COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033935-10**

Carrie Weilandt	Employee
American Lighting Fixture Corp.	Employer
Peerless Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

This case was heard by Administrative Judge Benoit.

APPEARANCES
James F. White, Esq., for the employee
Jessica Bobb, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits from February 23, 2018, and continuing, § 50 interest, §§ 13 and 30 benefits for "pain treatment conditions," and an additional order for §§ 13 and 30 "treatment of the Employee's emotional conditions." (Dec. II, 11.)[1] Although phrased as an order for "treatment of . . . emotional conditions," the employee claimed, and the judge's findings identify, only one emotional condition, "depression," from which the judge expressly found the employee to be suffering. (Dec. II, 10.) The sole question presented by the insurer's appeal is whether, pursuant to §§ 13 and 30, the judge properly ordered it to pay for medical treatment of "emotional conditions," including depression, where the evidence contains no medical opinion diagnosing the employee with depression, or any other emotional condition, and no medical opinion that treatment for depression is reasonable, adequate and related to the industrial accident as a

[1] An earlier decision was issued by Administrative Judge McDonald. His corrected hearing decision of March 19, 2013, is hereinafter, referred to as "Dec. I." The present judge's January 10, 2020, hearing decision is hereinafter referred to as "Dec. II." Although our decision does not refer to the transcript from the first hearing, in keeping with these designations, references to the transcript from the May 6, 2019, hearing are hereinafter, referred to as "Tr. II."

sequela of her physical injury. G. L. c. 152 § 30. For the reasons set forth below, we reverse so much of the judge's decision as found: 1) the employee suffers from depression; 2) the depression is causally related to her physical injury; 3) she requires treatment for depression, or any other unidentified "emotional conditions;" and, 5) that the insurer is responsible to pay for "treatment of the Employee's emotional conditions."

We recount only those undisputed facts that are necessary to address the issue on appeal. The employee, age 55, (Dec. II, 10), worked for the employer designing and fabricating prototype upscale lighting fixtures and chandeliers. The job required her to use hand tools and perform "some three thousand twisting motions per day with her hands and wrists," four to six hours per day. (Dec. I, 4.) From October 21, 2010, through the employee's last day of work, December 19, 2010, when the company closed, the pace of her workload increased, so that she was using her tools to fabricate fixtures between eight and ten hours per day. (Dec. I, 5; Dec. II, 4.) She began having difficulty holding a pen to do sketching and "found herself dropping things, feeling numbness in her hands and fingers, and her hands getting weaker." (Dec. I, 5.) Ultimately, the employee was diagnosed with bilateral carpal tunnel syndrome, cervical radiculopathy, bilateral DeQuervain's tenosynovitis and bilateral thumb CMC arthritis, all causally related to her repetitive work activities. (Dec. I, 7, 10-11, 12-14.) By the time of the first hearing, the employee had undergone surgeries consisting of bilateral carpal tunnel releases and bilateral DeQuervain's releases. (Dec. I, 9-10; Tr. II, 28.) She was awarded § 34 benefits from February 3, 2011, and continuing, and the insurer was ordered to pay for her medical treatment "including CMC arthroplasty." (Dec. I, 15.)

Upon the exhaustion of her § 34 benefits, the insurer commenced payment of § 35 benefits from February 2014, through the exhaustion of those benefits in February of 2018. (Dec. II, 2.) The employee's claim for § 34A permanent and total incapacity benefits came before the present judge for a § 10A conference on November 28, 2018. The judge ordered the insurer to pay the employee § 34A benefits from February 23, 2018, and continuing, along with medical benefits under §§ 13 and 30. The Form 140 Conference Memorandum did not seek an order for payment for any specific medical

treatment, including treatment of depression or any other mental or emotional conditions. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of board file). The insurer appealed, and on March 7, 2019, the employee was examined pursuant to § 11A, by Dr. Christian Sampson, a Board Certified General and Plastic Surgeon. (Dec. II, 2.) By the time the employee saw Dr. Sampson, she had undergone further surgeries consisting of bilateral thumb CMC joint arthroplasties and a fusion of her left thumb MCP joint, and had been referred to a pain management center for her continued pain. (Dec. II, 5-6; Ex. I.)

At the hearing the judge recited the employee's claims set forth in her hearing memorandum stating, in relevant part, that the employee claimed, "First, § 34A, permanent total incapacity benefits, from February 23, 2018 to date and continuing; secondly, treatment for depression and pain under §§ 13 and 30." (Tr. II, 4.) The following exchange then took place:

> Insurer's Counsel: Your Honor, I didn't know there was a claim for treatment for depression, so I would like to amend to also deny §§ 13 and 30 for depression.
>
> The Judge: Why don't you come up and annotate the hearing memorandum. The insurer is also denying entitlement to benefits under §§ 13 and 30 for psychological/psychiatric/emotional claims.

Id. at 4-5.[2]

The judge found Dr. Samspon's report to be adequate and the medical issues non-complex. (Tr. II, 14.)[3] Dr. Sampson's report discussed in detail the employee's physical

[2] Although the judge erred by allowing the employee to amend the claim at hearing without a motion to do so, the error was harmless where the insurer failed to object to joining the issue and the matter was tried by the parties. Desisto v. City of Boston, 33 Mass. Workers' Comp. Rep.___ (10/22/19).

[3] In doing so, the judge expressly denied the insurer's motion to open the medical evidence on the ground that the report was contradictory regarding Dr. Sampson's disability and causal relationship opinions pertaining to the employee's physical injuries. (Tr. II, 9-14.) No further motions were filed regarding the impartial medical examiner's report.

condition and pain and recommended the employee remain in a pain management program. (Dec. II, Ex. 1.) Nonetheless, notwithstanding a lengthy discussion on the record concerning the contents of that report, neither counsel nor the judge observed that Dr. Sampson's report was devoid of any diagnosis or causal relationship opinion pertaining to the newly joined claim for depression, or any other mental/emotional condition.

At the hearing, the employee testified extensively about the severity of her pain and how it affects her sleep and her ability to perform activities of daily living. (Tr. II, 30-40.) Dr. Sampson's deposition was taken by the parties on June 12, 2019, and he was specifically asked about her physical condition, pain, disability and need for pain management treatment.[4] (Dec. II, Ex. 10.)

Dr. Sampson was not asked any questions about the employee's claim for treatment for depression or for any other mental or emotional conditions. As a result, there was absolutely no medical opinion in the record indicating that the employee had an

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[4] After observing that the employee previously had a medial nerve block performed at the pain management treatment center she attended in Farmington, Connecticut, (Ex. 10, 20), Dr. Sampson's recommendation that the employee remain in pain management treatment, and his description of what that treatment would entail, were limited to the following exchange:

> Q: What did you expect they can do for her at a pain clinic?
>
> A: They have various modalities that they can apply that can be quite helpful. You know, every patient is a little bit different and requires a determination on the part of the patient and just [sic] they are going to respond to the treatment modalities given, so sometimes it can be quite effective and get patients back to working but it's a different patient group to treat because there is no crystal ball and sometimes it's just ongoing pain management with no real significant improvement, you just have to continue with the various drugs and other things that they can do to, you know allow - -
>
> Q: As a clinician and knowing the medical history, you know, of this particular employee, and knowing that this has proceeded over nine years of not working and not getting better, what does this say to you as a clinician?
>
> A: You know, she is probably at an end point and the way she is is probably the way it's going to be.

(Dec. II; Ex. 10, 27-28.)

active diagnosis of depression, or any another mental or emotional condition, much less any opinions regarding causal relationship or the reasonableness of treatment for the claimed condition.

In his decision, the judge found the employee credible and adopted her testimony as follows: "I am depressed because I cannot do the things that I used to do; I feel like I'm less than I used to be. I don't feel like I can defend myself, and so I literally lock myself in my apartment and don't come out very often. I don't associate with anybody." (Dec. II, 8.) Despite observing that the employee's claim "for psychological treatment does not have a medical record in direct support of it," the judge determined, "The Employee here has explained to my satisfaction the roots of her depression, and I find that they all lie in the physical reality, to wit, constant pain, stemming from her physical injury" and that "it would be in stark disregard of the benevolent purpose of our statute to conclude that she were not entitled to professional treatment of the depression." (Dec. II, 10.) The judge then separately ordered the insurer to pay for "medical expenses for treatment of the Employee's emotional conditions under §§ 13 & 30." (Dec. II, 11.)

The insurer raises no challenge on appeal to the judge's findings regarding the employee's physical limitations, her chronic pain, or his conclusions and orders regarding the employee's entitlement to § 34A benefits and §§ 13 and 30 benefits for pain management treatment. (Dec. II, 5-10, 11.) The insurer maintains only that, regarding the employee's claim for treatment of depression, the judge's decision is arbitrary, capricious, and contrary to law. In response, the employee argues there was "more than ample evidence to support [the judge's] finding the employee's chronic pain was the result of her accepted injury." (Employee br. 6-8.) Specifically, she asserts the judge's findings regarding the effects of her pain, both "physically and psychologically," were sound and concludes by stating, "It is not unreasonable to infer a pain management program is one way to treat the employee's depression." (Employee br. 8.) In light of the fact the insurer does not challenge the judge's findings and rulings regarding the employee's pain and need for pain treatment, we can only assume the employee is suggesting that her claim for treatment for depression was subsumed in, or part and

parcel of, her claim for pain management treatment.[5] However, the employee stops short of arguing the judge misconstrued her claim and erred in treating the claim for pain management treatment and the claim for depression as separate and distinct claims. The only evidence in the record regarding the employee's claim for treatment for depression was developed through the following line of questioning:

> Q: I know that the impartial physician is suggesting that you follow up with pain management. Is that something that you want to continue, to continue with pain management if you could find one that is close to your house?
>
> A: Yes.
>
> Q: There has been a claim that has been joined for your depression. What about this event that we're talking about today has caused you to be depressed?
>
> A: I'm sorry?
>
> Q: There is a claim for depression and pain management treatment?
>
> A: Right.

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[5] For the first time, on appeal, the employee's brief states, under the heading "Course of proceedings and disposition," that while she was receiving § 35 benefits, she "filed a claim for psychological/pain clinic treatment." The claim was resolved on September 11, 2015, prior to conference, through an approved § 19 Agreement "wherein the insurer agreed to pay, without prejudice, for six months of psychotherapy and pain management treatment." (Employee br. 2.) We observe that the Agreement was approved by a completely different judge, Judge Braithwaite, on a "without prejudice" and "without liability" basis. It provides no specific psychiatric diagnosis, and it was executed over three years before the present judge's involvement in this case. Rizzo, supra.

The hearing record contains absolutely no reference to this Agreement, nor is there any suggestion or indication its existence was ever brought to the present judge's attention at any point during the hearing. As such, and because it was executed expressly on a without prejudice basis, it has no legal effect on the disposition of this case. Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73 n. 2 (2005)(meaning of a §19 Agreement executed on a without prejudice basis is "that the insurer is not bound to acceptance of the underlying entitlement;" thus, the Agreement does not relieve the employee of proving every element of her claim for those benefits).

> Q: What about these events that we're discussing today has caused you to require that treatment? Are you depressed?
>
> A: Yes.
>
> Q: Why are you depressed?
>
> A: Because I can't do the things I used to do. I feel like I'm less than I used to be. I don't feel like I can defend myself. So, I literally lock myself in my apartment and don't come out very often. I don't associate with anybody.
>
> Q: Do you have any hobbies now?
>
> A: Just the animals.

(Tr. II, 40-41.)

The record shows the employee's claim for treatment for depression was presented as separate from her claim for pain management treatment. Most importantly, it is clear from the judge's findings of fact and orders, that the judge was under the impression the employee was pursuing separate claims for pain management treatment and treatment for depression, requiring separate orders. (Dec. II, 10-11.) Whether or not the inference suggested by the employee - that pain management is one way to treat her depression - is sound, it simply was not an inference drawn by the judge, who found the employee needed treatment of her depression and issued a separate order requiring the insurer to pay for treatment of the employee's "emotional conditions." (Dec. II, 10, 11.)

We turn now to the insurer's argument that, in the absence of any expert medical evidence supporting his findings, the judge erred by diagnosing the employee as suffering from depression that is causally related to her pain and that requires active treatment. The insurer urges us to reverse those findings as well as the order that it pay for treatment of the employee's "emotional conditions," and to deny and dismiss the employee's claim for treatment of depression.

"[T]he board may reverse the decision of an administrative judge only where it is 'beyond the scope of his authority, arbitrary or capricious, or contrary to law.' "

Wilson's Case, 89 Mass. App. Ct. 398, 400 (2016), quoting from G.L. c. 152, § 11C. "Proper decisions . . . must contain conclusions that are adequately supported by subsidiary findings which are not lacking in evidential support." Ballard's Case, 13 Mass. App. Ct. 1068 (1982). Relying on Lovely's Case, 336 Mass. 512, 516 (1957), the employee argues that, even in the absence of any medical opinion pertaining to her claim for treatment for depression, the judge did not err in finding the employee suffers from compensable depression that requires treatment. Specifically, the employee argues this case presents a situation where such expert evidence is not necessary, as it is within the common knowledge of a lay person to "connect the 'but for' causation dots that 8 years of chronic pain and failed surgeries caused this employee's depression." (Employee br. 10.)

Lovely's Case is distinguishable for at least two reasons. First, in Lovely's Case, there was no dispute that the employee had been diagnosed with and "was operated on for a hernia." Id. at 513. Here, there is a threshold dispute as to whether the employee even has a mental/emotional condition, in particular depression. There was no medical evidence that the employee has any active psychiatric/mental or emotional diagnosis, much less one that requires active treatment. While lay testimony may be used by the judge to bolster an otherwise weak or ambiguous medical opinion on the issue of causation, Josi's Case, 324 Mass. 415, 418-419 (1949), we know of no case, and none has been cited, where, as here, based on the lay testimony alone, a judge properly made findings and drew his own lay conclusion that the employee has a particular psychiatric/mental or emotional diagnosis. The threshold question of whether an individual has a psychiatric diagnosis, such as depression, is a matter requiring expert medical evidence because the ability to diagnose a specific psychiatric condition is simply a matter that is beyond the ability of a lay person to determine. The judge impermissibly took the employee's lay testimony that she feels depressed and turned it into a diagnosis of depression, which is something he could not do without the assistance of any expert medical opinion supporting the diagnosis. "The transformation of no opinion to an opinion, labeled a 'reasonable inference' stretches the meaning of that

concept beyond recognition." Allie v. Quincy Hospital, 12 Mass. Workers' Comp. Rep. 167, 169 (1998). Thus, the judge's findings "are unsupported by any medical opinion and are clearly speculative." Evans v. Geneva Constructing Co., 25 Mass. Workers' Comp. Rep. 371, 376 (2011).

Second, even where there is no dispute that the employee has a specific diagnosis, the facts have to be simple and the chain of causation straightforward in order for the trier of fact to make the causal connection without the aid of any medical opinion doing so. Lovely's Case presented a situation "where, in point of time, the relationship between sudden strain at work, the first symptoms and the hernia was so close and immediate, and where, on the undisputed facts, a layman could clearly reasonably infer, without medical testimony, that the strain caused the hernia." Id. at 515. Here, although the judge reasoned that the employee's pain caused her depression, the employee did not expressly testify that her pain was the root cause of her depression. Moreover, Dr. Sampson's report stated the employee had a *past medical history* of depression, but he did not opine that she currently suffers from depression, and he gave no indication that her depression was causally related to her industrial injury. (Dec. II, Ex. 1.)[6] Where the prima facie medical evidence stated the employee had a past medical history of depression, but provided no information about that past condition, the causal connection drawn by the judge is not so self-evident as to obviate the need for an expert opinion lending some credence to the causation theory. Wilson's Case, supra; Sfravara v. Star Market, 15 Mass. Workers' Comp. Rep. 181, 185 (2001). "This is not a situation where only one

[6] In his "Assessment," Dr. Sampson stated the following:

1. Diagnosis:

A. Chronic bilateral hand and wrist pain, status post multiple surgical interventions.
B. Status post bilateral carpal tunnel release.
C. Status post bilateral CMC joint arthroplasties.
D. Status post left thumb MP joint fusion.

(Dec. II; Ex.1.)

inference is reasonable within the context of the case and the realm of human experience." Allie, supra at 169. As we have previously stated,

> Expert opinion is required in cases of psychiatric disability because the etiology of mental disability is rarely a matter of general human knowledge and experience. We see no reason to vary that requirement in this case.
>
> The impartial medical examiner provided the sole medical evidence in this case. He did not render an opinion that the . . . psychiatric condition was causally related to the work injury. The judge was not competent to fill that evidentiary gap on his own. He needed expert medical evidence.

Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 264 (1997)(internal citations omitted).[7]

We agree with the insurer that it was beyond the judge's capability as a lay person to diagnose the employee with depression and hold the insurer responsible for paying for treatment of that condition without any medical evidence diagnosing the employee with depression, much less depression that is causally related to the industrial injury and requires treatment. We reverse so much of the decision as finds the employee suffers from depression causally related to the industrial injuries, and orders the insurer to pay for treatment of the employee's "emotional conditions under §§ 13 and 30." (Dec. II, 11.) Accordingly, we deny the employee's claim for medical treatment for depression as she failed to carry her burden of proof entitling her to those benefits.

[7] Like the present case, in Wilkinson, the employee suffered a compensable physical injury and the impartial medical examiner's report was the only report in evidence. However, unlike here, the § 11A impartial medical examiner diagnosed the employee as having a psychiatric condition, but offered no opinion regarding the cause of the condition. Id. at 264. The judge erred by filling that gap in the evidence with his own lay opinion, and we reversed the benefit award and recommitted the matter for the judge to allow the admission of additional medical evidence on the psychiatric issue. Id. at 265. Long ago, the reviewing board ceased this practice of sending cases back to the judge where the judge failed to sua sponte open the record and the employee failed to file a motion for a finding of inadequacy or medical complexity. Lyons v. Chapin Center, 17 Mass. Workers' Comp. Rep. 7, 18 (2003)("Litigants are hereby put on notice that any decision emanating from a hearing that commences after the filing date of this decision will no longer be subject to a Wilkinson-type recommittal"). We observe that the employee makes no argument urging us to reconsider that ruling, or seeking any relief other than her request that we affirm the judge's decision.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **October 15, 2020**