COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016117-15**

Debra Giaccarini	Employee
United Parcel Service	Employer
Helmsman Management Service c/o Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Bean.

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Joseph J. Durant, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision awarding the employee § 34 temporary total incapacity benefits, followed by § 34A permanent and total incapacity benefits. The insurer argues that the judge made inadequate and inconsistent findings unsupported by the evidence, and that he failed to properly address the insurer's "late notice" defense. We agree with both arguments, and recommit the case for further findings.

The employee, age sixty-two at the time of hearing, is a high school graduate who began working part-time for the employer as a sorter in 1989. She transitioned to full-time employment in 1998. Her job required "much lifting, overhead work and squatting." (Dec. 385.) By 2009, she was complaining of pain in her back, neck and shoulder. On August 29, 2009, she reported a "repetitive motion" industrial injury to her back. Id.; (Employee's claim form, dated 10/2/09, Board No. 023642-09). She was out of work for a short time, and then returned against her doctor's advice because she feared

losing her job.[1] Id. "She worked in constant pain. She discussed her ongoing pain with her supervisors every month or two." Id. at 386. On September 13, 2011, she left work due to "increasing low back pain and shoulder pain." (Dec. 386.) Three days later, she filled out a form stating that she hurt her back trimming trees in her yard. (Dec. 386; see Exs. 4 and 8.) Subsequently, she collected short and long-term disability payments, and then Social Security disability compensation. (Dec. 386.)

In June 2015, three years and nine months after leaving work, the employee filed the present claim for benefits, describing her injury as a "repetitive back strain." (Dec. 386.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The claim was denied at a § 10A conference, from which the employee appealed. (Dec. 385.)

At hearing, the report and deposition testimony of the § 11A examiner, Dr. Vasu K. Brown, were entered into evidence. (Dec. 385-386.) However, the parties agreed Dr. Brown's report was inadequate, (Dec. 387), and the judge allowed the submission of additional medical evidence. (Dec. 385, 387.) Specifically rejecting Dr. Brown's opinion, the judge adopted the June 18, 2015, medical opinion of Dr. George Whitelaw. Finding that Dr. Whitelaw "recorded a history consistent with the one related above and reviewed the employee's medical treatment history," (Dec. 387), the judge adopted Dr. Whitelaw's opinion that, the employee suffers from degenerative disc disease of the lumbar spine and a compression fracture at L-3; the diagnoses are causally related to the employee's work at UPS; she is permanently and totally disabled; and, her work injuries are a major cause of that disability. (Dec. 387.)

The judge concluded:

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[1] The parties in the 2009 case and in the present case are the same. The judge's findings indicate that the employee did not receive workers' compensation benefits for her 2009 back injury. (Dec. 385.) However, the Board file in that case (Board no. 023642-09) indicates the judge issued a conference order for a closed period of § 34 benefits from August 29, 2009 to October 5, 2009, as well as § 30 benefits. That order was not appealed. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (reviewing board may take judicial notice of documents in board file). We note that, although the judge stated, "[t]hat case is not before me in this action," (Dec. 385), the 2009 accepted back injury may affect the judge's causation analysis on recommittal. See supra note 6.

> [T]he employee suffered an industrial injury to her low back over the course of the many months before September 2011 due to the heavy and repetitive nature of her work at UPS. This repetitive work was and is a major cause of her disability and need for treatment. However, I acknowledge that there are a number of factors that impact the employee's ability to work. There are likely some residual effects of her 1980 car accident that injured her neck and shoulder. In the days before leaving work for the final time she suffered an injury from a fall at home while trimming a tree. Each of these events contributes to the employee's present disability. But the effect of the employee's employment at UPS that involved much heavy lifting, reaching and squatting suffered over many months dating back at least to 2009 or 2008 and perhaps many years further, remains a major cause of her disability and need for treatment.

(Dec. 388.) Further addressing § 1(7A), "after fully considering the recent fall and remote car crash," (Dec. 388), the judge found that the § 1(7A) defense was defeated, as "her many years on the job remain a major cause of her disability and need for treatment." Id.

Turning to the insurer's "§ 41 statute of limitations and notice defense," the judge found:

> *The employee did not report her September 13, 2011 injury claim for three years and nine months.* During that time she pursued short and long term compensation through her union and social security disability benefits. Such actions do raise the question that the insurer raised in its written closing argument but the statute is unambiguous – *the employee has four years to report an injury and did so in three years and nine months.* Certainly a quicker reporting of the incident is to be preferred, but I cannot deny the claim based on a long but legally permissible span of time from injury date to claim filing.

(Dec. 388; emphases added.) The judge then ordered the insurer to pay § 34 temporary total incapacity benefits from September 14, 2011, to September 11, 2014, and § 34A permanent and total incapacity benefits from September 13, 2014, to date and continuing.

We address the insurer's second argument first, as it deals with a threshold issue, the disposition of which may bar the employee's claim. The insurer maintains that the judge failed to address its § 41 defense insofar as it requires that the employee give notice "to the insurer or insured as soon as practicable." We agree.

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 the disability and his employment. [2]

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). Where the insurer properly raises both requirements, the judge must address them both.[3] 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." G.L. c. 152, § 41. Here, the judge made clear findings that the employee *filed her claim* within the four-year limitations period, as she did so within three years and nine months. (Dec. 386, 388.) However, he did not properly address whether she gave the employer or insurer *notice* "as soon as practicable." The judge did find that, "She did not *report* her September 13, 2011 injury claim for three years and nine months," and then acknowledged that "it would have been preferable for her to have reported the injury earlier." Id. at 388. (Emphasis added.) However, he then conflated the notice requirement with the four-year filing requirement by finding that an employee has "four years to *report* an injury," and that he could not "deny the claim based on a long but legally permissible span of time from injury to c*laim filing*." Id. (Emphasis added.) This

[2] General Laws c. 152, § 42, provides, in pertinent part, that "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 . . . ."

[3] Proper notice and claim are affirmative defenses which must be raised in order to require the judge to address them. Doherty, supra at 201-202. See also Dugas v. Bristol County Sheriff's Dep't, 17 Mass. Workers' Comp. Rep. 349, 354 n. 3 (2003). Although the insurer's initial denial did not specifically list lack of notice as grounds for denial, it did raise notice at both conference and hearing. (Dec. 384); Rizzo, supra. In any case, the employee does not allege that the insurer did not properly raise the notice requirement.

is error. On recommittal, the judge must make further findings, supported by the evidence, on whether, by reporting her injury three years and nine months after leaving work, the employee gave notice to the employer or insurer "as soon as practicable after the happening thereof." § 41.

If the judge determines that the employee did not give notice "as soon as practicable," his inquiry does not end there. He must go on to determine whether lack of notice is excused because the insurer or employer had knowledge of the repetitive back injury, or because the insurer was not prejudiced by the lack of such notice. G. L. c. 152, § 44.[4]

> " '[w]hen late notice is asserted by the insurer, the burden of proof rests with the employee to show either that the employer or insurer had knowledge of the injury, or that the insurer was not prejudiced by lack of timely notice.' Day v. Lumbermen's Mut. Cas. Co., 4 Mass. Workers' Comp. Rep. 313, 317-318 (1990), citing Clifford's Case, 337 Mass. 129 (1958), and Berthiaume's Case, 328 Mass. 186 (1951). 'Knowledge of the injury' is used 'in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty.' Dugas v. Bristol Cnty. Sheriff's Dept., 17 Mass. Workers' Comp. Rep.349, 354 (2003), quoting Walkden's Case, 237 Mass. 115, 117 (1921). 'Knowledge of the injury' has been interpreted to mean the employer or insurer knew or had reason to know the injury was causally related to the employment. Kangas's Case, 282 Mass. 155 (1933). In the absence of such knowledge, only a showing that the *insurer* was not prejudiced by his failure to give notice will permit the employee to recover benefits. Tassone's Case, 330 Mass. 545, 549 (1953); Kangas's Case, supra at 157-158.

Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. 127, 130-131 (2007)(italics in original). See also Lisby v. EDM Construction, Inc., 32 Mass. Workers' Comp. Rep. ___ (October 12, 2018); Mason v. Action, Inc., 26 Mass.Workers' Comp. Rep. 221, 224 (2012).

In making his determination as to whether the employer had knowledge that the injury was causally related to the employment, the judge should keep in mind that such

[4] General Laws c. 152, § 44, states, in relevant part, "[w]ant of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice."

knowledge must be ascribed to a supervisory employee. See Mason, supra; Dugas, supra at 355-357, and cases cited. "[T]he mere onset of pain . . . at work does not mean that the work caused those symptoms." Mason, supra at 224 (supervisor's knowledge that employee left work due to neck pain, without more, does not equate to knowledge that her problems were work-related), citing, Kangas's Case, 282 Mass. 155, 157-158 (1933)(where employer knew only that the employee hemorrhaged after exertion at work, a common incident of her tuberculosis, that was insufficient to warrant a finding that the employer had knowledge of a work-related injury).

If the judge finds notice was not given as soon as practicable, and the employer did not have knowledge of the employee's alleged injury, he must then determine whether the insurer was prejudiced. See Fantasia's Case, 75 Mass. App. Ct. 655, 659-660 (2009)(citing examples of prejudice to the insurer); Lisby, supra (same). The employee's claim may proceed only if the judge finds the insurer was not prejudiced by such lack of notice or knowledge. See Insurance Company of the State of Pennsylvania v. Great Northern Insurance Company, 473 Mass. 745, 751 (2016)("The employee is barred from receiving workers' compensation benefits . . . if the insurer, the insured [i.e., the employer], and their agent had no knowledge of the injury and the insurer was prejudiced by the absence of notice").

The judge's findings on notice may be dispositive. However, in case they are not, we address the insurer's first argument that a number of the judge's findings are arbitrary and capricious insofar as they are not supported by the evidence. Specifically, the insurer challenges the judge's findings regarding the employee's fall at home. The judge found the employee "suffered an injury from a fall at home while trimming a tree," which "contributes to the employee's present disability." (Dec. 388.) The insurer maintains that the evidence does not support the judge's finding that the fall at home occurred "just days before going out of work," or that the employee's last day of work was the date claimed, September 13, 2011. (Dec. 386, 388). However, the judge did not actually make findings on precisely when the fall at home occurred and whether the employee returned to work following it, despite the admission of documentary evidence addressing

those issues, (see Exs. 4 and 8; see also supra note 5), and his citation to some of that evidence. (Dec. 386, citing Ex. 4.). Until he resolves those issues with further findings, we cannot determine whether "correct rules of law have been applied to facts that could be properly found. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Along the same lines, the insurer also contends that the judge erred by relying on Dr. Whitelaw's opinion on diagnosis, causation and disability because it was based on an inaccurate history, not adopted by the judge, insofar as it did not include the fall at home. "The history upon which the medical expert relies is crucial to his opinion." Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 318 (2003), and cases cited. Thus, " 'the judge must find facts, and then adopt medical opinions consistent with them.' " Uka v. Westwood Lodge Hospital, 30 Mass. Workers' Comp. Rep. 129, 130 (2016), citing, *inter alia*, Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009); Pilon Jr.'s Case, 69 Mass. App. Ct. 167, 169 (2007); Correia v. Advanced Heating and Hot Water Supply, 29 Mass. Workers' Comp. Rep. 201, 203 (2015). The judge here did not appear to do that. The judge found the employee "suffered a fall at home . . . that affected her back," (Dec. 386), and then, "after fully considering the recent fall and remote car crash," found that the employee's "many years on the job remain a major cause of her disability and need for treatment," thus defeating § 1(7A). (Dec. 388.) However, the only medical opinion the judge adopted was that of Dr. Whitelaw, who did not mention the fall at home in his report. (See Ex. 9.) Indeed, the employee confirmed that she did not tell Dr. Whitelaw about that non-work-related fall. (Tr. 84.)[5] Dr. Whitelaw diagnosed the employee with degenerative disc disease of the lumbar spine and a compression fracture at L3, and found the work injuries to be a major cause of her disability. (Dec. 387.) However, because Dr. Whitelaw's report does not contain a

[5] Dr. Whitelaw did mention that the employee began treating with Dr. Nicola Kernan on September 12, 2012, but did not address, or indicate he was aware of, Dr. Kernan's statement on that date that the employee had fallen at home, or her later assessments on February 28, 2012, and September 24, 2012, regarding the fall. (See Ex. 9.)

history of the fall, his conclusions on diagnosis, causation and disability do not support the judge's findings on those issues. Thus, if the notice issue is not dispositive, on recommittal, the judge should make additional findings of fact regarding the fall at home, as discussed above, and reassess the medical evidence, adopting evidence consistent with his findings.[6]

Accordingly, we vacate the decision and recommit the case for the judge to consider the insurer's affirmative defense of failure to provide notice "as soon as practicable." Should the judge find the employee's claim is not barred due to lack of proper notice, he should make further findings as discussed above.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***August 7, 2019***

[6] We note that these findings may affect the causation analysis. See, e.g., Seney v. Dep't of Youth Services, 32 Mass. Workers' Comp. Rep. ___ (May 8, 2018)(discussing the difference between § 1(7A) analysis and intervening cause analysis where there are prior work-related and non-work-related injuries).