COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045978-04**

Carol Davoll	Employee
Parmenter VNA & Community Care Inc.	Employer
ALEA North America Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Hernández.

APPEARANCES
J. Channing Migner, Esq., for the employee
Karen S. Hambleton, Esq., for the insurer

KOZIOL, J. The parties cross-appeal from a decision denying the employee's claim for § 34 total incapacity benefits, and ordering the insurer to pay both reasonable medical expenses related to the employee's left biceps tendonitis and a fee to employee's counsel pursuant to § 13A(5). The employee argues the judge: 1) erred in his legal analysis of the issue of causal relationship; 2) made arbitrary and capricious credibility findings; and, 3) erroneously failed to rule on the employee's motion to submit additional medical evidence. The insurer argues the judge erred in awarding a fee to employee's counsel because no weekly benefits were awarded and no specific medical bills or treatments were in controversy.

The employee, age fifty-eight (58) at the time of the hearing, is a registered nurse who, at all relevant times, worked for the employer as a community health nurse. (Dec. 4.) On November 24, 2004, while preparing for an upcoming flu clinic, the employee engaged in repetitive activities using her left upper extremity to open between three and five hundred syringe packages. (Dec. 4.) After opening these packages, the employee's left upper arm became painful and she reported the incident.

(Dec. 4.) The employee first sought medical treatment for her left shoulder injury on December 31, 2004. At that time, she was diagnosed as having "a probable left shoulder impingement syndrome," and on January 3, 2005, she was also diagnosed as having left biceps tendonitits. (Dec. 4.) On May 29, 2005, a MRI revealed chronic tendonopathy of the supraspinatus but no rotator cuff tear. (Dec. 4.)

The employee continued to work for the employer while she received medical treatment, consisting of injections and physical therapy, for her left shoulder injury. (Dec. 4.) Her last day of work was August 18, 2005, and on August 21, 2005, while vacationing in Maine, the employee slipped and fell, experiencing an increase in her left shoulder pain. (Dec. 4, 5.) On September 20, 2005, a MRI revealed a left torn rotator cuff and a displaced biceps tendon. (Dec. 5.) The torn rotator cuff was surgically repaired on January 10, 2006. (Dec. 5.) The employee has not returned to work.

The insurer opposed the employee's claim for weekly § 34 total incapacity and medical benefits from August 22, 2005 and continuing. An administrative judge denied the claim at a § 10A conference and the employee appealed. On February 28, 2007, the employee was examined by an impartial medical examiner, orthopedic surgeon Dr. A. Jerome Philbin. (Dec. 2.) The matter then was assigned to the administrative judge who conducted the hearing. At the hearing, the insurer disputed liability, disability and the extent thereof, causal relationship, raised § 1(7A) as a defense, and denied entitlement to medical benefits and § 36 loss of function benefits. (Dec. 2.) The parties took the deposition of Dr. Philbin on May 21, 2008 and the record closed on May 28, 2008. (Dec. 2, 3; see footnote 4, infra.)

The judge made the following subsidiary findings of fact regarding the medical evidence:

> Dr. Philbin opined that the St. Andrew's Hospital emergency room records revealed that the examination [post-fall] was directly [sic] solely to the left upper extremity and the right upper extremity was normal. Dr. Philbin further opined that 'the fall was a primary cause of her rotator cuff tear with the previously confirmed tendonosis of the supraspinatus as a minor contributing

> factor.' (Exhibit 1 at pg. 3; Depo. at pg. 45).[1] Dr. Philbin opined that the Employee's 'tendon was fully intact in May so the fall caused the rotator cuff tear. . . .' (Depo[.] at pg. 40, 57). Dr. Philbin opined that the fall in August 2005 in Maine was the major factor of her disability, not repetitive stress syndrome. (Exhibit 1 at pg. 3; Depo. at pg. 45).
>
> Dr. Philbin opined that the employee 'has a bilateral tendonosis and impingement, the left becoming clinically apparent with repetitive injury of November 24, 2004 but not reasonably resulting in a permanent disability for routine clinic nursing activities.' (Exhibit 1 at pg. 3). Dr. Philbin opined that the predominant cause of the Employee's disability, surgery and re-tear was the fall in Maine and the pre-existing tendonosis. (Exhibit 1 at pg. 3; Depo[.] at pg. 40). Dr. Philbin considered the industrial one day repetitive injury to be a minor contributing factor. (Exhibit 1 at pg. 3; Depo. at pg. 40). Dr. Philbin opined that fibromyalgia was contributing factor [sic] in the patient's difficult rehabilitation. (Exhibit 1 at pg. 3).

(Dec. 6-7.)

The judge discussed these findings, making further specific findings as follows.

> I adopt the opinion of Dr. Philbin and find the Employee's tendonopathy of her rotator cuff was not caused by repeated stressed [sic] syndrome. I adopt the opinion of Dr. Philbin and find that the employee's fall on August 20, 2005 [sic] in Maine was the major factor of her rotator cuff tear and not the repetitive stress syndrome. I find that at the time of her surgery in January 2006, the Employee had three disrupted tendons, one completely as well as an additional dislocation of the bicep tendons from its groove. I adopt the opinion of Dr. Philbin and find that these findings contrast sharply to the May 29, 2005 MRI findings.
>
> I adopt the opinion of Dr. Philbin and find that the employee has a bilateral tendonosis and impingement, the left becoming clinically apparent with repetitive injury of November 24, 2004, but not reasonably resulting in permanent disability for routine clinic nursing activities. I adopt the opinion of Dr. Philbin and find that the Employee's disability, surgery and rotator cuff tear subsequent to August 22, 2005 was not related to her one day repetitive injury of November 24, 2004 but rather to Ms. Davoll's fall in Maine in August, 2005.

---

[1] While the judge clearly considered Dr. Philbin's testimony, the deposition has not been marked, or listed, as an exhibit in this case.

(Dec. 8, 9.)

In his general findings and rulings of law, the judge concluded, "I do not find the employee's physical injury to her left rotator cuff tear [sic], specifically a rupture of the supraspinatus and marked atrophy with retraction of the tendon, as well as a partial tear of the subscapularis and a possible injury to the infraspinatus, and subsequent disability to be causally related to her employment with [the employer]." (Dec. 9-10.) Lastly, the judge concluded, "I do find the employee's medical treatment for her biceps tendonitis limited to her one-day overuse syndrome of November 24, 2004, has been reasonable and necessary." (Dec. 10.)

The employee argues the judge's conclusion that no causal relationship exists between her rotator cuff tear and her November 24, 2004 injury, is unsupported by, and inconsistent with, Dr. Philbin's opinion, (Employee br. 9-10), and the judge erred in failing to analyze the slip and fall accident in Maine as an intervening event. We agree. "The general proposition is that non-work-related activity which is normal and reasonable, and not performed negligently in light of the employee's impairment does not constitute an intervening cause, if . . . some causal connection to the original industrial injury remains." Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345 (2008). Under such circumstances, "[t]he industrial injury remains compensable, relative to that latter event, if the employee can prove any continuing causal connection between the work and the resultant incapacity." Tirone v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 283, 286-287 (2001).

There was no evidence in the record that would support a finding that the employee was acting unreasonably when she slipped and fell or that her negligence caused or contributed to the slip and fall.[2] The judge found Dr. Philbin opined that the employee's industrial injury played a causal role in the resulting disabling rotator

[2] Indeed, Dr. Philbin testified the activities the employee was performing when she slipped and fell in Maine were within normal activities of daily living and would not be a concern to him in regard to her underlying shoulder condition. (Dep. 44-45.)

cuff tear as a minor contributing factor in its development. (Dec. 7.) The judge's analysis, however, applied the heightened "a major cause" standard of § 1(7A) to a situation where an after-occurring injury combined with the original industrial injury. The slip and fall accident " 'requires an entirely different approach to the causal relationship question' as compared to pre-existing non-work-related medical impairments subject to major cause analysis under § 1(7A)." Drumond, supra at 345, quoting from Tirone, supra at 286. As a result, the judge's ruling denying the employee's claim for weekly benefits must be reversed.

Nonetheless, we must recommit the case because the judge made insufficient findings of fact regarding the threshold compensability of the industrial injury, in light of the § 1(7A) defense raised by the insurer. Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005); see, Sicotte v. Land Air Express of Vermont, 23 Mass. Workers' Comp. Rep. 247, 248 (2009). The judge must make threshold findings identifying the precise injury or injuries the employee sustained as a result of the industrial accident, and then determine "what if any, pre-existing noncompensable injuries or diseases combined with the work injury to cause or prolong disability or the need for treatment."[3] Stecchi v. Tewksbury State Hospital, 23 Mass. Workers' Comp. Rep. __, n.5 (November 10, 2009), citing Vieira, surpa at 52-53; Dorsey v. Boston Globe, 20 Mass. Workers' Comp. Rep. 391 (2006). To the extent the judge finds a combination injury exists, he must complete the Vieira analysis in regard to that particular injury for the time period prior to the slip and fall incident of August 21, 2005. See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009)(no need for "magic

[3] Dr. Philbin, who provided the only medical opinion in evidence, indicated that prior to August 21, 2005, a number of diagnoses existed in this case, including left shoulder impingement syndrome with arthritis of the acromioclavicular joint, tendonosis of the supraspinatus, tendonopathy, and bicipital tendonitis. Dr. Philbin provided varied opinions that the work injury of November 24, 2004 either did not cause, caused, or aggravated these various diagnoses, (Dep. 25, 27, 29, 31-32, 40, 61, 66), and further opined that some of these conditions are associated with aging. (Dep. 9, 21, 31, 33-34.) The judge also found the employee's "past medical history is significant for fibromyalgia," (Dec. 5), and Dr. Philbin opined fibromyalgia is a "contributing factor in the patient's difficult rehabilitation," (Dec. 7; Ex. 1, 3).

words" but a combination injury case requires opinion "as to the relative significance of the incident-related causes of the employee's disability as compared with her significant pre-existing condition.")

We find no merit to the employee's challenge of the judge's credibility findings pertaining to the employee's account of the medical treatment she received after the slip and fall incident, the extent of her pain, and her opinions regarding causal relationship. Each of the judge's findings was grounded in the evidence and we will not disturb those findings of fact. Lettich's Case, 403 Mass. 389, 394 (1988). The employee also argues the judge erred in failing to consider her motion for additional medical evidence. The judge did not consider the employee's motion because the record had closed by the time he became aware the employee had attempted to file that motion.[4] (Ins. br., Ex.2.) However, because the matter requires recommittal, the judge may consider opening the medical evidence pursuant to § 11A(2), should he find the interests of justice so require.

Lastly, we agree with the insurer that under the circumstances, it could not properly be ordered to pay an attorney's fee to employee's counsel. The decision established only liability for a biceps tendonitis and ordered no weekly incapacity

[4] The judge has broad discretion in determining the date of the close of the record. Rosa v. Massachusetts Dept. of Mental Retardation, 23 Mass. Workers' Comp. Rep. 243, 245 (2009). However, the record provides conflicting dates as to when that event occurred. At the hearing, the judge set the deposition due date as May 28, 2008. (Tr. 80-81). The board file contains the judge's April 14, 2008 e-mail to the parties notifying them that he had allowed the employee's motion to extend "the deposition transcript due date" to June 20, 2008. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). Dr. Philbin's deposition was taken on May 21, 2008 and the deposition transcript was filed May 28, 2008. Id. The next correspondence appearing in the board file is the insurer's June 25, 2008, objection to the employee's apparent June 20, 2008, motion for additional medical evidence. The board file does not show the employee's motion was ever received by the judge. The exhibits appended to the insurer's brief indicate the employee failed to send the motion to the judge's proper e-mail address. (Ins. br., Ex. 1, 2.) The insurer claimed the employee's motion was untimely filed because it was received more than three weeks after the close of the evidence on *May 28, 2008*. Although it is also absent from the board file, on June 27, 2008, the judge sent the parties an e-mail advising them: 1) the close of the record had been extended to *June 20, 2008*; 2) the judge had not received the employee's motion by that date; and, 3) the record had closed. (Ins. br., Ex. 2.) The judge's decision states that the record closed on *May 28, 2008*. (Dec. 2.)

benefits as a result of that or any other condition. Moreover, there were no medical bills or specific medical treatments in dispute.[5] Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996). Consequently, the award of a § 13A(5) attorney's fee must be vacated. Of course, our conclusion does not preclude the award of an attorney's fee should the employee on recommittal prevail on any "significant litigation issue." Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996).

Accordingly, we reverse the judge's ruling on the issue of causal relationship and vacate the orders denying the employee's claim for weekly benefits and ordering the insurer to pay employee's counsel an attorney's fee. The matter is recommitted to the judge who may take additional evidence as necessary to address the issues presented, and to make further findings of fact and rulings of law consistent with this decision.

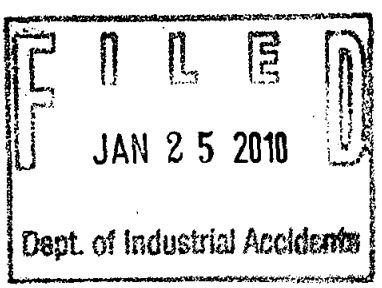
So ordered.

Catherine Watson Koziol
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed:



[5] We note that although the judge concluded the treatment for the biceps tendonitis was "reasonable and necessary," he did not identify what treatments the employee received specifically for that condition, as opposed to the other diagnosed conditions. (Dec. 10.)