COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019900-92 064092-92**

Barry C. Buckley	Employee
Boston Edison	Employer
Boston Edison	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer

KOZIOL, J. Raising multiple claims of error,[1] the employee appeals from a decision finding he sustained work-related injuries on May 10, 1992 and October 13, 1992, (Dec. 11-13), but denying and dismissing his claims for § 30 medical benefits, § 34A permanent and total incapacity benefits from January 1, 2010, and continuing, and an adjustment in the rate of compensation pursuant to § 35B. Only one of the alleged claims of error requires us to vacate the decision and recommit the case to the administrative judge.

At the time of both injuries, the employee was working for the employer as a Cable and Conduit Installer – Grade A. On May 10, 1992, he slipped and fell while working inside a manhole, injuring his left leg, hip, and low back. (Dec. 9.) Following that injury, he was out of work for approximately six weeks and was paid workers' compensation benefits. (Dec. 11-12.) He returned to limited duty work for a period of two weeks before returning to full duty. (Dec. 11.) On October 13, 1992, the employee felt a twinge in his back and stabbing pain between his shoulder blades and neck while pulling a wet plank from a manhole.

[1] The employee advances five main arguments, each containing multiple claims of error that he alleges require reversal of the decision. (Employee br. 7-30.)

(Dec. 12.) His absence from work from October 16-19, 1992, was paid through the self-insurer's workers' compensation account.[2] (Dec. 13.) He returned to work, and on January 14, 1996, was promoted to the position of Construction Inspector – Grade C. (Dec. 8.) He continued to work in that capacity for the self-insured employer until his last day of work, December 31, 2009. (Dec. 8.) He then filed the present claim seeking § 34A benefits commencing January 1, 2010.

The employee's claim was denied at conference. The employee timely appealed, and a de novo hearing was held.[3] The judge aptly observed: "the testimony, the medical evidence, and other documentary evidence concerning the claimed industrial injuries . . . is extensive, varied, at times vague, and sometimes contradictory, spanning as it does a period of some twenty years." (Dec. 8-9.) After making thorough findings of fact, the judge concluded:

> 81. Considering the medical evidence surrounding the employee's physical disability and incapacity in its entirety, I find there is no dispositive medical evidence that the employee's chronic pain and degenerative disc disease, diagnosed by Drs. Zolot, Rosen, Weiner, and others, are causally related to the injuries of May 10, 1922 or October 13, 1992. The injuries sustained on those dates were thigh and back contusions, hamstring pull, and lumbar strain. These were treated conservatively, and the employee was able to return to full duty.

(Dec. 23-24.) He further concluded the employee "failed to meet his burden of proof that the chronic pain and depression he has been experiencing is causally related to the injuries of May 10, 1992, and October 13, 1992." (Dec. 31.)

In his first argument on appeal, the employee contends reversal is required because the judge made "clearly erroneous findings," five of which we discuss, and the remainder of which we summarily affirm. (Employee br. 7-18.) Most of

[2] The judge made no specific findings as to when the employee returned to work. The transcript and the parties' briefs indicate the employee was paid workers' compensation benefits through February 4, 1993, when he returned to work. (Tr. I, 128; Employee br. 2; Self-ins. br. 4.)

[3] The hearing took place on September 19, 2012, and October 26, 2012. We refer to the transcripts as "Tr. I" and "Tr. II," respectively.

the employee's claims of error concern the judge's findings regarding the height from which the employee fell on May 10, 1992, and the nature of the injuries he sustained as a result of that fall. First, the employee takes issue with the judge's finding that on May 10, 1992, he fell from a distance of about four feet. There is no error. The record contains an abundance of conflicting evidence regarding the height from which the employee fell, ranging from records indicating that he did not fall from a height at all, through records stating that he fell from a height of fifteen feet. (Dec. 10, 15-16.) The judge made detailed findings of fact based on the evidence, resolving the conflict and stating that he was persuaded that the employee "[fell] to the floor, from a height more approximate to four feet." (Dec. 16.) Brommage's Case, 75 Mass. App. Ct. 825, 827-828, quoting from Pilon's Case, 69 Mass. App. Ct. 167, 169 (2005)("judge's findings that are reasonably deduced from the evidence and the rational inferences of which it was susceptible will not be disturbed").

The employee's second and third claims of clearly erroneous findings are interrelated. His second claim has two parts. The employee begins by arguing the judge erred by failing to discuss an alleged fracture of the transverse process of vertebrae in the employee's lumbar spine. He further argues the judge erred by failing to link an October 13, 1992 x-ray report of "some evidence, *perhaps* of an older fracture of the left L3 transverse process" (emphasis supplied), with a hand-written addendum to a report from a May 10, 1992 x-ray stating "split in L transverse process"[4] in order to conclude that a fracture occurred as a result of the

[4] The employee recounts only part of the hand-written "addendum" appearing in the physician's notes from the employee's May 10, 1992, emergency room visit, and fails to acknowledge the findings set forth in the x-ray's "Final Report." (Ex. 5.1.) The final report of the May 10, 1992, x-ray "Approved Mon May 11, 1992," expressly states, "linear lucencies course over the midportion of both transverse processes of L1 are noted which are unchanged compared with prior film of 6/24/92 [sic]. These most likely represent anomalous transverse processes or may possibly be related to old trauma. No evidence of acute fracture or dislocation is seen." (Ex. 5.1)

May 10, 1992, accident. (Employee br. 9-10.) The argument lacks merit for a number of reasons.

The judge is under no obligation to make findings regarding evidence he does not adopt or find persuasive. Clark v. Longview Assocs., 24 Mass. Workers' Comp. Rep. 253, 257-258 (2010). Here, the judge specifically found that after falling on May 10, 1992, the employee "sought immediate medical attention, at Beth Israel Deaconess Medical Center [BIDMC]" where the emergency department diagnosed him as sustaining a "thigh/back contusion" with "ø[zero] evidence of fx [fracture] or bleeding" and "the radiology report concluded that 'no evidence of acute fracture or dislocation is seen' [Id.]. This diagnosis was affirmed on May 27, 1992 at the Medical Service Center [Ex. 17.1]." (Dec. 10-11; brackets in original.)

Moreover, as the self-insurer points out, (Self-ins. br. 6), there is no medical opinion in evidence stating the employee sustained a fracture when he fell on May 10, 1992. Josi's Case, 324 Mass. 415, 418 (1949); Kent v. Town of Scituate School Dept., 27 Mass. Workers' Comp. Rep. ___ (12/10/13)(were we to say the judge erred, we "would be requiring the judge to have expert knowledge of a medical issue"); Colon-Torres v. Joseph's Pasta, 27 Mass. Workers' Comp. Rep. 61, 65-66 (2013)(causation cannot be determined or inferred by judge's own review without expert medical testimony). Thus, the inference proffered by the employee is neither required nor proper. Commonwealth v. Roy, 464 Mass. 818, 825 n.9 (2013)(inference must be "reasonable and as such, not a guess").

The employee's third claim of a clearly erroneous finding, argues the judge abused his discretion by failing to draw a negative inference regarding the self-insurer's credibility based on the alleged "suppression of [] critical evidence" consisting of a May 26, 1992, CT scan performed by Boston Imaging Group, which "[*m]ore likely than not,* [] confirmed a fractured left L3 transverse process." (Employee br. 12; emphasis in original.) He makes this assertion with no citation to the record and despite acknowledging that Dr. Sandra J. Thompson reported the

CT scan was "normal." (Employee br. 12.) The argument lacks merit. Nonetheless, we address the suppression allegations because they are peppered throughout the employee's brief.[5] (Employee br. 21, 25-27.) In each instance the employee's argument suffers from the same infirmities.

The employee alleges that the self-insurer suppressed medical records it was ordered to produce prior to the second day of hearing.[6] (Employee br. 9, 12.)

[5] The employee also asserts the judge erred by failing to draw an inference that Dr. James Rainville treated the employee for his accepted back injury in 1995. (Employee br. 20-21.) The employee asserts this inference is reasonable because the self-insurer paid for eight physical therapy treatments prescribed by Dr. Rainville for an "acute cervical strain" resulting from an off-duty motor vehicle accident that occurred in 1995, and that it made those payments through the account established for the May 10, 1992 date of injury. Regarding Dr. Rainville's notes, the employee accuses the self-insurer of suppressing those medical records, a claim he repeats later in his brief concerning the same records. (Employee br. 21, 25-27.)

[6] The record shows that on September 14, 2012, prior to the first day of hearing, the employee filed a "Renewed Motion to Compel Production" alleging in pertinent part:

> **Personnel File**
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> 1. Defense counsel has produced a personnel file stripped of whole categories of documents it should contain, e.g., union grievances, STD/LTD documents, DIA documents, medical records, etc. At our motion hearing he indicated he would investigate. I am still waiting.
>
> * * *
>
> Wherefore the employ [sic] respectfully requests an ORDER pursuant to 452 CMR § 1.12(4) for the production of:
>
> 1. The employee's complete personnel file including weekly payroll records form [sic] 5/10/91 until his last day worked and/or otherwise compensated, and union grievances documenting lost overtime wages which were found to be improper under the CBA and affect the AWW issue.
> 2. Documentation of all weekly benefits and medical payments made for the accepted 5/10/92 and 10/13/92 injuries.

On the first day of hearing, September 19, 2012, the parties argued the motion to compel and the judge ruled:

> The Court: Okay. Based upon, you know, what has been presented in the argument, I am going to allow the employee's Motion for the Production of Documents that may exist within the labor relations department folder. As well as the production of the short term disability and long term disability documents

In support of this allegation, the employee points to the self-insurer's late submission of medical records after completion of the lay testimony, and its failure to produce all of the medical records corresponding to payments it made to the employee's various medical providers in the years following the injury of May 10, 1992. (Employee br. 12, 21, 26-27.)

Whether the self-insurer violated the judge's discovery orders and suppressed evidence are issues that require findings of fact. 452 Code of Mass. Regs. § 1.12(4)(a)("Failure to comply with said order without good cause may result in the assessment of costs or penalties pursuant to M.G.L. c. 152, § 14"). The board file does not indicate that the employee filed a motion seeking findings and sanctions against the self-insurer after its late submission of records, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file), and the employee does not allege that he filed such a motion. The judge made no findings or rulings indicating the self-insurer failed to comply with his discovery orders or otherwise suppressed evidence.

On January 3, 2013, the employee filed a "Motion to Admit Medical Records First Produced Post-Hearing by the Self-Insurer," stating that the records had been the subject of a status conference, which was not recorded, and requesting the admission of these records in evidence. Rizzo, supra. By then, the employee knew what records were missing and possessed the information

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> which reflect the payments made to the employee. The DIA documents that are being sought, the employee has access to that through the Board file and the medical records have been provided.
>
> And the documents show that the payments of the May '92 and October '92 injuries, have been provided?
>
> [Employee Counsel]: Yes.
>
> The Court: So are there other documents that you feel may be in the possession of the employer that you're seeking to have produced?
>
> [Employee Counsel]: I think that covers it, Judge.

(Tr. I, 17.)

necessary to obtain them. He knew: the name of the company that performed the May 26, 1992, CT scan; the dates he was treated by Dr. Thompson, whose statements he impugns; and, the dates he was treated by Dr. Rainville. Nonetheless, he filed no motion for an extension of time so that he could obtain the missing records from these providers or take their depositions. Moreover, he gives no explanation as to why he did not, and could not, obtain the records himself. Thus, the employee's argument overlooks the fundamental principle that the injured employee carries the burden of proof on every "element[] necessary to entitle him to an award of compensation." Martinelli v. Chrysler Corp., 28 Mass. Workers' Comp. Rep. __ (4/1/2014); Sponatski's Case, 220 Mass. 526, 527-528 (1915). Under the circumstances, his unsubstantiated claims that the self-insurer possesses evidence he alleges would prove his case amount to little more than an improper attempt to shift the burden of proof to the self-insurer.

The employee's fourth claim of error appearing under the heading "clearly erroneous findings," asserts the judge erred in allowing the self-insurer to contest liability regarding the injuries of May 10, 1992 and October 13, 1992. (Employee br. 17-18.) The employee's Hearing Memorandum does not list § 7(1) [7] as an issue in this case regarding either date of injury. Rizzo, supra. The employee's

[7] General Laws c. 152, § 7(1), provides:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits. The notice shall specify the grounds and factual basis for the refusal to commence payment of said benefits and shall state that if no claim has yet been filed, benefits will not be secured for the alleged injury unless a claim is filed with the department and insurer within any time limits provided under this chapter. Any grounds and basis for noncompensability specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding. An insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.

motion "to establish liability," filed on September 17, 2012, was argued on the record the first day of hearing. However, the employee did not discuss the circumstances surrounding payment of the October 13, 1992, claim, and only referred to the self-insurer's failure to pay or deny the May 10, 1992, claim within fourteen days of the date of injury. (Tr. I, 18-27.) Rather than arguing that the self-insurer lost its defenses to the claims, or seeking a penalty under § 7(1), the employee contended the self-insurer's tardiness compelled the judge to make an affirmative finding establishing liability regarding the May 10, 1992, injury. Id. The employee's request for relief was overbroad because it ignored the last sentence of § 7(1): "[a]n insurer's inability to defend on any issue shall not relieve the employee of the burden of proving each element of any case." Thus, the judge did not err in granting the relief requested because he could not properly make a finding of liability without hearing the evidence in the case.

In any event, even if we were to assume that the employee's motion was sufficient to preserve the issue for appeal regarding both dates of injury, the claimed error, if any, was harmless. The judge found that the employee sustained injuries arising out of and in the course of his employment on May 10, 1992, and October 13, 1992, thereby establishing liability for both dates of injury. Thus, the employee fails to show any harm from the alleged error. To the extent he now argues, for the first time in his reply brief, that the self-insurer owes him penalties under § 7, the argument is waived.[8]

[8] We note however, that despite finding liability attached for both dates of injury, (Dec. 12, 13), under the heading "**Liability**" the judge made rulings addressing only the issue of causal relationship and determining the self-insurer was not "liable for the employee's presently claimed disability and incapacity." (Dec. 31-32; emphasis in the original.) Because these rulings refer to the issue of causal relationship, not liability, it would be clearer if the judge discussed issues of causal relationship under a separate heading to reflect the concept that liability and causal relationship are separate legal elements of a claim. Compare, G.L. c. 152, § 13A(1) and (2) (awarding a larger attorney's fee to successful employee counsel where initial liability is contested by an insurer) with § 13A(3) and (4) (awarding a smaller attorney's fee to successful employee counsel in all other disputed cases).

The employee's fifth claim of clearly erroneous findings takes issue with the judge's findings concerning the records of Dr. William Shea. He contends the judge erred in finding that there was no record or report from Dr. Shea indicating the employee was suffering from left sciatica after the May 10, 1992, injury. The judge found:

> 17. The employee was diagnosed at BIDMC emergency department as "thigh/back contusion" [Ex. 5.1].
>
> 20. The employee was seen at the employer's health center on May 12, 1992, where he reported that his primary care physician, Dr. William Shea, had diagnosed "sciatica L hip" [Ex. 5.2, quotation marks are in original, from which I infer the statement came from the employee].[4]
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> [4]There is no record or report from Dr. Shea in which he provides a diagnosis of sciatica, or any diagnosis.
>
> 24. . . . Based on these facts, I find the employee sustained a compensable injury on May 10, 1992, viz., a left thigh/back contusion and acute hamstring pull.

(Dec. 11-12; footnote and brackets in original.) The employee points to a billing slip dated 5/11/92, signed by Dr. Shea, stating the injury occurred on May 10, 1992, and the employee's diagnosis was "sciatica L hip." (Ex. 5.12.) Accordingly, we agree the judge erred in stating that there was no record or report from Dr. Shea providing a diagnosis of left hip sciatica.

The judge's findings of fact show that his analysis of the case was largely built on the improper foundation that when the employee fell on May 10, 1992, he sustained a "left thigh/back contusion and acute hamstring pull" and that the diagnosis of left sciatica was not associated with that injury. (Dec. 17-18 ¶s 50 and 53; 19 ¶58; 20 ¶s 63 and 64; 22 ¶76; 22 ¶ 76; 23-24 ¶ 81; 31-32.) Because the erroneous finding served, in part, as the basis for other findings and rulings regarding causation and disability, we recommit the matter for further findings of fact and rulings of law. McLaughlin v. Kohl's Dept. Store, 23 Mass. Workers'

Comp. Rep. 67, 68 (2009); Cibene v. Brentwood Realty Trust, 8 Mass. Workers' Comp. Rep. 172 (1994).

We do not address the employee's second argument on appeal, that a "heightened burden of proof [was] imposed on the employee," because the argument is largely premised on the judge's erroneous finding that Dr. Shea's records did not contain any diagnosis of left hip sciatica.

The employee's third argument on appeal, "mental/emotional injuries that result from a compensable physical condition are subject to a 'but for' causation analysis," states a truism. Although the judge found there was no causal relationship between the employee's psychiatric condition and the work-related injuries, the judge's erroneous finding regarding Dr. Shea's records may have influenced his reasoning in part. Accordingly, we do not address the argument because the judge's findings on the psychiatric aspect of the employee's claim may be subject to revision on recommittal.

The employee's fourth and fifth arguments on appeal lack merit. In his fourth argument, the employee asserts, without citation to any case or statutory authority, that he proved his claim for § 34A benefits because it is supported by the opinions of physicians, whose medical opinions the judge did not adopt, and because he received short-term disability, long-term disability and Social Security Disability benefits. The argument goes to the weight of the evidence "which is exclusively the judge's responsibility." Sullivan v. Premier Home Care, 26 Mass. Workers' Comp. Rep. 301, 308 (2012); Nelson v. Adap/Rite Aid Auto Palace, 10 Mass. Workers' Comp. Rep. 503, 507 (1996)("The judge is free to determine what significance, if any, an award [of Social Security Disability benefits] may have in his determination").

In his fifth argument, he asserts, again with no case or statutory citation, "[t]he opinions of treating doctors should be given controlling weight, consistent with [S]ocial [S]ecurity practice, the Mass. Rules of Evidence, the liberal interpretation required of the Act, common sense, and recent RICO caselaw."

(Employee br. 22-29.) The argument is contrary to longstanding case law, Amon's Case, 315 Mass. 210, 214-215 (1943); Ingall's Case, 63 Mass. App. Ct. 901, 902 (2005), and cannot be given credence in the presence of a statutory scheme that requires the use of an impartial medical examiner, whose opinions have the status of "prima facie evidence." G.L. c. 152, § 11A(2). To the extent the employee cites to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), claiming the diagnoses from the self-insurer's physicians, Dr. Giles Floyd and Dr. Michael Mufson, were unreliable and should be stricken from the record, the employee failed to object below to the admission of either physician's opinion. Thus, the issue is waived. Canavan's Case, 432 Mass. 304, 312 (2000); Taylor v. Morton Hosp. & Medical Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30 (2002)(objections to admissibility of medical evidence waived if not raised below).

Lastly, the employee requests that we direct the judge to take the following actions on recommittal: 1) take a view of the May 10, 1992 accident site; 2) allow further discovery and depositions; and, 3) make "the self-insurer [] pay for the forensic examination, by a team chosen and supervised by employee's counsel, of every NSTAR and Liberty Mutual computer in the Commonwealth." (Employee br. 30.) We deny the employee's requests. See, G.L. c. 152, § 11 ("At the hearing the member shall make such inquiries and investigations as he deems necessary . . . ."). In consideration of Dr. Shea's billing record of May 11, 1992, (Ex. 5.12), we vacate the decision and recommit the matter for further findings of fact and rulings of law.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **May 5, 2014**