COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038118-18**

Antonio Braga	Employee
Salvucci Masonry Co., Inc.	Employer
AIM Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabiszewski and Koziol)[1]

The case was heard by Administrative Judge O'Neill

APPEARANCES
Steven P. Brendemuehl, Esq., for the employee at hearing and on appeal
Linda D. Oliveira, Esq., for the insurer at hearing and on appeal

LONG, J. The insurer appeals from the administrative judge's decision awarding ongoing § 34 temporary total incapacity benefits and § 30 medical benefits. We affirm.

The employee, Antonio Braga, was sixty (60) years old at the time of hearing and worked as a mason for Salvucci Masonry Co., Inc. He attended school until the ninth (9th) grade and worked only as a laborer and mason during his career, the last nine years of which he worked for this employer. (Dec. 4; Ex. 3.) The employee sustained an industrial injury on April 2, 2018, when his right hand was struck by a piece of steel that fell from above him at a construction site at Emmanuel College. (Dec. 4; Tr. 11). The employee felt pain that extended from his hand up his arm and the hand began to swell. The employee was not able to finish work. He sought medical treatment at Mass General Hospital, where he had x-rays, was given a brace, and told to ice the hand. (Dec. 4; Tr. 12.) The employee was able to return to work light duty for fourteen (14) months, but he continued to feel numbness in his fingers and hand and a throbbing. He could not close his hand, nor hold anything, and the pain would be worse at the end of the workday.

[1] The original composition of the panelists included Administrative Law Judge Calliotte who retired before this decision was drafted. As a result, Administrative Law Judge Koziol was substituted for Judge Calliotte and participated in deliberations in this case.

(Dec. 5; Tr. 17-18.) The employee came under the care of Neil Chen, M.D., and complained of numbness in his right index finger and middle finger and a throbbing pain. The employee never had any numbness or tingling in his right hand/fingers prior to the April 2, 2018, injury.

In June 2019, he was advised to stop working by his physician. (Tr. 20-21.) After unsuccessful injections and therapy, the employee consulted with another hand specialist, Sang Gil Lee, M.D., in October of 2019, and then consulted with Victoria Bruegel, M.D., who ordered an EMG. The employee underwent carpal tunnel surgery in June of 2020 but did not experience any relief. The employee then saw Jung Mi Haisman, M.D. in December of 2020, who prescribed therapy and another EMG, as well as the only current home exercise treatment. (Dec. 5; Tr. 31)

Procedurally, the employee's claim for compensation was the subject of a § 10A conference on February 18, 2020. An order was filed on February 19, 2020, awarding § 34, temporary total incapacity benefits, from February 18, 2020, to date and continuing plus medical benefits "including an EMG as recommended by the treating doctor." (Dec. 2-3.) Following timely appeals by both parties, the employee was examined by the § 11A examiner, Hillel Skoff, M.D., on July 16, 2020. After the parties appealed the conference order, but before Dr. Skoff examined the employee, Dr. Bruegel diagnosed the employee as having carpal tunnel syndrome and he underwent right carpal tunnel surgery. The insurer filed a Motion to Submit Additional Medical Evidence citing inadequacy of the impartial report and medical complexity as grounds therefor.[2] On June 9, 2021, the judge ruled that the impartial report was adequate, but allowed the insurer's motion based on medical complexity. (Tr. 5.) See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n. 3(2002)(reviewing board may take judicial notice of contents of board file). At the hearing on June 24, 2021, the employee claimed § 34 benefits from November 11, 2019, to date and continuing. (Tr. 4; Exs. 2, 5.) The insurer accepted

[2] The decision refers to "insurer's and employee's Motions for Additional Medical Evidence" however, our review of the Board file reveals only the insurer's motion is on file.

liability for the industrial accident that occurred on April 2, 2018, and denied disability and extent of disability and denied causal relationship between the industrial injury and disability. (Tr. 4; Exs. 4, 5.) The judge instructed the parties to submit additional medical evidence in the form of reports and/or depositions, and each party submitted additional medical records and reports. No depositions were taken. Prior to the record closing, the insurer filed a Motion to Strike the Opinions of George P. Whitelaw, M.D., (Ex. 8), whose July 21, 2021, narrative report had been timely submitted as additional medical evidence by the employee. The insurer's Motion to Strike the Opinions of Dr. Whitelaw was denied and addressed by the judge in the hearing decision that was issued on November 4, 2021.

After considering the employee's testimony and examining the exhibits, the judge awarded the employee § 34 benefits from November 11, 2019, to date and continuing as well as reasonable and related medical benefits pursuant to §§ 13 and 30 for treatment relating to the employee's right hand. (Dec. 10.) The judge credited the employee's hearing testimony regarding his physical restrictions, complaints of daily pain and hand swelling and that "[h]e would like to go back to work but does not feel he is capable." (Dec. 5.)

The judge rejected the opinions contained in the insurer's additional medical records and instead adopted Dr. Skoff's opinions as follows:

- The employee sustained closed blunt trauma to his right hand in April of 2018.
- As a consequence of his injury, the patient developed scarring of the intrinsic muscles of the right hand, a common consequence of chronic hand swelling.
- Six months after the injury the employee began experiencing numbness in his hand that was not diagnosed until more than a year later.
- Though the time interval creates a dilemma as to whether the carpal tunnel syndrome is directly related to the injury of 2018. It is surely related to his work at Salvucci but the direct connection to a specific injury is unclear.
- The employee's residual complaints of stiffness in his hands [*sic*] are absolutely connected to the original injury as the blunt trauma from the striking steel has led

to scarring of the employee's hand intrinsic muscles which was not addressed by a carpal tunnel release nor benefitted from the occupational therapy which he received in the fall of 2019.

- The employee is not at an end result.
- He will need a good deal of occupational therapy to rehabilitate his hand.
- He remains disabled.

(Dec. 6.)

In addition, the judge adopted portions of Dr. Whitelaw's opinions as follows:

- The diagnosis is a closed blunt trauma to the right hand as a result of the piece of steel that fell on his right hand on or about April 2, 2018.
- That based upon a reasonable degree of medical certainty the employee developed scarring of the intrinsic muscles of the right hand with chronic hand swelling.
- That the incident of April 2, 2018 is a major if not necessarily predominant cause of the scarring of the intrinsic muscles and significant weakness of the right hand.
- The employee is disabled from returning to work and this disability is permanent and a direct result of the injuries sustained on April 2, 2018.
- As of June 21, 2021 (the date of Dr. Whitelaw's evaluation) the employee is at maximum medical improvement.

(Dec. 7.)

The crux of the insurer's argument on appeal stems from the judge's analysis of the opinions of Dr. Skoff and Dr. Whitelaw, from which the findings quoted above were drawn. In summary, on page five of his report, Dr. Whitelaw accurately recited Dr. Skoff's opinions regarding the cause of the employee's carpal tunnel syndrome. However, on page 6 of the same report, he stated he agreed with Dr. Skoff that the carpal tunnel syndrome was related to the April 2, 2018, injury, which is not an accurate portrayal of Dr. Skoff's opinions on that matter. The judge recognized this problem and

addressed it in her decision when she discussed the insurer's Motion to Strike the Opinions of Dr. Whitelaw:

> The Insurer filed a "Motion to Strike" the opinions of Dr. Whitelaw at the time their closing argument was filed. Specifically the Insurer alleges that Dr. Whitelaw mischaracterized the report of Dr. Skoff (the Sec. 11A examiner) when he opined that the work injury is the cause of the employee's carpal tunnel syndrome. While I do find that this opinion of Dr. Whitelaw, namely "that the injury that occurred on April 2, 2018 is directly related to his development of the carpal tunnel syndrome" does confuse what Dr. Skoff opined which was that the relationship of the April 2, 2018 event to the development of carpal tunnel syndrome is unclear but it "is surely related to his work at Salvucci." Given that on page 5 of Dr. Whitelaw's report he correctly stated what Dr. Skoff found, I am not sure whether this was scrivener's error or not. Nonetheless, I do not feel that this mistake warrants striking his opinion. Therefore, that motion is denied.
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> Complicating matters further, upon additional review, it seems that the carpal tunnel treatment and surgery were not part of this claim. It is not clear who paid for the surgery or whether it was claimed or denied. Accordingly, the insurer did not have the opportunity to defend this issue. Therefore, I make no finding on causal relationship or disability as it relates to the carpal tunnel syndrome in the context of this decision.

(Dec. 8.)

As a threshold matter, we note that neither party claims that the judge erred by excluding the carpal tunnel syndrome issue from consideration in this case. In light of the record, however, we are perplexed that the carpal tunnel syndrome diagnosis and surgery were not at issue during the hearing since a review of the record reveals this aspect of the claim was known and addressed by all.[3] Perhaps the parties addressed this

[3] The joint pre-hearing memorandum (Ex. 5.) reveals the employee alleged the carpal tunnel syndrome and surgery were related to the April 2, 2018, work injury and the insurer disputed the causal relationship of the carpal tunnel syndrome. Additionally, the Employee Biographical Data sheet (Ex. 3.) lists Dr. Bruegel as one of the employee's treating physicians and her treatment of the employee was for carpal tunnel syndrome, having performed the carpal tunnel surgery. Dr. Bruegel's records and operative report for right carpal tunnel release performed on June 16, 2020, were also part of the employee's additional medical records (Ex. 6.) and the insurer also submitted Dr. Bruegel's December 16, 2019, office visit report as part of its

issue during a status conference that was scheduled for November 1, 2021, three days prior to the issuance of the hearing decision, *Rizzo, supra*. however, there is no transcript of the status conference and we cannot determine if it even took place. "We have repeatedly urged judges and practitioners alike to 'conduct all but the most extraneous of trial business on the record.' " DeSisto v. City of Boston, 33 Mass. Workers' Comp. Rep. 231, 236 (2019); Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (20009), quoting from Hill v. Dunhill Staffing Systems, Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002). Be that as it may, where all the parties and the judge attest that the carpal tunnel syndrome was not at issue, we are hesitant to do that which we admonish, namely, to expand the parameters of the dispute. (See Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)(judge's determination of issues not raised by the parties is error).

The insurer argues that the administrative judge acted arbitrarily and capriciously by mischaracterizing the medical evidence used to support the findings on disability and causal relationship. (Ir. br. 9.) Specifically, the insurer cites error in the judge's reliance on the opinions of both Dr. Skoff and Dr. Whitelaw, the former for being inadequate and the latter for being internally inconsistent and mischaracterized by the judge. We disagree with most of the insurer's arguments but do find a technical error by the judge that rises to harmless error only. We address the insurer's concerns and make further comment.

The insurer argues:

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additional medical records. (Ex. 7.4.) The hearing transcript also reveals that the employee was questioned extensively on direct examination about the carpal tunnel syndrome and the surgery (Tr. 26-30.) without any objection from the insurer and on cross-examination was only questioned about how he was referred to Dr. Bruegel. At the very least, it appears that the carpal tunnel syndrome and surgery issue could have been tried by consent. Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. 417, 419 (2000)("a claim may be deemed amended where the parties try it by consent."); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 245 (1997)(issue tried by consent where "insurer did not object until practically all the evidence thereon was in"). DeSisto at 239.

> [The judge] failed to find the report of Dr. Skoff inadequate and adopted his opinion on disability. …[F]irst the report does not describe the extent of the employee's disability which is causally related to the employment. Without such, the report is inadequate on its face and should have been determined such. Second, this opinion does not distinguish the causality of the disability between the causally related blunt trauma and the unrelated carpal tunnel syndrome.[4]

(Ir. br. 9.)

The insurer's motion for inadequacy merely alleged that Dr. Skoff failed to opine about the employee's "current restrictions," and that the report, which was "near 12 months old," was stale and inadequate because it "does not address the employee's current status." (Ins. Motion to Submit Additional Medical Evidence 6/8/21); Rizzo. The insurer did not raise the ground for inadequacy now advanced, pertaining to the carpal tunnel syndrome, nor did it object to the judge's failure to find the report inadequate at that time or any time thereafter prior to this appeal and this argument is therefore waived. See Gravallese v. General Electric Aviation Co., 34 Mass. Workers' Comp. Rep. 41, 49 (2020); Diaz v. MBTA, 33 Mass. Workers' Comp. Rep. 41, 45-46; Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn &Wynn v. Massachusetts Commn. Against Discrimination, 431 Mass 655, 674 (2000) (" 'Objections, issues or claims – however meritorious – that have not been raised' below, are waived on appeal"). In any event, the judge allowed the insurer's motion to submit additional medical evidence on the ground of medical complexity on June 9, 2021, giving the insurer the same remedy had the report been deemed inadequate. Petersen v. Mass. State Lottery 33 Mass. Workers' Comp. Rep. 109, 115 (2019); Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670, 673 (1995).

To the extent that the insurer argues Dr. Skoff's report is deficient in its causal relationship and disability opinions, we disagree. Initially, in its brief, the insurer argues

[4] We note that contrary to the insurer's position, Dr. Skoff did causally relate the employee's carpal tunnel syndrome to his employment at Salvucci Masonry Co., Inc., but the doctor was unsure if it was specifically related to the accepted liability incident of April 2, 2018.

that Dr. Skoff's "report does not describe the extent of the employee's disability which is causally related to the employment." (Ir. br. 9.) However, a plain reading of Dr. Skoff's opinions, quoted above and adopted by the judge, demonstrates otherwise. We also disagree with the second component of the insurer's argument since Dr. Skoff's opinion statement clearly ascribes the employee's disability to the incident of April 2, 2018. Indeed, he opined the scarring of the intrinsic muscles of the employee's hand, which he clearly opined was caused by the accident on April 2, 2018, remained unchanged by the therapy the employee received prior to the carpal tunnel release or from the surgery itself (Ex. 1.)

However, the insurer's argument that Dr. Whitelaw "considered conditions that were not a part of the claim, specifically carpal tunnel syndrome and cubital tunnel syndrome in offering his opinion on disability" (Ir. br. 12.) does have merit and requires attention. The judge attempted to reconcile the medical opinions. The judge noted the discrepancy was a possible scrivener's error but properly admitted she couldn't discern whether it was or not. Indeed, Dr. Whitelaw, was never questioned about the apparent discrepancy. However, in our view, the only discrepancy is really whether or not Dr. Whitelaw intended to "agree" or perhaps "disagree" with Dr. Skoff on the issue of carpal tunnel syndrome causation. The slight difference is that Dr. Whitelaw opines that the April 2, 2018, incident caused the carpal tunnel syndrome, and Dr. Skoff is unclear as to whether it is related to the incident.

In any event, the judge properly excluded the carpal tunnel diagnosis from her analysis of the issues in dispute in her general findings and rulings of law. The judge was well within her discretion to adopt all, part, or none of the expert's opinions, as long as she did not mischaracterize the doctor's opinion, fail to consider the entire record or adopt conflicting opinions. Noel v. Faulkner Hospital, 31 Mass. Workers' Comp. Rep. 139, 142 (2017); Marcoux v. Lawrence General Hospital, 32 Mass. Workers' Comp. Rep. 61, 63 (2018).

The only error arose when the judge, after removing the carpal tunnel diagnosis from the case, still adopted Dr. Whitelaw's disability opinion that included the carpal tunnel diagnosis in his assessment of employee's incapacity. However, on the record before us, even if the report of Dr. Whitelaw had been stricken as requested by the insurer, the report and opinions of Dr. Skoff, as well as the adopted testimony of the employee, support the judge's causation and total incapacity findings. See Wilson's Case, 89 Mass. App. Ct. 398 (2016)(In making findings, the administrative judge may give decisive weight to the credible testimony of the employee and also may weigh any separate medical evidence. Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge). Any error, therefore, attributable to the judge's use of Dr. Whitelaw's opinion is rendered harmless.

We also disagree with the insurer's contention that the decision is contrary to law because "the employee's medical status and vocational profile does not support a finding of total incapacity." (Ir. br. 14.) In addition to the disability opinion of Dr. Skoff, the judge adequately performed a vocational analysis under Scheffler's Case, 419 Mass. 251 (1994). Regarding the vocational aspect of the case, the judge found:

> The Employee testified and I so find that he continues to experience pain on a daily basis. He takes 4 to 6 Advil a day. His hand swells up if he walks or does anything that leaves it hanging. He tries to help around the house by driving his wife to work or carrying up the laundry with his left hand, but he can't help out with household chores like he did before he was injured. He can't referee soccer like he did before he was hurt. He does play cards for a few hours a day. He cannot return to masonry work because he cannot hold a trowel, pick up a block or perform other necessary jobs with his right dominant hand. He has difficulty picking up a pot of coffee with his right hand or a gallon of milk. He can't twist the top off a water bottle or open jars without pain. He can only drive for 5 to 6 minutes. He has trouble shaving and the cold intensifies the throbbing. He would like to go back to work but does not feel he is capable.
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> I adopt the testimony as presented by the Employee above.

(Dec. 5.)

In finding the employee to be temporarily totally incapacitated from gainful employment, the judge stated:

> The right hand injury sustained at the workplace has resulted in ongoing pain and limited mobility. His past work experience involves physically arduous jobs as a laborer and mason, which based on his testimony, he would not be capable of performing. Additionally, given his lack of education, his work history of physically demanding jobs, his age, and his physical restrictions, I find that he is incapacitated from all work at this time. In light of these facts and my observations of the employee, I find that he is totally disabled.

(Dec. 8-9)

We are satisfied that "the judge properly made an individualized assessment of the employee's [§ 34] claim by considering his medical condition, pain, work history, age …[and] education before concluding that he remained totally disabled." Mulkern v. Mass. Turnpike Authority, 20 Mass. Workers' Comp. Rep. 187, 198 (2006) *quoting* Fuentes v. Fries Towing, 19 Mass. Workers' Comp. Rep. 75, 77 (2005).

Accordingly, the decision of the administrative judge is affirmed. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,834.27, plus necessary expenses.

So, ordered.

Martin J. Long
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: **May 10, 2023**

Catherine Watson Koziol
Administrative Law Judge