**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS.004728-01 032612-07[1] 017888-07 036324-09 006693-10 011690-10** |
| Darlene Ramm | Employee |
| Commonwealth Gas Co./NSTAR Electric & Gas | Employer |
| NSTAR | Insurer |

**REVIEWING BOARD DECISION**
(Judges Long, Fabricant and Harpin[2])

This case was heard by Administrative Judge Benoit.

**APPEARANCES**
John K. McGuire, Esq., for the employee
Gordon L. Sykes, Esq., for the self-insurer at hearing
John C. White, Esq., for the self-insurer on recommittal
Richard L. Neumeier, Esq., for the self-insurer on appeal

**LONG, J.** The employee appeals from a remand decision awarding her § 35 partial incapacity benefits from January 4, 2010, and continuing, based on a left ulnar neuropathy sustained on June 13, 2007, § 30 benefits for the ulnar neuropathy, and § 30 medical benefits for cervical and thoracic spine injuries sustained on the same date. The decision also established liability for a cervical injury on April 6, 2006, and denied and dismissed all other claims, including those arising from the additional alleged dates of injury.

[1] The Department's Case Management System (CMS) has Liberty Mutual Insurance Company listed as the insurer for this board number for the alleged November 19, 2003, date of injury. However, the hearing decision notes that counsel for the self-insurer confirmed that Liberty Mutual was the claims administrator for the self-insured, not an insurer. (Dec. 1 n. 1.)

[2] Judge Harpin participated in panel discussions but left the reviewing board prior to the publication of this decision.

This six-claim case has a long and complex procedural and substantive history described in detail in Ramm v. Commonwealth Gas Co./NSTAR Electric & Gas, 30 Mass. Workers' Comp. Rep. 137 (2016). There, we affirmed "the judge's award of §§ 30 and 35 benefits for the employee's ulnar nerve injury," Ramm, supra at 143, but recommitted the case to the judge following his initial hearing decision of February 26, 2015, for additional findings of fact and rulings of law "addressing all of the employee's claims and the self-insurer's defenses." Id. at 144. This included "the employee's allegations that she sustained cervical and thoracic spine injuries as a result of the June 13, 2007, injury," as well as the employee's remaining claims, involving five distinct dates of injury, which the judge had simply denied without prejudice. Id. at 143-144.

The employee's current appeal alleges that the remand decision contains internally inconsistent findings on critical issues, and that the judge committed error by making findings of fact based on an incomplete examination of the lay and medical evidence. (Employee br. 17-19.) We agree with the employee and recommit the case again for further findings of fact and rulings of law.[3]

The employee reasserts an argument from her appeal of the initial hearing decision regarding expert deposition testimony. She argues that the judge's findings related to the fibromyalgia opinions of the treating physician, Dr. Lisa Fitzgerald, were based on an incomplete reading of the record. Specifically, the findings failed to reflect Dr. Fitzgerald's final opinions, expressed during her second day of deposition testimony, after her recollection was refreshed regarding foundational facts. (Employee br. 20-22; Dr. Fitzgerald December 13, 2011, dep. at 137; 189-190; 204-210.) See Perangelo's Case, 277 Mass. 59, 64 (1931)(opinion of expert is his final conclusion at the moment of

[3] Following the employee's August 23, 2017, appeal of the July 26, 2017, remand decision, the judge issued another remand decision, "nunc pro tunc," dated October 26, 2017, wherein he attempted to cure the internally inconsistent findings. We do not consider the October 26, 2017 decision since it was recalled at the direction of the senior judge for lack of jurisdiction due to the employee's pending appeal to the reviewing board. See Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285, 287 (2004). We refer to the judge's remand decision of July 26, 2017 as "Dec. II".

testifying); Wilson's Case, 89 Mass. App. Ct. 389 (2016)(testimony of medical expert should be considered as a whole). Upon review of the deposition transcripts in question, we agree there is merit to this argument that must be addressed by the judge on further recommittal.[4]

The employee also argues that internal inconsistencies in the judge's findings render the decision arbitrary and capricious:

> In Judge Benoit's original decision of February 26, 2015, he places the employee on maximum Section 35 benefits from January 4, 2010 and continuing based on the June 13, 2007 date of injury (DIA #1788807). In the revised decision of July 26, 2017, Judge Benoit ostensibly reverses course and reverses the order of Section 35 benefits. In doing so, however, he makes conflicting findings to wit:
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> - I find that the employee's industrial accident of June 2007 has been and continues to be a major cause of her left ulnar neuropathy that has remained symptomatic at least through the close of evidence in this case. As the employee is right handed, I find that she has been partially incapacitated beginning on January 5, 2010 and continuing, and that the industrial accident of June 2007 has been a major cause of that incapacity. (Dec. P, 28)
> - I find that the employee has had an earning capacity of $320.00 per week, based on a minimum wage job and a 40-hour work week, from January 5, 2010 to date and continuing. (Dec. P, 28)
> - The employee has been partially incapacitated from January 5, 2010 to date and continuing, and the June 13, 2007 industrial injury is a major cause of that incapacity. (Dec. P, 30).
> - The employee has failed to establish that it is more likely than not that her injury sustained on June 13, 2007, caused her to be incapacitated at any time after January 2, 2010 (Dec. P, 16).
> - The employee has failed to establish that it is more likely than not that her injuries sustained on June 13, 2007 caused her to be incapacitated at any time after January 2, 2010. (Dec. P30).
>
> Therefore, within the confines of the same document, Judge Benoit makes the conflicting findings that the employee has established a partial disability

[4] Although the self-insurer raised § 1(7A) as a defense to some of the claims, and the judge made some findings regarding pre-existing conditions, (Dec. 20-22), he made no findings as to whether or not those conditions combined with work injuries so as to activate the "a major cause" standard of § 1(7A). On recommittal, if the judge finds that the provisions of § 1(7A) were activated, he must conduct the analysis we set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 350 (2005). See Ramm, supra at 144.

> causally related to the 2007 date of injury which continues to disable her from January of 2010 and continuing and that she has not established a partial disability causally related to the 2007 date of injury and that she has not established any proof [of] disability beyond January 2010.

(Employee br. 18-19.)

We agree with the employee that these findings are inconsistent as to whether the judge found the employee to be partially incapacitated as a result of the June 13, 2007, injury.[5] Where findings are internally inconsistent, the decision cannot stand. See § 11B, Anderson's Case, 373 Mass. 813, 817-818 (1977); Saravia v. General Electric Co., 8 Mass. Workers' Comp. Rep. 132 (1994). The decision fails to meet the requisites of § 11B, where a judge must identify the issues and decide each based on adequate subsidiary findings of fact grounded in the evidence. Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Cowan v. Springfield Associates, Inc., 9 Mass. Workers' Comp. Rep. 503, 506-507 (1995). We therefore recommit to the judge to cure the internally inconsistent findings.

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[5] The insurer concedes that the judge's findings are internally inconsistent, but argues "that the conflicting findings are harmless error in light of the fact that the employee does not question any findings in the Nunc Pro Tunc Decision." (Insurer br. 7.) As set out in footnote 2, supra, the nunc pro tunc decision is not considered due to its recall for lack of jurisdiction. We also observe that in his remand decision, the judge stated:

> The litigation in this collection of cases has focused on issues of disability and causal relationship. Although the employee has listed additional claims regarding each of the six DIA files, and the insurer has raised defenses, those are side issues to [what] the testimony and exhibits and the closing briefs. Essentially, those are requests for declaratory judgments, and that is not the business of this Board. Consequently, I am denying each of the claims in all other DIA files without prejudice.

(Dec. II, 29.)

As we stated in our prior decision, "postponing making findings and rulings on what could and should be decided in the present litigation does not serve the litigants' interests, wastes judicial resources, and may even prejudice the parties' rights." See Ramm, supra at 144. Again, the judge failed to address these claims as instructed in our decision; however, neither party raises this issue in the present appeal.

Although we affirm the judge's award of §§ 35 and 30 benefits for the employee's left ulnar neuropathy sustained on June 13, 2007, § 30 medical benefits for cervical and thoracic spine injuries sustained on June 13, 2007, and a cervical injury sustained on April 6, 2006, we cannot determine whether the benefits awarded are the only benefits the employee is entitled to receive due to the internal inconsistencies noted in the remand decision and the requested further review of Dr. Fitzgerald's deposition transcripts. The judge must consider Dr. Fitzgerald's deposition testimony as a whole and whether or not said testimony impacts his analysis regarding the additional claims asserted by the employee, including those that were denied and dismissed.

Accordingly, we recommit to the judge for further review and analysis of the deposition transcripts of Dr. Fitzgerald and to cure the internally inconsistent findings of fact and rulings of law pertaining to the June 13, 2007 claim. The self-insurer is directed to pay employee's counsel a fee of $1,680.52, pursuant to G.L. c. 152, § 13A(6).

So ordered.

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Martin J. Long
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **July 17, 2019**