COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031221-78**

George Lazarou	Employee
City of Peabody	Employer
City of Peabody	Self-Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Emmanuel N. Papanickolas, Esq., for the employee
Daniel B. Kulak, Esq., for the self-insurer

WILSON, J. This case is before us following a reconstruction of the hearing record pursuant to a previous reviewing board order. Lazarou v. City of Peabody, 12 Mass. Workers' Comp. Rep. 86 (1998). The report of the administrative judge, who coordinated the reconstruction, states that the reconstruction was successful and that no further reconstruction is necessary in order to properly address the issues raised by the employee's appeal. The employee, however, contends that justice requires a recommittal for hearing de novo.[1] After a review of the record, we agree with the report of the administrative judge that the reconstruction is sufficient and affirm the original hearing decision.

Mr. Lazarou was a forty-year-old, married father of four minor children at the time of the hearing. He is a Greek immigrant who had completed six years of schooling in his homeland. (Dec. 3.) In 1977, he was employed by the City of Peabody as a dog officer. During the 1978 year, the City of Peabody employed him as a CETA worker. CETA positions were temporary in nature, generally lasting one year and classified as public service employment. (Dec. 3.) On June 28, 1978, while preparing to paint dog cages, the employee felt something "snap"

[1] The administrative judge who issued the decision that is the subject of this appeal no longer serves in the department.

in the back of his neck. He continued to work, despite discomfort and shooting pains from the left side of his neck to his left upper back and numbness in his left hand and fingers, until approximately December 12, 1978. (Dec. 4.)

An initial claim by the employee was denied at conference. Subsequently, another claim was filed and, after hearing, the employee was awarded benefits for the injury to his left cervical and shoulder area pursuant to §§ 34 and 35A. The insurer next filed a claim to discontinue or modify the payment of benefits, but apparently no action was taken on the matter. The employee then filed a claim for § 34A benefits that was denied at conference. The employee appealed, seeking a hearing de novo. (Reconstruction report of administrative judge, 1-2, hereinafter "Report.")

Both parties requested expert medical testimony by way of deposition.[2] Permission was granted and Dr. Roger S. Williams, the employee's treating neurologist, was deposed on behalf of the employee. This deposition testimony was admitted into evidence. (Dec. 2, 3.) Dr. Williams first examined the employee on May 24, 1982. (Dep. 5; Dec. 4.) The doctor stated that November 1981 myelograms had revealed a nerve root compression in the neck area, especially between the fifth and sixth vertebrae. (Dep. 6; Dec. 4.) Based on those myelograms, Dr. Williams diagnosed cervical spondylosis. (Dep. 8-9; Dec. 5-6.) Prior to Dr. Williams' initial medical exam, the employee had undergone two surgeries to his neck, which has relieved that pain "ever since." (Dep. 6; Dec.5.) Subsequently, he began to experience pain on his right side primarily in the trapezius muscle region. (Dep. 6-7; Dec. 5.)

In December, 1983, Dr. Williams again examined the employee. Dr. Williams noted tenderness in the base of the neck, especially on the right side. No objective evidence of nerve root compression was found. (Dep. 10-12; Dec. 6.) The employee resisted Dr. Williams' recommendation that another myelogram be

[2] As the conference order was appealed prior to July 1, 1992, the effective date of the implementation of § 11A, the impartial medical examiner process was not applicable to this case.

done. (Dep. 12-13; Dec. 6-7.) Dr. Williams examined the employee numerous times over the next few years. (Dep. 14, 17, 18, 19; Dec. 5-8.) In 1984 the doctor determined that cervical nerve root compression and spondylosis were not the principal difficulties with respect to the employee's right shoulder pain. (Dep. 15; Dec. 7.) Despite the prescription of numerous medications, the employee's condition had not improved. (Dep. 15-22; Dec. 7-9.) A 1995 EMG was normal, but due to the reported level of pain, the doctor determined that the employee was unemployable and disabled. The doctor concluded, however, that the employee's right shoulder soft tissue pain was unrelated to either the 1978 work injury to the neck and left shoulder or the cervical surgeries. (Dep. 22, 24-27; Dec. 9.) Accordingly, the administrative judge determined that the employee had failed to prove that his present physical disability was causally related to his employment, and denied and dismissed the employee's claim for § 34A benefits. (Dec. 9-10.)

After the employee's appeal inexplicably languished without any activity, the case was ultimately recommitted for reconstruction of the record, pursuant to Fitzsimmons v. Sigma Instruments, Inc., 7 Mass. Workers' Comp. Rep. 12, 14-15 (1993), due to the unavailability of a transcript. Lazarou v. City of Peabody, 12 Mass. Workers' Comp. Rep. 86 (1998). Because the administrative judge who rendered the decision no longer served with the department, the case was reassigned to another administrative judge to oversee the reconstruction.

In his report to the reviewing board, the reconstruction judge stated that the previous judge made adequate and sufficient findings of fact regarding the employee's work injury, medical treatment and his physical condition from the time of injury up through the time of hearing. Further, the reconstruction judge determined that the employee's proposed findings offered few facts not already set forth in the previous decision of the administrative judge. This determination is bolstered by the lack of any objection from the City of Peabody with respect to the employee's proposed findings. As a result, the reconstruction judge adopted all the

employee's proposed findings except as to facts and circumstances that had occurred after October 1, 1985, the date that the hearing record was closed. (Report 5.) The reconstruction judge observed that the sole medical expert opined that the employee's present disability is not causally related to his work injury. He then concluded that no further reconstruction was necessary as the newly submitted record would allow appellate review of the issues at hand, (Report 7), and returned the case to us.

The employee's primary argument on appeal is that a hearing de novo should be ordered as reconstruction of the record is insufficient to ensure that the employee receive a just and equitable review of his claim. Citing a plethora of review board cases, the employee contends that in each case the administrative judge was allowed to take additional testimony and therefore this case mandates a hearing de novo. We disagree. The very same guidelines that the employee invokes were provided to the administrative judge in his charge to reconstruct the record. The language directing the reconstruction process was very clear: "If the judge decides that reconstruction of the record is sufficient, he shall return it to us for a decision on the merits. *On the other hand, if he determines that the proceedings cannot be sufficiently reconstructed or that reconstruction is more cumbersome than a new hearing, the judge shall conduct a hearing de novo.*" Lazarou v. City of Peabody, 12 Mass. Workers' Comp. Rep. 86, 87 (1998) (emphasis added).

Despite the employee's contention, "[t]he unavailability of a transcript is not a ticket to a hearing de novo." Pierre-Louis v. J.F. White Construction Co., 9 Mass. Workers' Comp. Rep. 76, 77 (1995). The interests of fairness and justice are preserved where reconstruction of the hearing record is sufficient to allow an evaluation of the merits of an appeal and enable a determination as to whether applicable legal principles were properly applied. See Harris v. Commissioner of Correction, 409 Mass. 472 (1991); see also Shaughnessy v. Kraft/S.S. Pierce, 8 Mass. Workers' Comp. Rep. 329 (1994). Here, the judge correctly determined

that reconstruction was successful and that the issues raised by the appellant could be addressed adequately on the reconstructed record without hearing de novo or additional evidence.

This case turns on the hearing judge's finding that, notwithstanding the employee's permanent and total medical disability, the employee failed to prove that his right shoulder disability was causally related to the work injury to his left shoulder and neck. (Dec. 9.) The deposition testimony of the employee's treating neurologist, Dr. Williams, which is included in the reconstructed record, was the sole expert medical testimony submitted. In response to questioning by the employee's attorney, Dr. Williams opined that the employee's right shoulder pain was unrelated to the work injury sustained in 1978. (Dep. 24-27.) Given the lack of any expert testimony causally relating the right shoulder condition to the work injury, it was entirely appropriate for the hearing judge to rely on this uncontradicted testimony in reaching his conclusion.[3] See Josi's Case, 324 Mass. 415 (1949)(where medical issues are outside realm of lay person's general knowledge, expert medical testimony is required to establish causal relationship between incapacity and a work related injury); Galloway's Case, 354 Mass. 427, 431 (1968). No amount of further lay testimony could compensate for the dearth of expert testimony causally relating the employee's symptoms to the work injury. It is noteworthy that the employee makes no argument in his brief to the reviewing board that the expert opinion on causal relationship was based on an erroneous history. Hence, a de novo hearing would be both superfluous and inefficient.

Two additional issues advanced by the employee are related and we address them together. First, the employee argues that the hearing judge erred by finding no causal relationship because the issue of causal relationship was never before him. On the heels of this argument, the employee then contends that, as the issue was not before the judge, the matter was barred by the issue-preclusion doctrine.

[3] If the employee has later medical evidence of causal relationship, it is open to him to file a new claim for a period subsequent to the close of hearing evidence in this case.

In support of this position the employee states that the prior award of § 34 benefits was never appealed and as such has res judicata effect. These arguments, however, ignore the import of the medical evidence and the hearing judge's conclusion. (Dec. 4, 9.) The claim raised by the employee and the benefits awarded by the March 1982 conference order were for injuries to the employee's left cervical and shoulder area. The present claim is for permanent and total incapacity related to the employee's right shoulder. Therefore, there was no res judicata or issue-preclusion effect in the case as presented to the administrative judge. Furthermore, even in a § 34A claim, the burden of proving every element of the claim, including continuing causation, is on the employee. Himmelman v. A. R. Green & Sons, 9 Mass. Workers' Comp. Rep. 99, 101 (1995); L. Locke, Workmen's Compensation, § 502 (1981). The insurer clearly disputed entitlement to § 34A benefits at hearing. (Dec. 1.) And, despite the employee's new-found assertion that the causal relationship issue was not before the hearing judge, his several questions to Dr. Williams on causal relationship show all too well that the issue was indeed before the judge, put into play by the employee. (Dep. 24-27.) After several futile attempts by the employee's attorney to elicit a positive response on causal relationship, Dr. Williams, the employee's expert, responded to further query in detail:

> THE WITNESS: My records state that he injured his neck which gave him pain in the left shoulder. And a myelogram confirmed nerve compression on the left which was successfully relieved by surgery. And I can see no logical relation between either the injury or the surgery and the soft tissue pain which he now has in the right shoulder.

(Dep. 25-26, emphasis supplied.) The employee attorney's questions to the expert on causal relationship not only demonstrate his awareness that the issue was the employee's burden to prove, but also illustrate why he cannot now deny that the issue was before the judge, as it was tried by consent. See Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 (1998); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 244-245 (1997).

Finally, the employee asserts that he should be awarded § 34A benefits from October 15, 1983 to the present and continuing. In support of this contention the employee quotes from a previous reviewing board decision: " 'Our workers[']compensation act offers very broad protection to employees.[. . .] It has been consistently held that the act should be liberally construed and interpreted wherever possible in favor of the injured employee . . . [.]' " (Employee's brief 13, quoting Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17, 30 (1997)). In our view, the quoted principle cannot tip the scales in the employee's favor in a case where a hearing judge, in a detailed and carefully reasoned decision that is grounded in the only medical evidence, the employee's deposition of his own treating neurologist, has found no causal relationship of the claimed medical condition to the work place. The decision is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: November 22, 1999

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Suzanne E. K. Smith
Administrative Law Judge

MCCARTHY, J. (dissenting) I believe that this case should be recommitted for a hearing de novo because it does not appear from the original hearing judge's decision that the issue of causal relationship, was ever properly before him. Miller v. Massachusetts Turnpike Authority, 10 Mass. Workers' Comp. Rep. 629 (1996). In his decision, the judge listed the issues as "1. Disability and extent thereof" and "2. Denial of 34A benefits[.]" (Dec. 1.) Though it was not listed as an issue, the judge nevertheless found "that the employee has failed to prove by the preponderance of the evidence that the permanent and total disability is causally related to his employment for the City of Peabody." (Dec. 9.)

Without the transcript it is impossible to tell whether the insurer ever raised causal relationship as an issue for adjudication.

The fact that employee counsel at deposition questioned Dr. Williams about the causal relationship of the right shoulder symptoms to the industrial injury of June 28, 1978 doesn't resolve the problem. It is fair to assume that at hearing, counsel also asked his client to describe how he was injured even though the occurrence of the accident is not disputed by the self-insurer. Moreover, there is no way of knowing whether the history relied upon by Dr. Williams is essentially the same as that testified to by Mr. Lazarou, thus leaving the validity of his no causal relationship opinion forever in doubt.

Prior to the evidentiary hearing, Lazarou had two cervical operations.[4] The decision is silent (and thus deficient) with respect to whether there is any medical disability or functional limitations flowing from these procedures.

The judge who oversaw the reconstruction recognized that, "[t]he employee's argument that the issue of causation was not properly before the judge is a legal argument which can be addressed by the reviewing board on the present record." (Report 5.) In my view the board regulations are key. The rules of the then-Division of Industrial Accidents in effect at the time of the initial decision (1987), support Mr. Lazarou's contention that, if the insurer fails to raise an issue at hearing, it is considered to be "established":

> Before the taking of testimony in a hearing before a single member, the insurer shall state clearly the grounds upon which the insurer either has declined to pay compensation or further compensation, or the ground upon which it seeks discontinuance, and thereafter only that testimony will be admissible which relates to the issues raised by the insurer's statement, and on all other issues the employee's rights under the chapter will be deemed to have been established.

[4] According to the employee's brief, Mr. Lazarou underwent a third neck operation which was performed at Massachusetts General Hospital on December 16, 1996 (Employee's brief 4.)

Rules of Division of Industrial Accidents, IV.3.[5]

Constitutional due process requirements apply to board hearings and decisions. Haley's Case, 356 Mass. 678, 682 (1970); Meunier's Case, 319 Mass. 421, 426-427 (1946). "Parties . . . are entitled to a hearing at which they have an opportunity . . . to know what evidence is presented against them and to an opportunity to rebut such evidence, and to argue, in person or through counsel, on the issues of fact and law involved in the hearing." Haley's Case, supra, at 681. The employee has the burden of proof and if he/she does not know what issues the insurer is contesting, he very well may not present pertinent evidence with fatal consequences to his claim. It cannot be assumed, based on questions asked of the treating physician at deposition, that the insurer had raised the issue of causal relationship, or that the employee presented the same evidence he would have presented had he known the issue was raised. For all we know, the transcript may also contain questions about the occurrence of the accident even though its occurrence on June 28, 1978 is not in dispute.

The decision here is ambiguous at best on whether causal relationship was raised as an issue. Where there is no transcript which might resolve the question and where Mr. Lazarou has maintained before the reconstruction judge and before the reviewing board that the issue was not raised, fairness dictates that the case be re-tried de novo. Cf. Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595 (1995) (where the majority reinstated benefits following the judge's sua sponte application of § 35E, over the objection of the dissenting judge, who

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[5] The current version of the regulation tracks its predecessor. It reads:

> Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer either has declined to pay compensation, or the grounds on which it seeks modification or discontinuance, provided that such statements are based on grounds and factual basis reported by the insurer or based on newly discovered evidence within the provisions of M.G.L. c. 152, §§ 7 and 8, and 452 C.M.R. § 1.00. On all other issues the employee's rights under M.G.L. c. 152 shall be deemed to have been established.

advocated recommittal for a determination of the defenses raised and an opportunity for the employee to present additional evidence, if desired). At that time, the insurer can raise all issues in dispute, and the employee will have adequate notice of what issues he has to prove. This is the only way to safeguard Mr. Lazarou's right to know what he must confront at hearing. Failing a hearing de novo, as the majority indicates, it is open to the employee to make a new claim for § 34A benefits for the period beginning the day after the hearing record closed if changing circumstances warrant it.

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William A. McCarthy
Administrative Law Judge

452 C.M.R. § 1.11(3).