COMMONWEALTH OF MASSACHUSETTS

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

Andrea O'Rourke	Employee
New York Life Insurance	Employer
Pacific Indemnity Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Michael J. Powell, Jr., Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer at hearing and on appeal
Christopher L. Maclachlan, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision awarding the employee ongoing weekly § 34 benefits, and §§ 13 and 30 medical benefits, including two surgeries and treatment for anxiety and depression. For the following reasons, we vacate the decision and refer the case to the senior judge for reassignment to a new administrative judge for a hearing de novo.

The employee, forty-eight years old at the time of hearing, is a college graduate with a Master's degree in Science and Administrative Studies. All of the employee's work experience, including her job as vice president of marketing for the employer, required attention to detail and good analytical and communication skills. (Dec. 4-5.) The employee was injured on May 16, 2011, when a magnet weighing approximately 8-12 ounces, fell from a door jamb and struck her on the forehead. "[D]azed and confused," she was taken by ambulance to the hospital, where she was diagnosed with a concussion. (Dec. 5.) "Over the next several days, the employee experienced pounding headaches, tingling along the left side of her nose and face, to her jaw and up the other side of her face. She also experienced neck pain, and low back pain on the right that

extended into her buttock [Tr. at 9, 10]." Id. She returned to work on May 20, 2011, on a part-time basis, and resumed full-time work on May 27, 2011. However, she did not feel fully functional because her neck and back pain, depression, anxiety and headaches, made concentration difficult. Id.

She worked various full-time and part-time schedules until December 4, 2012, when Dr. Emad Eskandar, a neurosurgeon, performed microvascular decompression of the trigeminal nerve, which temporarily reduced her headaches and the tingling in her face, but not the tingling in her jaw. (Dec. 6, 7.) The employee returned to part-time work on approximately March 13, 2013, but "felt like the back of her head was going to explode." (Dec. 6.) On Dr. Eskandar's recommendation, she left work again in April 2013, and then made another attempt to return to work in July 2013. Id. She finally stopped working altogether in March 2014. (Dec. 8.) Dr. Eskandar performed a second surgery (rhizotomy) in April 2014, in an attempt to alleviate the employee's persistent pain in her jaws and teeth, but without significant improvement. (Dec. 7.) In January 2015, Dr. Eskandar opined that she "did not have trigeminal neuralgia that was amenable to surgical treatment, and recommended referral to a pain management clinic . . . . " Id. He further opined she was totally disabled from returning to work. Id. Throughout this time, the employee consulted with and/or was treated by numerous physicians, including neurologists, a headache specialist, several psychiatrists, a social worker, a physiatrist, and her primary care physician. (Dec. 6-9.)

The employee claimed § 35 benefits from August 1, 2013 to September 15, 2014, based on her actual weekly earnings, and § 34 benefits from September 16, 2014, and continuing.[1] Following a § 10A conference, an administrative judge ordered the insurer to pay § 35 benefits based on the employee's actual earnings from August 1, 2013, and continuing. Both parties appealed to hearing. (Dec. 2.) On January 27, 2014, Dr. Ronald Birkenfeld, a neurosurgeon, examined the employee pursuant to § 11A. The judge allowed the parties to submit additional medical evidence based on medical

[1] The employee testified that she left work for good in March 2014. (Tr. 31.) However, she received short-term disability payments until approximately September 15, 2014. (Id.; Dec. 2.)

complexity. (Dec. 3.) Both parties submitted numerous medical records and reports, and the parties deposed Dr. Michael Bennett, a psychiatrist. (Dec. 1-3.)

The case was reassigned to a new judge who conducted the hearing. The judge credited the employee's testimony "concerning her constant headaches, facial pain and throbbing sensation in her left ear," (Dec. 8), and that "she does not feel capable of performing any work at this time because of her chronic pain, fatigue, depression and anxiety." (Dec. 9.) He found the "[s]ymptoms that keep [her] from working are her headaches, pressure in the left side of her face, tingling, electric shocks; fatigue; renewed neck pain, pulsating in her ear, anxiety, depression, and numbness and soreness in her tongue . . . . These symptoms make it difficult for the employee to concentrate." (Dec. 13.)

The judge did not adopt the opinion of the impartial physician, but instead adopted portions of the opinions of the employee's treating doctors and several of the insurer's examining physicians. Significantly, the judge adopted the opinion of Dr. James Lehrich, a neurologist who examined the employee on November 19, 2013, and December 11, 2014, at the insurer's request. The judge found that Dr. Lehrich opined:

> [T]he head trauma did *not* cause the trigeminal nerve injury; the microvascular decompression was reasonable, . . . *but not causally related*; the recurrence of the employee's *left facial pain may be a complication of her surgery*; the employee's recurrent headaches are causally related to the injury of May 16, 2011. There is no evidence of a preexisting condition.

(Dec. 10; emphasis added.) The judge also adopted the March 25, 2015 opinion of Dr. Stuart Grassian, a psychiatrist who evaluated the employee on behalf of the insurer, "that further psychopharmacologic and psychotherapeutic treatment is indicated." (Dec. 10.) In addition, he adopted Dr. Michael Bennett's opinion that the employee's "chronic pain" was "an element in her anxiety and depression," and concluded "the employee has a depressive disorder and anxiety disorder brought about by the traumatic accident at work on May 16, 2011." (Dec. 11-12.) He further adopted Dr. Bennett's opinion that "the

employee is unable to work full-time at present, and that this incapacity is causally related to the sequelae of the injury of May 11, 2011." (Dec. 12.)

The judge concluded the employee suffered an injury arising out of and in the course of her employment when she was struck on the head by a magnet. He found that she was totally disabled from working, based on the opinions of Dr. Eskandar, her neurosurgeon; Dr. Haims, her primary care physician; and Dr. Bennett, her psychiatrist, as well as her own testimony. With respect to causal relationship, the judge adopted the opinion of Dr. Paul Hezel, a physiatrist, that the employee's symptoms are " 'consistent with a protracted post-concussive syndrome,' " (Dec. 8, 14), and the opinion of Dr. Bennett, that her anxiety and depression are causally related to the work injury. (Dec. 14.) Finally, the judge found that the employee's treatment had been reasonable and causally related to the injury of May 16, 2011, "[i]ncluding the surgery provided by Dr. Eskandar on December 4, 2012 and April, 2014." (Dec. 14.) In so finding, the judge repeated, almost verbatim, the opinions of Dr. Lehrich he had previously adopted. (Dec. 14.) The judge ordered the insurer to pay § 34 benefits from September 16, 2014, and continuing, as well as reasonable and related medical treatment, including treatment by Dr. Eskandar, and treatment for the employee's anxiety and depression. (Dec. 15.)

The insurer appeals, arguing that the judge failed to make adequate findings on the physical aspects of the employee's injury, with respect to both disability and causal relationship. The insurer also maintains that the judge erred by making findings that are internally inconsistent and mischaracterize the medical evidence, with respect to the surgery and headaches. As a result of the judge's inadequate and erroneous findings on the physical injuries, the insurer maintains there was no foundation for the judge's conclusions regarding the emotional sequelae of the physical injury.[2]

[2] Although it does not appear that the employee made a specific claim for a psychiatric sequelae of her physical injury, the insurer has not disputed that the treatment and/or incapacity related to the psychiatric sequelae is at issue. Therefore, we deem the issue waived.

We agree that the judge made inconsistent findings regarding the trigeminal nerve injury and the causal relationship of the two surgeries performed by Dr. Eskandar. See King v. City of Newton, 29 Mass. Workers' Comp. Rep. 13, 17 (2015), quoting Cruz v. Corporate Design Co., 9 Mass. Workers' Comp. Rep. 618, 621 (1995)("Internally inconsistent findings which go to the heart of the issue presented are arbitrary and cannot stand"). Dr. Lehrich opined, and the judge found, that the head injury *did not cause* a trigeminal nerve injury. (Dec. 10; Ex. 4.2, 11/19/13 report of Dr. Lehrich.) The judge also adopted Dr. Lehrich's opinion that the microvascular decompression surgery[3] was reasonable but *not causally related* to the work injury. (Dec. 10, 14; Ex. 4.2, 11/19/13 and 12/11/14 reports of Dr. Lehrich.) Nonetheless, the judge concluded that the employee's treatment, "[i]ncluding the surgery provided by Dr. Eskander on December 4, 2012 and April, 2014," was reasonable and *causally related* to the work injury. [4] (Dec. 14.) Clearly, Dr. Lehrich's adopted opinion did not support a finding that the trigeminal nerve injury, or the surgeries to correct it, were causally related to the industrial accident.

The employee does not dispute that Dr. Lehrich opined the surgery was not causally related to the injury the employee suffered on May 16, 2011, (Employee br. 12), but suggests that the fact the employee underwent "two surgeries to her head . . . after consulting with a medical specialist at Massachusetts General Hospital and weighing the risks and rewards of such a procedure based on the information received from that specialist," is a sufficient basis for inferring causal relationship. Id. The employee's position only supports an inference that the surgery was reasonable, which Dr. Lehrich agreed it was. However, in complex medical situations, which this undoubtedly is, expert medical evidence on causation is necessary. Stewart's Case, 74 Mass. App. Ct. 919, 920

[3] According to Dr. Eskandar, who performed the surgery, it was a "microvascular decompression of the trigeminal nerve." (Dec. 7.)

[4] In fact, in his December 11, 2014, report, Dr. Lehrich opined that both "the microvascular decompression surgery on 12/4/12, and the radiofrequency rhizotomy on 4/29/14, were reasonable treatments for her facial pain, but were not causally related to the industrial accident of 5/16/11." (Ex. 4.2, 12/11/14 report of Dr. Lehrich.)

(2009). The judge has cited none. Therefore, the judge's finding of causal relationship for the two surgeries performed by Dr. Eskandar, and the order of payment for them, are arbitrary and capricious.

In addition, we agree with the insurer that the judge did not adopt the last medical opinion of Dr. Lehrich regarding the causal relationship of the employee's headaches to the work injury. See Perangelo's Case, 277 Mass. 59, 64 (1931)("opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying"). In so doing, he impermissibly mischaracterized Dr. Lehrich's opinion. LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 58 (2004). The judge adopted Dr. Lehrich's opinion from his first report of November 19, 2013, that "the employee's recurrent headaches are causally related to the injury of May 16, 2011." (Dec. 10; Ex. 4.2.) However, in his second report of December 11, 2014, Dr. Lehrich opined that the employee's "recurrent headaches are probably related to depression and anxiety," (Ex. 4.2, 12/11/14 report of Dr. Lehrich), without offering an opinion as to whether the depression and anxiety were caused by the work injury. The employee agrees that Dr. Lehrich's opinion changed and that the judge erred in adopting the earlier 2013 opinion, but maintains the error was harmless. (Employee br. 9.)

We disagree with the employee, and hold that neither the mischaracterization nor the inconsistent findings was harmless. This case concerns, in part, the psychological sequelae of a physical injury. Accordingly, the causal relationship of the psychological injury rises or falls on the causal relationship of the physical injuries the employee suffered as a result of the work accident.[5] Sfravara v. Star Market Co., 15 Mass. Workers' Comp. Rep. 181, 184-185(2001)(psychologist's causation opinion was

[5] As the insurer acknowledges, the causation standard applicable in this alleged psychological sequela of a physical injury is the simple "but for" causation standard. Cornetta's Case, 68 Mass. App. Ct. 107 (2007). Thus, it is enough if the employment was one of the contributing factors causing the injury. Colon-Torres v. Joseph's Pasta, 27 Mass. Workers' Comp. Rep. 61, 64-65 (2013).

contingent on impartial orthopedist's opinion causally relating employee's pain to the work injury); see Laflash v. Mt. Wachusett Dairy, 18 Mass. Workers' Comp. Rep. 254, 261 (2004)(psychiatrist's causation opinion was contingent on expert medical opinion employee had chronic orthopedic and neurological illness, including a chronic pain component). As the insurer argues, the judge failed to make adequate findings regarding the employee's physical injuries, which resulted in an inadequate foundation for his conclusion that the employee's anxiety and depression were causally related to the work injury. His inconsistent findings regarding the causal relationship of the trigeminal nerve injury and the two related surgeries addressing the employee's facial pain, as well as his mischaracterization of the medical evidence regarding the etiology of the employee's headaches, clearly factored into his determination of the employee's incapacity and the award of benefits. Accordingly, the errors are not harmless. See Fucillo v. M.I.T., 23 Mass. Workers' Comp. Rep. 355, 356 (2009)(error not harmless where it appears to have been factor in judge finding for employee).

While there is no doubt the employee was struck on the head by a magnet,[6] the specific injuries and symptoms caused by that incident remain in question. Because the psychological sequelae must be causally related to the physical injuries sustained *as a result of the industrial accident*, Laflash, supra; Sfravara, supra, we cannot determine, without more adequate findings, whether the employee's anxiety and depression were caused by any condition attributable to the accident of May 16, 2011.[7] See Praetz v.

[6] Although the parties stipulated that the employee suffered an industrial injury on May 16, 2011, (Dec. 4; see Tr. 5; Ex. 1), the insurer nonetheless contested liability. (Dec. 3; Tr. 4.)

[7] Both Dr. Hezel and Dr. Bennett assume, without specifying, that the employee's physical problems are causally related to the work accident. Dr. Bennett opined that the employee's "chronic pain" was "an element in her anxiety and depression," (Dec. 12), but, because of the inadequacy of the judge's findings, we cannot tell if the work accident is a cause of the pain. Similarly, Dr. Hezel opined that "the employee's symptoms are 'consistent with a protracted post-concussive syndrome.' " (Dec. 8.) However, those symptoms include headaches and left-sided facial numbness, the etiology of which remains in question, along with the etiology of many of the employee's other symptoms.

Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993(reviewing board must be able "to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found").

Normally, we would recommit the case to the judge for further findings of fact. However, because the judge who heard the case is no longer with the Department, recommittal is not possible. Accordingly, we vacate the decision, and refer the case to the senior judge for reassignment to another judge for a hearing de novo. During the pendency of the re-hearing, the conference order awarding § 35 benefits based on the employee's actual earnings beginning August 1, 2013, is reinstated. Where the employee has no earnings, the insurer shall pay maximum § 35 benefits.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: ***December 7, 2016***

Catherine Watson Koziol
Administrative Law Judge