COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 021758-17**
Donna Varona	Employee
FedEx Ground Package System	Employer
FedEx Ground Package System	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Koziol and O'Leary)

The case was heard by Administrative Judge Bergheimer

APPEARANCES
Karen S. Hambleton, Esq., for the employee[1]
Adam J. Harrison, Esq. for the self-insurer[2]

FABISZEWSKI, J. The self-insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits, plus § 30 medical benefits. We affirm the decision in all respects but address below the self-insurer's argument that the administrative judge failed to address the employee's voluntary refusal to obtain surgery.

We briefly summarize the facts relevant to this decision. On August 12, 2017, the employee injured her right shoulder and neck while working for the employer. (Dec. 5.) On January 31, 2020, the administrative judge issued a prior hearing decision based on the employee's initial claim for benefits, ordering the self-insurer to pay § 34 temporary total incapacity benefits from August 15, 2017, to date and continuing, plus benefits and

[1] On September 8, 2023, after the assignment to the panel, Sarah A. Farrell, Esq., filed a Notice of Change/Appearance of Counsel (Form 114) on behalf of the employee.

[2] On December 30, 2024, after assignment to the panel, Pamela Dorazio, Esq., filed a Notice of Change/Appearance of Counsel (Form 114) on behalf of the self-insurer.

interest pursuant to §§ 13, 13A(5), 30 and 50.[3] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). On July 8, 2020, the employee filed a claim seeking § 34A permanent and total incapacity benefits, or, in the alternative, temporary partial incapacity benefits, from August 15, 2020, to date and continuing, plus benefits and interest pursuant to §§ 13, 13A, 30 and 50. Rizzo, supra. On January 7, 2021, the administrative judge issued a § 10A conference order awarding the employee a closed period of § 34A benefits, followed by ongoing § 35 benefits.[4] (Dec. II, 3.) Both parties filed timely appeals. Pursuant to § 11A(2), the employee was examined by Hillel Skoff, M.D., on June 30, 2021. Prior to hearing, the self-insurer filed a motion to submit additional medical evidence based on the complexity of the medical issues, which was allowed. The self-insurer also filed a motion to join the issue of §1(7A), which was denied.

A hearing *de novo* was held on May 17, 2022. At the hearing, the self-insurer filed the Insurer's Hearing Memorandum (Form 162) and listed the following issues in dispute: disability and extent thereof; causal relationship; deny entitlement to § 36 benefits; and deny entitlement to § 13 and § 30 benefits. (Ex. 4.) These issues were read into the record by the administrative judge at the beginning of the hearing. (Tr. II, 5.) At no time did the self-insurer indicate that it was raising the employee's refusal to have surgery or any other medical treatment as a bar to the employee's entitlement to § 34A benefits, nor did the self-insurer list this affirmative defense on the December 1, 2021,

[3] The January 31, 2020, decision hereinafter referred to as "Dec. I", was the first of two hearing decisions issued in this case by the same administrative judge. On October 13, 2022, the administrative judge issued a hearing decision on the employee's subsequent claim for permanent and total incapacity benefits, hereinafter referred to as "Dec. II", which is the subject of the appeal in this matter. The transcript from the second hearing is hereinafter referred to as "Tr. II".

[4] Per the conference order, the self-insurer was ordered to pay § 34A benefits at the rate of $258.35 per week, based on an average weekly wage of $273.91 per week, from August 15, 2020 to August 15, 2021, plus ongoing § 35 benefits at the maximum rate of $193.76 from August 16, 2021, to date and continuing. Additionally, the self-insurer was ordered to pay benefits pursuant to §§ 13 and 30. (Dec. II, 3.)

Joint Pre-Hearing Memorandum. Rizzo, supra. The employee requested permission to depose Barry Saperia, M.D., the employee's treating physician, which was granted, and a copy of the transcript was admitted into the record as exhibit 12. (Tr. II, 10; Dec. II, 2.) Both parties filed closing arguments on July 29, 2022, which was the date that the record closed. Rizzo, supra; (Tr. II, 10.) Part of the self-insurer's closing argument asserted that the employee was not entitled to compensation because her decision to forgo surgery was unreasonable. Rizzo, supra. The employee's closing argument noted the employee's decision to decline surgery but did not address the reasonableness of her decision or otherwise object to the self-insurer's tardiness in raising the affirmative defense of failure to mitigate. Rizzo, supra. On October 13, 2022, the administrative judge issued a decision ordering the self-insurer to pay § 34A benefits at the rate of $258.35 per week, based on an average weekly wage of $273.91, from August 15, 2020, to date and continuing, plus benefits and interest pursuant to §§ 13, 13A, 30 and 50. (Dec. II, 11.)

On appeal, the self-insurer argues that reversal is required because the administrative judge erred by failing to address all the issues in controversy, namely its defense alleging the employee's refusal to undergo surgery was unreasonable and constitutes a failure to mitigate. (Self-Ins. br. 10.) The employee, while not addressing whether the defense of failure to mitigate was properly raised, argues only that the self-insurer failed to offer a medical opinion that surgery would restore the employee's work capacity.[5] (Employee br. 13.) As discussed below, we reject the self-insurer's argument and affirm the decision of the administrative judge.

The failure to mitigate is an affirmative defense that must be raised by the insurer "either at the commencement of the hearing, or in its hearing memorandum, or verbally during testimony." Ovalle v. City of Everett, 34 Mass. Workers' Comp. Rep. 65, 72-73 (2020). In circumstances where "the evidence raises the question whether continuing disability is due to the original injury or to unreasonable refusal of proper treatment by

[5] The employee noted that she has declined surgery since May 2019, which is prior to the first hearing decision in this case that resulted in an award of § 34 temporary total incapacity benefits. (Employee br. 13.)

the employee himself, the employee must prove that the injury remains the cause." Burns' Case, 298 Mass. 78, 79 (1937). In Burns' Case, supra, the Supreme Judicial Court stated:

> Commonly, refusal of a surgical operation is deemed unreasonable, if the operation involves no substantial danger to life or health and no extraordinary suffering, and if it fairly appears that substantial gain will result from submitting to it. If, however, the operation is a serious one and the benefit problematical, refusal may be found not unreasonable, even though medical opinion may, on the whole, favor making the attempt.

Burns' Case, at 79 (citations omitted). Thus, when properly raised, "it is generally a question of fact for the administrative judge to determine whether refusal to undergo surgery or other proposed treatment is reasonable." Ovalle, at 72, citing Chrigstrom v. Kenoza Vending Co. Inc., 32 Mass. Workers' Comp. Rep. 83, 83, 86-87 (2018).

Here, the self-insurer did not raise the defense of failure to mitigate in its hearing memorandum or at the commencement of the hearing when the administrative judge recited the issues in dispute. (Ex. 4; Tr. II, 5.) To the extent that it could be argued that the issue was tried by consent, the record does not support a finding that "it fairly appears that substantial gain will result" from the proposed surgery. Burns, at 79. Of the medical opinions admitted into evidence at the hearing, the employee's treating physician, Barry Saperia, M.D., was the only physician to recommend surgery.[6] In an office note dated May 23, 2019, Dr. Saperia noted that the employee, having exhausted all nonsurgical treatment, had discussed and agreed to proceed with surgical intervention. (Ex. 5.) Ultimately, the employee did not undergo the recommended surgical procedure. (Dec. II, 5.) During the deposition of Dr. Saperia, he was questioned on direct examination by employee's counsel regarding his recommendation for surgery:

> Q. Okay. In your opinion, would surgery have returned Miss Varona to her pre-injury status with regard to her right shoulder?

[6] The record also contains the opinion of the § 11A impartial medical examiner, Hillel D. Skoff, M.D., as well as Louis Bley, M.D., who examined the employee on behalf of the self-insurer. (Dec. II, 1, 2.)

> A. That is a debatable thing. That would be my hope and expectation but certainly every patient is different, the anatomy is different, and the ability to strengthen and rehabilitate the shoulder after surgery is patient dependent and sometimes does not work to our expectation.
>
> Q. Would you expect, Doctor, to have limitations regarding her use of her right dominant upper extremity following surgery?
>
> A. For an undetermined period of time, yes. Some people have a significant improvement, but not sufficient improvement to return to a repetitive use situation.[7]
>
> Q. Now, Miss Varona is now age 58. Would you anticipate that given her age restrictions would most likely be permanent?
>
> A. Yes, they would.

(Ex. 12, 12-13.)

Later in the deposition, on cross-examination by the self-insurer's counsel, when questioned about whether additional steroid injections would change his prognosis, the following exchange occurred:

> Q. So, Doctor, to a reasonable degree of medical certainty, would your prognosis for Miss Varona change if she had undergone additional injections as you recommended?
>
> A. That's a matter of conjecture. Rotator cuff surgery is a – it provides – it is a surgery that most often is very successful, but frequently because the shoulder is such a complex joint made up of four separate articulations, that sometimes people get better. Most people get significantly better. Some people get all better. But then there is a continuum in between that, and it is difficult to say that if I did surgery, she would be all better. There are many, many physical factors that – and of course other factors that come into play with any rotator cuff surgery.

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[7] The judge took judicial notice of her first decision. (Dec. II, 5.) Therein, the judge made findings regarding the repetitive nature of the employee's job, (Dec. I, 5-6.), and found the employee suffered a "repetitive injury and an incident on August 12, 2017," (Dec. I, 9.) In her present decision, the judge adopted the opinion of vocational expert, Rhonda Jellenik, that the employee "lacks the transferrable skills and educational background to obtain alternative employment in the open labor market," and that she "is permanently and totally vocationally disabled." (Dec. II, 7.)

(Ex. 12, 24-25.)

There is no medical opinion in the record to support that it "fairly appears that substantial gain will result" from the surgery. See, Burns, at 79. Dr. Saperia, who recommended the surgery, opined that it was "debatable" whether the recommended surgery would return the employee to her pre-injury status, further stating that, given her age, restrictions were likely permanent. (Ex. 12, 12-13.) Given the lack of evidence that "it fairly appears that substantial gain" would result from the proposed surgery, the insurer failed to establish the affirmative defense of failure to mitigate as a matter of law.

Accordingly, we affirm the judge's decision. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,900.55, plus necessary expenses

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Kevin B. O'Leary
Administrative Law Judge

Filed: ***April 1, 2025***