COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012706-11**

Andrea O'Rourke	Employee
New York Life Ins. Co.	Employer
Pacific Indemnity Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Herlihy.

APPEARANCES
Michael J. Powell, Esq., for the employee at hearing
Thomas A. Doherty, III, Esq., for the employee on appeal
Edward M. Moriarty, Jr., Esq., for the insurer at hearing
W. Todd Huston, Esq., for the insurer on appeal

LONG, J. This is the third appeal of this matter to the reviewing board. Following the first appeal by the insurer, we vacated the initial hearing decision issued by a prior administrative judge, who ordered ongoing § 34 temporary total incapacity benefits, §§ 13 and 30 medical benefits for physical and emotional injuries, and a § 13A(5) attorneys' fee. O'Rourke v. New York Life Ins. Co., 30 Mass. Workers' Comp. Rep., 303 (2016). After a hearing de novo before the current judge, the employee's claims for both her physical and emotional injuries were denied and dismissed. The employee successfully appealed the second decision to the reviewing board, where we found the judge mischaracterized medical evidence relied upon in the hearing.[1] "Specifically, the judge's findings of fact regarding the medical opinions of Dr. James Lehrich are internally inconsistent, resulting in a mischaracterization of his opinion. The error is not harmless because the judge adopted the mischaracterized opinion and

[1] At both § 11 hearings held on this matter, attorney Michael J. Powell represented the employee, while attorney Thomas Doherty, III, has represented the employee for her appeals to the reviewing board.

expressly relied upon it to deny and dismiss the employee's claim. As a result, we vacate the decision in part, and recommit the matter for further findings of fact." O'Rourke v. New York Life Ins. Co., 33 Mass. Workers' Comp. Rep. ____ (2019). The matter was recommitted to the judge who issued the present decision[2] without taking any further evidence; however, telephonic status conferences were held with the parties prior to its issuance. (Dec. III, 3.) The current cross appeals allege multiple errors within Dec. III. Finding merit in several of the issues raised by the insurer, we again vacate some of the judge's findings, uphold portions of others and summarily deny the employee's appeal.

In both Dec. II and Dec. III, the judge found:

> Andrea O'Rourke, the employee is a 51-year-old married woman with a master's degree in communication/administration. She earned a master's degree in 2008. At the time of injury, she was employed as a vice president of client strategy/sponsor experience. As a vice president she was charged with the task of retention and attraction of clients. The employee's prior work experience was of an administrative nature in the fields of marketing, law and finance.
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> On May 16, 2011 the employee was exiting the office through a glass door. As the employee placed her hand on the door handle and began to push a magnet above the door fell on her head. The employee testified the magnet felt as if it weighed 10 pounds.
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> After the accident the employee was taken to Norwood Hospital. She spent a few hours in the emergency room and the following day she experienced a headache and tingling on the left side of her face which she described in the shape of a triangle. As a result of the industrial accident the employee claims for physical injuries to her nose, face, jaw, low back, head and neck along with psychological injuries specifically anxiety and depression.

(Dec. III, 5.)

The judge went on to describe the employee's medical treatment and return-to-work attempts, and addressed the medical opinion of Dr. James Lehrich. She found:

[2] For ease of reference, we will refer to the initial vacated hearing decision, issued by Administrative Judge Douglas McDonald, as "Dec. I"; the second vacated decision, issued by Administrative Judge Sabina Herlihy, will be "Dec. II;" and, the current recommittal decision under appeal will be "Dec. III." We also note that both Judge McDonald and Judge Herlihy no longer serve as Administrative Judges at the DIA.

> The issues to be addressed in this remanded decision deal with the closed period between August 1, 2013 and December 11, 2014 along with psychiatric sequelae from a physical injury. The Board instructed this fact finder to make further findings of fact as it relates to the employee's claim for incapacity benefits during the closed period outlined in Dr. Lehrich's early reports and psychiatric sequelae.
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> I have reviewed the reports of Dr. Lehrich in their entirety and am persuaded the most accurate opinion from Dr. Lehrich is his latest on June 22, 2017, "According to her history, Mrs. O'Rourke was struck on the left forehead by a magnet on 5/16/11 causing local pain but no loss of consciousness subsequently she may have had a post-concussion syndrome with recurrent headaches…she continues to have recurrent headaches and atypical left facial pain, which are at least partially due to depression and anxiety not causally related to the incident at work on 5/16/11."
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> I am persuaded his accurate opinion regarding disability is referenced in 2014; Dr. Lehrich opined "…it was unlikely that she is still suffering from post-concussion syndrome more than 3 ½ years after the injury - post concussion syndrome rarely lasts longer than a few months."
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> In line with the directive from the Reviewing Board I adopt the opinion of Dr. Lehrich and find the employee suffered post-concussion syndrome as a result of the 5/16/11 industrial injury. I adopt the opinion of Dr. Lehrich and find that as of December 11, 2014 it is unlikely that the employee is still suffering from post-concussion syndrome.
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> I have reviewed the psychiatric evidence presented and I am persuaded by Dr, Grassian's opinion. On March 25, 2015 Dr. Grassian diagnosed the employee with unspecified bipolar or unipolar depressive disorder. As of March 25, 2015, the employee was no longer suffering from post-concussive syndrome. Any pain related to the surgery was not related to the industrial injury of 5/16/11. I adopt Dr. Grassian's opinion and find "There is a suggestion of other issues that may have a significant causal relation to her psychiatric difficulties or insecurities and marital issues."

(Dec. III, 8-9.)

The judge's August 3, 2020, Recommittal Decision ordered the insurer to "pay § 34 benefits at the rate of $1,064.84 based on an average weekly wage of $1,774.74 from May 16, 2011 to December 11, 2014 minus any time worked." Rizzo v. M.B.T.A.,

16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of Board file). This order sparked two motions by the insurer. The first, filed August 4, 2020, sought correction of various "scrivener's errors," including the award, which, it argued, incorrectly ordered benefits for a period not claimed (May of 2011 through July 31, 2013), and alleged that the award exceeded the statutory 156 weeks of potential entitlement to § 34 benefits. No action was taken on this motion. On August 21, 2020, the insurer filed a second motion to "Clarify the Hearing Decision of August 3, 2020." Rizzo, supra. Once again the insurer argued the award of § 34 benefits from May 16, 2011, through December 11, 2014 exceeded the statutory limit of 156 weeks, and that the phrase contained in that order, "minus any time worked," necessarily excluded an order for § 34 benefits; pointed out that there was no explicit order for § 35 benefits; and, urged the judge "to correct the order to provide § 35 benefits based on actual earnings from August 1, 2013 through September 15, 2014 and § 34 from September 16, 2014 through December 11, 2014" as claimed by the employee, thereby obviating the issues with the order as written. On August 25, 2020, the judge issued her Amended Recommittal Decision (Dec. III). There, despite acknowledging that her findings on recommittal were to be limited to "the closed period between August 1, 2013 and December 11, 2014," the judge ordered:

1. The insurer shall pay § 35 benefits based on the average weekly wage of $1064.84 minus actual hours worked from September 16, 2014 to September 16, 2017 and § 34 benefits from August 1, 2013 to December 11, 2014. *See: MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 35, 37 (2007)*.
2. The insurer credit itself with any benefits paid.
3. The insurer shall pay reasonable and necessary medical expenses pursuant to §§ 13 & 30 for the post concussion syndrome.
4. The insurer shall pay to the employee's attorney a fee of $5,969.79 plus necessary expenses pursuant to § 13A(5).

(Dec. III, 12.)

The insurer raises several issues dealing with the overlapping time periods contained within the judge's order, which we agree are internally inconsistent and non-reconcilable. Specifically, the employee's claims were as follows:

1. § 35 from August 1, 2013 to September 15, 2014; § 34 benefits from September 16, 2014 to September 16, 2017 and § 34A from September 17, 2017 to date and continuing;
2. §§ 13 & 30 and
3. § 36 (reserved)

(Dec. III, 3.)

The insurer rightfully notes that the employee claimed § 35 benefits for the period of August 1, 2013, to September 15, 2014; however, the Amended Recommittal Decision awards § 34 benefits for this same period of time. "Therefore, the administrative judge has no authority to award § 34 benefits when the employee claimed § 35 benefits for this period. Hewitt v. Blue Ridge Ins., 22 Mass. Workers' Comp. Rep. 313, 317 (2008)." (Ins. br.11.) We agree with the insurer on this point and vacate the award of § 34 benefits for the period of August 1, 2013 through September 15, 2014.

The insurer also correctly notes that the judge awarded both § 34 and § 35 benefits for the same period of time, between September 16, 2014 and December 11, 2014. This portion of the decision also cannot stand since "[i]t is inconsistent to assign an earning capacity to an employee while simultaneously finding he remains totally incapacitated for employment." Cowan v. Springfield Associates, Inc., 9 Mass. Workers' Comp. Rep. 503, 506 (1995). Thus, we vacate the award of § 34 benefits from September 16, 2014 through December 11, 2014. However, we disagree with the insurer insofar as it claims there is no basis for the award of *any* benefits in this case. (Ins. br. 13.)

The adopted medical opinion of Dr. Lehrich, that the employee was partially disabled by her headaches, and the employee's testimony regarding the severity of her daily headaches, (Dec. 10), adequately support the judge's award of § 35 benefits, based on actual hours worked for the time period of September 16, 2014 through December 11, 2014. MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 35

(2007) citing Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273 (1999); see also Reis v. Anchor Motor Freight Inc., 9 Mass. Workers' Comp. Rep. 82, 84-85 (1995)(If factual finding is supported by competent evidence in record, reviewing board must affirm it). We therefore uphold this portion of the order; where no earnings exist during this period, payment of § 35 benefits should be made at the maximum partial incapacity rate.

As noted earlier, the employee claimed § 35 benefits from August 1, 2013, to September 15, 2014, but the judge erroneously ordered § 34 benefits for this period of time. We have just vacated that order. Again, however, the adopted medical opinion of Dr. Lehrich and credited testimony of the employee, adequately support a similar order of § 35 benefits from August 1, 2013, to September 15, 2014, as claimed. Thus, the insurer shall pay the employee § 35 benefits, based on wages earned, and, where no wages are earned, at the maximum § 35 benefit rate, for the entire period from August 1, 2013, through December 11, 2014. Lastly, not only because the judge on recommittal was limited to addressing the timeframe from August 1, 2013, through December 11, 2014, but also because the adopted opinions of Dr. Lehrich do not allow for an award of benefits for any time after December 11, 2014, we vacate so much of the judge's decision as awarded the employee weekly benefits after that date (December 12, 2014, through September 16, 2017).

The insurer also argues, for the first time on appeal, that,

> There is no dispute [that] employee's attorney was paid an attorney's fee following the first Hearing Decision. An attorney's fee in the amount of $5511.91 was awarded to the employee's attorney. (Hearing Dec. P. 15). This decision was vacated. At the time of the Amended Remand Decision, a second attorney's fee was awarded. The insurer was ordered to pay to the employee's attorney a fee of $5,969.79. (Amended Remand Dec. P. 12).
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> This was not due or warranted.

(Ins. br. 18-19.)

The decision awarded the fee, plus necessary expenses, to Attorney Powell as he is the only attorney mentioned in the third hearing decision.[3]

Notwithstanding any potential viability of the insurer's argument, this issue was not raised at the time of the recommittal hearing before Judge Herlihy but is raised for the first time on appeal. At the time of the second hearing proceeding, the insurer was aware that the prior hearing decision had been vacated and that it was owed the repayment of the attorney's fee it now seeks, yet chose to rest on its laurels regarding the fee that it no longer owed. In fact, the attorney to whom both the fee payments were ordered to be made is not involved in any way with this appeal. He clearly is a necessary and indispensable party regarding any claim the insurer may have regarding the fee. Nonetheless, despite identifying this issue as an error in the judge's recommittal decision, the insurer made no attempt to join the employee's prior counsel as a necessary party to this appeal. Thus, with respect to these proceedings we make no ruling on the fee issue, as to do so would deprive Attorney Powell of due process of law. Haley's Case, 356 Mass. 678, 681-682 (1970)("[p]arties to proceedings before a single member or a reviewing board . . . are entitled . . . to argue, in person or through counsel, on the issues of fact and law involved in the hearing" because "constitutional due process requirements apply to board hearings and decisions").

Accordingly, the insurer is to pay the employee § 35 benefits as set forth, supra. Pursuant to G.L. c. 152, § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $1,745.44.

So ordered.

Martin J. Long
Administrative Law Judge

[3] Again, we note no further hearing proceedings were conducted after we recommitted the case to the present judge, and, as a result, the judge's recommittal decision lists only Attorney Powell as the attorney of record representing the employee. Indeed, Attorney Powell filed a lien on the employee's board file seeking, among other things, recovery of expenses. Rizzo, supra.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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