COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS
BOARD NO. 015846-17

George Vagelis	Employee
Dodge Park, LLC and HSM Investment LLC	Employer
New Hampshire Employers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Fabricant and Koziol)
The case was heard by Administrative Judge Sherry

APPEARANCES
John A. Smillie, Esq., for the employee at hearing and on appeal.
David L. Maille, Esq., for the employee on appeal[1]
W. Todd Huston, Esq., for the insurer

FABISZEWSKI, J. The insurer appeals from the administrative judge's decision awarding the employee §34A permanent and total incapacity benefits and medical benefits and attorney fees pursuant to §§13, 13A and 30.[2] On appeal, the insurer raises three issues and argues that the administrative judge erred by: 1) failing to adopt the impartial examiner's final opinion of disability; 2) making arbitrary and capricious findings regarding the employee's work capacity and extent of disability; and 3) taking judicial notice of a fact not in evidence, in the absence of a request by a party, after the close of lay testimony without

[1] Attorney Maille filed his appearance in this matter on October 23, 2024, after the filing of briefs on appeal by both parties.

[2] The administrative judge ordered the insurer to pay §34A benefits at the weekly rate of $794.03 from June 22, 2020, to date and continuing, based on an average weekly wage of $1,191.04. Further, the insurer was ordered to pay all reasonable and related medical expenses pursuant to §§ 13 and 30 for treatment of the diagnosis of discogenic back pain with right-sided lumbar sciatica, including pain management and palliative treatment through Ashraf Farid, M.D., and/or Southbridge Pain Clinic, and specifically including payment for the treatments at the Southbridge Pain Clinic on March 16, 2021, and June 14, 2021. Additionally, the administrative judge denied and dismissed the insurer's request to discontinue and/or modify weekly benefits. (Dec. 21.)

notice to the parties. Because we find that two of the insurer's arguments require reversal of the administrative judge's decision, we recommit the case for a decision consistent with this opinion.

The facts pertinent to the issues raised on appeal are summarized below. In April 2017, the then 36-year-old employee was hired by the employer as a licensed practical nurse (LPN). (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.); Dec. 7.) He had an LPN certificate from Quinsigamond Community College, where he also completed some course work towards a registered nursing (RN) degree, but did not complete the program. (Dec. 6.) His educational background also included two associate's degrees, one in general studies and the other in media and science. His previous work experience included a long work history assisting his parents in their pizza store. His duties included taking orders from customers, cooking, prepackaging food portions, managing inventory and ordering from distributors. He also had experience working in media and media production in various positions, including production assistant, assistant camera operator, talent wrangler and associate producer. (Dec. 7.)

In 2004, the employee suffered a back injury, unrelated to work, ultimately requiring a right-sided L4-5 discectomy, which was performed in October 2004.[3] (Dec. 8.) He experienced additional episodes of back pain in 2011 and 2013. (Dec. 9.) An MRI performed in October 2013 revealed post-surgical changes related to the prior surgery, with degenerative disc desiccation with circumferential disc bulge and wide posterior disc protrusions at L3-4, L4-5, and

[3] The hearing decision lists the date of surgery as October 2014, but this appears to be a scrivener's error, as the hearing exhibits indicate that the surgery was performed in 2004. 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.)

L5-S1, central stenosis at L3-4, and right lateral recess stenosis at L4-5. (Dec. 8-9.) In October 2016, the employee underwent physical therapy for approximately a month to address new pain located under the buttocks in both legs. (Dec. 10.) At that time, the employee was noted to have a significant limp and left-sided spasm but no radiating symptoms.

On June 22, 2017, the employee injured his lower back and right sciatic area while attempting to prevent a patient from falling. (Dec. 7.) He was initially diagnosed with a low back sprain/strain. (Dec. 10.) Over the next several years, he treated conservatively with physical therapy but continued to experience worsening pain, including shooting pain down the right leg with a burning sensation in the right calf, right toe numbness, and leg weakness. (Dec. 10, 12.)

The insurer accepted liability for the employee's injury and voluntarily paid §34 benefits from June 24, 2017 to June 19, 2020, followed by §35 benefits commencing on June 20, 2020. (Dec. 5.) In April 2020, the employee filed a claim seeking §34A benefits from April 29, 2020, and continuing. (Dec. 3.) In July 2020, a §10A conference was held before a different administrative judge, who allowed the insurer's oral motion to join a complaint to modify and/or discontinue the employee's benefits to the proceeding. Rizzo, supra. On August 3, 2020, that administrative judge issued a denial of both the employee's §34A claim and the insurer's complaint to modify and/or discontinue benefits. (Dec. 3.) Both parties filed timely appeals. (Dec. 3.) Pursuant to § 11A(2), the employee was examined by John R. Corsetti, M.D., on March 18, 2021. When the administrative judge retired from the Department, the case was reassigned to the current administrative judge.

On July 15, 2022, the administrative judge allowed both the employee's motion to join a claim for §§13, 30 benefits relevant to two treatment dates in 2021 at the Southbridge Pain Clinic, and the insurer's motion to submit additional

medical evidence based on complexity.[4] A hearing *de novo* was held on July 28, 2022. (Dec. 3.) On September 21, 2023, the administrative judge issued a decision ordering the self-insurer to pay §34A permanent and total incapacity benefits at the rate of $794.03 per week, based on an average weekly wage of $1,191.04, from June 22, 2022, to date and continuing, plus medical expenses pursuant to §§13 and 30 for treatment for the diagnosis of discogenic back pain with right-sided lumbar sciatica. (Dec. 21.) The administrative judge also ordered the insurer to pay for the employee's two treatment dates in 2021 at the Southbridge Pain Clinic. The insurer's complaint to modify and/or discontinue benefits was denied and dismissed.

The insurer first argues that the administrative judge committed reversable error in failing to adopt the final opinion of disability by Dr. Corsetti, the impartial examiner. (Ins. br. 7.) The employee asserts that Dr. Corsetti did not change his opinion on disability but merely conceded that the possibility existed that the employee could return to work with "fairly significant accommodations." (Employee br. 1.). We agree with the insurer that the administrative judge's failure to adopt the impartial examiner's final opinion on disability is reversable error.

In the March 18, 2021, §11A report, Dr. Corsetti opined that "[b]ased upon the veracity of the patient's complaints, poor functional capacity and ongoing pain, he is disabled from gainful employment for the foreseeable future." (Ex. 9.) However, when questioned by the insurer at his subsequent deposition on December 5, 2022, Dr. Corsetti gave a different opinion:

[4] The administrative judge's July 15, 2022 ruling allowed the introduction of additional medical evidence based on complexity but deferred ruling on the inadequacy of the impartial report pending a full argument on the record. (Dec. 3.); Rizzo, supra. The administrative judge also accepted the insurer's Offer of Proof regarding §1(7A) and noted the insurer's Notice of Intent to Raise Defense of Failure to Mitigate. (Dec. 3-4.)

Q. Okay, fair enough. So you examined him on 3/18/21. Are you able to assess his current disability status as of today?

A. No.

Q. And then you're aware he was a nurse?

A. Yes.

Q. Okay. So is it your opinion then that he could not perform telehealth at his home?

A. Telehealth requires a significant amount of continuous sitting, so at the time I saw him, I think that would have been difficult, but I'm not sure that that's true at this time.

Q. Okay. And if he was provided a sit/stand desk, would that be the kind of accommodation that would allow him to work?

A. I believe that would be a reasonable accommodation and would likely make it possible for him to work in that capacity, sure.

Q. So would it be fair to say then with the correct accommodations, that he would be able to work?

A. Yes. I think with fairly significant accommodations, he – he could work, yes.

(Ex. 14, 44-45.)

After this exchange, Dr. Corsetti was not asked any additional questions. (Ex. 14, 45.).

In complex medical cases, where a medical issue is beyond the common knowledge and experience of a lay person, expert medical testimony is required "to establish disability and causal relationship between a claimed incapacity and an industrial injury." Miller v. Metropolitan District Comm'n, 11 Mass. Workers' Comp. Rep. 355, 357 (1997), citing Josi's Case, 324 Mass. 415, 418 (1949). Although the administrative judge acknowledged Dr. Corsetti's final opinion that

the employee "could work with fairly significant accommodation," this was not the opinion adopted by the administrative judge and used in his analysis. (Dec. 15, 17). Instead, the judge adopted Dr. Corsetti's opinion that the employee "was disabled from gainful employment for the foreseeable future, with the June 22, 2017 incident being the major cause of [the employee's] disability." (Dec. 17.) In finding that the employee was permanently and totally disabled, the administrative judge relied on this opinion, noting that "Dr. Corsetti also gave total disability from gainful employment in his §11A report and deposition." (Dec. 19.) "While an administrative judge is free to adopt all, part or none of an expert's testimony, he is not free to mischaracterize it or fail to consider the entire record." Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 405 (1998). "The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying." Perangelo's Case, 277 Mass. 59, 64 (1931). See Ramm v. Commonwealth Gas Co./NSTAR Electric and Gas, 33 Mass Workers' Comp. Rep. 183, 185 (2019)(recommittal appropriate where judge's findings failed to reflect treating physician's final opinion expressed during deposition testimony). Here, the judge erred in failing to adopt the final opinion of Dr. Corsetti, using instead the Doctor's prior opinion for his analysis of disability and the extent thereof. On remand, the administrative judge must consider Dr. Corsetti's final opinion from his deposition testimony and then perform a vocational and incapacity analysis as set forth in Scheffler's Case, 419 Mass. 251, 256 (1994). Accordingly, we do not address the insurer's second appellate argument that the judge's work capacity and disability findings are arbitrary and capricious, because we are reversing the foundation for those findings and ordering the judge to perform a new incapacity analysis.

Finally, the insurer argues that the judge erred by *sua sponte* taking judicial notice of a fact not in evidence, after the close of lay testimony, and without notice to the parties. Specifically, the judge took judicial notice that the employee's nursing license was expired at the time the decision was written and

considered this information in his vocational analysis. (Ins. br. 22.) We agree with the insurer that this constitutes reversible error.

At hearing, the employee was questioned by the insurer regarding his LPN license:

> Q. And when you get an LPN certificate, do you automatically become licensed?
>
> A. No, you have to take a test.
>
> Q. And what type of test do you have to take?
>
> A. NCLEX I believe it's called.
>
> Q. I'm sorry?
>
> A. It's called an NCLEX test. It's just basically testing your knowledge of both clinical and academic – I'm sorry.
>
> Q. So the clinical aspects are tested?
>
> A. Clinical and the –
>
> Q. Educational? And how long is that test?
>
> A. I think it's anywhere from two to four hours.
>
> Q. And did you pass on the first time?
>
> A. Yes.
>
> Q. And are you still licensed?
>
> A. I think my license is still listed because of Covid protocol. I believe it's after three years if you haven't found work as an LPN or as a nurse you automatically forfeit your license.

(Tr. 67-68.) This was the last and only evidence on the issue at the hearing. Later in the hearing, the administrative judge and the insurer had the following exchange:

> THE JUDGE: And I don't know if this helps or not but I took a quick check on the registry. His LPN expired on 7/24/21.
>
> ATTORNEY HUSTON: And if I could just qualify that, Your Honor. The [employee] actually testified more accurately. Due to COVID, anyone who whose [sic] license expired during that period of time, it's actually been extended to, I believe, 12/31/22.

(Tr. 71.) We note that statements of counsel are not evidence. Welenc v. Verizon New England, 34 Mass. Workers' Comp. Rep. 103, 112 (2020) citing Harlow v. Chin, 405 Mass. 697, 705 (1989). In addition, the judge did not state on the record that he was going to use or rely upon information gained by his independent investigation of the licensing board records. In the decision, the judge stated:

> I take judicial notice of COVID-19 Public Health Emergency Order No. 2022-18 (September 30, 2022), which extended the license expiration date to December 31, 2022. I was provided with no evidence that [the employee] renewed his license and I take judicial notice that Health and Human Services Licensee Information lists [the employee's] license as expired.

(Dec. 6.)

Under G.L. c. 152, §11, an administrative judge has the authority at hearing to "make such inquiries and investigations as he deems necessary." G.L. c. 152, §11. However, "although a judge has investigatory powers under G.L. c. 152, §11, such authority remains subject to the rules of evidence applicable to hearings within the division of dispute resolution." McGrath v. NSTAR Electric and Gas, 26 Mass. Workers' Comp. Rep. 113, 116 (2012). Hearings are subject to constitutional due process requirements. Haley's Case, 356 Mass. 678, 682 (1970). These considerations require that parties are entitled "to know what evidence is presented against them and to [have] an opportunity to rebut such evidence and to argue, in person or through counsel, on issues of fact and law involved in the hearing." Id. at 681. Additionally, "due

process considerations entitle parties, *in advance* of a decision, to have reasonable notice of the evidentiary sources relied upon by the judge…" Pobliego v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 (2010)(emphasis in original).

Here, the judge decided, without notice to the parties, to investigate the validity of the employee's LPN license after the close of testimony, taking judicial notice of Public Health Emergency Order No. 2022-18, issued in September of 2022, two months *after* the hearing occurred, thereby violating the parties' due process rights. This error was not harmless as it served as a cornerstone to the judge's vocational analysis. Armed with the information gained in his extrajudicial investigation, the judge considered the vocational evidence offered by the insurer's expert, Susan Chase, MA, CAGS, CRC. The judge then stated, "I also note that the jobs listed in the addendum to her report require a current LPN license, which no longer appears to be the case with [the employee]." (Dec. 18.) This not only ignored the evidence at hearing, including her deposition, which occurred on October 26, 2022, but also neglected to consider the time frame in dispute, as the insurer's request for modification or discontinuance was joined to this case on August 3, 2020.

The judge's actions deprived the insurer of the right to know the evidence considered by the judge, prior to the issuance of the decision, thus failing to provide the insurer with an opportunity to rebut such evidence. Due process considerations require that the insurer receive notice and an opportunity to be heard on this issue. Failure to provide that opportunity and notice are a fatal flaw in the judge's decision.

Accordingly, we vacate the decision and recommit the case to the administrative judge to consider the evidence and perform the appropriate analysis based on that evidence consistent with this decision. The underlying conference order is reinstated. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***April 2, 2026***