COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001235-15**

Fernanda Silva	Employee
AES Corporation	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Bean.

APPEARANCES
Daniel P. Napolitano, Esq., for the employee at hearing and on appeal
Susan G. McDonald, Esq., for the employee on appeal
Scott E. Richardson, Esq., for the insurer

CALLIOTTE, J. The employee and the insurer both appeal from the judge's decision awarding the employee a closed period of § 34 temporary total incapacity benefits, and ongoing § 35 partial incapacity benefits. The insurer argues that, 1) the judge's findings are confusing and inconsistent with the evidence and thus arbitrary and capricious; 2) the findings on causation with respect to the employee's alleged right shoulder injury are contrary to law; and 3) the judge erred by finding the employee suffered an injury to her left shoulder. In her appeal, the employee disputes the insurer's arguments, and further argues the judge erred by finding the employee is only partially disabled. We reverse the judge's decision that the employee suffered a left shoulder injury. In addition, we vacate the decision, and recommit the case for the judge to make further findings of fact identifying the date or dates, and mechanism or mechanisms of the employee's right shoulder injury, applying the correct standard of "as is" causation. Until the judge makes these basic findings, we cannot address the remainder of the insurer's arguments or the employee's argument as to incapacity.

The employee, age fifty-one at hearing, emigrated from the Azores in 1974 and completed the seventh grade in the United States. In 2009, she began working for the

employer, first as an assembler, and then as a packer of alarms. The packing job required, inter alia, overhead lifting, and lifting and carrying boxes weighing five to ten pounds. On January 19, 2015, the employee slipped and fell on ice in the employer's parking lot, extending her right arm behind her. There is no dispute that she broke a bone in her right hand as a result of the fall. She received workers' compensation benefits for her hand injury for the six to eight weeks she was out of work. She then obtained a release from her doctor, and returned to her usual job as a packer. (Dec. 549.)

In the claim before us, the employee maintains that she also injured her right shoulder in the fall, and then injured it again during her later return to work. She testified that she felt bilateral shoulder pain immediately after the accident and that she reported the pain to the doctor at the hospital on the date of injury. However, the initial hospital records do not mention complaints of shoulder pain. The first medical record describing shoulder pain was approximately a month later, on February 20, 2015, indicating that she first felt shoulder pain two weeks earlier. Before returning to work, she received a cortisone shot for her right shoulder, but it did not reduce her pain. After returning to work, she worked for approximately a year, until April 29, 2016, before leaving work for right shoulder surgery. She has not returned to work since then. On May 2, 2016, the employee underwent her first right shoulder surgery. Following an unsuccessful course of physical therapy, she had a second right shoulder surgery on June 28, 2017, which reduced, but did not eliminate, her pain. (Dec. 549.) She continues to complain of shoulder pain and numbness radiating down her right arm, which increases with overhead work, reaching and lifting. Id. at 550.

The employee filed a claim for §§ 34, 13 and 30 benefits, beginning May 2, 2016, alleging right hand, right shoulder, and back injuries. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2016)(reviewing board may take judicial notice of documents in board file). Following a § 10A conference on January 6, 2017, at which the employee alleged right hand and right shoulder injuries, the judge denied the employee's claim. See Rizzo, supra. The employee appealed. (Dec. 548.)

Prior to the hearing, the employee was examined on April 26, 2017, by Dr. Hillel Skoff, pursuant to § 11A. At the hearing on April 26, 2018, the judge found the impartial report inadequate and allowed the parties to submit additional medical evidence. Following the submission of additional medical evidence and the May 13, 2018, deposition of Dr. Skoff, the judge allowed the employee's renewed motion to join a claim for a second date of injury – April 29, 2016, the employee's last day of work – on the theory that she also suffered an injury to her right shoulder "as a result of the cumulative effect of the heavy repetitive work activity plus her actual traumatic industrial injury." (Employee's Motion to Join a Claim to Add a Date of Injury, dated April 5, 2018; Tr. 19.) See Rizzo, supra. At hearing, the insurer challenged causal relationship, disability and extent of incapacity with respect to the employee's alleged traumatic right shoulder injury of January 19, 2015, and for the alleged repetitive right shoulder injury of April 29, 2016. With respect to the latter date of injury, the insurer also challenged liability. (Dec. 547; Tr. 13.)

In his decision, the judge found that the employee suffered a work-related injury to her hand and *shoulders*. Noting that there were three theories as to how the shoulder injury occurred, the judge wrote,

> I do not adopt a particular theory relating to the injury to the employee's shoulders. I rely on Dr. Skoff's opinion that there was not likely a pre-existing condition to determine that the injury to her shoulder occurred on or after January 19, 2015. The injury could have been caused by the slip and fall; it could have been caused by repetitive work, including overhead work, for the employer, over the course of many months or many years; it could have been a combination of the two. It could have been caused by the effects of the physical therapy she received after the cast was taken off of her hand; it could have been caused by that in combination with either or both of the first two theories. *I find that it is more likely than not that the first theory, the second theory, or the first and second theories in combination did cause the employee's shoulder injuries and continue to be a major cause of her disability and need for treatment.*

(Dec. 554; emphasis added.)

The judge then commented specifically on the employee's *left* shoulder:

> The injury to the employee's left shoulder requires comment. The employee broke her fall with her right arm, but not her left, suggesting that while the right shoulder may have been hurt then, the left would not. However, it is possible, although perhaps unlikely, that the jostling she took in the fall could have injured her left shoulder as well as the right. The left shoulder could have been hurt due to overuse after the right shoulder was injured, although there is no testimony suggesting that, or it could have been injured due to repetitive work and overhead work for the employer, or during the physical therapy sessions. I observe that the left shoulder was injured to a lesser degree than the right as seen in the two right shoulder surgeries and no left shoulder surgeries.

(Dec. 554.)

The judge concluded:

> In making these determinations, I rely on the credible testimony of the employee and the medical opinions of Doctors Skoff, Miller, Hollis and Gandhi. Both Doctors Skoff and Miller offered the opinions that the shoulder injuries were not related to the January 19, 2015 industrial accident largely due to the length of time that elapsed before she reported the injury to her doctors and due to the fact that such an injury is quite painful, causing them to believe that she would have reported the injuries earlier. That opinion if accepted, would negate the first theory but not the second or the third. Both of those doctors provided information that is discussed above that would tend to support a finding of causation. But for the 32 day lag in reporting, a lag that the employee insists should not exist, and the case for a positive causation finding is quite strong. Both doctors Hollis and Gandhi do causally relate the shoulder conditions to the industrial accident but do so with little supporting commentary.

(Dec. 555.)

The judge found the employee totally disabled after the January 19, 2015, fall due to her hand injury, and totally disabled again after each of her two right shoulder surgeries, until three months after the second surgery, or September 28, 2017. (Dec. 554.) Considering her age, education, experience, time out of the labor market, and pain, the judge found she could do some sedentary assembly and other jobs, but could only earn minimum wage to start, and could not work a full-time job. (Dec. 554.) Accordingly, the judge ordered the insurer to pay § 34 benefits from May 2, 2016, to September 28, 2017, and § 35 benefits from September 29, 2017, to date and continuing, based on an earning capacity of $220 per week. He also ordered "reasonable and

necessary medical treatment related to the industrial injury that the employee suffered *on or after* January 19, 2015, pursuant to §§ 13 and 30." (Dec. 555; emphasis added.)

Both parties appeal. We first address the insurer's last argument that the judge erred by finding that the employee suffered a lesser *left* shoulder injury at work. The insurer asserts that this was error because the employee never claimed she injured her left shoulder in the course of her employment. (Ins. br. 15-16.) Although the employee points out that she testified that she developed pain in both shoulders and complained of it at a medical appointment on February 20, 2015, (Employee br. 24; Tr. 66), she agrees that she never claimed a left shoulder injury. (Employee br. 24-25.) She maintains, however, that the judge's "comments" regarding a left shoulder injury are harmless because the judge's error did not influence his conclusion or had only a slight effect. Id.

We have long held that, where a judge makes findings on an issue that is not before him, he impermissibly expands the parameters of the dispute. See, e.g., Milton v. GT Advanced Technologies, 32 Mass. Workers' Comp. Rep. 197, 202-203 (2018); MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007). Moreover, where such findings are made, they raise potential due process violations. Milton, supra, citing Remillard v. TJX Companies, Inc., 27 Mass. Workers' Comp. Rep. 97, 102-103 (2013), citing Haley's Case, 356 Mass. 678, 681 (1970).

Here, despite the fact that the employee never claimed a left shoulder injury, the judge "observe[d] that the [employee's] left shoulder was injured to a lesser degree than the right," (Dec. 554), and found, "The employee suffered an injury to both *shoulders*," (Dec. 553; emphasis added), and "the employee did suffer a work related injury to her hand and *shoulders*." (Dec. 554; emphasis added.) These are not mere comments on the possibility of a left shoulder injury, but findings that one actually occurred. In making such findings, the judge erroneously expanded the parameters of the dispute, as there was admittedly no claim for a left shoulder injury.[1]

[1] The employee does not argue that a left shoulder injury was tried by consent, nor do we see any evidence that it was. Despite her testimony that she felt bilateral shoulder pain after she fell, and

This error is not harmless, as the employee argues it is, because it leaves the insurer open to liability for future claims for benefits, based on an established left shoulder injury. See Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99, 110-111 (2017)(judge's error in finding the employee injured his right knee, which was not an issue in controversy, had potential to impact the insurer in an adverse manner if the matter came before a new judge on an additional claim). See also Lopes v. Lifestream, Inc., 25 Mass. Workers' Comp. Rep. 121, 122-124 (2011)(where judge ordered benefits only for lumbar injury, but found employee injured neck as well, employee was free to later claim, based on evidence developed after the close of evidence of first hearing, that she became incapacitated as a result of her established neck injury). Moreover, contrary to the employee's argument, we cannot tell to what extent the judge's finding the employee suffered a lesser injury to her left shoulder affected his determinations on disability and incapacity. See O'Rourke v. New York Life Ins., 30 Mass. Workers' Comp. Rep. 303, 309 (2016)(errors not harmless where they appear to have been factors in judge's findings). Accordingly, we vacate the judge's findings that the employee suffered a *left* shoulder injury.[2]

We turn next to the insurer's other arguments, which we address only as they pertain to the employee's alleged *right* shoulder injury. The insurer argues that the judge's findings are confusing and inconsistent with the evidence, and thus arbitrary and capricious. Specifically, the insurer contends that the judge failed to choose any one of the theories he proposed could have caused a shoulder injury, reciting mere possibilities rather than probabilities. Furthermore, the insurer maintains that the adopted medical opinions of Drs. Skoff and Miller did not causally relate the January 2015 fall to the employee's shoulder condition, based on the extremely painful nature of the injury with

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a medical record to that effect, the vast majority of the lay and medical evidence was focused on the claimed right shoulder injury.

[2] We note that the judge has relied on no medical evidence to support his findings regarding the left shoulder, making those findings speculative. For that reason as well, they cannot stand. Evans v. Geneva Construction Co., 25 Mass. Workers' Comp. Rep. 371, 375-376 (2011).

which the employee was diagnosed and the absence of a medical record indicating the employee reported shoulder pain for over a month after the fall (Ins. br. 11.) Nor could Dr. Skoff causally relate the employee's repetitive work activities to her shoulder condition. (Ins. br. 12.) Thus, the insurer argues, the judge's findings "are inconsistent with the facts, and one another, and certainly not clearly supportive of the conclusions the judge drew from them." (Ins. br. 13.)

We agree with the insurer that the judge failed to choose from among the several theories he proposed regarding when and how the employee's right shoulder was injured. General Laws, c. 152, § 11B requires the judge to "set forth the issues in controversy, the *decision on each* and a brief statement of the grounds in support of each decision." (Emphasis added.) Clearly, the date of the injury to the employee's right shoulder and the manner in which the injury occurred were at issue, as the employee alleged two dates and mechanisms of injury, one on January 19, 2015, due to the fall, and the other on April 29, 2016, due to repetitive work activities. The judge was free to choose either or both dates and mechanisms of injury. However, rather than doing so, he equivocated, finding the employee's right shoulder injury occurred *either* when she fell on January 19, 2015, *or* during the time she returned to work due to repetitive activities through April 29, 2016, *or* due to both the single traumatic incident and the repetitive work injury. Such findings "fail to comport with the minimum requirements of § 11A." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46 (1993).

When faced with a similar, although more egregious, situation in Ramm v. Commonwealth Gas Co./NStar Electric & Gas, 30 Mass. Workers' Comp. Rep. 137 (2016), we held the judge erred by failing to address all claimed dates and types of injuries, and recommitted the case for him to do so. There, the judge made specific findings regarding only one injury suffered on one particular date, although the employee claimed six dates of injury to various body parts. The judge then dismissed without prejudice the employee's remaining claims. Acknowledging the "enormous amount of complicated and, at times, contradictory evidence" id. at 144, with which the judge was

faced, and citing § 11B, we recommitted the case for the judge to make findings of fact and rulings of law on the employee's five remaining claims. Id. Although the situation here is not as extreme as that in Ramm, here also, the judge was faced with conflicting medical opinions and similarly failed to make findings on the central claims of the employee and defenses of the insurer regarding when and how the employee was injured.

This situation is unlike that in Snyder v. Globe Newspaper Company, 26 Mass. Workers' Comp. Rep. 125 (2012), where we held the judge did not err by finding the employee's injury occurred "on or about" a specific date. There, noting that the employee need not prove each element of his claim with "unassailable certainty," we held that the judge's findings reflect that the employee met his burden of persuasion that it was more likely than not that the injury occurred on the date chosen by the judge. Id. at 130. Even if the judge's "on or about" finding was construed as an approximation rather than a precise finding, it was sufficiently specific to allow us to determine with reasonable certainty that he applied the law correctly. Id. at 131, citing Praetz, supra at 46-47.

Here, the judge did not choose even an approximate date of injury, but abdicated his responsibility to decide all issues in controversy by speculating on several different dates and ways the employee could have been injured. As a result, we cannot determine whether the judge applied the law correctly to "facts that could be properly found." Praetz, supra at 47.[3] Until the judge makes findings on these central issues, we are unable to address the insurer's further argument that the medical evidence the judge has adopted is inconsistent with and unsupportive of his factual findings.[4] Accordingly, on

[3] If it is unclear when the employee's shoulder injury occurred, the parties cannot know whether the insurer is liable for treatment for the alleged right shoulder injury during the period between the employee's fall and her return to work, and during the period after she returned to work. The judge found that employee "received a cortisone shot for her shoulder pain before returning to work," and "continued to treat for her shoulder pain" after that. (Dec. 549.)

[4] The judge adopted the opinions of four physicians, each of which is somewhat different on the issues of if, when, and how the employee suffered a right shoulder injury. (Dec. 550-553.)

recommittal, the judge must make clear findings, choosing a date or dates and mechanism or mechanisms of injury, supported by the medical and lay evidence he adopts.

We agree, in part, with the insurer's second argument, that the judge employed the wrong standard of causation by holding that "the first theory, the second theory or the first and second theories in combination did cause the employee's shoulder injuries and continue to be *a major cause* of her disability and need for treatment." (Insurer br. 14; Dec. 554; emphasis added.) In order for the affirmative defense of § 1(7A) to apply, the insurer must raise it and produce evidence that there was a combination of the pre-existing condition with the industrial injury. MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009). This clearly did not happen.[5] We are somewhat puzzled as to why the insurer raises this issue, other than to argue the judge failed to make necessary causal relationship findings. As the employee points out, the judge's application of the "a major cause" standard does not prejudice the insurer, but the employee. However, because the insurer has raised it, and the judge's application of it is clear error, upon recommittal, the judge shall apply the simple "but for" or "as is" causation standard. Thus, the employee must only show that "but for" the fall or the repetitive activities, she would not be incapacitated due to her shoulder condition. If the judge should find she injured her right shoulder initially in the fall and further aggravated it by returning to work, she need only show that the aggravation was "even to the slightest extent" a cause of her disability. Rock's Case, 323 Mass. 428, 429 (1948).

Finally, just as we cannot address the insurer's remaining arguments until the judge makes the necessary factual findings on which they are contingent, we cannot address the employee's claim that the judge erred in finding the employee only partially incapacitated until the judge makes those findings on recommittal.

Accordingly, we reverse the judge's finding that the employee suffered a left shoulder injury. We vacate the remainder of the decision and recommit the case to the

[5] Dr. Skoff, whose opinion the judge here adopted, opined that the employee did not have a pre-existing right shoulder condition. (Dec. 554.)

judge for further findings consistent with this opinion. In addition, because the judge allowed the joinder of a claim for a second date of injury, we instruct him to request a new board number be created for that claim.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **October 9, 2020**

Catherine Watson Koziol
Administrative Law Judge