COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020326-20**

Jill O'Meara	Employee
Boston Medical Center	Employer
Boston Medical Center	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Calliotte and Long)

The case was heard by Administrative Judge Bean

APPEARANCES
James Hykel, Esq., for the employee at hearing and on appeal
Lori J. Harling, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

FABISZEWSKI, J. In this case, our first involving Covid-19, the employee appeals from the administrative judge's decision denying and dismissing her claim for § 34 temporary total incapacity benefits for a closed period from May 24, 2020 to June 18, 2020. On appeal, the employee makes three arguments: 1) medical evidence is not required to establish causation where the cause of Covid-19 is obvious based upon general human knowledge and experience; 2) the medical opinion offered by the employee was sufficient to establish causation; and 3) the administrative judge's reliance upon the self-insurer's expert opinion was an error of law. For the reasons set forth below, we affirm the decision of the administrative judge.[1]

[1] We note that neither party raises the issue of whether the employee's illness was a "personal injury" as defined in G.L. c. 152, § 1(7A), which states, in relevant part, " 'Personal injury' includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment." Accordingly, we neither discuss nor decide this issue. See 452 CMR § 1.15(4)(a)(3).

We further note that most of the infectious disease cases decided to date by the courts and this board have dealt primarily with the issue of whether such diseases are a "personal injury." See, e.g., Perron's Case, 325 Mass. 6 (1949)(tuberculosis contracted by nurse working in TB hospital is a personal injury); Tartas's Case, 328 Mass. 585 (1952)(anthrax contracted by employee in

The employee, who worked as a registered nurse at Boston Medical Center, alleges that she contracted Covid-19 as a result of caring for patients on an adult Covid floor. (Dec. 756.) Pursuant to a § 10A conference held on the employee's claim for benefits, she was awarded § 34 temporary total incapacity benefits for a closed period from May 24, 2020, to June 18, 2020, plus medical benefits pursuant to § 30. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). The self-insurer filed a timely appeal. (Dec. 755.) No impartial examination was required because the dispute was limited to a closed period of prior disability. (Tr. 3; see 452 CMR § 1.10[5].) A hearing was held on August 24, 2021.[2] (Tr. 1.) On September 28, 2021, the administrative judge issued a decision denying and dismissing the employee's claim for benefits. (Dec. 760.)

The employee testified, and the judge found, that she worked twelve-hour shifts each day caring for adult Covid patients on May 17th, 18th and 19th of 2020. (Dec. 756, 758; Tr. 7-8.) The employee was assigned up to three patients each shift and attended to each patient as little as three, but sometimes as many as seven, times each shift. (Dec. 756.) She performed a physical assessment of each patient, which took up to 35-40 minutes and also dispensed medication, fed and toileted each patient. (Dec. 756; Tr. 14.) When attending to Covid patients, the employee wore personal protective equipment (PPE), including a gown, N95 mask, surgical mask, face shield and two pairs of gloves.

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course of employment working on hides, skins and wool, is a personal injury); Langevin v. Air Liquide America, 21 Mass. Workers' Comp. Rep. 293 (2007)(bacterial meningitis contracted during employment as long haul truck driver is not a personal injury); Lussier v. Sadler Brothers, Inc., 12 Mass. Workers' Comp. Rep. 451 (1998)(hazard of contracting tuberculosis is not a hazard inherent in employment as a machine operator); Raimo v. DeIulis Brothers Construction Co., 5 Mass. Workers' Comp. Rep. 210 (1991)(aggravation of pre-existing pneumonia is not so essentially characteristic of employee's outdoor work as mason as to be personal injury). As a result, these cases are of limited assistance in the instant case.

[2] The hearing date is listed in the decision as May 24, 2021, but this appears to be a scrivener's error, as a review of the hearing transcript and board file indicate that the hearing was held on August 24, 2021. See Rizzo, supra.

When not attending to Covid patients or on break, the employee wore a surgical mask but no other PPE. (Dec. 756.)

After May 19th, the employee was next scheduled to work on May 24th. However, she did not report to work that day because she was ill with flu-like symptoms, including fever, chills, body aches, low back pain and a loss of taste and smell. She remained out of work, and her subsequent test for Covid-19 on May 26th resulted in a positive finding. At the time the employee tested positive for Covid-19, she lived with her husband and her mother. Her mother was tested for Covid-19 on May 26th, while her husband was tested on May 28th. The tests of both her mother and her husband yielded negative results. (Dec. 756.) The judge credited the employee's testimony that she had "little or no interaction with anyone outside of her home" in the days before May 17th, which was the first day that she worked with patients infected with Covid-19. (Dec. 757, 759.) The judge found that the one time the employee may have ventured out to a commercial establishment was a visit to the grocery store on May 14th, where strict Covid protocols were implemented, including masking requirements, limiting the number of people in the store and designating aisle traffic flow.[3] (Dec. 759.)

Although most of the employee's symptoms resolved after a week, she continued to experience a loss of taste and smell. Because she could not properly be fitted with an N95 mask until her sense of smell returned, her employer instructed her to remain out of work. On June 19th, the employee finally returned to work in an accommodated position

[3] Although the judge noted parenthetically in the decision that it was "more likely" that the employee's mother made the trip to the grocery store on May 14th, this does not appear to be supported by the employee's testimony at the hearing. (Dec. 759.) While the employee had receipts indicating that groceries were purchased on that day, she was unable to recall whether she or her mother actually made the trip. (Tr. 48.) On direct examination, she testified that there was a "chance" that she went to the grocery store, later stating on cross-examination that it was "probably" her, and then that "[p]ossibly" it could very well have been she who went. (Tr. 26, 48.) She further testified, identifying the store that she went to, the type of mask she wore, the aisle traffic pattern, and the checkout process, noting that there was plexiglass at the cashier station and that the cashiers were wearing masks. (Tr. 26-27.)

in the neonatal ICU. In this position, she did not work with Covid patients and was not required to wear an N95 mask. (Dec. 756.)

At the hearing, the employee introduced two letters from her primary care physician, Tricia Scott, M.D., in support of her position that her Covid-19 infection was causally related to the work she performed for the employer. (Dec. 757.) The first letter, dated July 7, [2020], [4] stated in its entirety:

> (The employee) is a patient under my care who was diagnosed with Covid-19 on May 26, 2020. She became symptomatic on May 24, 2020, which timing definitely coincides with work exposure as she worked May 17th, 18th and 19th on a dedicated Covid-19 floor. Please contact my office with any questions.

(Dec. 757; Exh. 4.)

Dr. Scott's second letter, dated August 27, [2020], stated in its entirety:

> (The employee) is a patient under my care. It was medically necessary for her to be out of work starting May 24, 2020 until June 19, 2020 due to being infected with the Covid-19 virus. Please contact my office with any questions

(Dec. 757; Exh. 4.)[5] The insurer introduced the report of Milo Pulde, M.D., who opined that the employee likely acquired Covid-19 in the community rather than at work, citing the precautions taken by the hospital to prevent infection and the opportunity for exposure outside of work. (Dec. 755, 757; Exh. 3.) Neither doctor was deposed.

The judge found that the employee was totally disabled during the claimed period from May 24 until June 19, 2020, when she returned to work. However, he found the

[4] In the hearing decision, the judge references Dr. Scott's letters as being dated July 7, 2021, and August 27, 2021, but this appears to be a scrivener's error as a review of the hearing exhibits indicates that the letters were actually dated July 7, 2020, and August 27, 2020, respectively.

[5] Dr. Scott's letters were prompted by the employee's July 7, 2020, request for a letter, "stating to a degree of medical certainty I was exposed/infected with COVID 19 while working as a nurse on a dedicated COVID floor. My work dates May 17, 18, 19 2020[…]symptomatic May 24. Tested positive May 26." (Exh. 4.) The employee's medical records contain a note indicating that an office staff member forwarded the email to Dr. Scott. Id. Dr. Scott responded to the staff member with a message stating, "note ok with me, timing definitely coincides with work exposure." Id.

issue of causation to be "more problematic." (Dec. 758.) The judge determined that Dr. Scott's note from July 7, 2020, established only a "temporal relationship of the infection to her workplace," which, however, was "not enough" to establish causation. (Dec. 759.) He noted that,

> Expert medical testimony is not needed to establish a temporal relationship but it is needed to establish medical causation. I think that [Dr. Scott] meant to say that there is a causal relationship. She just did not write with legal precision. She did not use the magic words. *But she may have written what she wrote in an effort to obscure the fact that she did not want to or could not offer a positive causation opinion on a complex and controversial issue.*

(Dec. 759; emphasis added.) The judge concluded that there was "insufficient medical evidence upon which to make a finding on the issue of causal relationship that is favorable to the employee," (Dec. 759), and denied and dismissed her claim. (Dec. 760.)

The employee first argues that the judge erred as a matter of law by requiring a medical opinion to establish causation in this case. (Employee br. 5.) The employee relies on the Supreme Judicial Court's decision in Lovely's Case, 336 Mass 512 (1957). In Lovely's Case, the undisputed facts were that the employee, while carrying a 100-pound bag of sugar up a flight of stairs, felt pain in his right side. Id. at 513. That evening, he had swelling in his groin, which was later diagnosed as a hernia. Id. The court held that medical testimony is not required "in simple cases where a lay member of an expert administrative board can reasonably be permitted to relate incapacity to a specific injury or incident as a matter of general human knowledge and experience and without resort to what, in the absence of medical testimony, might partake of speculation and conjecture." Id. at 516. Specifically, the employee here asserts that since the cause of Covid-19 is obvious based upon general human knowledge and experience, no medical evidence is necessary to establish causal relationship. (Employee br. 5.) The employee maintains that she satisfied her burden with respect to causation because the judge determined that she had no possible Covid exposure, other than at work, in the two weeks prior to her diagnosis. (Employee br. 5-6.) We disagree on both counts.

"[A]n employee has the burden of establishing, by a preponderance of the evidence, all the elements of her claim for workers' compensation benefits, including the fact of the requisite causal connection between her injury and workplace events or conditions; and . . . she cannot prevail if any critical element is left to surmise, conjecture or speculation or otherwise lacks evidential support." Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000), quoted in O'Rourke's Case, 102 Mass. App. Ct. 1104 (Memorandum and Order Pursuant to Rule 23)(2022). The determination of whether an employee's injury arises "out of and in the course of his employment" under § 26 "is a question of fact to be decided by the [administrative judge]." Larocque's Case, 31 Mass. App. Ct. 657, 658 (1991). We will not disturb a judge's findings that are " 'reasonably deduced from the evidence and the rational inferences of which it was susceptible.' " Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007), quoting from Chapman's Case, 321 Mass. 705, 707 (1947). Although, in determining causal relationship, a judge need not rely on expert medical testimony alone, and may give decisive weight to the employee's credible testimony, Wilson's Case, 89 Mass. App. Ct. 398, 400-401 (2016), he cannot make causation findings in complex medical cases without any supporting medical evidence, Pollard v. M.B.T.A., 35 Mass. Workers' Comp. Rep. 7, 17-18 (2021), citing Stewart's Case, 74 Mass. App. Ct. 919 (2009), nor can he rely on his own knowledge of medical matters to form his judgment. Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999). Moreover, we note that even in Lovely's Case, supra, the factfinder was not required to find causation in the absence of medical evidence on that issue. Indeed, the Court held that "the [factfinder] might reasonably have found (although, of course, [he] was not required as a matter of law to do so) that the [work incident] caused the injury." Lovely's Case, supra at 515.

The judge here clearly struggled with the issue of causal relationship and determined that he needed expert testimony to decide whether it was more likely than not that the employee contracted Covid-19 at work. He discussed the issue of causation as "problematic," "complex" and "controversial," (Dec. 758, 759), and ultimately concluded

that he could not determine causal relationship without medical testimony. He did not conclude, as the employee argues, that she had no possible exposure to Covid-19 other than at work, but rather that it was possible she went to the grocery store during the two-week period before she became symptomatic, where she could have contracted Covid-19. (Dec. 759.)

Given that Covid-19 was a new virus, which spawned a global pandemic in which thousands of people were being infected every day in myriad settings, we cannot say that the judge's decision that medical evidence was necessary in this case was arbitrary or capricious or an error of law.[6] See Wilson's Case, supra at 400 (reviewing board has authority to reverse decision of administrative judge only if the decision is "beyond the scope of his authority, arbitrary or capricious or contrary to law"). Accordingly, we hold that the judge did not err in finding that he needed medical evidence to determine causal relationship in this case, nor did the facts, as found by the judge, compel a finding that it was more likely than not that she contracted Covid at work.

Next, the employee argues that even if an expert medical opinion is necessary in this case, the medical opinion offered by Dr. Scott is sufficient to establish causation. (Employee br. 7.) The employee asserts that the judge erred as a matter of law by rejecting Dr. Scott's opinion solely because she did not use "magic language," instead alleging that Dr. Scott's opinion established a definitive link between the employee's Covid diagnosis and her work exposure. (Employee br. 7.)

[6] We note that in Perron's Case, supra, there was testimony by the medical director of the tuberculosis hospital where the employee worked as a nurse that, in his opinion, the employee contracted TB while employed there through caring for patients with " 'wide open cases of tuberculosis.' " Id. at 8. In Tartas's Case, 328 Mass. 585 (1952), there was medical testimony that it was impossible to determine where the employee had contracted anthrax, since he worked for several different companies where he was exposed to it. We think that medical testimony to address causation is equally if not more important in a global pandemic where an individual could be exposed to Covid almost anywhere she went, and expert testimony is useful to analyze potential exposures, incubation periods, and the use of PPE, to list but a few of the complex variables involved.

The employee is correct that it is not necessary for a medical opinion to include the "magic words" of the statute if the opinion supports a finding of causation "in terms substantially equivalent to those of the statute." Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). However, here, the employee's argument is misplaced because the judge did not reject Dr. Scott's opinion merely because she did not use the "magic words." Rather, the judge rejected Dr. Scott's opinion because he found it ambiguous regarding causation, deeming it "obscure, at best." (Dec. 6.) "[T]he expert medical opinion as to that causal relation which the employee must obtain in order to prevail (when the matter is, as here, beyond the common knowledge of the ordinary layperson) has to be expressed in terms of probability, not mere possibility." Patterson, supra at 592. An employee "cannot prevail if any critical element is left to surmise, conjecture or speculation or otherwise lacks evidential support." Id. Here, the judge initially speculated regarding what Dr. Scott may have *meant* to say but concluded that she did not actually say that there was a causal connection between the employee's infection and her workplace. (Dec. 759.) He determined that the plain meaning of her words merely established a temporal relationship between the employee's diagnosis and her exposure at work, which was "not enough." (Dec. 759). See Koonce v. Bay State Bus Corp., 14 Mass. Workers' Comp. Rep. 238, 242 (2000)("[a] doctor's statement of temporal relationship is not an expert medical opinion as to causal relationship"); Duggan v. Liberty Transportation, 13 Mass. Workers' Comp. Rep. 380, 383 (1999)("[i]n complex matters a mere temporal correlation does not establish medical causation"). The judge then hypothesized that Dr. Scott may have offered her opinion in the manner that she did "in an effort to obscure the fact that she did not want to or could not offer a positive causation opinion on a complex and controversial issue." (Dec. 759.) Simply stated, the judge could not tell what Dr. Scott meant, and he was not going to guess. He concluded that the employee had offered "insufficient medical evidence" on which he could base a finding of causal relationship

favorable to her.[7] (Dec. 759.) See Lorden's Case, supra. "Findings of fact…are the exclusive function of the administrative judge." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). The reviewing board does not have the authority to disturb the judge's findings of fact "…unless they are infected with error or wholly lacking in evidentiary support." Hilane v. Adecco Employment Services, 17 Mass. Workers' Comp. Rep. 465, 470 (2003). As this finding was based on reasonable inferences drawn from the evidence, it was not arbitrary or capricious nor was it an error of law. See Granz v. MCICO MCI Concord, 36 Mass. Workers' Comp. Rep. ___(December 13, 2022), citing DeLuca v. Bingay & Son Corp., 9 Mass. Workers' Comp. Rep. 59, 62 (1995), citing Judkins's Case, 315 Mass. 226, 230 (1943)(where evidence does not compel one conclusion or another, judge does not abuse his discretion in making a decision based on reasonable inferences drawn from the evidence).

We reject the employee's final argument that, to the extent the judge relied on the opinion of the insurer's medical expert, Dr. Milo Pulde, it was an error of law. (Employee br. 8.) We find no evidence in the decision, nor does the employee cite to any, indicating that the judge adopted the opinion of Dr. Pulde or relied on it in any way.

[7] The employee argues that Dr. Scott's two letters plus her internal office message "create a definitive link between the [e]mployee's work exposure and her illness." (Employee br. 70.) Although the judge did not address the internal office message, it was admitted as part of Exhibit 4, and presumably considered. Warman v. Berkshire Community College, 31 Mass. Workers' Comp. Rep. 117 126-127 (2017)(judge not required to discuss every piece of evidence in the record). At any rate, we cannot say that the employee's request for a statement that she was "exposed/infected" with Covid at work, and Dr. Scott's response "note okay with me, timing definitely coincides with work exposure," (Exh. 4) requires, as a matter of law, a finding it was more likely than not that the employee contracted Covid at work. Cf. Lovely's Case, supra (although factfinder might reasonably have found causal relationship, he was not required as a matter of law to do so). This is particularly true since Dr. Scott's actual letter to the employee only referenced the timing of exposure and did not address any other relevant factors. See supra note 6. Further, we note that there is no indication in the record that either party sought to depose Dr. Scott to clarify her opinion. See, Rizzo, supra.

Accordingly, the decision of the administrative judge denying and dismissing the employee's claim for compensation is affirmed.

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***January 20, 2023***