COMMONWEALTH OF MASSACHUSETTS

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

Andrea O'Rourke	Employee
New York Life Ins. Co.	Employer
Pacific Indemnity Ins. c/o Chubb Group of Ins. Cos.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Long)

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

KOZIOL, J. This is the second appeal of this matter to the reviewing board. The insurer filed the first appeal from a different judge's hearing decision awarding the employee §34 benefits from September 16, 2014, and continuing, as well as §§ 13 and 30 medical benefits, including two surgeries and treatment for anxiety and depression. We vacated the decision but were unable to recommit the matter for further findings of fact because the judge had retired from the Department. Accordingly, we referred the case to the senior judge for reassignment to another judge for a de novo hearing. During the interim period, we reinstated the conference order awarding the employee partial incapacity benefits under § 35 from August 1, 2013, based on actual earnings, and where no earnings exist, requiring the insurer to pay maximum § 35 benefits. O'Rourke v. New York Life Ins., 30 Mass. Workers' Comp. Rep. 303 (2016). Thereafter, the matter was assigned to the present judge who conducted a de novo hearing. The employee now appeals from that judge's June 19, 2018, decision denying and dismissing her claim.[1] (Dec. II, 11.)

[1] Hereinafter, we refer to the first decision as "Dec. I," and the second decision as "Dec. II."

On appeal, the employee alleges the judge's decision contains multiple inconsistencies, mischaracterizes the evidence, and contains other errors that require reversal. We find merit in one of those arguments. 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 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.

The employee, age fifty-one at the time of the most recent hearing, was employed as a vice president of client strategy/sponsor experience at the time of her injury. (Dec. II, 5.) On May 16, 2011, she was exiting the office through a glass door when a magnet above the door fell on her head. (Dec. II, 5.) The employee was taken to Norwood Hospital, where she spent a few hours in the emergency room. Id. The following day she experienced a headache and tingling on the left side of her face. "The employee returned to work in October 2011 performing the same job until the first surgery on December 4, 2012." (Dec. II, 9.) On December 4, 2012, neurosurgeon, Dr. Ermand Eskander, performed "a left microvascular decompression" for "possible trigeminal neuralgia." (Dec. II, 6.) In April 2013, Dr. Eskander reported the employee's facial pain was gone but she continued to experience headaches. (Dec. II, 6.)

The judge made no findings regarding the employee's return to work date following the December 4, 2012, surgery. She found only that "her last day of work was in April 2014." (Dec. II, 9.) She also found that "on April 14, 2014 Dr. Eskander reported the employee still has facial pain and on April 29, 2014 Dr. Eskander performed a left fluoroscopically guided V2, V3 radiofrequency rhizotomy." (Dec. II, 6.) According to the history recorded in our prior decision, following the surgery on December 4, 2012, the employee

> returned to part-time work on approximately March 13, 2013, but 'felt like the back of her head was going to explode.' On Dr. Eskandar's recommendation, she left work again in April of 2013, and then made another attempt to return to work in July 2013. She finally stopped working altogether in March 2014.

O'Rourke, supra at 304-305. We also noted that the employee "testified that she left work for good in March 2014. However, she received short-term disability payments until approximately September 15, 2014." Id. at 305 n.1.

On June 18, 2013, the employee filed a claim seeking temporary total incapacity benefits under § 34 from April 8, 2013, through April 8, 2016, as well as medical benefits pursuant to §§ 13 and 30. Rizzo v. M.B.T.A., 16 Mass. Workers' Compensation Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The insurer denied the employee's claim contesting liability, causation and disability. Id. The claim was then the subject of a § 10A conference before a different judge than the one who conducted the first hearing. The parties' Form 140 Conference Memorandum shows that by that date, the employee sought only partial incapacity benefits commencing August 1, 2013, and continuing, as well as §§ 13 and 30 benefits for "medical bills, prescriptions, pkg receipts, etc." Id. On November 22, 2013, that judge issued a conference order requiring the insurer to pay the employee "partial incapacity compensation under M.G.L. c. 152, § 35, based on the employee's actual wages from August 1, 2013 and continuing," along with § 30 medical benefits "for claimed conservative treatment including prescribed MRI study. Payment for claimed surgery is stayed at this time." Id. Both parties appealed, and the case was reassigned to the judge who issued the first hearing decision.

As noted above, following the first hearing, the judge ordered the insurer to pay the employee ongoing incapacity and medical benefits, and the insurer appealed. We vacated that decision because the judge erred by, 1) making inconsistent findings regarding the alleged trigeminal nerve injury, and causal relationship between the employee's two surgeries performed by Dr. Eskander and the work-related injury; 2) mischaracterizing Dr. Lehrich's opinion by adopting the opinion from his first medical report, that the employee's headaches were causally related to the work injury, and ignoring his later opinion that the employee's recurrent headaches "are probably related to depression and anxiety" without offering an opinion causally relating her psychological conditions to the work injury; and, 3) concluding the employee's depression and anxiety were causally related to the work-related accident without making

adequate findings regarding the specific physical injuries sustained as a result of the accident. O'Rourke, supra at 307-309.

At the de novo hearing, the employee claimed entitlement to § 35 benefits from August 1, 2013, through September 15, 2014, and § 34 benefits from September 16, 2014, to September 16, 2017. The current judge allowed the employee to join a claim for § 34A benefits from September 17, 2017, and continuing. The employee also claimed entitlement to medical benefits pursuant to §§ 13 and 30. (Dec. II, 3-4, 9; see also EE exhibit 2.) The insurer raised the defenses of liability, disability and extent thereof, causal relationship of psychiatric and physical conditions, and § 1(7A), and denied entitlement to medical benefits under §§ 13 and 30.[2] (Dec. II, 4; Dec, II, Ex. 3.)

After conducting the de novo hearing, the present judge found the employee claims to have suffered "physical injuries to her nose, face, jaw, low back, head and neck along with psychological injuries specifically anxiety and depression." (Dec. II, 5.) The judge found that Dr. Lehrich examined the employee three times and that he "consistently opined the head injury did not cause a trigeminal nerve injury or trigeminal neuralgia." (Dec. 8.) The judge adopted Dr. Lehrich's opinion that "the employee's two surgical procedures, microvascular decompression and radio frequency rhizotomy were

[2] In its brief on appeal, the insurer states, without further explanation or argument, "the employee claimed Section 35 benefits for the closed period 8/1/13-9/15/14 based upon actual earnings [although not awarded in the prior hearing decision and employee did not appeal the decision]," (Ins. br. 3.) To the extent the insurer implies that the employee lost the ability to seek benefits for this timeframe, the insurer's observation contains no citation to the record or legal authority or any assertion that it is entitled to any relief regarding this issue, and fails to rise to the level of proper argument. 452 Code Mass. Reg. § 1.15(4)(a)(3). Moreover, we note the insurer raised no timely objection to this claim at the hearing de novo, (Tr. II, 4-12), nor did it raise any defense specific to the employee's ability to claim benefits for this timeframe in its issue sheet at that hearing. (Dec. II, 1; Ex. 3.) In any event, any such argument lacks merit where we vacated the earlier hearing decision, rendering it a nullity, and we reinstated the first judge's conference order awarding the employee § 35 benefits from August 1, 2013, and continuing. O'Rourke, supra at 309-310. As noted supra, both parties appealed from that conference order bringing the matter before the present judge for a de novo hearing on the parties' original cross-appeals from the conference order.

reasonable for the employee's facial pain but are not causally related to the industrial injury." (Dec. II, 10.)

The judge also found, "Dr. Lehrich opined the employee had suffered a post-concussion syndrome with recurrent headaches and [sic] are 'at least partially due to depression and anxiety and not causally related to the incident at work on May 16, 2011." (Dec. II, 8.) The judge then found:

> Dr. Lehrich opined the employee had suffered a post-concussion syndrome with recurrent headaches and [sic] were not causally related to the industrial accident. I adopt the opinion of Dr. Lehrich and so find.
>
> Causal relationship of the psychological sequelae from a physical injury needs a basis from the causal relationship of the physical injuries to the industrial accident. Sfravara v. Star Market Co., 15 Mass. Workers' Comp. Rep. 181, 184-185 (2001). I have adopted the opinions of Dr. Lehrich and found the employee's injuries were not a result of the industrial accident of May 16, 2011. I do not address the employee's psychological injuries. Indeed I have adopted the opinion of Dr. Grassian and find there is no causal relationship of the employee's depression to the industrial accident.

(Dec. II, 10.) The judge then denied and dismissed the employee's claim in its entirety. (Dec. II, 11.)

The judge correctly found that Dr. Lehrich unequivocally opined throughout the course of his multiple examinations of the employee, that her trigeminal neuralgia was not causally related to the industrial accident, nor were the two surgeries causally related to the industrial accident. We affirm her decision regarding these conditions. However, we vacate the denial and dismissal of the employee's claim, to the extent it rests on a mischaracterization that "Dr. Lehrich opined the employee had suffered a post-concussion syndrome with recurrent headaches and [sic] were not causally related to the industrial accident." (Dec. II, 10.)

On November 19, 2013, Dr. Lehrich opined in pertinent part:

> 1. According to the history, she was struck on the left forehead by a magnet, causing local pain but no loss of consciousness. Subsequently, she had a postconcussion syndrome with recurrent headaches.

. . . .

4. Currently, she has recurrent headaches and facial pain, at least partially related to depression and anxiety. The recent recurrence of left facial pain may be a complication of her surgery.

. . . .

6. She is partially disabled because of recurrent headaches, but she should be able to perform the normal duties of her work. No restrictions should be required.

7. Her recurrent headaches are causally related to the injury on 5/16/11, but she does not have trigeminal neuralgia related to the injury.

8. There is no evidence that Mrs. O'Rourke had a condition that preexisted the injury.

(Dec. II, 2; Ir exhibit 2, 11/19/13 report at 3-4.) Thus, as of November 19, 2013, Dr. Lehrich opined that the employee had sustained a physical injury as a result of the industrial accident of May 16, 2011, with a diagnosed condition of postconcussion syndrome with recurrent headaches. He also opined that condition resulted from that accident, and the employee was partially disabled because of the recurrent headaches, but should be able to perform the normal duties of her work without restriction.

Over a year later, on December 11, 2014, Dr. Lehrich saw the employee for the second time. His report stated, "the details of her accident and subsequent evaluation are described in my report of 11/19/13." (Dec. II, 2, Ir exhibit 2, 12/11/14 report at 1.) Dr. Lehrich did not state that he was altering any of his opinions as they stood in November of 2013; instead, he detailed the employee's symptoms and her ongoing medical treatment and opined, in pertinent part, as follows:

1. According to her history, she was struck on the left forehead by a magnet on 5/16/11, causing local pain, but no loss of consciousness. Subsequently, she had a postconcussion syndrome with recurrent headaches.

. . . .

4. She continues to have recurrent headaches and left atypical facial pain, at least partially due to depression and anxiety.

. . . .

6. Her recurrent headaches are probably related to depression and anxiety. **It is unlikely that she is still suffering from a postconcussion syndrome, more than 3-1/2 years after the injury.** Postconcussion syndrome rarely lasts longer than a few months.

. . . ,

8. In my opinion, she is not disabled for her work as an insurance executive, and she should be able to return to that job, without restrictions.

9. As stated above, in my opinion, her diagnosed conditions are not causally related to the alleged industrial accident of 5/16/11.

10. There is no history of any pre-existing condition present prior to the alleged injury on 5/16/11.

(Dec. II, 2; Ir exhibit 2, 12/11/14 report at 3-4; emphasis added.) Thus, over one year after his first examination of the employee, Dr. Lehrich opined the employee *was no longer* suffering from a postconcussion syndrome and that her recurrent headaches, as of that date, were no longer causally related to the industrial accident.

In his third report of June 22, 2017, Dr. Lehrich stated, "The details of her accident and subsequent evaluations are described in my reports of 11/19/13 and 12/11/14." (Dec. II, 2, Ir exhibit 2, 6/22/17 report at 1.) He then stated, "Since her last visit to me, she reports that her pain has worsened." Id. Dr. Lehrich detailed the employee's symptoms and her medical treatment occurring after his December 11, 2014, examination of the employee and opined in pertinent part:

1. 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 postconcussion syndrome, with recurrent headaches.

. . . .

6. Her recurrent headaches are probably related to depression and anxiety. **It is unlikely that she is still suffering from a postconcussion syndrome, more than**

> **6 years after the injury.** Postconcussion syndromes rarely last longer than a few months.
>
> . . . .
>
> 8. In my opinion, Mrs. O'Rourke was not disabled as a result of the injury on 5/16/11, and is not disabled at the present time as a result of that injury. Her depression and anxiety may interfere with her ability to work, which should be assessed by a psychiatrist.
>
> 9. There is no evidence of pre-existing conditions that predated 5/16/11.

(Dec. II, 2; Ir exhibit 2, 6/22/17 report at 3; emphasis added.) The doctor did not state anywhere in his report that he was altering his opinions rendered in his prior reports. Indeed, his report of June 22, 2017, showed no change in his opinion rendered in his report of December 11, 2014. Moreover, his report covers the state of the employee's health *during the three year period between those examinations*, and he concluded that the employee "was not disabled as a result of the injury on 5/16/11, and is not disabled at the present time as a result of that injury." Id

The insurer argues:

> With regard to Dr. Lehrich's opinions, there was some change as of his second evaluation date and the last opinion expressed is to be considered. See Darby v. City of Boston, 17 Mass. Workers' Comp. Rep. 447 (2003). In his 12/11/14 report, he attributed the employee's recurrent headaches and left atypical facial pain, at least, partially to depression and anxiety. He opined that it was unlikely that the employee was still suffering from postconcussion syndrome at that point, which he indicated rarely lasts longer than a few months. As of his third evaluation of the employee on 6/22/17, Dr. Lehrich maintained his opinions that the employee did not have trigeminal neuralgia, that the 5/16/11 accident did not cause a trigeminal nerve injury, that the surgeries were not causally related; that the employee's continued complaint of recurrent headaches and atypical facial pain were, at least partially due to depression and anxiety and not causally related to the incident of 5/16/11. Ins. Exh. 2. These opinions are not inconsistent with the judge's findings.

(Ins. br. 11.) The insurer's argument overlooks the fact that Dr. Lehrich's opinion was essentially the same in both his first and second reports insofar as he maintained that,

"Currently, she has recurrent headaches and facial pain, at least partially related to depression and anxiety." (Dec. II, 2; Ir exhibit 2, 11/19/13 report at 4.) In addition, the insurer's argument captures the essence of the problem with the judge's decision. Namely, that as of the second evaluation on December 11, 2014, Dr. Lehrich "opined it was unlikely that the employee *was still suffering* from postconcussion syndrome at that point." (Ins. br. 11; emphasis added.)

Indeed, Dr. Lehrich's examinations show that he found the employee suffered a physical injury as a result of the work accident: specifically, postconcussion syndrome. Moreover, it was his opinion that she continued to be suffering from recurrent headaches as a result of that injury as of November 19, 2013, and that she was partially disabled as a result thereof. By December 11, 2014, however, Dr. Lehrich was of the opinion that the employee no longer suffered from that condition, not that the diagnosed condition and its causal relationship to the industrial accident never existed in the first place. The judge's findings mischaracterize Dr. Lehrich's opinion by stating, "Dr. Lehrich opined the employee had suffered a post-concussion syndrome with recurrent headaches and [sic] were not causally related to the industrial accident." (Dec. II, 10.) Thus, contrary to the insurer's argument, the judge's findings are not consistent with Dr. Lehrich's opinions.

The judge's adopted mischaracterization of Dr. Lehrich's opinion formed the basis for her denial and dismissal of the employee's claim in its entirety, without considering that liability for an injury was contested by the insurer, and that the time period in dispute at hearing commenced with a claim for benefits beginning August 1, 2013. The claimed period in dispute began over three months prior to Dr. Lehrich's November 19, 2013, report causally relating her recurrent headaches and disability, at that time, to postconcussion syndrome, which he also causally related to the industrial accident. Moreover, Dr. Lehrich expressly opined in all of his reports, that the employee had no pre-existing conditions pre-dating her accident of May 16, 2011. Thus, at the very least, the judge's adoption of his opinion that the employee had a postconcussive syndrome with recurrent headaches, showed the employee sustained a physical injury requiring the establishment of liability for the accident, rendering the outright denial and dismissal of

the claim erroneous as a matter of law. In addition, the fact that over one year later, Dr. Lehrich found the employee no longer suffered from that condition, does not support the judge's ruling denying and dismissing the employee's claim in toto. Neither the employee's claim for medical benefits, nor her claim for incapacity benefits, could be summarily denied and dismissed without more findings of fact relating to those issues during the closed period between August 1, 2013, and December 11, 2014, the date of Dr. Lehrich's second report.

The mischaracterization of Dr. Lehrich's opinion also tainted the judge's assessment of the employee's claimed psychological sequelae from the injury. Regarding that analysis, the judge made the following findings and conclusions:

> Causal relationship of the psychological sequelae from a physical injury needs a basis from the causal relationship of the physical injuries to the industrial accident. Sfravara v. Star Market Co., 15 Mass. Workers' Comp. Rep. 181, 184-185 (2001). I have adopted the opinions of Dr. Lehrich and found the employee's injuries were not a result of the industrial accident of May 16, 2011. I do not address the employee's psychological injuries. Indeed I have adopted the opinion of Dr. Grassian and find there is no causal relationship of the employee's depression to the industrial accident.

(Dec. II, 10.) Because Dr. Lehrich found the employee's postconcussion syndrome with recurrent headaches was causally related to the industrial accident of May 16, 2011, the judge's rationale for not addressing the claimed psychological injuries cannot be supported. Moreover, Dr. Stuart Grassian's opinion is also foundationally deficient, and its adoption by the judge does not cure the failure to make findings addressing the employee's psychological injuries. Dr. Grassian first evaluated the employee on March 25, 2015 and subsequently evaluated her on July 5, 2017. (Dec. II, Ir exhibit 1.)[3] The judge adopted his opinion that, "the employee suffers from a clinically significant depression. In Dr. Grassian's opinion there is no causal relationship between the 2011 industrial accident and her depression and the employee is more capable than she

[3] The decision states the first examination occurred on 3/15/15, which appears to be a scrivener's error. (Dec. II, Ir. Ex. 1, 3/25/15.)

portrays. (Ir exhibit 1.)" (Dec. II, 9.) However, in his March 25, 2015 report, regarding the issue of causation, Dr. Grassian opined,

> It may well be that Ms. O'Rourke's psychiatric difficulties are at least in good part a product of her pain condition, but given the consensus opinion that there is no causal relationship between the accident and that pain condition, it necessarily follows that Ms. O'Rourke's psychiatric difficulties are not causally related to the workplace accident.

(Dec. II, Ir. Ex. 1, 3/25/15 report at 7.) The insurer correctly argues that "[w]ithout a diagnosis of an underlying physical or neurological condition causing headache, facial pain and/or numbness and tingling that is causally related to the 5/16/11 accident within a degree of medical certainty, there is no foundation for [the] psychological diagnoses that are advanced as sequelae." (Ins. br. 12.) The problem for the insurer is that in November of 2013, Dr. Lehrich *did* diagnose recurrent headaches and postconcussion syndrome causally related to the accident. Moreover, Dr. Lehrich was also of the opinion in November of 2013, that the employee had depression and anxiety causing in part, recurrent headaches and facial pain.

The judge mischaracterized Dr. Lehrich's opinion by finding the employee suffered from postconcussion syndrome and recurrent headaches that *were not* causally related to the accident, during a time period when the doctor also opined that she suffered from anxiety and depression. As a result, the judge's conclusion that she did not need to address the issue of a psychiatric sequelae, was erroneous. That same erroneous factual foundation rendered her subsequent adoption of Dr. Grassian's opinion erroneous. This is because the foundation for Dr. Grassian's opinion was that there was no causal relationship between the accident and the employee's pain, which cannot be reconciled with Dr. Lehrich's opinion, that for at least a closed period of time, the employee suffered from postconcussion syndrome with recurrent headaches that were causally related to the accident. Without further findings of fact on the issue of a psychiatric sequelae, the judge's decision denying and dismissing the employee's claim as it relates to the alleged psychiatric sequelae must be vacated.

Accordingly, we affirm the judge's decision in part, regarding the alleged physical injuries sustained by the employee, with the exception of the postconcussion syndrome with recurrent headaches diagnosed by Dr. Lehrich. The judge's mischaracterization of Dr. Lehrich's opinion regarding postconcussion syndrome and recurrent headaches requires us to vacate her decision denying and dismissing the employee's claim as it relates to that condition and the alleged psychiatric sequelae.

Because Dr. Lehrich's November 19, 2013, opinion establishes the insurer's liability for an injury resulting from the May 16, 2011, accident, we recommit the case for further findings of fact regarding the employee's claim for incapacity and medical benefits during the closed period identified by Dr. Lehrich, and for findings addressing the employee's claimed psychiatric sequalae. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **November 19, 2019**