COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025222-18**

Cesar Lugo	Employee
Salem State College	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabiszewski and O'Leary)

The case was heard by Administrative Judge Rosado

APPEARANCES
Grace Harrington Napolitano, Esq., for the employee
Joseph A. Clark, Esq., for the self-insurer

LONG, J. The self-insurer appeals from the administrative judge's decision awarding ongoing § 34A, permanent and total incapacity benefits and §§ 13 and 30 medical benefits. Because we find merit in the self-insurer's appellate arguments, we reverse the finding that the employee provided proper notice of his injury and recommit to the administrative judge for further findings of fact and rulings of law as outlined herein.

The Employee, Cesar Lugo, is a right-handed maintenance foreman employed full-time by Salem State College since 1998. He moved to the U.S. in 1984, after graduating high school in the Dominican Republic. Although he understands some English, he was aided by an interpreter at the hearing, and has limited English reading and writing abilities. (Dec. 5.) On September 3, 2015, while moving a table off a truck, the employee fell backwards, landing on his right side, pushing the table to keep it from falling on him. He continued to work through April 6, 2016, but required assistance from co-employees to perform the heavy jobs because of cervical/right shoulder pain, and right arm weakness. (Dec. 6.)

The employee's claim seeking §§ 34, 35, 13 and 30 was the subject of a § 10A conference on May 6, 2019, and the judge awarded § 35, temporary partial incapacity

benefits, and medical benefits pursuant to §§ 13 and 30. (Dec. 2.) Both parties appealed and on August 19, 2019, the employee was examined by impartial examiner Vladan Milosavljevic, M.D. Prior to the hearing, both the employee and self-insurer filed motions to allow additional medical evidence. Finding the medical issues complex, the judge allowed the motions, specifically ruling that the self-insurer's motion was "Allowed on 1(7A) issue; medical complex. Report will remain in evidence." Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) The employee also filed a motion to join a claim for § 34A, permanent and total incapacity benefits, which the judge also allowed. (Dec. 3.) A hearing was held on February 17, 2022, where the employee claimed § 34 benefits from April 6, 2016, to April 6, 2019, § 34A benefits from April 7, 2019, to date and continuing, and §§ 13 and 30, medical benefits. The self-insurer denied liability and raised several defenses, including proper notice, proper claim (§§ 41 & 42), laches, and the application of § 1(7A) pre-existing condition.[1] The employee testified at hearing

[1] General Laws c. 152, § 1(7A), states, in relevant part:

If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

General Laws c. 152, § 41, states, in relevant part:

No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment.

General Laws c. 152, § 42, states, in relevant part:

The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or, in the case of his death, by his legal representative, or by a person to whom payments may be due under this chapter, or by a person

along with two co-employees, Abraao Figueiredo and Edwina Lopez. Ezekiel Holt, the human resources leave liaison for the employer, also testified on behalf of the self-insurer. (Dec. 1, 6.)

The hearing decision, issued on March 17, 2023, awarded the employee all §§ 34, 34A, 13 and 30 benefits claimed. In her decision, the administrative judge, relying on witness testimony, found that the employer had notice of the injury shortly after it occurred and the employee properly filed his claim, thereby rejecting the self-insurer's defenses under §§ 41, 42 and laches. The following findings and rulings of law address these defenses:

> I credit the testimony of the Employee, and co-employees Edwina Lopez and Abraao Figueiredo in finding that notice of the event and Employee's fall was given to his two direct supervisors at a meeting held to ascertain how a table was damaged. In attendance at this meeting were the Employee, the two witness co-employees present at the time of the event and the Employee's superiors, including the assistant to the Vice President, the Director, and Assistant Director of facilities. I further credit the testimony of Ezekiel Holt, the Employer's H.R. leave liaison, that the event/injury should have been reported by the facilities supervisor present at the post-event meeting.

(Dec. 6.)

…

> I find the Employer had notice of the Employee's injury shortly after his fall off the back of a truck on September 3, 2015, that being given at the meeting held at the request of the Employer, and that the Employee continued to work until April 6, 2016, when he could no longer safely perform his job duties. I conclude and so find that the Employee properly filed this claim in 2018, after he became aware of the causal connection between this work injury and his medical disability. Thus, I do not find merit in the Insurer's defenses under Sections 41, and 42, that the statute of limitations excludes this claim, nor do I find that the Employee failed to provide proper notice or service of his claim for benefits. Furthermore, I do not find that the evidence I have adopted supports the Insurer's position it was

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on behalf of any one of them. Any form of written communication signed by a person who may give the notice as above provided, containing the information that the person has been so injured, giving the time, place and cause of the injury, shall be considered a sufficient notice.

> prejudiced by the delay in filing of this claim. As such, I conclude that its laches defense does not bar the Employee's claim.

(Dec. 11.)

The self-insurer argues the judge's finding that the employee gave notice of his injury "as soon as practicable" is arbitrary and capricious when the employee knew of his injury the day it occurred and never reported it. (Self-Ins. br. 13.) The self-insurer maintains that the evidence does not support the employer's actual knowledge of an injury to the employee, repeatedly arguing the judge's findings regarding its affirmative defenses lack adequate subsidiary findings. (Self-Ins. br. 15, 17, 18.) We agree with the self-insurer that the administrative judge's decision lacks sufficient findings on these issues.

We have stated "although often discussed together, notice and claim are two separate requirements." Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 201 n.6 (2017). "While an employee has four years from the date she becomes aware of the causal relationship between her injury and disability to file her claim, she must give the employer or insurer notice of an injury 'as soon as practicable after the happening thereof'." Giaccarini v. Liberty Mutual, 33 Mass. Workers' Comp. Rep. 195, 200 (2019). Additionally,

> [s]uch notice is to be in writing and state the time, place and cause of the injury. G.L. c. 152, § 42. However, "want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or it is found that the insurer was not prejudiced by such want of notice." G.L. c. 152, § 44. The employee has the burden of proving lack of notice or lack of prejudice to the insurer. Thibeault's Case, 341 Mass. 647, 649 (1961); Brunetti v. Avon Prods., Inc., 8 Mass. Workers' Comp. Rep. 71, 72 (1994). Either knowledge by the employer or lack of prejudice will excuse failure to give proper notice. See Swasey's Case, 8 Mass. App. Ct. 489, 495 (1979) and Dugas v. Bristol County Sheriff's Dep't., 17 Mass. Workers' Comp. Rep. 349, 353-354 (2003)(footnote omitted). "Knowledge of the injury" is used "in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty." Walkden's Case, 237 Mass. 115, 117 (1921).

Mason v. Action, Inc., 26 Mass. Workers' Comp. Rep. 221, 224 (2012).

The judge's finding that "the employer had notice of the employee's injury shortly after his fall off the back of a truck," is not supported by the record. While not stipulated to, it is clear from the record that a proper written notice was not provided by the employee, therefore oral notice standards must be met. The employee's testimony certainly does not suffice since he was aware that he injured his shoulder after falling from the truck (Tr. 34) and repeatedly acknowledged that he chose not to report his injury for fear of losing time and pay (Tr. 16, 37, 38, 56). The employee also confirmed that he was aware of how to report a work injury (Tr. 29) and that he personally did not report the injury until the claim was filed. (Tr. 50) As always, the employee has the burden of proving notice or lack of prejudice to the insurer. See Thibeault's Case; Brunetti, supra. The employee attempted to meet that burden through the testimony concerning events that occurred during a meeting on September 8, 2015. Edwina Lopez was the only witness to provide details about what was said at the meeting, from which the judge deduced the proper notice was given. Lopez's testimony undoubtedly supports the judge's findings that the employee's fall and the "event" of September 3, 2015, were relayed to the employer at the meeting, (Tr. 66) but nothing more. The following exchanges highlight the discrepancy between the testimonial evidence and the finding of proper notice. Lopez was questioned on direct examination by employee's counsel as follows:

> Q. Were you present at that meeting?
>
> A. Yes. Everybody that worked that day had to go to the meeting.
>
> Q. Okay, and can you tell me, when you were at that meeting, did you say anything about what had happened?
>
> A. Yes, I did because I feel at that point upset the fact that he fell and they were questioning about the table, you know, how this – they didn't question how this happened, they just were, Oh, it's very expensive.
>
> And I said, Well, he fell but do you question how the table get [sic.] broke, how it broke and, Oh, no, we didn't know that. And I said, Cesar fell out of the

truck. They asked him if he was okay and blah, blah, blah and he said, Yes, I'm okay.

(Tr. 64-65)

During cross-examination by self-insurer's counsel, Lopez was asked:

Q. Okay. So what were the exact words?

A. Well, I said to her, Well – and I said, did you find out – and I said to be asking about the table, did you ask what happened that the table broke that way. Do you know that – are you aware that Cesar fell out of the truck. That's it, that's what I said.

Q So you did ask them if they were aware if he fell out of the truck?

A. No, none of them. Because they didn't know.

Q. Okay. Now you didn't say that Cesar was injured?

A. No. No. I said, Cesar fell out of the truck.

Q. Okay. You didn't say what body part he hurt?

A. Cesar fell out of the truck. No.

Q. And your testimony is that Cesar said that he was fine?

A. When they asked him he said I'm fine.

(Tr. 68-69.)

Significantly lacking is any mention of the employee being *injured* as a result of the fall during the "event". Knowledge of an incident or "event" by an employer does not necessarily impart knowledge of an injury resulting from that incident or "event" upon the employer, particularly where an employee denies he was injured when asked, as in this claim. See Kanga's Case, 282 Mass. 155, 157-158 (1933)(employer knew only that the employee hemorrhaged after exertion at work, a common incident of her tuberculosis; court held that was insufficient to warrant a finding that the employer had knowledge of a work-related injury). "Where a supervisory employee has observed the claimant's symptoms in such circumstances as would indicate that they are the result of an accident or disease arising out of and in the course of the claimant's employment, such

observation is imputable as knowledge of the employer under § 44 of the statute." Mason, supra at 226, citing Davidson's Case, 338 Mass. 228, 231 (1958). However, as in Mason, the employee here has not made such a showing and the finding of proper notice is arbitrary and capricious. Edwina Lopez expressly denied that the employer was told at the "post event meeting" that the employee was injured as a result of the incident. Moreover, the evidence of the meeting only supports that the employee went on to expressly deny having any injury as a result of the incident. Thus the finding that notice was given at this meeting "does not appear to be affirmatively supported by any evidence of record," Simas v. Modern Continental Obayashi, 12 Mass. Workers' Comp. Rep. 104, 107 (1998). Where the September 8, 2015, meeting was the only event claimed to satisfy the employee's burden regarding notice, reversal on this issue is required.

Since the judge found that notice was properly given, there is no analysis of the self-insurer's claim of prejudice due to lack of notice and laches defenses, other than to summarily declare, "I do not find that the evidence I have adopted supports the insurer's position it was prejudiced in the delay in filing of this claim. As such, I conclude that its laches defense does not bar the employee's claim." (Dec. 11.) Laches is applicable to proceedings at the Department of Industrial Accidents. Wadsworth's Case, 78 Mass. App. Ct. 101, 109 (2010), rev. on other grounds, Wadsworth's Case, 461 Mass. 675 (2012). As the Appeals Court noted,

> Laches is an equitable defense consisting of unreasonable delay in instituting an action which results in some injury or prejudice to the defendant. Yetman v. Cambridge, 1 Mass. App. Ct. 700, 707 (1979). Laches is not mere delay but delay that works disadvantage to another. Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 531 (2008), quoting from Mosely v. Briggs Realty Co., 320 Mass. 278, 283 (1946). The operation of laches generally is a question of fact for the judge, and a judge's findings as to laches will not be overturned unless clearly erroneous. A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 517 (2005). The burden of proving laches rests with the party claiming laches. McGrath v. CT. Sherer Co., 291 Mass. 35, 59-60 (1935).

Wadsworth, at 109.

The witness testimony from the self-insurer's witness, Mr. Holt, was advanced in part to buttress the self-insurer's prejudice and laches defenses, yet there is no cognizable discussion from the judge on these issues. Similar to the judge's findings on notice, here:

> [T]he judge's general findings are conclusory with no identifiable subsidiary findings. The subsidiary findings recite evidence without factual determinations. [ ] Recitals alone do not constitute subsidiary findings of fact adequate to support general findings and conclusions. Messersmith's Case, 340 Mass. 117, 119 (1959); Carney v. M.B.T.A., 5 Mass. Workers' Comp. Rep. 25, 26-27 (91991); see Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). Recitations defy appellate analysis because they cloud the key facts the judge found persuasive. Thereby the reviewing board cannot perform its appellate function because the issues are not addressed with clarity such that we can, with reasonable certainty, determine whether correct principles of law have been applied to facts that could properly be found. Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172 (1995).
The factual analysis of the self-insurer's affirmative defenses is sparse, limited and too ambiguous to allow the board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found (Praetz, supra), requiring recommittal.

The self-insurer also argues the judge failed to perform an adequate analysis of its § 1(7A) defense, as outlined in Vieira v. Hanover Ins. Co., 19 Mass. Workers' Comp. Rep. 50 (2005). We defer addressing the self-insurer's § 1(7A) arguments at this time since the disposition of the case upon recommittal may render the issue moot. Accordingly, we vacate the decision and recommit the case to the judge to make further findings of fact as to the insurer's §§ 41 and 42 and laches defenses. In the meantime, the conference order is restored. See Lafleur v. M.C.I. Shirley, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Martin J. Long
Administrative Law Judge

Filed: ***March 22, 2024***

Karen S. Fabiszewski
Administrative Law Judge

Kevin B. O'Leary
Administrative Law Judge