COMMONWEALTH OF MASSACHUSETTS

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	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Harpin and Calliotte)

The case was heard by Administrative Judge Benoit.

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

KOZIOL, J. The parties cross-appeal from a decision awarding the employee § 30 medical benefits and § 35 partial incapacity benefits from January 4, 2010 and continuing, based on a left ulnar nerve injury sustained on June 13, 2007, and denying, without prejudice, all other claims, including those arising from the remaining five alleged dates of injury. Both parties argue the judge erred by dismissing the remaining claims without making findings of fact or reaching any conclusions. They urge us to recommit the matter for the judge to make findings of fact addressing each of those claims and the insurer's defenses. (Employee br. 18-19; Self-ins. br. 24.) We agree, and recommit the case for further findings of fact and ruling of law.

[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 a claims administrator for the self-insured, not an insurer. (Dec. 1 n.1.)

This six claim case has a long and complex procedural and substantive history, both of which we summarize. The employee is a long-term employee of the self-insured employer. She began working for this employer in 1994, when it was Commonwealth Gas Company, and continued to work for it after it became NStar Electric and Gas. The employee initially worked as a data entry clerk; she then became an appliance ledger specialist; later a customer service representative; and in 2001, she started work in the planning department. (Dec. 11.)

The present case began when the employee filed six claims seeking payment of temporary total incapacity or, in the alternative, partial incapacity benefits from January 4, 2010[2] and continuing, as well as medical benefits under §§ 13 and 30. The claims allege the employee sustained industrial injuries on February 7, 2001, November 19, 2003, April 6, 2006, June 13, 2007, December 9, 2009, and January 4, 2010. Each claim alleged injuries to more than one body part. The February 7, 2001 claim alleged injuries to the employee's right wrist, hand and thumb, and bilateral carpal tunnel syndrome. The November 19, 2003 claim alleged injuries to the employee's cervical, thoracic and lumbar spine. The April 6, 2006 claim alleged injuries to the employee's cervical and thoracic spine. The June 13, 2007 claim alleged injuries to the employee's cervical and thoracic spine, a long thoracic neuropathy and ulnar nerve injury. (Dec. 3, 4.) The December 21, 2009 claim alleged bilateral injuries to the employee's arms and shoulders, and to her thoracic and lumbar spine. (Dec. 3.) The January 4, 2010 claim alleged bilateral injuries to the employee's upper extremities and shoulders, her left ulnar nerve, her cervical, thoracic and lumbar spine, and a lower extremity radiculopathy. (Dec. 3.) The judge described the employee as "a longtime sufferer of many physical ailments and

[2] Originally, the employee indicated that her last date of injury, and her last day of work, was January 2, 2010. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file). At hearing, the parties stipulated that the employee last worked on January 4, 2010, and that all references to January 2, 2010 were deemed to refer to January 4, 2010 instead. (Dec. 2.) Notwithstanding Judge Novick's conference order using the January 2, 2010 date, for ease of reference in this already factually complex case, we will refer to the stipulated date of January 4, 2010, as if it were the date originally claimed.

conditions, including insulin-dependent diabetes, degenerative disc disease of her cervical, thoracic and lumbar spine, ulnar nerve entrapment of her left elbow, and generalized myofascitis (also known as fibromyalgia)." (Dec. 10.) He summarized her six claims as being "premised on the notion that her work activities have caused or aggravated her conditions to the point of her being incapacitated from gainful employment since January 4, 2010 through the present." (Dec. 10.)

At the time the claims were filed, the self-insurer had already accepted liability for the February 7, 2001 injury, which consisted of an injury to the employee's right wrist, hand and thumb, and bilateral carpal tunnel syndrome.[3] Regarding the April 6, 2006 claim, the self-insurer accepted only the cervical spine injury. (Dec. 4; Self-ins. br. 2.) Regarding the June 13, 2007 claim, the self-insurer accepted only so much of that claim as consisted of a long thoracic neuropathy. (Dec. 3-4.) The self-insurer denied liability for the remaining three claims, as well as for so much of the April 6, 2006 claim as alleged injury to the employee's thoracic spine, and so much of the June 13, 2007 claim as alleged injuries to the employee's cervical and thoracic spine and ulnar nerve. (Dec. 2-4.) The insurer raised the defense of § 1(7A) for five of the claimed dates of injury, but did not raise that defense in regard to the accepted February 7, 2001 date of injury. (Dec. 3.) For all six claims, however, the insurer contested causal relationship, disability and the extent thereof, and denied entitlement to medical benefits. (Dec. 2-4.)

The six claims proceeded to conference before Judge Novick, who by § 10A orders dated September 30, 2010, denied five of the claims. Rizzo, supra. On October 1, 2010, Judge Novick ordered payment on the sixth claim bearing the most recent date of injury, January 4, 2010, consisting of § 35 benefits at the maximum rate of §577.09 per week from January 4, 2010 and continuing, as well as payment of § 30 medical benefits,. The parties filed cross-appeals, and the employee was examined pursuant to § 11A(2) by orthopedic surgeon, Dr. Steven Silver. (Dec. 9.)

Judge Novick determined the medical issues were complex and allowed the parties to submit additional medical evidence. She held three days of hearing, July 18, 19, and

[3] The parties stipulated the self-insurer accepted liability for these injuries. (Dec. 2 n.2.)

September 26, 2011, and the parties took the depositions of Dr. Silver, Dr. James Nairus, the employee's examining physician, and Dr. Lisa Fitzgerald, the employee's treating rheumatologist. (Dec. 5, 9.) The parties submitted written closing arguments and the record closed on November 28, 2011. However Judge Novick was unable to issue a decision before she passed away. (Dec. 9.) The matter was assigned to Judge Jacques who held numerous status conferences before being transferred to another region. (Dec. 9.) The matter was then assigned to the present judge.

In the proceedings before the present judge, the parties stipulated that, with the exception of the employee's testimony, the judge could consider the prior testimony of the remaining five witnesses without the need to recall them for further testimony. (Dec. 9-10.) The judge then held an additional two days of hearing, December 11, 2013 and December 12, 2013, at which time the employee testified. The twelve exhibits admitted in evidence at the hearing before Judge Novick were part of the record before the present judge, and the parties submitted an additional forty-eight exhibits, thirty-eight of which were medical records and reports spanning dates from December, 1998 through February, 2014. (Dec. 5-8.) The judge also considered the medical depositions submitted in the hearing before Judge Novick, expressly noting that the employee's treating rheumatologist testified "for 7 hours, 48 minutes" over a two-day period. (Dec. 24.) The parties submitted written closing arguments, and the evidence closed on April 28, 2014.

The judge made findings regarding the employee's job duties and the history of her employment over the nearly sixteen years she worked for the employer. He also made findings about the circumstances surrounding some of the six alleged dates of injury,[4] but made no findings on others.[5] In addition, he discussed some of the medical

[4] For example, regarding the accepted February 7, 2001 injuires, the judge found the employee underwent surgery on Janurary 14, 2003, consisting of "right carpal tunnel decompression and releasing of stenosing tenosynovitis of the right thumb IP joint." (Dec. 12.) The judge found the employee, "recalls being out of work for approximately 6 weeks thereafter, during which she received workers' compensation benefits," and that despite surgery, her "problems continued, and she received injections on September 5 and October 8, 2003." (Dec. 12.) However, the judge made no further findings regarding that claim. The board file shows that in October of 2006, the employee filed a second claim for benefits as a result of the February 7, 2001 injury.

treatment she received throughout the time period in issue. (Dec. 10-18.) The judge recited opinions of the doctors stating he adopted all of those which he recounted, including those of the employee's treating rheumatologist. (Dec. 18-22.) He then engaged in a discussion about the evidence, expressing his doubts about some of the employee's testimony and questioning the motives of her treating rheumatologist. (Dec. 23-26.) Notwithstanding his lengthy discussion, the judge made specific findings and rulings pertaining only to the ulnar nerve injury the employee sustained on June 13, 2007.

> 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.

Judge Lewenberg's February 6, 2007, § 10A conference order regarding that claim required the self-insurer to pay the employee a total of $1,263.00 in § 35 benefits for the period from February 18, 2001 through May 3, 2003; $3,946.73 for § 36(1)(k) scarring; $2,127.08 for § 36(1)(f) loss of function benefits for the permanent loss of function of the employee's major hand at the wrist; and, medical benefits pursuant to § 30. The self-insurer appealed from that order but subsequently withdrew its appeal. Rizzo, supra.

The April 6, 2006 claim alleged injuries to the employee's cervical and thoracic spine; however the self-insurer only accepted the cervical spine injury. The judge found:

> On April 6, 2006 the Employee was working in the vault and chitchatting with a coworker about a recent television show and whether young members of their families had watched it. For reasons that are unclear to me[6], while the Employee was not looking at her a coworker struck the Employee on the side of her head with a file folder container [sic] one or more documents. She went to an emergency room that day, and 4 days later she saw her treating rheumatologist, Dr. Fitzgerald. The doctor diagnosed a neck sprain near C3-4, symptoms in the thoracic area, and diffuse myofascial pain. She prescribed physical therapy, which the Employee later reported to be not beneficial. On May 17, 2006 the Employee returned to Dr. Fitzgerald with principal complaints of neck and back pain. The Employee did not miss any sustained time from work as a result of the April 6, 2006 injury.
> [6] The Employee did not regard this event as being malicious in nature.

(Dec. 13.) The judge made no further findings of fact and no rulings of law pertaining to this claim, which he ultimately denied "without prejudice."

[5] The employee claimed that on November 19, 2003, she sustained an injury to her cervical spine, thoracic spine and lumbar spine. (Dec. 2.) Again, this claim was unaccepted. The judge's decision contains no findings of fact pertaining to that alleged injury. (Dec. 8-27.)

> 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 the 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. 26.)[6] Thereafter, the judge discussed the employee's motion for an enhanced attorney's fee and his findings on that issue.[7] He then returned to the other claims, apparently including those pertaining to the other body parts the employee claimed to have injured as a result of the June 13, 2007 injury. (Dec. 26-27.)

> The litigation in this collection of cases has focused on the 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 [sic]. 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 the other DIA files without prejudice.

(Dec. 27.) The judge's statement that the remaining claims are for "declaratory" relief fails to acknowledge that initial liability was contested in three of the five remaining claims, and that the employee received extensive treatment to and for the body parts she alleged were injured as a result of all five claims. Bonds v. Boston School Dept., 30 Mass. Workers' Comp. Rep. ___ (2/24/16)("We have stated before that the extent of an

[6] Citing the opinions of Dr. Silver, the self-insurer argues the judge erred by awarding partial incapacity benefits to the employee for the June 13, 2007 ulnar nerve injury because the employee failed to carry her burden of proving a causal relationship existed between that injury and any disability on January 5, 2010 and continuing. (Self-ins. br. 11-19.) We disagree. The judge adopted Dr. Nairus's opinions that the employee's "left sided ulnar neuropathy at the level of her elbow, which is called cubital tunnel syndrome, is attributable to her June 13, 2007 work injury" and that injury acted as a major contributing cause of her left ulnar neuropathy. (Dec. 22.) The left upper extremity activity limitations assigned by Dr. Silver were the same as those assigned by Dr. Nairus (Dec. 5, 22, 26; Statutory Exhibit.); thus, to the extent the adopted vocational specialist's opinion was based on the limitations set forth in Dr. Silver's § 11A(2) report, there was no error.

[7] The self-insurer also argues the judge erred in awarding the employee's counsel a "clearly excessive" attorney's fee of $28,000. (Self-ins. br. 19-22.) The judge made findings of fact supporting his attorney's fee award, which we summarily affirm. (Dec. 26-27.)

employee's incapacity is not controlling on the issue of whether she is entitled to ongoing medical services."). Indeed, the judge's findings indicate that medical treatment was provided with regard to some of those claims. (Dec. 10-18); Dominguez v. Rainbow New England Corp., 29 Mass. Workers' Comp. Rep. __ (12/8/15)(even if medical treatment has been paid in full by health insurer, and employee has not made any out-of-pocket payments, employee may pursue §§ 13 and 30 claims). Although we affirm the judge's award of §§ 30 and 35 benefits for the employee's ulnar nerve injury, because the judge failed to address the remaining claims, we cannot determine whether the benefits awarded are the only benefits the employee is entitled to receive.[8]

The parties produced extensive evidence in this case and exhaustively litigated all of the claims, including those the judge denied without prejudice and without making clear findings of fact. By failing to resolve the issues presented by those claims and denying them without prejudice, the judge's decision requires the parties to re-litigate the claims notwithstanding the extensive litigation, which, through no fault of any party, has already taken nearly six years to complete. We acknowledge the judge was faced with an enormous amount of complicated and, at times, contradictory evidence from a number of

[8] The employee also argues the judge erred by adopting conflicting medical evidence and making findings of fact based on an incomplete examination of the lay and medical evidence. (Employee br. 20-28.) As the record presently stands, it is not possible for us to address these alleged errors as the judge failed to make sufficient and clear findings of fact and rulings of law pertaining to the employee's conditions, body parts and injuries. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Indeed, the employee appears to acknowledge as much; for example, she notes the judge adopted medical evidence that fibromyalgia can be exacerbated by overuse, (Dec. 19), but "he then goes on to *seemingly* conclude that her fibromyalgia is unrelated to her activity at work." (Employee br. 21-22; emphasis supplied.) The employee further argues that the findings the judge did make, regarding her physician's fibromyalgia opinions, were based on an incomplete reading of the record because they failed to reflect the physician's final opinions expressed during her second date of testimony, after her recollection was refreshed regarding foundational facts. See Perangelo's Case, 277 Mass. 59, 64 (1931)("The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying"); Wilson's Case, 89 Mass. App. Ct. 389, __ (2016)("The testimony of a medical expert should be considered as a whole"). We anticipate that the employee's concerns will be addressed on recommittal as we are requiring the judge to address *all* of the employee's claims as well as the self-insurer's defenses, including its § 1(7A) defense.

lay, vocational and medical experts, which spanned an unusually lengthy time period. However, 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 Mancini v. Suffolk County Sheriff's Dept., 30 Mass. Workers' Comp. Rep. ___ (3/01/16)(delays affect due process rights of parties).

"Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for such decision." G. L. c. 152, § 11B. The judge erred by failing to make findings of fact and rulings of law addressing all of the employee's claims and the self-insurer's defenses, including the employee's allegations that she sustained cervical and thoracic spine injuries as a result of the June 13, 2007, injury, for which the insurer continues to contest responsibility. Although the self-insurer raised § 1(7A) as a defense to four of the five remaining claims, and the judge made some findings discussing pre-existing conditions, (Dec. 18-20), 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 § 1(7A) were activated, he must conduct the analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 350 (2005).

Accordingly, we recommit the matter for further findings of fact and rulings of law pertaining to the employee's five remaining claims and for so much of the June 13, 2007 claim as alleged injuries to the employee's cervical and thoracic spine. (Dec. 2-4.) Because we affirm the award of benefits for the ulnar nerve injury and the attorneys' fee, the employee has prevailed, and the self-insurer is directed to pay the employee's counsel a fee of $1,618.19, pursuant to G. L. c. 152, § 13A(6).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***June 1, 2016***