COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014569-15**

Darren M. Desisto	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

This case was heard by Administrative Judge Fitzgerald.

APPEARANCES
Seth J. Elin, Esq., for the employee
Ryan R. Keough, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from a hearing decision ordering it to pay the employee § 34 benefits at a rate of $494.51 per week, based on an average weekly wage of $824.19, from his date of injury, June 8, 2015, through the exhaustion of those benefits, followed immediately thereafter by payment of ongoing § 35 benefits at a rate of $230.51 per week based on a minimum wage earning capacity of $440.00. The self-insurer raises three issues that it asserts require either reversal of the decision or an order vacating the decision and recommitting the matter for further findings of fact. We affirm the judge's decision in part and reverse only so much of the decision as ordered the self-insurer to pay the employee § 50 interest.

To provide background for our discussion of the self-insurer's first argument on appeal, we recite the undisputed part of the record. The employee, age 51 at the time of the hearing, worked for the self-insurer as a mechanical equipment operator and public works laborer from November of 2014 through his date of injury, June 8, 2015. (Dec. 5.) His job duties "included filling potholes, driving a trash truck and emptying trash barrels at different stops. He also performed snow removal." (Dec. 5.) On June 8, 2015, the employee was struck by a vehicle while attending CDL school as required by his job. (Dec. 6.) The vehicle struck the employee's right forearm, and may have also struck his

right knee; nonetheless, on impact, the employee's body twisted and turned, resulting in him twisting his right knee. (Dec. 6.) That same day, the employee went to the Faulkner Hospital where he was diagnosed as having sustained a contusion of the right wrist and strain of the right knee as a result of being struck by the vehicle. (Dec. 8.) The employee did not return to work after the accident, and on June 12, 2015, he sought treatment from Dr. Michael Mason for his right knee pain. Dr. Mason treated the employee for a prior workers' compensation injury, but he "noted that the [right] 'lateral knee pain is new.' " (Dec. 8.) The employee's pain in the right knee worsened, and by July 9, 2015, Dr. Mason recommended an MRI of the right knee. (Dec. 8.)

On July 22, 2015, the employee filed a claim for weekly workers' compensation benefits and medical treatment seeking benefits for injuries to his right knee and right wrist, sustained as a result of the accident on June 8, 2015. Rizzo v. M.B.T.A., 16 Mass. Workers' Compensation Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). On October 20, 2015, the claim was the subject of a § 10A conference before a different administrative judge. Box 10 of the parties' Form 140 Conference Memorandum listed the "Nature and Cause of Injury" as "Employee was a pedestrian struck by a passing car in a MVA. Injured right wrist and right knee." Rizzo, supra. The employee sought § 34 benefits from July 24, 2015,[1] and continuing, as well as "13 & 30 (right knee MRI)." Id. On October 21, 2015, the judge ordered the self-insurer to pay the employee § 34 benefits for the time period requested, as well as "Section 30 benefits to include payment for a right knee MRI." (Dec. 2-3.) Both parties appealed, and on January 19, 2016, the employee was examined pursuant to § 11A(2), by Dr. George P. Whitelaw. Thereafter, the matter was assigned to the present judge for a de novo hearing because the judge who presided over the conference had retired.

Prior to the hearing, the self-insurer filed a motion to open the medical evidence, stating the impartial examiner's report was inadequate because Dr. Whitelaw "opined

[1] The board file shows that the self-insurer paid the employee weekly benefits on a without-prejudice basis from the date of injury through June 23, 2015, when it terminated those benefits upon seven days written notice. Rizzo, supra.

'the right wrist [h]as gone on to heal without any consequences . . . [the employee] does need to have the MRI done of the right knee to give an evaluation as to what can be done for treatment and what his prolonged disability will be." Furthermore, the self-insurer maintained that the employee had the MRI on March 30, 2016, but Dr. Whitelaw had not had an opportunity to review it prior to the examination. Rizzo, supra. The judge's endorsement on that motion states, "motion allowed due to inadequacy & complexity. 3/1/17." Id.

The hearing took place on January 23, 2018. The parties submitted additional medical evidence. In her decision, the judge made findings about the employee's prior work experience; in particular, she found the employee "worked for A-Alert from November 2013 to July 2014 as a truck driver." (Dec. 5.) The judge also found the employee, "injured his left knee and bilateral elbows on July 15, 2014 while working for A-Alert Courier Service, Inc. As a result of those injuries, the Employee sought conservative treatment with Dr. Lowney, his primary care physician. [Ex. 9, 10.]" (Dec. 7; footnote omitted.) The judge noted, "[t]he Employee settled his case on December 20, 2017 with Travelers Indemnity Company of America. Liability was established for a left knee strain and bilateral elbow strains." (Dec. 7, n. 1.)

Regarding his work for the self-insurer, which began in November 2014, the judge found that the trash truck the employee usually used was missing the bottom step. (Dec. 6.) As a result, in order to get into the truck, the employee had to climb up the side of the truck; to exit the vehicle, he had to jump out of the truck. Id. He performed these tasks at every stop so that he could empty trash barrels into the back of the truck. The judge found this activity "affected his knees and his elbows." (Dec. 6.) The judge found that during the winter of 2015, the employee worked "twenty hours at a time, had four hours off, and then worked another twenty hours," performing duties consisting of driving a plow truck, shoveling out fire hydrants and barrels, and breaking up rock salt on top of trucks. (Dec. 6.) The judge credited the employee's testimony that the motion of "constantly turn[ing] the steering wheel" of the plow truck "caused his elbows to swell" and that all of his snow removal duties "affected his knees and elbows." Id. The judge

found the employee's additional summer job duty of sweeping and shoveling debris off city streets "bothered his knees and elbows." She further found that on June 8, 2015, while attending CDL school for work, he was as a pedestrian when he was struck from behind by a moving vehicle. The judge found the vehicle struck the employee's right forearm and that the impact resulted in him twisting his right knee. (Dec. 6.)

Adopting the medical opinions of Dr. James McGlowan and Dr. Anthony Schena, the judge found the employee injured both knees and both elbows as a result of his repetitive work activities for the self-insurer; he sustained a specific injury to his right knee as a result of the motor vehicle accident on June 8, 2015; and, the employee was totally disabled as a result of those injuries from June 8, 2015, to date and continuing. (Dec. 14-15.)

On appeal, the self-insurer first argues that the judge erred by allowing the employee to try the "repetitive-use" claim alleging injuries to bilateral knees and elbows because that claim was not properly before her at the de novo hearing. Specifically, it asserts that the employee failed to give proper notice of the additional alleged injuries and claim, failed to properly amend his claim pursuant to G.L. c. 152, § 49 and 452 Code Mass. Regs. § 1.22, and never filed a motion to join the self-insurer to any other claim at the Department of Industrial Accidents. (Self-ins. br. 1, 7.) It further alleges the judge erred by failing to address its defenses of late notice and claim concerning the additional body parts and mechanism of injury.

In response, the employee asserts that prior to the hearing on January 23, 2018, there were "approximately six status conferences at the hearing level," and that "at multiple status conferences it was addressed by the Employee's counsel that if the case went forward, there would be argument regarding repetitive injuries to multiple body parts." (Employee br. 3-4.) The self-insurer makes no reference to any of these alleged meetings. In addition, although the judge's decision discusses the procedural history of the claim, it does not state that there were any status conferences in this case. It also does not state how, or when, injuries to the additional body parts and the additional mechanism of injury came to be part of the case. Although our case management system shows the

hearing was rescheduled multiple times, it only shows one status conference event taking place prior to the hearing, and that event occurred on May 22, 2017. Rizzo, supra. There is no transcript of the May 22, 2017, proceeding, and, to the extent other status conferences may have been held, none of them were conducted on the record. "We have repeatedly urged judges and practitioners alike to 'conduct all but the most extraneous of trial business on the record.' " Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009), quoting from Hill v. Dunhill Staffing Systems, Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002).

Against this backdrop, the self-insurer's argument has surface appeal. To the extent the employee relies on correspondence he sent to the judge to show that these body parts were indeed part of the case, he fails to show that he ever properly amended the claim that was pending against the self-insurer. Indeed, the board file contains no motion to amend, or to join, despite the fact the record shows the only body parts at issue from the moment the claim was filed through the § 10A conference were the employee's right wrist and right knee. Rizzo, supra. 452 Code Mass. Regs. §1.22 states:

> (1) Pursuant to M.G.L. c. 152, § 49, a party may amend his or her claim or complaint as to the time, place, cause, or nature of the injury, as a matter of right, at any time prior to a conference, with written notice to all parties. **At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge.** Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.
> (2) As to a party to the original action, a party may amend a claim or complaint in writing with notice to all parties as a matter of right at any time prior to a conference whenever the controversy created by the amended claim or complaint arose out of conduct, incident, or series of occurrences set forth or attempted to be set forth in the original claim or complaint.
> **(3) No amendment to a claim or complaint may be made except as provided by M.G.L. c. 152 and 452 CMR 1.00. Any party shall be allowed a reasonable time to prepare a defense to an amended claim or complaint. Such period shall not exceed 45 calendar days from the date of notice of the amendment, unless an administrative judge finds that additional time to prepare a defense is needed.**

(Emphasis supplied.)

Creating a record of the proceedings at status conferences and adhering to the procedural rules prohibiting the amendment of claims and complaints without a motion and opportunity to be heard, would have prevented the scenario presented by this case: an appeal concerning the basic nature of the matters properly in controversy at the hearing. Because the language of the regulation is clear that from the time of conference onward, a party may amend his or her claim only by filing a motion with the administrative judge, we agree the judge erred by allowing the employee to amend his claim after the conference without filing a motion to do so. Nonetheless, piecing together the available record, we conclude that error is harmless under the circumstances.

The hearing transcript shows that the issue of multiple body parts was clearly discussed and addressed throughout the hearing with no objection by the self-insurer. There is no statement by self-insurer's counsel, or other evidence in the transcript, that shows the self-insurer was in any way surprised that the employee's claim had morphed at hearing to include a claim alleging "repetitive-use" injuries to multiple additional body parts.

At the beginning of the hearing, when discussing the appeal of the conference order, the employee indicated that his claim concerned "multiple body parts." (Tr. 4.) The judge then set out the claims and defenses as follows:

> The Judge: The employee makes the following claims:
> Section 34 temporary total incapacity benefits from June 8, 2015, to date and continuing. The employee also raises the issues of Section 7, Section 8, Section 13A, Section 50 and Section 35B.
> The [self-] insurer raises the following defenses and issues: denies disability and extent of incapacity, denies causal relationship between industrial injury and disability, and denies entitlement to Section 13 and 30 medical benefits.
> Attorney Elin, do you also want Section 13 and 30 medical care benefits checked off?
> Mr. Elin: Yes, your Honor. Is it not on mine?
> The Judge: It was not.
> Mr. Elin: You know what? Let me take that back, then, your Honor. There should probably be a little more detail since there is sort of a confusing aspect of all the body parts in question.
> So I'm going to add to this 13 and 30 to **include treatment for bilateral knees and bilateral elbows.**

(Tr. 4-5; emphasis added.) Despite alleging in its brief that this exchange between the judge and the employee's counsel was the "first time the Self-Insurer was notified that the Employee was alleging these body parts were allegedly causally related to an alleged 'repetitive-use' injury while employed by the City," (Self-ins. br. 10), the self-insurer did not object to the employee's counsel's statement nor did it object to the judge allowing the employee's counsel to amend his issue sheet. In addition, the self-insurer did not request to amend its hearing issue sheet in response to the employee's statement, nor did it ask to add any additional defenses in response to the employee's amended issue sheet.

As to the self-insurer's related argument that the judge also erred by failing to address its defenses of late notice and claim, we note that neither defense was raised at any time during the hearing, and both appeared for the first time in the self-insurer's written closing argument. Rizzo, supra. The judge did not err by failing to address affirmative defenses which were not timely raised and litigated. The self-insurer alleges it was deprived of the ability to raise these defenses earlier because it first received notice that the repetitive use injuries to other body parts were being claimed by the employee "after Hearing had commenced on January 23, 2018," and as a result "the Self-Insurer was not afforded the opportunity to draft an opposition prior to the hearing." (Self-ins. br. 11.) We disagree not only because the self-insurer raised no objection on the record to proceeding with the claim as framed by the employee at the outset of the hearing, but also because the hearing record itself indicates the self-insurer had an abundance of time to prepare to defend against these new allegations. Indeed, while the judge and the parties discussed the impartial medical examiner's report in detail, the self-insurer's counsel stated:

> Judge, just based on the opinion of the impartial, I think it was inadequate because he didn't have a chance to review the MRI. Maybe as to the other body parts, other than the knee, maybe those are complex and not inadequate, but certainly regarding the right knee condition he didn't have a chance to view the MRI, so based on that issue alone it's inadequate on that body part. The other body parts may be on complexity. I think we discussed this last year in March so . . .

(Tr. 9.) The self-insurer's statement that the other body parts were discussed "last year in March," over ten months prior to the hearing, shows it had far more than forty-five days to prepare a defense. See 452 Code Mass. Regs. § 1.22(3).

Nothing in the hearing record indicates the self-insurer raised any objection whatsoever to litigating the additional body parts and mechanism of injury. During the hearing itself, the employee was questioned extensively about his work activities with the self-insurer and their effect on his bilateral elbows and knees, again without objection by the self-insurer. (Tr. 13-59.) At the very least, the issue was tried by consent. Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. 417, 419 (2000)("a claim may be deemed amended where the parties try it by consent"); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 245 (1997)(issue tried by consent where "insurer did not object until practically all the evidence thereon was in").

In its second issue on appeal, the self-insurer argues the judge acted arbitrarily and capriciously by ordering it to pay the employee ongoing § 35 partial incapacity benefits, following the exhaustion of § 34 benefits, because there was no claim seeking payment of those benefits at hearing. The hearing took place on January 23, 2018. (Dec. 3.) On June 13, 2018, while the hearing record was still open, the self-insurer filed a Form 107, notification of termination of weekly benefits stating the "employee's compensation benefits under section 34 were exhausted as of June 4, 2018." Rizzo, supra. The hearing record closed on September 24, 2018. (Dec. 3.) The employee's claim sought § 34 benefits from June 8, 2015, to date and continuing. (Dec. 3.)

> It is well-established that a judge, faced with a claim for § 34 incapacity benefits only, may award 'lesser included' § 35 benefits for the same period. An employee's failure to claim § 35 incapacity benefits in the alternative does not bar a judge's award of such benefits. Tredo v. City of Springfield School Dept., 19 Mass. Workers' Comp. Rep. 118 (2005). The only requirements that must be satisfied are that the period in question is a period in which benefits are sought, and that the employee has shown that he is incapacitated. Id. at 123; Fallon v. Department of Revenue, 19 Mass. Workers' Comp. Rep. 298, 299 n. 1 (2005)(judge may award 'lesser included' § 35 benefits only for a period in which some incapacity is alleged.)

Bracchi v. Ins. Auto Auctions, 22 Mass. Workers' Comp. Rep. 287, 288-289 (2008). The judge did not err in ordering the payment of § 35 benefits following the exhaustion of the employee's § 34 benefits.

Lastly, the self-insurer argues the judge erred by ordering it to pay § 50 interest because such an order is barred under the doctrine of sovereign immunity. (Self-ins. br. 13.) In support of its argument, the self-insurer relies on Russo's Case, 46 Mass. App. Ct. 923 (1999)(doctrine of sovereign immunity barred § 50 interest award against the Commonwealth), and Cugini v. Town of Braintree, 17 Mass. Workers' Comp. Rep. 363, 365 (2003)(doctrine of sovereign immunity also applies to municipalities and "nothing in c. 152, expressly or by necessary implication, waived the application of the doctrine"). The employee's brief offers no argument for, or against, this proposition. "Consequently, to the extent that the judge's decision may be construed as ordering the payment of § 50 interest,[2] that order is vacated." Jones v. North Central Correctional Center, 27 Mass. Workers' Comp. Rep. 111, 114 (2013).

Accordingly, we reverse only so much of the judge's decision as ordered the payment of § 50 interest, and otherwise affirm the decision. Pursuant to G.L. c. 152, § 13A(6), the self-insurer shall pay the employee's counsel a fee in the amount of $1,705.66.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

[2] The judge ordered, "that the Self-Insurer shall pay the Employee any Section 50 benefits due." (Dec. 16.)

Martin J. Long
Administrative Law Judge

Filed: **October 22, 2019**