COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 004272-12 021754-13 017407-12**
Gregory B. Jones	Employee
National Grid	Employer
Northeast Utilities and its Subsidiaries	Insurer
NStar	Employer
NStar	Self-insurer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Long)

The case was heard by Administrative Judge Preston

APPEARANCES
Alan S. Pierce, Esq., for the employee
Paul S. Kelly, Esq., for National Grid
Joseph S. Buckley, Jr., Esq. for NStar
Richard L. Neumeier, Esq. for NStar on appeal
Pedro Benitez-Perales, for the Workers' Compensation Trust Fund at hearing

HARPIN, J. The self-insurer, NStar, and the employee cross appeal from a decision awarding the employee § 34 benefits and § 30 medical benefits, and an enhanced fee to his counsel. We affirm the award of benefits, but reverse the enhanced fee and recommit for further findings on whether such a fee is due, and if so, in what amount.

The employee worked as a lineman for NStar from 2005 to 2007, and for National Grid (Grid) beginning in 2008. (Dec. 6; T. 12, 31.) While working for NStar he worked outside on power transmission equipment, where he was exposed to tick bites. (Dec. 6.) The judge found the employee gave an accurate medical history to two doctors when he said that, beginning in 2006, he experienced

arthritic joint pain, diarrhea, abdominal pain, head pain and facial pressure. Id. By June, 2009, the employee's physical problems had accelerated. Id.

The employee continued to work until September 23, 2011, when he left due to the effects of what was diagnosed as Lyme disease, a tick borne illness, which the judge found had been latent until then. (Dec. 9, 10. 11.) The employee remained disabled from that disease until July 12, 2012. On January 20, 2013, he was found to have no active, acute or chronic disease process, and no further treatment was indicated. (Dec. 9.)

The issue at the hearing was when did the employee sustain the tick bites that led to his Lyme disease; while he was working for NStar, or while working for Grid. Adopting the opinions of Grid's IME physician, Dr. Jerome Siegel, the judge found the infection occurred while the employee worked for NStar, and that it remained latent until September 23, 2011. (Dec. 7-9, 10, 11.) He ordered NStar to pay the employee a closed period of § 34 benefits, from September 23, 2011 to July 12, 2012. Additionally, due to the fact that the employee's disease was latent from 2006 to 2011, the judge ordered the Workers' Compensation Trust Fund to reimburse NStar the difference between the amount that would have been paid under the employee's 2006 § 34 rate, and the amount actually paid using the 2011 § 34 rate, as per G. L. c. 152, §§ 35C and 65(2)(b). (Dec. 15.) The judge also awarded an enhanced attorney's fee to the employee's counsel, in the amount of $9,000.00, plus expenses. Id.

NStar appeals, arguing the medical opinions on which the judge rested his finding of liability were not legally supportive of the decision, and that the judge's award of an enhanced attorney's fee was without a basis in the record.
NStar first asserts that in his 2012 report Dr. Siegel found the employee's constellation of symptoms in that year was "consistent with possible Lyme disease diagnosis." (Employee br. 19; Siegel July 23, 2012 report, 17, Ex. 6.) NStar asserts this "possible" diagnosis, without more, is insufficient to meet the requirement that a medical opinion must be expressed in terms of probability, not

possibility. Berfield v. North Shore Medical Center, 30 Mass. Workers Comp Rep. 87, 91 (2016).[1] However, it is excerpting only a portion of Dr. Siegel's opinions. In his second report, dated January 25, 2013, the doctor discussed the report of Dr. John Brausch, NStar's examining physician:

> I agree partially with Dr. Brausch's conclusions that there was a lack of objective medical documentation and definitive diagnostic testing performed in this case. However, it is well known that individuals with Lyme disease frequently have clinical symptomatology consistent with the Lyme disease diagnosis that may be present for years prior to making a definitive diagnosis by more objective methods and testing. In this case, that is likely exactly what happened; the tick bite exposure was in June, 2006, the symptoms were progressive over a five (5) year time period and the diagnosis of Lyme disease was solidified in 2011.

(Ex. 6, Siegel 2013 report). Qualifying his opinion in this manner satisfied the evidentiary requirement, even though the doctor did not use the word "probable" in his discourse. Aleman v. City of Boston, 29 Mass. Workers' Comp. Rep. 89, 92 (2015)(language that is substantially equivalent to that required for supportive medical opinion is sufficient). NStar's argument thus fails.

NStar next argues the employee's negative Lyme test on June 9, 2006, is an insufficient basis on which to diagnose Lyme disease in 2011. NStar is, of course, correct in this argument, but that fact leads nowhere. The adopted medical expert's opinion is that the testing for Lyme disease is not reliable: the disease is not easy to diagnose with laboratory testing in any event, the testing is often negative even when the patient is infected with the disease, and the employee had documented tick bites in 2006 and no medically documented bites while working for Grid. (Dec. 8.) The judge thus did not rely on the negative test to prove the

[1] Cf, Josi's Case, 324 Mass. 415, 417-418 (1949), where an opinion expressed in terms of a possibility will be accepted if there is other evidence supporting that opinion. However, if the equivocal expert opinion is the only evidence on a particular issue, it will not be sufficient. Hachadourian's Case, 340 Mass. 81, 86 (1959; Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep., 801 (1995).

contrary, but instead accepted the doctor's opinion that, even in the face of a negative test, the other facts pointed to Lyme disease stemming from exposure while at NStar. This is sufficient support for the ultimate finding of causal relationship.

NStar then asserts the "overwhelming evidence" was that the employee's Lyme disease was not caused by exposure to "a few ticks" while at NStar, but was due to his exposure to "numerous ticks" while working at Grid. It cites to the opinion of a Dr. Donata, who did indeed state that the employee's disease was due to exposure in 2009 – 2011, the period while he worked for Grid. However, the judge did not adopt this doctor's opinions, which he had every right to do.[2] Kent v. Town of Scituate, 27 Mass. Workers' Comp. Rep. 195, 199 (2013)(judge free to adopt all, part or none of expert's opinions, as long as he makes sufficient findings on what evidence he relies). Also, while the employee testified at some length to what he saw as his exposure to ticks while working for Grid, (T. 22, 23, 30, 34, 37), the judge did not find this testimony to be credible. (Dec. 6.)[3] Vallee v. Brockton Housing Authority, 31 Mass. Workers' Comp. Rep. ___ n. 1(March 15, 2017), Pilon's Case, 69 Mass.App.Ct., 167, 169(2007) (credibility findings are final). The judge's finding on causation was thus supported in the record, and we will not disturb it.

NStar further argues that Dr. Siegel's opinions ran afoul of a Commonwealth v. Lanigan, 419 Mass. 15, 24 (1994) analysis, due to his personal lack of any testing of the employee. (NStar br. 23.) This assertion is without merit, as a Lanigan analysis concerns a determination by the judge, made upon

[2] "I do not accept any opinion contained therein [of Dr. Donata] that is based on a clinical history from the Employee that attempts to move the goalposts of the onset of the Employee's chronic Lyme disease to 2009 or later." (Dec. 10.)

[3] "The Employee's physical problems accelerated by June, 2009, but there is no symptomology [sic] by the Employee after May/June 2009 or credible dispositive history then of, tick exposure or Lyme disease." (Dec. 6.)

objection by a party prior to the admission of evidence, as to the scientific reliability of the medical data or opinions offered. Id. If the evidence is offered in a deposition, an objection must be made to any such evidence prior to any answer, or a motion to strike made after such answer. Canavan's Case, 432 Mass 304, 309 (2000); Taylor v. Morton Hospital, 16 Mass. Workers Comp. Rep. 30 (2002).[4] NStar instead seeks to invalidate Dr. Siegel's opinion because: "Dr. Siegel did no testing. He merely reviewed reports of others and reached a conclusion of 'possible' Lyme disease diagnosis caused by tick exposure in 2006. This is insufficient as a matter of law to impose liability on NStar instead of National Grid." (NStar's br. 23-24.) Lanigan, when properly raised, concerns the reliability of the theory or process underlying the doctor's opinion. Id, at 24; Wirtz v. Barry Wehmiller Group, 19 Mass. Workers' Comp. Rep. 171, 176 (2005). As NStar is not raising the reliability of the theory of Dr. Siegel's opinions as an issue, but merely that he did not conduct his own tests and relied on information received from other physicians, its Lanigan argument is without merit.[5]

NStar's final argument is that the judge erred in awarding an enhanced attorneys fee, as there was no basis in the record for such a fee. It argues that the

[4] NStar's counsel made several objections to the lack of foundation of some of the opinions of Dr. Siegel, (see pages 141 and 143, deposition of Dr. Siegel), and moved to strike the whole deposition at its conclusion. (Siegel deposition, 170)("I don't think there's a foundation for it or that the literature backs up the doctor's opinions.) The judge overruled each of the objections and denied the motion to strike. (Dec. 18, 19).

[5] Courts, and the department, have in any event long accepted a physician's reliance on the reports and tests of other doctors to formulate their own opinions. Higgins Case, 460 Mass. 50, 62 (2011). The impartial physician system embodied in § 11A could not function if the doctor was not able to rely on the reports and tests submitted by the parties, given that the impartial physician's report is the only medical document allowed into evidence, absent inadequacy or complexity of the medical issues. G. L. c.152, § 11A(2).

judge's award of $9,000.00 to the employee's attorney[6] was excessive as a matter of law, as the attorney did not request such a fee, did not submit any legal memoranda or proposed findings, and did not submit any documents substantiating "over 40 hours of preparation, research, attendance at the deposition and hearing." (Employee's brief, 24.)

A judge has the discretion to award an enhanced fee to an employee's counsel due to the "complexity of the dispute and effort expended," G. L. c. 152, § 13A(5), but "[a]ny decision to award an enhanced fee should be grounded in the record evidence and based on specific factual findings about the complexity of the hearing dispute or the effort expended by the attorney at hearing." Sylvester v. Town of Brookline, 12 Mass. Worker's Comp Rep. 227, 231-232 (1998). Where a judge refers to specific hours of work by the attorney and specific effort expended, without any support in the record for these findings, the matter must be recommitted. Marino v. Progression Systems, 30 Mass. Workers' Comp. Rep. 93, 101 (2016).

Here, the judge's reference to "over 40 hours of preparation, research, attendance at the deposition and hearing" was based on nothing from the record, as the employee himself has admitted. "Counsel for the Appellant correctly states there was nothing submitted by the employee's counsel to indicate how many hours he spent." (Employee's br. 6.)[7] In such a situation we must vacate the

[6] The judge wrote: "*Sua Sponte*, I have enhanced the legal fee because Employee Counsel had to expend significant additional hours to professionally and properly represent his client. The claims were complex and readily involved over 40 hours of preparation, research, attendance at the deposition and hearing. Anything less would have marginalized the Employee's rights to benefits under Chapter 152." (Dec. 15, italics in original.)

[7] The employee also notes the judge ordered the fee, "[s]ua Sponte, as counsel did not specifically request an enhanced fee." Id.

award of the enhanced fee and recommit the matter to the judge, for further findings that are based on the record. Marino, supra.[8]

The employee has cross-appealed, noting his position has always been that his work-related exposure to tick bites at Grid was responsible for his Lyme disease (Employee's br. 5), but he stops short of seeking a vacation of the judge's decision on that ground. "The employee suggests that there may indeed be adequate factual, medical and legal foundation for affirmation of the Administrative Judge's Decision and there may be equally compelling reason to reverse and award benefits as against National Grid." Id. Given this equivocation, we find "no there there,"[9] and dismiss the employee's appeal as lacking merit.

The decision of the administrative judge is affirmed, with the exception that his award of an enhanced attorney's fee is vacated, and the matter recommitted for further findings in accord with this decision.

Because the employee has prevailed on NStar's cross-appeal, NStar shall pay the employee's counsel a fee of $1,618.19, pursuant to § 13A(6).

So ordered.

_____
William C. Harpin
Administrative Law Judge

_____
Bernard F. Fabricant
Administrative Law Judge

[8]We note that the employee is in agreement that, "[i]f the Reviewing Board deems it advisable, . . . recommittal to the Administrative Judge for purposes of taking further evidence as to the time expended by counsel would be appropriate to amplify a scanty record." (Employee's br. 6.)

[9] Everybody's Autobiography, Gertrude Stein.

_____

Martin J. Long
Administrative Law Judge

Filed: **May 18, 2017**