COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 036422-14 011918-15**

Francisca Barbosa	Employee
Massachusetts General Hospital Corporation	Employer
Partners Healthcare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Fitzgerald.

APPEARANCES
Adelio DeMiranda, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding the employee medical benefits pursuant to § 30, as well as § 34 weekly benefits from January 15, 2012, to February 3, 2012, and from January 15, 2015, to date and continuing. The self-insurer argues, for the first time on appeal, that the employee's claims are barred by the statute of limitations. We affirm the decision.

The employee was born in Cape Verde and came to the United States in 1990 at age 32. (Dec. 4.) She did not work in the U.S. until 2000, when she began working as an animal technician for Massachusetts General Hospital, a position she held at all times relevant to this proceeding. (Dec. 4.) She initially felt pain in her back while working in 2008, and again, in 2011. On both occasions, she sought medical treatment and informed her work supervisor. (Dec. 5.) The employee next experienced back pain on the job on January 15, 2012, and again sought medical treatment and informed her supervisor. (Dec. 5.) On December 19, 2014, she again injured her back while performing heavier work duties than during her previous work injuries. The result was not only worse back pain, but right leg pain as well. (Dec. 5.)

This appeal references the consolidation of two specific claims filed by the employee. The first claim was filed by the employee on May 13, 2015, for benefits

related to the January 15, 2012, work injury.[1] The second claim, filed by the employee on June 8, 2015, sought benefits related to the work injury on December 19, 2014.[2]

During the hearing, at the request of the judge, the employee's counsel clarified the claimed dates of disability: for the January 15, 2012, injury, disability was claimed from January 15, 2012, to February 3, 2012; for the December 19, 2014, injury, disability was claimed from November 4, 2015, to the present and continuing. (Tr. 58.) These dates were again confirmed by the judge in her May 4, 2017, ruling on the employee's Motion to Clarify Dates of Disability Regarding Injury on December 19, 2014. The self-insurer did not object to this motion or to the judge's ruling thereon.[3]

The self-insurer's brief is not entirely clear as to the exact legal grounds supporting this appeal. At hearing, the self-insurer raised a § 1 (7A) defense, citing a 2008 pre-existing condition. (Dec. 9.) The judge found that the self-insurer did not meet the requirements to properly assert § 1 (7A), finding the 2008 injury to be work related. (Dec. 9.) The self-insurer does not specifically mention § 1 (7A) in its appellate brief, [4] and instead presents a single issue to us for review: Is the judge's finding that the employee's injuries were work-related and not barred by the statute of limitations, an error of law or arbitrary and capricious? (Self-Insurer br. 1.)

We note that the self-insurer did not raise the statute of limitations issue at hearing. Section 41 is an affirmative defense that must be raised before the burden shifts

[1] The claim was initially filed with a date of injury of October 22, 2012, but was subsequently amended to January 15, 2012.

[2] The claim was initially filed with a date of injury of December 14, 2014, but was subsequently amended to December 19, 2014.

[3] Despite requesting clarification only for the December 19, 2014, date of injury, the judge clarified the claimed incapacity dates for both the January 15, 2012, and December 19, 2014, injuries. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2016)(reviewing board may take judicial notice of board file).

[4] Section 1 (7A) is not raised by the self-insurer on appeal, and therefore that issue is deemed waived. Zavalu v. Standard Thomspson Corp., 28 Mass. Workers' Comp. Rep. 235, 240 (2014)(failure to raise issue on appeal deemed waiver of issue).

to the employee to prove compliance with the notice and claim requirements it prescribes. Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. __ (2017). The Supreme Judicial Court has specifically held that, where no contention was made at hearing or before the reviewing board concerning late filing of the claim, the question cannot be raised for the first time on appeal. Doherty, supra, citing Rich's Case, 301 Mass. 545, 547 (1938). The reviewing board has also noted that, "Section 41 does not operate to bar compensation unless the self-insurer raises it as an issue." Doherty, supra, citing Dugas v. Bristol County Sheriff's Dep't, 17 Mass. Workers' Comp. Rep. 349, 353 n. 3 (2003).

Even if the self-insurer had properly raised the statute of limitations defense, the dates of injury and the claim filing dates clearly do not present a statute of limitations issue. G. L. c. 152 § 41.[5] The self-insurer appears to argue on appeal that because the employee may have treated for a similar injury as early as 2008, the statute began to run in 2008. However, the employee has never sought compensation for a 2008 injury. The medical evidence presented provides ample support for findings that the claimed dates of injury correspond to the claimed, and awarded, dates of disability. Additionally, the self-insurer's own brief chronicles much of this evidence, and even concedes an exacerbation of the pre-existing condition in November and December of 2014. (Self-Insurer br. 3; §11A dep. 6.) The self-insurer does not, however, cite or otherwise proffer medical evidence requiring a finding that the employee's claimed disability is the result of a work-related 2008 injury.

To the extent that the self-insurer may be arguing that the employee cannot use the 2008 injury to defeat operation of § 1(7A) by claiming her pre-existing condition was work-related, we disagree for the reasons set forth in Doherty, supra, quoting from

[5] General Laws, c. 152, § 41, provides, 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 his disability and his employment.

Richards v. US Bancorp, 28 Mass. Workers' Comp. Rep. 115, 120 (2014)(judge may find prior compensable injury occurred " 'irrespective of whether compensation for [her] injury is available under the act' ").

We therefore affirm the decision of the administrative judge. The self-insurer shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,654.15, plus necessary expenses.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **February 9, 2018**