COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024909-05**

George Miller	Employee
City of Lawrence	Employer
City of Lawrence	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Bean.

APPEARANCES
Michael C. Akashian, Esq., for the employee
William H. DiAdamo, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee §§ 13, 30 and 34 benefits for an alleged right foot injury. We vacate the decision and recommit the case for further findings of fact.[1]

At the hearing,[2] the employee testified as follows. On August 8, 2005, he injured his right foot while working to repair a sewer. (Tr. I, 10.) Standing in boots soaked with sewerage, he stated that "somehow part of the wall gave way and the casting slipped forward and went right on top of my foot." Id. He experienced pain climbing out of the sewer, and had difficultly driving to his next assigned workplace. (Tr. I, 13-14.) A co-worker drove him to a local hospital where he was treated, released, and told to follow up with his doctor. (Tr. I, 14-15.) Some days later he was informed that he had a staph infection in his foot; he

[1] The issues at hearing were liability, causal relationship, disability, and the extent thereof. (Dec. 765.)

[2] The hearing was held on February 8, 2011, and April 15, 2011; we refer to the transcripts of those hearings as Tr. I, and Tr. II, respectively.

missed about four months of work and received workers' compensation benefits.[3] (Tr. I, 16-17.) He returned to work on antibiotics and "still had the lesions on me." (Tr. I, 18-19.) His infection then "spread like wildfire on [his] skin" traveling "all the way up [his] leg . . . and then up and around [his] back on [his] arms, and then across to the other side and back down to the other foot." (Tr. I, 20.) In the spring of 2006, he experienced an increase in symptoms which forced him out of work for five to six months.[4] (Tr. I, 21, 23-24.) In 2007, he left work "when the wound on the foot . . . re-opened . . . when I went down with a bucket of cement and I slipped on the bricks there in the sewer line." (Tr. I, 24-25.)[5] In June, 2008, he returned to work. (Tr. I, 27.) In January, 2010, while at work the employee described feeling something "like a bite" on his foot "right above the old staph wound. . . ."[6] (Tr. I, 57.) His right calf began to swell and "was

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[3] The board file reveals an employer's first report of injury (Form 101) was filed on August 8, 2005, based on the employee's report that he suffered a contusion to his right foot at work that day. The file also indicates the self-insurer paid § 34 benefits until November 29, 2005. See Form 106 dated December 2, 2005. We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[4] The board file contains a second Form 101, prepared by the employer/self-insurer on May 19, 2006, citing the August 8, 2005, injury date. There is no further information on the record respecting whether the self-insurer paid the employee workers' compensation benefits after May, 2006.

[5] The board file is silent respecting any injury to the employee in 2007, and whether the employee was paid compensation during 2007 or 2008. However, the judge found that the employee "suffered another work injury" in September, 2007. (Dec. 767.) At her deposition, the impartial medical examiner was presented with a copy of a 2007 first report of injury, but it was not marked for identification. (Dep. 46-47.)

[6] The board file contains a third Form 101, prepared on January 29, 2010, indicating that the employee was injured at work on January 13, 2010. That form states, "See attached Report," and "Relates to injury of 8/8/05." The attached unsigned employee's report of injury states that the employee "felt a biting sensation" on his right leg which became red, and that thereafter, during a trip to California, the leg became swollen. Surgery to remove "a large abscess in the calf of [the employee's right] leg" was performed. It is then reported that lab results later determined "it was a staff [sic] infection called Arias [sic]. . . ." On March 11, 2010, the self-insurer filed a Form 104 denying the claim, inter alia, on liability and causal relationship grounds.

burning." (Tr. I, 29.) The judge credited the employee's testimony. (Dec. 767-768, 771.) The employee's claim at hearing was for weekly indemnity and medical benefits from January 15, 2010, to date and continuing, based on his alleged August 8, 2005, industrial accident.[7]

In her report and at her deposition, the impartial medical examiner, Dr. Geneve M. Allison, an infectious disease specialist, opined the employee's methicillin resistant staphylococcus aureus (MRSA), cellulitis, sensitive staph aureus, and rashes were not causally related to his work. (Ex. 3; Dep. 30-21, 40, 46, 50, 71, 79, 89-90.) She also opined the employee was not disabled, having recovered from his initial foot injury. (Dep. 45, 54.)

The employee filed a motion to admit additional medical evidence on the grounds of inadequacy and medical complexity; he also argued that the self-insurer had paid the employee compensation "greater than 180 calendar days, thus conceding liability." See "Motion For Inadequacy And/Or Complexity" filed on or about February 8, 2011; G. L. c. 152, §§ 7 and 8. The self-insurer filed a memorandum in opposition to the employee's motion. At the hearing, the judge took no action on the motion, and instead focused his attention on whether the self-insurer had accepted liability for the employee's claim:

> What I am looking for is the total number of days the employee collected Section 34 benefits on a paid-without-prejudice basis.
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> It's clear that he was out of work for well over 180 days and he was paid for those 180-plus days, but there is no reliable evidence to establish what he was paid on those days.
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> So that leaves me with the possibility that he could have been paid workers' compensation benefits for 181 days, which would mean the case was accepted. . . .
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> But it is entirely possible that he was paid vacation time and sick time and that he was paid less than 180 days. And if that is the case then I would have to do a more in-depth analysis and not take the quick-and-easy-way out of just saying as a matter of law liability is accepted.

[7] The employee did not claim benefits based on any other injury date.

(Tr. I, 4.) The judge then continued the matter for a second day of hearing, in part "to get an accurate calculation of when [the employee] was out and under what auspices was he paid when he was out." (Tr. I, 5.)

On the second day of hearing, employee's counsel reminded the judge that "we were holding the case to find out how many days [the employee] was paid workers' compensation benefits as a result of the 2005 injury. . . ." (Tr. II, 11.) The parties discussed a printout of payments that could be made available to address this issue. (Tr. II, 11-12). However, counsel for the self-insurer indicated that there remained the "question as to whether or not whatever he was out for previously, I think about in 2005, is the same thing that he was out for as a result of his 2010 injury." (Tr. II, 12.) See footnote 6, supra. The parties then agreed with the judge to "agree on a date to return" following the deposition of Dr. Allison,

> [a]t which time any motions would be filed. And the two of you are going to know, as well as can be known, how many days the employee was paid and whether the case, as a . . . matter of law, has been accepted or not.

(Tr. II, 13.) Review of the board file demonstrates that the self-insurer provided employee's counsel with a printout of the employee's payroll records for the time following his August 8, 2005, injury. In a letter dated April 22, 2011, employee's counsel then sent those records to the judge, renewing his prior motion and requesting a status conference. However, the file contains no transcript of what transpired when the parties reconvened after the second day of hearing.[8]

In his decision, the judge wrote that he determined Dr. Allison's report and deposition testimony were inadequate "[a]fter I began the process of writing the

[8] After the parties filed their appellate briefs, a conference call was held in an attempt to reconstruct the record. The parties could not agree on what happened at the status conference that was held with the judge "off the record," following the second day of hearing. Once again, we advise judges to take special care to preserve the record. We also note the judge's decision does not list any payroll records as hearing exhibits.

decision. . . ." (Dec. 766.) He contacted the parties and invited them to submit additional medical evidence; only the employee did so. Id. The judge then adopted the opinion of the employee's treating physician, Dr. Thomas F. Johnson, and found that the employee's medical conditions were work-related, and that they disabled him from work. (Dec. 6-8; Ex. 4.) The judge also found that,

> In the years 2005-2009 the employee was out of work, collecting workers' compensation benefits for more than a year. Therefore, as a matter of law this is an accepted case.

(Dec. 4.) Accordingly, the judge awarded the employee § 34 benefits from January 15, 2010, and continuing, and also ordered the self-insurer to pay for "reasonable and necessary medical treatment related to the August 8, 2005 work injury. . . ." (Dec. 772.)

On appeal, the self-insurer raises several issues. We need only address two. First, it argues the judge erred by allowing the submission of additional medical evidence on the basis that Dr. Allison's report was inadequate. Dr. Allison's opinions, expressed unequivocally in her report and at her deposition, addressed the statutory elements. See G. L. c. 152, § 11A(2). However, even when an impartial medical examiner's opinion satisfies the criteria of § 11A(2), "the judge may [nevertheless] find inadequacy for other reasons, but the reasons cannot be invalid or incorrect as a matter of law." Fritz v. Living Assistance Corp., 22 Mass. Workers' Comp. Rep. 247, 255 (2008); See DiCostanzo's Case, 71 Mass. App. Ct. 1126 (2008)(Memorandum and Order Pursuant to Rule 1:28)(inadequacy finding upheld as based on expressed rationale). Here, because the judge provided no explanation in his decision to support his inadequacy finding, we cannot determine whether "the correct rules of law" were applied. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). This requires recommittal.[9]

[9] Because the judge never ruled on the employee's motion to allow the submission of additional medical evidence on the grounds of medical "complexity," he may consider

The self-insurer also argues the judge erred "in determining that this was an accepted case." (Self-ins. br. 2.) While we agree the evidence of record does not support this finding, the parties acknowledge that additional proceedings were held off the record. It is therefore appropriate to recommit the case for the judge to determine the record of the untranscribed proceedings. We hasten to add that in view of the multiple reports of injury filed in this case, and in light of the various diagnoses made at different times, the printout of the self-insurer's workers' compensation payments to the employee may prove insufficient, standing alone, to support a finding that "this is an accepted case." (Dec. 4.)

Accordingly, we vacate the decision and recommit the case to the judge for further findings consistent with this opinion.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **December 10, 2012**

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this question on recommittal. Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365 (1998).