COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 046146-04

Calvin Vibert	Employee
Raytheon Company	Employer
Raytheon Company	Self-Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Koziol)
The case was heard by Administrative Judge Bean.

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Douglas A. Fecteau, Esq., for the self-insurer

FABRICANT, J. The self-insurer challenges a judge's finding that the employee suffered a back injury entitling him to a closed period of § 34 temporary total incapacity benefits. The self-insurer maintains the employee's back pain was not at issue at hearing. We agree, vacate the closed period award, and recommit the case for further findings regarding whether the employee was disabled during the closed period due to his claimed left knee injury, which was properly at issue.

Calvin Vibert, age fifty-five at hearing, worked for the employer for twenty-six years, most recently as a carpenter. In that position, he pushed a 200 to 420 pound cart containing his tool box over carpeting throughout the employer's complex. The employee claims the cart was difficult to push due to its weight, the carpeting and defective wheels. In two claims filed on or about November 1, 2005, he alleged he injured his back, left knee and legs on March 29, 2004, and March 29, 2005.[1] (Dec. 892-893.) At the § 10A conference, according to the self-insurer,

[1] The two claims are identical except for the dates of injury. We take judicial notice of documents within the Board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

employee's counsel stated the employee was proceeding on the left knee claim only.[2] (Self-ins. br. 1-2.) The administrative judge issued a temporary denial, and the employee appealed to a de novo hearing. (Dec. 891.)

At hearing, the employee claimed weekly § 34 benefits from February 9, 2004[3] through April 16, 2004, and from March 29, 2005 to date and continuing. (September 28, 2006 Tr. [hereinafter Tr. I], 3-4). As the employee began to testify that his back pain started in 2004 mainly as a result of pushing his tool box, (Tr. I, 12), the following colloquy ensued:

> Mr. Fecteau: Your Honor, I'm going to object to this line of questioning. It's the self-insurer's understanding that this claim is for left knee only so I'm not sure of the relevancy of probing this witness regarding back pain.
>
> The Judge: What is the probative value of the low back pain?
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> Ms. Benoit: Well, he had some initial back pain which the impartial comments on and says it's essentially resolved and it didn't-it did progress to knee pain, but I'll move right on past that.
>
> The Judge: All right.
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> Mr. Fecteau: My only the [*sic*] concern, Your Honor, is at the conference - Again my sister was not here but, as you may recall and your notes may reflect, this was somewhat of a convoluted body part claim, and Attorney Kerrigan emphatically stated this claim is for left knee only, which simplified the issues and allowed the parties to proceed to an orthopedic impartial exam whereas prior to that revelation the self-insurer was seeking a more global physiatric examination.
>
> The Judge: Mm-hmm.

[2] There is, of course, no record of the conference and no indication in the Board file the employee withdrew the back claim. See Rizzo, supra.

[3] There was no explanation as to why the initial claim stated the first date of injury as March 25, 2004, but the hearing memorandum (Ex. 1) and the employee's testimony (Tr. I, 14), both indicate the employee initially left work on February 9, 2004.

> Mr. Fecteau: So in that regard, Your Honor, again *the self-insurer is here today on what they believe to be a left knee only claim.*
>
> The Judge: All right. *Well, I understand that, and that's how we'll proceed.* But, as she goes through -we've all seen many cases where someone falls down, hurts five body parts but we're only here for the one or the two that didn't resolve fairly quickly. That doesn't mean you can't discuss those other three just so you get [*sic*] history straight. So I'm going to allow her to do that.

(Tr. I, 13-14.) (Emphasis added.) There was no objection to the judge's ruling, and no further discussion on the record on the issue. At the end of the lay testimony, the judge declared the case involved complex medical issues not sufficiently addressed in Dr. Ralph Wolf's impartial opinion. (Tr. I, 70; Dec. 892.) Both parties submitted additional medical evidence. In his decision, the judge found:

> Over the course of several months, the employee developed back pain. He attributed the onset of the back pain to his work as a carpenter, in particular, the pushing of his heavy toolbox throughout the company complex. *The employee's back pain is not at issue in this case. Along with the back pain, he began to experience knee pain. He left work due to his back and knee pain on February 9, 2004. He described his knee pain at this time as "minor." He was out of work primarily due to his back pain.* He received treatment including physical therapy and returned to work on April 16, 2004. By that date his knee pain was gone and his back pain was nearly gone.

(Dec. 892-893.)(Emphasis added.)

The judge concluded that "the employee suffered back and left knee injuries at work." (Dec. 897.) He found "the employee was [totally] disabled due to his *work related back pain* from February 9, 2004 to April 16, 2004." (Dec. 898.) (Emphasis added.) In addition, the judge found the employee had been totally disabled due to his knee injury since March 29, 2005. (Dec. 897.)

The self-insurer appeals only the judge's award of the closed period of benefits for a back injury. It contends the colloquy at hearing, quoted above, is a clear acknowledgement by the judge that the employee's back pain was not at issue. (Self-ins. br. 6.) The self-insurer argues that, in reliance on the judge's statement at hearing, it did not defend against a back claim. It contends that allowing an award for a back injury under such circumstances would infringe on the self-insurer's due process rights to develop its defense. (Self-ins. br. 8.) Moreover, the judge, in his decision, clearly stated that the employee's back pain was not at issue. (See Dec. 4.)

The employee acknowledges his back pain was not at issue in the hearing, (Employee br. 5), but maintains that the self-insurer has confused the issue of back pain with the employee's claim of an injury in 2004. The employee argues the fact that his back pain had resolved does not mean the judge could not find he injured his back at work in 2004, and award benefits. The self-insurer should have defended the claim accordingly, says the employee. (Employee br. 5, 7.) We disagree.

The employee is correct that his claim for an injury in 2004 was before the judge. However, based on the above-quoted discussion that transpired at hearing, it is clear the employee's claim no longer encompassed a back injury. Insurer's counsel objected to testimony regarding a back claim and stated his understanding that the only claim before the judge was the left knee claim. The judge indicated the case would proceed on that basis and he would allow testimony regarding the employee's back pain only insofar as it provided history. The employee's counsel did not object to this ruling or otherwise address it. (Tr. I, 13-14.) Thus, the issue of whether the employee suffered from disabling, work-related back pain was removed from consideration at the hearing level. Under these circumstances, the judge could not properly consider the back injury, though it was originally claimed, or award the employee benefits for disabling back pain resulting from that injury. See Paganelli v. Mass. Turnpike Auth., 21 Mass. Workers' Comp. Rep. 9, 14-15 (2007)(where employee did not claim a back injury and judge stated "the back is not an issue today," judge erred in finding employee's back problems causally related to work injury). It is not for the judge to be the trial strategist for the parties. MacEachern v. Trace Const. Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007), citing Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). Where a claim is effectively withdrawn, as here, and not tried by consent, the judge strays from the parameters of the case and errs in making findings on an issue not properly before him. MacEachern, supra, citing Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31, 32 (2006). In this situation, the self-insurer had no real opportunity to defend and present evidence against a claim for back pain since it understood it was not before the judge. The result is a violation of the self-insurer's due process rights. See Battaglia, supra at 463.

Accordingly, we reverse the judge's finding of a compensable back injury and vacate the closed period award of benefits from February 2, 2004 through April 16, 2004. Because the employee also alleged a knee injury during that time, we recommit the case for the judge to make further findings on causation and extent of disability, if any, due to the alleged left knee injury for that period. In all other respects, the decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: June 16, 2009