COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031456-05**

Christine Warman Employee
Berkshire Community College Employer
Commonwealth of Massachusetts Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
Rickie Weiner, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Arthur Jackson, Esq., for the self-insurer

HARPIN, J. The self-insurer appeals from a decision awarding the employee §§ 34 and 34A benefits based on both physical and psychiatric disabilities. We affirm.

The employee suffered an industrial accident on September 12, 2005 when she slipped and fell while descending stairs at her employer's location, suffering multiple metatarsal fractures in her left foot. (Dec. 4.) The self-insurer accepted liability for the employee's orthopedic injury and for its psychiatric sequela,[1] (Tr. I, 4, 8, 9),[2] paying § 35 benefits to exhaustion, as well as some periods of § 34

[1] The employee had previously filed two claims for psychiatric treatment, resulting in an unappealed conference order of payment dated June 24, 2009, and another order of payment dated January 11, 2012, which was appealed by the self-insurer. Following an impartial examination on April 17, 2012, by a psychiatrist, Dr. Kenneth Jaffe, the self-insurer withdrew its appeal. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

[2] The transcript of the first day of hearing, on January 8, 2014, will be referred to as "Tr. I;" the transcript of the motion session of March 5, 2014, will be referred to as "Tr. II;" and the transcript of the third day of hearing, September 9, 2014, will be referred to as "Tr. III."

benefits. (Tr. I, 5-6, 11.) The employee had several surgeries on her left foot, the first a fusion in 2006, followed by a second surgery on December 12, 2012, and a third on September 5, 2013.[3] (Dec. 4.) The judge found the employee credibly testified the second surgery resulted in some improvement to her left foot, but she still had a giving-way sensation in the left heel and trouble weight bearing on that foot. Id. She also had difficulty with stairs and uneven surfaces, and developed pain in her left knee. Id. The third surgery did not significantly improve her condition, as she had subjective pain in her heel, and the constant pain required elevation of the foot about five times a day, depending on physical activities. Id. During cold weather her foot takes hours to feel warm, and she cannot leave the house on cold days for that reason. Id. Due to her pain and physical limitations, the employee feels sad, cries often, and has fits of anger due to her situation. Id.

The judge found the employee was permanently and totally disabled, due not only to her orthopedic condition, but also due to a major depression causally related to the industrial injury. (Dec. 4-5). He awarded the employee the remainder of her § 34 benefits, and § 34A benefits from March 6, 2014 and continuing. (Dec. 5.)

The self-insurer appeals on four grounds.

First , the self-insurer argues the issue of the extent of a psychiatric disability should never have been tried at the hearing, as the employee did not make it an issue at the conference, there was no contemporaneous medical report submitted at the conference on the employee's then-current psychiatric disability, and the employee appealed the conference order only on a "non-medical" basis. It asserts that, pursuant to Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997), the judge impermissibly expanded the medical issues at the hearing beyond those raised at the conference. We disagree.

[3] The date of the third surgery was noted in a stipulation. (Dec. 3).

At the conference the parties submitted a Memorandum Cover Form, which stated, as to the nature and cause of injury, "Foot & Psych – fall downstairs." Rizzo, supra. In support of her claim at that proceeding, the employee submitted a number of medical and psychiatric records, one of which was a report of the prior psychiatric impartial physician, Dr. Jaffe, dated April 17, 2012. While the self-insurer is correct that Dr. Jaffe found no psychiatric disability, he found a causal connection between the employee's injury and her "current depression," and stated that she could benefit from psychotherapy and treatment with antidepressant medication. (Report of Dr. Jaffe, 3-4).

Moreover, at the hearing the parties stipulated that "this is an accepted case for orthopedic and psychiatric sequela." (Tr. I. 9.) The judge noted the lack of a current psychiatric report at the conference did not prevent the issue of psychiatric disability from being raised at the hearing, because it would go to the weight to be given to the claim, not whether it existed. (Tr. I, 8.) The judge also allowed the self-insurer the opportunity to obtain and submit a psychiatric IME report,[4] which the self-insurer took advantage of by submitting the report of Dr. Michael Rater, dated March 14, 2014. (Ex. 9.) Finally, the employee submitted a written Motion for Additional Medical Evidence at the hearing, in which she specifically sought the appointment of a psychiatric impartial physician, because the impartial physician appointed to the case "failed to address an issue that was part of the claim, the Employee's psychiatric issues." (Employee's Motion, 2.) The self-insurer submitted a brief on the same day, acknowledging that the employee claimed a psychiatric disability and raising the alleged Ruiz violation. (Self-insurer's hearing brief, 3.)

In Ruiz, supra, we held that an impartial physician's opinion that fell outside the boundaries of the medical dispute framed at the conference was not

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[4] The judge allowed the admission of further psychiatric evidence, based on the inadequacy of the impartial physician's report (which was orthopedic only), and the complexity of the issues. (Dec. 3; Tr. I, 13.) He also allowed further orthopedic medical evidence, based solely on complexity. (Tr. I., 14.)

entitled to any weight, and, as a result, additional medical evidence had to be admitted to make up for this discrepancy. Id, at 403. The key, as we noted in Yeshaiau v. Mt. Auburn Hosp., 24 Mass. Workers' Comp. Rep. 15, 20 (2003), is whether the decision determines issues that had not been raised by the parties. When the parties stipulate to the issues, as in Yeshaiau, or even try an issue by consent, explicit or implicit, as in Linton v. International/Chartpac, Inc., 30 Mass. Workers' Comp. Rep. 287, 293 (2016), there is no Ruiz error. Here, the parties agreed the employee had a causally related psychiatric condition, and the employee sought disability benefits for both her orthopedic and psychiatric conditions. The self-insurer had full knowledge the employee was making an issue of her psychiatric condition at the onset of the hearing, as is clear from the self-insurer's hearing memorandum, in which it complained about that very thing. We see no error in the judge's inclusion of the extent of the employee's psychiatric disability as one of the issues at the hearing.[5]

The self-insurer next argues the judge erred by failing to allow it to conduct further cross-examination of the employee and present a job offer, after he had formally allowed the employee to add a claim for § 34A benefits two months after the first day of the hearing. (Dec. 3.) The self-insurer argues this failure impinged on its due process rights to present its full defense, in violation of prior decisions of the reviewing board. (Self-insurer br., 19.) We do not agree.

At the hearing on January 8, 2014, the judge himself raised the issue of §34A, due to the fact that the employee's § 34 benefits were going to reach their maximum amount in four months, and the employee had already maximized any

[5] The self-insurer questions whether the employee's appeal of the conference order on a "non-medical issue only" basis supplied another reason not to expand the medical dispute at the hearing. (Self-insurer's br., 18.) However, the conference order did not specify the injuries for which § 34 and medical benefits were awarded, and, as noted, infra, "foot and psych" were listed on the conference memorandum. Thus, the psychological issues may well have been considered at conference, and their consideration at hearing was not a clear expansion of the medical dispute.

§ 35 benefits that were available. (Tr. I, 11.) He stated: "from my review of the file, I noted that the employee actually did claim 34A, when she first filed her claim. So, that in my opinion is in play."[6] Id. Although the self-insurer did not object on that day to the inclusion of § 34A as an issue in dispute, the next day its attorney sent an e-mail to the judge doing so.

> [T]he employee's appeal of your conference order was on a "Non-Medical" basis. Thus, the employee did not appeal your denial of her § 34A claim. I believe case law, Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 283 (2009), among other cases, would hold that if you do not appeal a conference order, you cannot do better than what you received at the conference and if you do not appeal an issue, denial of Sec. 34A, you cannot raise it at the hearing. Thus, I do not believe that Sec 34A should be an issue at the hearing.

(E-mail of Attorney Jackson to Judge Rose, January 9, 2014; Rizzo, supra.)

On January 12, 2014, after initially indicating he would schedule a motion session, the judge changed his mind and held that, to the extent the Commonwealth was attempting to raise two "procedural issues" as some form of late motion, it had waived the right to do so by failing to raise them on the day of hearing. (January 12, 2014 e-mail from judge to parties.) After the self-insurer filed a "brief" formally raising the two procedural issues, the judge e-mailed the parties stating he would "entertain a formal motion to add a claim for Section 34A from the employee." (January 14, 2014, e-mail from judge to parties.) On February 19, 2014, the employee filed a claim for § 34A benefits, along with a motion to join that claim to the hearing. Id.

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[6] The case was initiated at the DIA with the filing of the employee's claim on January 7, 2013, for not only § 34 benefits from December 12, 2012 and continuing, but also for medical expenses and "34A & 13A." Rizzo, supra. On May 6, 2013 the employee filed another claim, this time for § 14, and sought to join that claim to the already pending claim. In his conference order on May 14, 2013, the judge ordered § 34 benefits from December 12, 2012 and continuing, and joined the § 14 claim for the hearing. Id.

The motion session was held on March 5, 2014. The employee's counsel noted that at the hearing "[i]t was pointed out that on the 110 form, 34A was part of the claim. You had made it a part of the claim at the time of the hearing given the fact that there was only a short period of time left for the ---." (Tr. II, 2.) The self-insurer argued that § 34A was not in play because the employee had appealed on a non-medical issue only, and he had not presented a medical indicating he was permanently and totally disabled. (Tr. II, 6.) The self-insurer's counsel argued the case was not appropriate for § 34A, because the employee's treating surgeon had agreed the surgery had improved her condition "up to 30 to 50 percent," the employee was still in physical therapy, and "she seems like she's working towards making improvement." (Tr. II, 6.) He concluded by arguing that "the only reason we're here on a 34A is really because of the statutory time limit.." (Tr. II, 7.)

The judge then allowed the motion to join the § 34A claim, citing considerations of judicial economy, and gave the self-insurer the option of a second day of hearing, to put on any vocational testimony that it wished, with the employee able to provide a "countervailing expert," if she wished. (T. II, 9-10.)

At the onset of the second day of hearing, September 19, 2014, the self-insurer's counsel noted his intention to not only present vocational testimony, as had been allowed by the judge at the March, 2014 motion hearing, but to cross-examine the employee again about her "current condition," and to present a job offer that had been made on May 2, 2014. (Tr. III, 4.) The judge denied all but the vocational evidence, noting that he had kept the hearing open only for vocational evidence from the self-insurer, and that any job offer should have been made back in January, at the first day of the hearing. In addition, he found that further cross examination would be "basically retrying the entire case, and I'm not going to allow that." (Tr. III, 7).

The self-insurer argues its due process rights were violated when the judge failed to allow it to conduct a second cross-examination of the employee on the

second day of the testimonial hearing, on September 19, 2014, or to allow it to present evidence of a job offer made after the formal joinder of the § 34A claim. [7] In support of its argument, the self-insurer points to Mulkern v. Mass. Turnpike Auth., 20 Mass. Workers' Comp. Rep. 187, 192 (2006), and Casagrande v. Mass. Gen. Hospital, 15 Mass. Workers' Comp. Rep. 383, 388 (2001). In Mulkern, we affirmed the judge's allowance of the employee's motion for joinder of § 34A and § 35 claims, even though that motion was submitted after four days of testimony, and noted that due process was satisfied with the judge's granting to the insurer the right to conduct further cross-examination of the employee, submit vocational evidence, and submit further medical evidence. Id. at 192. However, the basis of that decision was an analysis of the judge's joinder discretion, and the protection of each party's due process rights after that joinder was allowed. The analysis notes that a judge is given wide discretion in controlling the conduct of hearings before him, Neal v. Mary Immaculate Nursing Center, 24 Mass. Workers' Comp. Rep. 281, 285 (2010), including whether to allow the admission of further evidence after the initial testimony is taken. Saez v. Raytheon, Corp., 7 Mass. Workers' Comp. Rep. 20, 23 (1993). The measure of an abuse of that discretion is whether there "is implied absence of arbitrary determination, capricious disposition, or whimsical thinking." Id. at 22, quoting Davis v. Boston Elevated Railway, 235 Mass. 482, 496-497 (1920). Discretion can be abused if the fundamental rights of a party, which include the opportunity to develop their case in a manner that comports with the "real and perceived sense of fairly administered justice permeating each proceeding," are violated. Casagrande, supra, at 387.

In the case before us, the judge determined that the self-insurer had sufficient opportunity to cross-examine the employee as to her current and future

[7] On appeal, the self-insurer has abandoned its arguments made at the hearing that there was no relevant § 34A report, that the joinder was due solely to the imminent exhaustion of the employee's § 34 benefits, and that § 34A should not be an issue because the employee appealed on a non-medical issue only.

level of disability, because he noted at the very onset of the hearing that the case would proceed on a §34A basis, given that the employee's § 34 benefits had only a few more months left until their exhaustion. (Tr. I, 11; January 12, 2014 e-mail of judge.) He then determined that, because of the formally joined § 34A claim, the self-insurer would have the opportunity to present vocational evidence and to examine their vocational expert at a continued hearing, although he denied the admission of the self-insurer's job offer. The judge stated: "[w]hy wasn't the job offer made before the last time we were here back in January? What's the - - you know, some four, five months after the testimony, all of a sudden a job offer comes in? Can you explain that, Counselor?" (Tr. III, 5.)

Although in Mulkern, supra, further cross-examination of the employee was allowed after joinder of a § 34A claim, we did not make such additional testimony a requirement for joinder; we only required that the judge not abuse his discretion in determining whether to allow further testimony. Similarly, in Casagrande, supra, we held that due process required "further medical evidence and *possibly* additional lay testimony," id. at 387 (emphasis added), when the judge denied a § 34A claim joined as of the date of a decision. In the present case the judge put the parties on notice that § 34A was at issue at the onset of the hearing in January, and, when it was formally joined, he allowed further evidence in the form of vocational testimony and psychiatric evidence. The judge thus properly protected the self-insurer's due process rights. In the circumstances presented here, he was not required to do more, and we will not make such a requirement a rule of law. There was no abuse of discretion.

The self-insurer next argues the judge erred in finding the employee was permanently and totally disabled, when the employee's foot surgery "improved her foot condition between 30 and 50 percent[,]" and she "reported to her medical providers that the December 2012 surgery had led to a marked improvement in her quality of life." (Self-insurer br., 20.) It refers to Dr. Errol Mortimer's deposition, who, when presented with a statement from the employee to another

doctor that she could walk for 45 minutes and stand for 30 minutes, agreed the employee was able to return to work in a sedentary position. It concluded with "it was arbitrary and capricious for the Judge to find that an employee who had been working for over six years and then had an operation which improved her condition, had suddenly become totally disabled and then permanently and totally disabled." (Self-insurer br., 21.)

The self-insurer has chosen a small part of Dr. Mortimer's deposition testimony to support its argument, conveniently disregarding the bulk of the doctor's testimony that the employee, despite her improvement from the surgery, was totally and permanently disabled. As we said in Vallee v. Brockton Housing Authority, 31 Mass. Workers' Comp. Rep. ___ (March 15, 2017), the testimony of a medical expert is to be considered as a whole when determining the opinion being given. Dr. Mortimer first stated he felt the employee was permanently and totally disabled due to her work-related injuries, because, "I can't imagine she would be able to find any kind of occupation where she would be able to work constructively or on a consistent basis and not work in agony and be able to do her job effectively without being distracted by her constant pain." (Dep. of Dr. Mortimer, 19-20.) The doctor did say the employee was between "30 and 50 percent better than she was," id. at 23, but he qualified that statement by noting that, while the employee "definitely acknowledged she is better than she was at her worst, . . . she is far from normal." Id, at 31. The doctor stated: "You're asking my opinion on whether she should be working or not. I think she shouldn't be working beforehand and continue to think she shouldn't be working subsequent to her surgery based on what I know of her ailments." Id. at 26. His last word on the subject was given in response to the employee's counsel's redirect: "Do you still maintain the opinion based on a reasonable degree of medical certainly, that she is permanently and totally disabled as a result of her work-related conditions?" The doctor replied: "Yes, I do." Id. at 43.

There was thus more than adequate support in the record testimony of the doctor, whose opinion the judge adopted, to find the employee permanently and totally disabled.[8] (Dec. 4-5); Kent v. Town of Scituate, 27 Mass. Workers' Comp. Rep. 195, 199 (2013)(judge free to adopt all, part or none of expert's opinions, as long as he makes sufficient findings on what evidence he relies).

The self-insurer raises two final arguments. First, it claims the judge erred when he "invited the employee to file a Sec. 34A claim" at the hearing, and by noting that joinder of the § 34A claim would avoid an "unjust situation where the employee is without benefits and could be a public charge." (Self-insurer br., 22, citing Tr. II, 8.) It cites LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 399-400 (2011), in support, alleging that statements similar to those at present were found to be contrary to law. However, in LaFleur we found the judge had impermissibly indicated his preference to award future § 34A benefits, when no such claim was before him. "It was not appropriate for the judge to discuss, much less issue, a prospective order in a case where no additional claim was pending. At the very least, the appearance of impartiality has been compromised, requiring recommittal to another adjudicator." Id. That is a very different circumstance from the present, where not only were § 34A benefits claimed, but that section was formally joined, with the self-insurer given the opportunity to submit vocational and additional medical evidence as a defense to that specific claim. We see no error in the judge's statements regarding the joinder of the claim.

The self-insurer also argues that, because the judge did not list the report of its medical expert, Dr. Connolly, or the employee's medical submissions in the first decision, or discuss the "impact" of Dr. Connolly's report on the result, the decision was arbitrary and capricious. The answer to this allegation is contained

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[8] Even had there been a problem with Dr. Mortimer's opinions and the employee's testimony as to her extent of physical disability, the judge adopted the opinion of Dr. Hernando Romero that the employee was permanently and totally disabled from her causally related major depression. (Dec. 5.)

in the self-insurer's next sentence: "the Judge then later issued an amended decision noting Dr. Connolly's report [.]" (Self-insurer's br. 23.) The amended decision was issued fourteen days after the original decision, with the report listed as Exhibit number 10. Rizzo, supra. It is this decision which was appealed by the self-insurer. The self-insurer's argument is thus internally inconsistent and without merit. As for the judge's failure to discuss the impact of Dr. Connolly's opinions, we have said many times that a judge is not required to discuss every piece of evidence in the record, and especially need not discuss medical opinion evidence that he has not adopted, as long as it is clear what evidence he relies on in reaching his decision. Dixon v. Urban League of Eastern Mass., 28 Mass. Workers' Comp. Rep. 219, 223 (2014). We see no error.

We affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,613.55.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **August 16, 2017**