is actually an inflated statistic, as decisions filed in cases involving multiple injury dates (with a board number assigned to each date), are counted as multiples. In other words, if a judge files a decision with three board numbers, she is credited with three decisions, not one.

[10] Workers' Compensation Advisory Council, Fiscal Year 1994 Annual Report, p. 33.

[11] Workers' Compensation Advisory Council, Fiscal Year 2014 Annual Report, p. 40. A review of advisory council's annual reports over the years demonstrates the number of hearing decisions filed has decreased steadily from 1994 to 2014. The number of hearing decisions filed in Fiscal Year 2014, divided by the number of administrative judges serving, produces an average of slightly more than one decision per month, per judge. But see, footnote 9, supra.

[12] I realize that, on rare occasions, the parties may request that a judge refrain from filing a decision for a period of time after the close of the record. However, my review of hundreds of cases since 2004 also reveals that some judges, sua sponte, schedule multiple "status conferences" *after* the record closes − further delaying the filing of decisions, and frustrating attorneys and clients alike.

received a favorable decision from the judge. After his total incapacity benefits expired pursuant to the conference order, Mr. Mancini received no benefits for more than two years before the hearing decision awarded retroactive partial incapacity benefits − based on an unsubstantiated earning capacity. The delay also compromised, inter alia, the Commonwealth's ability to effectively gauge the need to schedule medical examinations of the employee. See G. L. c. 152, § 45. And because we are caused to recommit this case more than fifty-three *months* after the evidence closed, the right of the parties to appeal from our decision will likely be postponed, as an appeal at this time would be interlocutory.

Due to the excessive delay below, our remedy is inadequate. It is easy to authorize the parties to relitigate the case from September 10, 2011, forward; as a practical matter, the passage of time makes this work onerous.

But this "intolerable situation," Monico, supra at 186, need not have happened. Effective oversight here would have minimized, or prevented, the negative "affect or prejudice [on] the substantive rights" of the parties caused by the excessive delay. Id. at 184; See G. L. c. 23E, §§ 3, 6.

All judges at this department take an oath upon assuming office. It is an oath of allegiance *not to the department*, but to the constitutions and laws which govern us. These laws include fundamental rights to due process, and G. L. c. 152, § 11. See footnote 5, supra.

I apologize to the parties, and their attorneys, for the harm, and unnecessary anxiety, caused by the three and one-half year delay, and for the residual inadequate remedy that we provide. As a department conceived to administer justice to injured workers, we can do better. But in order to do so, we must work harder. We owe it to all we serve.

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Mark D. Horan
Administrative Law Judge

Filed: ***March 1, 2016***