COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035801-14**

Donald Denham	Employee
Kiewit Corporation	Employer
Kiewit Corporation	Self-insurer
Sullivan and McLaughlin Companies	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul Durkee, Esq., for the employee
James E. Ramsey, Esq., for Kiewit Corporation
Peter Harney, Esq., for AIM Mutual Insurance Company at hearing
Holly B. Anderson, Esq. for AIM Mutual Insurance Company on appeal

LONG, J. The subsequent insurer in this successive insurer claim, AIM Mutual Insurance Company, (hereinafter "AIM"), appeals from a decision ordering it to pay the employee ongoing § 34 temporary total incapacity and §§ 13 and 30 medical benefits. The insurer presents four objections to the hearing decision. Finding merit in its arguments that the administrative judge erred when he adopted inconsistent and conflicting medical opinions, and that he further erred when he failed to address its defenses of proper notice, proper claim and the employee's violation of § 27A,[1] we

[1] M.G.L. c. 152, § 27(A) provides:

> In any claim for compensation where it is found that at the time of hire the employee knowingly and willfully made a false representation as to his physical condition and the employer relied upon the false representation in hiring such employee, when such employee knew or should have known that it was unlikely he could fulfill the duties of the job without incurring a serious injury, then the employee shall, if an injury related to the condition misrepresented occurs, not be entitled to benefits under this chapter. Retention of an employee who rectifies any misrepresentation made to his employer

vacate the decision and recommit to the administrative judge to make additional findings, and to resolve the internally inconsistent medical opinions relied upon in the decision.

The employee filed two claims for benefits, in which he alleged an incapacity to work due to the cumulative effects of his job as a union electrician. One claim was filed against the self-insurer, Kiewit Corporation, (hereinafter "Kiewit"), based upon an April 4, 2013, alleged injury date, corresponding to the employee's last day of work for the employer, Kiewit Corporation. The other claim was filed against the subsequent insurer, AIM, based upon a January 31, 2014, alleged injury date, which was also the employee's last day of work for the employer, Sullivan and McLaughlin Companies. (Dec. 1-2.) A conference was held on both claims on August 4, 2015, after which the judge issued an order of payment against AIM for § 34 benefits from August 1, 2014 to date and continuing, as well as § 30 benefits. The judge denied the claim filed against Kiewit. The employee appealed the denial, and AIM appealed the order of payment. An impartial examination was conducted by Dr. Peter Schur on November 23, 2015. (Dec. 2.)

The hearing on the claims took place on June 8, 2016 and July 29, 2016. The employee sought § 34, or in the alternative, § 35, benefits, from August 1, 2014, to date and continuing, as well as medical benefits pursuant to §§ 13 and 30. The defenses raised by the self-insurer and AIM were liability, disability and extent thereof, causal relationship, entitlement to §§ 13 and 30 medical benefits, proper notice, § 1(7A)[2] and § 27A. The judge allowed the introduction of additional medical evidence, and the employee was the only witness to testify at the hearing. (Dec. 3.) The hearing decision

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> regarding his physical condition subsequent to the hire but prior to the injury shall restore any right to compensation under this chapter.

[2] M.G.L. c. 152, § 1(7A) provides:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

was issued on June 15, 2017. The judge denied and dismissed the claim against Kiewit and ordered AIM to pay the employee § 34 benefits from August 1, 2014, to date and continuing, plus medical benefits pursuant to §§13 and 30. The judge relied upon the medical opinions of Dr. Schur and Dr. Christopher Vinton to support the decision. AIM thereafter appealed to this board. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

The employee was close to forty-nine years old at the time of hearing and has a vocational high school education as well as apprenticeship and electrical training. He worked as an electrical worker for twenty-eight years through the International Brotherhood of Electrical Workers. The employee's duties included carrying/climbing ladders, lifting reels of wire, tools, conduit and pipe, as well as frequent bending, reaching, pushing, pulling, crawling, lifting, squatting and stooping. (Dec. 4-5.) From April 1, 2013 to April 4, 2013, the employee worked on a project for the employer, Kiewit Corporation, that required frequent bending. After approximately twenty seven hours work over the course of three days, he was laid off from the job. After he stopped working his pain level returned to its pre-employment level. He collected two months of unemployment compensation before going to work on or about June 10, 2013, at Sullivan and McLaughlin Companies, where the work involved smaller electrical conduit and wiring. The job went well for several months, but as the weather got colder his pain began to increase and his productivity fell. In January 2014, he was laid off from the job; he received unemployment compensation through July 2014. The employee's pain level following the work for Sullivan McLaughlin Companies never returned to the pre-employment level.[3] (Dec. 5.)

The judge relied upon the opinions of Dr. Schur and Dr. Vinton to find that a compensable injury arose out of and in the course of the employee's work with Sullivan

[3] The employee's pre-employment pain level prior to the Kiewit Corporation job was described during the hearing using a "1- 10" pain scale; however, the decision is devoid of any comparative pain analysis with respect to the employee's pain level vis-a-vis the Kiewit Corporation job as opposed to the Sullivan and McLaughlin Companies job.

and McLaughlin Companies. The following are portions of Dr. Schur's opinions adopted by the judge:

> Peter H. Schur, M.D. performed a § 11A examination of the employee on November 23, 2015 in the Arthritis Center, Brigham and Women's Hospital, and in his report stated the following facts and/or opinions:
>
> Mr. Denham says he worked as an electrician for over 28 years, full time, 40 hours per week without any interruption, but because of worsening arthritis by January 31, 2014, he had to stop work.
>
> He had to stop work, he said, because he could not complete a job in a timely fashion, having trouble because of heavy lifting, pushing, pulling, climbing, kneeling, bending, working in a cold environment, and/or a confined space.
>
> Furthermore, he says he is being taken care of by Dr. Reed a rheumatologist in Worcester, for inflammatory polyarthritis. This was characterized by pain all over as well as stiffness. He was not quite so bad 10 years ago, but has gradually gotten worse so that morning stiffness went from about 25 – 30 minutes, to now it is virtually all day, and having pain initially for some hours, although now he is having pain widespread all day.
>
> ….
>
> He was diagnosed as having inflammatory arthritis based on his history and physical exam by Dr. Reed and for that he was treated initially with nonsteroidals, in particular Indocin, occasionally short course of prednisone, was started on hydroxychloroquine (Plaquenil) approximately 1-1/2 to 2 years ago; it helped initially, but then stopped working.
>
> ….
>
> My diagnosis is chronic widespread pain in the realm of fibromyalgia.

(Dec. 6-7.)

The judge also adopted the following opinions expressed by Dr. Vinton:

> Christopher Vinton, M.D. is a Board certified orthopedic surgeon and the chief of the Department of Orthopedics at St. Vincent hospital. He has examined the Employee on two occasions, March 3, 2015 and July 14, 2016, and in his report of July 16, 2016 stated the following facts and/or opinions:
>
> Mr. Denham was diagnosed with seronegative inflammatory arthritis approximately just over 10 years ago.

….

I reviewed office notes from Dr. John Reed, which support the diagnosis of seronegative inflammatory arthritis. Enbrel and Neurontin had been instituted since I last saw him. Dr. Reed's notes do document significant joint involvement.

Diagnosis: seronegative inflammatory arthritis.

….

Causation: it is still my medical opinion that the patient clearly has some pre-existing inflammatory seronegative arthritis. However, his heavy work activities as an electrician for IBEW acted as a major contributing cause to his current disability and need for treatment in the sense that it exacerbated or accelerated his underlying pre-existing condition.

It does also still remain my medical opinion that the work that he did at the Vocational Loft Apartments in Worcester, Massachusetts also acted a s a major contributing cause to his above-mentioned diagnoses, disability and need for treatment, as it does appear that his symptoms progressed from manageable to disabling during the time period of his employment there.

(Dec. 8-9.)

The insurer argues "[t]he adopted opinions of Dr. Schur and Dr. Vinton concerning diagnosis and causal relationship to work conflict and cannot be reconciled, rendering the hearing decision internally inconsistent and the result of error that cannot be deemed harmless." (Insurer br. 24.) Additionally, the insurer argues the judge "also mischaracterized the opinion of Dr. Schur, leaving out those portions of Dr. Schur's opinion that would otherwise have highlighted the evidentiary conflict." (Insurer br. 26.) We agree with each of the insurer's arguments regarding the judge's handling of the medical evidence.

The judge first mischaracterized the impartial medical opinion of Dr. Schur by attributing Dr. Vinton's diagnosis of "seronegative inflammatory arthritis" to Dr. Schur when, in fact, Dr. Schur specifically and emphatically rejected this diagnosis. Omitted from the hearing decision were Dr. Schur's opinions that:

My diagnosis is chronic widespread pain in the realm of fibromyalgia – no

> evidence for an inflammatory polyarthritis based upon review of his records in that his ESR (sedimentation rate) and C-reactive protein (CRP) in Dr. Reed's notes have always been normal indicating no inflammation and there has been no evidence for arthritis on the one x-ray he appeared to have done (feet). Tests for rheumatoid arthritis were negative; an ANA nonspecific/barely positive/non-diagnostic.
>
> There has been no history of any injury and I think he was laid off because he could not do his work. I think he could not do his work as an electrician, not because of "inflammatory polyarthritis" (for which there was no objective evidence), but because of untreated chronic widespread pain.
>
> ….
>
> I should add that in my review of Dr. Reed's records dating back to 2005 he never had an elevated ESR or CRP, indicating that he had no inflammation; his tests for rheumatoid arthritis (RF and CCP) all [were] negative, and he only had x-rays of his feet looking for arthritis and no abnormalities were found – typically when we evaluate somebody for inflammatory arthritis, we take x-rays of at least the hands and feet to determine if in fact there is arthritis.

(Ex. 1.)

By ignoring and/or rejecting Dr. Schur's contradictory opinion that there was no objective evidence to confirm Dr. Vinton's diagnosis of seronegative inflammatory arthritis to support his findings, the judge mischaracterized the medical evidence. "While the judge is free to adopt all, part or none of an expert's testimony, he is not free to mischaracterize it or fail to consider the entire record." Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 405 (1998). Here, the hearing findings are couched in such a way as to imply that Dr. Schur concurs with Dr. Vinton's diagnosis when, in fact, Dr. Schur flatly rejects Dr. Vinton's opinion on this issue. The employee argues "[t]he fact that the employee may be suffering from more than one (1) work-related medical condition is a common everyday occurrence before the Board. The mere fact than an employee may carry two (2) separate diagnosed conditions certainly does not render this decision internally inconsistent." (Employee br. 20.) The flaw in this argument, however, is twofold: Dr. Schur does not opine that the "chronic widespread pain in the realm of fibromyalgia" is a work-related condition; and, more importantly, he entirely disagrees

with the other adopted diagnosis of "inflammatory arthritis." The medical opinions of Dr. Schur and Dr. Vinton cannot be reconciled and the result is a decision that is internally inconsistent. "When a judge adopts 'parts of two expert medical opinions, which cannot be reconciled' the resulting decision is internally inconsistent and 'arbitrary and capricious,' requiring recommittal for further findings of fact." Connerty v. MCI Bridgewater, 31 Mass. Workers' Comp. Rep. 129, 136.

The insurer also argues the hearing decision should be recommitted for rulings on the insurer's proper notice and § 27A defenses. We agree that this argument too has merit. While the judge lists proper notice and § 27A as defenses raised by each insurer (Dec. 2), the decision is bereft of any discussion, analysis or further mention of the properly raised defenses. This too is error. "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 each such decision." G.L. c. 152, § 11B; see Connerty, supra at 136-137. On recommittal, the judge must resolve the internally inconsistent medical opinions and also make express findings of fact and rulings of law on all of the issues presented, including the insurer's proper notice and § 27A defenses.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **November 26, 2018**